The Planning Inspectorate

Costs Decision

Hearing held on 15 March 2022 and 8 June 2022
Site visit made on 8 June 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 July 2022

Costs application in relation to Appeal Ref: APP/X5210/W/21/3277179
The Brunswick Centre, Bloomsbury, London WC1N 1BS

- The application is made under the Town and Country Planning Act 1990, sections 195, 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 partial award of costs against Lazari Properties 2 Limited.
- The hearing was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development described on the application form as: "Class E".

Decision

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

Submissions

2. A written application was made and a written response was provided. Comments in reply to the response were made orally at the Hearing and these are summarised in the Annex.

Reasons

3. 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. Unreasonable behaviour may be based on procedural or substantive grounds. In this case the Council's application is based on both.

4. As is set out in the PPG[1], all costs applications must be formally made to the Inspector before the Hearing is closed. This costs application was made in writing and submitted before the Hearing was reconvened on day 2. So contrary to what is suggested by the appellant, it was made in good time.

5. The Hearing was scheduled to last for 1 day. In the afternoon of the first day the appellant introduced a new argument to the effect that Condition 3 of the site's 2003 planning permission controlled matters for 10 years (from the date of the planning permission) but not beyond. This had not been set out in the appellant's written evidence and came as a surprise. This contributed to the need for the Hearing to be adjourned to a second day, so that the Council could consider the new argument and respond.

[1] Appeals – Paragraph: 035 Reference ID: 16-035-20161210

6. As is set out in the examples in the PPG[2], prolonging the proceedings by introducing a new issue is unreasonable behaviour on procedural grounds. Having considered the response to the costs application, I am not satisfied this argument was merely in response to comments made by the Council at the Hearing or that it was simply a further nuance in the submissions already made, as has been suggested by the appellant. In my view, the new argument could potentially have changed the outcome of the appeal and should have been properly set out in the appellant's written submissions so that it did not come as a surprise.

7. It is the Council's view that the Hearing would have been completed in one day had it not been for this new argument. But I am not satisfied this is the case, as by the time the Hearing was adjourned at approximately 4:00 pm there were still questions to be asked, costs applications to hear and the site visit to be carried out. The Hearing closed on the second day at approximately 2:45 pm. This strongly indicates to me that even if the new argument had not been made, the Hearing could not have been completed in one day.

8. Nevertheless, the new argument, introduced at such a late stage, meant that additional work was required by the Council before the Hearing was reconvened, to consider and respond to the new argument. That work would not otherwise have arisen. This reflects an example of unreasonable behaviour described in the PPG[3].

9. After adjourning the Hearing on the first day I issued Directions to the parties. These were set out in an email dated 21 March 2022. In point 2 of that email I asked that the appellant set out their line of argument regarding Condition 3, in writing, in advance of the Hearing being reconvened, so that the Council may consider it and respond when the event is reconvened.

10. The appellant's submissions in respect of the above were received on 18 May 2022. Having considered those submissions I then issued further Directions, which were set out in an email dated 31 May 2022 as follows:

    "In relation to The Town and Country Planning (General Permitted Development) Order 1995, Schedule 2, Part 3, Class E, paragraph E.1 (b), the appellant has set out in their further written submissions, submitted on 18 May 2022 (copy attached), their view that: "the reasonable reader would interpret Condition 3 as being imposed to seek to control matters relating to the use of units during the 10-year period but not beyond." On this particular point, the Inspector will need to interpret the planning permission and the effect of Condition 3 and whether the GPDO should be read into this condition in the way the appellant suggests. When the Hearing is reconvened, the Inspector will ask the Council to respond to this particular point, as he wishes to understand the Council's position. It will be helpful for the Inspector to receive that response in writing. Thank you."

11. The Council set out its response, in writing, and provided this by email on the evening of 6 June 2022, ie prior to the Hearing being reconvened on 8 June 2022.

12. In respect of substantive grounds, the PPG reminds us that in lawful development certificate (LDC) appeals the onus of proof on matters of fact is

[2] Appeals – Paragraph: 052 Reference ID: 16-052-20140306
[3] Appeals – Paragraph: 052 Reference ID: 16-052-20140306

on the appellant[4]. In this regard, the Council has drawn my attention to an argument made by the appellant, to the effect that they have a right to go back to a use persisting in 2013. But, the Council says, without any evidence as to what that level of use in fact was at that time.

13. As set out in my appeal decision, this argument does not take account of how lawful use rights may be lost, where there is no right of reversion pursuant to section 57(4) of the 1990 Act. So I am not satisfied evidence expected by the Council in this regard was necessarily required, such that its absence constituted unreasonable behaviour.

14. In terms of evidence provided by the appellant in other regards, in response to feedback from the Council, a statutory declaration and retail survey data were submitted. Whilst these have not led to success for the appellant, as set out in my appeal decision, the appellant reasonably believed they constituted sufficient evidence of the existing use and it is a matter of planning judgement as to whether they were sufficient or not. So I am not satisfied that not providing further evidence necessarily constituted unreasonable behaviour in this case.

15. I appreciate that the Council has sought additional information, which it considers highly likely that the appellant possesses. But at least for the disputed units (ie those where it is alleged by the Council that there is a use with a hot food takeaway primary component) it seems to me that the appellant would not necessarily have access to data which would satisfy the Council in this regard, such as, for example, sales figures.

16. The provision of such information would require tenants of the appellant to show their hand. This could have significant consequences for those tenants. Due to the restrictions in the 2003 permission, either the data may show tenants are in breach of planning control (with potential consequences for them and the owner), or it may show they are not, which could fuel tenants' perceived risk that their landlord (having obtained a 'Class E' section 191 LDC) may seek to lease their units to other tenants prepared to pay higher levels of rent.

17. The Council identifies costs incurred by them in preparing for the additional day of the Hearing, attending the additional day of the Hearing and the costs incurred in preparing their costs application.

18. But as set out above, I have found grounds for costs demonstrated only in respect of the new argument that Condition 3 controlled matters for 10 years but not beyond. Accordingly, costs are also attributable also to the preparation of the part of this costs application relevant to that new argument.

19. Point 3 of my Directions dated 21 March 2022 invited submissions from both main parties on whether the relevant use of each unit at the date of the LDC application was the permitted use or the use actually being carried out. For the avoidance of doubt, these submissions were invited to assist me with my Decision. They are not a demonstration of unreasonable behaviour.

20. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been

[4] Appeals – Paragraph: 053 Reference ID: 16-053-20140306

demonstrated, but only to the limited extent described above. A partial award of costs is therefore justified.

Costs Order

21. 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 Lazari Properties 2 Limited shall pay to the Council of the London Borough of Camden, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in considering and responding to the new argument that Condition 3 controlled matters for 10 years but not beyond and those costs incurred in the preparation of the part of the costs application relevant to that new argument; such costs to be assessed in the Senior Courts Costs Office if not agreed.

22. The applicant is now invited to submit to Lazari Properties 2 Limited, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

L Perkins

INSPECTOR

Annex: Comments in reply to the respondent

- The appellant raised a new line of argument that had not been properly set out. It was a late point following a long and detailed prior discussion. It led directly to an adjournment.
- The Council does not recognise the chronology in paragraphs 8 and 17 of the response.
- It is not agreed [the new point] was a 'response', as paragraph 11 of the response suggests.
- The "only 10 years" and "right to revert" points were new and not properly set out.
- The point in paragraph 13 of the response, about parties changing their case, is not accepted. To change your case risks costs, it is the "new issue" point in the PPG. Cases should be fully set out and this is a Hearing, not an Inquiry.
- If the case had been fully set out this could have been dealt with in one day. This was the only point outstanding at the adjournment.
- The Council does not recognise the point regarding "the Council took so long", in paragraph 17.