

Costs Decision

Inquiry held on 7 December 2016

Site visit made on 7 December 2016

by Nigel Burrows BA MRTPI

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

Decision date: 12 January 2017

Costs application in relation to Appeal Ref: APP/X5990/C/16/3147923 26 Strutton Ground, London, SW1P 2HR

- 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 City of Westminster Council for a partial award of costs against Mr Hossein Ghashtasebi.
 - The appeal was in connection with an enforcement notice alleging the unauthorised material change of use of the ground floor of the Property from a Class A1 (retail) use as a sandwich shop to a Class A5 (hot food take-away) use, and associated works which facilitate this material change of use, which include the installation of the large extract duct on the rear of the property, a smaller extract system on the shopfront and the installation of food storage and cooking equipment.
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Decision

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

Reasons

2. The Planning Practice Guidance suite (PPG) published by the Government in March 2014 advises that, irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.
3. The appeal against the enforcement notice was lodged on grounds (a) and (d). Ground (a) is that planning permission ought to be granted for what is alleged in the notice. Under ground (d) it is argued that at the time the notice was issued, it was too late to take action against the matters stated in the notice. The costs application only relates to ground (d).
4. Ground (d) is known as one of the 'legal' grounds of appeal. The onus is firmly on the appellant under this ground to make out the case that, in effect, the matters alleged in the notice occurred at least 10 years before it was issued and, as a consequence, it is too late for the Council to take enforcement action against the Class A5 (hot food take-away) use.
5. The appellant's stance at the Inquiry was that the premises had operated for 8 years as an A5 use - albeit at the time the enforcement notice was issued the overall period of use of the premises for non-retail purposes was 13 years.¹ In effect, the appellant's stance is that the premises were used for purposes within Use Class A3 during the remaining period.
6. However, by the appellant's own admission, the premises had only operated for 8 years as an A5 use. It should have been clear to him that a ground (d) appeal based on the use of the premises for this purpose would have no reasonable prospect of success. The appellant's approach to the appeal appears to have been coloured by certain factors. These include his perception that the ground floor had been used for non-retail purposes prior to his acquisition. The appellant also appeared to allege the Council had withheld material information concerning the planning history of the site which supported his case.

¹ Paragraph 1.3 of Mr Fatherazi's Summary of Proof

7. As I indicate in my appeal decision, I have taken into account the appellant's assertion that the ground floor was used for A3 purposes prior to his acquisition of the premises. However, there is no firm evidence to demonstrate this was the case, or to show that this particular activity constituted a lawful use of the appeal premises for planning purposes.
8. There appears to be nothing of substance in the planning register or history of the premises that would substantiate the allegation that material information has been withheld by the Council. The appellant's agent sought to explore this matter at the Inquiry. However, in cases such as this, it is for the appellant to provide the evidence on which he relies. It is well established in planning law that the onus rests with the appellant to make out his case.
9. I agree with the Council that an early review of the evidence available to the appellant should have shown the weaknesses in his case, thereby triggering the withdrawal of ground (d). Potentially, this would have avoided the need for an Inquiry to hear evidence on ground (d). The appeal could have proceeded by written representations or a hearing.
10. As matters stand, I conclude the appellant's decision to pursue an appeal on ground (d) constitutes unreasonable behaviour of the type described in paragraph 16-053 of the Costs chapter within the PPG. The Council has therefore incurred unnecessary expense in countering the appellant's submissions under ground (d) during the appeal and the Inquiry.
11. I conclude that a partial award of costs is therefore justified, limited to those costs incurred in countering the appellant's submissions on ground (d) in the appeal against the notice.

Costs Order

12. 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 as amended, and all other powers enabling me in that behalf, I HEREBY ORDER that Mr Hossein Ghashtasebi shall pay to Westminster City Council the costs of the proceedings, limited to those costs incurred in countering the appellant's submissions upon ground (d), such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned an enforcement appeal heard at a Local Inquiry, more particularly described in the heading of this decision.
13. The Council is now invited to submit to the appellant, 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.

Nigel Burrows

INSPECTOR