



Costs Decision

Inquiry opened on 10 February 2021

Site visit made on 27 April 2021

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State

Decision date: 07 June 2021

Costs application in relation to Appeal Ref: APP/T5150/C/19/3226686 199 High Road, London NW10 2SB

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by the Council of the London Borough of Brent for a partial award of costs against Khalid Osman Khalaf Al-Thefeiry.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the material change of use from a shop and two flats to a shop and five flats, and the erection of a two-storey rear extension, and the erection of a rear dormer window roof extension to the premises.
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Decision

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

The submissions for the Council

2. The Council argue that the appellant did not submit evidence of the EPC and other photographs until 2 days before the Inquiry opened, and that there was a serious lack of evidence on, for instance, materials receipts.
3. Plans of the building purporting to show the building before and after development were contradictory, and what was said to be a definitive plan was produced during the Inquiry but found to be incorrect. This had led to difficulty in examining witnesses and understanding what might have happened and when.
4. There had been non-acceptance by the appellant of obvious matters such as the way the shed was replaced, and the extension to the outrigger. The Council had been forced into rebutting a fanciful account of what had occurred. An unnecessarily wide factual matrix had been presented on which the Council had to formulate their submissions.
5. The ground (a) appeal and deemed planning application had been pursued despite the development being contrary to development plan policy, and not in line with recent appeal decisions on similar nearby properties.
6. The ground (d) appeal was unfounded and contrary to unassailable factual evidence. After some eight years the appellant should have been able to provide precise and unambiguous evidence of the state of the building both before during and after completion of development. Statutory declarations from

witnesses were lacking in precision and were ambiguous, again leading to difficulty in examining witnesses and prolonging the Inquiry.

7. The appellant can have had little or no doubt about the Council's concerns, going back to 2012 when a Building Control officer visited the site and subsequent visits by a planning officer. Nevertheless, he had pursued his case through submission of LDC applications that were refused on the basis of insufficiently precise and unambiguous evidence – notably tenancy agreements presented for flats that did not exist until some months after those agreements were made. On the other hand, the Council conceded that the rear dormer construction had become lawful as soon as they received evidence from the appellant. However, that again was submitted only two days before the Inquiry opened. Withholding that evidence – which had been available for several years before submission led to unnecessary expense for the Council just as much as pursuing a case contrary to evidence.
8. An award for partial costs should be allowed.

The response for the appellant

9. The Council's application is misguided, confused and lacks clarity. The Council had agreed that it had been reasonable for the appellant to bring the ground (d) case, and that the award was sought only with regard to ground (a). Their submissions concerning ground (d) should be ignored.
10. The Council's complaint about evidence of the shed reconstruction was not sustainable, when the appellant had presented an account of how this happened, and there is nothing to suggest the Inquiry was extended as a result. It is in any case no more than an attack on the merits of the appellant's ground (d) case. The appellant has a right to put his case, and not unreasonable for him to do so. In fact the Inquiry had been completed within much the timeframe to be expected for a case such as this, with numerous witnesses, and the need for an interpreter.
11. As to additional material put in, this assisted the Inquiry and did not add appreciably to its length, it had been reasonable to submit this. The EPC photographs were in any case put in on the Council's request. The submission of the as built plan arose because one had been requested during the Inquiry. The Council had not objected to their introduction at the time. The Council have in any case been able to respond to this evidence, and indeed to rely upon it.
12. Regarding the claim of lack of evidence, it is for the appellant to decide what evidence he wants to rely upon, and any absences can be used by the Council in their own case. Furthermore, the Council did not cross-examine the appellant or witnesses as to what they might expected to provide. In any case the appellant has cooperated in providing relevant information, both when making LDC applications and in supporting his appeal.
13. The existence of contradictory evidence is not of itself unreasonable but shows differences of opinion that must be weighed in the evidential balance.
14. It is denied that the appellant's behaviour has been unreasonable either procedurally or substantively. In any case, the Council had themselves been late in introducing legal authorities just before resumption on 17 March 2021. They made unexpected submissions about the planning unit, and referred to

- the possibility of the appellant's deceit, which had not been argued previously, even though it was not pursued.
15. On the ground (a) appeal the appellant has broadly complied with policy in the round, and in any case, non-compliance may be allowable if other material considerations outweigh policy aims. Also, the appeal decisions in other cases do not deal with the particular merits of this case, and at least one is supportive of the appellant's case.
 16. The fact that the Council have a different view on ground (d) does not amount to being unreasonable, and the appellant has adduced much written and oral evidence from occupants of the premises to support this. Furthermore, the Council's advocate and only witness had not even visited the site, and it is reasonable for the appellant to expect his case to be fairly tested.
 17. The appellant had not himself put in the second building regulations application referring to change of use – this was completed by the Council – nor did the building control officer ask the appellant about a change of use, and there is no evidence the outbuilding was self-contained – this was in a report from the planning officer about a visit to the next-door building.
 18. The various LDC applications were necessary because the first two were flawed in respect of the first-floor extension, and the third nonetheless turned down on the basis of insufficient evidence. The evidence of completion of the dormer had been made sufficiently clear in the earlier LDC applications, so the evidence on this was already available well before the Inquiry. There is no basis to suggest the nature of the appellant's case prolonged the Inquiry, and his case is fundamentally sound.
 19. The application for a partial award should fail.

Reasons

20. I have determined the application in the context of the government's Planning Practice Guidance. This includes the advice that costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
21. Regarding the submission of evidence, the appellant submitted the EPC and other photographs including evidence to support their authenticity (appendices 148 to 157 to the appellant's proof of evidence) at a late stage in the process – only two days before the Inquiry opened. While this was unreasonable given the long period of lead-in and the fact that the photographs had been available since 2013, it did not result in any significant extension of Inquiry time and cannot be said to have caused unnecessary expense.
22. As to the lack of evidential documents such as materials or other receipts and proofs of payments, it is an appellant's choice to submit whatever evidence he believes might help his case. Conversely, the fact that he does not submit what might be relevant material may be found to actually harm his case. However, a Local Planning Authority cannot prescribe what evidence is put in. While it may make comments on lack of evidence, it cannot be described as unreasonable for this to happen, and it cannot realistically result in wasted expense.

23. The appellant's evidence concerning completion of the dormer was not submitted until 8 February 2021, 2 days before the Inquiry opened. The Council conceded that there was sufficient evidence for its construction before 30 March 2012. While no significant Inquiry time was spent in reviewing this, the late submission was unreasonable, and had caused the Council to spend time in preparing their case on this aspect of the development. Although the dormer was a feature of the earlier LDC applications, these apparently did not contain adequate unambiguous supporting evidence.
24. As regards contradictory evidence, the appellant has put in several versions of plans of the building, variously described as 'existing' or 'proposed', and dated from December 2012 onwards, as well as a further plan produced during the Inquiry labelled 'as built' and dated 4 March 2021. I understand all were produced by the same draughtsman. The plans of existing, prior to development, and of the proposed – supposedly after development – do not show Flats 1 and 2 or the rebuilt shed, and this evidence was lacking. The proposed plans of December 2014 include Flats 1 and 2 as well as the two-storey outbuilding and link – although not to the shape that actually exists, and different internal layouts for some of the flats. Existing plans dated May 2017 have corrected the shape of the outbuilding, although internal layouts are still incorrect. Another proposed plan dated – indistinctly – May or July 2017 omits the upper storey of the outbuilding and link. This may be intentional since another plan dated May 2017 shows the upper storey. The proposed plan dated January 2019 shows the intention to remove the upper storey. The most recent as built plans do not show the upper floor of the outbuilding and link and there are anomalies such as inclusion of a non-existent window, although it is noted on the drawing that the upper storey of the outbuilding is to be removed.
25. I bear in mind that the plans put in before the Inquiry were sworn as representing a true picture, and it might be expected that a man experienced in building would ensure drawings were correct. The various plans introduced considerable confusion, and in my opinion significant Inquiry time was spent in trying to understand which plan applied at any particular time – a central issue on the ground (d) appeal. Given the period of many years available for the appellant to produce a coherent and accurate account of what had occurred and when, I consider it was unreasonable to put in what I consider was in some ways misleading and partial information.
26. Regarding the tenancy agreements, I found it difficult to comprehend why and how purported tenants entered in to these at a time several of the flats – or even the space to contain Flat 5 and its staircase – did not exist. Statutory declarations adduced by the appellant were to my mind imprecise, and, given the wide range of witnesses who submitted them – all had the character of documents prepared by rote – notably in their descriptions of each flat as being the same. Although the early tenancy agreements and statutory declarations were unhelpful in understanding the situation of individual occupiers or the nature of their occupancy, and it was unreasonable to submit such poor documents, it did not lead to significant waste of Inquiry time or to unnecessary preparation by the Council.
27. In relation to the shed reconstruction and the link, I am inclined to think the Council's description of the appellant's account as 'fanciful' was reasonably accurate, having closely inspected what had most probably occurred. However, the appellant had reasonably made his case on that matter, and it was for the

Council to explain their reasons for questioning the truth of that. This cannot be regarded as unreasonable or unnecessary.

28. As regards the ground (a) appeal, I accept the development could not be shown to comply with development plan policy, and that it went against the grain of recent appeal decisions on nearby property. However, each case must be determined on its merits, and the appellant put up the best case available to him to justify this particular development on this site. The appellant put up a credible professional planning witness to present his case, and I do not consider it was unreasonable for him to do so or that the Council had to rebut the arguments unnecessarily.
29. The appellant has complained that the Council's costs application was made late in the day. I acknowledge that early applications are to be encouraged, that the PPG endorses this, and it is clearly helpful to an opposing party if this can be done. However, given the adjournments that were necessary in any case, the late application did not hamper the appellant in any significant way and caused no further delay to the Inquiry.
30. Overall, I consider the appellant behaved unreasonably with respect to late submission of his appendices 148 to 157, and poor tenancy and statutory declaration documents, these did not lead to unnecessary preparation time for the Council, or extended Inquiry time. However, I consider the late submission of the dormer construction information, and submission of inaccurate and confusing plans of the building constituted unreasonable behaviour, which led to unnecessary preparation for the Council or to extension of Inquiry time. Those latter instances caused unnecessary and wasted expense.
31. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified.

Costs Order

32. The application for a partial award of costs is allowed in the terms set out below.
33. 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 Khalid Osman Khalaf Al-Thefeiry shall pay to the Council of the London Borough of Brent, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in preparation and defence of matters relating to the submission of evidence relating to construction of the rear dormer, and to plans of the appeal premises submitted with the appellant's case and during the Inquiry; such costs to be assessed in the Senior Courts Costs Office if not agreed.
34. The applicant is now invited to submit to Khalid Osman Khalaf Al-Thefeiry, 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.

Stephen Brown

INSPECTOR