The Planning Inspectorate

Costs Decisions

Hearing Held on 16 April 2019
Site visit made on 16 April 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 June 2019

Application 1: Costs application in relation to Appeal Refs: APP/X5210/C/18/3209863 and APP/X5210/W/18/3217324 Land at 275 Eversholt Street, London NW1 1BA

- 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 Mr Leo Kaufman of Redcourt Ltd for a full award of costs against the Council of the London Borough of Camden.
- The hearing was in connection with appeals against an enforcement notice alleging, without planning permission, the unauthorised use of a self-contained flat at basement level, and a failure to give notice within the prescribed period of a decision on an application for planning permission.

Application 2: Costs application in relation to Appeal Refs: APP/X5210/C/18/3209863 and APP/X5210/W/18/3217324 Land at 275 Eversholt Street, London NW1 1BA

- 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 Camden for a full award of costs against Mr Leo Kaufman of Redcourt Ltd.
- The hearing was in connection with appeals against an enforcement notice alleging, without planning permission, the unauthorised use of a self-contained flat at basement level, and a failure to give notice within the prescribed period of a decision on an application for planning permission.

Decisions: Application 1 is refused and Application 2 is refused

Reasons

1. I have taken the somewhat unusual approach of combining my decisions on both applications because, it seems to me, the applications are essentially two sides of the same coin. It is therefore both convenient and expedient to consider the applications together.

2. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority or against an appellant. In relation to both, the Planning

Practice Guidance advises that a party to an appeal may be at risk of an award of costs if there is a lack of co-operation with the other party in terms of providing information or only providing information at appeal when it was previously requested, but not provided, at application stage.

3. The essence of the claim by Mr Kaufman is that, having been invited by the Council to submit a retrospective planning application to regularise the use of lower ground floor, and having then submitted that application promptly and in good faith, the Council nevertheless issued an enforcement notice requiring the use to cease. It is helpful at this point to briefly recite the planning history up to that point.

4. In July 2015, planning permission was refused for a proposal described as a change of use of the lower ground floor of the appeal premises from a sauna to a one-bed flat (Council Ref: 2014/5391/P). The reason for refusal was, to paraphrase, that in the absence of a legal agreement to secure a car-free development, the proposal would lead to unacceptable parking stress and congestion in the surrounding area.

5. The officer recommendation had been to grant planning permission subject to the completion of a section 106 agreement. Such an agreement was signed by the applicant but, because the applicant refused to pay the Council's legal fees for the preparation of the legal agreement and subsequent monitoring, the section 106 agreement was not progressed. Accordingly, the application was refused.

6. The matter rested there until June 2018 without further communication from the Council (albeit there is some evidence of an earlier approach from the Council dated 15 March 2018). There then followed an exchange of emails culminating, on 4 July 2018, in the invitation to submit a planning application to regularise the use referred to above. I note that the correspondence from the Council was very clear in stating that the application should be accompanied by a section 106 agreement to secure car-free housing.

7. The planning application was duly submitted on 11 July 2018. The application was therefore, as the applicant maintains, submitted promptly. Mr Kaufman suggests that an email from the Council dated 27 July 2018 indicates that the application would be recommended for approval subject to the signing of a section 106 agreement to secure car-free housing, although I do not read that correspondence as going that far: on my reading, the email from the Council is merely confirming that the completion of a section 106 agreement to secure car-free housing is the main concern in connection that application, which is entirely consistent with the Officer's report for the application and the putative reason for refusal. In the event, because the freeholder of the land could not be traced, the section 106 agreement was never completed.

8. Mr Kaufman maintains that he was attempting to sort out the section 106 agreement, but that the Council was slow to respond. Eventually, on 15 November 2018, the Council issued a warning that the file would be closed within 14 days if the section 106 agreement was not settled, and that the planning application would be treated as being withdrawn. In these circumstances, Mr Kaufman considered that he had no option other than to appeal against failure of the Council to give notice of its decision on the application within the prescribed period. The appeal was duly lodged on 28 November 2018.

9. In lodging that appeal, part of Mr Kaufman's reasoning was that, in the interim, the Council had on 16 July 2018 issued the enforcement notice that was subject to appeal ref: APP/X5210/C/18/3209863. Given those circumstances, Mr Kaufman explains that he had no option other than to appeal against that enforcement notice because, at the time that the notice was issued, the retrospective planning application had not been determined.

10. Mr Kaufman maintains that the section 78 appeal could have been avoided altogether if the Council had acted more promptly in negotiating the section 106 agreement. Furthermore, had the Council granted planning permission, the appeal against the enforcement notice would have been withdrawn, such that further costs in pursuing that appeal would have been avoided.

11. The Council's perspective on this sequence of events, and in turn the basis of its application for costs against Mr Kaufman, is that the section 78 appeal could have been avoided if Mr Kaufman had been more responsive in his progression of the section 106 agreement. The Council points out that a copy of the Council's standard legal agreement for car-free housing was provided to Mr Kaufman on 8 August 2018 but that, with the exception of a single email dated 20 August 2018, nothing was heard from Mr Kaufman or his advisors for three months. In such circumstances, it is the Council's normal approach to issue a letter after a period of three months with no activity to indicate that the application would be treated as being withdrawn if the matter was not settled in 14 days, hence the letter dated 15 November 2018. The Council therefore disputes Mr Kaufman's view that this was a hostile approach to the matter.

12. The Council points out that it had consistently made it clear that, other than in exceptional circumstances, the signature of the freeholder on a section 106 agreement was a requirement. However, once the efforts made by the applicant to trace the freeholder had become apparent through the appeal submissions, the Council has acted reasonably by showing a willingness to consider the matter afresh.

13. Having regard to the sequence of events outlined above, this in my view is a classic example of a failure to communicate and, I hasten to add, in equal measure on both sides. The origins of situation can be traced back to July 2015 when, with a favourable officer recommendation in hand, there was the failure to complete the section 106 agreement. To put it simply, the appeals to which these applications for costs relate would never have arisen had the matter been resolved back then, either through completing the legal agreement or by the issue of an enforcement notice at that time once it became apparent that the legal agreement would not be completed. This is something that the parties have no doubt reflected upon.

14. Nevertheless, the sequence of events did arise. Initially, I suspect, it arose from a realisation on the Council's part, quite late in the day, that the window of opportunity within which it could take enforcement action against the use of the lower ground floor was rapidly closing. The corollary is that the Council did not give Mr Kaufman sufficient time to submit a (further) planning application to regularise the use before it had to safeguard its position by issuing the enforcement notice. In turn, in those circumstances Mr Kaufman clearly did have no other option than to safeguard his own position by submitting an appeal against the enforcement notice.

15. On the other hand, although Mr Kaufman indicates that the appeal against the enforcement notice would have been withdrawn if the planning application had been granted, there appears to have been no urgency to his attempts to get the matter resolved. The Council says that some 3 months passed without meaningful correspondence, and I have no evidence to suggest otherwise. I recognise that part of Mr Kaufman's attention may have been diverted by the need to submit the appeal against the enforcement notice, but to my mind that does not explain the lack of response over a period of some three months. Particularly so when attention to the prospect of securing planning permission may have resolved the issue over the enforcement notice once and for all.

16. Moreover, I note that the letter from a firm of solicitors instructed by Redcourt Ltd certifying the actions that were taken to track down the freeholder was dated 7 January 2019, and therefore several months after Mr Kaufman was first aware of the issue. I take the point that the matter did not arise when the legal agreement in relation planning application 2014/5391/P was being prepared, but that did not preclude the Council from raising the matter on this occasion. Similarly, it would appear that a tracing agent was only employed after the Hearing. Therefore, given the Council's indication that the letter from the tracing agent satisfies its requirements in terms of demonstrating an absent freeholder, I cannot discount the possibility that the matter may have been resolved much sooner had Mr Kaufman been more proactive in this respect.

17. It seems to me that some aspects of the behaviour of both applicants may be considered to be unreasonable in the terms set out in the Planning Practice Guidance: the Council put Mr Kaufman in a difficult position by inviting the submission of a planning application with insufficient time to determine it before having to issue an enforcement notice; Mr Kaufman could have been more proactive in completing the section 106 agreement and attempting to locate the whereabouts of the freeholder. However, when I look at the bigger picture, the actions of both parties may be considered to be entirely reasonable in the circumstances: Mr Kaufman was obliged to lodge both appeals in order to safeguard his position; the Council followed its normal procedures in issuing the warning letter when the section 106 agreement was not nearing completion within three months. Consequently, looked at in the round and given how events unfolded, I am not convinced that either of the parties acted unreasonably, certainly to the extent that it caused the other party to incur unnecessary or wasted expense in the appeal process.

18. For that reason, I conclude that an award of costs in not justified in respect of either of the applications before me.

Paul Freer

INSPECTOR