



Costs Decision

Inquiry held on 14 May 2024

Site visit made on 14 May 2024

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11th June 2024

Costs application in relation to Appeal Ref: APP/N5090/C/23/3314429 Land at Flat 4, The Spinney, 22 Hendon Wood Lane, London NW7 4HR

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by the Council of the London Borough of Barnet for a partial award of costs against Mr GMP Fitzgerald.
 - The inquiry was in connection with an appeal against an enforcement notice alleging without planning permission the material change of use of Flat 4 to use as a dwellinghouse.
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Decision

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

Procedural matter

2. In addition to responding in writing to the Council's application, the appellant sought in the same document to revisit and add to their own application for costs. In doing so, the appellant did not follow the process clearly set out and confirmed at the inquiry. The appellant's costs application is the subject of a separate Decision.

Reasons

3. 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.
4. The Council's concise application focusses on the appellant's behaviour on procedure, which the Council submit resulted in significant delay to the inquiry timetable and knock-on effects that incurred wasted expense.

Behaviour at the inquiry

Late evidence

5. In the opening session of the inquiry the appellant sought to hand in five documents, comprising an aerial photograph, three tenancy agreements and a licence to occupy. In order to decide whether the documents should be accepted I needed to establish what the documents were about, their relevance to the main issues, whether they repeated evidence already submitted, why they were not produced earlier in the process and the views of the Council. I decided to admit the aerial photograph and the licence to occupy. The process

took about 45 minutes of inquiry time, disrupted the efficiency of the opening session and prolonged the length of the inquiry. In addition to the time taken to discuss whether or not to accept the late documents, time was spent dealing with the new evidence through the examination of the witnesses. Introduction of the documents at an earlier stage in the proceedings would have allowed for early consideration and understanding of their contribution to the chronology of events.

6. The appellant's behaviour needs to be considered within the context of the overall appeal process during the 16 months or so leading up to the inquiry. The Planning Inspectorate by letter dated 2 February 2023 informed the appellant of the appeal procedure and the timetable and advised on the further guidance available (the start letter). The start letter stated: "You must supply a list of (and it would be helpful if you supplied copies of) all factual written information you intend to rely on with your statement of case." Tenancy agreements were included in the list of example documents. The statement of case was required to be submitted by 16 March 2023. The start letter also confirmed that proofs of evidence should be submitted no later than four weeks before the date of the inquiry. Attention was drawn to the importance of sticking to the timetable and sending relevant documents within the deadlines.
7. In Pre-Inquiry Note 1 dated 22 February 2024 I reminded the parties that at the inquiry no new documents or evidence should be submitted. Pre-Inquiry Note 2 dated 28 March 2024 also stated the parties should not submit new/additional documents at the inquiry.
8. On the legal grounds of appeal the onus is on an appellant to prove their case on the balance of probability. The appellant is represented by a professional agent who should be aware that 'delay in providing information or other failure to adhere to deadlines' is an example of unreasonable behaviour cited in Planning Practice Guidance. The documents were not in response to new, unforeseen circumstances and had been in the possession of the appellant for some considerable time. To produce them on the morning of the inquiry was unreasonable behaviour. Moreover, two of the tenancy agreements were already included in the Council's bundle of documents, having been submitted by the appellant to support an application for a lawful development certificate made in November 2023. The third tenancy agreement was not relevant to the main issues.

Statement of common ground

9. The start letter required the appellant to submit a copy of the agreed statement of common ground no later than four weeks before the inquiry. The letter indicated the expected content of the statement and a link to further guidance. Pre-Inquiry Note 2 dated 28 March 2024 reminded the parties of this requirement. The Council followed this up by contacting the appellant on 5 April and later submitted a draft statement of common ground on 16 April 2024. Having heard nothing further, Pre-Inquiry Note 3 dated 1 May 2024 commented on the draft document.
10. An email from the appellant dated 12 May 2024 outlined the attempts to progress a statement of common ground with the Council and attached various draft documents. The appellant submitted to the Planning Inspectorate a copy of the agreed statement of common ground around 1700 hours on 13 May.

11. Two documents were submitted during the opening session of the inquiry. The shorter document, including the word 'STET' for various paragraphs, was essentially the 'agreed' document, although unsigned. The second was an earlier draft that included the text of the STET paragraphs. The appellant asked that both documents be read together.
12. Not completing a timely statement of common ground or not agreeing factual matters common to witnesses of both principal parties is one of the examples of unreasonable behaviour referred to in the Planning Practice Guidance. The appellant did not engage with the process of producing a statement of common ground in a timely manner and in draft documents sought to include a substantial amount of text setting out aspects of the appellant's case (that comprised the content of the STET paragraphs). The appellant behaved unreasonably.

Appellant's evidence in chief

13. The appellant's version of events and timing of the material change of use emerged for the first time during his evidence in chief, even though the information would have been known to the appellant at the outset of the appeal. This very late oral evidence on a key aspect of their case amounted to unreasonable behaviour.

Costs application

14. Pre-Inquiry Note 4 dated 7 May 2024 stated if either party intended to apply for costs, they should submit a draft application in writing no later than 1000 hours on Monday 13 May to the Planning Inspectorate, copied to the party against whom the application was made.
15. On 13 May the appellant advised the Planning Inspectorate that it was not possible to make the costs application within the stated timescale because of family circumstances. The application was circulated electronically early on the morning of 14 May and submitted at the start of the inquiry.
16. The instruction to the parties was to encourage good practice and assist the efficient running of the inquiry. It was consistent with Planning Practice Guidance, which also states all costs applications must be formally made to the Inspector before the hearing or inquiry is closed.¹ All matters considered, the timing of the appellant's costs application was not unreasonable behaviour.

Additional document

17. The Council refer to a new document being raised by the appellant in cross-examination of the Council's witness. The matter was unexpected at the time and had little relevance to the main considerations. Dealing with it involved an insignificant amount of inquiry time and will not be considered further.

Expense incurred

18. The appellant should have been aware that the aim was to conduct the inquiry in one day (Pre-Inquiry Note 2), although everyone was expected to be available on the following day (Pre-Inquiry Note 4). At the start of the inquiry the appellant's advocate announced the appellant was not available to attend the inquiry the following day.

¹ Planning Practice Guidance: Appeals Paragraph: 035 Reference ID: 16-035-20161210

19. The inquiry timetable was disrupted and the length of the inquiry unnecessarily extended by the unreasonable behaviour attributable to the late documents, submission of the statement of common ground documents and the appellant's evidence in chief. In addition to the extension of the opening session by at least 45 minutes, a very significant proportion of time in hearing and examining the witnesses' evidence was spent on the new documents and evidence. The inquiry was unnecessarily prolonged by around 1.5 hours and wasted expense was incurred. The ability to adjust the inquiry programme to allow for the Council's consideration of the submitted documents enabled the inquiry to proceed and prevent further disruption, delay and possible adjournment.
20. The Council necessarily spent time undertaking additional preparatory work during the inquiry to avoid an adjournment. Time spent on earlier preparatory work would have been unnecessary and wasted. The events on the day of the inquiry prompted the Council to make an application for costs and incur expense in doing so.
21. I conclude the unreasonable behaviour caused the Council to incur unnecessary and wasted expense in the appeal process. A partial award of costs is warranted.

Costs Order

22. 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 GMP Fitzgerald shall pay to the Council of the London Borough of Barnet, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the extension of the sitting time of the inquiry, additional preparatory work during the inquiry to respond to the additional and new evidence submitted late by the appellant (as described in the Reasons above), the unnecessary preparatory work and the expense of making the costs application; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Mr GMP Fitzgerald, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Diane Lewis

INSPECTOR