The Planning Inspectorate

Costs Decisions

Site Inspection on 17 June 2019

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 31 July 2019

Costs Application Relating to Appeal APP/B9506/C/18/3216011
Site at: Ashley View Farm, Hyde, Fordingbridge SP6 2QE

- The application is made under the Town and Country Planning Act 1990, Sections 174, 322 and Schedule 6, and the Local Government Act 1972 Section 250(5).
- The application is by Mr David Cotter and is for a full award of costs against the New Forest National Park Authority.
- The appeal was made against an enforcement notice issued by the planning authority. The notice was dated 26 October 2018. The breach of planning control alleged in the notice is: "Without planning permission the erection of a self-contained unit of accommodation shown in the approximate position coloured blue on the plan attached to this Notice".

Costs Application Relating to Appeal APP/B9506/W/18/3211011
Site at: Ashley View Farm, Road from Hyde to Ogdens, Hyde, Hants.

- 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 by Mr David Cotter[1] and is for a full award of costs against the New Forest National Park Authority.
- The appeal was made against the planning authority's decision to refuse planning permission for development, described in the application as: "Retention of replacement building to provide Holiday let (C1 use)".

Introduction and Procedural Matters

1. Irrespective of the outcome of the appeal, costs may only 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.

2. Two separate applications for awards of costs have been made, one relating to the appeal against an enforcement notice, the other relating to the appeal against refusal of planning permission. Both applications are considered here.

3. The costs decisions have been delayed so that I could obtain information from administrators in the Planning Inspectorate about what payment had been made for the application deemed to have been made under Section 177(5) of the 1990 Act arising from the Section 174 appeal. I then arranged for an email to be sent to the council and the appellants' agent asking questions on this matter, because

[1] See "Identity of Appellant", paragraph 2.

I considered it necessary to seek clarification. I return to this topic in paragraphs 9 and 10 below.

4. As explained in my appeal decision, the Section 78 appeal purported to be made by Mr David Cotter, although the original planning application had been made jointly by Mr and Mrs Cotter, and the right of appeal was only held jointly by the applicants. However, I have treated the appeal as if Mr Cotter had acted for the joint applicants, and I am doing the same thing for the application for costs relating to the Section 78 appeal.

5. I summarise briefly below the main points argued for the appellants in both applications. I have not considered it necessary to do the same for the planning authority's rebuttal arguments.

Costs Application Relating to Mr Cotter's Section 174 Appeal

6. The main points made in support of the application are (in summary):

- The planning authority did not carry out adequate prior investigation before issuing the enforcement notice. The Executive Director of Strategy and Planning admitted on the telephone that he had not read the appellant's statement for the Section 78 appeal and so did not realise the authority had made errors in determining the 2018 application.
- The enforcement notice contained inaccuracies: for example the works carried out were conversion works, not construction of a new-build.
- The reasons for issuing the notice simply repeated the reasons for refusal of the 2018 application, and are not adequate reasons explaining why the authority considered it expedient to take enforcement action. The authority did not properly consider the matter of expediency and behaved unreasonably by issuing the enforcement notice prematurely only seven weeks after the appeal had been lodged against the refusal of planning permission.
- The appellant should not have been required to pay a fee for the deemed application relating to the enforcement appeal. The fee could have put off an appellant. A reasonable local authority would have taken more care to avoid such a consequence.
- The appellant has incurred unnecessary or wasted expense in instructing specialist planning lawyers to provide advice, prepare statements and carry out other tasks in support of the appeal.

7. As I have mentioned in my appeal decision, the fact that the planning authority's executive director had not read the Section 78 appeal statement before the enforcement notice was issued does not show that the authority had not considered the expediency of issuing the notice. In the authority's view, a clear breach of policy had occurred, a retrospective planning application had been refused, and therefore it was expedient to take enforcement action. The authority could have been open to criticism if enforcement proceedings had been delayed until after the decision on the Section 78 appeal. The authority also appears to have had in mind that an appeal against the notice could efficiently be considered together with the Section 78 appeal. In my judgment that was not an unreasonable approach.

8. The enforcement notice was not inaccurate in the way alleged by the appellants. The works carried out were a new-build, not a conversion. For the reasons explained above, I do not consider that the enforcement notice was issued

prematurely. There was nothing wrong with the reasons for issuing the notice being the same as the reasons for refusal of planning permission, plus the statement that the authority did not consider that planning permission should be granted because conditions could not overcome the objections.

9. As regards the fee for the deemed application, Mr Cotter has claimed (through his agent) that: "The appellant, in relying on ground (a) in his appeal against the enforcement notice, has incurred the considerable cost of the planning application fee". The next sentence contains the statement that: "All of these costs are unnecessary". Taken together, these statements appear to be saying that the appellant incurred the unnecessary cost of paying a fee for his ground (a) appeal against the enforcement notice. As a result of my inquiries mentioned in paragraph 4 above I have established that in fact no fee was paid to have ground (a) considered.[2]

10. The appellant has been lucky to have had ground (a) and the deemed application considered at all. I have not been able to track down exactly how the decision came to be made that the deemed application and ground (a) were "fee exempt". Be that as it may, a fee should have been paid, despite the claim by the appellant's agent that "there is an exemption".[3] The deemed application fee specified by the National Park Authority was the fee appropriate for hotel development - not for residential development - and so was not correct. As I have commented elsewhere, it seems that for the 2018 application, the applicants positively wanted the application to be categorised as hotel development and paid the appropriate fee to help support that approach.

11. I find that the somewhat messy situation relating to application and deemed application fees involved faults on both sides. I do not know what discussions may have taken place between the appellant or his agent and the National Park Authority regarding the fee amount;[4] but the end result has been that Mr Cotter gained "free" consideration of ground (a) and the deemed application even though these components of his appeal should have lapsed long before the appeal reached me. The appellant did not incur the cost of any enforcement-related fee and there is no basis for the claim that the appellant incurred an unnecessary application fee.

12. It was the appellant's decision to employ a firm of solicitors to prepare and submit his appeal case and costs application. That decision was not the result of any unreasonable behaviour by the planning authority.

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[2] This has been confirmed by both the planning authority (in an email on 18 July 2019) and by the appellant's agent (in an email on 30 July 2019, which was outside the timescale specified for responses, but I have delayed this decision until receiving it).

[3] In order to have an appeal under Section 174(2)(a) considered, a fee has to be paid for the application deemed to be made under Section 177(5) of the 1990 Act. If this is not paid, ground (a) and the deemed application lapses. Fee exemption does not apply unless, subject to various time limits and other provisos, a normal application has been made for "the development to which the enforcement notice relates". In this case, the exemption should not have applied because the development enforced against (a dwelling) was not the same as the development described in the 2018 application ("holiday let C1 use", ie hotel development).

[4] As is explained in the "Frequently Asked Questions" guide to deemed planning application fees issued by the Inspectorate, the fee amount is twice the amount of a standard planning application for the development enforced against and an appellant who has a query about the amount should approach the local planning authority, and if this is not resolved should ask for an extension to the fee deadline.

13. In summary, I find that the planning authority acted in accordance with normal reasonable practice in taking enforcement action. Any shortcomings did not amount to unreasonable behaviour causing wasted expenditure justifying an award of costs. Indeed, the authority's apparent acceptance of non-payment of the deemed application fee resulted in an advantage for the appellant, since ground (a) and the deemed application were considered instead of lapsing. I conclude that the application for costs relating to the Section 174 appeal does not succeed.

Costs Application Relating to Mr and Mrs Cotter's Section 78 Appeal

14. The main points made in support of the application are (in summary):

- The proposal, when taking into account the fall-back position which is a material consideration, should have been permitted.
- The National Park Authority made an inaccurate assertion in its first reason for refusal that the use class is residential (C3).
- The Authority made an inaccurate assertion in its second reason for refusal that no mitigation measures had been submitted.

15. As will by now be apparent from my appeal decision, the appellants' belief that there was a "fall-back position" as a material consideration has been misguided. The authority's planning committee were not wrongly advised as is claimed for the appellants. What was built was a new replacement building, which was unauthorised. Requiring its demolition was a normal step for an enforcement notice and was not excessive. There is no fall-back position.

16. As is explained in my appeal decision, for the purposes of planning law the use of a building constructed for use as a "holiday let" is residential. The National Park Authority did not make an inaccurate assertion on this point. The mitigation measures which had been the subject of a previous permission for alterations to the original piggery building involved a unilateral undertaking. As far as I have been able to establish, no such undertaking was entered into in relation to the development of a new-build dwelling, and I do not find unreasonable behaviour justifying an award of costs in respect of the authority's second reason for refusal of planning permission.

17. I conclude that the application for costs in respect of the Section 78 appeal does not succeed.

Planning Authority's Costs

18. One of the criteria which can justify an award of costs against appellants is that the right of appeal should be exercised in a reasonable manner. Appellants may also be at risk of an award of costs against them if an appeal or ground of appeal had no reasonable prospect of succeeding.

19. The written representations submitted for the appellants in these cases were constructed on what appears to me to be a "grapeshot" basis, with numerous weak points being fired off in the hope that one or more might find a target. When trying to avoid repetition in my assessment of the legal aspects of the appellants' appeal cases, I had difficulty finding enough adjectives (which included: unfounded; unconvincing; flawed; wrong; misguided; erroneous; mistaken; and incorrect). There were several unreasonable features about the way the appellants' cases were presented, especially bearing in mind that the appellants were advised by a firm of solicitors who could normally be expected either to have a knowledge of planning law or to realise the need to seek advice.

Two examples are: (i) the attempt to argue that the development was a conversion of an existing building, despite its previous description for the appellants as a "replacement building"; and (ii) the claim that the 2018 application, which sought planning permission for development already carried out, "was not submitted as a retrospective application".

20. Inspectors deciding planning appeals can initiate awards of costs irrespective of whether an appeal party has made an application. The appellants and their agent can count themselves fortunate that the National Park Authority did not apply for costs and that I have narrowly decided against initiating an award of costs against the appellants.

Formal Decisions

Application Relating to Section 174 Appeal

21. The application for an award of costs is refused.

Application Relating to Section 78 Appeal

22. The application for an award of costs is refused.

G F Self

Inspector