
Costs Decision

Site visit made on 14 December 2023

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 19 January 2024

Costs application in relation to Appeal Ref: APP/C2741/X/23/3326860 4 Government House Road, York YO30 6LU

- 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 Rachel Gilbert-Cornish for a full award of costs against City of York Council.
 - The appeal was against the refusal of a certificate of lawful use or development for the installation of gates across a highway.
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Decision

1. The application for an award of costs is allowed in part.

Reasons

2. The Council's refusal notice pointed out that it is illegal to obstruct the highway. I assume this is a reference to section 137 of the Highways Act 1980, although the Council did not say so at the time. This did not explain why the proposed development would not have been lawful for planning purposes.
3. The Council's refusal notice also referred to the case of *Shepherd* and the Court there having held that permitted development rights should be construed in a manner that would be consistent with the protection of other public rights envisaged by other parts of the planning system. The Council, whilst identifying those public rights as the public right to pass and re-pass over the highway, nonetheless did not identify where those rights are envisaged to obtain protection in other parts of the planning system.
4. The appellant's costs application is predicated on the lack of clarity given by the Council's reason for refusing the application, leading her to have to seek legal advice. That legal opinion is dated 30 October 2023, some three months following the submission of the appeal. Ultimately I have not agreed with its conclusion, but not because of its analysis of the *Shepherd* case.
5. I acknowledge that, according to an entry from the London Gazette, a case in Cherwell District appears to have proceeded differently, with the Council there having granted a lawful development certificate on the basis of Class A rights applying, following which the Secretary of State made an Order under section 247 of the 1990 Act. However the full facts of the case, including the precise nature of the works, whether any prior consents had been granted by the local highway authority, and the reasoning of the Council for issuing that certificate, are not available to me.

6. Section 195(1) of the 1990 Act provides that an appeal may be made against the Council's refusal of an application under section 192. On appeal, the Secretary of State shall dismiss the appeal if the refusal was well-founded. This is a reference to the outcome of the Council's deliberations, rather than to the reasons for the decision. On appeals of this type, the Inspector's considerations are not limited to the arguments made by the parties. Although I have not found the Council's reasons for refusing the certificate to be convincing, I have nonetheless dismissed the appeal because I am of the opinion that a certificate should not be granted for other reasons. It was held in Cottrell v SSE & Tonbridge and Malling BC [1982] JPL 443 that the Secretary of State cannot be compelled to issue a certificate where of the opinion that one should not be granted, and is entitled to consider all relevant factors in reaching a decision.
7. The onus in cases of this type is on the appellant to demonstrate, on the balance of probabilities, the lawfulness of the proposal. That burden remains irrespective of the case (if any) put forward by the Council. Nonetheless any appellant can be expected to respond to the case put forward by the Council, as this appellant has done.
8. Although accepting that the case raises difficult legal issues for consideration, I find that the Council's reasons for refusing the application, forming the basis of the case to which the appellant would need to respond on appeal, were somewhat inchoate. Unlike their later appeal statement, the decision notice made no mention of the proposal comprising or resulting in a material change of use of the land.
9. The Council's statement points out that the land in question is an adopted vehicular highway and not a footpath. I find the Council's reasons for saying that the publicity requirements of article 15 of the Development Management Procedure Order 2015 ('the DMPO') should nonetheless apply here to be somewhat opaque. If the Council really intend to rely on article 15(5), as their statement sets out, then I understand them to be saying that any permitted development right must be subject to these publicity requirements. That cannot be right, because that would essentially require an express planning application for any development.
10. Insofar as they are suggesting that the effect of the development on public rights of way should be the subject of particular publicity, as in Shepherd, then I note that the Council's own committee report on the previous planning application (reference 22/02198/FUL) reported that the application had been advertised by site notice and neighbour notification letter, and not by publication in a local newspaper as article 15(3) DMPO would have required (if it applied). Those requirements apply (inter alia) to development affecting a public right of way to which Part 3 of the Wildlife and Countryside Act 1981 applies. That in turn concerns the Definitive Map and Statement for the area which, as the appellant points out, does not include the highway in question here, which is a vehicular highway presumably now appearing on the Council's List of Streets maintained pursuant to section 36(6) of the Highways Act 1980.
11. The Council's statement, although exhorting me to consider the 'broader legal principles' arising from the Shepherd litigation, does not particularly assist me in elucidating what those principles are or how they apply here. Their general point is that permitted development rights cannot be used to interfere with public rights over the highway, although it is conceded that the principle is

nowhere set out in primary legislation. However, they do not answer the *Philcox* point that any lawful development certificate confers a presumption of lawfulness only for the purposes of the 1990 Act and not otherwise. The existence of any lawful development certificate, confirming that the erection of the disputed gates would amount to permitted development and would thus be lawful for the purposes of the 1990 Act, would not prevent the local highway authority from asserting the public's rights over the highway, as the Highways Act 1980 would oblige them to do, or from prosecuting any offence of wilful obstruction if those gates were then erected.

12. Nor do the Council explain how the particular public rights at stake here are envisaged to be protected by other parts of the planning system, or amount to public rights that are singled out for special attention in the planning regime. Unlike the footpath at issue in *Shepherd* (where, subject to establishing a private right to drive over it, there was apparently no bar under highways legislation to the establishment of the vehicular means of access there sought) the relevant rights over the highway here to pass free of obstruction have their own protections under the Highways Act 1980, which obliges local highway authorities to assert and protect the public's rights of use and enjoyment, and provides that those wilfully obstructing the highway are liable to prosecution.
13. I have ultimately found it unnecessary to determine whether the relevant highway user rights can be disregarded for the purposes of establishing whether the permitted development rights in issue here give rise to the entitlement to a certificate of lawfulness. That is because I have found that the proposal encompasses development (namely, the material change of use inherent in the proposal) that would not be permitted by the 2015 Order in any case.
14. Nonetheless I am concerned that the Council have made and pursued the point without referring me (or the appellant) to any specific provisions whereby it is envisaged that the planning system will protect the public highway user rights in issue. Especially in the light of *Philcox*, which the Council did not bring to my attention, if the Council are to suggest that a statutory instrument does not really mean what it says on its face then I would expect a considerably more robust justification than the one given here to support it.
15. In addition, the Council have not disabused the appellant of any apparent reliance by them on the 'narrower' principle of the *Shepherd* case, which is to say that developments affecting public rights of way require special publicity arrangements and therefore cannot amount to permitted development for that reason. The Council have appeared to pursue the application of that principle to the facts of this case both in their notice of refusal and on appeal.
16. I can find no reason to apply that narrower principle of *Shepherd* to the facts of the case here, where no public right of way to which Part 3 of the Wildlife and Countryside Act 1981 applies is involved. The extended publicity requirements relating to ways shown on the Definitive Map with which *Shepherd* was concerned do not appear relevant here. The Council's argument is that the particular publicity provisions of the DMPO would operate here so as to deprive the appellant of the permitted development rights claimed but, for the reasons set out above, I consider this cannot be right.
17. For these reasons I find the Council's reliance upon the *Shepherd* case as providing support for the reasons they have given to justify their refusal of the

application to have been substantively unreasonable. No proper reason has been given by them to justify why the reasons given by the Court of Appeal in that case would support their refusal of the present application.

18. The appellant launched her appeal without first seeking legal advice, and the opinion is dated some three months after her appeal was made. Nonetheless I do not consider it at all unreasonable for her to have sought professional advice in order to assist her rebuttal of the case being put by the Council. I consider her costs of seeking that opinion, to the extent that it was limited to analysing and responding to the Council's position in relation to the Shepherd case, to have been unnecessarily incurred as a result of the Council making and pursuing this part of their case.
19. For these reasons the appellant's application for a full award of costs is refused. However a partial award of costs, limited to the appellant's costs incurred in the appeal of analysing and responding to the Council's case in relation to the application of Shepherd, will be granted.

FORMAL COSTS ORDER

20. 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 the City of York Council shall pay to Rachel Gilbert-Cornish the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in analysing and responding to the Council's case in relation to the application of Shepherd v Secretary of State for the Environment (1998) 76 P&CR 74; such costs to be assessed in the Senior Courts Costs Office if not agreed.
21. The applicant is now invited to submit to the City of York Council details of those costs with a view to reaching agreement as to the amount.

Laura Renaudon

INSPECTOR