



Costs Decision

Site visit made on 22 September 2020

by Simon Hand MA

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

Decision date: 08 October 2020

Costs application in relation to Appeal Ref: APP/F1610/C/20/3249802 12A Farmington, Cheltenham, Gloucestershire, GL54 3NQ

- The application is made under the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 39, 89 and Schedule 3, and the Local Government Act 1972, section 250(5).
 - The application is made by Farmington Natural Stone Ltd for a full award of costs against Cotswold District Council.
 - The appeal was against a listed building enforcement notice alleging substantial, harmful alterations to 12A Farmington a listed building.
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Costs application in relation to Appeal Ref: APP/F1610/C/20/3249808 Land south of 12A Farmington, Cheltenham, Gloucestershire, GL54 3NQ

- The application is 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 application is made by Farmington Natural Stone Ltd for a full award of costs against Cotswold District Council.
 - The appeal was against an enforcement notice alleging the carrying out of unauthorised engineering works to alter the land levels and to create an access track on the land.
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Decisions

Costs application in relation to Appeal Ref: APP/F1610/C/20/3249802

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

Costs application in relation to Appeal Ref: APP/F1610/C/20/3249808

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

The Cases for Parties

3. The appellant argues that both appeals were unnecessary. The enforcement notice alleging engineering works was invalid as it did not set out what the appellant had done, identify any harm or explain how to remedy it. The listed building enforcement notice was (and I paraphrase here) an overreaction on the part of the Council who refused to discuss or negotiate at any point due to their inexplicable insistence in dealing with the case as if a crime had been committed. The Stop notice directly contradicted the enforcement notice which required works to be undertaken.
4. The Council argue that having discovered significant illegal works being carried out to a listed building they responded as per their procedure and opened an investigation with a view to prosecution if they found the works to be criminal. Given this any meetings would have prejudiced their position. It was the

appellant who declined to be interviewed under caution. The Stop notice was necessary as further works were carried out by the appellant and in any event sits alongside the enforcement notice. As to the engineering works the appellant refused to provide any details of what had happened and so the Council were forced to rely on photographs.

Reasons

The listed building enforcement notice

5. The listed building enforcement notice is the most tangled of the two. The issue began on 11 October 2019 when the Council carried out a site visit. It is worth pointing out that although I have not upheld many of the requirements of the listed building enforcement notice, I have upheld some, and others have been rectified by the appellant during the course of the works. I also had the advantage of seeing the cottage when the works were complete. The scene that greeted the Council officers in October 2019 was quite different. The Cottage was in the process of being gutted and what looks like major landscaping works were being carried out around it and on the land to the south.
6. A meeting was arranged between the parties to discuss what was going on, but before that was held Mr Barrow, the director of the appellant company, was invited for interview under caution on 13 November. The Council are entitled to prosecute for the carrying out of any unauthorised works that harm a listed building or issue an enforcement notice or do both at the same time. Reading between the lines it seems to me the Council were so concerned at the scale of the works they had witnessed they had a genuine concern that prosecution would be necessary.
7. Mr Barrow passed the case to the company's legal advisor, Mr Wolton QC, who arranged an interview under caution with the Council and Mr Barrow. However, he was then told he could not represent Mr Barrow as he was not a practicing solicitor. I am not sure whether this is strictly true or not, or whether both men could have attended the interview with Mr Wolton acting in as a more informal advisor, but in the event Mr Barrow cancelled the meeting.
8. It was at this point that things seem to have begun to go wrong. Because there was to be no interview under caution, the Council cancelled the meeting to discuss the works for fear of jeopardising their ongoing investigation into a potential prosecution. This seems to me to be a circular argument. I would have thought the first thing to establish was exactly what had been done, and what was intended. It may have turned out that many of the works were necessary or harmless, given the original state of the building. However, without a meeting to discuss this it seems difficult to see how the investigation could proceed. In the event the outcome of any investigation was still unknown when the costs claim was made in August 2020.
9. The interview under caution is voluntary and can be declined if the interviewee so wishes or a written statement can be supplied instead. This document was provided by Mr Barrow on 6 December 2019, but the Council did not consider it provided sufficient information. On 12 December Mr Barrow made a pre-application request for advice. Mr Wolton then wrote on the 9th January 2020 it would seem somewhat exasperated, to say they would be continuing with works that were not in breach of the law. On 14 January The Council wrote to

Mr Barrow to make it clear that without an interview under caution there could be no pre-application advice, but an application should be made for listed building consent anyway. Also that because the interview under caution had been declined a prosecution file was being prepared for consideration.

10. It would seem to me the appellant is being told firstly that his failure to attend a voluntary meeting was a de facto admission of guilt – otherwise why threaten prosecution when the Council had no more information than they had in October. Secondly, that he should make an application for listed building consent, but the Council refused to talk to him about what he had done wrong. The appellant was of the view that none of the works were illegal or harmful, the Council took the opposite view, but the difference is the appellant was keen to resolve the matter by meeting but the Council were not.
11. This was followed on 20 January by another site visit where further works were witnessed and the Council issued a temporary Stop Notice. From the Council's point of view this seemed reasonable as works were ongoing and they had no idea what further damage was being done. Had they agreed to one of the meetings suggested by the appellant it is possible some light could have been shed on the matter. The Stop Notice was followed up by the listed building enforcement notice on the 21 February. I do not need to be detained by the Stop Notice issue as these can and do sit beside enforcement notices as they only prevent unlawful works, and those required by a notice are lawful by definition.
12. The saga continued in early March with an offer of another meeting by Mr Wolton declined by the Council, who relied on the issues set out in the enforcement notice as being clear and self-explanatory. On the 25th March appeals were lodged and on 23 April Mr Wolton wrote to say they had received specialist advice and accepted a number of the alterations did indeed need listed building consent and would seek consent for them. He wanted a meeting to make sure the Council agreed with the expert advice. Throughout May there is correspondence back and forth whereby the Council agree to a meeting but never actually arrange one. A fee for pre-application advice was sent in but returned as it was the wrong one. On 17 June Mr Wolton wrote to say, in essence, he wasn't going to waste his time any further and they were going ahead with the works required by the notice.

Conclusions on the listed building enforcement notice

13. The purpose of the costs regime is to discourage unreasonable behaviour that has led to unnecessary costs. I do think the Council have been unreasonable in this case. It is clearly a nonsense to refuse to discuss alleged damage to a listed building for fear of undermining an investigation into that damage. It is always possible that an agreement could have been reached as to what needed putting right and what didn't that would have avoided the need for an appeal. However, with the benefit of hindsight I can see this was never going to be possible. The appellant, until he commissioned an expert report, firmly believed he had done nothing wrong and the report wasn't produced until after the appeal had been lodged. The Council, on the other hand thought he had done quite a lot wrong and described 21 different issues in the notice. It is difficult to see how the two parties could have reached an agreement had they had a meeting, so an appeal was always going to be necessary.

14. The question then remains could the scope of the appeal have been cut down if there had been sensible negotiation between the parties. Clearly the appellant accepted the front windows needed to be replaced and I have upheld that part of the notice. However, most of the rest of the Council's issues have varying degrees of merit. I agreed with them over the dormer fascia boards, and other matters such as the rest of the windows, the upstairs partition, the fireplace, the boxed in staircase and the landscaping were obviously matters of subjective opinion. On the question of the plaster walls and ceilings I was persuaded by the appellant's evidence, but it was not unreasonable of the Council not to be. It might have been clear, following discussion, that the repointing was being carried out with lime mortar and the concrete floors were merely replacements, but I cannot be sure of that. I do, however think that requiring the restoration of the old plumbing, the doors and the 1950s floorboards was unreasonable.
15. Taking this altogether, I consider only a few minor elements of the notice could definitely have been avoided. An appeal was always going to be necessary, and as nearly everything alleged was a matter of not unreasonable dispute, then there were no wasted costs. Although I do think the Council were unreasonable to refuse to discuss the case with the appellant, and I can understand the frustration of the appellant with the Kafkaesque process he was put through, it does not seem to me that the final outcome was greatly affected one way or the other and an award of costs is not justified.

The engineering works enforcement notice

16. The engineering works notice plan covers the land to the south of the cottages. There clearly were engineering works going on when the Council visited the site but I have concluded that they did not affect the level of the land, or if they did, it was only temporary, while the various excavation works around the cottage took place. I had the advantage of seeing everything put back, which the Council did not, and this does not seem to have happened until after the notice was issued, but it is still unclear to me exactly what changes in ground levels the Council were concerned about. It is clear they did not like the track, but as I explain in the appeal decision the notice does not over the track – except for a metre or so at the end.
17. It does seem to me on the question of ground levels there was really nothing between the parties. Had the Council been prepared to discuss this it should have been clear and not do so was unreasonable. The attack on the track is flawed and really a different notice should have been issued, covering the land to the west of the listed building so the whole track could have been considered. Not to do so rather undermined the purpose of including the track in the notice at all. I consider this also to have been unreasonable.

Conclusions

18. On the listed building appeal I do not find there has been unreasonable behaviour leading to wasted expense and shall refuse that claim. On the enforcement notice appeal I do consider the appellant was put to the unnecessary expense of an appeal due to the unreasonable behaviour of the Council and shall award costs accordingly.

**Costs Order on Application Relating to Appeal Ref:
APP/F1610/C/20/3249808**

19. 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 Cotswold District Council shall pay to Farmington Natural Stone Ltd, 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.
20. The applicant is now invited to submit to Cotswold DC, to whom a copy of this decision has been sent details of those costs with a view to reaching an agreement as to the amount.

Simon Hand

Inspector