
Costs Decision

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 05 October 2022

**Costs application in relation to Appeal Ref: APP/V2635/X/21/3276307
The Common, South Creake, Fakenham**

- 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 South Creake Business Park Limited for a full award of costs against King's Lynn and West Norfolk Borough Council.
 - The appeal was against the refusal of a certificate of lawful use or development for drainage pits, and the storage of industrial machinery, vehicles (including lorries), trailers, straw, waste stone, soil and polythene.
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Decision

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

Main Issues

2. Planning Practice Guidance advises that where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.
3. The applicant's case is that the Council had a fundamental misunderstanding of the law in relation to whether an LDC can be granted in respect of a dormant use and this resulted in the case being appealed. They say that the Council relied on additional evidence during the appeal (namely the aerial photographs) and did not appear to give any consideration to the statutory declarations provided in support of the application, contrary to the guidance. In addition, the Council did not modify the description of the development and therefore failed in their duty under section 191(4) of the 1990 Act, notwithstanding that they have accepted the lawfulness of the use of the site for drainage purposes
4. The Council say that it did not act unreasonably or fail to engage with the applicant, but was simply of a different view regarding the proven use. The Council are of the view that the third party representations received during the appeal support the aerial photographs and that sufficient evidence was not provided by the appellants to show anything other than the drainage pits.

Reasons

5. It is in the nature of the appeal process that the parties' cases can change and that points are conceded, and this does not necessarily constitute unreasonable behaviour within the terms of the guidance.

6. In this case, there is evidence which contradicts or otherwise make the applicant's version of events less than probable (the aerial photographs and representations from third parties). The statutory declarations alone were therefore not sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. This evidence was only directly referred to by the Council during the appeal process, and indeed the third party representations were not made until that stage. However, as the appeal is treated as being de novo, and the issue being determined is whether the refusal was well-founded, additional evidence can be considered. The purpose of the LDC provisions overall are to enable the making of an objective decision based on the best fact and evidence available when the decision is taken.
7. The applicant argues that the Council was under a duty to modify the description of the use pursuant to section 191(4) of the 1990 Act, and should have done so once it accepted that a dormant use can be taken into account when determining whether there has been a material change of use for which an LDC should be granted. It is not clear from the information before me when the Council first accepted this point. However it is clear that the applicant continued to argue that all of the component uses in the application description as a mixed use had been proven throughout the course of the appeal.
8. I have found that only part of the mixed use described in the LDC application has been proven on the balance of probability. Whilst the decision in the appeal is not determinative regarding whether costs should be awarded, any wasted costs must have been caused by the unreasonable behaviour of the other party. In this case, the applicant appealed the wider description of mixed use and has not argued that it would not have done so if an LDC had been granted by the Council for drainage purposes alone. Any wasted costs regarding the dormant use, which the Council properly conceded in its statement of case once it had received the appellant's appeal statement and so did not behave unreasonably, were relatively minor in terms of the overall costs of the appeal for the wider mixed use which the applicant would have incurred in any event.
9. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the guidance, has not been demonstrated.

Zoë Frank's

INSPECTOR