Directorate for Planning and Environmental Appeals

Claim for an Award of Expenses Decision Notice

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The Scottish Government

Decision by Malcolm Mahony, a Reporter appointed by the Scottish Ministers

- Appeal reference: CLUD-290-2000
- Site address: Loanview House, Lang Loan, Straiton EH20 9QT
- Claim for expenses by Midlothian Council against the appellants, Mr and Mrs McGlynn
- Date of inquiry: 3-4 October 2012

Date of decision: 15 November 2012

Decision

I find that the appellants have acted in an unreasonable manner resulting in liability for expenses. Accordingly, in exercise of the powers delegated to me and conferred by section 265(9) as read with section 266(2) of the Town and Country Planning (Scotland) Act 1997, I find the appellants liable to the council in respect of those elements of the expenses of the public local inquiry relating to their unreasonable conduct in the appeal as described in paragraph 20 below. Normally parties are expected to agree expenses between themselves. However, if this is unsuccessful, I remit the account of expenses to the Auditor of the Court of Session to decide on a party/party basis. If requested, I shall make an order under section 265(9) read with section 266 of the Town and Country Planning (Scotland) Act 1997.

Reasoning

1. The claim was made at the appropriate stage of the proceedings.

Case for the council

2. The appellants had submitted that their occupation of Loanview House had become immune from enforcement after 4 years because it consisted in a change of use to a single dwellinghouse in breach of planning control. A procedure notice set out matters to be considered at an inquiry session including clarification of that submission. As the house seemed never to have been designed or intended for any other use, or used otherwise than for residential occupation, it was not apparent what change of use was being alleged. The appellants' statement of case did not provide any substantial support for this claim in law. The council claims costs which it incurred in examining that issue.

3. The appellants produced two additional affidavits after the deadline for production of evidence had elapsed. The council had to have additional consultation in relation to these new items of evidence. At the inquiry, the appellants produced evidence about an electricity bill – a bill which had not previously been submitted. It required further investigation and the appellants' interpretation of it turned out to be misleading. The council claims these additional costs.

4. The appellants changed their story of the occupation of Loanview House substantially between the application and the appeal and inquiry. It amounts to an entirely different case. They could have put their new story in a fresh application to the council, paying the appropriate fee. Analysis of the changing story has taken up considerable time. The council claims the costs of the appeal.

5. The inquiry was only necessary because the appellants gave minimal details of their case in the affidavits and submissions provided with their appeal. Their precognitions provided minimal further detail. They then sought to flesh out and amend their case at inquiry. The need to test the credibility and reliability of the appellants' case therefore had to take place by inquiry, whereas it might have been plain from fuller written submissions. The council claims the costs of the inquiry.

6. The appellants withdrew one witness from the inquiry on its opening day, without prior notice to the council. The reasons for his withdrawal, should have been well known to the appellants. The council claims the costs of preparation for his evidence.

7. Even the augmented case presented at the inquiry stood no reasonable prospect of success. The council claims expenses in that respect.

Response for the appellants

8. No response was submitted for the appellants.

Conclusions

9. For context and to avoid repetition, this notice should be read together with the associated appeal decision notice.

10. The appellants' agent submitted in their appeal statement that their occupation of Loanview House had become immune from enforcement after 4 years because it consisted in a change of use to a single dwellinghouse in breach of planning control. In a procedure notice, this was identified as a matter requiring clarification or explanation in the inquiry session and was therefore to be addressed initially in the statement of case for the appellants.

11. That statement argued that the change of use was from tied accommodation to dwellinghouse. It maintained that the impact of the house linked to kennels and cattery was materially different from its occupation without those operations in relation to noise, food deliveries, customers, veterinary support, security fencing, lighting, parking and turning provision, and potentially additional staff accommodation within the house. It went on to suggest that this was a matter which could be covered in prior legal submissions.

12. The council challenged this as being a fresh ground from that submitted at application stage. I agreed and ruled that it could not be admitted at appeal stage. The council is now arguing that this element of the appeal case received no substantial support. I am not persuaded that this is so; without entering into the merits of the argument, I consider that the support summarised in the foregoing paragraph cannot be described as being without substance.

13. Two affidavits in support of the appellants' case were produced late. Although dated 10 April 2012, they were not received by the council or myself until 9 September. The appellants' agent claims that they were originally sent in April. It is not possible to conclusively verify or refute this. Furthermore, the affidavits were short and the council had over 3 weeks to consider them.

14. In the course of the inquiry, the appellants made reference to an amended electricity bill which they said they had just found. It was submitted by them on the basis that there would be no opposition to its not being admitted if the council objected. After due consideration overnight, the council was content for it to be admitted and it was formally lodged as a document. Whilst the late production of documents is bad practice, it would not be unusual for a lay person to realise the importance of a document rather late in the day and then locate it amongst domestic papers. The bill comprised a single page. It would be harsh to categorise such behaviour as unreasonable.

15. There is no doubt that the appellants' account of their occupation of Loanview House underwent considerable development and adjustment between application and appeal and then again at inquiry. The McGlynns couched their original story in rather vague terms. It gave the impression that the house was built largely by Mr McGlynn, that it was nearly complete by September 2001 and that most essential services were in place and being used. By the end of the inquiry it was evident that none of those impressions were accurate. However, these are matters of impression and of degree; I do not accept that they represent an entirely different case.

16. That said, I agree with the council that the proper course of action would have been to put the revised account and new evidence to the council in a fresh application. Had that been refused and appealed, the council would have been saved the need to analyse the changing story, but not the need to defend at inquiry.

17. The council argues that more detailed submissions could have avoided the need to test the credibility and reliability of the appellants' case at inquiry. I am not convinced that oral procedure could have been avoided, especially given the reliance on personal testimonies. The advice in Circular 10/2009: Planning Enforcement is that the inquiry procedure should be used where matters of fact are in dispute, as in this instance.

18. The explanation for the appellants withdrawing one of their witnesses at the inquiry should have been known in advance and could have been communicated to the council before the inquiry opened. This would have avoided some abortive preparation work on the council's behalf.

19. As to whether the augmented case presented at inquiry stood no reasonable prospect of success, my decision on the merits of the case was judged on the balance of probability and does not, therefore, prove that point. As my appeal decision notice indicates, I found the appellants' case to be seriously flawed, although that was in part due to a lack of evidence to corroborate key parts of their case. In that respect, it is possible that the appellants, although professionally represented, may not have appreciated the level of proof required. That leads me to conclude that their case had little (rather than no) reasonable prospect of success.

20. In the foregoing paragraphs, I have accepted the council's claim that the appellants have acted unreasonably in two respects. These arise from: (a) the council's need to analyse the appellants' changing story between application stage and appeal stage and inquiry stage, and (b) the abortive preparation work it carried out relating to hearing oral evidence from the witness who was subsequently withdrawn. In both respects the council has been put to unnecessary additional expense.

Malcolm Mahony

Reporter