



Costs Decision

Site visit made on 31 January 2020

by Thomas Bristow BA MSc MRTPI AssocRICS

an Inspector appointed by the Secretary of State

Decision date: 26 February 2020

Costs application in relation to Appeal Ref: APP/Q5300/D/19/3240140 7 Tintern Gardens, Southgate N14 6AS

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr & Mrs Drostan McDonald for a full award of costs against the London Borough of Enfield ('LBE').
 - The appeal was against the refusal of the Council, via notice dated 18 September 2019, to grant planning permission for the development proposed via application Ref 19/02036/HOU, dated 4 June 2019.
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Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However the Planning Practice Guidance ('PPG') explains that costs may be awarded against a party who has behaved unreasonably, and thereby directly caused another party to incur unnecessary or wasted expense in the appeal process.¹ That is a separate matter to the planning merits of a scheme. Costs applications may relate to events, if not expenses incurred, before an appeal was brought.²
3. The appellants advance two arguments for a full award of costs. The first is that, in dealing with application Ref 19/02036/HOU, the Council failed to consider the relevance of a fallback position, namely alternative alterations to No 7 Tintern Gardens established via certificate of lawfulness issued in 2017 (Ref 17/00261/CEA, the 'CLD').
4. The PPG cites not following 'well-established case law' as a type of behaviour that may give rise to a substantive award of costs against a local planning authority.³ The case law referenced by the appellants' in this respect is *Mansell v Tonbridge and Malling Borough Council*.⁴ The appellants' second argument is that the Council refused to enter into pre-application discussions with them.⁵
5. The appeal decision to which this costs application relates sets out the relationship of the CLD scheme to application Ref 19/02036/HOU. *Mansell v Tonbridge* is a relatively recent judgement concerned with the materiality or

¹ Reference ID: 16-028-20140306.

² PPG Reference ID: 16-032-20140306.

³ Reference ID: 16-049-20140306.

⁴ [2017] EWCA Civ 1314.

⁵ Again with regard to PPG Reference ID: 16-049-20140306.

significance of a fallback position. Within it, earlier litigation is referenced.⁶ Paragraph 27 of that judgement explains how 'the status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar'. Within the terms of the PPG above, it is fair to say that *Mansell v Tonbridge* reflects well-established case law principles.

6. The reference number for the CLD is cited in the Council's officer report related to application Ref 19/020306/HOU. The Council has also, in line with the statutory basis for decision-taking in section 38(6) of the Planning and Compulsory Purchase Act 2004 as amended, considered relevant elements of the development plan in reaching a decision. I note there is some divergence between the provisions of policy DMD 13 (criterion 1.a.),⁷ which recommends how dormer insets [from eaves, ridges and roof edges] should normally be between 500-750mm' and limitations on relevant permitted development rights in that regard.⁸ It could therefore be argued that the existence of the CLD was acknowledged, and a planning judgement reached based on appropriate evidence in this particular context.
7. However the officer report contains no discussion or reasoning as to nature or comparability of the fallback position to the development subsequently proposed. That is despite figure 28 of the supporting Design and Access Statement, which overlays CLD plans compared to the present scheme. It is unclear whether or not the Council have considered if the fallback position would be merely a theoretical proposition or a realistic possibility. I am also told by the appellants, with no countervailing evidence, that this matter was specifically raised in correspondence with the Council without response (via correspondence of 18 July 2019).
8. The Council's position, that their actions were reasonable, is undermined by their response to the costs application. Therein LBE state that they determined the proposal in accordance with section 38(6) of the 2004 Act, as referenced above. However at paragraph 4.12 they explain how policy DMD 13 is instead a 'material planning consideration' to which 'due regard' was required (effectively inverting the approach in *Mansell v Tonbridge*). Further confusing matters at 4.13 LBE explain that 'the decision making process is reasonable for this [householder] application'. That I can only read as suggesting that there is some sort of differential approach applied to householder development as opposed to other types of development.
9. Thirdly, the first sentence paragraph 4.10 of the Council's response to the appellants' costs application states 'the Council questions why an application for a lawful development was not implemented...'. That appears to be the first instance in which the Council have actively questioned whether or not the fallback position would be a realistic prospect. However, with reference to the case law cited above, a fallback position need not be implemented, or indeed probable, to be material. Fourthly the second sentence of paragraph 4.10, is that 'this previously granted lawful development certificate could be

⁶ Including that which concerns the same issue dating back some time, i.e. *R. v Secretary of State for the Environment and Havering London Borough Council ex parte P.F. Ahern* [1998] Env. L.R. 189.

⁷ Of the Council's Development Management Document, adopted in November 2014.

⁸ Schedule 2, Part 1, Class B (B.2)(b)(i)(bb) of the Town and Country planning (General Permitted Development) (England) Order 2015 as amended, specifies an inset from the eaves of 0.2m.

implemented'; that statement appears to conflict with LBE's position in the first sentence of that paragraph.

10. Bringing together my reasoning above, it is not clear that the Council gave any active consideration to either the comparability of the CLD fallback position, the prospect of that position being implemented, or the weight that should be accorded to it. Similarly there is no evidence that the Council undertook that process and discounted the relevance of the fallback position. The absence of any substantive reasoning in this respect does not align with well-established case law, despite the appellant's prompting on this precise point. The Council's convoluted position in respect of costs, if anything, undermines any benefit of the doubt that may have been given. Consequently the Council's conduct in this respect represents unreasonable behaviour.
11. It is both more complex and more simple to address the appellant's second argument. More complex as there is a difference of opinion between the parties as to the adequacy of engagement, upon whom the responsibility fell for cancelled meetings and the like, and as the PPG guides that a tailored rather than standardised approach to pre-application advice should be taken.⁹ However it is simpler as LBE accept that, despite prompts by the appellants, they did not provide timely advice in line with their expected standards at pre-application stage. Effectively the appellants were therefore unable to engage with the Council in pre-application discussions.
12. Moreover reaching a conclusion in respect of the appellant's second argument is simpler by virtue of my reasoning in respect of their first argument. Had there been the opportunity at pre-application stage to discuss the implications and relevance of the CLD fallback position, the appeal might have been avoided, but even more probable is that the issues in dispute could have been narrowed.¹⁰ Therefore I also find that the Council unreasonably failed to provide suitable opportunity for pre-application discussions. That is having noted broader issues of resourcing raised by the Council (which neither affect the provisions of the PPG nor justify LBE's approach in this specific case).

Conclusion

13. For the above reasons, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated, and a full award of costs is justified. Whilst the appellants have not precisely enumerated the costs that they have incurred at appeal, the PPG specifies that may include the time spent by appellants and their representatives in preparing for an appeal, and clearly some time has been expended in that regard.¹¹

Costs Order

14. 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 Enfield shall pay to Mr & Mrs Drostan McDonald the costs of the appeal proceedings described in the heading of this

⁹ Reference ID: 20-003-20140306.

¹⁰ With reference to the full text of bullet 12 of the PPG entry referenced in paragraph 4 of this decision.

¹¹ Reference ID: 16-032-20140306

decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

15. Mr & Mrs Drostan McDonald are now invited to submit to the Council of the London Borough of Enfield, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Thomas Bristow

INSPECTOR