

Costs Decision

Site visit made on 28 November 2016

by C Jack BSc(Hons) MA MA(TP) MRTPI

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

Decision date: 28th December 2016

Costs application in relation to Appeal Ref: APP/A2280/D/16/3159647 1 Embassy Close, Gillingham, Kent ME7 3EN

- 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 and Mrs P Dudley for a full award of costs against The Medway Council.
 - The appeal was against the refusal of planning permission for a single storey side and rear extension.
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Decision

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

Reasons

2. Planning Practice Guidance (PPG) advises that, 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 expense in the appeal process. The relevant paragraphs of the PPG replaced Circular 03/2009.
3. The application for costs essentially relied on behaviour by the Council in considering the planning application. This included that it did not consider the applicants' fallback position of an extension under permitted development rights, which the applicants considered would result in the same daylight scenario for the neighbouring property, 2 Embassy Close, as the proposed development. It was also put to me that the Council was erroneous in its assessment of the BRE rule of thumb 45 degree test. The applicants considered that the relevant point fell outside the line in elevation form and that the test requires the relevant point to be inside the line on both the elevation and plan forms of the test to indicate the possibility of poor daylight conditions prevailing. As a result, they consider that the reason for refusal is not precise and relevant and cannot be substantiated by evidence.
4. The PPG states that examples of unreasonable behaviour by local planning authorities include failure to produce evidence to substantiate each reason for refusal on appeal and vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis¹. Furthermore it states² that costs can only be awarded in relation to unnecessary or wasted expenses at the appeal, albeit behaviour and actions at the time of the planning application can be taken into account.

¹ Paragraph 049 Ref ID: 16-049-20140306

² Paragraph 033 Ref ID: 16-033-20140306

5. In itself, the reason for refusal set out in the decision notice was complete, precise, specific and relevant to the application. It clearly stated the policy of the Medway Local Plan 2003 that the Council found the proposal to conflict with. The Council's Officer Report was then provided by the Council to support its position in the appeal. The appeal was carried out under the expedited 'Householder Appeal Service', whereby the Council may provide its Report to support its position but there is no opportunity for it to comment on the grounds of appeal or provide a further statement. In these respects, I therefore consider the Council did not act unreasonably.
6. The Council was also not unreasonable in seeking to assess the proposed development using the '45 degree test', which the accompanying text to the relevant development plan policy refers to. This test originates from the Building Research Establishment's 'Site Layout Planning for Daylight and Sunlight: A guide to good practice' (BRE). The most recent version of which is the 2011 second edition. In principle, the Council was not unreasonable in using the 45 degree test, which as the applicants note is expressly a 'rule of thumb', to aid its assessment of the effects of the proposed development upon daylight to 2 Embassy Close.
7. The Council has accepted that it misapplied the test when considering the application. It provided another version with its response to the costs application, which indicates that the test was passed. Nonetheless, the test is not intended to be definitive and should generally be used flexibly, factoring in any relevant circumstances of each case. The more marginal the outcome of the test, the more pertinent these other factors might be. The Council states that its decision was also based on a site visit and information submitted with the application. However, the Council has provided nothing significant by way of objective analysis or substantiation for its decision in its report, notwithstanding that it had anyway incorrectly applied the test.
8. The Council's Report stated only that, "The 45 degree test in plan and elevation form shows a detrimental harm to the amenity of the occupier of no. [2] due to the loss of daylight". Thus it failed to consider the wider context pertaining to the potential loss of daylight indicated by its undertaking of the rule of thumb 45 degree test. Thereby, the Council failed to fully substantiate its reason for refusal. Given that the Council appears to have applied the test in black and white terms for decision-making purposes, i.e. the test was failed therefore there would be a harm impact on terms of daylight, it seems likely that had the Council's original elevation test been carried out correctly, indicating that the test was passed as the Council's subsequent test did, it is likely that the Council would have reached a different determination of the application. In such a circumstance the appeal would have been avoided as this was the sole reason for refusal.
9. With regard to consideration of the applicants' stated fallback position, I note that an application for a certificate of lawful development for a rear extension has been submitted to the Council. However, it is not clear from the evidence before me whether this application was made before the Council determined the planning application. Furthermore, the Council states that permitted development rights are removed by condition for rear extensions at the appeal property. As a result, the Council considered that there was no fallback position. The Council did not specifically address this in its report so it would not have been clear to the applicants why the Council appeared to have

dismissed the fallback position they believed was relevant to the case. However, there was also nothing significant in the planning application documents to suggest that the purported fallback position was put in detail to the Council at the time of the application, or to indicate that any such fallback was particularly likely to proceed. In the absence of this, the Council was not unreasonable in determining the planning application before it on its own merits.

10. As a result, I consider that the Council failed to fully substantiate its sole reason for refusal with objective analysis, principally as a result of misapplying the rule of thumb test upon which it entirely relied in determining the application. No further specific consideration or contextual justification in relation to daylight was set out in the Council's report to substantiate its decision. In these circumstances, while I consider that the applicants may not have been put to large amounts of additional expense in countering the council's position on this single matter at the appeal, some unnecessary costs would have been incurred in making the appeal.

Conclusion

11. I therefore conclude that for the reasons set out above, unreasonable behaviour resulting in unnecessary and wasted expense in the appeal has been demonstrated and that an award of costs is therefore justified.

Costs Order

12. 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 Medway Council shall pay to Mr and Mrs P Dudley, the costs of the appeal proceedings described in the heading of this decision.
13. The applicant is now invited to submit to The Medway 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, such costs to be assessed in the Senior Courts Costs Office if not agreed.

Catherine Jack

INSPECTOR