
Costs Decisions

Inquiry held on 28 February 2017

Site visit made on 1 March 2017

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA FRICS

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

Decision date: 7 April 2017

Costs application A in relation to Appeal Ref: APP/X5990/X/16/3159960 61C Edbrooke Road, London W9 2DE

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Karen Atkinson for a full award of costs against City of Westminster Council.
 - The inquiry was in connection with an appeal against the refusal of a certificate of lawful use for use of a second floor roof as a terrace.
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Costs application B in relation to Appeal Ref: APP/X5990/X/16/3159960 61C Edbrooke Road, London W9 2DE

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by City of Westminster Council for a full award of costs against Karen Atkinson.
 - The inquiry was in connection with an appeal against the refusal of a certificate of lawful use for use of a second floor roof as a terrace.
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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.

Decisions

Application A

2. The application for costs is refused.

Application B

3. The application for costs is refused.

Application A

The submissions for Karen Atkinson

4. The appeal was not necessary in the first place and on the evidence provided the council was unreasonable not to have issued an LDC. This has involved the appellant in the wasted expense involved in making the appeal and attending the inquiry.

5. Paragraph 048 of the Planning Practice Guidance, Planning General – Appeals notes that for enforcement action, local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place, or ensured that it was accurate.
6. Paragraph 049 notes that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include acting contrary to, or not following, well-established case law.
7. If the case of *First Secretary of State v Arun DC* [2006] EWCA Civ 1172; [2007] 1P & CR10 had been followed the Council would have understood the correct period for consideration of the time required to achieve lawfulness was 4 years and not 10 years and the appeal would have been unnecessary. This interpretation was confirmed by the Director of Environment and Planning and a note by another officer, so the current approach is inconsistent with that advice.
8. The Council unreasonably relied on the email of 5 July 2013. This was a specific response to a question asked in an email from the Council dated 4 July 2013 and was a 'narrow' answer to that question. If the Council had visited the site it would have seen that the use of the terrace continued with the storage of items and this was not a question put by the Council's email, so the Council was not entitled to conclude that the whole of the use of the terrace had ceased from the response in the appellant's email.
9. Had the period to achieve lawfulness been 4 years the Council relied on the *Nicholson* case to assume that the lawful use of the roof had recommenced in July 2012 and that any subsequent breach started the period afresh, rather than considering this to be a situation akin to *Panton and Farmer* where the use had gained lawfulness and that the cessation of use from July 2012 should therefore be considered as a period of dormancy where the lawful use gained by the passage of 4 years was not lost, but continued until resumed.
10. The Council's case on deliberate concealment was introduced at a late stage and was an unreasonable application of it.
11. The Council was required on the evidence presented to issue the certificate as identified in Section 191(4)

The response by Westminster City Council

12. It is general practice with applications for LDC's not to visit the site and usually it is a desk based matter. In this case there was no need to visit the site as in the Council's view the matter revolved around the interpretation of the law and written evidence presented.
13. While the interpretation of the law is an important matter, it is the appellant's interpretation that is wrong, not the Council's.
14. The Council has been consistent in its dealings with the appellant that the period for lawfulness is 10 years. There is previous correspondence with the former owner, but that was not an official view, but advice of officers. If the

previous owner wanted to have this decided a LDC application had to be made, and that correspondence predated relevant case law.

15. The appellant argues that the Council has gone beyond the reason for refusal, but the Council has to be able to respond to the case made by the appellant, which is what has been done in this case.

Reasons

16. In terms of the law and its interpretation, I have found for the Council on what is the period for obtaining lawfulness through the passage of time. I therefore reject that the Council behaved unreasonably in relation to this and explained in the main decision the reasons for the rejection of the advice previously given by the Director of Environment and Planning.
17. It was not unreasonable of the Council to rely on the email of 5 July 2013 in relation to how the roof was being used. The appellant is in the best position to know the use and I have accepted in the main decision that the information provided by the appellant was not an attempt at deception, but putting forward a genuine understanding of what was occurring. It was not therefore unreasonable behaviour for the Council not to have visited the appeal site at the time of the LDC application. Again the Council's interpretation of what it considered to be deliberate deception was not unreasonable, even though I considered that the evidence did not support its interpretation of what occurred.
18. I note the dispute between the parties in relation to Nicholson, and Panton and Farmer, but the matter of which approach applied to this situation and condition did not need to be considered in the main decision, once the 10 year period was decided upon. Whatever the correct interpretation, it is clear that both parties genuinely put forward their case as being correct, with reasons, so whichever is wrong it is not an example of unreasonable behaviour that should lead to a partial costs award.
19. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance has not been demonstrated so neither a partial nor full award of costs is justified.

Application B

The submissions for Westminster City Council

20. The application was made in writing and is at Document 7 of the main decision and is based on (a) fundamental legal errors being contrary to established case law and (b) the evidence included statements which were manifestly inaccurate or untrue. The appellant should have been familiar with planning law, being an architect.

The response by Karen Atkinson

21. The appellant's case was not just based on the legal cases cited and error of the Council's interpretation. The prior established lawful use obtained by 4 years' use is preserved in a period of dormancy as noted by Panton and Farmer and Thurrock does not come into consideration once the use is established. There was not reliance on Nicholson, but North Devon and the crucial point that can operate in reverse.

22. The appellant interprets Arun differently, and considers that interpretation is plain from the judgement. The case of Bloomfield was well before Arun and therefore is superseded by it.
23. While it is acknowledged that the appellant is an architect, she has no greater knowledge than a 'layman' because her specialism relates to interior design.
24. The appellant was not trying to conceal the use in her email of 5 July 2012, but was simply answering the question put to her in the Council's email and it should not be looked at in isolation but in the context of the question addressed. The other items remained on the terrace. The email was a statement of the facts at the time. Physical access can cease, while the terrace use remains because of the chattels that remained upon it. There was no cavalier attitude or intent to deceive or conceal the use that was occurring.

Reasons

25. I have found for the Council in terms of the interpretation of whether or not 4 or 10 years should be the time to achieve lawfulness. However, that does not mean the appellant was being unreasonable in maintaining her understanding of the Arun judgement was that the period should be 4 years. Reasons were put for that interpretation. I have considered Panton and Farmer and Nicholson above and the same considerations apply to this costs application.
26. Whether the appellant has behaved unreasonably in deliberately trying to conceal use from the Council was considered in the main decision and I have concluded that there was no evidence of this or that the appellant made any statements that were manifestly untrue or misleading.
27. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance has not been demonstrated, so neither a partial nor full award of costs is justified.

Graham Dudley

Inspector