

Costs Decision

Site inspection on 23 March 2022

by John Whalley

Inspector appointed by the Secretary of State

Decision date: 4 April 2022

**Costs application by Mr Forbes Bailey made in connection with appeal
ref: APP/A5840/X/21/3283694 No. 18 Elfindale Road, London SE24
9NW**

- The application was 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 was made by Mr Forbes Bailey for a full award of costs against the London Borough of Southwark Council.
 - The appeal was made by Mr Forbes Bailey against the refusal by the Council to issue a certificate of lawful development in respect of the proposed construction of a dormer roof extension over the rear outrigger and the replacement of one rooflight on the rear flat roof at No. 18 Elfindale Road, London SE24 9NW.
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Decision

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

Submissions made by Mr Forbes Bailey

2. The Council had not consistently or correctly applied the tests in the Town and Country Planning (General Permitted Development) (England) Order 2015, (the Order), by requiring a set back of at least 0.2m of the proposed dormer from the rear wall of the house.
 3. The planning history of nearby properties, in which similar developments had been considered to be permitted development, showed an inconsistent approach. Dwellings at 2, 4, and 20 Elfindale Road had certificates of lawfulness granted by the Council for extensions to the roof that did not have a 0.2m set back. It appears that the Council were now of the view that those decisions were erroneous.
 4. There had been no policy or legislative changes or further issuing of technical guidance that would have significantly altered interpretation of the legislation. All that was required was that no part of the enlargement is to extend beyond the outside face of any external wall of the original dwellinghouse.
 5. There had also been an additional delay in the progression of the project. There was potential for costs in relation to the preparation of a full planning application should the appeal be dismissed in addition to the delay presented through the refusal of the certificate of lawfulness.
 6. The Applicant should have his costs.
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Submissions made by the London Borough of Southwark Council

7. The Council said they had acted reasonably throughout the application process. It was understood there was some inconsistency in the way that the tests of the Order had been applied. It was the view of the officers that the proposed rear dormer extension did not comply with the conditions and limitations set out under Class B of the Order, specifically condition B.2(b)(i)(bb) which states that *"the edge of the enlargement closest to the eaves of the original roof shall, so far as practicable, be not less than 0.2 metres from the eaves, measured along the roof slope from the outside edge of the eaves"*.
8. The reading of this condition was applied as it is written, taking into consideration the definition of "eaves" set out on page 11 of the Permitted Development Rights for Householders Technical Guidance by the Ministry of Housing, Communities and Local Government. That interpretation was upheld by Delegated Panel, who agreed that the Officer's recommendation to refuse the Certificate was sound.
9. It was also considered that the Council behaved reasonably in all other respects. The Certificate application was determined in a timely manner, in accordance with the statutory determination date and therefore did not delay any subsequent appeal or application submission by the Applicant.
10. The Applicant should not have his costs.

Inspector's conclusions

11. Irrespective of the outcome of the appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party or parties applying for costs to incur unnecessary or wasted expense in the appeal process.
12. The Council said there had been 'some inconsistency in the way that the tests of the Order have been applied'. They appear to have changed their view on the interpretation and application of Condition B.2(b)(i)(bb) to the Order. It seems that the Council have now taken a gable wall junction with a roof slope, to be eaves for the purposes of Condition B.2(b)(i)(bb). That sloping edge along the joint between the roof and a gable wall is a rake, not part of the eaves for the purposes of the Order concessions. The Council's interpretation is not supported by the Order. It may be that the Council correctly applied Condition B.2(b)(i)(bb) to the earlier Elfindale Road extensions. They now take a different, but in my view, a mistaken position.
13. A local planning authority should know how the provisions of the Order are to be interpreted and applied. I consider that the Council's position on the application of Condition B.2(b)(i)(bb) to the Order amounted to unreasonable behaviour in relation to the handling of the lawful development application and appeal. It was a needless application.
14. An application for costs needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. In my view, that was done. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, was demonstrated. An award of costs against the Council is justified.

COSTS ORDER

15. 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 London Borough of Southwark Council shall pay to Mr Forbes Bailey the costs of the appeal proceedings described in the heading of this decision.
16. Mr Forbes Bailey is now invited to submit to the London Borough of Southwark 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

John Whalley

Inspector