The Planning Inspectorate

Costs Decision

Site visit made on 3 December 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 18 February 2021

Costs application in relation to Appeal Ref: APP/U5930/C/19/3227528
18 Rosslyn Avenue, Chingford, London E4 6DX

- The application is made under the Town and Country Planning Act 1990 (the 1990 Act), sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr O Kulah for a full award of costs against the Council of the London Borough of Waltham Forest.
- The appeal was against an enforcement notice alleging without planning permission: the erection of a single storey side extension ("Unauthorised Development").

Decision

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

Preliminary Matter

2. It is not clear from the information before me as to whether the applicant is seeking a full or partial award of costs. However, given the substance of the applicant's case I consider that it is highly likely that he is seeking a full award.

Reasons

3. The Planning Practice Guidance (PPG) 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 directly caused another party to incur unnecessary or wasted expense in the appeal process. I acknowledge that although costs can only be awarded in relation to unnecessary or wasted expense within the appeal process the PPG states that behaviour and actions at the time of a planning application can be taken into account.[1] Whilst, the appeal is not against the refusal of a planning application there is a relatively complex planning history on this site and part of that relates directly to the development before me.

4. The PPG advises that an award of costs against a local planning authority may be procedural, relating to the appeal process, or substantive, relating to the substance of the matter under appeal. It makes it clear that a local planning authority is required to behave reasonably in relation to both of these elements and provides examples of unreasonable behaviour for both[2]. The application was made in writing and therefore there is no need to rehearse the detailed points made.

5. The main thrust of the applicant's case is that the Council introduced new reasons for refusal; provided information that is shown to be manifestly inaccurate or untrue and that the Council did not review their case promptly following the lodging of an appeal.

[1] Paragraph: 033 Reference ID: 16-033-20140306
[2] Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

6. The planning history on the appeal site is relatively complex. The single storey side extension that forms the breach of planning control was begun in September 2015. Since 2014 numerous planning applications and applications for lawful development certificates (LDC) under section 191/192 of the 1990 Act for extensions to 18 Rosslyn Avenue (No 18) have been determined by the Council.

7. The last LDC application[3], relating to the side extension, was refused by the Council on 12 February 2019 for the following reason: -

   'The single storey side extension when first constructed had a width greater than half the width of the original dwellinghouse and was not constructed in facing materials that were similar in appearance to the existing dwelling and as such failed to comply with criterion (j) (iii) and Condition A.3 (a) of Class A, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order (2015) (As Amended). Notwithstanding the subsequent alteration to reduce the width of the extension to less than half the width of the dwelling house, as the extension has been constructed unlawfully the development under Article 3(5)(a) of the same Order cannot benefit from the rights granted under Schedule 2 retrospectively and as such the development is not lawful.'

8. The enforcement notice, cited in the banner heading above, was issued on the 5 April 2019 and the Council's Delegated Report states within it 'Special Decision Issuing Instructions: Pass to Enforcement'. Therefore, it is likely that the issuing of the enforcement notice was linked to the refusal of the LDC application. Moreover, given that Article 39 (13) of The Town and Country Planning (Development Management Procedure) (England) Order 2015 states that *'where an application is refused, in whole or in part (….) the notice of decision must state clearly and precisely the authority's full reasons for their decision'* I acknowledge that the appellant could have expected that the ground (c) appeal would revolve around the issue raised within the LDC reason for refusal. As such, his initial evidence within his statement of case relates to the width of the side extension. However, in respect of an appeal on ground (c), the onus of proof as to whether, those matters (if they occurred) do not constitute a breach of planning control, lies with the appellant in that appeal.

9. In its written submissions the Council undertook a detailed assessment which encompassed a number of reasons that supported its view that the side extension was a breach of planning control when the enforcement notice was issued. The Council also offered, within its final comments, an explanation as to why it had a different interpretation and conclusion in relation to the factual evidence. The Council was not in the position of having to disprove the applicant's evidence.

10. The applicant has provided his final comments in response to the Council's evidence. I acknowledge that those final comments necessarily encompassed matters that the applicant considers had been formerly accepted by the Council. Moreover, the Council had not stated previously, when the LDC applications were determined, that it considered that drawing RA.01.02A was inaccurate. In addition, the applicant considers that the Council undertook measurements in 2016 that indicate the development met the limitations in relation to eaves height. However, as stated within my appeal decision those

[3] Ref No: 183248

specific measurements have not been submitted and it appears that the drawing does not accurately reflect the as built side extension and bay window.

11. It is not clear as to why the Council had previously accepted that the drawing cited above demonstrated that the eaves height of the extension did not exceed the height of the eaves of the existing house. I can sympathise that the applicant was surprised by the matters raised in the Council's Statement of Case in regard to the ground (c) appeal given the planning history on this site.

12. However, the Council did not act unreasonably during this appeal process by providing evidence as to whether the side extension was in breach of planning control. Additionally, even had I found that the Council had acted unreasonably on this matter, which I do not, the behaviour would not have led the applicant to incur unnecessary or wasted expense in the appeal process as the information to demonstrate whether the side extension constituted a breach of planning control would have been required in any event.

13. Linked to the above, the applicant considers that the Council has provided information that is manifestly inaccurate and untrue. This relates to the Council's interpretation of photographs from a third party, the likening of the gap between the rear and side extensions to other cases, disregarding the previously submitted advice from Counsel on this matter, the lawful status of the dormer roof extension, the height of the eaves of the side extension and whether the reason for refusal compiled the Council's full reason for its decision.

14. The Council have submitted a number of photographs within its evidence and I acknowledge that it is not clear if some of the photographs were taken by Council Officers or third parties. I also note that it is not clear the exact date that some of those photographs were taken. Nevertheless, even though the applicant disagrees with the Council's interpretation of those photographs I consider that it is a matter of judgement as to what they indicate. As such, the Council's interpretation of them is not unreasonable in this regard.

15. As stated above, I can understand that the Council reassessing whether the side and rear extensions effectively join and can be treated as a wraparound extension came as a surprise to the applicant given the Council's apparent acceptance of the previously submitted advice from Counsel. Nevertheless, the interpretation of whether development meets the limitations and conditions of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) is a matter of judgement. Moreover, whether appeal decisions on other cases are similar and indicate support for an interpretation of the GPDO is also a matter of judgement. In addition, as stated in my appeal decision it is not clear on what information/plans the advice from Counsel was based on.

16. The Council stated within its evidence that it considered that the dormer roof extension at No 18 was unlawful. Nevertheless, the appellant has provided correspondence from the Council which indicates that it considered in July 2020 that the dormer roof extension was lawful with regard to the time limits contained within section 171B of the 1990 Act. The Council confirmed at the site visit that this was correct. As such, the statement in the Council's evidence is inaccurate. However, the implications of Article 3(5) of the GPDO have also been raised by the third party. Therefore, the inaccuracy would not have led the applicant to incur unnecessary or wasted expense in the appeal process as the information to demonstrate whether Article 3(5) of the GPDO

applied in this case would have been required in any event. Moreover, the applicant's response to this matter was limited to pointing out the inaccuracy and providing a copy of the correspondence.

17. In relation, to the eaves height of the side extension as stated above it is not clear why the Council did not query the accuracy of the submitted drawing during the determination of the 2017 and 2019 LDC applications. However, there is no evidence to indicate that they have submitted information that is inaccurate or untrue on this matter. They have supplied copies of the correspondence that cite the measurements taken on site in 2016 and copies of the drawings submitted previously on this matter.

18. The Council has inaccurately stated that the time between the decision on the 2019 LDC and the enforcement notice was 9 months within its response to the costs application. The Council has also stated that the reasons for refusing the LDC applications and the ground (c) appeal are related but are not comparable. As stated above, I can understand why the applicant is frustrated and I sympathise with his surprise at the reasons why the Council considered the side extension is a breach of planning control. However, in line with my findings above the onus of proof within a ground (c) appeal is on the appellant and the evidence relating to why the side extension is not a breach of planning control would have been required to support his case.

19. The applicant also considers that the appeal could have been avoided, had the Council properly considered his evidence in relation to a fallback position and the ground (f) appeal submitted in July 2020 during the appeal process. He considers that the Council should have withdrawn the notice as it should have considered that it was not expedient to issue it after that assessment. It appears that the Council had not assessed the applicant's evidence submitted in July 2020 when it submitted its Statement of Case in October 2020.

20. However, the Council has stated within its evidence that there is no fallback position with regard to permitted development rights. Consequently, even if the Council had fully assessed the applicant's case prior to the submission of its own Statement of Case it is highly unlikely that it would have withdrawn the enforcement notice. Therefore, the appeal would not have been avoided. In addition, I have found in my appeal decision that the fallback position cited by the applicant has little weight. As a result, the Council have not acted unreasonably in this respect. Furthermore, even though the applicant considers that the requirements of the enforcement notice are unreasonable that does not constitute unreasonable behaviour and ground (f) specifically allows consideration of such matters.

21. The applicant is clearly not satisfied with the Council's handling of the LDC applications and enforcement proceedings at the appeal site. However, other procedures exist, including the Council's own complaints procedures, to deal with such matters.

Conclusion

22. I therefore conclude that for the reasons set out above, unreasonable behaviour resulting in unnecessary expense during the appeal process has not been demonstrated. For this reason, and having regard to all other matters raised, the application for an award of costs is hereby refused.

D. Boffin INSPECTOR