
Costs Decision

Site visit made on 15 July 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 August 2019

Costs application in relation to Appeal Ref: APP/N5090/X/18/3217277 83 High Street and 2-8 Union Street, Barnet EN5 5UR

- The application 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 Mr James Freeman for a full award of costs against the Council of the London Borough of Barnet.
 - The appeal was against the refusal of a certificate of lawful use or development for the implementation of planning permission N/05621E/07 dated 23 February 2009.
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Decision: the application is refused

Reasons

1. The Planning Practice Guidance 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 or wasted expense in the appeal process. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority. These include where a local planning authority only supplies relevant information at appeal when it was previously requested at application stage, and failing to produce evidence to substantiate each reason for refusal on appeal.
2. The Planning Practice Guidance also makes it clear that awards of costs against a local planning authority may be either procedural or substantive. The applicant's claim for costs includes elements of both. It is convenient to consider the procedural elements in the first instance.
3. The applicant points out that not only did the Council not determine the application within the eight-week timeframe, it took the Council some eight months to issue a decision. The applicant also complains that he was not given the opportunity comment on the Council's decision before it was issued, a failure which deprived him of an opportunity to correct, in the applicants view, some erroneous assumptions made by the Council. A number of points flow from this.
4. Having gone beyond the eight-week period for determining the application, at no point in the following six months or so did the applicant exercise his right to appeal against the non-determination of that application. The applicant indicates that he did submit details of the works that he undertook in February

2012 to the Council but received no response. I can understand that the Council's approach might not have been helpful and the frustration that the applicant must have felt in that situation. But there is no statutory obligation on the part of the Council to engage in such correspondence, however helpful that might have been. The Council does, however, have an obligation to determine applications in a timely manner and where, as in this case, it fails to do so, there is a statutory remedy in the form of an appeal against non-determination.

5. Having not received any response from the Council, either informally or in terms of formal decision, it seems to me that clear signals were there that an appeal on non-determination may have become necessary. There may have been good reasons for not taking that path of which I am unaware but, either way, it seems to me that applicant cannot now complain about a lengthy delay in determining his application having not availed himself of the remedy provided in statute.
6. Tied in with the above is the refusal of the Council to divulge its legal advice on the application for a certificate of lawful use or development. Again, I can understand the applicant's frustration in this respect but I am not aware of any obligation on the part of the Council to share its legal advice with applicants. There are, I understand, avenues open to the applicant to pursue a failure to disclose information through the Information Commissioners Office and it is not clear to me whether the applicant has explored that possibility.
7. However, to my mind the salient point is that the Council does not appear to have relied on that legal advice in refusing the application. Instead, the Council refused the application for reasons relating to the purpose of the works that were undertaken and on grounds that in my view were well-founded. It therefore seems to me that the Council's legal advice is academic in that respect and that, however much the applicant might like to see it, the failure of the Council to disclose that legal advice had no material effect on the outcome of the application or this appeal.
8. In terms of the substantive reasons, the first point that the applicant makes is that the Council made a serious mistake in its assessment in referring to the wrong gates. Having read the Council's Delegated Report submitted with the appeal questionnaire, it would appear that there is some substance in that point. The final paragraph of that report refers to a difference in terms of where the gates were proposed and where the trench was dug which, as I read it, can only mean that the Council was considering the gates closest to the Union Street frontage. Further evidence in this respect is the reference by the Council to an e-mail confirming that the trench was undertaken for the new gates on the Union Street frontage, from which it is apparent that the Council took to mean the gates closest to the Union Street frontage.
9. It follows from the above that the Council's decision was based on a mis-interpretation of the proposal. In my view that must constitute unreasonable behaviour in the context of the Planning Practice Guidance. However, the Planning Practice Guidance is clear that an award of costs can only be awarded where unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. For reasons that I now set out, I am not persuaded that this second requirement has been met in this case.

10. My main reason for taking this view is that the reasons for refusing the application, as set out in the Council's appeal statement, relate to the need for foundations for the security gates. That would apply irrespective of whether the gates in question had been correctly identified at application stage. The applicant would therefore have had to appeal the decision in any event.
11. A further consideration is that the Council relied upon information provided by the applicant that led it to focus upon the wrong gate. In particular, this took the form of an email confirming that the trench was "undertaken for the new gates on the Union Street frontage." In my view, the Council was entitled to infer from that description that the trench was intended for gates at the other end of the covered archway and that this led the Council to conclude that the trench was in the wrong position. It could, I accept, be fairly argued that the Council should have queried with the applicant why the trench was dug in what appeared to be the wrong position rather than simply proceed regardless. Nevertheless, in these circumstances, it would be unfair to award costs against the Council in favour of the applicant where the error was, at least in part, caused by mis-information provided by the applicant himself.
12. The applicant then complains that the Council has not substantiated its decision to refuse the application with evidence. However, with applications for a certificate of lawful use or development the burden of proof is firmly upon the applicant (and in turn, on appeal, the appellant). It is not for the local planning authority to disprove the applicant's case: the onus falls squarely upon the applicant to demonstrate that the development is lawful in planning terms. The applicant's submissions, both at application stage and on appeal, fell short in that respect and that is no fault on the part of the Council.
13. Moreover, in this case, the Council's position in relation to the need or otherwise for foundations for the entrance gates was made perfectly clear in its appeal statement. The applicant therefore had an opportunity to provide more detailed evidence in relation to the need for foundations for these gates in his Final Comments, but this opportunity was not taken. It therefore follows that any lack of clarity, if such there was, in relation to the Council's position was resolved during the course of the appeal process, such that the applicant had every opportunity to present his case and was not prejudiced by any deficiencies at application stage.
14. Finally, the applicant considers that the Council did not apply the correct test of 'on the balance of probabilities' in a balanced and reasonable way. I concur with the applicant insofar as neither the Council's Delegated Report nor the Appeal Statement are structured in such a way that the reader can ascertain that the correct test is being applied. Nevertheless, paragraph 2 of the Council's formal Decision notice does specifically refer to 'the balance of probability' and I must therefore assume that the Council had the correct test firmly in mind when considering the application.
15. In conclusion, it seems to me the applicant's claim for costs is borne out of a sense of frustration over the length of time this matter has been with the Council. However, whilst the Council may wish to reflect upon some aspects of its handling of the application, I am satisfied that the Council's behaviour was not unreasonable in the terms set out in the Planning Practice Guidance. It follows that an award of costs is not justified in this case.

Paul Freer

INSPECTOR