The Planning Inspectorate

Costs Decision

Site visit made on 28 August 2019

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 October 2019

Costs application in relation to Appeal Ref: APP/H1515/X/18/3205313 Oaklands, Wyatts Green Road, Wyatts Green CNM15 0PT

- 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 N Othen for a full award of costs against Brentwood Borough Council.
- The appeal was against the refusal of a certificate of lawful use or development for a detached outbuilding used incidentally to the enjoyment of the dwellinghouse as such.

Decision

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

Reasons

2. The Planning Practice Guidance (PPG) 'Appeals' section advises that parties in planning appeals should normally meet their own expenses. However, costs may be awarded where a party has behaved unreasonably and that behaviour has caused another party to incur unnecessary or wasted expenditure in the appeal process (paragraphs 028 and 030). Guidance on what is meant by 'unreasonable' is contained in paragraph 031. The application for costs was made in writing in accordance with the guidance at paragraph 035.

3. An award of costs is largely sought on substantive grounds. The applicant's case in summary is that they had provided detailed evidence to show that an LDC should be granted and the decision to refuse the application was not supported in law. The Council did not enter into dialogue prior to determining the application, nor did it respond to a post-decision request for clarification on the basis for its decision or follow up informal advice offered. The Council also declined to agree any common ground to try and narrow the matters at issue in the appeal.

4. In response, the Council stated that it gave detailed consideration to the applicant's evidence. The reason for refusal was clearly set out and was based on all the available evidence. The Council did not decline to agree non-contentious matters. Advice offered by a Council officer was informal, it did not bind the Council and the applicant did not take up that advice in any event.

5. Examples of unreasonable behaviour which may put a Council at risk of an award of costs concerning the substance of the case are in the PPG at paragraph 049. They include failing to produce evidence to substantiate a reason for refusal on appeal; making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis; acting contrary to, or not following, well-established case law, and;

refusing to enter into pre-application discussions, or to provide reasonably 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.

6. In LDC cases the burden of proof rests on the applicant, the relevant test of the evidence being on the balance of probability. The applicant provided clear evidence in respect of the laying of foundations for an outbuilding at the site in 2006. The applicant referred to established case law[1] in which it was held that the date on which a development commenced determined the Development Order it should be judged against. The logical conclusion to be drawn from the submitted evidence was that provided the 2006 foundations were comprised in the outbuilding, judgement should be against the Town and Country Planning (General Permitted Development) Order 1995 (GPDO 1995).

7. The Council did not dispute that foundations were laid in 2006 and were comprised in the outbuilding. However, they went on to assert that widening the outbuilding during its construction in 2015 meant that the structure could not be judged against the GPDO 1995. In doing so, the Council did not refer to any part of the planning legislation which might have underpinned its argument. It did not offer a coherent explanation for concluding that the GPDO 1995 only granted permission for a smaller outbuilding. Also, the Council did not refer to any relevant judicial authority which might have supported its own interpretation of events at the site. Neither did the Council draw attention to any relevant appeal decisions which might have supported its approach. Moreover, the Council gave limited weight to the principles set out in case law referred to by the applicant, even though they were clearly of relevance to the matter at issue. Furthermore, the Council expressed a limited understanding of the significance of a relevant appeal decision supplied by the applicant[2].

8. Consequently, the Council did not show that the reasoning behind its decision followed a logical assessment and had a sound basis. It follows that the Council's reason for refusing the application and its case at appeal lacks substance. Accordingly, in defending the reason for refusal I find that the Council has acted in a similar fashion to the examples of unreasonable behaviour at PPG paragraph 049 above, as they have made inaccurate assertions which are unsupported by an objective analysis and have not followed established case law. The above has had the effect that ultimately, the applicant has been put to the wasted expense of pursuing an appeal.

9. The Council did not enter into discussions prior to refusing the application. However, it is not always practicable to do so having regard to the timescales involved in determining applications, particularly where, as in this case, there appears to have been a fundamental disagreement between the main parties over how planning law should be interpreted. The PPG at paragraph 048 encourages Councils to deal with applications within their time limits unless there are substantive reasons for not doing so. Given the matter at issue between the main parties, it is unlikely that submitting further evidence would have made a significant difference in terms of the outcome of the application in any event.

[1] *Williams Le Roi v SSE & Salisbury DC* [1993] JPL 1033.
[2] Ref: APP/Q1255/X/15/3133974.

10. I acknowledge that the applicant sought to engage with the Council following refusal of the application. It is important that the Council should explore any opportunities available to try and avoid an appeal being made or to narrow the scope of an appeal where possible. Consequently, it is unfortunate that the applicant's offer of post-application discussions was not pursued more vigorously. Nevertheless, the Council's decision letter clearly explained why the application had been refused. More detailed reasoning was set out in the officer report. Those documents clearly showed that the disagreement between the main parties largely centred on whether the outbuilding should be judged against the GPDO 1995.

11. Accordingly, whilst I am not persuaded that any perceived lack of assistance in preparing for the appeal on the Council's part has unnecessarily widened the scope of the appeal, as the Council have failed to substantiate their case the appeal was unnecessary in any event and, as a consequence, the conditions for an award of costs as set out in the PPG have been met.

Conclusion

12. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that an award of costs is justified.

Costs Order

13. 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 Brentwood Borough Council shall pay to Mr N Othen, 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.

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

Stephen Hawkins

INSPECTOR