



Costs Decision

Site visit made on 18 October 2022

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7TH NOVEMBER 2022

Costs application in relation to Appeal Ref: APP/K0425/C/21/3275673 Land at 10 Avery Avenue, Downley, Buckinghamshire HP13 5UE

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 Oliver Trussell for a full award of costs against Buckinghamshire Council.
 - The appeal is against an enforcement notice alleging without planning permission, the construction of a box dormer to rear in connection with loft conversion.
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Decisions

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. The PPG paragraph 031 explains that unreasonable behaviour in the context of an application for costs can be either procedural-relating to the process, or; substantive-relating to the issues arising from the merits of the appeal.
3. The application was made in writing, in accordance with the guidance at paragraph 035 of the PPG. An award of the applicant's costs appears to have largely been sought on substantive grounds. Summarised briefly, the applicant's case is that what has been built is a 'technical' breach. The enforcement notice serves no useful purpose and its requirements are punitive. By requiring removal of the dormer and in defending that position at appeal, the Council have failed to properly review its case or to attribute the appropriate weight required to the 'fallback' position. As far as I was made aware, the Council did not respond to the application.
4. Paragraph 048 of the PPG, which concerns the handling of an application or an enforcement notice prior to an appeal, is relevant. This advises that a Council must carry out adequate prior investigation before issuing a notice; 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 to serve the notice in the first place, or ensured that it was accurate.

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

5. 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 apply equally to a Council deciding that it is expedient to take enforcement action. The non-exhaustive list of examples of where such a situation might arise include failing to produce evidence to substantiate reasons for refusal, making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis, acting contrary to, or not following, well-established case law and; not reviewing its case promptly following the lodging of an appeal as part of sensible on-going case management.
6. An enforcement notice can have the purpose of remedying the breach of planning control or remedying the harm to amenity. Whilst the notice does not state as such, its purpose is clearly the former; removal of the dormer would remedy the breach by restoring the land to its condition before the breach took place. Any lesser step would not remedy the breach, as the dormer would still be in situ. Development which exceeds permitted development entitlements has still been undertaken without planning permission, even if changes are later made which satisfy the relevant limitations and conditions by which permission would otherwise have been granted. The cladding subsequently applied to the rear elevation of the dwelling made little difference in terms of whether erecting the dormer was permitted. Therefore, I am not persuaded that the notice required any more than what would have been reasonable and necessary in the circumstances to remedy the breach specified.
7. I appreciate that the applicant had engaged with the Council prior to constructing the dormer. However, once a breach had been established the applicant declined to make a retrospective planning application by which the Council could have had the opportunity to impose appropriate conditions, for example regarding the use of suitable external materials. Moreover, the Council's written submissions show that it has carefully reviewed its case concerning the planning merits of the dormer in defending the appeal. That I found it necessary to impose a condition to make the dormer acceptable points firmly towards the breach not having been technical or trivial. Consequently, there is little to suggest that the Council's conclusions on the expediency of taking enforcement action were not well-founded. Withdrawing the notice without good reason would have exposed the Council to the risk of an award of costs being made against it on procedural grounds.
8. Where a 'fallback' position has been advanced, attributing the relative weight to it depends on the likelihood of that development taking place. Therefore, assessment of the fallback argument involved a significant element of judgement. The Council made submissions in support of its conclusion that the fallback position had not been adequately made out. An explanation was offered as to why it believed that there was no more than a theoretical prospect of the dormer being re-erected. The Council did not completely dismiss this aspect of the applicant's case at appeal. There was little to suggest that the Council either had a closed mind, or that it had failed to take sufficient account of relevant case law. It is entirely possible that the Council might have reached a different conclusion on this matter had for example, further drawings or details been provided of alternative external finishes which enabled a clearer comparison between the appearance of the dormer enforced against and that of a rebuilt structure.

9. Accordingly, whilst ultimately I did not share the Council's conclusions regarding the planning merits of the dormer, its case at appeal has nevertheless been substantiated. In particular, I have found little to suggest that the Council acted in a manner similar to the examples of unreasonable behaviour in the PPG referred to above relating to the substance of the case, or that as a result of this or in terms of the Council's actions prior to serving the notice the applicant has incurred wasted expenditure. 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