

---

## Costs Decision

Site visit made on 12 July 2016

**by Mr N P Freeman BA(Hons) DipTP MRTPI DMS**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 15 July 2016**

---

### **Costs application in relation to Appeal Ref: APP/B9506/X/16/3141773 4 Fernside Cottages, Hyde, Fordingbridge, Hants, SP6 2QF**

- 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) by Mr Peter Gurd for a full award of costs against New Forest National Park Authority.
  - The appeal was against the refusal of a certificate of lawful use or development (LDC) for the construction of a vehicular access to a domestic property.
- 

### **Reasons**

1. I have considered the application in the light of the advice contained in the Government's Planning Practice Guidance (PPG) on such matters. This advises that irrespective of the outcome of the appeal costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily in the appeal process.

### **Submissions for the appellant**

2. The Authority has acted unreasonably for two principal reasons. Firstly, they have erroneously sought to argue that the proposal is not in accordance with the terms of Class B of Part 2 and Class F of Part 1 both of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) (Order) (GPDO) 2015. In particular the Authority asserts that because the land in question formed part of the gardens of adjacent properties in the past that it is not within the curtilage of the dwellinghouse, that is 4 Fernside Cottages, and therefore the proposal does not satisfy the terms of paragraph (a) Class F. This is despite being informed that the land in question was part of the curtilage of No.4 at the time the application was submitted. The Authority has failed to grasp the significance of this fact and has not interpreted the legislation correctly or with the due diligence necessary.
  3. Secondly the Authority sought to argue in pre-application correspondence and at the time of the application was determined and the decision issued that the absence of consent from Natural England under Section 28E of the Wildlife and Countryside Act 1991 to create the access across a verge within a Site of Special Scientific Interest (SSSI) meant that the proposed development would be unlawful. This is borne out by the wording contained in a letter to the appellant dated 12 February 2015 which states "as you do not have (*Natural England's*) consent...the development does not constitute permitted development". The Authority when asked to clarify why the absence of this consent rendered the proposed development unlawful in terms of the relevant planning legislation failed to respond with a clear explanation.
-

4. The unreasonableness of the Authority on this point was compounded for two additional reasons. Firstly, the inconsistency on this matter between the wording of the officer's report where the issue is addressed under the heading "Informative(s)" and the actual decision where the point is covered under the heading "...grounds for the above decision...". Secondly, by the comments in paragraphs 2.2 and 3.3 of the Authority's response to the costs application which categorically state that this was not a reason for refusing to issue a LDC. This is in direct contradiction with what was said in the pre-application letter of 12 February 2015. This indicates that the Authority's response in the first instance was not properly thought through leading to erroneous advice in law which was a factor that has led to the matter having to be contested at appeal. It was only when responding to the Costs Application that the Authority's view that it was not a reason for refusal emerged, well after the decision was taken.
5. In terms of the advice given in the PPG on costs matters the following points are highlighted:
  - a) There was a lack of co-operation from the Authority in responding to correspondence and a failure to provide "reasonably requested information" about the understanding of the GPDO which could have avoided the need for an application and the subsequent appeal;
  - b) The Authority's misguided interpretation of planning law on permitted development in respect of the SSSI issue;
  - c) A failure by the Authority to properly substantiate the reasons for refusal in that:
    - It has not been demonstrated why the existing and future uses of the land over which the driveway would pass cannot be regarded as being within the lawful curtilage of the appeal property;
    - There is no role for Natural England to influence the question of lawfulness in terms of the Planning Acts.
6. The Authority's reference to the decision of The Ombudsman in response to a complaint about the Council's conduct is of no relevance to the planning appeal process which is considering different issues.
7. For these reasons the Authority have behaved unreasonably in terms of their conduct and their actions have led to the appellant having to pursue the appeal for no good reason resulting in unnecessary and wasted expense.

### ***Authority's response***

8. The Authority's appeal statement (paragraphs 4.3 and 4.4) gives a clear explanation of the reasoning which led to the decision, which is founded on the consideration of what constitutes the lawful curtilage of the appeal property and the rights and limitations set down in the relevant parts of the GPDO. The fact that the Authority took a different view to the appellant's agent does not render the Authority's behaviour unreasonable. As regards the SSSI issue this did not form part of the Authority's reason for refusing the LDC application.
9. As to the other points, prior to the submission of the application there was a full exchange of e-mail correspondence and The Ombudsman found no fault with the Authority in this respect. The consent of Natural England as regards

works affecting an SSSI is a something that needs to be obtained before the proposed development could be implemented but again it was not a reason for refusing the LDC application.

10. For these reasons the Authority has not behaved unreasonably or acted in a manner which has led to the appellant incurring unnecessary or wasted expense.

### ***Inspector's conclusions***

11. The principal issue to consider is whether the Authority's decision to refuse the LDC application was unreasonable having regard to the rights conveyed by the GPDO. There is also the secondary issue of the relevance of the SSSI and any consent that may be required for works that affect this designated land.
12. The point on which the Authority's decision turned is whether the land affected by the proposal was within the curtilage of a dwellinghouse, in this case No.4 Fernside, and whether the hard surfacing was for a purpose incidental to the enjoyment of that dwellinghouse as such. I consider that on any reasonable assessment and interpretation of the facts of this case as presented by the appellant and his agent the answer should have been in the affirmative. No issue has been taken by the Authority that the purpose would not be incidental to the enjoyment of that dwellinghouse. It was also made plain that the land required for the proposed development was solely within the curtilage of No.4 at the time of the initial enquiries and when the application was made. This was the critical fact which should have led the Authority to conclude that the proposed development was lawful having regard to the rights conveyed by the relevant parts of the GPDO.
13. It seems that Authority are seeking to justify their decision on the basis that part of the land required for the development may have previously or originally been part of the rear gardens of Nos.1-3 Fernside and therefore part of different curtilages. However, as the appellant's agent argues, this is a flawed approach for two reasons. Firstly, the Authority's decision should have been based on what existed by way of curtilage at the time of the application and not what may have existed historically. Secondly, there is no suggestion that the transfer of the bottom parts of the gardens of Nos.1-3 into the garden of No.4 would have been an unlawful change of use. So even if this is what did occur it happened without the need for any planning permission and resulted in all the land in question being within the curtilage of No.4 at the time the application was made. The assessment to be made was a matter of law and not subjective judgement and in this respect I consider that there was a failure on the part of the Authority to properly consider the facts in the context of the relevant legislative framework.
14. Turning to the secondary issue, I consider that the Authority's approach was at best ambiguous and at worst contradictory. The ambiguity stems from the fact that the officer's report describes the need for Natural England's consent as an informative – that is for information or advice - whereas the actual decision does not include the heading "Informative" but simply adds words as a separate paragraph under the grounds for refusal. It appears that the Authority are trying to backtrack from the way the decision is set out and indeed from the pre-application advice given in their letter of 12 February 2015 to which the agent refers. The comments in paragraphs 2.2 and 3.3 of the Authority's costs response that this was not a reason for refusal are in direct

conflict the quoted comment in the earlier letter. On this basis I have no doubt that the appellant has been misled and that the view of the Authority on the relevance of the SSSI issue changed after the application was determined and the appeal was lodged. This has resulted in time having to be taken and expense incurred to unravel something that should not have been necessary if the correct advice had been given in the first place.

15. Overall for these reasons, I conclude the Authority's handling and determination of the LDC application was misconceived as there was a failure to have regard to the factual circumstances at the time of the application and the legal principles that were pertinent in respect of lawfulness under the planning legislation. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in the Government's PPG on costs, has been demonstrated and that a full award of costs is justified.

### **Decision**

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

### **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 the New Forest National Park Authority shall pay to Mr Peter Gurd, the costs of the appeal proceedings described in the heading of this decision.
18. The applicant is now invited to submit to the New Forest National Park Authority, 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.

*N P Freeman*

INSPECTOR