The Planning Inspectorate

Costs Decision

Site visit made on 6 January 2021

by Nick Davies BSc(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 January 2021

Costs application in relation to Appeal Ref: APP/X1118/W/20/3255430 Blackmoor Gate Service Reservoir, Former services reservoir Kentisbury, Nr Blackmoor Gate, Devon EX31 4SJ

- 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 Damian Pope (Valandea Ltd) for a full award of costs against North Devon District Council.
- The appeal was against the refusal of planning permission for extension of building and setting out of driveway.

Decision

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

Reasons

2. The Planning Practice Guidance (the 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 claims that the Council has acted unreasonably in:

    a) Ignoring its own guidelines in relation to a fallback position;

    b) Ignoring case law, which was brought to its attention;

    c) Questioning the validity of a Certificate of Lawfulness; and,

    d) Changing its mind in relation to the drainage issue.

4. On the first issue, the applicant relies on the advice published on the Consultation Portal area of the Council's website, under the heading Frequently Asked Questions (FAQs). This part of the website provides generic answers to commonly asked questions. The relevant answer identifies what is meant by the term fallback position, and says that, once a fallback position has been established, an alternative proposal should be considered against that position. It is made clear on the webpage that the answers do not have any formal planning status, and are provided as informal guidance.

5. The Officer's Report clearly referred to the two potential fallback positions, and how the application should be considered against them. The report concluded that the fallback positions were hypothetical, so carried little weight. There was, consequently, no detailed comparison of the impacts of the proposed scheme and the fallback schemes. The report did not refer to the advice set out

in the FAQs, but, given that it has no formal planning status, I do not find that was unreasonable.

6. On the second issue, the PPG advises that local planning authorities are at risk of an award of costs against them if they act contrary to, or do not follow, well-established case law. The Officer's report does not specifically refer to the document submitted with the application entitled "Fallback Legal Position", or all of the case law referred to in it. However, the Officer's Report did include a summary of the most recent Court of Appeal decision[1] that it contained. The Council was therefore aware of established case law relating to the circumstances in which a fallback position is a material consideration.

7. The conclusion of the Officer's Report makes it clear that the fallback positions were considered as a material consideration. It was then a matter for the Council, as decision-maker, to determine the weight that the fallback position should be given in the overall planning balance. The Council's conclusion that they were of limited weight was not irrational, and I came to a similar conclusion in my decision, albeit for different reasons. I do not therefore find that the Council acted contrary to established case law, so find no unreasonable behaviour on this issue.

8. The Certificate of Lawfulness (the CLD) referred to in the third issue was granted in May 2019. It confirms that, under the provisions of Schedule 2, Part 7, Class H of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO), the existing reservoir structure could be enlarged in accordance with an approved drawing. The Officer's Report, however, suggests that unauthorised engineering operations had taken place to remove earth around the structure without planning permission. It is argued that "*as the permitted development works are enabled by unauthorised development, the LPA do not consider the applicant could undertake the Part H extensions within permitted development*". At the time of determining the application, therefore, the Council's position appeared to be that the CLD could not be implemented.

9. The applicant's appeal statement contains evidence that the removal of the earth banks took place some time ago, before he took ownership of the land. That being the case, the CLD was approved after the works took place. Based on the applicant's evidence there were, therefore, no grounds for the Council to have questioned the ability to implement the development approved under the CLD.

10. The Council's statement did not include any information to undermine the evidence in the applicant's statement. Nevertheless, the Council persisted with its position at paragraph 2.5 of its appeal statement, where it is explained that "*in other words as the removal of earth around the structure has been undertaken without the benefit of planning permission it is contended the fall-back position is not applicable in any event*". Consequently, the applicant was compelled to provide further evidence in response to the Council's statement.

11. Section 192(4) of the Town and Country Planning Act 1990 provides that the lawfulness of any use or operation for which a CLD is in force "*shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun*". The Council has not provided any

[1] Mansell v Tonbridge and Malling BC & others [2017] EWCA Civ 1314

evidence to demonstrate that there has been any such material change since the CLD was granted. Consequently, its position casting doubt on the ability to implement the CLD was unreasonable, and the appellant was put to the unnecessary expense of providing additional evidence on this point.

12. The application on the fourth issue is based on the fact that the Council stated in correspondence that there were no drainage concerns with the proposals, but subsequently included a reason for refusal relating to the inadequacy of the proposed foul drainage provision. In response, the Council says that the reference in their correspondence to drainage was only meant to relate to surface water drainage. However, that was not clearly stated, and there was no reference elsewhere in the correspondence to any issues regarding foul drainage.

13. I have some sympathy with the Council on this matter, because, although the National Planning Policy Framework encourages local planning authorities to work pro-actively with applicants, there was no obligation for officers to provide such a comprehensive explanation of the likely outcome of the application. However, the correspondence did give the impression that there were no technical issues that needed to be addressed. Had the applicant been made aware of the concerns, additional information could have been provided, and the reason for refusal could have been avoided. Instead, the applicant was compelled to provide additional evidence as part of the appeal.

14. The additional information demonstrated that mains foul drainage was not achievable and that, if percolation tests proved unsatisfactory, a cesspool could be installed as a last resort. Based on the additional evidence, I concluded that the matter could have been addressed through an appropriately worded planning condition. The PPG advises that planning authorities are at risk of an award of costs for refusing planning permission on a planning ground capable of being dealt with by conditions, where it is concluded that suitable conditions would enable the proposed development to go ahead. I therefore find that the inclusion of the fourth reason for refusal was unreasonable, and, as a result, the applicant was put to unnecessary expense in the appeal process in this regard.

Conclusion

15. I therefore find that unreasonable behaviour by the Council, resulting in unnecessary and wasted expense, as described the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

16. 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 North Devon District Council shall pay to Mr Damian Pope (Valandea Ltd), the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in providing evidence on the ability to implement the CLD, and in relation to the fourth reason for refusal; such costs to be assessed in the Senior Courts Costs Office if not agreed.

17. The applicant is now invited to submit to North Devon District 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.

Nick Davies

INSPECTOR