Costs Decision

Site visit made on 17 November 2015

by Simon Hand MA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 27 November 2015

Costs application in relation to Appeal Ref: APP/X5210/X/15/3006433
45 Redington Road, London, NW3 7RA

- 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 Mr Shimshon Torn-Hibler for a full award of costs against the Council of the London Borough of Camden.
- The appeal was against the refusal of a certificate of lawful use or development for the installation of a swimming pool on the lower ground floor.

Decision

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

The Case for the Applicant

2. The appellant argues that the swimming pool is expressly permitted under Class A and E and the Council failed to substantiate any reasons for refusing the LDC. The Council also failed to determine like applications in the same way. Finally they delayed the appellant by not providing the information they should have.

The Case for the Council

3. The Council respond that the cases were considered in the same way and their professional opinion was that the engineering works proposed took the swimming pool beyond the scope of Class A. As to the information the Council sent in the questionnaire to the Inspectorate and it is not usual for them to copy it to the appellant.

Reasons

4. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party who have behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

5. The Council did have several reasons for refusing the LDC. They found reasons to consider it was outwith both Class A and E and also that it was beyond the scope of Class A altogether. In terms of Class E, the application of this Class to a basement swimming pool is not obvious or straightforward and I consider their view that the proposal was contrary to E.1(d) was not inherently unreasonable. As to Class A the Council had already found the basement was within the limits of Class A and had issued a LDC to that effect. However they

still opposed the development as it breached one of the Class A limitations. I consider this was unreasonable as it was not founded on a reasonable interpretation of the limitation in question which clearly had nothing to do with the development proposed.

6. The Council's main opposition however was based on their view that the works comprised engineering works which were not permitted under Class A at all. This came from a legal opinion that was submitted by opponents of a basement scheme at 24 Quadrant Grove. That application was refused as was this case on the same grounds. A further case at Mackeson Road went to appeal against non-determination but would have been refused on the same grounds and the appeal decision was not issued until August this year. At the time the Redington Road application was being considered by the Council the Mackeson Road appeal decision was still awaited. The Council wanted to wait until they heard the outcome of that appeal before determining the Redington Road application. In the event they did not do so, although there appeared to be no explanation why, and issued the refusal. However, in the officer's report to committee the Council referred in detail to a decision at 17 Wadham Gardens. This application seems to have been made in November 2014 and was being determined about the same time as Redington Road. The appellant was confused as there is no mention of Redington Road in the substance of the report. It appears to be mistakenly comparing Quadrant Road to Wadham Gardens instead. In fact as the appellant points out a lot of the report is a straight copy from the original Wadham Gardens Report.

7. It seems to me, based on the evidence provided for the appeal and the costs claim that the Council had up until the summer of 2014 considered basement cases to be Class A, and the officers had recommended both Quadrant and Mackeson Road for approval. It was the legal opinion provided by the opponents of Quadrant Road that gave the Committee a reason to refuse that proposal and subsequently those at Wadham Gardens and Redington Road. In this evolving policy context one decision was used as precedent to support the next. Hence the emphasis on Wadham Gardens in the Redington Road report.

8. The appellant however argues that this application was not similar to the others at all. They all involved excavations to create new basements. In this case there was already a basement and its extension had already been deemed to be lawful. It was also different as much of the basement was not underground because of the slope of the land and so was in reality a ground floor. According to the appellant it followed that introducing a swimming pool into a lawful basement that is half ground floor is entirely different from creating a new completely subterranean basement in the first place.

9. Here I agree with the appellant. The Council do not seem to have addressed the obvious differences between this application and the others. The legal opinion referred only to Class A and no mention appears to have been made to Class E and the effect that would have on the question of the provision of a swimming pool. Indeed had there been a discussion of Class E it might have given pause to the wholesale acceptance of the legal opinion, as Class E clearly allows for a considerable amount of excavation for the construction of swimming pools, despite no mention being made of "engineering works" in that Class. The Class E argument appears to have been first made in the appeal statement. There is no analysis in the officer's report why Quadrant Road and Wadham Gardens were analogous to Redington Road. As mentioned above the

report appears to be largely copied from Wadham Gardens when the two proposals had significant differences. In the report the officer states in reference to Quadrant Road "since the proposed basement works would require the involvement of a qualified civil or structural engineer, the works would constitute an engineering operation and in line with the Gwion Lewis opinion, the application should be refused". If this indeed what the committee said then it is clearly wrong. Many ordinary extensions permitted under Class A will require input from a qualified civil engineer and all can still benefit from permitted development rights granted by Class A or other Classes in Part 1. There was no consideration as to whether the excavation of the swimming pool in the basement was engineering works in the first place. The Council seem to have operated on the basis that any digging under the ground was engineering works and no engineering works were allowed by any Class in Part 1 of the GPDO. The Council seem to have extrapolated this from the Gwion Lewis opinion which contradicted their own legal advice and was not from a neutral observer but was provided in order to advance the interests of opponents of basement extensions. Nowhere do they explain why the basement extension at Redington Road was lawful when the swimming pool was not.

10. Consequently, I consider the Council did act unreasonably. Had they approached this application properly, differentiated it from the other applications, considered the implications of Class E and the relevance of the legal opinion in that context they should have come to the view the application for a LDC was well founded and should have been granted. They had ample opportunities to do so and several e-mails from the appellants' agent clearly spelled out the issues and why the cases were different, none of which were addressed by the Council. This is setting aside the question of whether the legal opinion itself was capable of supporting the weight the Council were placing on it.

Conclusion

11. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense as described in the PPG has been demonstrated and a full award of costs is justified.

Costs Order

12. 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 Camden shall pay to Mr Shimshon Torn-Hibler, the costs of the appeal proceedings described in the heading of this decision. Such costs to be assessed in the Senior Courts Office if not agreed.

13. The applicant is now invited to submit to the 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Simon Hand

Inspector