

Costs Decision

Site visit made on 21 February 2017

by George Mapson DipTP DipLD MRTPI

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

Decision date: 23 March 2017

**Costs application in relation to
Appeal Ref: APP/A5270/X/16/3161119
86 Berkeley Avenue, Greenford, UB6 0NZ**

- The application is made under the Town and Country Planning Act 1990, sections 78, 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr R Sheldon for a full award of costs against the Council of the London Borough of Ealing
 - The appeal was against a refusal to grant a certificate of lawful use or development (LDC) for an application made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate is sought is described on the application form as "*Construction of a single-storey outbuilding for workshop/storage in rear garden*".
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Decision

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

National guidance

2. National guidance on awards of costs is set out in 'Planning Practice Guidance' [PPG]¹. Paragraph 28 states that in planning appeals and other planning proceedings parties normally meet their own expenses.
3. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.

Submissions made on behalf of the applicant, Mr R Sheldon

4. The appellant asserts that the Council acted unreasonably in refusing the application for a certificate of lawfulness by basing its decision on the size of the original dwelling as opposed to the dwelling as existing; by applying the '*incidental test*' on the issue of the size of the proposed outbuilding only, irrespective of other considerations; and by including planning merits in part of the reason for refusing to grant of a certificate.
5. The Council has behaved unreasonably in the determination of the application and has failed to provide sufficient evidence as part of the appeal. The appellant incurred unnecessary or wasted expense in having to appeal the Council's decision, and in the appeal process, and these should be the subject of a full award.

¹ 'Planning Practice Guidance' is a web-based resource that was launched by the Department for Communities and Local Government on 6 March 2014. It provides, among other things, national guidance on costs awards, replacing the guidance formerly provided by Circular 03/2009.

Submissions made on behalf of the Council

6. On the applicant's first point, 'basing the decision on the original dwelling opposed to the existing dwelling', the Council takes the view that the original footprint of the dwellinghouse is the main and primary living accommodation. Planning permission was granted in 2006 for additions to the side and rear of the house, which increased the footprint from 44.7sqm to 93sqm; an increase of 51.93%. At 92.5sqm, the footprint of the proposed outbuilding would almost equal that of the primary living accommodation; a difference of only 0.5%. An outbuilding of this size would not ancillary to the house.
7. On the second point, 'applying the incidental test on the issue of size of the outbuilding only irrespective of other considerations', the Council contends that the size of the accommodation is a material consideration in the assessment of such applications. The 'other considerations', to which the applicant has referred, are unclear because nothing has been provided for assessment that would justify the size of the outbuilding proposed.
8. On the third point, 'including planning merits in the reason for refusal', the permitted development assessment is a desk top study that would not include planning merits.

My assessment and conclusions

9. PPG paragraph 31 explains that unreasonable behaviour, in the context of an application for an award of costs, may be either procedural (relating to the process) or substantive (relating to the issues arising from the merits of the appeal).
10. Unreasonable behaviour by a local planning authority leading to a procedural award of costs might include a delay in providing information or other failure to adhere to deadlines (PPG paragraph 47). A substantive award against a local planning authority might arise from a failure to determine similar cases in a consistent manner (PPG paragraph 47).
11. Dealing first with factors that might lead to a procedural award of costs, the Council has sought to rebut the applicant's assertion that it behaved unreasonably in the determination of the application. However, the applicant's assertion that the Council failed to provide sufficient evidence as part of the appeal, has not been rebutted directly.
12. On 2 November 2016 the Planning Inspectorate notified the parties that the deadline for the submission of statements was 14 December 2016.
13. By 3 February 2017 the Council had not submitted a statement of case or a rebuttal of the applicant's costs application. On that date the Planning Inspectorate wrote to the Council with a reminder about statements and a request for copies of Mr Sheldon's previous application for a certificate of lawfulness that had been granted on 9 May 2008, together with the application plans and the officer's report. The email asked for these documents to be sent by 10 February 2017. No reply from the Council was received.
14. On 15 and 20 February 2017 the Planning Inspectorate sent further emails to the Council seeking a response to the earlier email, the second of which was copied to the Director Regeneration and Planning for her information. She sent an immediate acknowledgement and an assurance that a response to the correspondence would be forthcoming.
15. On 21 February the Council submitted the requested application documents and a statement which sought to address the applicant's grounds for his costs application.
16. There were several delays in providing information and failures to adhere to deadlines, despite reminders to do so from the Planning Inspectorate. These failures prolonged the appeal process and delayed the determination of the appeal.

17. I find that these actions of the Council amounted to unreasonable behaviour that warrants a procedural award of costs.
18. Turning next to factors that might lead to a substantive award for costs, it will be evident from my appeal decision that the Council failed to determine two similar cases in a consistent manner.
19. In 2008 the Council certified as lawful the proposed erection of an outbuilding in the rear garden of the appeal property. The officer's report accepted that the outbuilding would be for purposes incidental to the enjoyment of the dwellinghouse as such, and that it would comply with all the conditions and limitations of Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) Order 1995, as amended, which was in force at that time.
20. The 2016 application, the subject of the appeal, was for a proposed outbuilding with the same footprint, the same internal layout of rooms with the same intended uses, and in the same position as the scheme that was certified as lawful in 2008. Only the height and shape of the roof differed from the earlier scheme; a change that was made to ensure compliance with the conditions and limitations of Class E of the Town and Country Planning (General Permitted Development)(England) Order 2015, which now applies.
21. The Council's position in its determination of the 2016 application – namely, that the proposal could not be regarded as being for a purpose incidental to the enjoyment of the dwellinghouse as such, for reasons relating to its size in comparison to the size of the original dwellinghouse – was untenable given its decision in 2008. There had been no material change in planning circumstances, relevant to this development, in the intervening period that would justify taking a different view of this application from the one taken in 2008.
22. The appellant has drawn attention to some flaws in the reasoning process that led to the Council's decision on the appeal proposal. There were others that I have identified in my decision on the appeal.
23. The Council's rebuttal of the cost application included the statement that the permitted development assessment is "*a desk top study that would not include planning merits*", but the officer's delegated report on the application appears to indicate that planning merits were taken into account in the reasoning process that led to the decision. The report refers to "*the unduly large scale of the proposal*" being such that it "*would not fit commensurately to the rear of the property and would cause harm to the character and appearance of the area.*"
24. Part of the flawed reasoning process in the Council's submissions was the lack of any no cogent explanation for refusing to grant a certificate for the proposed outbuilding in 2016, despite having granted one for essentially the same development in 2008. The 2008 scheme is listed in the 'site history' section of the report but it is accorded no significance in the assessment of the proposal.
25. I find that the Council's failure to determine these two similar cases in a consistent manner amounts to unreasonable behaviour that warrants a substantive award of costs. Not only did it delay development that could have been begun in the summer of 2016, but also it caused the applicant to incur the expense of making his appeal and the subsequent costs of presenting his case, including his response of 9 March 2017 to the Council's statement.
26. For the reasons given, I 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.

Costs Order

27. 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 Council of the London Borough of Ealing shall pay to Mr R Sheldon, the costs of the appeal proceedings described in the heading of this decision.
28. The applicant is now invited to submit to the Council of the London Borough of Ealing, 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.

George Mapson

INSPECTOR