



Appeal Decision

Inquiry opened on 7 July 2004

Site visit made on 8 July 2004

by **D E Morden MRTPI**

an Inspector appointed by the First Secretary of State

The Planning Inspectorate
409 Kite Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ 0117 372 6372
e-mail: enquiries@planning-
inspectorate.gsi.gov.uk

Date

- 3 SEP 2004

Appeal Ref: APP/P0810/X/04/1139958

Park Hall, Mount Hawke, Truro, Cornwall, TR4 8DL

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a lawful development certificate (LDC).
- The appeal is made by Mr C M Ealden against the decision of Carrick District Council.
- The application (Ref.C25/0545/01/N), dated 28 March 2001, was refused by the Council by notice dated 19 February 2002.
- The application was made under section 191(1)(a) of the 1990 Act as amended.
- The use for which a Certificate of Lawfulness is sought is the use of the building known as Park Hall as a single dwelling house with an associated residential curtilage as shown on the plan accompanying the application.
- The inquiry sat for 2 days on 7 and 8 July 2004.

Summary of Decision: The appeal is allowed and a Certificate of Lawfulness is issued, in the terms set out in the Formal Decision at paragraph 17 below.

Procedural Matters

1. At the Inquiry an application for costs was made by Mr C Ealden against Carrick District Council. An application was also made by Carrick District Council against Mr Ealden. These applications are the subject of separate decisions.

Main Issues

2. The dispute between the parties in this case was whether or not there had been a continuous period of four years of occupation of the building as a dwelling house.

Background

3. In January 2003 an appeal against the refusal, in May 2002, of an application for a Certificate of Lawfulness and also against an enforcement notice that had been issued in April 2002, both for the same use, was dismissed. The application the subject of this appeal, however, was submitted in 2001 and technically a Certificate of Lawfulness can be issued as it would predate the Enforcement Notice.
4. At this inquiry there was some further evidence put in at the opening which resulted in a 25 minute adjournment to enable the Council to consider the additional information provided. Two videos were then watched (which had been watched at the previous inquiry in January 2003) and evidence was then heard (on oath) from seven witnesses, four of whom had given evidence at the previous inquiry. At this point the appellant's advocate asked the Council if it wished to proceed any further with the inquiry as the evidence of those seven individuals had basically gone unchallenged. He stated that if the Council were going to persist with the inquiry a full application for costs would be made before it closed.

5. After an adjournment of 45 minutes the Council stated that it had intended to rely on the appellant's evidence and argue that little weight could be attributed to it as he not told the truth on a number of occasions in the past (including not filling in documents correctly). The Council still had its conflicting records but what had now been presented was probably true and those records, which had relied on what the appellant had stated, were probably incorrect. The Council stated that if the appellant would admit, under oath, that certain matters the Council were relying on were based on false information that the appellant had given in the past, it would not oppose the appeal any further.
6. The appellant under oath confirmed that he had given false information on a number of matters at the last inquiry and on various documents and applications in the past. The Council accepted his answers to eight specific questions but still wished a formal decision to be made, however, as it would have difficulty explaining the situation in the future bearing in mind the appeal dismissal and confirmed enforcement notice in January 2003.
7. No further evidence was put by the appellant (other than him answering the questions about evidence and information he had provided in the past) and no witness was called nor evidence put by the Council although evidence was heard from an interested person who lived close to the site. Both sides also gave closing submissions, the appellant to put forward his case and the Council to explain why it had not simply withdrawn from the inquiry by issuing a Certificate of Lawfulness and also to submit why, in law, there were still good reasons for not granting a Certificate.

Reasons

8. Both in the videos and from the seven witnesses who gave evidence on behalf of the appellant there was considerable unchallenged evidence that use of the building as a dwelling house had been a continuous activity since about 1991 when it was purchased by the appellant. Even if the evidence of the appellant himself may not be given so much weight due to the fact that he admitted to lying about all sorts of evidence and information provided in the past, it seems to me that the evidence of others is not tainted in the same way.
9. The Council submitted in closing that, as a matter of law, the evidence still did not show that the appellant had proven, on the balance of probability, use as a dwelling house. The evidence of all those who had spoken or written in were all snapshots in time and the Council considered that the use of the building and land amounted to no more than a weekend or holiday/recreational use of the building rather than use as a dwelling house. There had been many letters, photographs and the video but they were inconclusive and no LDC should be granted.
10. In my view the evidence of the other seven witnesses was compelling including old acquaintances and friends who had stayed there with him; written letters there to him for many years. It was the address on his building society account from the time it was opened in 1992, his contact address for a number of authorities including the Inland Revenue, his solicitors during his divorce proceedings and his registered address for the local doctor's practice.
11. A Mr Watson carried out rewiring and changed his supply from temporary to domestic in May 1992 and the regional electricity company confirmed that there had been a domestic supply since January 1993. The appellant held a shotgun certificate from 1993 to February

1997 and it confirms his address as the appeal site; these are usually only issued when the weapon is kept at a dwelling house. There was much other correspondence produced and evidence provided all of which pointed to use of the appeal property as the appellant's dwelling house from about 1991 or 1992.

12. Regarding the Council's submission that even if the evidence was accepted, the use was not use as a dwelling house, I agree with the appellant that he did not have to show that the property was his sole or even his primary residence; that was different to him showing that it had been used as a dwelling house for the requisite period. The Court in *Gravesham BC v SSE and M W O'Brien* (1982) 47 P & CR, 142 had decided that provided a building or part of one afforded all the facilities for day to day living and was so used, it was a dwelling house. Many people who had second homes or due to work commitments lived in a flat in a large city in the week and somewhere else at the weekends but both were dwelling houses.
13. Further, as the appellant submitted, many areas of legislation including planning point to the fact that to be a dwelling house one does not have to use a building (or part of one) as one's primary and/or sole residence. The exemption on capital gains tax is on one's sole or main residence indicating that someone may have more than one. There is a discount by the Council regarding Council Tax on 'second homes'. The Housing Act 1981 refers to a person's only or principal home. Finally, the Use Classes Order describes Class C3 as 'Use as a dwelling house (whether or not as a sole or main residence) ...'.
14. It is clear that there are many forms of dwelling house including timeshare holiday ownership where a person may have the right to occupy the building for only one week of the year but the building is still used as a dwelling house whoever is residing in it on a particular week and even if they are on holiday whilst there.
15. Finally there was concern from the Council about the continuity of the use. In my view the evidence points to continuous use of the building except for an enforced absence of about 21 months in 1997 and 1998 and there is no evidence that it was used for anything else during that period. Given the reasons for the appellants absence there is no reason to consider that the appellant intended to anything other than return to the property in November 1998.

Conclusions

16. On the basis of the evidence put before me, I conclude on the balance of probability that the building and its small associated curtilage (which I saw was clearly laid out as a domestic garden that had matured) is used and had been for many years, as a dwelling house and garden. Once lawful that use had not been abandoned. In these circumstances I shall allow this appeal and grant the appropriate lawful development certificate.

Formal Decision

17. In exercise of the powers transferred to me, I allow the appeal and I attach to this decision a Certificate of Lawfulness describing the existing use which I consider to be lawful.


INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mr Paul Barkley LLB (Hons) MSc Solicitor, Carrick District Council

FOR THE APPELLANT:

Mr Sebastian Head

Counsel, instructed by Mr L Osborne of Laurence Associates, Trevithick House, Trafalgar Wharf, Malpas Road, Truro, TR1 1QH

He called

Miss S Hitchcock

Mr T Grasty

Mrs E B Chidwick

Mrs M M Chidwick

Mr A Chidwick

Mr K Ealden

Mrs B Ealden

Home Farm, Marchwood, Southampton

15 Chegwyn Gardens, St Agnes, Cornwall

97 North Down Park, Margate, Kent

Little Lestraynes Farmhouse, Penryn, Cornwall

Little Lestraynes Farmhouse, Penryn, Cornwall

71 Keith Lucas Road, Farnborough, Hampshire

71 Keith Lucas Road, Farnborough, Hampshire

INTERESTED PERSON:

Mr J Manetta

Toad Hall, Mount Hawke, Cornwall

DOCUMENTS

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| Document | 1 | List of persons present at the inquiry |
| Document | 2 | Council's letter of notification of the inquiry and list of addressees |
| Document | 3 | Letters of representation |
| Document | 4 | Statements from Mrs B Ealden, Mr K Ealden, Mrs M Chidwick, Mr T Grasty |
| Document | 5 | Copy of note from Inspector N Hammans to Mr L Osborne (dated 22.12.03) |
| Document | 6 | Details of video and letter from recordists confirming authenticity |
| Document | 7 | Copy of planning application for 3 polytunnels dated February 1996 |
| Document | 8 | Letters from Cornwall Hospital & St Agnes surgery regarding Mrs L Ealden |
| Document | 9 | Extract from The Kingdom by the Sea by Paul Theroux |
| Document | 10 | Extract from Daily Telegraph Tax Guide re second homes |
| Document | 11 | Council's information about second homes and Council Tax Discounts |
| Document | 12 | Extract from Inland Revenue guide regarding capital gains tax relief |
| Document | 13 | Lawtel summary of L B Hammersmith v A Clarke & D Clarke 20/11/2000 |
| Document | 14 | High Court Transcript - Moore v SSE & New Forest DC, 12 February 1998 |
| Document | 15 | High Court Transcript - Thurrock BC v SSE & Terry Holding, 22/2/2001 |
| Document | 16 | C M Ealden's Evidence and Appendices to Inquiry in January 2003 |
| Document | 17 | L Osborne's Evidence and Appendices to Inquiry in January 2003 |
| Document | 18 | C M Ealden's Evidence and Appendices to this Inquiry |

Document	19	L Osborne's Evidence and Appendices to this Inquiry
Document	20	K Roberts's Evidence on behalf of Carrick DC
Document	21	Evidence and Appendices of P Bateman for Carrick DC to January 2003 PI
Document	22	Statement of L Osborne to this Inquiry made just prior to Costs application
Document	23	Report on photographs and video tapes
Document	24	Report and photographs showing location of washing line at the site

PLANS

Plan	A	Location plan/site plan submitted with application
Plan	B	Application block plan, floor plan and elevations submitted with application

PHOTOGRAPHS

Photo 1 Bundle of photographs mainly at the site taken between 1990 and 1996

TAPES

Video	1	Eddie & Trina's home video
Video	2	Dear Old Park Hall and Other Capers
Cassette	3	Sound cassette of letter from appellant to his mother (transcript at Appendix D)



Lawful Development Certificate

The Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ 0117 372 6372

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT
PROCEDURE) ORDER 1995: ARTICLE 24

IT IS HEREBY CERTIFIED that on 28 March 2001 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The change of use took place and became lawful by continuing for a period of four years prior to the submission of the application and it has not been abandoned since it became lawful.



Inspector

Date

Reference: APP/P0810/X/04/1139958

First Schedule

Use of building and land as a single dwelling house and associated residential curtilage

Second Schedule

Land at Park Hall, Mount Hawke, near Truro, Cornwall

IMPORTANT NOTES – SEE OVER

CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated:



The Planning Inspectorate
4/09 Kite Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN



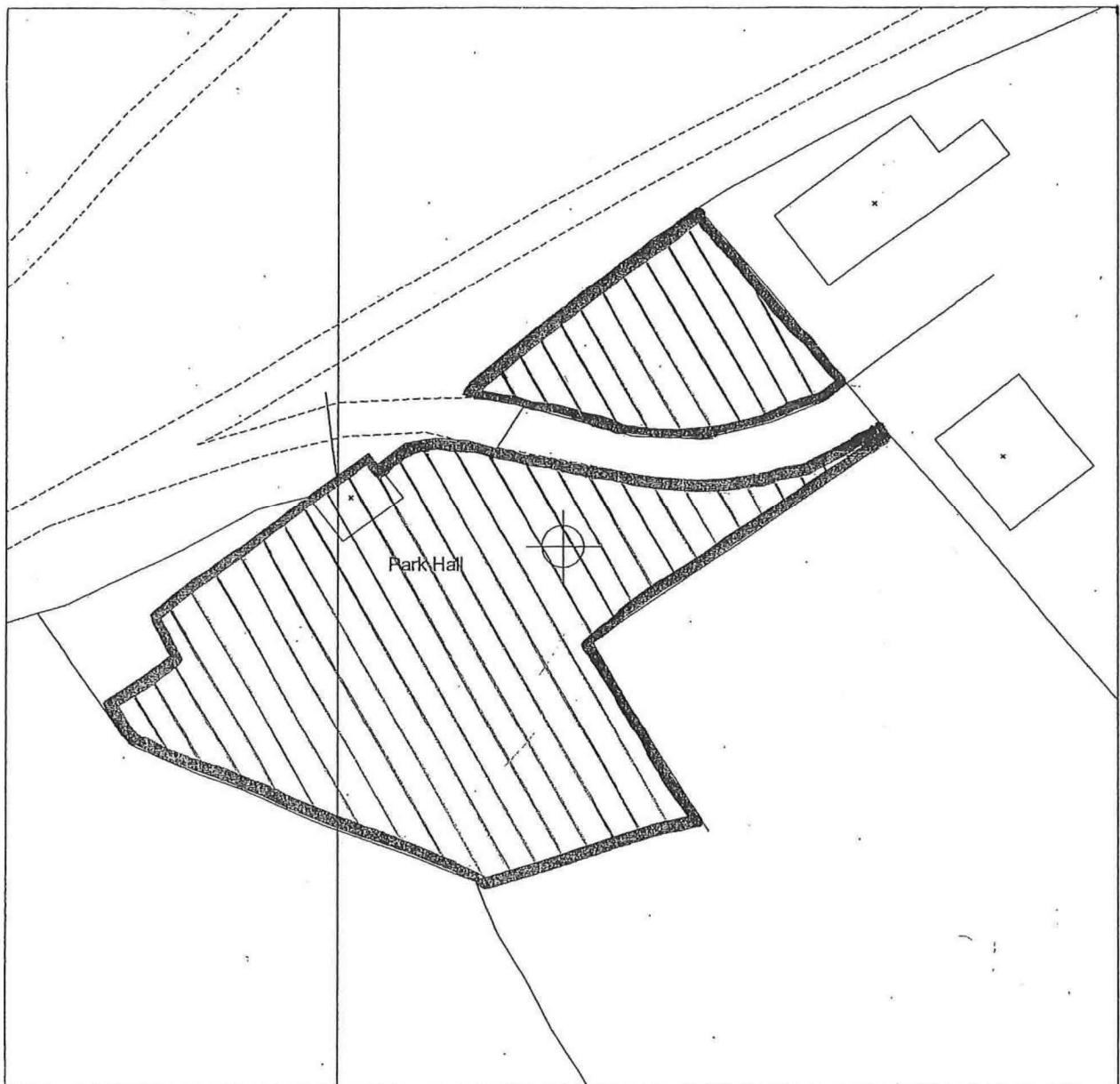
by D E Morden MRTPI

Land at: Park Hall, Mount Hawke, Truro, Cornwall

Reference: APP/P0810/X/04/1139958

Scale:

1:500





Costs Decision

Inquiry held on 7 July 2004

Site visit made on 8 July 2004

by D E Morden MRTPI

an Inspector appointed by the First Secretary of State

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2 The Square
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Date

- 3 SEP 2004

Costs applications in relation to Appeal Ref: APP/P0810/X/04/1139958 Park Hall, Mount Hawke, near Truro, Cornwall

- The applications are 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 first application is made by Mr C M Ealden for a full award of costs against Carrick District Council and the second application is made by the Council for a full award against Mr C Ealden. Both parties also made partial applications as well as full applications for costs.
- The inquiry was in connection with an appeal against the refusal of the Council to issue a certificate of lawfulness for the use of the building known as Park Hall as a dwelling house with an associated residential curtilage.

Summary of Decisions: The Council's application fails and no award of costs is made. The appellant's application is allowed in the terms set out in paragraph 20 below in the Formal Decision and Costs Order.

The Submissions for Mr C M Ealden

1. The appellant referred to the Circular and Annex 3 in particular. Whatever had occurred at the Inquiry in January 2003 it was always the duty of the Council to consider this earlier LDC according to the law of the land and correct legal principles. He stated that he was exhaustive in closing on the details of the evidence provided and all of those details were contained in written evidence that had been with the Council at the last inquiry.
2. The Council had not asked itself the right question. It was clear, even in the worst scenario, that someone could have two dwellings and use them as such; it was not necessary to have residential use of any building on a permanent basis for it to be a dwelling nor did it have to be their main residence. It was also not the fault of the previous inspector that the correct interpretation of the law was not put to him. If he had applied the above principles to the 10 points he listed in his decision he should have granted the LDC.
3. The only evidence against the appellant was Mr Manetta's testimony and that had to be balanced against all the other evidence that the Council had. The untruths of the appellant were easily explained but even they did not give cause for any reasonable doubt on everything else that had been submitted previously, even if that was not being looked at correctly.
4. The partial claim was based on the time since the appellant's evidence for this case had been submitted on 8 June; it should have been clear at least from that point, if not before, that the appellant had an overwhelming case. No new point of substance was added by any of the witnesses on day one or the letters handed in at the opening of the inquiry. The Council heard those witnesses, did not challenge their evidence and then conceded. The only thing yesterday's witnesses did was to powerfully reinforce all that had gone before. The appellant had proved his case beyond reasonable doubt on the first batch of evidence

and proved it beyond a shadow of a doubt with the later evidence; both were in excess of the required proof which was only the balance of probability.

The Response by the Council and the counterclaim

5. The Council's partial claim was for the time spent on the adjournment to read the letters put in at the opening of the inquiry and assess the contents; they could have been submitted earlier and so saved time. On the full application the Council did not agree that the previous inspector has been given incorrect submissions on the law or that he had misunderstood the situation. Further, the Council had not misunderstood what it was required to do when determining either LDC application.
6. This application was made on the same principles as the later one which had been dismissed at appeal in January 2003; there was a costs application by the appellant at that appeal and that was also dismissed. The evidence was in three parts; firstly, what had been before the inspector in January 2003; secondly, what had been submitted with the appellant's proofs of evidence and finally, what had been submitted on the first morning of the inquiry.
7. It was reasonable to look at the evidence before the previous inspector and say it was not good enough; it had been dismissed at appeal and the related enforcement notice upheld. When the proofs of evidence arrived they were considered and it was envisaged that there would only be two witnesses; the appellant and Mr Osborne. There was further evidence but nothing had really changed. At the opening of the inquiry there were the fresh letters and new witnesses and it was the additional evidence yesterday that led the Council to concede.
8. The Council's claim was based on the fact that had that evidence been put in much earlier, as it could have been, the Council would have been able to concede before the inquiry opened. The appellant could have made a statutory declaration about what he admitted at the inquiry much earlier. It was unreasonable that all this new evidence was not provided earlier; what was put in yesterday could have been put in with the proofs of evidence. A new LDC application could have been submitted with that information and the inquiry could have been avoided. The live evidence was a new element and it was significant in what it said and the appellant must have thought so to have made the statement he did after it had been presented.

The appellant's response to the counterclaim

9. Regarding the partial claim the extra evidence was lay evidence and that came in piecemeal; the Council were able to deal with it quite easily after a short adjournment no question in cross examination of the witnesses was about it or based on it. There was very little of substance in the evidence, it was more in the way of additional confirmation of what had been submitted before.
10. Regarding the full claim there was nothing new in what was put before the inquiry. The Council could not really say it could not believe all the evidence until it heard it on oath at the inquiry rather than just see it in writing. The Council was suggesting that there was something so new and so significant in that little bit of extra evidence that it would have persuaded the Council to go against its then current view that the mass of other evidence already submitted was not sufficient and that was a claim that was impossible to believe.

Reasons

11. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.
12. At the opening of the inquiry the appellant produced four letters from individuals and three of them gave evidence at the previous inquiry the exception being the appellant's sister-in-law and her comments simply confirmed evidence her husband had already given. As stated by the appellant there was nothing new in any of the letters nor indeed in any of the oral evidence those witnesses gave under oath at the inquiry.
13. Only two hours and ten minutes was spent in total in hearing the evidence, cross examination and re-examination of those seven witnesses, and I agree with the appellant that neither in the four letters nor in the oral evidence was there anything new to what had gone before in January 2003. The evidence was not challenged by the Council in what little cross examination took place. There was a forty five minute adjournment for the Council to consider the appellant's request that it withdraw and at the end of that period the Council confirmed that it would concede if the appellant admitted that he had lied about certain information given to the Council in the past.
14. Even allowing for the false information that had been given it should have been clear from the evidence in the past that, on the balance of probability, the appellant had proved his case. Most of that incorrect information was not actually significant to the determination of the issue as it seemed to me on the evidence that the use as a dwelling house had been established in the early 1990s and there was nothing in the Council's arguments that suggested abandonment of the use. The Council could have asked its eight questions of the appellant (about incorrect information) at any time between the lodging of the appeal and the opening of the inquiry; those questions could not, in my view, be a result of anything that had been stated by those seven witnesses or what was in their letters as there was nothing new in that evidence.
15. I agree that the Council appeared to be searching for something more conclusive than 'the balance of probability' and were also not taking the correct legal approach to what constituted the use of the building as a dwelling house. In my view there was nothing produced that merited the Council waiting until after the opening of the inquiry to concede and I consider that a full award of costs should be awarded.
16. Regarding the Council's partial claim, the adjournment to read the four letters and consider their implications was only twenty five minutes and that made no real difference to the length of the inquiry that went well into the afternoon of the second day. As stated by the appellant there were no questions put to any of the witnesses about what had been written in the letters and they simply reaffirmed what had already been stated.
17. Regarding the full claim, there was nothing to suggest that had this late evidence been submitted earlier the Council would have issued a certificate. The concession only came after the appellant's advocate had submitted to the Council (after it had not challenged the first seven witnesses) that its doubts were based on the appellant having lied about certain information in the past. The Council still submitted in closing that the use might not have equated to use as a dwelling house even if all the evidence was accepted.

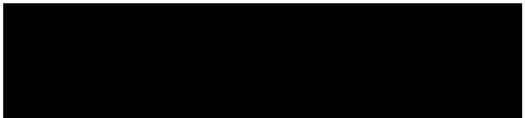
Whilst some of this evidence may have been provided earlier it was nothing new and there was nothing to suggest therefore that the Council would have invited a further application and approved it. I do not consider in the circumstances, even if I concluded that the appellant had behaved unreasonably, that the Council was put to any unnecessary expense in this case and I shall dismiss the Council's claims for costs.

Conclusions

19. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 8/93 has been demonstrated and I therefore conclude that a full award of costs is justified in the appellants case against the Council.

Formal Decision and Costs Order

20. In exercise of my powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990, and all other powers enabling me in that behalf, I HEREBY ORDER that Carrick District Council shall pay to Mr C M Ealden, the costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under section 195 of the Town and Country Planning Act 1990 against the refusal of the Council to issue a Certificate of Lawful Use of the building as a single dwelling house with an associated curtilage at Park Hall, Mount Hawke, near Truro, Cornwall.
21. The applicant is now invited to submit to Carrick District Council 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 Supreme Court Costs Office is enclosed.



INSPECTOR