The Planning Inspectorate

Costs Decision

Inquiry Held on 14 and 15 January 2020, 2 November 2021 and 15 March 2022
Site visit made on 15 January 2020 and 2 February 2022

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 April 2022

Costs application in relation to Appeal A: Ref: APP/T5150/C/18/3209760 and Appeal B: APP/T5150/C/18/3201506
13-15 Walm Lane, Willesden Green, London NW2 5SJ

- 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 full award of costs against Mr Nihat Algul.
- The inquiry was in connection with appeals against enforcement notices alleging (i) without planning permission, the removal of two shop fronts and the installation of a new combined single shop front; and (ii) without planning permission, the erection of a first floor rear extension to the rear of No 15 Walm Lane.

Decision

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

The submissions for the Council

2. The Council's application was submitted in writing and was made on three grounds:

   i) The withdrawal of an appeal without good reason; this refers to the withdrawal of the appeals on grounds (b) and (c) on 2 November 2021 and the withdrawal of the nullity/invalidity arguments on 15 March 2022 in respect of Appeal A;

   ii) Prolonging the appeals by failing to provide organised evidence and introducing new grounds of appeal namely ground (g) for both appeals; and

   iii) Pursuing a ground (a) appeal and deemed planning applications for developments that were clearly not in accordance with the development plan.

The response by Mr Algul

3. The response was made orally at the Inquiry. Mr Algul reviewed his position throughout the course of the appeals, as this is his responsibility. The Council's Proof of Evidence (POE) shows that appeals on grounds (b) and (c) were addressed quite briefly, as was the nullity/invalidity argument. In addition, very little Inquiry time was taken to deal with the appeals on grounds (g). With regard to the ground (a) appeal and the deemed planning applications, the Council only referred to the development plan in their POE. The Council

never detailed the harm to the conservation area and did not submit any heritage evidence.

Reasons

4. The Planning Practice Guidance (the Guidance) advises that costs may only 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.

The first ground

5. This application ground centres on the late withdrawal of two grounds of appeal and the nullity/invalidity argument. Pursuing these grounds then abruptly withdrawing them prolonged proceedings unnecessarily.

6. The Guidance requires appellants to keep their cases under review to support an efficient and timely appeal process. Sometimes, for example, due to new evidence coming to light, an appellant may decide to stop pursuing a particular ground of appeal. The Guidance provides examples of unreasonable behaviour which may result in an award of costs and includes "withdrawal of an appeal *without good reason* (my emphasis).

7. When the appeals were first made, Mr Algul indicated that he wished to pursue appeals on grounds (b) and (c) in respect of the shop front. In addition, he advanced an argument that Notice A, in respect of the shop front, was a nullity or invalid. The first Start Letter from the Planning Inspectorate for the appeals, dated 7 December 2018, stated "we do not consider there are any issues that make the notice invalid or a nullity and we consider written representations are suitable". However, when the procedure for determining the appeals was changed to an Inquiry, Mr Algul continued to pursue a nullity/invalidity argument.

8. Initially, the appeals were not conjoined and so the Council produced separate Statements of Case (SoC) for each appeal, which were at the time to be dealt with using the written representations procedure. The SoC for Appeal A contained three paragraphs as the response to the ground (b) appeal and two in respect of the ground (c) appeal. Nothing was said about nullity/invalidity.

9. When the Council's POE was produced, this dealt with both appeals in the one document for convenience, but the Council also relied on the previous SoC. Therefore, they were submitted as documents to the Inquiry in January 2020. Mr Algul refers to grounds (b) and (c) being dealt with briefly in the POE but this overlooks the SoC. The POE did not provide a written response to the nullity/invalidity argument.

10. My records show that in January 2020 Mr Algul's then advocate/agent spent approximately 30 minutes in his opening statement and approximately an hour and three quarters during evidence in chief talking about the nullity/invalidity argument. He was therefore cross examined on it by the Council. Mr Algul's son was also cross examined by the Council on grounds (b) and (c) for approximately 15 minutes. In addition, Mr Algul's then advocate/agent cross examined the Council's witness for approximately 15 minutes on nullity/invalidity.

11. After all this, on 2 November 2021, Mr Algul's new advocate announced the withdrawal of the appeals on grounds (b) and (c) just before the resumption of cross examination of the Council's witness. No mention was made of the nullity/invalidity argument. It was only when asked about that on 15 March 2022 that Mr Algul confirmed he would no longer be pursuing that argument. Nothing had changed in respect of the Council's case and this announcement, together with that made on nullity/invalidity on 15 March, came as a surprise to the Council.

12. Mr Algul's response is that there was a lack of clarity in Notice A, that it was reasonable to pursue the appeals for this reason and that nullity/invalidity is a legal point. With regard to the latter point, I engaged Mr Algul's first advocate/agent on this during my opening remarks and announcements on 14 January 2020. I explained that the use of the word "shopfront" is an architectural term and is not related to the use of the premises.

13. I also set out that the Council had made a mistake in referring to the incorrect supplementary planning document in the reasons for issuing the notice but that did not make the notice invalid. Regarding the conservation area point, and the lack of any reference to guidance, I explained that even if there was guidance, it is down to the Inspector to reach their own conclusion on the character and appearance of an area and what is significant about it. Notwithstanding this, the nullity/invalidity point continued to be pursued.

14. The Council submit that the appeals on grounds (b) and (c) had no reasonable chance of success. Certainly, after I had explained about nullity/invalidity in my opening remarks and engagement with Mr Algul's first advocate/agent, he should have reviewed his position then in respect of ground (b), as this was connected to the nullity/invalidity argument. It should also have become obvious to him after his cross examination by the Council that the appeal on ground (c) no longer had any prospect.

15. I therefore find in respect of the first application ground that Mr Algul failed to keep his case under review with regards to grounds (b), (c) and nullity/invalidity. This caused the appeal process to be inefficient and led to delay. In particular, he failed to address the latter part of the example in the Guidance, namely *without good reason,* with sufficient explanation. Therefore, unreasonable behaviour has been demonstrated which led to wasted expense for the Council.

16. The Council incurred the costs of responding to the appeals on grounds (b) and (c) and incurred costs dealing with these grounds, as well as the nullity and invalidity argument, at the Inquiry. The extra time taken up at the Inquiry on these matters amounted to some three hours. If the appellant had kept his case under review, proceedings could have been completed within two days.

The second ground

17. The Council criticised the presentation of Mr Algul's case. Notwithstanding the number of tabs in his written material, he did provide a reference system to his appendices, all documents were dated and important points were underlined. Whilst the documents were largely repetitive, it was possible to understand and follow his case. I therefore find that the Council's application on this point is unsubstantiated.

18. The additional appeals on ground (g) were made after the start of the appeal process but before the opening of the Inquiry in December 2019. This is not unusual. However, the Council had not noted the additional grounds until I brought them to their attention in my opening remarks and announcements. At that point the Council stated they were content to respond to the appeals on ground (g) in their closing statement, which they did. They made no request to adjourn to consider the ground (g) appeals and there was no need, as they were able to briefly address them in their closings.

19. I therefore find in respect of the second ground for the application, that the late submission of the appeals on ground (g) was not unreasonable and did not lead to any wasted expense.

The third ground

20. The Guidance is clear that there is a right of appeal[1] and this is expressly reiterated in respect of enforcement notices[2]. In the circumstances that Mr Algul found himself it was unsurprising that he exercised that right, given the likely costs incurred during the construction of the extension and the installation of the new shop front. He is also entitled to choose his grounds of appeal, provided they can be substantiated, and in respect of ground (a), he responded in detail to the reasons for issuing both notices.

21. I found that Mr Algul's case in respect of both ground (a) appeals was adequate. Whilst I have disagreed with the case made for the extension, as set out in my decision, that does not make it unreasonable to have come to a different view. Although I was not satisfied that the extension accorded with the development plan, it does not follow that therefore the ground (a) appeal had no prospect of success.

22. With regard to the shop front, for the reasons set out in my decision, I found that it did preserve the character and appearance of the Willesden Green Conservation Area and there was therefore no conflict with the Council's policies or supplementary guidance. Whilst there is a requirement to consider like cases in a like manner, this also depends on the merits of the proposal. As such, it was not "obvious" that the shop front development was "contrary" to the development plan and that the ground (a) appeal had no prospect of success.

23. I therefore find that the case for unreasonable behaviour on the third ground is not substantiated.

Conclusion

24. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated in respect of the first ground for the costs application, and that a partial award of costs is justified.

Costs Order

25. 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 Mr Algul

[1] Paragraph reference ID: 16-001-20140306
[2] Paragraph reference ID: 16-018-20140306

shall pay to the London Borough of Brent Council the partial costs of the appeal proceedings described in the heading of this decision. These are limited to those costs incurred by those matters set out in paragraphs 10 and 16 above, such costs to be assessed in the Senior Courts costs office if not agreed.

26. The applicant is now invited to submit to Mr Algul, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

D Fleming

INSPECTOR