



Costs Decision

Site visit made on 20 March 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 08 December 2023

Costs application in relation to Appeal Ref: APP/T5150/C/22/3296738 98 Priory Park Road, London NW6 7UU

- 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 Brent for a partial award of costs against Mr Riadh Fnaiech, Atlantic Property Management Ltd.
- The appeal was against an enforcement notice alleging, without planning permission, the material change of use of the premises to eight self-contained studio flats.

Decision

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

Reasons

2. The Planning Practice Guidance (the PPG) advises that, irrespective of the outcome of an appeal, 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 process¹.
3. The PPG sets out that awards against appellants may be either procedural in regard to behaviour in relation to completing the appeal process or substantive which relates to the planning merits of the appeal². The applicant (the Local Planning Authority – LPA) contends that the appellant/appellant company has behaved unreasonably on both procedural and substantive grounds and caused them to incur unnecessary or wasted expense in the appeal process.
4. The reasons cited in relation to procedural matters include: resistance to, or lack of co-operation with the other party or parties in providing information, discussing the application or appeal, or in responding to a planning contravention notice (PCN); delay in providing information or other failure to adhere to deadlines; introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen; prolonging the proceedings by introducing a new ground of appeal or issue; providing information that is shown to be manifestly inaccurate or untrue; and deliberately concealing relevant evidence at planning application stage or at a subsequent appeal.
5. Notwithstanding the LPA's comments on the content of the information provided, the appellant responded to the PCN within the twenty-one day deadline³; and provided a statement of case and final comments within the

¹ Planning Practice Guidance, Paragraph: 030 Reference ID: 16-030-20140306.

² Planning Practice Guidance: Paragraph: 051 Reference ID: 16-051-20140306.

³ Dated 10 February 2022, response dated 15 February 2022.

deadlines set out in the Procedural Guide: Planning Appeals - England⁴ and/or by The Planning Inspectorate, and thus co-operated with all parties. Additionally, whilst the deficiencies in the appellant's evidence raise substantial questions regarding the precision, transparency and detail of the appellant's claims, it has not been demonstrated that they are manifestly inaccurate or untrue. Similarly, I cannot be sure that the appellant deliberately concealed relevant evidence as part of the appeal. Consequently, I am not persuaded that the appellant has acted unreasonably in the above respects.

6. However, the appellant introduced fresh and substantial evidence as part of their final comments, which advanced a new ground of appeal (ground (f)) and contained two other hidden grounds of appeal (grounds (e) and (c)). I note their reasons for doing so and I am aware of the extensive correspondence between the parties and The Planning Inspectorate on this matter. However, having regard to the examples stated in the PPG, these actions amount to unreasonable behaviour on the appellant's part. That the late evidence was exceptionally accepted by The Planning Inspectorate, does not mean that the behaviour was reasonable.
7. In relation to substantive matters, the LPA contends that the appeal should not have been pursued because, on the evidence available, there was no reasonable prospect of success. The reasons cited include: the development is not in accordance with the development plan, and no other material considerations are advanced that indicate the decision should have been made otherwise, or where other material considerations are advanced, there is inadequate supporting evidence; in enforcement appeals, the onus of proof on matters of fact is on the appellant. Sometimes it is made plain by a recent appeal decision that development should not be allowed; the burden is on the appellant to prove their case on the basis of precise and unambiguous evidence; and the appellant cites a class of the Town and Country Planning (General Permitted Development) (England) 2015 Order, which, on the basis of their own evidence cannot apply.
8. It is for the appellant to decide how to frame and make their case. The appeal was initially advanced on grounds (b) and (a), namely that the matters stated in the enforcement notice (the notice) have not occurred, and that planning should be granted for the use of the property as a House in Multiple Occupation (HMO) for up to eight persons. This was developed at final comments stage, setting out a case that the notice was invalid and could not be corrected without prejudice, and that the lawful and existing use of the property is as two HMO which they want to maintain. They also incorporated grounds (e), (c) and (f), namely that copies of the notice had not been served correctly, that the matters do not constitute a breach of planning control and that the requirements exceed what is necessary to remedy the breach.
9. Had I found that the notice was invalid and could not be corrected without prejudice, it would have been quashed with none of the grounds of appeal being considered. Moreover, had the appeal fully succeeded on grounds (e), (b), (c) or (a), again the notice would have been quashed and any following grounds would not have fallen to be considered. Given the matters stated in the notice, the case brought by the appellant under ground (a) was somewhat misplaced in seeking the grant of planning permission for a HMO or two HMO

⁴ Dated 5 October 2023.

when the deemed planning application was for eight self-contained studio flats. However, this has to be read in the context of their case regarding what they contended to be the lawful use of the property and their stated fallback position, which the LPA disagrees with. Moreover, each appeal is required to be considered on the specific set of circumstances which apply in that case. Consequently, I consider that the appellant was entitled to believe that there was a reasonable prospect of success, and their actions in relation to the matters above do not constitute unreasonable behaviour.

10. There is no doubt that the onus of proof on matters of fact is on the appellant and, for it to be accepted, any evidence should be sufficiently precise and unambiguous. As set out in my main decision, I have found considerable deficiencies in the appellant's evidence in the form of discrepancies, ambiguities and gaps. This has resulted in their appeals failing on all of the grounds advanced. Nonetheless, this is a failure of the appellant's evidence and the case. Having regard to my conclusions on the procedural grounds above, I am not satisfied that these substantive matters amount to unreasonable behaviour on the appellant's part.
11. Drawing all of the above together, I find that the appellant acted unreasonably on procedural grounds in introducing fresh and substantial evidence and grounds of appeal (e), (c) and (f) as part of their final comments. These prolonged the proceedings and undoubtedly resulted in the LPA having to spend extra time and unnecessary expense in responding to the additional matters raised.

Conclusion

12. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the additional evidence and grounds of appeal (e), (c) and (f) submitted at final comments stage and a partial award of costs is therefore warranted.

Costs Order

13. 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 Riadh Fnaiech, Atlantic Property Management Ltd, shall pay to the Council of the London Borough of Brent, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in responding to the additional evidence and grounds of appeal (e), (c) and (f) submitted at final comments stage; such costs to be assessed in the Senior Courts Costs Office if not agreed.
14. The LPA is now invited to submit to Mr Riadh Fnaiech, Atlantic Property Management Ltd, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

F Cullen

INSPECTOR