



Costs Decision

Site visit made on 21 November 2023

by Graham Wraight BA(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 May 2024

Costs application in relation to Appeal Ref: APP/A5840/C/22/3301409 26 Underhill Road, London SE22 0AH

- 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 London Borough of Southwark Council for a full award of costs against MTP Real Estate Ltd.
 - The appeal was against an enforcement notice alleging Without planning permission, the erection of a building.
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Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However, 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.
3. The costs application and responses have been made in writing. With respect to the appeal that was pursued on ground (c), the respondent accepts in their costs rebuttal that their case on this ground has been demonstrated to be wrong. This they conceded in their final comments on the appeal against the enforcement notice, having made reference in their Statement of Case that their only defence was ignorance of an unlawful use carried out by others to who they had leased the site. Their case on ground (f) was also in effect conceded at final comments stage where it was accepted that, as the purpose of the notice is to remedy the breach of planning control, an Inspector will be likely to be severely constrained in which power they may exercise under S176 of the Town and Country Planning Act 1990 (as amended) (the Act).
4. The enforcement notice sets out the applicant's position that the alleged development could not have been lawful due to the provisions of Article 3(5) of The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GDPO). Pre-appeal correspondence provided by the respondent concedes that the use of the property was unlawful on 23 March 2022 but that they had no evidence when exactly the unlawful use began. The same correspondence acknowledges that the applicant had evidence, in the form of a HMO license application, that could support their position that the unlawful use of the property began before the construction of the outbuilding was commenced.
5. In an appeal on ground (c), the burden of proof falls on the appellant, meaning that they would clearly need to demonstrate why there had been no breach of planning control, with the test being the balance of probabilities. On the basis

of the correspondence of which I have been made aware, it would appear that the respondent has never been in a position to counter the applicant's position and thus to demonstrate that there was no breach of planning control. This is indeed what has transpired during the appeal process. Pursuing an appeal under ground (c) without the necessary evidence to substantiate their position represents unreasonable behaviour, and it means that the applicant has incurred unnecessary and wasted expense in having to address this ground of appeal.

6. The respondent's position on ground (f) relates to what they considered to be a fallback development arising from the fact that the property is now in a lawful use, and that permitted development rights have been reinstated. This is a more complex argument than the one that played out under ground (c) and there is some support, including in case law, to the respondent's general position that the enforcement procedure is intended to be remedial rather than punitive. Whilst I have set out the reasons in my decision as to why the appeal under ground (f) is not successful, on balance I do not consider that the respondent acted unreasonably in pursuing that ground of appeal and that their case is sufficiently comprehensive. The applicant did not therefore incur any unnecessary or wasted expense in defending the appeal under ground (f).
7. I acknowledge that the respondent sets out a number of mitigating reasons in their costs rebuttal. These include their own inexperience in submitting enforcement appeals, that they consider that the applicant did not follow its own protocols prior to issuing the enforcement notice, a perceived lack of engagement from the applicant both before the appeal was submitted and during it, that their case was not stubbornly inflexible nor did it disregard information coming to light during the appeal and that they were not aware that they could withdraw grounds of appeal. They also raise concern as to their ability to access the caselaw quoted by the applicant and point out that they themselves have incurred considerable wasted expense in the appeal.
8. However, with respect to the ground (c) appeal, I have set out that it would have been reasonably evident before the appeal was submitted that it would be unlikely to succeed on that ground. In that respect the applicant had provided clarity on their position, disclosed evidence which they held and engaged in dialogue with the respondent which was clear in their view that they did not see how an appeal on ground (c) could be successful. The respondent's inexperience in enforcement appeals does not justify their submission and then continuation with the appeal on ground (c) and it is clear that the applicant endeavoured to provide guidance which, if heeded, would have avoided this element of the appeal.
9. For the reasons given above, unreasonable behaviour resulting in unnecessary and wasted expense has occurred in respect of the appeal made on ground (c) and a partial award of costs is therefore warranted.

Costs Order

10. 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 MTP Real Estate Ltd shall pay to the London Borough of Southwark Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of the appeal made on the ground set out in

section 174(2)(c) of the Town and Country Planning Act 1990 as amended.; such costs to be assessed in the Senior Courts Costs Office if not agreed.

11. The applicant is now invited to submit to MTP Real Estate Ltd, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Graham Wraight

INSPECTOR