



Costs Decision

by C Sherratt DipURP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 10 May 2022

Costs application in relation to Appeal Ref: APP/T5150/C/17/3182904 154a Harlesden Road, Willesden, London

- 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 Ebele Muorah for a full award of costs against the Council of the London Borough of Brent.
 - The appeal was against an enforcement notice alleging without planning permission, the erection of a canopy and door, facing Harlesden Road ("the unauthorised development") and without planning permission the material change of use of the premises from one to two dwellings ("the unauthorised change of use").
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Decision

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

Reasons

2. By way of background, this appeal was initially determined following the Inquiry procedure. An application for costs was withdrawn at the Inquiry. Following a High Court challenge, made under s289, to the Inspector's decision, the Court ordered that the appeal was re-determined. The matter was therefore remitted to the Secretary of State for re-hearing and determination in accordance with the opinion of the Court. The re-determination was on a narrow point identified by the Court and proceeded by way of Written Representations. An application for costs was made at this stage. The redetermination decision is now the subject of a further challenge.
3. An appeal against the Council's refusal to issue a Lawful Development Certificate (LDC) had also been made by the appellant and was determined separately. The appeal decision in respect of the LDC was dated 10 September 2020¹. It is currently the subject of a High Court challenge made under s288.
4. The LDC certified that, on the balance of probability, the change of a dwellinghouse into two flats was lawful on the date of the application; that being 7 November 2019. The dispute between the parties centred on the interpretation of s191(2)(b) of the 1990 Act and specifically, whether the notice could be considered to be 'then in force' on the date of the application. The appeal against the enforcement notice had been remitted to the Secretary of State for redetermination on 15 January 2020.

¹ LDC appeal reference APP/T5150/X/32344211

Therefore, on the date of the LDC application, the Inspector agreed that there was no enforcement notice "in force" for the purposes of section 191(2)(b), and the enforcement notice was of "no effect" pending the final determination of the appeal (as per section 175(4) of the 1990 Act). Accordingly, the development described in the application would not have been in contravention of any of the requirements of the enforcement notice on that date. The appeal was allowed.

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 application was made in writing² and so it is not necessary to repeat it in full. In summary the applicant makes the claim on the basis that the failure of the Council to withdraw the enforcement notice amounted to unreasonable behaviour. Four grounds are set out explaining why the Council should have done so, as follows:

"1. The LPA are not able to produce any evidence of any delegated authority to issue the enforcement notice which was served on 24th July 2017.

2. The certificate of lawful development (now subject to appeal) which ought to have been granted on the subject property ought to have invalidated any further costs being incurred via the enforcement notice appeal.

3. The failure to accept there has not been any breach of control due to the fact that the LPA do not operate any article 4 directive so that it was permitted development to have a HMO which equally in turn enjoys permitted development rights to change a window into a door despite the high court quashing the decision on this very basis is also unreasonable behaviour by the LPA

4. The LPA has failed to consider the fallback position as proposed in Ground A and as presented in the inquiry with new material introduced by the LPA which clearly demonstrates an enlargement of the building under permitted development enables each flat to satisfy the size requirements by the London Plan is the last evidence of unreasonable behaviour."

7. The applicant considers that the wasted expense has been her moving costs along with the costs of the written Inquiry procedure, the cost of the first Inquiry and cost of the court determination. The liability of the wasted cost of the second public inquiry has not yet been determined by the applicant but given the error in the decision itself, she does not think that the Local Authority should be liable in those wasted costs. That argument was, she explains, put before the High Court.
8. As a matter of clarification, this decision will simply determine whether any unreasonable behaviour leading to wasted or unnecessary expense in the appeal process has occurred. The amount of any costs would be a matter for the applicant to agree with the Council.

² Application for an Award of Costs Form dated 20 February 2020

9. The Council responded to the application for costs in correspondence dated 16 April 2020, again in writing, so I need not repeat it here. Like the Council, I shall respond to each ground advanced by the applicant in the order raised.

Ground 1

10. Whether proper authority exists to issue a notice is not a matter that can be addressed through an application for costs. Such concerns were not raised as part of the initial appeal. In any event, I note that the Council has now provided the applicant with a copy of both the delegated report and scheme of delegation. I do not consider that the Council has acted unreasonably in the context of a costs application in this regard.

Ground 2

11. The application for a LDC in respect of the use of the property as two flats was not submitted until sometime after the enforcement notice had been issued, the appeal against it lodged and subsequently determined and that decision then challenged in the High Court. The costs incurred in respect of the enforcement notice appeal could not therefore have been avoided even if the Council had approved the application for a certificate of LDC.
12. For the avoidance of doubt, this Costs Decision can only address whether unreasonable behaviour and wasted expense occurred in respect of the appeal against the enforcement notice rather than the LDC. Further, any costs involved in re-determination of the appeal are not as a result of unreasonable behaviour by the Council but rather an error found in the Inspector's decision.
13. I find no unreasonable behaviour occurred in this regard.

Ground 3

14. It is difficult to understand the precise nature of this ground. There appear to be a number of matters rolled into one which I have sought to address separately. I turn first to address the assertion that the Council failed to accept that no breach had occurred in respect of the use of the premises as a House in Multiple Occupation (HMO) and in relation to a change from a window to a door.
15. The alleged material change of use described in the notice was not to a HMO; rather it was a material change of use of the premises from one to two dwellings. There was no appeal made on the basis that the material change of use to two dwellings had not occurred. There was no ground (c) appeal asserting that the material change of use to two dwellings was not a material change of use involving development (irrespective of whether the previous lawful use was a single dwelling as set out in the notice or a small HMO falling within Class C4 of The Town and Country Planning (Use Classes) Order 1987 (UCO) as argued by the appellant).
16. Whether or not an Article 4 direction was in place appears to be of no relevance to the description of the breach. The Inspector agreed with the Council that a material change of use to two dwellings would conflict with the development plan and there were no material considerations to

indicate that determination of the ground (a) appeal should be made other than in accordance with the development plan. No fault was found in relation to the Inspector's consideration of the appeal on ground (a) by the Court. The Council has not acted unreasonably in this regard.

17. In respect of the canopy and door, it need only have appeared to the Council that a breach had occurred. In legal grounds of appeal, the onus falls on the appellant to demonstrate, on the balance of probability, that the ground(s) should succeed. The Inspector found, when considering the appeal made under ground (c) in relation to the canopy and door that, given the circumstances of this case, it was not necessary to determine whether the property was in a use found in Class C3(c) or C4 of the UCO. It therefore had no bearing on the deliberation of the ground (c) appeal and so the Council did not act unreasonably in issuing the Notice, regardless of the lack of an Article 4 direction.
18. The basis for the High Court Order to remit the appeal for re-determination was on the basis of an error that remained in Step 1 of the Notice. Step 1, as drafted, prevented occupation of the property by more than one household. That would, if left uncorrected, prevent the subsequent use of the property as a small HMO operating within Class C4 of the UCO whether through reversion to a previous use (s57(4) of the Act) or a subsequent change of use from a single dwelling to a small HMO falling within Class C4 of the UCO³. An enforcement notice should not take away existing lawful use rights; it can do no more than require the unauthorised use to cease and require any works that were installed to facilitate that particular use to be removed in order to remedy the breach; that is irrespective of whether they could be used for another future lawful use.
19. The Council did therefore behave unreasonably by issuing a notice that required that the property could only be occupied in the future by one household, thus preventing the appellant from benefiting from the permitted development rights afforded by the GPDO or reversion rights provided for by s57(4). Unfortunately, that error was further perpetuated when the Inspector acknowledged the problem but then failed to correct the notice. In terms of wasted expense, the appeal would not have been avoided altogether since the appellant appealed on a number of grounds and raised wider arguments in respect of ground (f).
20. I note that, in its letter of 24 March 2020, the Council suggested that the correction to Step 1 could have been achieved by an exchange of letters with the appellant⁴, but the appellant rejected such an approach. Of course, this was a matter for her.
21. I find the unreasonable behaviour of the Council and the consequential wasted expense is therefore limited to the work and time taken to present a case at appeal in relation to the requirement in Step 1 in so far as it would limit occupation to one household.

³ As permitted by Class L of Part 3 of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

⁴ Section 173A(1)(b) enables a LPA to waive or relax any requirement of a notice.

Ground 4

22. The appellant refers to additional material put before the Inquiry. I am not aware of matters arising at the Inquiry and so any concerns about unreasonable behaviour should have been put to that Inspector. However, a costs application was, I understand, made and then withdrawn.
23. As a matter of principle, whilst it may have been open to the Council to indicate whether an alternative scheme suggested during the appeal process would be acceptable to it, on appeal the decision lies with the Inspector appointed by the Secretary of State. There can be no criticism of the Council for not taking new and additional material into account at appeal stage. The Council made its decision to issue an enforcement notice based on the development that had occurred. There was no mechanism open to it to require works to enlarge the flats to take place, only to remedy the breach. The deemed planning application that accompanies an appeal under ground (a) is for the development alleged. It is only open to an Inspector to consider an alternative scheme advanced by an appellant if it is 'part of' that development alleged.
24. However, in this case, the deemed planning application simply did not include enlargements to the building since no enlargements existed. A proposal to carry out enlargements cannot be considered to be part of the development alleged and so could not be considered by an Inspector as part of the appeal process. A proposal of this nature would need to be made to the local planning authority outside of the enforcement proceedings. If planning permission were forthcoming, then the enforcement notice would cease to have effect in so far as it were inconsistent with any permission granted⁵.
25. Furthermore, no criticism was made in the court judgment of the Inspector's decision in relation to ground (a). No unreasonable behaviour by the Council has been demonstrated in relation to this ground.

Conclusion

26. To conclude, I find that the unreasonable behaviour is limited to the requirement in Step 1 to cease the occupation of the property by more than one household. The appeal was not avoidable altogether as the appellant brought a number of grounds unrelated to Step 1 and an appeal under ground (f) was still likely to have been made irrespective of the error with Step 1 of the Notice. Any resultant wasted expense is therefore limited to that involved in raising concerns about the restriction to one household.
27. 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

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

⁵ Section 180 of the Act.

amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that London Borough of Brent shall pay to Ms Ebele Muorah, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the appeal on ground (f) in so far as it relates to the requirement to cease its occupation by more than ONE household; such costs to be assessed in the Senior Courts Costs Office if not agreed.

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

C. Sherratt

Inspector