



Costs Decision

Site visit made on 10 January 2023

by A Berry MTCP (Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 27 January 2023

Costs application in relation to Appeal Ref: APP/D3505/W/22/3295745 Frog Hall Farm, The Street, Aldham IP7 6NH

- 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).
 - Application A is made by Mr Jewers for a full award of costs against Babergh District Council.
 - Application B is made by Babergh District Council for a full award of costs against Mr Jewers.
 - The appeal was against the refusal of planning permission for the conversion of an agricultural storage barn into a dwelling.
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Decision

1. Application A for an award of costs is refused.
2. Application B for an award of costs is allowed in the terms set out below.

Reasons

3. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby causes the party applying for costs to incur unnecessary expense in the appeal process.
4. The appellant considers that the Council acted unreasonably in: failing to engage with the appellant; failing to substantiate the Council's request for an ecological survey; failing to have regard to the change in planning history and the circumstances of the site following the submission of two further applications; reliance on Counsel opinion and a number of appeal decisions that were not supplied to them; and failing to undertake an appropriate assessment in accordance with the Conservation of Habitats and Species Regulations 2017, as amended ('the Habitats Regulations').
5. The Council consider that the appellant acted unreasonably in the submission of the appeal, on the grounds that no substantive evidence was submitted to the appeal to address the Council's reasons for refusal.
6. The PPG indicates that local planning authorities will be at risk of an award being made against them if they fail to produce evidence to substantiate each reason for refusal and if there is a lack of co-operation with the other party. The PPG also indicates that appellants will be at risk of an award being made against them if there is a delay in providing information, and advises that, appellants are encouraged to withdraw their appeal at the earliest opportunity if there is good reason to do so.

7. The prior approval application was refused, as set out in the Council's decision notice, due to insufficient ecological information in respect of Great Crested Newts (GCNs) and bats. The reason for refusal clearly indicates which protected species could be impacted by the proposed development; the Officer Report clearly states why such ecological information is required; and both the Officer Report and the reason for refusal detail which section of paragraph Q.2 (1) of the General Permitted Development Order¹ (GDPO) the proposal does not comply with. Furthermore, a note is attached to the decision notice that advises the applicant that the reason for refusal should be capable of resolution by the submission of sufficient ecological information with any subsequent application. Therefore, the impasse between the parties is likely to have been overcome by the submission of further information accompanying a subsequent application that would not have attracted a fee.
8. The Officer Report at footnote 1 on page 8, lists the appeal references the Council consider reinforce their view in that an ecological survey is required. Whilst these may not have been physically provided direct to the appellant, sufficient information was provided for the appellant to be able to locate these appeal decisions using the Planning Inspectorate's website and to familiarise themselves with their content, before deciding how to proceed.
9. An appeal was subsequently lodged for the proposed development and contained no ecological information to address the Council's only reason for refusal. Whilst the appellant may still have considered that the requirement for ecological information fell outside the scope of Class Q of the GPDO and required me to determine the appeal on this basis, the appellant subsequently submitted the ecological information with their final comments. The lateness of the submission did not allow interested parties to be able to provide further comments, or for consultees to be re-consulted, and therefore would have prejudiced these parties had I accepted the information. However, its submission clearly indicates that the appellant considered that it was required to determine the appeal.
10. This view is supported by the appellant's subsequent submission of two further Class Q prior approval applications to the Council, prior to the determination of this appeal, both of which were accompanied by ecological information. The first was refused due to additional bat surveys not having been undertaken, which further adds to the Council's view that the building did have potential for bats and therefore the ecological information was required to ensure that protected species would not be adversely harmed by the proposed development. Furthermore, I have determined that little weight could be attached to the two subsequent applications.
11. The decision of the Council to instruct Counsel was taken following the determination of the planning application and was not available until after the appellant had lodged their appeal. Notwithstanding this, Counsel opinion is privileged information and therefore the Council was under no obligation to provide the appellant with a copy. It was open to the appellant to obtain their own Counsel opinion on the matter, but from the information before me, chose not to do so.

¹ The Town and Country Planning (General Permitted Development) (England) Order 2015

12. At any time during the course of these two subsequent applications, the appellant could have chosen to withdraw their appeal, with the first application² having been determined by the Council on 21 June 2022. However, no attempt to do so was made until an email was received by the Planning Inspectorate on 27 September 2022, but only if the Council would agree to withdraw their application for costs against the appellant.
13. I appreciate that the lack of communication with the Council during the application process, will have been frustrating to the appellant. However, I find nothing to suggest that a decision was not reached on the basis of the merits of the proposal.
14. The appeal site is located within the Zone of Influence of the Stour and Orwell Estuaries Special Protection Area and Ramsar site (SPA), which is afforded protection under the Habitats Regulations. The Officer Report details that a payment was received from the appellant to support the Recreational Avoidance and Mitigation Strategy for the SPA. An appropriate assessment (AA) was not undertaken by the Council as part of the consideration of the proposed development. However, as the Council were refusing the application, an AA is not required. Furthermore, there is no requirement for an AA to be undertaken in respect of individual buildings that may support protected species.
15. For the reasons detailed above, the time taken to defend the appeal was not borne out of the unreasonable behaviour of the Council and therefore the appellant did not incur unnecessary expense in the appeal process. However, the time taken for the Council to defend the appeal was borne out of the unreasonable behaviour of the appellant and the Council incurred unnecessary expense in the appeal process.

Conclusion

16. I therefore find that unreasonable behaviour by the Council, resulting in unnecessary and wasted expense to Mr Jewers, as described in the PPG, has not been demonstrated. However, I find that unreasonable behaviour by the appellant, resulting in unnecessary and wasted expense to Babergh District Council, as described in the PPG, has been demonstrated and that a full award of costs is justified.

COSTS ORDER

17. 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 Jewers shall pay to Babergh District Council, the full costs of the appeal proceedings described in the heading of this decision.

² Planning Ref: DC/22/02160

18. The Council is now invited to submit to Mr Jewers, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

A Berry

INSPECTOR