
Costs Decision

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 February 2022

**Costs application in relation to Appeal Ref: APP/V1505/W/21/3282101
Foxfield House, Potash Road, Billericay, Essex CM11 1DJ**

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Alex Headley for a full award of costs against Basildon District Council.
 - The appeal was against the refusal of a certificate of lawful use or development (LDC) for the construction of new swimming pool and gymnasium outbuilding.
-

Decision: the application is refused

Reasons

1. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include acting contrary to, or not following, well-established case law.
2. The essence of the applicant's grounds for seeking costs is that, having correctly identified the relevant case law, the Council acted unreasonably by not following that well-established case law. Specifically, the judgment in *Emin v Secretary of State for the Environment* [1989] J.P.L. 909 indicates that the size of the building is not, in itself, determinative of whether a development falls within the provision of Class E1. The applicant points out that the Council correctly identified that the outbuilding would meet all the requirements in Class E.1, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), but considers that the Council then went on to conclude that the proposed outbuilding was not genuinely and reasonably required without setting out the reasoning behind that conclusion.
3. The Council responds by pointing to its formal Decision Notice, in which reference is made to the supporting information provided with the original application. It is helpful to quote in full the relevant paragraph in that Decision Notice:

The burden of proof rests with the applicant and the test of the appropriate evidence is the balance of probabilities. The supporting statements which have been submitted are not considered to demonstrate that the proposed building is 'genuinely & reasonably' required. The justifications provided refer to standards which are applicable to commercial facilities and remain unjustified in respect of private accommodation. Therefore on the balance of probabilities the proposed building is not considered to constitute 'permitted development'.

4. On my reading, that one paragraph neatly encapsulates the Council's approach to determining the application. It correctly identifies that the burden of proof rests with applicant. It correctly identifies that the relevant test is the balance of probabilities. And it explains that, in the Council's view, *the supporting statements submitted by the applicant with the application were not considered to demonstrate* that the proposed building is 'genuinely & reasonably' required (emphasis added). Further to the judgment in *Emin*, that is the correct test to be applied. Bringing all these elements together, the conclusion in the last sentence of the paragraph was a conclusion that the Council was perfectly entitled to reach.
5. Within that paragraph lies the Council's reasoning that the applicant claims is absent, or at least a summary of it (the text highlighted above): namely, that the supporting documents submitted with the original application for the LDC do not provide justification for a conclusion that the development would have been lawful on the date the application was submitted. Given that the burden of proof rests with applicant in LDC applications, the Council cannot be criticised for reaching that conclusion. Indeed, I similarly found that the applicant's submission was not sufficient to show, on the balance of probabilities, that the proposed outbuilding would be lawful.
6. The applicant observes that the Council's formal Decision Notice refers in a previous paragraph to the observation that the "substantial footprint of 298 square metres exceeds that of the existing dwellinghouse within whose curtilage the building is proposed to be situated". However, it seems to me that the applicant has quoted that extract out of context. A full reading of the relevant paragraph reveals that the Council then immediately cites the case of *Emin* and correctly states that the size of building was not, in itself, found to be determinative. That paragraph of the Decision Notice goes on to state, again correctly, that the relevant test was established of whether the proposed accommodation is 'genuinely & reasonably' required for the proposed use.
7. Neither of the two paragraphs referred to above reveal any error in law. On the contrary, it seems to me that the Council has applied the relevant case law correctly. As such, the Council cannot be said to have acted unreasonably in the context of the Planning Practice Guidance. In the absence of any unreasonable behaviour on the part of the Council, an award of costs in favour of the applicant is not justified.

Paul Freer
INSPECTOR