



Costs Decision

Site Visit made on 16 August 2023

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 September 2023

Costs application in relation to Appeal Ref: APP/K5600/C/22/3312364 10 Rutland Mews South, London SW7 1NZ

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Claud Cecil Gurney of De Gournay LTD for a full award of costs against the Council of the Royal Borough of Kensington and Chelsea.
 - The appeal is against an enforcement notice in respect of without planning permission, the installation of solar panels at roof level.
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Decision

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

Reasons

2. The Planning Practice Guidance (the Guidance) 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. For an application to be successful, it needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. Parties in the appeal process are normally expected to meet their own expenses.
3. The applicant submits that the Council has acted unreasonably in its consideration of the appeal proposal and its pursuance of enforcement action in the manner outlined in paragraph 48 of the Guidance and paragraph 49 of the National Planning Policy Framework. This centres on two factors. The first is that the Council did not carry out adequate investigation before the notice was served, and secondly, that the Council has not engaged with the applicant since the notice was issued.
4. Paragraph 48 of the Guidance states that in relation to enforcement action, local planning authorities must carry out adequate prior investigation and that the local planning authority will be 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.
5. Also of relevance, despite not being referred to, is paragraph 32 of the Guidance which outlines that costs applications may relate to events before the appeal or other proceeding was brought, but costs that are unrelated to the appeal or other proceeding are ineligible.
6. Looking at the chronology of events around the notice being served, which I set out below, it seems to me that the merits of the solar panels on the roof have been explored by the Council over a period of around two years as a pre-application advice, a formal planning application and through the enforcement

- process, in which, the Council has investigated whether there has been a breach of planning control. Given the points made by the applicant in relation to a hidden ground (c), there had, as a matter of fact, been a breach of planning control from the solar panels on the roof of the appeal property.
7. The start of the process dates from January 2021 when the Council wrote to the owner/occupier of the appeal property relating to the installation of solar panels on the roof, noting that planning permission had not been sought or granted for this development. Within this same letter, a planning application was invited. In April 2021 the Council provided pre-application advice to the applicant outlining its initial view on the solar panels in place, and what, in the Council's opinion, might be considered acceptable.
 8. Planning permission was then refused on 1 June 2022. According to the Council, this scheme related to the solar panels in their current arrangement. The application was refused but there was dialogue between the case officer and the applicant's representative at the time with a view to arranging a site visit to discuss a way forward.
 9. Following the refusal of planning permission, an enforcement notice ("the first EN") was issued on 30 June 2022. This notice was appealed by the applicant, but the Council withdrew the notice on 12 August 2022 due to the inclusion of an incorrect case reference number. As a related event to the enforcement notice before me ("the third EN"), the incorrect reference on the first EN is unfortunate, but once the Council realised that there was an issue, the first EN was withdrawn. Even if expense was incurred by the applicant in lodging the appeal, I do not consider the Council's behaviour to be unreasonable.
 10. On the same day, the Council issued a second enforcement notice ("the second EN"). Between the first and second ENs being issued, there was dialogue between the applicant and the Council. The thrust of the dialogue centred around why the solar panels were not considered to be permitted development ("PD") when judged against Class A, Part 14, Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended) ("the GPDO").
 11. Consequently, the second EN was not just amended to correct the reference number as it included an additional requirement to *"remove and reconfigure the solar panels to comply with the conditions detailed in Class A, Part 14, Schedule 2 of the GPDO"*. The exact reason for including this requirement in the second EN is unclear, but correspondence indicates that it stems from points made by the applicant in their appeal statement concerning the first EN. Whether that was right or not, it shows that, at least, the Council was seeking to find a resolution and was listening to what the applicant had to say.
 12. The second EN was appealed by the applicant, but this notice was withdrawn by the Council on 26 October 2022. The Council's reason was that it would not have been possible to comply with the third requirement of the notice, namely the one referring to the GPDO. The Council's decision to withdraw the second EN came after a site meeting on 5 October 2022 and its subsequent advice on 25 October 2022 which set out why the solar panels installed on the flat roof would not, in their view, accord with the GPDO and be PD.
 13. However, the consideration of whether the solar panels did or did not meet the terms of the GPDO was explored by the Council in April 2021. It was not new. Although that earlier advice refers to 20 solar panels and subsequent evidence

refers to 18, their height, which has not been disputed to be above the threshold to be considered to be PD, nor the appeal property's flat roof had changed between April 2021 and October 2022 based on the Council's own work. Therefore, the Council ought to have been cognisant of the issue and could have ensured the second EN's requirements were accurate.

14. On 26 October 2022 a third EN was issued. That notice was appealed against and that is the appeal before me, but prior to doing so, the applicant sought to engage with the Council to continue discussions about why the Council considered the solar panels on the roof were not PD. No reply was received by the applicant based on the documents before me, and the applicant chased a reply on three occasions before lodging the appeal.
15. As part of its appeal submissions, the Council articulated why the solar panels in situ are not PD and outlined its view about their planning merits. It also explained its position about the ground (f) case made by the applicant.
16. The Council does not refute that it did not engage with the applicant after the third EN and its advice on 25 October were issued. Instead, it says that the applicant could have sought follow-up advice if they wished. I am mindful that dialogue has taken place between the two parties over a period of roughly two years. It also seems to me that the parties' views on whether the solar panels were PD or not had reached a point whereby agreement probably would not be found. So, while the Council did not respond to the applicant, given the situation and previous advice, I do not consider that unnecessary or wasted expense has been caused in this regard, even if I were to consider the Council's actions to amount to unreasonable behaviour. This is because an appeal would still have occurred due to the difference in view on the matters at hand.
17. Stepping back, I consider that the Council has, for the most part, adequately investigated the breach of planning control that is the same in each of the enforcement notices. Be as that may, they are related events, particularly as the second and third ENs were issued on the same days that the first and second ENs were withdrawn. Each notice has been appealed on the same grounds, yet the Council's actions in respect of the requirement in the second EN and its subsequent advice which its position is now based on are inconsistent. The Council should have ensured the second EN's requirement was accurate, especially given the height of the solar panels were above the PD threshold; a matter set out by the Council in its advice a year earlier.
18. For a change of mind to come about a matter of weeks later is unreasonable behaviour when the circumstances do not seem to have changed. Despite the merits of doing so, the applicant had incurred costs in submitting their appeal against the second EN. Given the overlap between the second and third ENs and the Council's actions in relation to both events, I consider that greater diligence on behalf of the Council would have ensured the second EN was accurate, and that then did not lead to the third EN being necessary.
19. The applicant says that the inclusion of an alternative requirement in the notice would have enabled a solution to be negotiated without needing to appeal. The purpose of the notice was to remedy the breach of planning control. That is in the public interest. It has been open to the applicant to take on board and respond to the Council's advice, which seems to have been consistent about the planning merits of the solar panels, to achieve a satisfactory solution without the need for an enforcement notice. The Council has not acted

unreasonably through not including some unknown solution to be negotiated. The fact that planning permission was later granted for an alternative scheme does not change this.

20. For the reasons set out, the Council has, in the main, adequately investigated the breach of planning control set out in the three enforcement notices that all relate to the same property and the same development. Due to the Council's actions in respect of the second EN, which link to the reason for the third EN, the appeal against the second EN could have been avoided if that notice was accurate. So, while I am of the view that the application for a full award of costs should fail, the applicant has incurred unnecessary and wasted expense in the appeal process due to the Council's unreasonable behaviour relating to the second EN.

Conclusion

21. I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated. As a result, a partial award of costs is warranted in this case.

Costs Order

22. 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 Council of the Royal Borough of Kensington and Chelsea shall pay to Mr Claud Cecil Gurney of De Gournay LTD, the partial costs of the appeal proceedings limited to those incurred in relation to the second EN until that notice was withdrawn; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to the Council of the Royal Borough of Kensington and Chelsea, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andrew McGlone

INSPECTOR