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## Costs Decision

Site visit made on 5 November 2019

**by Stephen Hawkins MA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 17 December 2019**

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### **Costs application in relation to Appeal Ref: APP/J1860/X/18/3219273 The Cherry Ash and Cherry Ash Annex, Bank Lane, Abberley WR6 6BQ**

- 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 R T Jukes for a full award of costs against Malvern Hills District Council.
  - The appeal was against the part refusal of a certificate of lawful use or development (LDC) for what was described on the application form as: *"The use of a building previously used as a single dwellinghouse as two separate single dwellinghouses, specifically not subject to any occupancy conditions"*.
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### **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' chapter 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). The application for costs was made in writing, in accordance with the guidance at paragraph 035.
3. The PPG paragraph 031 explains that unreasonable behaviour in the context of an application for costs can be either procedural-relating to the process, or; substantive-relating to the issues arising from the merits of the appeal. An award of the appellant's costs was sought on both procedural and substantive grounds.
4. Paragraph 047 of the PPG stresses that a Council should behave reasonably in relation to procedural matters at the appeal, for example by complying with the requirements and deadlines of the process. A non-exhaustive list of examples of where a Council risks an award of costs being made on procedural grounds is at the end of the paragraph. Examples include not cooperating with the other party, and; introducing fresh and substantial evidence at a late stage, necessitating extra expense for preparatory work that would not otherwise have arisen.
5. At paragraph 049, the PPG advises that a Council risks an award of costs on substantive grounds where an application is unreasonably refused. The non-exhaustive list of examples of unreasonable behaviour with respect to the substance of the matter at appeal at the end of the paragraph include failing to produce evidence to substantiate reasons for refusal; making vague,

- generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis, and; acting contrary to, or not following, well-established case law.
6. I am given to understand that the applicant sought to engage with the Council before the application was determined, to try and address the differences between the parties and so avoid the prospect of having to make an appeal. It is important that parties should explore any opportunities available to try and avoid an appeal or to narrow its scope where possible. Even so, the costs regime is primarily concerned with the behaviour of parties at appeal, as opposed to the handling of the application itself. There were no details provided of any post-application dialogue between the parties which might have shown evidence of an uncooperative approach on the part of the Council in preparation for the appeal or in its procedures.
  7. From the delegated report, the Council's case in refusing the application was in summary that no material change of use had occurred in respect of the original dwelling, The Cherry Ash, when the subdivision of Cherry Ash Annex had occurred. Nevertheless, the Council's written submissions in respect of the appeal promoted a substantially different argument; this being in summary that the planning permission granted in 2000 for a granny flat<sup>1</sup> had already created a separate dwelling in respect of Cherry Ash Annex. The Council also referred to an appeal decision which it considered supported that conclusion.
  8. As a result, the Council's case at appeal was considerably wider in scope than was initially apparent from the delegated report and the decision notice. In effect, an additional reason for refusal was introduced by the Council during the appeal. This argument would have come as a surprise to the applicant. In order to respond to the Council's expanded case, the applicant was forced to prepare and submit a detailed rebuttal at the final comments stage. The additional work undertaken on behalf of the applicant would have been unnecessary, had the Council confined its case to the matters set out in the delegated report.
  9. Turning to the substantive matters, the Council granted an LDC in respect of Cherry Ash Annex, as it was satisfied that a material change of use to a separate dwelling had occurred more than four years before the application date and was lawful. As a result, the Council had proper regard to the case law referred to by the applicant regarding the relevant time limit for taking enforcement action.
  10. Even so, when determining the application, the Council made no reference to the effect of s55 (3) (a) of the Act on the subdivision of a building used as a dwelling into two or more separate dwellings. Neither was this section of the Act referred to in the Council's submissions in response to the appeal. The consequences of the section were illustrated in the appeal decisions referred to by the applicant, although none of those cases exactly mirrored the circumstances of this appeal. The Council did not clearly explain the significance of the Supreme Court's decision in *Welwyn*<sup>2</sup> to their case and in my view, its relevance was limited. The circumstances in the appeal decision referred to by the Council were not materially similar to those at the appeal site. Additionally, in responding to the appeal the Council interpreted the effect

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<sup>1</sup> Council Ref: 99/00873/FUL.

<sup>2</sup> *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15.

of the 2000 permission in a restrictive fashion that failed to take account of the appellant's factual evidence regarding the use of the accommodation, or relevant case law<sup>3</sup>. Therefore, the Council did not provide clear, specific, relevant and accurate evidence to substantiate its case at appeal and it has not followed well-established case law.

11. Accordingly, although there was no firm evidence to suggest that the Council had been uncooperative, otherwise its actions have been similar to the examples of unreasonable behaviour concerning the procedures and the substantive case at appeal in the PPG, referred to above. As a result, 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 Malvern Hills District Council shall pay to Mr R T Jukes, 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 Malvern Hills District 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

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<sup>3</sup> *Uttlesford BC v SSE & White* [1992] JPL 171.