

Costs Decision

Site visit made on 18 September 2023

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 19th October 2023

Costs application in relation to Appeal Ref: APP/U5930/X/22/3291626 18 Rosslyn Avenue, Chingford E4 6DX

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Ms Ceyda Kulah for a full award of costs against the Council of the London Borough of Waltham Forest.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development (LDC) for demolition of existing single storey side extension and erection of new single storey side extension.
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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 (PPG) says 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.
3. The applicant says that the Council has behaved unreasonably because it failed to determine the LDC within the statutory determination period. She also points to 'imaginative arguments' made by the Council during the appeal process in resisting the proposal, which she says are wholly unjustifiable, misdirected and patently incorrect.

Failure to determine

4. The PPG says¹ that if it is clear that the local planning authority will fail to determine an application within the time limits, it should give the applicant a proper explanation.
5. The statutory deadline was 17 January 2022. I have seen no evidence that the Council gave a proper explanation to the applicant before that date when it became apparent that the time limit would be exceeded. A brief explanation² was given by the case officer by email on 19 January 2022, after the deadline, when a determination was chased by the applicant's agent. While that explanation has some credibility, given the complex planning history of the site (including an enforcement notice, an enforcement appeal and a High Court Challenge), there is no good reason why it – and also the request for further information in that email – couldn't have been made within the time limit.

¹ Paragraph: 048 Reference ID: 16-048-20140306

² 'Apologies but we are still reviewing this application and seeking advice in regards to the application. As you're aware there is quite a history to delve into as well as legal cases.'

6. This constituted unreasonable behaviour on the part of the Council. However, as the Council has resisted the application upon appeal with a number of reasons why it considers the LDC should not be granted, it seems to me that those same reasons would have been given by notice to the applicant had there been no failure to determine the application. Presumably the applicant would then have appealed with the same counter-arguments that I have considered in my Decision on the non-determination appeal.
7. Therefore, as an appeal would have been made against the Council's reasons for opposing the LDC in any event, I do not think that the Council's tardiness and late communications of themselves has caused the applicant to suffer wasted or unnecessary expense. Rather, it is more pertinent as to whether the Council's reasons for opposing the LDC were so unjustified in substance to the extent that it was unreasonable behaviour to refuse it and resist an appeal to which the applicant was put to unnecessary expense.

Substance

8. The PPG advises³ that local planning authorities are at risk of a substantive award of costs if they behave unreasonably with respect to the substance of the matter under appeal by unreasonably refusing or failing to determine applications, or by unreasonably defending appeals. It gives an example of preventing or delaying development which should clearly be permitted.
9. The LDC application should clearly have been granted as development permitted by The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ('the GPDO'). The proposal in its design dealt coherently with the reasons why the Inspector determining the enforcement appeal in 2021, upheld by the High Court, considered the extension in place at that time to fall short of compliance with the GPDO.
10. However, the Council did not determine the application and resisted the appeal on arguments which were unreasonably weak in substance, tenuous and in some cases clearly undermined by documentation the Council had itself provided to the applicant. For example:
 - it was perverse to argue that the replacement of an unlawful extension (which did not benefit from planning permission under the GPDO or otherwise) with lawful permitted development (the appeal proposal) would be an unlawful act by way of the reinstatement of the former;
 - arguments made about the legal implications of features of the dwellinghouse, including the dormer roof extension and the position of the original walls, were quickly punctured when the applicant provided copies of communications and documents (including plans) derived from council officers which neutralised the Council's own points;
 - the Council made an argument about the width of the original dwellinghouse, selecting the narrowest measurement from the plans rather than the widest part of the dwelling, when it should have known that the common guidance⁴ indicated use of the latter for determination of compliance under that part of the GPDO; and

³ Paragraph: 049 Reference ID: 16-049-20140306

⁴ *Permitted development rights for householders - Technical Guidance* (2019); Ministry of Housing, Communities and Local Government; p23: "The width of the original house should be calculated at its widest point".

- rather than apply the aforementioned guidance (including diagrams) at face value as regards the joining of extensions, the Council chose to argue that a gap between extensions in the appeal proposal was a 'sham' and did not count. No authority for this particular interpretation of the GPDO was submitted other than 2 appeal decisions⁵. These were attached as appendices to the Council's appeal statement without any serious attempt at objective comparative analysis with the appeal proposal. It was quickly apparent on reading the appeal decisions that they were not materially similar factual circumstances to the case before me, concerned with very small gaps with no design or functional purpose as opposed to a considerably larger gap to be used as a thoroughfare.
11. 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 as the applicant was put to the expense of making an appeal that should not have been necessary.
12. On a final point, the Council rather pejoratively states that the applicant has a "lack of 'clean hands'" because of the various applications and appeals that she has made. However, while the Council makes no costs claim itself around this allegation, it is not unreasonable behaviour for an individual to seek to obtain lawfulness of a development (existing or proposed) through the mechanisms that Parliament has provided. That includes applications made at the same time as an appeal process, and I do not agree that it amounts to "undue pressure" as attributed by the Council.

Costs Order

13. 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 London Borough of Waltham Forest shall pay to Ms Ceyda Kulah, 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.
14. The applicant is now invited to submit to the London Borough of Waltham Forest 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 Walker

INSPECTOR

⁵ APP/Y1945/X/16/3151883; APP/J0350/D/17/3183507