The Planning Inspectorate

Costs Decision

Site visit made on 4 October 2022

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26th OCTOBER 2022

Costs application in relation to Appeal Ref: APP/A5270/C/20/3265284
Premises known as the upper floors at 181 Noel Road, Acton, London, W3 0JJ

- 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 Mr Malek El-Houry for a full award of costs against the Council of the London Borough of Ealing.
- The appeal was against an enforcement notice alleging without planning permission, the material change of use of the upper floors to use as two flats (Flat B and Flat C).

Decision

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

Reasons

2. The Planning Practice Guidance (PPG) 'Appeals' chapter advises that parties in planning appeals should normally meet their own expenses. However, costs may be awarded where a party has behaved unreasonably and that behaviour has caused another party to incur unnecessary or wasted expenditure in the appeal process (paragraphs 028 and 030). "Unreasonable" has its ordinary meaning, as established by the Courts[1]. The PPG paragraph 031 explains that unreasonable behaviour in the context of an application for costs can be either procedural-relating to the process, or; substantive-relating to the issues arising from the merits of the appeal.

3. The application for an award of costs was made in writing, in accordance with the guidance at paragraph 035 of the PPG. Although it does not state as such, an award of costs appears to have largely been sought on substantive, but also partly on procedural, grounds. Summarised briefly, the applicant's case is that the Council did not agree with the evidence submitted with their response to the Planning Contravention Notice (PCN) and with an application for a Lawful Development Certificate (LDC) submitted for the two flats. However, the Council did not produce evidence of its own which either contradicted the applicant's version of events or made them less than probable. Nor did the Council seek to obtain information from Council Tax records which might have corroborated the applicant's case. No copy of any report setting out the Council's consideration of the expediency of enforcement action was made available. The Council imposed a stricter burden of proof than the civil standard of on the balance of probability, leading directly to the issue of the enforcement notice and the associated expense of pursuing an appeal.

[1] *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774.

4. At paragraph 047, the PPG stresses that a Council should behave reasonably in relation to procedural matters at the appeal. The non-exhaustive list of examples of where a Council risks an award of costs being made on procedural grounds includes lack of cooperation with the other party and delays in providing information.

5. Even if this appeal had been against the refusal of the LDC application, the PPG paragraph 033 makes it clear that costs cannot be claimed for the period during the determination process. Nevertheless, the enforcement notice was issued shortly after the LDC application was refused. Paragraph 048 of the PPG, which concerns the handling of an application or an enforcement notice prior to an appeal, is therefore relevant. This advises that a Council must carry out adequate prior investigation before issuing an enforcement notice; a Council is at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place or ensured that it was accurate.

6. At paragraph 049, the PPG advises that a Council risks an award of costs on substantive grounds where an application is unreasonably refused. This could apply equally to a Council deciding that it is expedient to take enforcement action. The non-exhaustive list of examples of where such a situation might arise include failing to produce evidence to substantiate reasons for refusal, making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis and acting contrary to, or not following, well-established case law.

7. The Council's reasons for considering that enforcement action was expedient were clearly set out on the face of the notice. Moreover, the delegated report for the LDC application largely dealt with the sum of the evidence that had been provided prior to the issuing of the notice. Having sight of any expediency report prepared by the Council is therefore unlikely to have made a significant difference to the applicant in terms of their preparing for the appeal. On this basis, even if the Council might have been more cooperative by making a copy of any expediency report available, I am unconvinced that by not doing so the applicant incurred any wasted expense.

8. On a fair reading, the LDC application delegated report referred to an absence of suitable evidence to support the claimed use as two flats for more than four years prior to the application date. It was for the applicant to submit sufficiently clear and precise evidence to show why, on the balance of probability, the claimed use as two flats was lawful. As a result, the reasoning underpinning the decision to refuse the application is clear. Even if Council Tax information had been obtained, as that does not necessarily demonstrate use it is unlikely to have led to a different decision in respect of the LDC application or the consequent decision to take enforcement action.

9. Whilst the Council could have sought the submission of further information before determining the LDC application, that is not always practicable having regard to the timescales involved. In all probability, the Council were also mindful that the four-year period for taking enforcement action might imminently expire. That the applicant deemed it was necessary to submit substantial additional evidence regarding the claimed use as two flats with their enforcement appeal suggests a recognition, at least in part, of a deficiency in

the evidence that had accompanied both the PCN and the LDC application. Consequently, it is highly probable that the enforcement notice would still have been issued, in which case the applicant would still have found it necessary to make an appeal to protect their interests.

10. The Council's written statement expanded on its case at appeal. The statement fully explained the relevance of what were seen as ambiguities in the evidence provided, which led to the drawing of a number of adverse inferences and the conclusion that the lawfulness of the use as two flats had not been made out. The Council's reasoning was set out in considerable detail. It is not unreasonable for the Council to give weight as they consider appropriate to an appellant's evidence, providing as in this case the approach is clearly and logically explained. There is little in the written statement or the delegated report that gave me sound grounds to consider that the Council had approached the evidence applying either a higher standard of proof than that of the balance of probability, or that the assessment of the available evidence was other than open-minded and objective. Furthermore, there is little to suggest that the Council had not understood the nature of the submitted evidence and its significance in terms of the occupation of the flats during the four-year period.

11. Taking all of the above matters into account, in my view the Council has shown in its case at appeal that it was possible to reach a reasoned and objective, opposite conclusion to that of the applicant, largely based on the inferences drawn from the available evidence. When looked at as a whole the Council reached reasonable conclusions as to why it was considered that the civil burden of proof was not discharged in this instance.

12. Accordingly, whilst ultimately I did not share the Council's interpretation of the available evidence, it has nevertheless substantiated its case at appeal. In particular, I have found little to suggest that the Council had acted in a manner similar to the examples of unreasonable behaviour in the PPG referred to above relating to the substance of the case, or that in terms of procedural matters the Council's actions involved the applicant incurring wasted expenditure. It follows that the conditions for an award of costs at PPG paragraph 030 have not been met.

Conclusion

13. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Stephen Hawkins

INSPECTOR