The Planning Inspectorate

Costs Decisions

Site visit made on 6 January 2023

by D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 4 April 2023

Application 1 in relation to Appeal Ref: APP/A2280/C/21/3274505
Application 2 in relation to Appeal Ref: APP/A2280/C/21/3274506
1 Dean Road, Strood, Kent ME2 3QH

- The applications are 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 applications are made by Mr David Watford (Application 1) and Mrs Kelly Watford (Application 2) for a full award of costs against Medway Council.
- The appeal was against an enforcement notice alleging without the benefit of planning permission the erection of a detached single storey dwelling to the rear of the Property.

Decision

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

Procedural Matter

2. It is not clear from the information before me as to whether the applicants are seeking a full or partial award of costs. However, given the substance of the applicants' case I consider that it is highly likely that they are seeking a full award.

Reasons

3. The Planning Practice Guidance (PPG) advises that parties in appeals should normally meet their own expenses. However, costs may be awarded where a party has behaved unreasonably and that behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Paragraph 032 of the PPG makes it clear that costs unrelated to the appeal are ineligible and awards cannot extend to compensation for indirect losses.

4. PPG paragraph 048 sets out where the handling of an enforcement notice prior to the appeal might lead to an award of costs. This states that Councils must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would either have meant there was no need to serve the notice in the first place or that would have ensured it was accurate. In relation to substantive matters, the PPG advises that a Council may be at risk of an award of costs for reasons including not reviewing their case promptly following the lodging of an appeal.

5. The applicants consider that it should have been apparent to the Council that what was alleged in the notice had not occurred, they also consider that the Council was unreasonable in; suggesting corrections to the enforcement notice at a late stage of the appeal process; not withdrawing the notice and stating

that the planning permission[1] granted in 2016 (the 2016 permission) was not extant.

6. The 2016 permission related to the construction of a detached single storey annexe building to the rear of 1 Dean Road (No 1). It was stated within the design and access statement submitted with the planning application that the annexe was to be used to house the father of one of the applicants. The approved drawings indicate that the annexe was to have a bedroom, bathroom, lounge and kitchen. Therefore, I acknowledge that the intention to use the building for a residential use was expressly made in that application. The 2016 permission was granted and condition 4 states that the development shall only be occupied ancillary to the main dwelling and shall not be occupied as a separate hereditament.

7. The Council have not provided any evidence of what investigations were carried out by the Council prior to the enforcement notice being issued. It appears that a Council Officer visited the site in the summer of 2019 and that she pointed out the differences in the design of the building to the applicants. However, it is not clear as to whether she saw the internal space of the building. The applicants tried to resolve the issue by submitting a drawing to the Council with the alterations shown in red pen on the approved plan. However, there is no record before me of any response to that submission or whether it was received by the Council.

8. There is no record of any other investigations carried out by the Council such as the issuing of a Planning Contravention Notice or any requests for information from other Council departments. I consider that even though the building from the outside has the appearance of a dwelling a cursory examination of the internal space would have made it clear that the building was incomplete and did not have facilities within it required for day-to-day private domestic existence.

9. I have found in my substantive decision that the erection of a dwelling has not occurred as a matter of fact taking into account relevant case law. In the applicants submitted appeal evidence in May 2021 their agent highlighted that the building had no basic facilities within it. The response of the Council within its Statement of Case is that an annexe has not been constructed as approved and that a dwelling has been erected and that a breach of condition could not be considered as there is no planning permission to which a breach of condition notice could be attached to. It goes onto state that the presence of a fence that has subdivided the garden of No 1 and the position of the windows and doors indicate that it would be readily severable from No 1. It also indicates that it is its view that a separate planning unit has been created. However, the enforcement notice only relates to the operational development of the building, not the fences and not a material change in use of the land.

10. It was not until the submission of the Statement of Common Ground in response to my Pre-Hearing Note that the Council conceded that it could be considered to have been slightly premature to refer to the development as a dwelling. It then suggested that the word 'dwelling' within section 3 of the notice could be substituted with the word 'building'. I acknowledge that on an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act

[1] Ref No: MC/15/4550

where the correction will not cause injustice to the appellant or local planning authority. Nevertheless, for the reasons given in my substantive decision that correction does not address the breach of planning control that has occurred.

11. In addition, the Council appears to have misunderstood the situation with regard to whether the 2016 permission was begun and the implications of deviation from that permission. I have found that the 2016 permission is extant and that the differences to the design of the building as a matter of fact and degree do not amount to material changes that have significant planning consequences. I have also found that the breach of planning control that has occurred is a breach of condition 2 of that permission. This could have been established if the Council had taken legal advice prior to the issue of the notice and may have led to the Council realising that it was open to them to issue a breach of condition notice.

12. They could also have taken legal advice after the appeal was lodged, especially as the matter was once again brought to their attention by the applicants' agent. The PPG advises that the Council should review their case promptly when an appeal is made as part of on-going sensible case management. The Council could have withdrawn the notice and issued a corrected notice. A costs application and award may have resulted from the enforcement notice being withdrawn but the early withdrawal of the notice would have minimised any potential costs award.

Conclusion

13. All the above leads me to conclude that the Council has acted unreasonably in issuing the enforcement notice subject of the appeal. The applicants have, therefore, been put to the unnecessary expense in making the appeals against the notice; preparing statements and evidence that specifically support their appeals and response to the reasons for issuing the notice; and making the costs applications. Accordingly, 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

14. 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 Medway Council shall pay to Mr and Mrs Watford, 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.

15. The applicants are now invited to submit to Medway 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.

D Boffin

INSPECTOR