

Costs Decision

Site visit made on 27 April 2022

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 20 May 2022

Costs application in relation to Appeal Ref: APP/C1435/C/21/3266742 Land at Sale Lodge (Moons Farm), Sharpsbridge Lane, Piltdown, Fletching, East Sussex

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Wealden District Council for a partial award of costs against Mr John Randle.
- The appeal was against an enforcement notice alleging without planning permission, the erection of a building for use as a dwelling.

Decision

1. The application for an award of costs is allowed in the terms set out below.

Reasons

2. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
3. The appellant withdrew his ground (c) appeal by letter on 7 April 2022, in advance of the inquiry due to open on 26 April 2022¹. As a result, it was agreed by the main parties² that the appeal could be dealt with by way of written representations rather than by an oral event. The Planning Inspectorate, on behalf of the Secretary of State, subsequently decided upon review of the outstanding matters in dispute that the written representations procedure was indeed the most appropriate procedure under which to determine the appeal.
4. The Council says that the appellant had behaved unreasonably in that he had been fully aware for a substantial amount of time that his appeal under ground (c) had no realistic chance of success, yet had pursued an inquiry, resulting in the Council spending a substantial amount of additional time and expenses in preparation for it. Further, that the late cancellation of the inquiry venue entailed that the booking payment could not be recovered.
5. On his appeal form of 12 January 2021, the appellant had indicated that an inquiry was necessary for reasons set out in his Grounds of Appeal Statement and in particular paragraph 1.8. That paragraph said that an inquiry was sought as it was considered necessary to investigate and test technical evidence of expert witnesses, including via cross-examination.

¹ That letter also confirmed that the appellant was continuing to pursue his appeal on all other grounds ((a) (b) (f) and (g)) under which the appeal was started.

² the appellant by way of a letter dated 14 April 2022 following an initial suggestion the Council had made on 6 April 2022.

6. The Council on the other hand indicated on the appeal questionnaire that it was content with the written representation procedure. The Planning Inspectorate, having considered the parties' representations on procedure, started the appeal as an inquiry.
7. The inquiry timetable submitted by the appellant dated 17 May 2021 indicated that there would be 3 witnesses in support of his appeal. These would be his agent and 2 other witnesses who would give evidence respectively on the physical works undertaken to the appeal building and the structural engineering implications of work undertaken. These then, presumably, were the expert witnesses who in the appellant's belief were necessary to be cross-examined at an inquiry. It is clear to me from the appellant's submissions that their evidence was to be pursuant to his case under ground (c).
8. However, on 28 March 2022 the appellant submitted an amended inquiry timetable indicating that expert witnesses (other than the agent) would be no longer giving evidence. This broadly coincided with the signing of a Statement of Common Ground on 29 March 2022 which stated that:

"10.13. It is common ground that the combination of the GDPO and the Habitats Regulations imposes a condition for the resolution [of] likely significant effects of development on a designated site. This was not discharged in WD/2017/0328/PO4."

9. In my view, this declaration was one that significantly undermined his ground (c) appeal. Following my pre-inquiry note of 1 April 2022 seeking to clarify whether it remained the intention of the appellant to pursue an appeal under that ground, the appellant withdrew the ground (c) appeal on 7 April 2022.
10. The response to my pre-inquiry note, the withdrawal of the ground and the agreement to the Council's suggestion of a change of procedure were timely and showed due consideration for the avoidance of unnecessary costs for all parties.
11. However, I can see no good reason why the ground (c) had been made at all or why its withdrawal could not have happened much earlier in the appeal process. The decision notice in respect of prior approval application WD/2017/0328/P04 on 5 April 2017 had said:

"NOTE 1: It is a condition of any 'permitted development' which is likely to have a significant effect on a European site (in this case the Ashdown Forest Special Protection Area and Special Area of Conservation), either alone or in combination with other plans and projects, and is not directly connected with or necessary to the management of the site, must not be begun [my emphasis] until the developer has received written approval under Regulations 73 & 75 of the Conservation of Habitats and Species Regulations 2010."

12. The appellant accepts in his submissions that these statutory requirements were not met as the development had commenced before obtaining written approval from the Council under the Habitats Regulations. It is reasonable to have expected the professionally represented appellant to have known, at the point of making the appeal and subsequently, that by virtue of this specific issue the development was a breach of planning control notwithstanding other arguments made - and that therefore the ground (c) appeal could not succeed.

13. The opinion sought of the appellant's Counsel did not deal with this specific issue³. While I accept that Counsel's opinion obtained by the Council⁴ was not shared with the appellant until February 2021 (after the appeal had started), that opinion did very clearly deal with the issue and that afforded a further opportunity for the appellant to withdraw the ground (c) appeal well in advance of a scheduled inquiry.
14. Further, while I accept that the appellant has been in touch with Natural England and the Council as regards discharging the condition under WD/2017/0328/P04, it has clearly been factually impossible to discharge this pre-commencement condition ever since the works commenced in June 2019.
15. While the appellant points to contacting the Council on 4 June 2019 and being reportedly advised by a Council officer that no off-site mitigation payments were required to be paid, he has not been able to provide evidence that a formal application to the Council was made to discharge the condition or of any subsequent written approval. Indeed, had a formal application been made he would have had right of appeal to the Secretary of State in the event of refusal by the Council or its failure to determine the application. Instead works were begun, rendering the development unlawful.
16. I do not give any significant weight to the appellant's argument that full planning permission was applied for in 2021 (WD/2021/1750/F) to avoid the appeal before me. The appeal was made, and for the reasons given above, it was unreasonable to pursue a ground (c) appeal when it was reasonable for the appellant to have known it was bound to fail.
17. Further, ground (c) seems to have been a significant factor in the reason for the need for an inquiry given the expert evidence associated with it, which the appellant said would be adduced for testing at the inquiry solely requested by him.
18. The appellant responded in a responsible and timely fashion to my pre-inquiry note and subsequent consultation on a change of procedure. In doing so, an unnecessary oral event was avoided. Nonetheless, I accept the council's submission that it was too late to avoid paying for the costs of the cancelled venue, and the council would not have incurred these costs were it not for the appellant's unreasonable behaviour in bringing the ground (c) case in the first instance and which had led to the choice of the inquiry procedure.
19. The Council also says that the appellant should pay its costs associated with the time and expense for preparing for the event. The Council has not been sufficiently descriptive as to the said preparation involved and I note it had a degree of notice before the event of the appellant's agreement to its suggestion to change procedure. I also note that Counsel's opinion had been obtained in 2019, long before the service of the notice and the appeal.
20. I do not consider that the proofs of evidence provided by the Council were an entirely unnecessary expense as the council's initial short appeal statement was limited and the proofs formed the basis of the council's submissions on which the written representation appeal was determined, as it had requested in its letter of 6 April 2022. However, I do accept that the Council was

³ Scott Stemp, 17 September 2019

⁴ Saira Kabir Sheikh QC, 26 November 2019

unnecessarily put to the time and expense of defending a ground (c) appeal that should not reasonably have been pursued by the appellant.

21. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated in respect of the cancelled inquiry venue and that a partial award of costs is justified.

Costs Order

22. 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 John Randle shall pay to Wealden District Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the ground (c) appeal and payment for the cancelled inquiry venue; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to Mr John Randle, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andrew Walker

INSPECTOR