



Costs Decision

Site visit made on 22 June 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13th July 2021

Costs application in relation to Appeal Ref: APP/C1760/C/21/3270682 Land at 15 Bracken Hall, Bracken Place, Chilworth, Southampton, Hampshire SO16 3ET

- 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 Mr Lee Smith for a full award of costs against Test Valley Borough Council.
 - The appeal was against an enforcement notice alleging without planning permission the construction of a second floor balcony.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) 'Appeals' chapter 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 caused another party to incur unnecessary or wasted expenditure in the appeal process (paragraphs 028 and 030). "Unreasonable" has its ordinary meaning, as established by the Courts¹. Paragraph 031 advises that unreasonable behaviour can be either procedural-relating to the process, or substantive-relating to the issues arising from the merits of the appeal.
3. An award of costs was sought on procedural and substantive grounds. Summarised briefly, the applicant's case is that the Council's investigation prior to issuing the enforcement notice was at fault. Whilst the applicant made the Council aware that the balcony already benefitted from planning permission, they did not address this matter in correspondence, mistakenly focussing in the main on matters of ownership instead. Had the Council considered this matter properly, the notice would never have been issued. The Council have not explained why what has been built does not accord with the approved plans. The Council's errors are compounded by the remedy sought by the notice, which would not restore the appeal property to accord with the approved plans.
4. Paragraph 047 of the PPG stresses that a Council should behave reasonably in relation to procedural matters at the appeal, for example by complying with the requirements and deadlines of the process. Paragraph 048 makes it clear that in terms of matters occurring prior to an enforcement appeal, a Council is at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need

¹ *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774.

to serve the notice in the first place, or ensured that it was accurate. At paragraph 049, the PPG advises that a Council risks an award of costs on substantive grounds where an application is unreasonably refused; this could equally be relevant to a Council deciding that it is expedient to issue an enforcement notice. Examples of unreasonable behaviour with respect to the substance of the matter at appeal listed in this paragraph include failing to produce evidence to substantiate reasons for refusal and making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis.

5. As far as I am aware, the Council has made no response to the costs application. However, in my view there is no firm evidence to indicate that the Council did not consider matters thoroughly prior to issuing the notice. The copies supplied of correspondence leading up to service of the notice suggest that the Council carefully considered what was shown on the approved plans and the applicant's explanation in that respect, compared with what has been built. The Council clearly explained why they still considered that planning permission was required for the balcony, having regard to the approved plans. To my mind, it is not unreasonable to conclude that references to the balcony included considerations of its size and the position of the railing. From this it can sensibly be inferred that the Council took the size of the balcony and the position of the railing on the approved plan into account in their deliberations.
6. The balcony access arrangements represented one of the points used by the Council to illustrate the differences between what has been built and the approved plans; it was not the sole or main focus of those differences. I did not interpret the Council's correspondence as suggesting that they regarded matters of ownership as relevant. The Council's correspondence clearly set out their position. The Council was evidently open to considering further material from the applicant, thereby showing that they did not have a closed mind on the matter. However, given the applicant's confirmation that the balcony would not be removed and in the absence of further correspondence raising significant new issues, I am not sure what practical purpose there would have been in the Council providing any further written explanation regarding their position prior to the notice being served.
7. The Council's statement of case set out a detailed explanation as to why they considered that the balcony breached planning controls. In particular, the Council fully explained how they reached a conclusion that what has been built departed significantly from what was shown on the approved plans. The Council's evidence clearly identified what they regarded as material differences from the approved plans. For similar reasons to those set out above, I read the size and position of the railing on the approved plans as being included in the Council's assessment of the balcony as a whole, whilst I did not interpret the Council's case as giving weight to access or ownership issues. The Council also described the planning harm that they considered is caused by the balcony at some length. The Council's evidence in this respect was clear, detailed and site-specific and substantiates the case at appeal. In assessing both the 'legal' ground of appeal and the planning merits of the deemed planning application, I reached similar conclusions to those of the Council.
8. The steps in the notice require reversion to the pre-existing railing arrangement at the property. Whilst the approved plans do not show the pre-existing railing, those plans are now more than twenty years old, whilst as far

as I was made aware the pre-existing railing is not unlawful in planning terms. Compliance with the notice would therefore do no more than restore the appeal property to its condition prior to the breach taking place.

9. Accordingly, I find little to support a conclusion that the Council have acted unreasonably by issuing the notice, or that they have not substantiated their case at appeal. In particular, there is little to suggest that the Council acted in a manner similar to that which the PPG regards as unreasonable behaviour prior to the issue of the notice referred to above or in a way akin to the examples set out in the PPG concerning the substance of the matter at appeal, or that they have otherwise acted unreasonably. Given all that I have read, it seems to me that unless the applicant had removed the balcony following the exchanges of correspondence with the Council, the issue of an enforcement notice was more or less inevitable. This being the case, the applicant would still have had to make an appeal to try and protect their position and the associated expenditure they have incurred has therefore not been unnecessary. It follows that the conditions for an award of costs in the PPG at paragraph 030 have not been met.

Conclusion

10. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Stephen Hawkins

INSPECTOR