



Costs Decision

Site visit made on 14 May 2024

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date:

Costs application in relation to Appeal Ref: APP/C1570/W/23/3330213 Land to the North of Cornells Lane, Widdington, Essex CB11 3SG

- 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 Dr and Mrs M. Tee for a partial award of costs against Widdington Parish Council.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for the erection of 4 no. detached dwellings and associated works.
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Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
3. The applicant's application is against Widdington Parish Council (WPC), an interested party in the above appeal. Representations have been submitted as part of the appeal by an individual acting on their behalf.
4. The applicants contend that WPC has behaved unreasonably and caused unnecessary expense to be incurred in the appeal process due to WPC's submissions on ecology. WPC made other detailed points, but these are not the basis of the application. The applicants contend that WPC's points on ecology are based on an ecological report carried out by an ecologist that, through their own actions, led to that ecological report being revised and re-submitted in place of the earlier version. The applicants say that this caused unnecessary expense due to abortive time being spent reviewing and considering the original ecology report, obtaining professional and legal advice, and making professional and legal submissions to the Inspectorate. Further time was spent checking the content of the revised submission. The application therefore relates to procedural matters.
5. While awards of costs against interested parties are not generally envisaged or anticipated, they are not ruled out either. The fact that the appeal has been heard by way of written representations does not preclude an application or an award, nor does the lack of Rule 6 status. If they do arise, exceptional circumstances are required, which, to my mind, will be case-specific. There is also no closed list in terms of the type of unreasonable behaviour that could lead to an award of costs, given the PPG's use of the words 'for example'.
6. There is no definition or indication in the PPG of what circumstances may be

deemed to be exceptional. It seems reasonable to me to use my professional experience and judgement to determine whether the situation here is exceptional or not.

7. WPC submitted their original representation, dated 18 January 2024 and included an ecology report, dated 12 January 2024. The ecology report was commissioned by an individual who lives near the appeal site and who objected to the proposal. It is also my understanding that they are a parish councillor of WPC. The individual has made separate representations as part of the appeal, dated 13 January, but these did not include or refer to the ecology report, dated a day earlier.
8. The ecology report and WPC's submission were completed by individuals who are members of professional institutes.
9. Although WPC may not have directly commissioned the ecology report, there was a direct link between the individual who did and WPC. Further, WPC submitted the ecology report, and at no time have they distanced themselves from its content or existence, even though it was an individual who originally commissioned the report. WPC has in effect adopted the content of the ecology report, and it has been presented as part of their objections to the proposal. They are therefore complicit in its content, even though they did not directly commission the report. The merits of the ecology report are not the subject of this cost application, so points around its sound, professional analysis are irrelevant here.
10. The applicants wrote to the Inspectorate on 24 January 2024 outlining that the findings of the ecological report were partly based on observations carried out by the ecologist on the appeal site, and that their permission as landowners had not been given for them to be on the site. In short, they alleged that the ecologist trespassed on their land to carry out part of their survey.
11. Trespass disputes are a civil matter; the Inspectorate's role is to determine the planning appeal. But in this case, the alleged trespass is said to amount to unreasonable behaviour and to have caused unnecessary or wasted expense in the appeal process. To determine that, I need to reach a view on the trespass matter, on the balance of probabilities, as that is the sole reason for the alleged unreasonable behaviour.
12. In legal submissions made by WPC, dated 5 February 2024, the ecologist explained their actions. They confirmed that their commission was to conduct an independent review of the appellant's ecological material, checking for accuracy/veracity and highlighting any issues of concern. They explain that this was initially a desk-based exercise, but after some initial work, they advised their client (the individual) that a site visit would be helpful as the land could be viewed from the adjoining road and from the public right of way that runs along one side of it. The ecologist confirmed that they were not instructed to enter the land.
13. However, leaving the merits of the grassland condition assessment to one side, the ecologist considered that it would be helpful to the appeal process for empirical botanical evidence to be collected to corroborate their conclusion about that assessment. They say that "the gate into the site from Cornells Lane was open, so I wandered in, taking a direct linear route diagonally across the appeal site from the gate to the public right of way at the eastern edge." They

go on to explain that they “stopped five times along this walk and marked out 1mx1m squares using bamboo canes and a tape measure” and that they were “on the land for around 20-25 minutes max completing this botanical sampling, I took no material, left no material and nor did I otherwise damage the land.” Further, they confirm that they were not instructed to go onto the land by anyone. It is clear that the applicants, as landowners, had not given their permission for the ecologist to be on the land. As such, the evidence collected by the ecologist from being on the appeal site appears to have been obtained through trespass based on their own account.

14. Subsequent correspondence between the appellant, WPC, and the Inspectorate took place. WPC suggested that either: the applicants could retrospectively grant the ecologist permission for the activities undertaken by him; or that they arrange a suitable time and date for the ecologist to re-visit the site and repeat the measurements undertaken. Neither option was satisfactory to the applicants for the reasons explained. That is their prerogative as landowners.
15. It was the applicant’s principal view that the ecology report should be disregarded altogether. However, that would not have ensured an open, fair, or impartial appeal process as it would have prevented an interested party from submitting their views and evidence on the proposal, particularly as the ecology report was not wholly based on observations undertaken while on the appeal site. As a way forward, the applicant’s suggested that the ecology report be amended to adduce/refer to evidence properly and lawfully obtained, and the revised submission submitted, with an exchange of comments thereafter. In effect, the appellant suggested that the ecology report be based on the ecologist’s findings through their desk-based assessment and observation from public places.
16. That suggestion was put to WPC’s representative on 16 February 2024 by the Inspectorate. It was expressed as “the best way forward”, but the email did ask for confirmation of “whether it is your intention to remove the ecological report completely from your submission or to have it edited to remove the site-collected data and reference to it.”
17. Without a compromise, an impasse had been reached. Although WPC say in its costs response that they did not accept that there is a legal impediment to refer to the original ecology report, WPC decided to revise its statement of objection and submitted this on 19 February 2024. They did not object to the suggested way forward, and fairly considered that suggestion as a compromise to the situation. They could have suggested another potential way forward, but they didn’t. That is a conscious choice. But that choice can have consequences.
18. Given that the ecologist is a professional and had, by their own account, first carried out a desk-based assessment and an assessment using public land, I am unclear why they went onto the appeal site when, by their own admission, it was not necessary to do so. They have explained that they did, however, and clearly, they did not have permission to do so. They subsequently based the original ecological report on their observations and measurements. The merits of that are irrelevant here, as the action has led to evidence being obtained without permission. The examples cited in the PPG about unreasonable behaviour in respect of procedural matters do not include this scenario, but the list is stated not to be exhaustive. Unreasonable is given its ordinary meaning, which is ‘not fair or acceptable’. Applying that, I am of the view that the ecologist’s actions were unreasonable behaviour.

19. In my view, exceptional circumstances mean something that is not ordinary, uncommon, or unusual. I consider that this is such a situation given my professional planning experience, given that WPC was professionally represented, and the ecology report was carried out by a professional ecologist. To my mind, they are not naïve participants in the process.
20. I have therefore identified that unreasonable behaviour has arisen. It has been caused by WPC, who adopted the ecology report as their own despite not directly commissioning it. In this case, I consider those actions to amount to exceptional circumstances. This indicates that an award of costs is appropriate in this case. I am mindful of the applicant's points about the unnecessary and wasted expense that they have incurred as a result during the appeal. I consider all the work that they identified in their costs application to be a fair summary of the unnecessary and wasted expense that they have been put to.

Conclusion

21. For the reasons given above, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of matters relating to the ecology report submitted with WPC's representations during the appeal, and a partial award of costs is therefore warranted.

Costs Order

22. 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 Widdington Parish Council shall pay to Dr and Mrs M. Tee, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the applicant's expense of reviewing and considering the original ecology report, obtaining professional and legal advice, making professional and legal submissions to the Inspectorate, and checking the content of the WPC's revised submission; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicants are now invited to submit to Widdington Parish Council, to whom/whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andrew McGlone

INSPECTOR