The Planning Inspectorate

3F Hawk Wing
Temple Quay House
2 The Square
Bristol BS1 6PN

Direct Line: 0303 444 5601
Customer Services: 0303 444 5000

John Walker
Director of Planning
Westminster City Council
Westminster City Hall
PO Box 732
Redhill
RH1 9FL

Your Ref: DP/PET/14/56765/J & 14/56839/K

Our Ref: (A) APP/X5990/C/16/3150618
(B) APP/X5990/C/16/3150679

Date: 23 August 2017

Dear Sir

LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 174 AND 322
LAND AT 117A HARLEY STREET, LONDON W1G 6AT
APPEALS BY KOOL PHARMA LIMITED: APPLICATION FOR COSTS

1. I am directed by the Secretary of State for Communities and Local Government to refer to the Planning Inspector's decision of 21 December 2016 concerning appeals against two enforcement notices, in respect of land and premises described above, issued by Westminster City Council on 15 April 2016. The decisions were to uphold both enforcement notices. The notices alleged:

Appeal 3150618 (Notice A)

Without the requisite planning permission and within the last 10 years the unauthorised and material change of use of part of the basement and front basement vaults of the property, as shown shaded red on the attached 'Plan A' from a medical healthcare clinic (Class D1) to a Pharmacy (Class A1).

Appeal 3150679 (Notice B)

Without the requisite planning permission and within the last 4 years the unauthorised installation of an air-conditioning unit, associated brackets, pipework, fixtures and fittings within the front basement lightwell of the Property as shown edged red in 'Photograph A' attached.

2. With apology for any delay this letter deals with the Council's application[1] for a full award of costs against the appellants as made in written correspondence dated 16 December 2016. The appellants' agents, Ashbournes Solicitors, replied on 2 February 2017. As these representations have been made available to the parties it is not proposed to summarise them in detail. They have been carefully considered.

3. The appellants' agents stated that they were no longer acting for the appellant company which had gone into liquidation. Contact details for the Insolvency Practitioners

[1] Although submitted "late" the Inspectorate's letter of 27 January 2017 explained why the costs application had been accepted for determination by the Secretary of State.

(Quantuma LLP), appointed on 6 December 2016, were provided. The agents stated that their appeal submissions clearly stated that all steps had been taken to rectify the issues that were the subject of the enforcement notices. They claimed it would be iniquitous for the appellant company to pay the Council's costs as they were fully aware of the steps taken to remedy the situation. The agents also pointed out that an e-mail from the Council dated 24 August 2016 had brought to the Inspectorate's attention that they considered the appeals could be withdrawn because (with reference to attached correspondence) the pharmaceutical practice had ceased and the air-conditioning unit had been removed. Although the Inspectorate also sought comments regarding the costs application from Quantuma LLP no written response was received.

Summary of decision

4. The formal decision and costs order are set out in paragraphs 15 and 16 below. The costs application succeeds and a full award of costs is being made.

Basis for determining the costs application

5. In enforcement notice appeals (as for appeals in general) the parties are normally expected to meet their own expenses irrespective of the outcome. Costs are awarded only on the grounds of unreasonable behaviour resulting in unnecessary or wasted expense.

6. Section 322 of the Town and Country Planning Act 1990 enables the Secretary of State to award appeal costs against any party which do not give rise to a local inquiry where it is found that one of the parties to the appeal has behaved unreasonably and the expense incurred by any of the other parties is wasted as a result.

7. The application for costs has been considered in the light of current Government guidance on awards of appeal costs (as published on the Gov.uk website under "Appeals"), the appeal papers, the decision on the appeals, the written costs correspondence and all the relevant circumstances.

Reasons for decision

8. All the available evidence has been carefully considered. Particular regard has been paid to paragraphs 052 & 053 of the costs policy guidance. The view is taken that an appellant's right of appeal, to protect their interest in land/premises, has to be balanced against the expectation that all parties to appeals should act responsibly and not cause another party to incur unnecessary expense in the process.

9. It is noted that the appeals were submitted in May 2016 and were linked by the Inspectorate for joint consideration. Appeal 3150618 (Notice A) was made on grounds (b) and (f) in section 174(2) of the 1990 Act. Appeal 3150679 was made on ground (f) only. The Inspectorate's procedural letters of 10 June 2016 explained that the appeals would be decided following an exchange of written statements and a site visit by a Planning Inspector. A "start date" and timetable were set for the submission of appeal documentation. The appellants were warned, via the letter to their agents, that withdrawal of the appeal without good reason could place them at risk of an award of costs. The Council proceeded to submit a completed appeal questionnaire and statement of case. The Inspector's site visit took place on 14 December 2016. Following the site visit the Council wrote to the Inspectorate making an application for a full award of costs against the appellants. The application referred to the fact that, at the site visit, it was noted that the air-conditioning unit (and associated brackets, pipework etc.) had been removed in accordance with the requirements of Notice B. Furthermore, it was evident that all the general pharmaceutical stock inside the appeal premises had been removed together with all signage outside the premises referring to a pharmacy use. As such it appeared that the unauthorised Class A1 retail pharmacy use had ceased in accordance with the requirements of Notice A. The Council advised that at no stage

of the appeal process had the appellants notified their intention to comply with the enforcement notices. They also pointed out that no explanation had been given as to why the appeals had not been withdrawn in a timely manner once the compliance requirements of the notices had been met.

10. The Inspector's decision on the appeals (notices upheld) followed on 21 December 2016. Paragraphs 3 & 4 of his decision referred (under Procedural Matters) to changes made to the appeal premises. The Inspector went on to state (paragraph 6) that the appeal against Notice A could not succeed on pleaded ground (b). And although ground (c) was more appropriate it had not been shown that a material change of use had not taken place and accordingly this ground of appeal also failed. As regards ground (f) the Inspector noted that no statement of case had been produced. He found the requirements of the notice to be entirely reasonable and appropriate. The ground (f) appeal failed. He also found the requirements of Notice B to be reasonable and noted that, in any event, the air-conditioning unit had been moved. Ground (f) of the appeal against Notice B also failed.

Conclusions

11. Having made the appeals it was to be expected that the appellants would wish to pursue them in a reasonable manner. However in deciding to comply with the notices the view is taken that the appellants should, in the interest of saving time and resources, have clearly communicated this to the Council and the Inspectorate.

12. Against the background of compliance with the notices and the regretful move towards insolvency proceedings the Secretary of state considers that it would have been reasonable for the appellants to take action to withdraw the appeals in a timely manner thus saving the Council from incurring expense from the public purse in contesting them. Regardless of whether or not the Council were aware that steps had been taken to comply with the notices it remained necessary for them, in the absence of the appeals being withdrawn, to incur expense in the appeal proceedings. Only the appellants and/or their agents were in a position to formally withdraw the appeals and bring the proceedings to an end.

13. On the information available, including the decision on the appeals, the Secretary of State concludes that the appellants have pursued the appeals in an unreasonable manner with the result that the Council incurred unnecessary expense in the appeal process. In the particular circumstances a full award of costs is considered justified.

14. For the avoidance of doubt, the Secretary of State does not decide the amount of costs payable. This is for the parties' agreement or, failing that, via an application for detailed assessment in the Senior Courts Costs Office.

FORMAL DECISION

15. For these reasons it is concluded that a full award of costs against the appellants, on grounds of "unreasonable" behaviour resulting in unnecessary or wasted expense, is justified in the particular circumstances.

COSTS ORDER

16. Accordingly, the Secretary of State for Communities and Local Government in exercise of his powers under section 250(5) of the Local Government Act 1972, and sections 174 and 322 of the Town and Country Planning Act 1990, and all other powers enabling him in that behalf, **HEREBY ORDERS** that Kool Pharma Limited (in liquidation) shall pay to Westminster City Council their costs of the appeal proceedings before the Secretary of State; such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned two appeals more particularly described in paragraph 1 of this decision letter.

17. You are now invited to submit to Quantuma LLP in their capacity of insolvency practitioners details of those costs with a view to reaching agreement on the amount. A copy of this decision letter has been sent to them.

Yours faithfully

John Gardner

JOHN GARDNER
Authorised by the Secretary of State
to sign in that behalf