



Costs Decision

Site visit made on 27 April 2023

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 June 2023

Costs application in relation to Appeal Ref: APP/L5810/X/22/3293972 22 Orchard Road, Twickenham TW1 1LY

- The application is made under the Town and Country Planning Act 1990, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr John Fletcher for a award of costs against Richmond Upon Thames London Borough Council.
- The appeal was against the refusal of a certificate of lawful use or development (LDC) for a proposal to repair the existing cellar, keeping its floor area and volume as existing. Installation of a flight of steps (in line with building regs) down from the kitchen to the cellar

Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may 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. Unreasonable behaviour in the context of an application for an award of costs may be either procedural, relating to the process, or substantive, relating to the issues arising from the merits of the appeal. The PPG also confirms that costs applications may relate to events before the appeal but costs that are unrelated to the appeal are ineligible. Costs awards in planning appeals do not follow the outcome of the case and so it is possible that an appeal may be dismissed but that the unsuccessful appellant may win an award of costs if the above conditions for an award have been demonstrated.

Unreasonable behaviour?

3. The application for the LDC was submitted following detailed discussions with Council planning officers during the processing of another application proposing a more substantial sub-terranean development. The applicant in an email to the then planning officer dated 26 May 2021 set-out some basic details of their review of the basement proposal to omit any extension but to repair the existing cellar, keeping its floor area and volume as is. However, it also stated that the existing primitive ladder would be replaced by installing a "flight of steps (in line with building regs), down from the kitchen to the cellar." Furthermore, that email referred to a plan being attached which had the same reference as that included in the subsequent LDC application.
4. The Council says that the plan is not possible to retrieve with the former planning officer's email. I am surprised by that given the importance of record keeping when a member of staff leaves a local authority's employment,

particularly when it is clearly in the public interest to explain on what basis advice has been given. However, it is to the Council's detriment in a situation such as this as they have no evidence that what the applicant is now suggesting is incorrect. On the balance of probability, it seems likely that the draft proposal in front of the planning officer when giving their advice included one of the same plans as was subsequently submitted.

5. The plan clearly showed that steps down would be proposed to access the basement from the kitchen. From just that plan however, it is not entirely clear that a void would be newly created under the kitchen floor. The additional plans with the LDC submission did clarify that and even then, it is not until viewing the site that I completely understood the proposal. I can therefore understand the Council's statement that it was not clear that excavation would be required when the advice was given. I can understand that any doubt in the planning officer's mind regarding how the plan could reasonably be interpreted may have been mistakenly clarified by the written description of the works by the applicant including the words "they are not an extension of the existing cellar and do not increase the usable space within the cellar or its floorspace". The officer did refer to s55(2) of the Act, as I have in my appeal decision. A reading of that along with the order taking away permitted development rights could perhaps have flagged up the need for further clarification. However, the submission and consideration of a formal proposal for a LDC is a way of overcoming such ambiguities and I return to that below.
6. The email advice from the planning officer also contains a caveat that it was their opinion and that it is without prejudice to any consideration that the Local Planning Authority may give to an application on this site in future. This is fairly standard practice in my experience. It does not mean however that the Council can be excused from the necessary care and attention that is needed in order to provide a service upon which people can rely. Having said that, it was also clearly written in fairly informal terms rather than purporting to be formal advice. It was also in the context of discussing the withdrawal of the planning application being processed at that time.
7. Furthermore, as I explain in the appeal decision, such correspondence from planning officers, however formally they are written, cannot change the legal basis upon which such determinations are made and could not authorise something that would, in law, require planning permission. The applicant took a sensible approach by submitting an application for a LDC because that is the only way of receiving such a formal determination. There can be no guarantee that the opinion of an individual officer will be the same as the outcome of that formal process.
8. From the point at which the LDC application was submitted, there was no obligation on the Council to accept revised plans or discuss alterations. There would seem to have been no purpose in doing so particularly as, fundamentally, there would be no way of adapting the proposal to not involve operational development nor to make it a permitted form of development given that such rights have been removed. Furthermore, once the decision was made, the appeal route is the usual way of challenging it.
9. The view of the planning officer prior to the submission of the LDC was not reached irrationally and although ultimately it involved giving incorrect advice, it was not a point of view that was reached unreasonably. Once the application

was submitted, the correct decision was made in my view with the officer report succinctly setting out why planning permission would be required. Additional plans were also available at that stage, to assist. I do not consider therefore that the processing of the LDC application or the way that the Council has defended its decision in the appeal has been unreasonable.

10. The submission of the incorrect Article 4 direction that related only to 'Flood Hazard Areas' which the appeal site does not fall within, does demonstrate insufficient care and attention to important detail in my view by the Council. This therefore involved unreasonable behaviour.

Wasted expense?

11. Following the advice from the planning officer, the applicant made an understandable decision to be cautious given the controversy that seems, from what I am told, to often surround any subterranean development. They sought confirmation of the planning officer's opinion via the LDC procedure. The procedure is there, in law, for that purpose in order to give a formal determination about such matters. This allows for a more calculated approach than is sometimes the case when a planning officer is responding less formally in an email and allows for consultations with colleagues. The Council's decision not to issue an LDC was, for reasons I set out in the appeal decision, correct. Much of the applicant's case in that appeal and in this application relate to matters that could not change that legal determination.
12. The submission of the incorrect Article 4 direction order did result in an email response from the applicant's professional advisers following some checking of the plan. I consider that a partial award of costs is therefore justified so that the applicant can claim back those costs alone.

Conclusion

13. The Council has behaved reasonably within the appeal proceedings apart from towards the very late stages when the wrong documentation was submitted. That directly resulted in additional time being spent on consideration of that information by the applicant's advisors and then additional correspondence.

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 Richmond Upon Thames London Borough Council shall pay to Mr John Fletcher, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in correspondence and communication about the appeals since 9 May 2023; such costs to be assessed in the Senior Courts Costs Office if not agreed.
15. The applicant is now invited to submit to Richmond Upon Thames London Borough 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.

Andy Harwood

INSPECTOR