



Costs Decision

Inquiry Held on 27 & 28 September 2022

Site visit made on 28 September 2022

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 November 2022

Costs application in relation to Appeal Ref: APP/K2420/C/21/3289687 The Paddocks, Bungalow Farm, Leicester Road, Earl Shilton, Leicestershire LE9 7TJ

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr William Willett for a full award of costs against Hinckley & Bosworth Borough Council.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the formation of a new vehicular access onto Hinckley Road, which is a classified road.
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Decision

1. The application for a full award of costs is refused.

The submissions for Mr William Willett

2. The respondent did not engage with correspondence identifying material errors in the assessment that had informed its decision to refuse to grant a certificate of lawful use or development (LDC) for the new vehicular access.
3. The applicant had provided aerial images showing that a gate had been installed in the boundary wall between September 2011 and April 2015, meaning that the new vehicular access was immune from enforcement action. The respondent failed to provide evidence to demonstrate that it had not been in place for 4 years when the LDC was refused, and its witness conceded in cross-examination that the appeal on ground (d) should succeed.
4. The planning history in the report recommending refusal to grant an LDC had related to another property and the respondent failed to clarify this.
5. It was therefore unreasonable of the respondent to issue the notice, and to fail to enter into pre-appeal discussion or review its case. Development that should clearly have been permitted was prevented and the applicant incurred unnecessary costs in making the appeal.

The response by Hinckley & Bosworth Borough Council

6. The applicant's concern about the assessment of the LDC application is a separate matter that could have been challenged in an appeal against the refusal to grant an LDC but was not. The failure to respond to requests for information did not alter that and does not demonstrate unreasonable behaviour in respect of the appeal process.

7. The decision to issue the notice was justified by the evidence available at the time. The additional evidence provided by the applicant during the appeal process did not alter the respondent's view that the new vehicular access was not immune from enforcement action when the notice was issued.
8. Evidence that the new vehicular access generates unacceptable impacts on highway safety was presented, therefore the respondent did not prevent development that should clearly have been permitted.

Reasons

9. The Planning Practice Guidance ("the PPG") advises that costs may be awarded if a party has behaved unreasonably, and so has directly caused another party to incur unnecessary or wasted expense in the appeal process. A local planning authority may be at risk of an award of costs if more diligent investigation on its part would have avoided the need to serve an enforcement notice.
10. The applicant emailed the respondent 5 times between December 2020 and June 2021, following the refusal to grant an LDC and the respondent's advice that an enforcement investigation had begun. Only one substantive reply was received, in December 2020, before the notice was issued. This included an offer to provide evidence the applicant had requested, although it asked him to provide more evidence first.
11. The applicant provided further evidence, including aerial images that had not been submitted with the LDC application, but the respondent did not produce its evidence in return. While that may not have been reasonable behaviour, it has not been shown that, had a response been made, it would have prevented the notice being issued or that unnecessary or wasted expense resulted.
12. The report recommending refusal to grant an LDC had wrongly included the planning history of another site. However, there is no evidence that, had the correct planning history been included, the notice would not have been issued.
13. The request for the respondent's evidence to demonstrate its view that the new vehicular access had not been in place for 4 years is understandable but that is not the correct test for an LDC application or for an appeal on ground (d). In each, the onus is on the applicant or appellant to provide information sufficiently precise and unambiguous to demonstrate lawfulness or immunity from enforcement action on the balance of probability. Nevertheless, it appears the requested evidence, an aerial image from 2017, was produced, albeit only after the appeal was made¹.
14. While the various aerial images are claimed as evidence of the new vehicular access, the most they demonstrate with reasonable certainty is that a gap was made in the front boundary wall after 28 September 2011 and before 21 April 2015. What appears to be a field gate can be seen in the gap in a later image, dated 4 April 2018, but the resolution of this and the earlier aerial images is not ideal. Such a gate appears in a photograph attached to a statutory declaration forming part of the LDC application and which confirmed the "gated entrance ... has been in use for at least four years and six months".
15. This evidence does not, however, indicate what had been done within the verge between the carriageway and the wall, which is the land to which the notice

¹ Figure 4 on page 8 of Ms Zacharia's proof of evidence

- relates. Of themselves, the gap in the wall and the gate do not constitute the new vehicular access to the highway shown on the plan attached to the notice, although they appear intended to facilitate its use. Nevertheless, none of the aerial images include evidence that vehicles gained access or egress.
16. The statutory declarations before the respondent when it issued the notice lack precision. None included a plan identifying the access they refer to, which was described as “the second access on Hinckley Road at the stables”, “this gated entrance” or “the second access at the back of the stables”. Neither did any of these declarations describe the access as vehicular. Accordingly, it was not made clear what access they described. Nevertheless, and assuming they meant the new vehicular access the subject of the notice, they did not need to show when it was formed, only whether it had been substantially completed 4 years before the notice was issued.
 17. The applicant must have acknowledged weaknesses in this evidence because he improved on it after making his appeal. New statutory declarations of Adele Thompson and Lucy Vellam were made in August 2022, each identifying and describing the new access and stating when they began using it, and with which vehicles.
 18. The most significant change in the evidence provided by the applicant was the addition, in February 2022, of the statutory declaration of John Hall, who subsequently appeared at the Inquiry. Mr Hall’s oral evidence demonstrated how, since 2014, he had been able to use the new vehicular access and, from there, tow a large caravan to a yard beyond the stables and then to the touring site. The existence and practicality of this route, which is integral to the applicant’s reasoning for the formation of the new vehicular access, had not been clearly demonstrated prior to Mr Hall’s oral evidence.
 19. While Mr Hall’s statutory declaration was useful, it was his oral evidence that made the applicant’s case compelling. Ms Thompson’s and Ms Vellam’s new statutory declarations were also useful, but they were only provided a month before the Inquiry opened. As it was then still expected they would appear in person, allowing their evidence to be tested, it was not unreasonable of the respondent to maintain its position.
 20. The applicant’s success on ground (d) meant that I did not need to consider the planning merits of the new vehicular access in the main decision. However, the evidence of David Hunt is sufficient to show it was not clear that the development should have been permitted. Furthermore, and as a matter of fact, the Council’s actions did not prevent or delay development because the new vehicular access had already been formed.

Conclusion

21. For the reasons set out above I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Mark Harbottle

INSPECTOR