The Planning Inspectorate

Costs Decision

Site visit made on 30 September 2016

by John Whalley

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

Decision date: 7 October 2016

Application relating to Enforcement Notice appeals - refs: APP/X5210/C/16/3145106, /07, /08, /09, /10; Planning application appeal – ref: APP/X5210/W/16/3144970
Land at Merton House, Merton Lane, London N6 6NA

- The application was made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application was made by Mr Richard Auterac.
- The site inspection was in connection with appeals made by Mr Richard Auterac against an enforcement notice issued by the London Borough of Camden Council and against the decision by the Council to refuse an application to discharge a condition on a planning permission.

Summary of decision: No award of costs is made

Submissions made by Mr Richard Auterac

1. Mr Auterac, the Appellant, sought a full award of costs against the London Borough of Camden Council in relation his appeal against the refusal to grant planning permission for the hard and soft landscaping and boundary treatment at Merton House (Condition 3) and in relation to the enforcement notice against the boundary treatment.

2. As to procedural matters, the planning officer had not divulged all the pertinent information to his superiors when writing his delegated report. Had that information been provided, planning permission should not have been refused and enforcement action need not have arisen.

3. There were 3 areas that should have been properly addressed:

    1) The Council's officer did not address the fact that the details of the front wall and railings had been previously approved with drawing 93-014 under application 2013/2999/P. At that time, the case officer's delegated report specifically addressed the issue of the front boundary treatment, recording that "iron railing on top of the existing brick wall to the front are considered to be acceptable, and therefore is considered to preserve and enhance the character and appearance of the conservation area.".

    2) That oversight apart, the officer mistakenly referred to the fact that under permitted development rights, the replacement boundary treatment could only be 1.0m high. However, Class A (gates, fences, walls, etc), Part 2 (Minor operations) of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 permitted the owner to maintain, improve or alter the means of enclosure provided it did not exceed the former height of the means of

enclosure. The officer failed to draw his superior's attention to the fact that the plans submitted with the original application 2010/2460/P showed the existing boundary treatment being a wall with a fence above. That was considerably higher than the 1.0m that the officer's report contended was all that was permitted.

3) The officer failed to consider a relevant planning decision that had been granted only a few years previously on the property immediately adjacent to the appeal property, (ref: 2008/5842/P for No. 35 Highgate West Hill with a 1.5m wall and 1.1m railings above). Rather, the officer considered railings to be an alien feature, despite that erected to the neighbouring property. He had also referred to the character of the area being "a soft-landscaped character with numerous mature trees" with no adequate consideration of the multiplicity of boundary treatments in the immediate vicinity.

4. If the officer had been more diligent in his investigation, it should not have been necessary to take enforcement action. Whilst the above 3 reasons were procedural reasons for an award of costs, they also represented substantive reasons, since they demonstrated that:

a) the Council failed to grant a further planning permission (ref:2015/6310/P the discharge of condition 3) for a scheme that already had planning permission, ref: 2013/2999/P;

b) the Council failed to determine similar cases in a consistent manner (ref: 2008/5842/P for No. 35 Highgate West Hill); and

c) the Council provided generalised and inaccurate assertions in the officer's report, which were unsupported by any objective analysis.

Response by the London Borough of Camden Council

5. The Council responded to the 3 points raised.

6. Point 1: The drawing referred to by the Applicant, No. 93-014, approved under planning permission 2013/2999/P, was a drawing showing the line of the front boundary, but not its height. It did not support retention of works higher than the permitted development limit of 1m adjacent to a highway.

7. Point 2: Within planning permission 2010/2460/P there was no indication of an existing wall or fence higher than the 0.8m/0.9m brick wall. The approved plans did not indicate a front boundary fence over that height. An approval of details application was required by condition to assess any proposed boundary treatments. The relevant details were subsequently approved under ref. 2013/2999/P. Approved drawing No. 93-014 indicated the line, but not the height, of the front boundary. It was clear from the approved drawing that a front boundary higher than 0.8m or 0.9m had not been approved.

8. Point 3: Highgate West Hill, while it connected to Merton Lane, was a different context with a different character. It was a main road, heavily trafficked and commercial in places. By contrast, Merton Lane was a quiet, generously-greened residential laneway leading to Hampstead Heath. While both streets were in the same Conservation Area, it was inaccurate and misleading to treat Highgate West Hill and Merton Lane as if they were of similar character.

9. A Breach of Condition Notice was issued on 4 August 2015, (ref: EN15/0370),

for failure by the owner to comply with Condition 3 of application 2010/2460/P, (Landscaping). Despite that, there was constructive co-operation and dialogue between the Council, the owner and the owner's planning agent. In July 2015 the agent agreed to a reduction of the front boundary to 1.1m total height.

10. Council officers agreed not to take enforcement action on the unauthorised front boundary works. That was on the basis that its height reduction would be carried out in September 2015, as agreed. Despite the constructive and pro-active efforts of its officers, the Council now found itself involved in the appeal because of the failure by the owner to carry out the reduction of the front boundary height as agreed. Based on the behaviour of the owner and his failure to remove the unauthorised works, enforcement action was necessary.

11. If the owner thought the fence he had erected was lawful, he could have submitted an application for a Lawful Development Certificate. The Applicant had failed to identify any error, inconsistency or unreasonableness by the Council that caused him wasted expense.

Considerations

12. I have considered this application for costs in the light of the Department for Communities and Local Government, (DCLG), Planning Practice Guidance, (PPG), 6 March 2014 and all the relevant circumstances. In relation to Appeals – The Award of Costs – General; paragraph 030 of the Guidance says: "*Costs may be awarded where a party has behaved unreasonably; and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.*".

13. Para. 029 of the PPG says: "Parties in planning appeals and other planning proceedings normally meet their own expenses. The aim of the costs regime is to:
    - *encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case.".*

14. On the first procedural point raised by the Applicant - the approval by the Council of drawing 93-014 with application 2013/2999/P - both parties fell short. The drawing showed a photograph of metal rail fencing. But it did not to show its height. That was a fundamental omission. The 2013/2999/P approval that followed was likely to be subject to misconstruction. The approval was not for a fence to any height the owner might choose. Nor did it restrict to the height of fencing to the permitted development limit. The matter was incapable of satisfactory resolution without further application or agreement. Because the subsequent application, the subject of appeal ref: APP/X5210/W/16/3144970, was for a substantially different fence to the frontage of Merton House, possible misunderstandings arising from the 2013/2999/P approval became less significant.

15. The second point related to what the Applicant said was the Council's incorrect interpretation of permitted development rights to maintain, improve or alter the front fencing to Merton House. However, the complaint about the Council's behaviour amounted to mere disagreement over the application of

Class A, Part 2 of Schedule 2 of the General Permitted Development Order. The Applicant's case on the lawfulness of the fencing was relevant, but ultimately unconvincing.

16. The third point dealt with the planning merits of retaining the metal railing fencing. Both parties' cases were pertinent. If one side's case is thought unpersuasive by the other, that alone is not indicative of unreasonable behaviour.

17. None of the above showed the Council to have behaved so unreasonably as to cause the Applicant to incur unnecessarily expenditure. I do not agree with the Applicant's assertion that the planning officer's action led to an unnecessary refusal or enforcement action. I found the appeal fencing to be in breach of planning control and that its retention should not be permitted.

18. As to the Applicant's claim against the Council on the substantive matters, a) regarding the Council refusal to grant a further planning permission (ref: 2015/6310/P the discharge of condition 3) for a scheme the Applicant said already had planning permission, (ref: 2013/2999/P), the proposals in relation to the fences to the road side were not the same. The Council seemed to assume that the metal railing fencing was to be no higher than 1m. It was to be over 2m high in the second, refused, scheme. Both parties here were somewhat remiss; the Applicant in not stating the proposed height of the fence; the Council assuming it was no more than 1m high.

19. The other 2 matters raised went to the Council's consideration and decision on the planning merits of the proposed 2015/6310/P application scheme. Whatever the criticism of the Council's approach, I found in their favour on the demerit of retaining the fencing and refused to grant planning permission.

20. The enforcement notice's allegation described, "front boundary fencing". The deemed ground (a) application arising from that description of the breach of planning control was therefore for the retention of the entire fence. The notice's plan did not delineate any length of fencing complained of. It was unclear whether the omission of a requirement to remove the timber fencing was deliberate under-enforcement, whether the Council thought it permitted development or just untroubled by it. The application for the approval of landscape details that led to the s.78 appeal included details for the metal railing and the timber panel fencing. The reasons for refusing the application made no mention of the timber fencing. As the Council's statement on the s.78 appeal was submitted out of time and returned unread, the Council's views on the timber fencing remained obscure.

21. There were inconsistencies by both parties. The road facing fencing to Merton House built and as proposed by the 2015/6310/P application was not that shown in the 2013/2999/P approved layout. The 2013/2999/P approved layout failed to show the height of fencing. The Council's enforcement notice was flawed. The 2015/6310/P fencing proposals required planning permission. They were unacceptable. Amid these deficiencies, it is hard to see how any particular action by Council amounted to behaviour that justifies an award of costs against them.

Conclusion

22. Unreasonable behaviour by the London Borough of Camden Council resulting in Mr Richard Auterac incurring unnecessary expense, as described in paras. 046 to 049 in the section headed Appeals – The Award of Costs – National Planning Policy Framework; Planning Practice Guidance, was not shown in relation to the matters connected with the appeals made against an enforcement notice issued by the London Borough of Camden Council and against the decision by the Council to refuse an application to discharge condition 3 on planning permission 2010/2460/P dated 7 September 2010.

COSTS ORDER

23. No order as to costs is made.

John Whalley

INSPECTOR