

Costs Decision

Site visit made on 30 August 2016

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 23 September 2016

Costs application in relation to Appeal Ref: APP/X5990/C/16/3144746 275 Regent Street, London, W1B 2HB

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by the City of Westminster Council for a partial award of costs against The Company Secretary Leon.
 - The appeal was against an enforcement notice alleging the material change of use of the basement and ground floor of the property from use for Class A1 (Retail) purposes to use for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant/café and hot food takeaway (the unauthorised use) and the material change of use of the public highway to the front to the property to use for the placing of table and chairs in association with the unauthorised use.
-

Decision

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

The submissions for the Council – Main points

2. The Council applied for a partial award of costs on the basis that the Appellant had behaved unreasonably in making an appeal on ground (c) because a recent appeal on this ground in respect of another branch of Leon operating in the City of Westminster with an almost identical breakdown of sales activity was dismissed on the basis that that Inspector determined a material change of use had occurred. The ground (c) submissions were the same in each appeal.
3. Although the Appellant was represented by the same Agent in both appeals no consideration was given by the Appellant to the findings by the earlier Inspector in the ground (c) appeal despite the Appellant referring to his decision in the ground (a) appeal.

The response by the Appellant – Main points

4. There are material differences between the operation in the earlier appeal and the operation in this appeal between such things as the provision of customer toilets and the number of customer covers on each site. These material differences were spelled out in the ground (c) appeal. Each site must be individually assessed and it is unreasonable for the Council to apply a blanket approach to both of these Leon units without considering the individualities of the actual operation and the material differences between them.
-

5. The assessment of use classes under which Leon operates within London is inconsistent in that across London Leon has 28 units, 18 operate within Class A1; 6 within Class A3; 2 as a mixed A1 and A3 use; and 2 as a mixed A1, A3 and A5 use. A fact and degree judgment has to be made on each basis.

Reasoning

6. The Planning Practice Guidance (the Guidance) advises 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 process¹. The right of appeal should be exercised in a reasonable manner and an example of where an Appellant is at risk of an award of costs being made against him is where the ground of appeal has no reasonable prospect of succeeding because the appeal follows a recent appeal decision relating to the same, or very similar development².
7. The appeal referred to³ was in connection with a considerably larger establishment than that with which I am concerned in that it had some 79 seats inside and 14 seats on a private forecourt. There were also other differences including the provision of customer toilets. The sale of goods in that case was broken down into 40% dining in; retail sales 45%; and hot food taken away 15%. The figures in this appeal are 39% dining in; 38% retail sales; and hot food taken away 22%⁴. The proportions are slightly different although there are considerably greater hot food takeaway sales in this appeal. On the basis of the figures it seems to me that the differences between the two operations is not significant.
8. I cannot comment on the similarity or otherwise of the Appellant's submissions in the two appeals because I have not seen those in the other appeal but I have no reason to question the Council's view that they were very similar to the submissions made in this appeal given their nature and context.
9. It may well be that other London boroughs have different views about the appropriate Use Class for the Appellant's business and I accept that the units operated by the Appellant may well have different combinations of dining in, retail sales and hot food takeaway. But the appeal to which I have been referred and this appeal are in the same borough with similar sales figures.
10. The appeal on ground (c) failed and despite the differences in such things as the size of the operation I consider that there are sufficient similarities to find that the Appellant acted unreasonably within the terms of the Guidance in not taking the recent appeal decision into consideration and pursuing the ground (c) appeal. This caused the Council to incur unnecessary and wasted expense in responding to the appeal on ground (c).

Conclusions

11. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Practice Planning Guidance, has been demonstrated and that a partial award of costs is justified.

¹ Planning Practice Guidance: Appeals paragraph 030

² Planning Practice Guidance: Appeals paragraph 053

³ APP/X5990/C/3121641

⁴ Response to Planning Contravention Notice dated 30 October 2015

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 Company Secretary Leon shall pay to the City of Westminster Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of the ground (c) appeal.
13. The Council is now invited to submit to the Company Secretary Leon, to whose agents 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.

Gloria McFarlane

Inspector