



Costs Decisions

Site visit made on 14 September 2023

by **D Hartley BA(Hons) MTP MBA MRTPI**

Decision date: 22ND SEPTEMBER 2023

Costs applications in relation to Appeal Ref: APP/M2270/C/22/3305147 Land at 72 Camden Road, Royal Tunbridge Wells, Kent TN1 2QP

- 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).
 - Application A is made by Epic Capital UK Limited for a full award of costs against Tunbridge Wells Borough Council and Application B is made by Tunbridge Wells Council for a full award of costs against Epic Capital UK Limited.
 - The appeal was against an enforcement notice alleging the material change of use of the front part of the ground floor and entire basement to a self-contained flat.
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Decisions

Application A

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

Application B

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

Reasons

3. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably, and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.

Case made by Applicant A

4. In respect of Application A, the applicant states that the local planning authority (LPA) has failed to accord with paragraph 59 of the National Planning Policy Framework 2023 (the Framework) which states that '*enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control*'.
5. The view expressed is that the LPA has not been proportionate in so far that action has been taken on a procedural matter and not on substantive grounds. Concern is raised that the LPA has not considered the rights of occupiers of the building in the form of Article 8 of the European Convention on Human Rights, as incorporated into the Human Rights Act 1998 (HRA), and that there is no legal basis for the LPA's claim that permitted development rights cannot be exercised retrospectively.

Case made by Applicant B

6. In respect of Application B, the LPA comments that Epic Capital UK Limited lodged the appeal (particularly the appeals on grounds (b), (c) and (d)) in the full knowledge that the development was not permitted development and hence planning permission was required. The LPA claim that a ground (a) appeal was unreasonably pursued in the knowledge that a similar appeal under section 78 of the Town and Country Planning Act was considered and dismissed 18 months earlier: this included an assessment of a very similar proposal in the context of development at 116 Camden Road.
7. It is stated that planning policies have been misinterpreted and that the ground (e) appeal was baseless as a copy of the enforcement notice was served on Epic Capital UK Limited. The LPA also comments that the ground (f) appeal is unreasonably made as it suggests that the enforcement notice is seeking to reverse internal refurbishment works when it is not. The LPA also suggests that Epic Capital UK Limited has included incoherent emails and an attached document from 16 September 2022 onwards which include non-planning matters.
8. A pre-arranged accompanied site visit took place on 14 September 2023. While representatives from the LPA were in attendance, the appellant did not turn up. At my request, the LPA contacted the appellant by telephone while I was on the site visit to find out where he or a representative was. In response, the appellant commented that he refused to attend the site visit and that instead he wanted to pursue judicial review proceedings. The LPA considers that this action amounted to unreasonable behaviour resulting in it wasting time and expense in the appeal process.

Application A

9. While it is open to the LPA to determine whether it is expedient to take enforcement action, the evidence is such that the breach of planning control was not permitted development and that it was reasonable and proportionate to take enforcement action given the clear and substantiated concerns expressed in terms of living conditions and character and appearance matters. It is not the case that the LPA acted on solely a procedural matter. The evidence is that the LPA acted because it considered that it was expedient to do so, in the knowledge that planning permission was required for the breach of planning control and owing to identified planning harm.
10. The applicant provides no reasonable or credible evidence to support the contention that there is any conflict with paragraph 59 of the Framework. While the development that was the subject of the previous appeal made under section 78 of the Town and Country Planning Act is not exactly the same to the development which is the subject of the enforcement appeal, the issues raised and considered were very similar. It is not surprising that in view of the conclusions reached by the previous Inspector, the LPA reasonably took the view that it was expedient to take enforcement action.
11. I have considered the officer report that led to a decision being made that it was expedient to take enforcement action as well as the statement of case prepared by the LPA. The officer report does not in itself specifically refer to rights under the HRA and nor does it consider the LPA's housing undersupply position and hence the engagement of paragraph 11d of the Framework. Given

the officer report, I cannot be certain if the LPA did consider housing undersupply and HRA matters. However, these matters are explicitly referenced and weighed in the balance in terms of the LPA's appeal statement of case. In this regard, I am satisfied that the LPA has reasonably substantiated its decision to take enforcement action and, as part of the appeal, has reasonably weighed in the balance the HRA and the undisputed housing undersupply position.

12. For the above reasons, I conclude that the LPA has not displayed unreasonable behaviour resulting in Epic Capital UK Limited being put to wasted time and expense in pursuing the appeal. Therefore, an award of costs is not justified.

Application B

13. The enforcement notice was issued on 28 July 2022. However, the LPA communicated with the applicant (including sending a copy of the relevant legislation) in so far as making it clear that the development was not permitted development. This communication took place in February 2022 and hence prior to the enforcement notice being issued. It is clear from the evidence that the applicant fully understood why the breach of planning control was not permitted development.
14. Despite the above clarity, the applicant appealed on grounds (b), (c) and (d) based on the breach of planning control being permitted development. This is in fact only a ground (c) appeal matter and so the grounds (b) and (d) appeals were not reasonably substantiated. In fact, the ground (c) appeal was not reasonably made and substantiated given the clarity provided by the LPA in February 2022. Indeed, the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) states clearly that a prior approval application should have been made prior to the development beginning. This did not happen and so planning permission was required for the development.
15. The evidence is that the applicant pursued the grounds (b), (c) and (d) appeals unreasonably. This appears to be based on comments made on 16 March 2022 where the applicant stated that *'I disagree with your interpretation of the legislation which runs completely contrary to what Parliament intended and flies in the face of the notion of permitted development'*. It is not reasonable to pursue an appeal based on what is alleged as *'Parliament intended'*. In addition, the applicant does not specifically interpret the wording of the class of permitted development in a different way to the LPA. A ground (c) appeal should be pursued based on whether the matters alleged constituted a breach of planning control. Furthermore, and, in any event, I cannot imagine that it was the intention of Parliament to allow unauthorised development to take place in the absence of first applying for prior approval.
16. In respect of the ground (a) appeal and the deemed planning application, I do not find that the applicant has reasonably considered the comments made by the previous Inspector who considered similar (albeit not identical) development under section 78 of the Town and Country Planning Act. Such an Inspector made some very clear findings about main issues that also formed the basis of the ground (a) appeal. I do not find that the appellant reasonably considered the previous appeal decision, as a material planning consideration, in seeking planning permission under this ground of appeal. Furthermore, it is noteworthy that the previous Inspector provided clear reasoning about 116

Camden Road as part of the consideration of the planning merits of such a proposal and, again, this was not reasonably considered by the appellant.

17. I also agree with the LPA that the ground (e) appeal was unreasonably pursued as the evidence indicates that a copy of the enforcement notice was served on Epic Capital UK Limited. Furthermore, the representative of Epic Capital UK Limited was clearly aware that the enforcement notice had been issued as an appeal was lodged by this company. Furthermore, I agree with the LPA that the ground (f) appeal was unreasonably made as the evidence is that the enforcement notice was not seeking to reverse internal refurbishment works. Furthermore, several matters have been raised by the applicant that are not directly relevant to the grounds of appeal.
18. The applicant did not attend the accompanied site visit on 14 September 2023. The reason given for not attending the site visit was that the appellant '*wanted to pursue judicial review proceedings.*' This comment has not been reasonably substantiated, particularly in the context that a site visit would have been needed in association with the choice of any appeal procedure. The applicant appears to accept that there has been some wasted time and expense on behalf of the LPA as he states, in respect of this matter, '*we understand that the Council may have incurred some expenses, this is trivial in the context of its inflated budget.*'
19. I find that the failure to reasonably facilitate or attend the above accompanied site visit resulted in wasted time and expense for the LPA and without reasonable explanation. The extent of the Council's budget is of no relevance in deciding whether unreasonable behaviour has occurred leading to wasted time and expense in the appeal process. In respect of the accompanied site visit on 14 September 2023, I find that the appellant did display unreasonable behaviour leading to LPA wasted time and expense in the appeal process.
20. While the applicant does not appear to have had reasonable regard to paragraph 219 of the Framework, the relevant development plan policies are, in any event, deemed out of date owing to the LPA's housing undersupply position. Indeed, paragraph 11d of the Framework is triggered. While the appellant's approach to considering local and national development plan policies is not accurate, this has not in itself led to wasted time and expense in the appeal process.
21. Notwithstanding the above, and, for the reasons outlined, when considered as a whole, the appellant's appeal was a hopeless one. I conclude that Epic Capital UK Limited has displayed unreasonable behaviour resulting in the LPA being put to wasted time and expense in responding to the appeal. Therefore, a full award of costs is justified.

Costs Order – Application B

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 Epic Capital UK Limited shall pay to Tunbridge Wells Borough Council, the full costs of the appeal proceedings, such costs to be assessed in the Senior Courts Costs Centre if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision.

23. Tunbridge Wells Borough Council is now invited to submit to Epic Capital UK Limited, 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 Hartley

INSPECTOR