
Costs Decision

Site visit made on 9 June 2020

by Timothy C King BA(Hons) MRTPI

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

Decision date: 10 July 2020

Costs application in relation to Appeal Ref: APP/K3605/C/19/3240702 Woodend, Leatherhead Road, Oxshott, Leatherhead KT22 0EX

- 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 Mans Zelmerlow for a full award of costs against Elmbridge Borough Council.
 - The appeal was against the unauthorised erection of a single-storey outbuilding.
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Decision

1. The application for an award of costs is refused.

Reasons

2. Paragraph 030 of the Planning Practice Guidance (PPG) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. The guidance indicates that a local planning authority is at risk of an award of costs if it fails to produce evidence to substantiate its actions.
3. The basis of this costs application relates to the applicant's consideration that, upon the appeal being lodged, the Council should have reconsidered its case and *"this should, objectively, have resulted in the notice being withdrawn."* The appellant considers that such a review, undertaken promptly, would have been *"sensible on-going case management."* Although I agree that the Council is required to weigh up the expediency, in the particular circumstances, of issuing any enforcement notice, I find this approach to be somewhat presumptuous as it would tend to imply that, should an appeal be lodged, the appellant stands a greater chance of success than the Council would in defending its decision. In fact, both main parties are entitled to feel that their respective cases would be successful, and the planning process allows for equitability.
4. As the appellant has chosen to apply for a costs award then I must examine the substance of the claim as against the Council's case, but also the appellant's approach towards the appeal itself, and the content put forward which he considered was necessary to overcome the enforcement notice's requirements. With reference to the paperwork submitted it is apparent that the case put forward concentrated more on what *could* be built instead, under what is termed *"worse fallback"* by way of the householder's permitted development entitlement, rather than primarily addressing and analysing the effects of the actual outbuilding in situ. Although the latter is touched upon,

more so with respect to the effects on 'House D's' rear garden, I note that 'Fallback' is the first heading on the appellant's Statement of Case, with this stated to be "*of prime legal significance*". I disagree, as the matter of fallback is a material consideration to be taken into account when determining applications for development proposals. As such, in enforcement appeals, an alternative scheme put forward to illustrate a credible appeal under ground (f) can transpose itself to planning permission being granted by way of the deemed planning application (DPA) should an appeal under ground (a) fail to be considered.

5. The DPA relating to Woodend, therefore, represented an attempt to retain the development, as built and the emphasis should have been on appraising, and balancing out, the planning merits and impacts of the building in situ. The preparation and submission of an image of what is apparently an outbuilding, yet without an intended positional footprint, without any scale attached, nor any annotated dimensions added, and with the building coloured pink for emphasis, did not serve to assist the case save for the assertion that such a building could be erected under permitted development. I have raised the relevance of an articulated and identifiable alternative scheme for the purposes of ground (f) appeals in my main decision letter. Indeed, I note that the appellants in the appeal decision put forward by the Council advanced six separate options for consideration under their ground (f) submission.
6. Section 38(6) of the Planning and Compulsory Purchase Act, 2004 indicates that an application for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. In assessing the merits of the appeal I did find, in common with the appellant, that the orientation of the neighbouring dwelling's garden and also the vegetative screening were material considerations to be taken into account, but the fact that I concluded that the development did not materially conflict with the aims and requirements of the policies, referred to in the stated reasons for issuing the notice, does not mean that they were not of relevance.
7. The claim for costs also makes reference to the Council's reliance on its Supplementary Planning Document 'Home Extensions Companion Guide' (SPD) which it considered reinforced its decision to issue the notice. In the main decision letter I comment that the general guidance within the SPD is hardly applicable and, ultimately, the Council, in its rebuttal of the costs claim, acknowledges the same. Nonetheless, this is a very minor point as policy DM2 of the Elmbridge Development Management Plan and policy CS17 of the Elmbridge Core Strategy are clearly of direct relevance, as is the Council's reference to the National Planning Policy Framework.
8. Turning to the Council's case, the appellant indicates his view that the previous appeal decision relied upon, relating to the effects of an outbuilding in Hounslow, was not of particular relevance. Here, I also agree with the appellant, for reasons set out in my main decision letter. However, the costs claim states that it "*...was not comparable factually requiring the appellant show why it was not.*" This was hardly an onerous task for the appellant given the description of the development in paragraph 9 of the previous decision. Accordingly, it was not difficult to explain why I considered a direct parallel could not be convincingly drawn. Also, I do not understand, nor was it properly explained, the purpose of taking issue with the Council for not enforcing against a "*tree protection zone*" condition which is suggested had been

breached; a matter which, from my reading of the Council's case, did not influence the decision to take enforcement action against the outbuilding.

9. In essence, the Council was quite entitled to reach the decisions it did; both as regards refusing planning permission for the application that preceded the enforcement notice's issue, and the consideration that it was expedient to then issue the notice given that an outbuilding which required the benefit of planning permission had been subsequently built, regardless. Admittedly, the refusal of planning permission will have directly influenced the decision to enforce, but that is not to say that the stated reasons for issuing the notice were unjustified and that the Council acted unreasonably. Its case was clear, although perhaps somewhat subjective. Weighing matters up, on balance, I found against the Council on both main issues.
10. However, irrespective of my decision to allow the appeal I must conclude, given the circumstances described, that the Council was entitled to take formal enforcement action in this instance, and this obviously necessitated the appellant, in order to protect his position, lodging an appeal. I cannot reasonably see, given the Council's considered opinion, how this scenario could have been avoided.
11. Accordingly, for the reasons given above, I am satisfied that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.
12. I therefore refuse the application for an award of costs.

Timothy C King

INSPECTOR