



Costs Decision

Inquiry held on 7 – 10, 15 & 22 September & 22 October 2021

Site visits made on 7 & 23 September 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 January 2022

Costs application in relation to Appeal A Ref: APP/U5360/C/19/3242430 Land at Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E2 8BD

- 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 Mr Russell Gray of Shiva Ltd for a full award of costs against the Council of the London Borough of Hackney.
 - The inquiry was in connection with an appeal against an enforcement notice alleging: Without planning permission the erection of four (4) unauthorised structures at roof level, the installation of a platform and decking at roof level and the installation of fencing around the roof edge at 53 Laburnum Street.
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Costs application in relation to Appeal B Ref: APP/U5360/C/20/3260019 The Regent's Canal and Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney, London E2 8BD

- 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 Mr Russell Gray of Shiva Ltd for a full award of costs against the Council of the London Borough of Hackney.
 - The inquiry was in connection with an appeal against an enforcement notice alleging: Without planning permission the material change of use of the land to a mixed use – (A3) Restaurant and bar, (D1) the display of art installations (D2) cinema; and use to host social gatherings / as an events space (Sui generis use).
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Decision

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

The submissions for Mr Russell Gray of Shiva Ltd

2. A written submission was provided by the applicant. Additional comments were made orally at the Inquiry and are summarised in Annex A.
3. The applicant's reply to the respondent was given orally at the Inquiry and is summarised in Annex C.

The response by the Council of the London Borough of Hackney

4. The response was given orally at the Inquiry and is summarised in Annex B.

Reasons

5. The Planning Practice Guidance (PPG) 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 process.
6. The applicant seeks an award of costs against the Council on both procedural and substantive grounds.
7. The applicant states that the Council went to the High Court for an emergency injunction, without notice, on the day of the launch of the sharks art installation. But the injunction is not before me and, in any event, given comments published in the *Guardian*¹, said to be made by the appellant and the sharks' creator, the Council's course of action was, in my view, entirely reasonable.
8. For the same reason, I do not think it unreasonable for the Council to not make inquiries about risks or harms to local people arising from the placement of the sharks on the site's moorings, before taking enforcement action, as I do not see that the Council had any reason to doubt what was said in the aforementioned *Guardian* article.
9. The applicant states that enforcement officers knew, or could have known, that the display of art installations had been ongoing for 2 decades. But this does not matter given that the material change of use alleged in the notice in Appeal B was a mixed use including other primary components and not just the display of art installations.
10. The Council made no inquiries about structures/installations which are the target of the Council's enforcement action, according to the applicant. But as Mr O'Connor said at the Inquiry, sometimes a case is so clear that inquiries are not necessary and in respect of the operational development attacked by the notices, I am satisfied that is the case here.
11. The applicant considers that the Council failed to consider if the display of art installations internally complies with the relevant policy and states that there is no conflict with development plan policies. But this is not the case, as I have found in my appeal decision, in respect of policies including LP10 and LP32. The applicant indicates that as a result, the ground (d) argument has been largely if not entirely unnecessary. But logically ground (d) must be considered prior to ground (a) and it was for the appellant to decide on what grounds to appeal the notice, omitting ground (d) if they so wished, if they were confident of their position on ground (a). Given the above policy conflict, I do not accept the applicant's contention that the Council should simply have sought conditions to control use of the roof and allow the internal display of art installations.
12. The applicant has referred to shortcomings in the enforcement notices, the Council failing to apply its mind to the existing uses and misdirecting itself regarding the different planning units. But I have not found this to be the case regarding the planning units and there were no problems with the notices that were not correctable in accordance with section 176 of the 1990 Act.

¹ Oliver Wainwright article dated 18 August 2020 "Sharks! Why are five man-eaters being unleashed into a popular canal?"

13. According to the applicant, the Council failed to properly investigate the extent to which the premises had been used as a bar, restaurant and cinema. But I have not found this to be the case nor, in my judgement, were any of these uses incidental as suggested by the applicant.
14. The applicant indicates the Council failed to have regard to the potential for a ground (d) appeal before deciding on use of the enforcement notice (and stop notice). But it would have been obvious to the Council when it served these notices that not all components of the mixed use it alleged had continued for the relevant immunity period, particularly given that, on the appellant's own case, the cinema and restaurant and bar use were only introduced in the last couple of years.
15. The Council ignored voluminous letters of support and wrongly asserted that there are no public benefits of the appeal development, according to the applicant. But I am satisfied that the Council's position on public benefits was fully substantiated and the planning process (at least in respect of ground (a)) is not a referendum. In other words, no matter how many representations are received, a decision on ground (a) must still be based on the merits of the case rather than the number of representations.
16. The applicant considers the Council focussed on alleged fears of noise and light associated with the sharks installation when there are other means of community protection. But the injunction is not before me and in any event, the Council was entitled to make use of the planning enforcement powers available to it, to control a breach of planning control, whether other powers were available or not. Moreover, in my view, the Council reasonably acted on information in the public domain (including the aforementioned *Guardian* article) about the appeal development.
17. Based on the tracked changes draft Statement of Common Ground (SoCG) provided on 22 October 2021 (submitted with the appellant's closing submissions), it is clearly not the case that the Council failed to cooperate on the production of a SoCG. Moreover, the version signed only by the appellant, submitted on 7 September 2021, does not reflect deletions in the above version and so it is no surprise that the Council did not sign it and this was not unreasonable behaviour.
18. The applicant considers the Council consistently refused to engage with the appellant in order to be adequately informed about the uses of the site. But in my view, by the same token, there is no evidence the appellant properly engaged with the local planning authority prior to changing the use of the land, by way of pre-application engagement in a manner consistent with the National Planning Policy Framework. This is despite the appellant being experienced in planning and enforcement matters, as is obvious from the site's appeal history, referred to in my appeal decision. In any event, under section 172 of the 1990 Act, a local planning authority may issue an enforcement notice **where it appears to them** that there has been a breach of planning control and that it is expedient to issue the notice (my emphasis). In other words, engagement by the Council was not a pre-requisite for the Council issuing either notice.
19. According to the applicant, the Council refused to engage with the appellant over what conditions might be necessary to protect local residential amenity. But I do not accept this is the case as it is clear that the Council provided a draft schedule of conditions before the Inquiry opened (long before the

- conditions session on 22 September 2021), including conditions relating to residential amenity and conditions seeking to control events.
20. My attention has been drawn to paragraph 049² of the PPG, where it indicates that refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead. But refusing planning permission for a proposed development is not the relevant scenario in this case and there is no evidence a prospective planning application for the appeal development has ever been received by the Council for it to impose all the necessary conditions.
 21. Whilst I have found in my appeal decision that the effect of the appeal development on living conditions is capable of being dealt with by conditions, this was entirely a matter of planning judgement based on the specific circumstances of this case. In other words, I could have reached a different conclusion on this main issue. Moreover, it was not open to the Council to impose all the necessary conditions in this case via requirements of either enforcement notice, as one of the necessary conditions requires the submission of a scheme for approval and case law is clear that an enforcement notice cannot do this. Furthermore, the imposition of conditions would not have addressed all other main issues in this case and so in my view the Council's behaviour was not unreasonable in respect of conditions.
 22. My attention has also been drawn to a licence and conditions contained in that. But planning and licensing are entirely separate regimes and it is for the appellant to satisfy both, rather than for the local planning authority to accept whatever conditions may be acceptable for licensing purposes.
 23. The Council introduced the issue of a loss of employment land in a Proof of Evidence when this had not been raised in either enforcement notice or its Statement of Case. This meant the appellant had had no opportunity to respond to this issue in their evidence. As a consequence, the appellant prepared a supplementary Proof of Evidence to address this issue.
 24. The issue fell away during the Inquiry as a consequence of the allegation in the notice being corrected to include artists' studios. But this issue amounted to the introduction of fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen. This is unreasonable behaviour for the purposes of the PPG³ and the applicant incurred unnecessary or wasted expense as a result.
 25. The applicant considers the Council introduced late a new issue of intensification. But references to intensification were in the context of a previously ancillary use (ie the display of art installations) becoming a primary component of the mixed use alleged in the notice in Appeal B.
 26. The applicant states that had the Council not acted unreasonably the possibility of applying for a certificate of lawful use in relation to a mixed use including displaying art installations would have been recognised as an alternative that obviated the need for this Inquiry. But it was open to the appellant to make such an application outside of the Inquiry and before it began.

² Appeals - Paragraph: 049 Reference ID: 16-049-20140306

³ Appeals - Paragraph: 047 Reference ID: 16-047-20140306

27. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated only in relation to the aforementioned loss of employment land issue, and that a partial award of costs is justified.

Costs Order

28. 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 Council of the London Borough of Hackney shall pay to Mr Russell Gray of Shiva Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in responding to the loss of employment land issue raised by Mr O'Connor's Proof of Evidence, including the preparation of the supplementary Proof of Evidence dated 2 September 2021 by Russell Gray; such costs to be assessed in the Senior Courts Costs Office if not agreed.
29. The applicant is now invited to submit to the Council of the London Borough of Hackney, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

L Perkins

INSPECTOR

Annex A: Additional submissions for Mr Russell Gray of Shiva Ltd

- The tracked changes version of the SoCG, with deletions by the Council, was provided only 48 hours before Inquiry was due to begin. No SoCG meant the amount of evidence heard increased. The Council should have been more proactive and could have proceeded without the bits deleted but it was left until too late and not signed. The Council did not adhere to the timetable. They did not delete it all so it should have been signed and submitted.
- Inspector Simpson⁴ said conditions could control events. The Council should have engaged on conditions regarding events.
- Enforcement could have been avoided by talking.
- Section 177 means planning permission may be granted for any of the uses or part of the land.
- The employment floor space issue required the analysis of employment data and was not in the Statement of Case but in Mr O'Connor's proof. The Council failed to specify what the change of use was from. The production of art means there was no loss of employment floor space therefore the issue fell away when the production of art was accepted as the existing use. This was unreasonable.
- Intensification presupposes the prior existence of the thing being intensified, ie the display of art, if art display intensified to go from ancillary to a primary use.

⁴ APP/U5360/A/04/1150239 dated 3 February 2005

Annex B: The response by the Council of the London Borough of Hackney

- Regarding section 177, the use is the mixed use, as per the *Beach*⁵ case.
- Regarding paragraph 6, 2 High Court judges did not agree the Council is misbehaving as they would not have made the orders they made, so there is no unreasonable conduct. The Council took a sound approach, endorsed by the judge and his interim order.
- The argumentative SoCG was sent back the next day, with the guidance inviting Mr Gray to produce a SoCG that complies with the guidance and Mr Gray did not take this up.
- Regarding paragraph 8, these are all for the Inspector to decide on substantive matters. The Council's approach has been reasonable and it has provided professional evidence.
- The Council had sufficient material to issue the notices, see the delegated reports and a High Court judge agreed there were sufficient grounds to go for relief. Existing enforcement proceedings had not been complied with by the appellant.
- Public benefits is simply a matter of disagreement between the Council and the appellant. But the authority has considered the material and has articulated its case on public benefits. This is an attack on the merits. It was taken into account.
- Mr O'Connor dealt with the employment point fairly and has not sought to pursue the point. There is not continued reliance on this by the Council.

⁵ *Beach v SSETR & Runnymede BC* [2002] JPL 185

Annex C: The applicant's reply to the respondent

- Costs could have been saved had the parties properly engaged after the grounds of appeal stage and this did not happen. It seems the Council do accept the display of art was ancillary and that was an established ancillary use and as per the *Mansi* principle and could be introduced into the amended notice.
- Regarding the SoCG, Mr Gray replied to the Council the same day inviting the Council to produce its own draft or strikethrough any points not agreed.