



Costs Award

Site visit made on 2 November 2021

by Brian Cook BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Award date: 7 January 2022

Costs award in relation to Appeal Ref: APP/K1128/X/20/3252613 Land to the north of Seymour Drive, Dartmouth

- The award is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The appeal was made by Mr David Holloway against the failure of South Hams District Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development (LDC)
 - The development for which the LDC is sought is private undeveloped land relating to the area edged red on the submitted plan 17006_PL502 in continuous breach of condition 7 and the non-application of conditions 6 and 8 of 15/1790/98/F which required the laying out, landscaping and use as an area of open grassland accessible to the public in the interests of the visual and residential amenities of the locality and to assimilate the development into its surroundings.
 - **Summary of award: A full award of costs is made against Mr David Holloway**
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Procedural Matters

1. Following the issue of my decision on 15 November 2021, the Planning Inspectorate's Costs and Decisions Team (CDT) wrote to Mr David Holloway as the appellant in the matter to say that I was considering whether to make an award of costs against him. This was on the grounds that:
 - (a) The appellant has not produced the approved drawing MH232/323A. The appellant is therefore unable to show that there has been a failure to comply with condition 7 of planning permission reference 15/1790/98/F.
 - (b) The appellant has misunderstood the law as it applies to the grant of a LDC.
2. Despite being sent a reminder, no response was received from Mr Holloway.

Reasons

3. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused another party to incur unnecessary or wasted expense in the appeal process.
4. An application for a LDC was made under s191(1) of the Act as set out in the summary details above. As explained in my appeal decision, this was not the appropriate procedure through which to pose the question asked in relation to conditions 6 and 8 of the 1999 permission. With regard to condition 7, it was contended that there had been a failure to comply with the terms of the

condition and that the period during which the Council could have taken enforcement action had ended by the LDC application date of 23 January 2020.

5. First, fundamental to the appellant's case was approved drawing MH232/323A which gave the details of the landscaping and planting scheme to be implemented and 'strictly adhered to' in the words of condition 7.
6. Neither the appellant nor the Council was able to produce in evidence the approved drawing. It is regrettable and a matter of embarrassment to the Council that it was unable to do so. Nevertheless, case law has established that the burden of proof rests on the applicant where an application is made for a LDC or an appellant where an appeal is lodged against the local planning authority's decision or, as in this case, failure to make one.
7. In the absence of the approved drawing referred to above, the appellant relies on the earlier version as reflecting the approved scheme despite it being common ground that this was superseded by the approved Revision A. There is simply no basis for that reliance. The appellant therefore has no evidential basis for the application or the appeal as put.
8. Second, it was clear from the totality of the evidence that there had been some tree planting on the appeal site. Even the appellant gave evidence to that effect. Whether or not that planting was in accordance with the approved scheme, it was removed in December 2018.
9. The Council clearly interprets condition 7 as requiring the approved scheme to be retained in perpetuity. The LDC application was made about two years into the 10-year period that the Council would have to 'take enforcement action' (as defined in the principal Act) following the clearance of the site. There may well be arguments that could be made through an appeal under s174 of the Act in the event of a notice being issued by the Council. However, enforceability of a notice is not relevant to the determination of an application under s191(3) or an appeal under s195. The only matter of relevance to this appeal is whether the Council was time-barred from taking enforcement action at the LDC application date.
10. The appellant did not appear to understand the law on this point. What matters is not whether any enforcement action taken would be upheld on appeal, but whether it could have been taken at all, that is, not time barred. It was not, so a LDC in the terms applied for could not have been granted.
11. Therefore, neither the application nor the appeal had any realistic prospect of success. This is given in the Planning Practice Guidance as the umbrella type of behaviour that will place an appellant at risk of a substantive award of costs being made against them if an appeal is pursued in such circumstances.

Conclusions

12. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified. For the avoidance of doubt, the award includes the costs incurred by the Council in responding to the appellant's own application for an award of costs against the Council in respect of this appeal. That application was subject of a separate decision which has been issued to the parties. The application was refused.

Costs Order

13. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Mr David Holloway shall pay to South Hams District Council, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
14. South Hams District Council is now invited to submit to Mr David Holloway, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Brian Cook

Inspector