



Costs Decision

Site visit made on 18 May 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 August 2022

Costs application in relation to Appeal Ref: APP/D5120/X/21/3271688 Stuarts Nurseries, 57 North Cray Road, Sidcup DA14 5EU

- The application 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 application is made by Mr Adam Stuart of Stuarts Nurseries for a full award of costs against the Council of the London Borough of Bexley.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development for: Mixed use of the identified land in connection with green waste processing, open storage and distribution.
-

Decision

1. The application for an award of costs is refused.

Reasons

2. The Planning Practice Guidance (PPG) 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. Unreasonable behaviour may be based on procedural or substantive grounds.
3. The applicant's position is that they were put to unnecessary and wasted expense in making the appeal due to substantive unreasonable behaviour by the Council. According to the applicant, the practical consequence of the Council's failure to determine the appeal application was that they had to seek recourse via the appeal system.
4. For an appeal against non-determination, paragraph 048 of the PPG¹ states that, if an appeal in such cases is allowed, the local planning authority may be at risk of an award of costs, if the Inspector or Secretary of State concludes that there were no substantive reasons to justify delaying the determination.
5. But I have dismissed the appeal and although the Council failed to make a decision within the prescribed time, even if it had, the appeal would not have been avoidable since the position established by the Council is that a certificate should not be issued.
6. So in terms of the examples of substantive unreasonable behaviour set out in paragraph 049 of the PPG² that I have been referred to, I do not see the Council as having prevented or delayed a decision on an LDC application which

¹ Appeals - Paragraph: 048 Reference ID: 16-048-20140306

² Appeals - Paragraph: 049 Reference ID: 16-049-20140306

should clearly have been permitted, and, the Council produced evidence to substantiate its position for the appeal. I do not therefore consider the Council has unreasonably defended the appeal, as has been suggested by the applicant.

7. The applicant has indicated their view that delay in determining the lawful development certificate (LDC) application was not justified as there has been no planning history associated with the appeal site. But as is seen in my appeal decision, there has been at least one planning contravention notice and at least one enforcement notice, covering land which includes the appeal site. So in my view it is not correct to say that the appeal site has no planning history.
8. Moreover, as part of its assessment, the Council would have to consider whether the appeal site is a planning unit in its own right, or whether it has been used in connection with activities on the wider site, ie the land outlined in blue on plan 35. The Council was not assisted by the submissions it received from the appellant in this regard and some of the appellant's own evidence indicates a connection exists between the appeal site and the wider site, as I have set out in my appeal decision.
9. In respect of the planning status of the land, my attention has been drawn to the LDCs PPG³ which states that if a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.
10. The applicant considers the Council failed to provide any counterevidence within the statutory time period for determining the application. Be this as it may, there is nothing in the PPG to say that such information must be provided within that timescale. Whether this is unreasonable or not depends on the circumstances of the case.
11. In this case, the Council has drawn my attention to extenuating circumstances which it says prevented timely determination of the LDC application. First, the completed statutory declarations relied on by the appellant were not received until long after the LDC application was submitted, (some 5 plus weeks into the determination period for the application). Second, the LDC application is complex. The Council considers this necessitated it taking legal advice but its solicitor was on paternity leave. Third, the officer dealing with the LDC application was also dealing with an Inquiry relating to the wider site during the LDC application determination period.
12. Whilst I do not condone a failure to issue a decision, I am satisfied that the combination of the above circumstances constitute good reasons why this failure may have occurred in this case. This is particularly so given the appellant's own evidence suggests there is a connection between the appeal site and the wider site, as I have set out in my appeal decision. So the appeal site should not necessarily be considered in isolation.
13. The solicitor's absence should not have come as a surprise to the Council. But the timing of the absence would not necessarily have been certain, as can be the nature of paternity leave. The Council may well have had Counsel instructed on the aforementioned Inquiry. But there is no evidence the need for advice on a separate case would have been covered by the Counsel's existing

³ Lawful development certificates – Paragraph: 006 Reference ID: 17c-006-20140306

- instructions and so I do not consider it reasonable to expect the Counsel concerned to take up the functions of an existing Council officer.
14. I have discretion when deciding an award, enabling extenuating circumstances to be taken into account⁴ and so in light of the above I shall do so in this instance. I am also of the view that, logically, the above circumstances would also have delayed the Council from sharing evidence it would draw on in its decision.
 15. My attention has been drawn to the Council's application of section 55(3)(b) of the 1990 Act. This states that for the avoidance of doubt it is hereby declared that for the purposes of this section the deposit of refuse or waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose, if—(i) the superficial area of the deposit is extended, or (ii) the height of the deposit is extended and exceeds the level of the land adjoining the site.
 16. The appellant states that their use of the land does not include the depositing of waste for disposal purposes, referring to 'deposits' on the land as temporary stockpiles. But the Council considers these to be engineered bunds. Based on the cases put to me, I accept that the use described by the appellant in the LDC application does not constitute the deposit of waste and so section 55(3)(b) is not relevant in this case.
 17. But the Council's application of section 55(3) has made no difference to the outcome of the appeal, which I have dismissed for other reasons. Moreover, from the information provided, I am not satisfied the Council's application of section 55(3) has caused the applicant to incur unnecessary or wasted expense.
 18. According to the applicant, the Council's investigations have not been thorough enough to be certain as to the extent and/or nature of any breaches of planning control. But this is not unreasonable behaviour given that in an LDC application the evidential burden falls on the applicant/appellant to make out their case and not the Council.
 19. The applicant states that costs have recently been awarded in regard to the Council's handling of enforcement investigations and two notices relating to the wider site. Be this as it may, it does not necessarily indicate a costs award is justified in the case before me.
 20. I have been referred to what the applicant considers are claims by the Council that the appeal site could lawfully be in agricultural use. But this is not an accurate reflection of the words used by the Council in its statement, which says "an agricultural or nil use". The applicant also states that the Council's own evidence suggests that "there has been continued use (without suggesting what that use might be)." But in fact, the Council's statement says the appeal site "appears to have been used periodically but not continuously for substantially different and unrelated purposes."
 21. According to the applicant, the Council's evidence "focusses heavily on documentation from beyond the last 10 years which is largely irrelevant for the purposes of this appeal". Whilst not all evidence provided by the Council may

⁴ Appeals - Paragraph: 031 Reference ID: 16-031-20140306

have been material to my appeal decision, it is fair to say that evidence provided by the Council contributed to my decision to dismiss the appeal.

22. The applicant states that the Council is wrong to rely on the lack of reference to the appeal site in past evidence relating to another parcel of land as counter-evidence relating to the evidence of use of the appeal site. But the applicant's point is not clear in this regard. In any event, the Council's evidence draws on notices that included the appeal site, notwithstanding that the activity targeted by those notices may have been occurring on another part of the land.
23. According to the applicant, the Council is wrong in suggesting that a lack of an environmental permit to carry out waste operations from within the appeal site means that it simply has not happened. But this misses the point that a lack of such a permit does not support the appellant's case.
24. In respect of evidence relating to the removal of trees, the applicant considers the Council has changed its views. Be this as it may, from the information provided, I am not satisfied the Council's position on this issue has caused the applicant to incur unnecessary or wasted expense.
25. The applicant states that the Council has mis-labelled evidence. But there is no evidence this was anything other than a genuine administrative error and I am not satisfied it has caused the applicant to incur unnecessary or wasted expense.
26. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

L Perkins

INSPECTOR