The Planning Inspectorate

Costs Decision

Site visit made on 15 July 2014

by John Whalley

an Inspector appointed by the Secretary of State for Communities and Local Government

Date 6 August 2014

Costs application in relation to appeal ref: APP/X5210/C/14/2212282, 83 10 Mackeson Road, London NW3 2LT

- The application was 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 was made by Mr J B Abelman and Ms C V Greco.
- The site inspection was in connection with an appeal made by Mr J B Abelman and Ms C V Greco against an enforcement notice served by the London Borough of Camden Council.

Summary of decision: No award of costs is made

Submissions made on behalf of Mr J B Abelman and Ms C V Greco

1. For the Appellants, it was said that the Council, under Government Circular 03/09, should pay them the costs of the appeal on the basis that they were put to unnecessary and wasted expense in the appeal and in the years of correspondence leading up to the appeal and because of the unreasonable behaviour of the Council.

2. There were 9 points:

    1. The enforcement notice was doomed because of multiple procedural shortcomings. Any reasonably competent local planning authority would have foreseen those shortcomings and would not have exposed the Appellants to the costs of an appeal by embarking on enforcement action. The fact that the development was so minor only served to underscore the unreasonableness of the local planning authority's conduct, (Circular 03/2009, B12, 33, 36).

    2. The enforcement notice was also doomed because the Appellants had permitted development rights. Again, any reasonably competent local planning authority would have foreseen the point and would not have exposed the Appellants to the costs of an appeal by embarking on such enforcement action, (Circular 03/2009, B12, 33, 37).

    3. By failing to properly serve the enforcement notice, the Appellants were given inadequate time to engage with the Council before instructing their professional team to appeal. That was unreasonable conduct, (Circular 03/2009, B4).

    4. Even when the Appellants' agent wrote to LB Camden in order to engage and before the lodgement of the appeal, the Council failed to respond within sufficient time to avert the appeal. That was unreasonable conduct, (Circular 03/2009, B4).

    5. The Appellants had throughout sought to engage in dialogue with the Council in relation to the matters the subject of the enforcement notice, (Circular 03/2009, B4).

    6. The development said to constitute the breach of planning control did not unacceptably affect public amenity. Even if it was a breach of planning control, it

improved the streetscape, improved public hygiene, reduced the scope for crime and was altogether commendable. The Council did not behave reasonably in exercising its discretion to take enforcement action. It was not expedient to issue the enforcement notice, (Circular 03/2009, B34).

7. If there was a breach of planning control by the development, there was no significant planning objection to the breach of control alleged in the enforcement notice, (Circular 03/2009, B40).

8. The Enforcement Notice failed to refer to, (and, to be inferred, to have taken into account), a large number of the LB of Camden's policies relevant to the development and which, had they been properly taken into account, would have made it obvious to the Council that neither expediency, amenity nor any other material consideration supported issuing the enforcement notice.

9. The entire course of conduct of the LB of Camden from 2010 had been one of changing positions, failure to properly engage with the Appellants and their Agent, misstatement of fact and misrepresentation and/or misunderstanding of planning law. Had the Council entered into discussions in 2010 with an open mind and a listening ear, the matter would have not gone beyond the Spring of 2010. The approach of the Council defied the spirit, letter and intendment of Circular 03/2009.

3. Had the Council not behaved as they had and engaged in constructive dialogue with the Appellants' Agent, Mr Abelman and Ms Greco would not have been compelled to appeal against an enforcement notice and would thus have been spared the expense of engaging an agent in order to deal with the matter. The Council did not, before issuing the enforcement notice, take on board the points that had been earlier made by and on behalf of the Appellants.

4. As a result of the Appellants being in Hong Kong they had been wholly dependent on the services of their Agent. That had increased the cost to the Appellants.

5. The Appellants should have a full award of costs.

Response by the London Borough of Camden Council

6. It was for the Appellants to demonstrate clearly what the Council's alleged unreasonable behaviour was. That was not substantiated.

7. A response was made to each of the 9 points alleging unreasonably behaviour.

1. There had been no procedural shortcomings regarding service of the enforcement notice. The Appellants refused to accept the Council's advice that the structure a) required planning permission and b) was contrary to policy. The minor nature of the development did not alter the fact that it was contrary to policy and resulted in demonstrable harm.

2. The structure did not benefit from permitted development rights. That was explained to the Appellants and formed part of the subject of the appeal. The Council sought its own legal advice as to the position and informed the Appellants during the course of the enforcement investigation.

3. The enforcement notice was served properly in accordance with s.172 of the Town and Country Planning Act 1990 (as amended) as explained in paragraphs 3.27 - 3.31 of the Council's appeal statement.

4. A letter was received from the Appellants' Agent on 15/01/2014. The Council replied on 15/01/2014. The Council declined the Appellants request for a meeting prior to the appeal as all previous meetings and correspondence had failed to resolve the differences of opinion between the parties. The appeal could not be avoided at that

stage. The Appellants were advised that the information requested was contained within the officer delegated report which was available online. The Appellants also submitted a freedom of information request that was responded to within the statutory time frame on 11/02/2014.

5. The Council had been engaged in dialogue with the Appellants over the course of the investigation. Despite the efforts of the Council, the Appellants had repeatedly refused to remove the structure, apply for planning permission for the structure, or to accept that the structure required planning permission.

6. The bike and bin store was unacceptable and contrary to policy as outlined in the officer's delegated report and the enforcement notice and in the Council's response to the ground a) appeal in the appeal statement.

7. Again, the bike and bin store was unacceptable and failed to comply with policy as outlined in the officer delegated report and the enforcement notice and in the Council's response to the ground a) appeal in the appeal statement.

8. All relevant policies were taken into account when assessing the structure and issuing the enforcement notice. The Appellants erroneously referred to polices applicable to the assessment of new residential development and residential conversions as reason to justify the structure's failure to comply with relevant policies. The Council considered all relevant policy as demonstrated in the assessment in the delegated report and discussed further in the Council's statement.

9. The Council made every effort to engage with the Appellants to regularise the situation on site. The Council maintained during the course of negotiations that the bike and bin store was unacceptable and contrary to policy.

8. The Council had not misstated facts nor misunderstood planning law at any stage, as alleged by the Appellants. A large volume of correspondence existed between the Appellants and Council that illustrated the Council's attempts to convince the Appellants to regularise the situation at the site. The Appellants were repeatedly informed that the structure was not acceptable and if not removed that enforcement action would be forthcoming. The Appellants refused to accept the Council's advice. As a last resort, they were invited to apply for planning permission to test their assertion. At that stage, the Appellants began a new argument that the structure did not require planning permission. The Council informed the Appellants that the structure did require planning permission and gave its reason behind reaching this conclusion. It was only when all avenues of negotiation failed that the enforcement notice was issued.

9. The Appellants refused to respond to the Council's Planning Contravention Notice, waiting until the last day of the 21 day response period to ask for an extension of time and then again until the end of the extended time period to challenge the validity of the PCN, refusing to respond on the basis they might incriminate themselves.

10. The allegations of the Council changing positions related to the boundary wall that was considered under a separate enforcement case and was not relevant to this appeal. Although presently the Council did not consider the boundary wall acceptable, it was accepted that the previous officer indicated to the Appellants that the modification of the wall was sufficient to make enforcement action not expedient. On that basis, the Council had not pursued enforcement action with respect to the boundary wall.

11. At no point had the Appellants been informed by the Council that the bike and bin store was acceptable. Despite repeated advice to regularise the situation the

Appellants had consistently refused to take any action. Throughout the course of the investigation the Council had acted entirely reasonably and had attempted to resolve the matter informally.

Considerations

12. I have considered this application for costs in the light of National Planning Guidance of March 2014 and all the relevant circumstances. Paragraph 027 of that guidance says: *"An award of costs is an order which states that one party shall pay to another party the costs, which may be in full or in part, which have been incurred by the receiving party during the process by which the Secretary of State's or Inspector's decision is reached."*.

13. Para. 030 advises that, irrespective of the outcome of the appeal, costs may be awarded where: a party has behaved unreasonably; and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. The word "unreasonable" is used in its ordinary meaning, as established by the courts in *Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774*. Unreasonable behaviour in the context of an application for an award of costs may be either: procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal.

14. As to procedure, any disputes unrelated to the appeal process itself are beyond the consideration of an application for an award of costs. In this instance, much of the difficulties allegedly encountered by the Appellants could have been averted had they made an application for a certificate of lawfulness before the notice was served. The Council made clear they considered the bike and bin store built at the front of No. 10 Mackeson Road not to be development permitted by the Town and Country Planning (General Permitted Development) Order 1995. The Appellants took a different view, as they were entitled to do. But the way to have dealt with that disagreement was to have made an application for a certificate of lawfulness under s.191(1)(b) of the Act. Any other course in pursuit of such disagreement would not have sat well with the fundamental principle that a local planning authority may not fetter its discretion to issue an enforcement notice by any form of agreement, *Southend-on-Sea Corporation v Hodgson (Wickford) [1961] 12 P and CR 165.* In *Saxby v SSE and Westminster CC [1998] JPL 1132* it was held that under the revised provisions for certificates of lawfulness, (s.191 - 196 of the Act), it was no longer possible to have an informal determination of whether planning permission was required.

15. On the substantive matters, the enforcement notice was not a nullity, was valid and served in a manner that I found not to have caused the Appellants any substantial prejudice. The Appellants said that the notice had "failed to refer to a large number of LB Camden's policies relevant to the development.". The notice's reasons for issue noted 3 determinative local policies, sufficient in my view to deal with what the Appellants described as a development of a minor nature. The Appellants remained free to refer to other polices which they said supported their cases.

16. The Council served the enforcement notice, requiring that the bike and bin store be removed. Subsequently, much of what was said in the claim for an award of costs went to the merits of the appeal against the notice. I found in the case of

the Appellants' ground (e) appeal, no substantial injustice to the Appellants took place. The appeal on ground (c), that planning permission was not required for the bike and bin store, also failed. Other criticisms of the Council went to planning merit. The Council were of the view that the bike and bin store was harmful to the street scene. The ground (a) appeal also failed. Both parties put forward relevant and well argued cases.

17. I find nothing in the application made by the Appellants that suggests an award of costs against the Council is merited.

18. Unreasonable behaviour resulting in unnecessary expense, as described in National Planning Guidance, has not been shown. I therefore conclude that an award of costs should not be made.

Formal Decision

19. No award of costs is made.

John Whalley

INSPECTOR