
Costs Decision

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 March 2022

Costs application in relation to Appeal Ref: APP/N5090/C/20/3259541 Land at 58 Sturges Avenue, London NW4 3TS

- 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 Council of the London Borough of Barnet for a partial award of costs against Mr Namir Moslawy.
 - The appeal was against an enforcement notice alleging without planning permission the change of use of land in the rear garden to use for/as two dwellinghouses and operational development in the form of construction of the building in which these dwellings are situated carried out incidental to making the change of use.
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DECISION

1. The application for an award of costs is refused.

REASONS

2. The Planning Practice 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 process.
3. The application is made in relation to grounds (a), (d) and (e) of the appeal.

Ground (e)

4. In summary, the appellant in his grounds of appeal submitted that the enforcement notice was a nullity or in the alternative that it should be quashed for failing to comply with the requirements of section 172 of the 1990 Act. The onus of proof in this legal ground of appeal was said to rely on the local planning authority. The statement of case revealed that the thrust of the appellant's ground (e) case was directed at the authority to issue the notice, not the service of the notice which is the matter identified in section 174(2)(e).
5. A ground (e) appeal was made when the appellant's case was directed at other matters related to validity. The supporting facts to support a ground (e) appeal were not provided by the appellant at the relevant time, contrary to procedural guidance issued by the Planning Inspectorate. In an appeal decision issued after the current appeal was made, an Inspector disagreed with the applicant's 'onus of proof' interpretation of the *Nelsovil* judgement¹. The agent representing the appellant in the current appeal was the agent in that appeal.

¹ Appeal decision ref APP/N5090/C/18/3215654 dated 9 November 2020 re 148 Clitterhouse Road London NW2 1DN in the London Borough of Barnet

6. In my decision on the appeal I did not deal in any detail with the appellant's argument that the notice was "not constitutionally valid", considering that the matter was more appropriately dealt with by way of judicial review. In the past (2016) Inspectors have considered similar issues but in my view case law has evolved recently, as indicated by the Inspector in the Clitterhouse Road decision (2020).

Ground (d)

7. The facts relied on initially to support the ground (d) appeal did not address in any detail the alleged breach of planning control as worded in the notice and relied on the residential use of the planning unit, 58 Sturgess Road. The statement of case repeated this point and also relied on the lawfulness of the two units in two previous appeal decisions.
8. As the appeal was allowed on ground (c), it was not necessary for me to consider ground (d).

Ground (a)

9. The Planning Inspectorate's Procedural Guidance states that appellants should ensure that, at the time they make their appeal, the grounds pleaded are made clear and facts are provided to support each of the grounds. Grounds of appeal on ground (a) should cover the planning merits of the case, explain clearly why the appellant disagrees with each of the reasons for issuing the enforcement notice and explain why the alleged development would either satisfy the local and or national planning policy or why they are not relevant. A reason for this is to ensure all other participants (including interested people) viewing the appeal documents will be aware of the arguments and issues from the start and will be able to make informed comment by the 6 weeks deadline.
10. When the appeal was made, the accompanying document Appeal Grounds stated in respect of ground (a) that full reasons would be given at the time of submission of the appeal statement. The Procedural Guidance was not followed. It was only at the statement of case stage that the reliance on the then lawfulness of the two units as a material consideration became clear.

Considerations

11. The appeal has succeeded on ground (c) and the enforcement notice quashed. This decision was informed by the Court ruling on the appeal decision that resulted in a lawful development certificate being issued for the two units. The appeals on grounds (d) and (a) did not need to be considered.
12. The date for the submission of statements of case was extended for both parties to a date after the outcome of the challenge was known, albeit the Council complied with the initial timescale. It was reasonable for the appellant's case to reflect that outcome.
13. The Clitterhouse Road appeal decision was issued after the current appeal was made and therefore could not inform the grounds of appeal at the outset.
14. On balance, bearing in mind the background of the planning history and timing of the appeal, unreasonable behaviour did not occur.

Conclusion

15. I find that unreasonable behaviour resulting in unnecessary or wasted expense as described in Planning Practice Guidance has not been demonstrated.

Diane Lewis

Inspector