



Costs Decision

Inquiry Held on 30 and 31 July 2019

Site visit made on 31 July 2019

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 11 September 2019

Costs application in relation to Appeal Ref: APP/B4215/C/18/3209377 Land at First Floor, 108 Wilmslow Road, Manchester M14 5AJ

- The application is made under the Town and Country Planning Act 1990 (the 1990 Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Khalis Ibrahim for a full award of costs against Manchester City Council.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the material change of use from a restaurant to a shisha smoking place.
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Decision

1. The application for an award of costs is refused.

The submissions for Mr Khalis Ibrahim

2. It is claimed that the notice would be a nullity if I were to find that the Council did not have the authority to serve the notice in the form in which it was served. In such circumstances, the appellant indicates a full award of costs would be justified.
3. Further, it is argued that it is not acceptable for the Council to proceed on the basis of common sense, assumption, lack of investigation, failure to investigate internally, changes in position and lack of evidence. Several examples are cited: (i) the Council's acceptance that the delegated report dated 17 July 2018 was submitted in error, as this had been superseded by a subsequent report in which the wording of the breach alleged was amended; (ii) there was no justification for serving the notice in relation to noise outbreak or increased comings and goings; and (iii) the Council's statement was based on an understanding of the premises that was materially incorrect, in respect of the location of the kitchen and brazier, access arrangements and flue.
4. It is maintained that the Council may have taken a different approach if it had undertaken a diligent inspection in the first place. It may not have opposed the development on the grounds of impact on residential amenity or it may not have served the notice at all. Moreover, the Council knew elements of its case to be incorrect and did not seek to clarify those matters. The Council accepts that the investigation could have been improved, which is significant.
5. The claim is that this amounts to unreasonable behaviour, and the appellant has been put to considerable abortive expense.

The response by Manchester City Council

6. Whether or not the notice was served ultra vires is not a procedural matter connected to this appeal. In any event, the authority to serve the notice was exercised correctly.
7. (i) It is asserted that case law sets out that officer reports should be read fairly and as a whole. The material question is whether on a fair reading, the report has materially misled on a matter bearing upon the decision and the error has gone uncorrected before the decision is made¹. In this case, it is maintained that no prejudice has been caused to any party due to the anomalous wording in one part of the delegated report, which only concerned the previous use. Ultimately, there is no requirement to specify the previous use.
8. (ii) The Council's concern about noise outbreak, or noise from comings and goings, is a legitimate planning consideration as shown by relevant Inspectors' decisions, as submitted. In addition, there is third party evidence and a threatened closure order. In these circumstances, it is entirely proper to rely on planning judgement and common sense.
9. (iii) The misdescription of the appeal premises was accepted during cross-examination. However, it is argued that it is not the case that a more diligent investigation would have prevented the need for service of the notice.

Reasons

10. 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.
11. The PPG makes it clear that, for enforcement action, local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place or ensured that it was accurate.
12. The question of whether or not the notice was served without authority is addressed in my decision. I found that the notice is not a nullity, or otherwise invalid. The appellant's claim in relation to this matter alone is not justified.
13. The amendment to the breach alleged, as set out in the delegated reports, is not indicative of inadequate investigation. Only that, for whatever reason, the officer saw fit to correct that part of the report before the notice was served. The allegation in the notice mirrored that of the corrected report and the appellant's case was based on this allegation.
14. The Council was satisfied that the nature of the unauthorised use, having regard to the site-specific circumstances, was likely to be a source of noise nuisance to nearby residents. The officers exercised their planning judgement in reaching this view, as explained in the reports and substantiated in statements and proofs. While the appellant fundamentally disagrees with this assessment, this is not an example of a vague, generalised or inaccurate assertion about a proposal's impact.

¹ *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 is cited.

15. The Council's understanding of the premises was shown to be partially incorrect, as the kitchen and shisha preparation area was described as being at the rear of the premises. The submissions also alluded to the need to site braziers in the public domain, which is not the case at the appeal premises. In addition, the references to the well-used rear access suggests public access, which would be wrong. However, it is not apparent that this was an attempt to mislead. The errors arose due to reliance on a description by an officer who subsequently left the Council.
16. Crucially, it is highly unlikely that the Council would have taken a different approach if these misdescriptions had not occurred. The reasons for issuing the notice concern noise and disturbance, and the effect on the character of the District Centre. These planning objections would be unaffected by the location of the kitchen/brazier and the flue. Similarly, the Council's case did not rely on whether or not the fire escapes were used by customers, as it was their use by staff that was advanced as a contributing factor.
17. It is clear from the sequence of events that the Council did carry out adequate prior investigation, which led to the service of the notice. It is not apparent that the appeal could have been avoided by more diligent investigation.

Conclusion

18. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Debbie Moore

Inspector