
Costs Decision

Hearing held on 30 November 2016

Site visit made on 30 November 2016.

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 14 February 2017

Costs application in relation to Appeal Ref: APP/P3040/F/16/3146993 Park Lodge, Bridgford Road, West Bridgford NG2 6AT

- The application is made under the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 39, 89 and Schedule 3, and the Local Government Act 1972, section 250(5).
 - The application is made by Ben Sheppard of Paragon Property Development Co. Ltd. for a full award of costs against Rushcliffe Borough Council.
 - The hearing was in connection with an appeal against a listed building enforcement notice alleging abrasive blasting of the exterior brickwork to the south-west and north-west elevations of Park Lodge, for the alteration of the building by removing the fire-skins of the bricks affecting the character of the building as a building of special architectural or historic interest, contrary to sections 7 and 9 of the Planning (Listed Buildings and Conservation Areas) Act 1990.
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Decision

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

The submissions for the appellant

2. The Council had failed to cooperate with the appellant to identify their concerns about the unauthorised works, or to identify solutions to those concerns. It is apparent that the Lodge brickwork had been subject to unsympathetic treatment by previous owners or tenants, including the application of bitumen paint and attachment of signage. The appellant was informed by the Council that cleaning would not require listed building consent.
3. Following several unsuccessful attempts at cleaning, the sandblasting was done in September 2015. The appellant arranged with a brick specialist, and in the Council's presence, to put forward options for sealing and tinting the bricks. Following that the Council did not confirm what action they required to overcome their concerns or steps required to avoid enforcement action, but invited the appellant to attend a formal interview under caution, with the investigation clearly directed towards prosecution proceedings. It can be seen that the appellant engaged with the Council at every stage. On asking the Council whether a listed building consent application to tint and seal the brickwork should be made it was indicated this should be done without delay. The application was refused without any intervening dialogue with the appellant.

4. Although the listed building enforcement notice is understood to be informed by a specialist brick report, this has not been forthcoming, despite repeated requests since October 2015. These requests have been refused, and it has been indicated that no copy would be made available until a decision to prosecute has been taken.
5. Even though the appellant had concerns that the Council have failed to demonstrate that the Lodge is a curtilage listed building, he continued to be willing to work with the Council to overcome their concerns. The Council's failure to engage constructively over the 5 month period between the sandblasting being done and the issue of the enforcement notice is clearly unreasonable. Had a more constructive approach been taken the appeal could have been avoided, or at the very least, the issues narrowed.
6. The Council had failed to provide information when requested to substantiate the claimed curtilage listing of the Lodge, and then produced additional information in their Hearing statement despite that information being requested repeatedly prior to service of the notice. The appellant had requested evidence of the curtilage listing of the Lodge on 15 September 2015, but the only evidence provided prior to issue of the listed building enforcement notice and the subsequent appeal was the Council's response on the 23rd of that month. This information was challenged on several occasions, but the Council did not respond adequately, and simply asserted that their original letter was sufficient. The Council provided information at appeal stage, but could have done so before. This was unreasonable behaviour meriting an award of costs.
7. The introduction of new material in the form of committee minutes of its predecessor authority to substantiate the Council's case on curtilage listing is a clear ground for an award of costs. This is publicly available material and should have been provided prior to appeal proceedings when requested, and included in the Council's letter of 23 September 2015. The Council deliberately chose not to provide their Hearing statement with the appeal questionnaire, and instead withheld the minutes until submission of their statement on 5 July 2016. The Council failed both to provide requested material, and to review their case following the lodging of the appeal.
8. The Council had invited an application for listed building consent to seal and tint and the affected brickwork, and then refused the application without further dialogue. The application was made in an attempt to obviate the need for unnecessary appeal proceedings. However the Council failed to engage in any dialogue on that application or identify any additional works that may have been acceptable. Inspectorate guidance is that local planning authorities should enter into constructive dialogue with those who may be in breach of planning control, and failure to do so would be unreasonable behaviour that might substantiate an award of costs.
9. The Council clearly focused on enforcement action, which they would have realised would result in an appeal. In that regard the Council failed to take account of the central requirement of the costs regime, which is to discourage unnecessary appeals and encourage parties to consider a revised planning application. This failure, and the failure to entertain alternatives to enforcement action, merit a full award of costs.

The response for the Council

10. In terms of the chronology put forward, the Council had at no time advised that cleaning the Lodge would not require listed building consent. Regarding the claim that there was a failure to co-operate, several letters had been received from solicitors saying that the appellant remain willing to carry out works deemed to be necessary, to which the Council had responded in kind. However in the event there was never any approach from the appellant's surveyor who had submitted the listed building consent application, and who might have discussed the proposed works.
11. As to the claimed failure to provide information concerning the status of the Lodge as a curtilage listed building, the Council's letter of 23 September 2015 did no more than set out the relevant criteria and tests. There was never a request for the Council to substantiate that status, but as the historic owners there was information available such as property deeds.
12. As to presenting the predecessor Council's minutes late, the Council are not aware of a requirement to submit a statement at questionnaire stage, and it was submitted in accordance with the Inspectorate timetable. In any case the relevant committee minutes are held in the County Archive. They are in 4 volumes with an incomplete and inaccurate index. Although the Council were aware of the relevant committee, there had not been time to identify the relevant minutes in September 2015. In any case, it was only at appeal stage that it became necessary to scrutinise the archive and identify the relevant minutes.
13. Determination of the extent of curtilage of a listed building must be a matter of fact and degree, there is not necessarily a definitive plan. The material submitted by the Council is sufficient to determine the status of the lodge in relation to the Hall, and it was submitted at the required time. Curtilage determinations are not clear-cut, the Council's arguments in this regard cannot be seen as unreasonable, and it was inevitable that the curtilage question would need to be settled by means of an appeal.
14. Regarding willingness to engage in discussion, a listed building consent application was submitted after a brief discussion. It was submitted with a surveyor's statement. The appellant did not discuss the proposed specification, or invite liaison with their surveyor or contractor. The Council considered the application was lacking in terms of the extent of works and materials proposed. The appellant requested guidance on what he should do to remedy the problem, and in response the Council provided a detailed schedule in the form of the listed building enforcement notice.
15. The Council have not been unreasonable, and have done nothing that has caused direct costs to the appellant. In any event the Hearing would have been necessary, and the appellant has not been caused unnecessary expense. The application should be refused.

Reasons

16. The government's 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. That is the basis upon which I have determined this application.

17. Regarding the alleged failure to cooperate with the appellant to identify their concerns about the unauthorised works, it appears to me that the Council's concerns were raised a matter of days after the sandblasting had occurred on 5-8 September 2015. Furthermore, in their letter of the 23rd of that month, the Council make clear that any remedial works should include a solution to the problem caused by removal of the fire-skin from the brickwork. In my opinion it was then for the appellant then to put forward potential solutions.
18. In the event the appellant did indeed propose a solution in the listed building consent application in October 2015, which the Council refused. The Council's role in determining an application is to consider whatever scheme is proposed, there is no duty to negotiate a positive outcome with the applicant. In this instance there had been a brief discussion beforehand, but the appellant or his agent did not attempt to discuss the details of the specification, and the Council came to the conclusion that the proposal was lacking in terms of the extent of works necessary, and the types of material proposed. I do not consider the Council behaved unreasonably in terms of lack of co-operation.
19. The listed building enforcement notice is readily comprehensible without any reference to outside sources such as the Council's specialist report. Indeed the specification attached to the notice is comprehensive, and I understand reflects the conclusions of that report. While it may have been diplomatic for the Council to have produced the report, I do not see how the appellant's case would have been furthered by access to it, or prejudiced by its absence.
20. The Council's letter of 23 September 2015 makes a concise summary of the legal criteria for assessing curtilage structures, and of the main headings under which the Council reached their view that the Lodge is curtilage listed. Although the appellant made a Freedom of Information request for all documentation that identified the curtilage of the Hall, it must be born in mind that there need be no definitive document or documents that determine the extent of a listed building curtilage – it is a matter of fact and degree in each case. In my view the minutes of the former Council's Hall and Parks Committee were germane to the case, submitted in due time, and supported arguments already advanced by the Council.
21. The question of curtilage listing is one of the main planks of the appellant's case, and the dispute about this matter alone would have necessitated determination at appeal. I do not consider the Council acted unreasonably with respect to this aspect of the case.
22. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Stephen Brown

INSPECTOR