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## Costs Decision

**by Grahame J Kean BA (Hons) Solicitor MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 13 October 2025

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### **Costs application in relation to Appeal Ref: APP/P5870/C/22/3307199**

#### **Land known as 12 Lind Road, (and the loft area of 10 Lind Road), Sutton, SM1 4PJ**

- 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 KPD Realty for a full award of costs against the London Borough of Sutton.
  - The appeal was against an enforcement notice alleging without planning permission, erection of a two storey side extension with basement and the material change of use of the land to (4) self-contained units (flats) on the land.
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### **Decision**

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

### **Background**

2. In the substantive appeal decision, it was determined that the appeal against the enforcement notice should be allowed and the enforcement notice was accordingly quashed. The notice was issued on 16 August 2022. However, on 1 October 2024, before the appeal decision was issued, the Council granted planning permission Ref DM2024/00225 to retain the four self-contained residential units and alterations to the front and rear fenestrations in respect of 10-12 Lind Road. In effect planning permission was granted for the development alleged to be unauthorised. Therefore, the appeal on ground (c) succeeded and the notice was quashed.

### **The submissions for KPD Realty**

3. The costs application was submitted in writing. The following points were made.
4. The notice should have been withdrawn once planning permission was granted. The appellant could not have withdrawn its appeal as the notice would remain registered on the local land charges register which would have created an unnecessary encumbrance on the titles of the properties in question, potentially affecting their marketability and value. The proper course was for the Council to withdraw the notice, which would automatically have removed the registration.
5. Substantial fees were paid in respect of the ground (a) appeal and there was no mechanism to recover the fees if the appeal had been withdrawn, although the Council had granted permission for the development that was the subject matter of the appeal.
6. Therefore, the Council had behaved unreasonably in failing to withdraw the notice, the enforcement action was unnecessary, and the notice incorrectly served. The appellant incurred substantial costs in preparing and pursuing the appeal and a full award of costs was justified.

## The response by the Council

7. No response was made by the Council. However, it is pertinent to note that in correspondence between the parties following the grant of permission referred to above, the Council's planning officer told the appellant that the enforcement notice would not be withdrawn because no conditions had been discharged and therefore the approved scheme was technically not yet lawful.
8. The Council also informed the appellant of its view that that there was no requirement to withdraw the notice just because planning permission was granted. The officer dealing stated in terms<sup>1</sup>:

*"Until the conditions have been discharged the planning [sic] hasn't been fully approved. The notice and breach is [sic] still extant until the works are completed and then the Enforcement Notice will be complied with. It is up to you whether you want to withdraw the Notice [sic] and stop the appeal but we will not be making this decision."*

## Reasons

9. Parties in planning appeals normally meet their own expenses but Planning Practice Guidance (PPG) advises that costs may be awarded against a party who behaved unreasonably and caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. "Unreasonably" is to be understood in its ordinary meaning. The costs regime aims to encourage all involved in the appeal process to behave reasonably and to follow good practice.
10. The appellant cited what purported to be various passages from various legal authorities, but these were inaccurate and despite requesting clarification of the source, none was received. Therefore, I am unable to take them into account.
11. By s180(1)(a) of the 1990 Act where, after the service of a copy of an enforcement notice, planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission.
12. It is established<sup>2</sup> that s180 of the 1990 Act protects from proactive enforcement development which is the subject of an extant and valid enforcement notice, if and to the extent that the retention of that development is not inconsistent with a subsequent grant of planning permission. The effect would have been to cancel, not merely to suspend the effect of the notice insofar as inconsistent with the subsequent permission, not upon implementation of the permission but upon its being granted, contrary to what the Council's officer appears to believe. However, in this case and for the sake of clarity I quashed the notice.
13. Conditions attached to a permission cannot alter the essential nature of the development thereby permitted. The permission here amounted to formal approval of the unauthorised development, albeit that it had conditions attached to it that regularised the development in the interests of the proper planning of the area. The Council failed to appreciate the distinction between the grant of the planning permission on the one hand, and the conditions to which the operative part or grant is subject.

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<sup>1</sup> Email 16 October.2024.

<sup>2</sup> R. (on the application of Rapose) v Wandsworth LBC [2011] J.P.L. 600.

14. By refusing to withdraw the notice the Council has attempted to use the enforcement appeal process to wield control over compliance with conditions that it has most recently imposed on the retained development. These related to: compliance with the approved plans; approval of refuse and recycling storage; cycle storage; meeting targets for a new build's energy performance (actually derived from building regulations), complying with the submitted fire safety strategy and implementation of SuDS measures.
15. Had I not, for the sake of clarity, quashed the notice, it would seem, following established case law<sup>3</sup> which is to the effect that a permission may override an enforcement notice even though it does not go precisely to the matters covered by the notice and even though it contains conditions, that because here it covered the same area of land and the development permitted by the permission embraced the development enforced against, the notice would have been inconsistent with the permission as a matter of fact and degree.
16. In the normal course of events compliance with conditions such as those imposed by the Council would be monitored and further enforcement action would be taken through a range of measures which may include but also fall short of formal enforcement action. In addition, and, as pointed out on the face of the planning permission document, if the appellant were aggrieved by the decision to grant permission subject to conditions, he had a right to appeal to the Secretary of State under s78 of the 1990 Act, which right would be undermined by continuing to insist on the requirements of the extant enforcement notice which do not relate to the newly imposed conditions.
17. Furthermore, PPG<sup>4</sup>, makes clear that breaches of planning control be addressed without formal enforcement action such as an enforcement notice, and enforcement action should be proportionate to the breach of planning control to which it relates and taken when it is expedient to do so. Local planning authorities should usually avoid taking formal enforcement action where:
  - *there is a trivial or technical breach of control which causes no material harm or adverse impact on the amenity of the site or the surrounding area;*
  - *development is acceptable on its planning merits and formal enforcement action would solely be to regularise the development;*
  - *in their assessment, the local planning authority consider that an application is the appropriate way forward to regularise the situation, for example, where planning conditions may need to be imposed.*
18. As was made clear in the appeal decision if the ground (a) appeal fell to be considered the conditions would have been found appropriate for the reasons on the face of the permission. In the enforcement appeal, however the Council failed to make any case on ground (a) whatsoever. The development was acceptable on its planning merits and approval with conditions should have clarified, not least for the Council itself, that those conditions would appropriately regularise the situation.
19. Furthermore. in this costs application, there is no evidence of such harm being caused by a breach of conditions that would justify why the appellant should be subject such an intransigent attitude, even had it been demonstrated that such action was lawful. None of the conditions were drafted to be retrospective in effect.

<sup>3</sup> *Haverling LBC v Secretary of State for the Environment and Smith MacDonald & Co and MacDonald Evans & MacDonald* (1983) 45 P. & C.R. 258; [1983] J.P.L. 240

<sup>4</sup> Paragraph: 010 Reference ID: 17b-010-20140306, Paragraph: 011 Reference ID: 17b-011-20140306.

20. Having accepted the development in principle and sought to regularise it by conditions it was disproportionate and unreasonable, if not impermissible, to hold over the appellant the prospect of requiring residential accommodation now approved, to be demolished and removed from the site.
21. In the circumstances I find that the Council's behaviour in refusing to withdraw the notice was unreasonable and has caused the appellant unnecessary expense. The ground (e) and (b) appeals were lost and no costs should be recovered in relation to this part of the appellant's case, however in all other respects the appellant should recover the full costs incurred in the appeal process.

### **Costs Order**

22. In exercise of the powers under sections 195, 320 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the London Borough of Sutton shall pay to KPD Realty, the full costs of the appeal proceedings described in the heading of this decision.
23. The applicant is now invited to submit to the London Borough of Sutton, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

*Grahame Kean*

INSPECTOR