



Costs Decisions

Hearing Held on 10 January 2023

Site visit made on 10 January 2023

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 6 February 2023

Costs applications in relation to Appeal Ref: APP/A5270/C/21/3285033 129A Broadway, West Ealing, London W13 9BE

- The applications are made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - Application A is made by Mr Mehdi Rezaee Nejad (Oud Lounge Limited) for a partial award of costs against the Council of the London Borough of Ealing.
 - Application B is made by the Council of the London Borough of Ealing for a full award of costs against Mr Mehdi Rezaee Nejad (Oud Lounge Limited).
 - The hearing was in connection with an appeal against an enforcement notice alleging without planning permission, the material change of use of the land to use as a shisha lounge.
-

Decisions

1. Application A for an award of costs is refused.
2. Application B for an award of costs is allowed in the terms set out below.

Reasons

3. 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.

Application A

4. The applicant (who is the appellant in the appeal) says that the Council behaved unreasonably in that he was not notified of the venue for the hearing that was to take place on 8 September 2022 and that, as a result, the hearing had to be postponed with costs incurred by his solicitor.
5. However, the reason why the hearing was postponed was because the Planning Inspectorate decided it was appropriate as it had not sent the appellant a letter confirming that the hearing had been fixed for the above date. That fact had become apparent on 5 September 2022, when an email from the appellant's solicitor made it clear that he was unaware that the hearing had been confirmed for 8 September 2022 and that, as a result, counsel had not been instructed to be available. The Inspectorate decided to postpone the hearing to a new date (the date upon which the hearing successfully took place) to avoid any injustice being caused to the appellant, and informed the parties by letter the same day.
6. Accordingly, the postponement was not caused by the Council. In any respect, it is not clear how the applicant and his solicitor were put to any unnecessary

or wasted costs in finding out several days in advance of the hearing that it was to be postponed to another date. It was clear from the solicitor's communications that he had not prepared for an event to take place on 8 September 2002, or had made arrangements for either his or counsel's attendance on that date, as that was the reason it was considered necessary by the Inspectorate to postpone the event in the interests of fairness.

7. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated in respect of Application A.

Application B

Procedural issues

8. Applicant B (the Council) says that the appellant behaved unreasonably in failing to engage with arrangements for hearings that had been scheduled for 10 May 2022 and 8 September 2022.
9. I have already addressed the reasons why the 8 September 2022 event was postponed. The appellant was not at fault for the postponement. Further, the decision to postpone the 10 May 2022 hearing was made by the Inspectorate following satisfactory evidence being produced of the appellant's ill health. Again, there was no unreasonable behaviour of the appellant that led to the decision to postpone the event. Further, I see no failure by the appellant in any way to engage with the appeal process.

Substantive issues

10. The Council says that the appeal had no reasonable prospect of success, and that by implication it was unreasonable for it to be made.
11. I agree with the Council, for the reasons given in my Appeal Decision, that the evidence in support of the appellant's case under his ground (b) appeal was unreasonably weak¹.
12. The same can be reasonably concluded of the ground (a) and (f) appeals. It has been clear since the issue of the notice, through the stated reasons for issue, that the Council's objection to the breach of planning control as respects planning harm was the incompatible use within the location. That use – as a venue used for smoking – necessarily (because of smokefree law) involves significantly more openness of structure than would otherwise be the case. Yet the appellant demonstrably failed to substantiate a case that the use would not cause harm, through the permeation of noise and odour through that structure, to close residential receptors such as the flat directly above the appeal premises. In particular, key elements of the appellant's case on these grounds – such as that planning permission should be granted with a condition for 'air curtains' which would satisfactorily control and/or mitigate such planning harm – were not supported with detail or supporting evidence.
13. Further, the appellant's key argument that living conditions concerns had not been raised by residents (in a neighbour consultation process he independently carried out) was unreasonably weak when taking into account evidence from very close neighbours that they had not been so consulted.

¹ Paragraph 6

14. Moreover, purported written evidence from third parties derived from any such consultation was undermined by a candid admission at the hearing that the appellant had written online reviews of the premises himself that purported to be from third parties.
15. Further, while the appellant at the hearing questioned why the notice was requiring the removal of items and facilities from the premises (under ground (f)), there was a very limited substantive case, backed up by evidence, that the said items and facilities had not been part and parcel of the unauthorised change of use.
16. For all of the above reasons, the appeal had no reasonable prospect of success. Accordingly, the Council was put to the unnecessary expense of defending an appeal which should not reasonably have been made. Further, I have seen evidence that the Council sought to avoid further ongoing unnecessary expense by (unsuccessfully) suggesting to the appellant he withdraw the appeal².
17. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated in respect of Application B and that a full award of costs is justified.

Costs Order (Application B)

18. 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 Mehdi Rezaee Nejad (Oud Lounge Limited) shall pay to the Council of the London Borough of Ealing, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicant is now invited to submit to Mr Mehdi Rezaee Nejad (Oud Lounge Limited), to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andrew Walker

INSPECTOR

² Email from Joel Holland Turner (Senior Planning Officer) to 'Elie' (no date visible) prior to the 'fallback' scheme being approved