



Costs Decision

Site visit made on 26 April 2022

by Chris Preston BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 09 May 2022

Costs application in relation to Appeal Ref: APP/P0240/C/21/3273972 Land to the rear of 33 Newtown, Pottton SG19 2QH

- 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 & Mrs Dickinson for a full award of costs against Central Bedfordshire Council.
 - The appeal was against an enforcement notice alleging: Without planning permission, the erection of a single storey building.
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Decision

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

Reasons

2. The application for an award of costs was made in writing and the parties will be familiar with the content of the claim. Consequently, the following is a brief summary of the main points. The applicants state that Council officers wrote to them on numerous occasions to identify that the building would amount to 'permitted development' if built to appropriate dimensions. The garage was built to these dimensions only for the Council to change its mind. Subsequent to that the Council showed a lack of interest in the evidence presented which demonstrated that the land was within the curtilage of the dwelling. The garage would not have been built if the Council had identified that it wasn't permitted development in the first instance.
3. The Council did not respond to the application.
4. Paragraph 030 of the Planning Practice Guidance (the PPG) advises that costs may be awarded where a party has behaved unreasonably *and* that the unreasonable behaviour has caused another party to incur unnecessary or wasted expense in the appeal process. Both elements need to be satisfied for an award to be made.
5. There is quite a lengthy planning history relating to the site, including applications for a new dwelling which were refused and subsequently dismissed at appeal. Following those decisions, the appellant sought to construct an outbuilding on the site and commenced work in the belief that it would be permitted development. The delegated enforcement report which recommended that an enforcement notice be served identifies that a site visit was conducted on 17 February 2020 after the appellant had started to 'lay foundations for an outbuilding'.

6. The report identifies that the appellant was under the impression that the building benefitted from permitted development rights. Subsequent to that, on 25 February 2020, the enforcement officer sent a letter to the appellants to confirm that permitted development rights would apply, providing that the garage was not more than 2.5m high. The letter does not state that it is without prejudice to any future investigation and confirms that consultation had been had with a planning officer. The letter was sent directly to the appellants, who do not appear to have engaged an agent at that stage. It was unambiguous in its terms.
7. Subsequently, a planning application for an outbuilding on the same footprint but with a higher pitched roof was submitted. During consideration of the application, the planning officer emailed Mrs Dickinson on 19 May 2020 to express her view on the planning merits of the application with a suggestion that it would be recommended for refusal. The email reiterated the view expressed in the February letter that if the roof of the building was less than 2.5m 'the proposal is likely to constitute permitted development'. A further email from the planning officer on 21 May stated 'if you wish to use the PD rights then you can erect the building with a height of 2.5m as long as it is in line with the requirements of Class E'. The building was subsequently constructed to that reduced height.
8. I recognise that the formal route to ascertain whether a building is lawful is to apply for a certificate of lawful development (LDC) under section 191 of the Town and Country Planning Act 1990 and that individual letters and emails from officers do not prevent the Council from subsequently carrying out its statutory duties with regard to enforcement. However, a lay person unfamiliar with the technicalities of the planning system would be likely to read the correspondence on its face as confirmation that planning permission was not required, providing that the height was no greater than 2.5m. The appellant was told three times that such a building would amount to permitted development. A flat roofed building not exceeding 2.5m in height is what was subsequently constructed.
9. Therefore, I can well-imagine that the applicants were aggrieved when the Council subsequently instigated enforcement proceedings. An application for an LDC was then submitted and refused by the Council prior to the enforcement notice being served. Neither the report regarding the LDC or the delegated enforcement report make any mention of the fact that the Council had previously advised that the building would amount to permitted development and it is therefore difficult to ascertain why the Council's position changed.
10. Having said that, the delegated report regarding the LDC application explains in some detail why the Council reached the position it did, with reference to relevant case law. Ultimately, I disagreed with the position of the Council on the issue of whether the land is within the curtilage of No.33 and on whether the use would be incidental to the enjoyment of the dwellinghouse. However, both matters required finely balanced judgement and it was not unreasonable for the Council to take the view that it did having assessed the matter in the round. There is a significant amount of caselaw surrounding the issue of curtilage and that matter in particular was not a straightforward judgement.

11. Moreover, the earlier letter of 25 February 2020 contained flawed logic in that it suggested that the site was outside the curtilage of the dwelling but, nonetheless, stated that a garage no higher than 2.5m would amount to permitted development. It is a prerequisite of Class E of Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended, that buildings or other enclosures must be within the curtilage of a property to benefit from permitted development rights. Given the flawed basis of the earlier advice, I can understand how the Council reached a different position when dealing with the formal LDC application even though I didn't agree with their position.
12. I am also mindful that I am only in receipt of some correspondence relating to discussions between the parties. It may be that more evidence exists but the Council has decided not to respond to the costs application or submit a specific appeal statement relating to the enforcement notice appeal. Given the circumstances and the apparent volte-face it would have been helpful for the Council to explain in more detail why it changed its view.
13. Overall, I do find that the Council behaved unreasonably in terms of the mixed messages that were sent to the applicants. However, the Council has a statutory duty to investigate complaints and the officer reports in relation to the enforcement notice and the LDC application represented the Council's fully considered position in relation to the development, as opposed to the informal officer opinions previously given. Those reports were detailed and adequately explained why the Council felt the development wasn't lawful and why it was appropriate to serve an enforcement notice.
14. Therefore, although this is a very finely balanced matter, despite the uncertainty provided by earlier correspondence the costs incurred in the appeal proceedings relating to the enforcement notice were not unnecessarily incurred and the Council did provide evidence to justify its position.
15. In those circumstances, whilst there are no doubt lessons to be learned from the matter, I find that an award of costs is not justified. Accordingly, I shall refuse the application.

Chris Preston

INSPECTOR