
Costs Decisions

Site visit made on 14 February 2017

by Martin Joyce DipTP MRTPI

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

Decision date: 03 March 2017

Costs application in relation to Appeal Ref: APP/F5540/X/16/3157749 75 Shakespeare Avenue, Feltham, London TW14 9HU

- The application (Application 1) 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).
 - The application is made by the Council of the London Borough of Hounslow for a full award of costs against Mr George Traykov.
 - The appeal was against the refusal of an application for a Certificate of Proposed Lawful Use or Development (CLOPUD) for the proposed erection of a detached outbuilding to be used solely as an ancillary storage building for a purpose incidental to the enjoyment of the dwellinghouse.
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Costs application in relation to Appeal Ref: APP/F5540/X/16/3152984 75 Shakespeare Avenue, Feltham, London TW14 9HU

- The application (Application 2) 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).
 - The application is made by the Council of the London Borough of Hounslow for a full award of costs against Mr George Traykov.
 - The appeal was against the refusal of an application for a Certificate of Lawful Existing Use or Development (CLEUD) for an outbuilding measuring 6.00m x 5.85m x 2.5m within the curtilage of the dwellinghouse.
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Decisions

1. The application for an award of costs in respect of Application 1 is refused.
2. The application for an award of costs in respect of Application 2 is allowed in the terms set out below in the Costs Order.

APPLICATION 1

The Case for the Council

3. The Council contends that the appellant has acted unreasonably in relation to this appeal. They draw attention to the onus of proof being upon an appellant on matters of fact in Lawful Development Certificate (LDC) appeals such as this.
 4. In this case, they contend that the appellant has provided information within his Statement of Case which has been found to be untrue; that the outbuilding which formerly occupied the site was empty at the time of the application, and that the main dwelling was not in use as a House in Multiple Occupation (HMO). Additionally, it should have been clear to the appellant that the appeal would not succeed because he had not provided information to support the case that the outbuilding would be used as an incidental use at the application stage, and
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the information provided at the appeal stage provides only limited further evidence, with no reference made to the previous use of a building of the same scale that was the subject of an enforcement notice and subsequent unsuccessful appeal¹. This all suggests that the proposed building would not be used for incidental purposes.

5. The Council has clearly stated that this prevents the issue of an LDC, and has referred to two appeal decisions to support its case that there is a need to demonstrate an incidental use. Nevertheless the appellant has chosen to pursue his appeal even when it was clear that it would be rejected. The Council has processed a number of applications, enforcement investigations and appeals on this site in a prompt and reasonable manner without objecting to the expense of undertaking such work. However, the current appeal is considered to be an excessive and unreasonable step over and above the work already undertaken. Instead of taking steps to remove the outbuilding, the appellant chose to continue challenging previous decisions, even after the building was eventually removed. This is unreasonable behaviour that has required the Council to administer an appeal submission and prepare written representations on the scheme, and a full award of their costs should therefore be made.

The Response by the Appellant

6. The appellant denies that he has behaved unreasonably, rather it is the actions of the Council that have resulted in this unnecessary appeal. This appeal has little to do with the previous appeal against an enforcement notice that alleged the use of an outbuilding as separate living accommodation. It relates to the appellant's permitted development rights to build an ancillary building for storage use. He is not seeking a separate dwelling, only confirmation of the rights available to every house owner in the area, and this has been made clear to the Council at every stage in the process. The appellant, therefore, has every reason to expect his appeal to be successful.
7. The Council has not dealt with this application and appeal on its own merits, rather they have dealt with this, and the other application for an LDC, as if they were for a separate dwelling. The appellant has, therefore, had to appeal to obtain a decision from an independent Planning Inspector who would make a proper lawful determination. Therefore the application for costs should be refused.

Reasoning

8. The 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. It also gives examples of the type of behaviour that may give rise to a substantive award against an appellant including that the appeal had no reasonable prospect of succeeding or where the appeal follows a recent appeal decision in respect of the same, or a very similar, development on the same site².
9. In this case, the Council's case revolves around a claim that the appellant has acted unreasonably in pursuing an appeal that he knew would have no chance

¹ CLG Ref: APP/F5540/C/15/3025077, dated 9 February 2016.

² Planning Practice Guidance paragraph 053 Ref ID: 16-053-20140306.

- of success, given the outcome of a previous appeal against an enforcement notice relating to a building of very similar style and size. They also suggest that the appellant did not provide sufficient information to show that the use of the proposed building would be incidental or ancillary to that of the main dwellinghouse, and that that provided with the appeal was very limited.
10. In all of these matters, however, I do not consider that the appellant has behaved unreasonably to the extent that an award of costs should be made against him. There is some substance to the Council's claim that the application for a Certificate of Lawful Proposed Use or Development (CLOPUD) contained little in the way of justification or information to show why such a building was needed, and it is true that the former outbuilding was still in place at the time of the application. However, further information was provided at the appeal stage and, although the Council have challenged the adequacy of this information, I have found that it provides sufficient justification in terms of showing an intended ancillary use of a building that would otherwise meet all of the criteria of Class E of Part 1 of Schedule 2 to The Town and Country Planning (General Permitted Development (England) Order 2015 as amended (GPDO). In this context, even if the main dwellinghouse is in use as an HMO, such use does not remove permitted development rights under Class E.
11. I also do not consider the fact that there was an enforcement appeal relating to the use of a previous outbuilding of substantially the same size and style as that now proposed to be of such relevance as to allow a conclusion that the appellant would use the new building for similar purposes, as a separate residential unit. Neither does any delay in complying with the terms of the upheld notice, as this is largely a separate matter over which the Council, ultimately, has powers to take appropriate action.
12. In all of the above circumstances, therefore, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

APPLICATION 2

The Case for the Council

13. The Council contends that the appellant has acted unreasonably in pursuing an appeal that would not succeed for three principal reasons. Firstly, an appeal against an enforcement notice which alleged the use of the outbuilding in question as a separate residential unit was dismissed. That decision considered, and rejected, a fallback use of the property as a store. Secondly, the appellant's argument that the outbuilding was permitted development was also rejected in the previous appeal. Thirdly, the Council has clearly stated the regulation which prevents the issue of a Certificate of Lawful Existing Use or Development (CLEUD) where an enforcement notice is in effect on a property, a matter that the appellant was well aware of. Additionally, as with the first application for costs, the Council alleges that the appellant provided information in his Statement of Case that was untrue, relating to the use of the building at the date of the application for a CLEUD.
14. It is clear from all of the above that the appeal would be rejected but even when the building was removed in compliance with the enforcement notice, the appellant continued with his appeal notwithstanding that the Council had asked

him to withdraw it. In all of these circumstances a full award of costs should be made.

The Response by the Appellant

15. The appellant denies that he has acted unreasonably, rather it is the Council that has acted in such a manner as set out in the appellant's appeal statement. As with the other appeal currently under consideration, it is contended that the application has little to do with the previous appeal against an enforcement notice, as that did not concern an ancillary storage building and so was materially different. Moreover, the Inspector who determined that appeal did not measure the building in question and so was unable to form a view as to whether it was permitted development or not. Indeed, other Inspectors have come to an opposite view and allowed such outbuildings to remain with suitable planning conditions.
16. The appellant has attempted to negotiate with the Council to show that an outbuilding of this nature could be considered to be permitted development but the Council appeared to wish to take a strict and intransigent approach, therefore the only way in which the matter can be addressed formally, and the Council's approach legally challenged, is through the appeal process, hence the appeal was not withdrawn. In all of these circumstances, therefore, the application for an award of costs should be refused.

Reasoning

17. 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. It also gives examples of the type of behaviour that may give rise to a substantive award against an appellant including that the appeal had no reasonable prospect of succeeding or where the appeal follows a recent appeal decision in respect of the same, or a very similar, development on the same site.
18. In this case, whilst the application for a CLEUD may not relate to the same use as that which was the subject of the previous appeal, it did concern the same building, which was still in position at the date at which the application was made. The Council refused the application for a single reason – that the proposal directly contravenes the requirements of an enforcement notice and as such, in accordance with Section 191(2) of the Town and Country Planning Act 1990 is not lawful. This provision states: *"For the purposes of this Act uses and operations are lawful at any time if – (a) no enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and, (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force"*.
19. The application for a CLEUD, was made on 9 May 2016 after the appeal against the 2015 enforcement notice had been determined, on 9 February 2016, thus that notice was in force, having been upheld. One of the requirements of the notice was to demolish the outbuilding in question, thus no CLEUD could be granted in respect of that building because it would directly contravene that requirement. Moreover, the previous appeal decision specifically addressed the questions of whether the building was built as permitted development and

whether it could remain in place, as an alternative requirement to demolition, for use as a hobby room/store/gym. Both arguments were rejected by the Inspector.

20. It is clear from all of the above circumstances that the appeal against the Council's refusal of a CLEUD had no prospect of success and that the pursuit of an appeal against that refusal was unreasonable. Consequently, the Council was forced to incur expense in providing a response to this appeal.
21. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a full award of costs is justified.

Other Matters

22. I have taken account of all other matters raised in the written representations but they do not outweigh the conclusions I have reached in respect of the main grounds and issues of these applications.

Costs Order, in respect of Application 2

23. 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 Mr George Traykov shall pay to the London Borough of Hounslow Council, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
24. The applicant is now invited to submit to Mr George Traykov, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Martin Joyce

INSPECTOR