

Costs Decision

Site inspection on 29 January 2020

by John Whalley

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

Decision date: 03 February 2020

Costs application by Mr Datatray Thacoor Bissumbhur, (Appeal Ref: APP/D5120/C/19/3222775), and Mrs Saraswatee Luchmun, (Appeal Ref: APP/D5120/C/19/3222776), against the London Borough of Bexley Council

11 New Road, Welling, Kent DA16 1QJ

- The applications were made under the Town and Country Planning Act 1990, Sections 174, 322 and Schedule 6, and the Local Government Act 1972 Section 250(5).
 - The applications were made by Mr Datatray Thacoor Bissumbhur and Mrs Saraswatee Luchmun for a full award of costs against the London Borough of Bexley Council.
 - Appeals were made by the Applicants against an enforcement notice issued by the Council alleging the unauthorised construction of a single story rear extension to the property.
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Decision

1. The applications for an award of costs are refused.

Submissions made by Mr Datatray Thacoor Bissumbhur and Mrs Saraswatee Luchmun

2. The Applicants, Mr Datatray Thacoor Bissumbhur and Mrs Saraswatee Luchmun, said the London Borough Council had acted unreasonably by issuing the enforcement notice.
3. A Council planning officer inspected the appeal extension with its uncompleted additional canopy. She gave an assurance that everything was in order. The officer subsequently changed her mind without valid reason. By the time the Council requested a fresh planning application, the extension was fully completed.
4. The canopy addition did not require planning permission. It did not enclose any living space. It merely provided sun and rain shelter. The complaint made by neighbours at No. 12 was unjustified.

Submissions made by the London Borough of Bexley Council

5. The Council had invited the Applicants to submit a planning application in respect of the amended extension at No. 11 New Road.
 6. It was conceded that the advice offered by the planning officer who initially looked at the appeal extension was wrong. Further consideration
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showed that planning permission was required. However, the earlier incorrect advice could not be relied upon to restrict the ability of the the Council to enforce against the altered development.

Inspector's conclusions

7. Irrespective of the outcome of the appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party or parties applying for costs to incur unnecessary or wasted expense in the appeal process.
8. The history of the appeal rear extension at No. 11 New Road has been somewhat unfortunate. Because the rear extension was to extend beyond the permitted development limit of 3m, (*Schedule 2, Part 1 limitation A.1(f)(i) of the The Town and Country Planning (General Permitted Development) (England) Order 2015*), the prior approval process that applies to larger single-storey rear extensions was engaged. A prior approval consultation was carried out. There were no neighbour objections. The Council issued an approval by their decision dated 22 February 2018.
9. However, the Appellants added a canopy that took the extension from 4.1m out from the rear wall of No. 11 to just under 6m. It appears that prior to the final completion of the canopy, the Council officer who saw the extension said that, as built, no further application for approval was required. By the time the Council changed their view, that permission was required for the modified extension, the canopy works had been completed.
10. I consider that the Appellants were wrong to hold firm to the view that the addition of the canopy to the rear extension to No. 11 did not require a further prior approval application. The alteration and addition to the rear extension by means of fitting a large canopy was a significant change to that which had been approved. The fact that the canopy did not envelop any living area is irrelevant. The canopy installation was not an insignificant alteration. It amounted to built development, (s.55(1A)(c) of the Act). It was sufficient for it to have elicited a neighbour complaint.
11. The House of Lords in the case of *R v E Sussex CC ex parte Reprotech (Pebsham) Ltd [2002] UKHL 816* held that concepts of private law should not be introduced into the public law of planning control, which binds everyone. The general principle is that public authorities cannot be estopped from performing their statutory duties. It is a fundamental principle that a local planning authority may not fetter its discretion to issue an enforcement notice by any form of agreement; *Southend-on-Sea Corporation v Hodgson (Wickford) [1961] 12 P & CR 165*. Any representation by a local planning authority as to how it will or will not exercise its powers under s.172 will not give rise to a binding estoppel by representation.
12. In *Saxby v SSE & Westminster CC [1998] JPL 113217* it was held that under the revised provisions for certificates of lawfulness, that is, s.191-196 of the Act, it was no longer possible to have an informal determination of whether planning permission is required; the new provisions are "an entirely new and fully comprehensive code"; see also

Flattery & Japanese Parts Centre Ltd v SSCLG & Notts CC [2010] EWHC 2868 (Admin).

13. The Council's change of view as to the need for planning permission for the canopy addition may have caused understandable frustration. But it did not alter the requirement for further prior approval consultation. Despite the changed advice from the Council the Applicants' rigidly held to the view that the canopy did not require planning permission. The way to test that was by means of an application for a certificate of lawfulness.
14. The Council's subsequent enforcement notice was appealed, amongst others, on ground (c) – that no breach of planning control had occurred. That appeal was pertinently if not persuasively addressed. In my view, nothing in the issue of enforcement notice and the manner in which the appeals was dealt with by either side produced any behaviour which justified an award of costs. The issue of an enforcement notice was an almost inevitable consequence of the Council's view on the need for planning permission for what they considered to be an unacceptable addition to the approved extension.
15. If any unnecessary or wasted expense was incurred it was not as a result of any unreasonable behaviour by the Council. The enforcement notice was issued following the Council's assessment that there had been an unacceptable breach of planning control.
16. An application for costs needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. In my view, that was not done. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, was not demonstrated. An award of costs against the Council is not justified.

COSTS ORDER

17. No order as to costs is made.

John Whalley

Inspector