

## Costs Decision

Site visit made on 14 December 2021

**by K Savage BA(Hons) MPlan MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 3<sup>rd</sup> February 2022**

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### **Costs application in relation to Appeal Ref: APP/B5480/W/21/3275388 65 Westland Avenue, Hornchurch RM11 3SD**

- 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 Gill for a full award of costs against the Council of the London Borough of Havering.
  - The appeal was against the refusal of planning permission for 'Retrospective permission merging together of two outbuildings into one and verandah/lean-to to existing outbuilding at rear of garden' without complying with a condition attached to planning permission Ref P1055.13, dated 10 February 2014.
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### **Decision**

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

### **Reasons**

2. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. An application may be made on procedural grounds, relating to the appeal process, or substantive grounds relating to the planning merits of the appeal.
3. The applicants set out that the Council acted unreasonably in refusing permission despite acknowledging that no harm would arise from the ancillary use of the outbuilding. The applicants further contend that the Council failed to produce evidence to substantiate its reason for refusal, that it made vague, generalised or inaccurate assertions about the proposal's impact, that it refused permission on a planning ground capable of being dealt with by the condition suggested by the applicants and that it failed to properly review, and subsequently misinterpreted, the applicants' case at appeal. The applicants also criticise the Council for placing an onus on them to demonstrate that a change from 'incidental' to 'ancillary' would not be harmful and argue that the Council has confused itself by trying to consider the matters connected with the enforcement investigation.
4. The Council states that it was correct to consider the impact of use of the unified building on nearby occupiers and the character of the site in accordance with the development plan, and that the ongoing enforcement investigation further supports the need to retain the condition as it stands. The Council also argues that the applicants' reasons for seeking the variation to the condition are unclear given the alleged use of the outbuilding as a separate dwelling.

5. The appeal related to a single condition attached to the 2014 permission. My considerations were limited to whether this condition satisfied the relevant tests for conditions set out in the National Planning Policy Framework. However, the Council in refusing permission relied to a large extent on its allegation that a separate dwelling had been created within the outbuilding. It refers several times to its ongoing enforcement investigation. However, no detailed evidence arising from this investigation was submitted as part of the appeal to substantiate this claim and to counter the statements made by the applicants in their statutory declaration. As a result, the Council failed to substantiate its main claim that *'the alleged use is not connected to the host property, and will therefore result in a material change of use of the building'*.<sup>1</sup>
6. Moreover, in conflating its enforcement investigation and the application, the Council failed to grapple with the main question of whether the condition met the relevant tests for conditions set out in the Framework. It stated that with the existing condition still in place, no harm would occur to neighbours' living conditions. However, the Council made no substantive assessment of what harm, if any, would occur should the condition be removed or varied as sought by the applicants. Rather, its concern was predicated on its position that a separate dwelling had already been created, with the implied consequence that any condition granted would immediately be in breach. However, whether or not this would be the case was not relevant to the merits of whether the condition met the six tests. In this respect, the Council failed to substantiate its reason for refusal that varying the condition would materially change the approved scheme in an manner that would lead to harm to neighbours' living conditions.
7. Furthermore, the Council uses the terms *incidental* and *ancillary* interchangeably to describe the use of the outbuilding despite this being a supposedly significant distinction in the condition. It also contradicts itself by on the one hand stating its conviction that a separate dwelling has been created, but on the other hand stating that *'the specific use of the site has not been confirmed by the applicant, therefore, it would not be possible to assess the level of harm of the use.'*<sup>2</sup>
8. However, the outbuilding exists on site and the nature of its use was capable of inspection by council officers. Indeed, whilst the Council states a site visit was not possible due to Covid-19, it reveals that photographs were available from the enforcement investigation, indicating that a site visit was undertaken at some point and evidence of its use available. In light of this, for the Council to take the position that insufficient information was provided to allow it to determine whether there would be harm to neighbours' living conditions is unreasonable. The Council persisted with this position at appeal, continuing to avoid any substantive analysis of the potential impact of the outbuilding if the condition was to be removed or amended to allow ancillary residential accommodation.
9. In these respects, I find that the Council has made vague, generalised and inaccurate assertions about the proposal's impact, unsupported by objective analysis. Moreover, given the Council's apparent concession at various points that the approved use was in fact ancillary to the main dwelling, and not just

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<sup>1</sup>Ref P0057.21 Officer Report, Pg 3, Para 1

<sup>2</sup> Ibid, Page 4, Para 1

incidental, its failure to consider varying the wording of the condition in the alternative to removing it entirely was also unreasonable.

10. Ultimately, I determined that the condition failed the tests of necessity and precision and therefore does not serve a legitimate planning purpose and should be removed. The Council failed to engage with the central question of the appeal, and instead based its case on allegations arising from an enforcement investigation for which few details were provided. Moreover, the Council failed to quantify any material harm which would arise from the removal of the disputed condition, or its variation in the terms alternatively sought by the applicants.
11. Consequently, the Council has failed to substantiate its case at appeal, and in doing so has prevented development which should have been granted planning permission. This amounts to unreasonable behaviour, as a result of which the applicants have been put to the wasted expense of making the appeal. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a full award of costs is justified.

### **Costs Order**

12. 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 Havering shall pay to Mr & Mrs Gill 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.
13. The applicants are now invited to submit to the Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*K. Savage*

INSPECTOR