



Costs Decision

Hearing Held on 6 June 2023

Site visit made on 6 June 2023

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 23 June 2023

Costs application in relation to Appeal Ref: APP/U2235/W/23/3316176 Pear Paddock, Symonds Lane, Yalding ME18 6HA

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr and Mrs Coster for a full award of costs against Maidstone Borough Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for what was described as the siting of an additional mobile home including removal of existing amenity building and erection of a dayroom (part retrospective).
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Decision

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

The submissions for the parties

2. A skeleton costs application was submitted by the applicants in advance of the hearing, followed shortly by a skeleton response from the Council. Both parties elaborated on their respective positions at the hearing, and answered some of the questions I put to them. It is unnecessary for me to recite the parties' positions at length as they are already largely reduced to writing.
3. The applicants' costs application rests essentially on their view that the Council had unreasonably persisted in pursuing their two reasons for refusing planning permission. This was augmented in more recent weeks since the issuing of two other appeal decisions by Inspectors, one granting permission for another Gypsy or Traveller site in Flood Zone 3a and both finding that Gypsy and Traveller accommodation needs in the area were not being met. The Council in reply says that each case must be determined on its own merits, and in the light of the advice from the Environment Agency it was unable to conclude that the criteria of policy DM15 were met because the Flood Risk Assessment had not been agreed.

Reasons

4. I was told at the start of the hearing that the Council had just conceded its second reason for refusal. As will be apparent from my substantive decision letter, this reason was plainly unreasonable. There is no policy requirement for any applicants for planning permission to demonstrate their status as Gypsies or Travellers. It was in any event clear, at least by February 2023 when the applicants' appeal statement was submitted, that the proposed site occupants were Gypsies or Travellers, as the attached correspondence showed.

5. The underlying reason for refusal, however, was said to be that the 'continued use of the site' (which does not itself require permission) is unjustified development harmful to the character and setting of the countryside in an unsustainable location. However, these matters: the sustainability of the site's location, and the development's effect on the character and setting of the countryside, received no attention at all in the Council's appeal statement. The location received only scant consideration in the earlier officer's report, which assessed this question on the mistaken assumption that the development would result in an increased number of site occupants. On the Council's own analysis, the proposal was found to be acceptable in its landscape and visual impacts. Thus I found that the reason for refusal was not substantiated in any event, irrespective of the application of policy DM15.
6. That said, the application plainly was for a Gypsy and Traveller site development; this much was made clear on the application form. I find that it was unreasonable for the Council to have insisted on the Gypsy or Traveller status of the proposed occupants to have been demonstrated, and to have assessed the proposed development in the absence of the application of policy DM15 when, in the opinion of the Council, and in spite of both the site's recent planning history and the Court of Appeal's judgment in *Smith*, that status had not been demonstrated. To persist with this objection following the receipt of the correspondence attached to the appellants' appeal documents, plainly demonstrating that status, was additionally unreasonable. On the Council's own case, there was no generalised objection to the proposal on the grounds of locational sustainability or the effects on the countryside when applying policy DM15. The Council have applied an unjustified gloss on the policy, which does not require *any* demonstration of need by an applicant or even an assessment of it by the decision maker. The pursuit of this reason for refusal, which could clearly have been satisfied by the imposition of a relevant occupancy condition, was unreasonable.
7. The other reason for refusing planning permission related to flood risk, and attached to the Flood Risk Assessment ('the FRA'), which itself explains that the existing use of the site is lawful and no new principle of development is involved, is a trail of paid-for pre-application correspondence between the appellants' representative and the Environment Agency ('the EA').
8. The EA proposed to recommend refusal on the proposal then described as the siting of one additional mobile home, the removal of existing amenity building and erection of a dayroom on an existing Gypsy and Traveller site, because the proposed development would fall into a flood risk vulnerability category inappropriate to the Flood Zone in which the site is situated. The EA accepted that the finished floor levels of the mobile homes would be compatible with the 1 in 100 year plus 70% Climate Change modelled flood level. The issue of void spacing underneath the mobile homes was raised, with plans sought, and that the site has no safe access or egress. A photograph from 2013 showing the inundation of surrounding roads was supplied.
9. In response it was posited that the site has an existing and permanent lawful use, and that the change from living in a touring caravan to an elevated mobile home would be likely to reduce the flood risks to the relevant existing residents of the site. The raised floor levels would, it was contended, be sufficient to provide refuge in the unlikely event that the site could not be evacuated before the onset of flooding.

10. In response the EA queried the lawfulness of the existing use and whether it was temporary or permanent. They required drawings of the voids. The appellants' representative replied to confirm the permanent lawful use and to say that there was no intention to close off the voids.
11. Again, drawings of the voids were requested. In relation to the lawfulness of the existing use, the EA stated that if confirmation of this could be provided by the Council then they could 'review and potentially revise' their comments. What they would evidently not do was to provide advice on the premise that the appellants' repeated contention as to the lawfulness of the existing use was correct, without confirmation of the position from the Council.
12. It is unclear precisely what transpired on this point during the course of the application, although the EA's formal consultation response of July 2022 again stated that it was unclear from the proposal whether the site is lawful or is a time limited use. This is somewhat surprising in view of the EA having been consulted, and responding without overall objection, on the application culminating in the 2017 permission, which itself required a Flood Emergency Plan to be submitted and adhered to. It also rather defies logic that one would make a planning application for 'one additional mobile home' if the existing mobile homes were not already lawfully sited and used. The matter of void space appears to have been addressed by the time of that response: the issue of safe access was nonetheless not overcome.
13. At the hearing the EA agreed that they had been sent a copy of the appellants' representative's appeal hearing statement in this case, although could not say exactly when. This attached a copy of the 2017 permission at annexe 3, and was submitted in the course of the appeal by February 2023. A review of this document should have put the matter beyond doubt, although it apparently did not constitute the confirmation by the Council upon which the EA insisted.
14. It is unclear why the Council did not clarify the existing lawfulness of the use of the site, or confirm the appellants' assertion in the FRA that the proposed mobile home was to replace the existing living arrangements, at any earlier juncture, in the light of the pre-application correspondence appended to the FRA indicating that the EA might revise their comments upon confirmation by the Council of the lawfulness of the existing development, which in the event they did. This question was plainly central to their assessment of the proposal. In the end, their objection was withdrawn, and with it the Council's perseverance with its reason for refusal, after the opening of the hearing.
15. It is thus clear that the EA's consultation response was made on an incomplete basis. Quite why they did not accept the appellants' pre-application assertion as to the lawfulness of the existing use is not clear but, given their clear communication that this was a matter requiring confirmation by the Council, I find it was unreasonable of the Council not to have clarified the position with the EA at a much earlier stage and prior to pursuing this reason for refusal on appeal. In the event, that clarification prompted the withdrawal of the EA's objection.

Conclusion

16. For the above reasons I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, 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 Maidstone Borough Council shall pay to Mr and Mrs Coster the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
18. The applicants are now invited to submit to Maidstone Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Laura Renaudon

INSPECTOR