



Costs Decisions

Site visit made on 10 September 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 December 2024

Costs applications in relation to Appeal Ref: APP/T5150/C/24/3343607

- 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).
- The applications are made by Hornington Investments Ltd for a partial award of costs against the Council of the London Borough of Brent and by the Council of the London Borough of Brent for a full award of costs against Hornington Investments Ltd.
- The appeal was against an enforcement notice alleging the material change of use of the premises to eight flats.

Flats 1-8, 14A Central Business Centre, Iron Bridge Close, London NW10 0UR

Decisions

1. The applications for an award of costs are refused.

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.

Application by the Appellant

3. The appellant's costs application is made with regard to ground (d). It is suggested that the Council has behaved unreasonably both procedurally and substantively. In terms of procedure, it is suggested that the Council failed to clarify its position on ground (d) despite having been asked to do so by me. This is stated to have left the appellant in the position of not having a proper understanding of the Council's case on ground (d).
4. When submitting its appeal, the appellant will have been well aware that an Inquiry may have been selected as the appropriate procedure. The criteria for determining the procedure for planning, enforcement, advertisement and discontinuance notice appeals (2024) advises an inquiry would be appropriate if, in an enforcement appeal, evidence needs to be given on oath (For example where witnesses are giving factual evidence about how long the alleged unauthorised use has been taking place).
5. While the procedure was eventually changed, it was necessary for me to explore exactly what the matters in dispute are to assist my consideration as to whether evidence of fact should be tested under oath. I did this by raising the matter of the procedure with the parties during the Case Management Conference (CMC), which was held on 26 July 2024. I raised the likely main issues during the CMC and raised whether it was necessary for evidence to be given under oath. The Council responded to my query via email on 31 July

2024, following which correspondence was received from both the appellant and the Council.

6. The Council set out its approach to determining the date on which the material change of use of the premises took place¹. The Council made its position clear that it considered less emphasis should be placed on the physical state of the appeal premises and more on its actual use. While I sought clarity as to its position regarding completion of the works, this was a different point and was intended to help me understand exactly what the matters in dispute were.
7. The Council confirmed in its email of 31 July 2024 it does not agree that works to convert the appeal premises into flats were substantially completed by 27 March 2020. The Council was not unreasonable in confirming this and this did not, to my mind, contradict its earlier position regarding the approach to ground (d). The Council was simply responding to my question. I do not believe the Council's behaviour was unreasonable in this regard, nor was it introducing a new point. Furthermore, in responding to my question, the Council maintained its position that its view was that the use was not active and continuous throughout the relevant period such that the Council could have taken enforcement action at any time.
8. In terms of substance, it is suggested that the Council's position under ground (f) was inconsistent with its position under ground (d). I do not believe it to be so. The Council's case with respect to ground (d) being that when considering when a material change of use has occurred, the fact that the works which were carried out in reconfiguring the premises were for convenience rather than necessity meant that less emphasis should be placed on the physical state of the appeal premises and more on its actual use.
9. This is not inconsistent with the Council's position under ground (f), which is that works which were integral to and which facilitated the material change of use can be required to be removed to restore the appeal premises to its condition before the breach took place. That is a well-established principle set out in case law, which is cited by the Council and so I find that the Council has not been unreasonable in this regard.

Application by the Council

10. The Council's application for costs is made on substantive grounds. The PPG makes it clear that the right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award of costs being made against them if the appeal had no reasonable prospect of succeeding. The Council suggests that none of the grounds of appeal had a reasonable prospect of success.
11. With respect to the appeal under ground (d), it is suggested that the appellant has ignored the law set out in *Thurrock*² and *Swale*³, despite these cases being brought to their attention. It is suggested that had the appellant properly considered and applied them to the facts of this case, it would have been obvious that the appeal under ground (d) had no reasonable prospect of success.

¹ Paragraph 41 of the Council's Statement of Case.

² *Thurrock BC v SSETR* [2002] EWCA Civ 226

³ *Swale BC v FSS & Lee* [2005] EWCA Civ 1568

12. The appellant's initial argument appeared to focus on substantial completion and referred to the case of *Sage v SSETR & Maidstone BC* [2003] UKHL 22, which concerned whether a building was substantially completed. However, the appeal concerns a material change of use and so its reliance upon it suggests the appellant's case is being directed towards immunity under section 171B(1) rather than section 171B(2). Had the appellant limited its consideration to *Sage*, I may have agreed with the Council.
13. However, the appellant states that it has not ignored *Thurrock* and *Swale*, rather it has taken a different view on the law and relied upon the Supreme Court's decision in *Welwyn*⁴. It is suggested the appellant's evidence did deal with the principles in *Thurrock* and *Swale*, addressing the change of use, the continuous and unbroken nature of that change, and explained clearly the situation regarding occupation of the premises.
14. The appellant has since set out its consideration of each of the cases referred to by the Council, including *Thurrock*, *Swale*, *Islington*⁵ and *Bansal*⁶. The appellant differentiates between the different cases, referring to the hierarchy of the courts within which they were decided and differentiating between the facts of the cases.
15. While I have disagreed with the appellant's arguments in this regard, since it has reasoned its approach and sought to apply the principles of established case law to the facts of the case, I do not consider its behaviour to be unreasonable.
16. With respect to the provision of evidence in support of its case, the appellant has provided a number of statutory declarations, as well as documentary evidence. Although the appellant's appeal under ground (d) did not succeed, it was not unreasonable for pursuing it.
17. The PPG advises unreasonable behaviour may occur where the development is clearly not in accordance with the development plan, and no other material considerations such as national planning policy are advanced that indicate the decision should have been made otherwise, or where other material considerations are advanced, there is inadequate supporting evidence.
18. With respect to the appeal under ground (a), the Council points out that the flats do not come close to meeting nationally described minimum space standards. The appellant's arguments in this respect appear to be that it should be considered against the size requirements for single room accommodation rather than a 1 bed, 1 person dwelling and that it would contribute to the Council's housing supply in a sustainable location. The appellant has also sought to show that outdoor amenity space could be provided within the appeal site.
19. The PPG advises unreasonable behaviour may be demonstrated where the appeal follows a recent appeal decision in respect of the same, or a very similar, development on the same, or substantially the same site, where the Secretary of State or an Inspector decided that the proposal was unacceptable and circumstances have not materially changed in the intervening period. While

⁴ *SSCLG & Anor v Welwyn Hatfield Borough Council* [2011] UKSC 15

⁵ *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)

⁶ *Bansal v SSHCLG & Anor* [2021] EWHC 1604

the Council has drawn my attention to a number of appeal decisions⁷, these relate to different sites, with different facts.

20. The appellant has also set out its position with respect to the Significant Industrial Location (SIL), identifying that it considers there is a lack of demand for office floor space within the SIL, and the effect of other residential developments within and adjacent to the SIL. With respect to affordable housing and the provision of family sized dwellings, I have found the appeal scheme does not conflict with the development plan. In respect of bin and cycle storage, I have found these matters could be secured by condition. While I have found the units do not provide satisfactory accommodation and that there would be harm to the SIL, pursuing the ground (a) appeal was not, in my view, unreasonable.
21. With respect to the appellant's appeal under ground (f), the Council's costs application largely repeats its arguments in respect of the ground (f). The appellant has set out its case under ground (f). While the appellant's appeal under ground (f) has been largely unsuccessful, as set out in my appeal decision, I have found that the requirements of the notice are excessive and have varied the notice. It follows I do not consider the appellant was unreasonable in advancing its case under ground (f).

Conclusions

22. Thus, for the reasons given above, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

M Savage

INSPECTOR

⁷ APP/U5930/W/21/3282454, APP/T5150/C/22/3296738 & APP/M5450/W/22/3311776