
Costs Decisions

Inquiry Held on 30 July 2019

Site visit made on 30 July 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 September 2019

Costs application in relation to Appeal A: APP/U5360/C/18/3197581 80 Dunsmure Road, Hackney, London N16 5JY

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by The Manager, Fairdeal Housewares for a full award of costs against the Council of the London Borough of Hackney.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the erection of fencing at first floor level to facilitate the creation of a roof terrace; the erection of an outbuilding at first floor level; and the material change of use of the rear of the commercial unit to use as 2 self-contained flats.
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Costs application in relation to Appeal B: APP/U5360/X/18/3207965 80 Dunsmure Road, Hackney, London N16 5JY

- 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 The Manager Fairdeal Estates Ltd for a full award of costs against the Council of the London Borough of Hackney.
 - The inquiry was in connection with an appeal against the refusal of a certificate of lawful use or development for two x 1 bedroom basement flats.
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Decision

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

Preliminary Matters

2. As I mention in my appeal decision, it was confirmed to the inquiry that the appellant in both appeals, and therefore the applicants for costs in both cases, is Fairdeal Estates Ltd.

The submissions for Fairdeal Estates Ltd

3. An application for costs in relation to Appeal B was made in writing before the inquiry. This was on the basis that the Lawful Development Certificate application (LDC) had been erroneously refused.
4. At the inquiry, a full application of costs was made with respect to both appeals. This in on the basis that the Council's evidence has been very limited. Furthermore, the Council did not carry out due diligence regarding their evidence or that of the appellant. Had the Council looked properly or contacted the person who took the photographs reproduced in annex E of the planning witnesses evidence for the Council, it may have made a difference.

5. The Council compounded the problem when in March 2019 an officer of the Council suggested that there was evidence to contradict documents submitted by the applicant. That evidence was not then provided, only hints were given about its significance. The Council said that there was no obligation to provide that evidence but it would have been reasonable to do so.
6. The Council also provided late evidence to the inquiry in the form of photographs of the fencing that could have been provided with the proofs of evidence.

The response by the Council of the London Borough of Hackney

7. The costs application made before the inquiry related to the way that the LDC was considered and was understood to be a partial application. The Council concedes that it should not have refused that application for the reasons given and should have gone on to consider the evidence.
8. Regarding the substance of the cases, when the Council's case officer and witness at the inquiry became involved, he asked the applicant's agent Mr Coward if there is anything else to add following discussions with his client regarding evidence which was being relied upon. There had been an e-mail exchange starting in March 2019 which indicated that the appellant was waiting for information from the previous owner of the appeal property and that this would be discussed with the Council. That did not happen. Whether or not the Council's evidence had been provided to the appellant following the e-mail exchanges, there would still have been a need to test that through the inquiry process.
9. The photographs of the fence were provided late because the Council were under the impression, due to what was said at the initial statements stage of the appeal, that the allegations regarding unauthorised operational development were not going to be contested. This change was not apparent until Mr Coward's proof of evidence was received.

Reasons

10. The Planning Practice Guidance (PPG) advises that parties in planning appeals and other planning proceedings normally meet their own expenses. Costs may however 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 PPG confirms that the aim of the costs regime is, amongst other things, to encourage all involved in the appeal process to behave in a reasonable way and follow good practice.

The Lawful Development Certificate (LDC)

11. The submission of the LDC application after the issuing of the enforcement notice, was an opportunity for the Council to consider the evidence including sworn statements. There is a dispute over whether or not those statements were received by the Council. The Council's LDC decision and the report leading to that however refer only to the development being contrary to the requirements of an enforcement notice in force, which was incorrect. The notice was not 'in force' as it was the subject to of an appeal (Appeal A).
12. The Council mis-applied the law in refusing the application for the LDC and did not consider the evidence that had been submitted or suggest that further

evidence was required. The Council acted unreasonably in reaching that decision and this did lead to a further appeal that was linked with the Enforcement Notice appeal that had already been submitted.

The Enforcement Notice and LDC appeals

13. Notwithstanding their error in dealing with the LDC, the Council had evidence which they considered provided, on the balance of probabilities, doubt regarding the lawfulness of the 2 flats and also regarding the operational development that the enforcement notice also addressed. This is the evidence that had previously led to the issuing of the enforcement notice.
14. The onus was upon the appellant to demonstrate their case in both appeals. However, the PPG emphasises in relation to enforcement action that local planning authorities must carry out adequate prior investigation. The PPG also suggests that local planning authorities are at risk of an award of costs if they fail to co-operate with the other party or parties, delay providing information and do not review their case promptly following the lodging of an appeal.
15. The Council's case had relied upon the interpretation of photographs and notes that had been prepared by an officer who had left the Council's employment. The notes are very limited and it would have been useful to try and seek some clarification from that former officer. However, I can appreciate the difficulties in requesting help from an ex-employee. I do not consider the Council were unreasonable in not contacting this former officer but they should have recognised the limitations of their own evidence.
16. The e-mail exchange between Council officers and the applicant's agent that commenced in March 2019, prior to the submission of planning statements, indicates that the Council had undertaken a review of their evidence. In these e-mail exchanges, specifically that from the Development Management and Enforcement Manager dated 21 March 2019, the Council suggested that they possessed evidence that in their view could make a difference to the reliability of documents that had been provided by the appellant. The appellant's agent requested sight of that evidence. He explained in a response of 26 March 2019 that he was relying on the information from a previous owner. He also stated that in order to take the matter much further, he needed the evidence. I agree that it was reasonable to request the evidence referred to by the Council and to expect it to be supplied. An exchange of such evidence and follow up questioning may well have made a difference to the way the appeals proceeded and the matters that continued to be in dispute.
17. The submission of joint appeal statements for Appeal A and Appeal B was in April 2019 and then subsequently the proofs of evidence were exchanged in June 2019. The e-mail exchanges were therefore at an important time in the preparations of both parties' cases. The PPG makes it clear that it is unreasonable to refuse to provide requested information when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the appeal. The Council's witness did not concede at the inquiry that the explanation of the photographs by the appellant's witnesses would have made a difference to his opinion. Even so, given the strength of the appellant's evidence and the weakness of the Council's, a review of the case with colleagues in my view could have made a significant difference to the Council's position.

18. I therefore consider that in relation to the 2 flats, the Council's initial decision to issue an enforcement notice was based upon some, albeit limited evidence. Given that they had realised that they were at least close to the date when the flats could have been immune from enforcement action, I can understand that the Council would act cautiously to at least try to bring matters under control. However, not providing their evidence as requested to the appellant and then further reviewing the case was unreasonable and contrary to the guidance provided in the PPG.
19. With respect to the operational development, the Council's production of further photographs on the day of the inquiry was a direct result of the appellant changing their opinion regarding the fence at first floor level. It was not unreasonable for the Council to react to that change in circumstances and they did not act unreasonably in providing further evidence late in the process.
20. I have upheld the enforcement notice with respect to the operational development. Even if the case regarding the material change of use had been different, an appeal was likely to be necessary at some point particularly given the appellant's change of view regarding the fence. The issues may have at least been narrowed down but a ground (d) appeal against the enforcement notice would have been necessary. The residual matters may still have required the holding of a public inquiry but this would have a much more straightforward event that would have taken less time to prepare for and less inquiry time.

Overall Conclusion

21. I therefore find that the Council acted unreasonably in the manner that they refused the LDC application. The lodging of the appeal against that decision involved work by the appellant's agent as the submission of Appeal B did involve submissions as a direct consequence of the Council error. To that limited extent, I consider that costs should be awarded in relation to unnecessary expense involved in the initial lodging of that appeal.
22. With respect to both Appeal A and Appeal B, by not disclosing their evidence with respect to the material change of use to 2 self-contained flats, the Council acted unreasonably. As a consequence, the appellant has been put to wasted and unnecessary expense by having to continue to pursue the appeals in relation to those matters. A more reasonable approach by the Council may have led to more straightforward cases being considered through the appeal process. A partial award of costs is therefore justified.

Costs Order

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 the Council of the London Borough of Hackney shall pay to Fairdeal Estates Ltd, the costs of the initial submission of Appeal B relating to the refusal of the LDC application as well as those costs from March 2019 involved in preparing for and attending the public inquiry in relation only to the use of the rear of the commercial unit as 2 self-contained flats, in both Appeal A and Appeal B; such costs to be assessed in the Senior Courts Costs Office if not agreed.

24. The applicant is now invited to submit to the Council of the London Borough of Hackney, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

A Harwood

INSPECTOR