



Costs Decision

Site visit made on 28 July 2020

by Jillian Rann BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 September 2020

Costs application in relation to Appeal Ref: APP/Z4310/W/20/3250427 339 Smithdown Road, Liverpool L15 3JJ

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Arthistory Ltd for a full award of costs against Liverpool City Council.
 - The appeal was against the refusal of planning permission for development described as: '1. To remove the stud partition between bedrooms 2 and 3 to form large living room, reducing bedrooms to 5; 2. To discontinue A3 usage of retail unit and revert to A1; 3. To change use of residential unit to HMO'.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party which has behaved unreasonably and thereby caused another party to incur unnecessary or wasted expense in the appeal process.

Application for planning permission

3. The appellant contends that they incurred unnecessary and wasted expense as the Council requested and refused an application for something that did not require planning permission.
4. The appellant's decision to submit a planning application appears to have been based on advice from the Council. It is clear from the submissions that the Council's advice in that regard was given on the basis that it considered that planning permission was required, and included reasons for that view. As set out within my decision, it is not within the scope of this appeal to determine whether planning permission was required for the development. Had the appellant wished to make a case on the basis that planning permission was not required, other mechanisms were available. However, the appellant made an application for planning permission. The Council considered the application on that basis, on its planning merits, and it did not act unreasonably in doing so.

Reason for refusal 1

5. In refusing the application on grounds relating to the existing proportion of houses in multiple occupation (HMOs) in the area, the Council placed greater

weight on Policy H11 of the emerging Liverpool Local Plan 2013-2033 than on Policy H7 of the City of Liverpool Unitary Development Plan and the advice in Supplementary Planning Guidance Note 7: Conversion of Buildings into Flats and Bedsits.

6. The weight to be attached to material considerations, including emerging policy, is a matter for the decision maker. It is clear from the Council's submissions that emerging Policy H11 and the 10% threshold for HMOs therein stem from its concerns regarding particularly high concentrations of HMOs in certain parts of the city and the resultant effects on the character of, and balance of housing in, those areas.
7. The Council's submissions set out that the proportion of HMOs in the Dales area exceeds the 10% threshold proposed in the emerging policy. I have not been presented with substantive evidence to indicate otherwise. Furthermore, whilst the emerging policy refers to family housing it does not appear to be intended solely to apply to, or to restrict the change of use of, 'family' houses. Rather, its aim appears to be to maintain a balance of housing across those areas identified. Therefore, whilst the appeal property was a flat above a shop and not a house, the Council was not unreasonable in reaching the view that its change of use to create an additional HMO could further tilt the balance of housing and affect the character of the area to an unacceptable degree, as a matter of planning judgement. The Council has also identified concerns regarding living conditions with reference to the specific detail of the proposal.
8. It will be seen from my decision that I have come to a different conclusion regarding the weight to be attached to emerging policy H11. However, the Council has clearly articulated its concerns regarding the implications of additional HMOs and its reasons for attaching greater weight to the emerging policy in the light of those concerns, including with reference to the feedback received from an examining Inspector in that regard. Accordingly, it did not act unreasonably in affording the emerging policy the weight it did, as a matter of planning judgement.
9. It is evident from the Council's submissions that it also had regard to other planning matters, but concluded overall that the conflict with those policies it identified was sufficient to justify refusal of the application. It was not unreasonable for the Council to do so as a matter of planning judgement.
10. Therefore, I conclude that the appellant has not been put to unnecessary or wasted expense in having to provide evidence to refute the Council's first reason for refusal.

Reason for refusal 2

11. The PPG advises that local planning authorities are at risk of an award of costs for not determining similar cases in a consistent manner or for refusing permission on a planning ground capable of being dealt with by conditions where it is concluded that suitable conditions would enable the proposed development to go ahead.
12. The Council's second reason for refusal states that the proposed waste storage arrangements could lead to the unauthorised dumping of waste arising from the ground floor commercial unit. However, the Council has provided no substantive evidence to support its assertion that future occupants of that unit

would carry out such unauthorised activity or to explain why enforcement powers existing under other legislation, referred to by the appellant, would be insufficient, even were such issues to arise in that regard.

13. Furthermore, previous planning permissions granted by the Council¹ would have led to a similar scenario. In those cases the ground floor commercial unit would have had direct access to the rear yard and the residential unit would not. However, the Council granted permission for that arrangement subject to conditions requiring waste to be kept within the site except on collection days. As now proposed, the residential unit would have direct access to the rear yard whilst the commercial unit would not. However, the Council has not provided substantive evidence to indicate that there has been a material change in circumstances or that a commercial operator would be more likely than a residential occupant to dump waste outside the site. The Council has therefore failed to justify why it has come to a different decision in concluding that this arrangement would be unacceptable in this case, or why the matter could not be dealt with by similar conditions to those imposed on previous permissions.
14. The Council refused a more recent application² on the basis that the ground floor unit – in that case a proposed A3 use – would not have access to the rear yard. That refusal may be consistent with that which forms the subject of this appeal. However, that does not explain or justify why, in those two more recent decisions, the matter of one of the occupants not having access to the rear yard is now considered unacceptable by the Council when it was considered acceptable and dealt with by condition previously, or the lack of consistency with those previous planning permissions in that regard.
15. Therefore, with regard to the second reason for refusal I conclude that the Council's behaviour was unreasonable in the terms of the PPG. That behaviour has led to the appellant incurring unnecessary and wasted expense insofar as they have had to address the second reason for refusal in their submissions.

Reason for refusal 3

16. The Council has clearly explained and justified its third reason for refusal with reference to the proximity of the proposed waste storage areas to ground floor residential kitchen windows and the comings and goings of occupants of the ground floor commercial unit, close to those windows, to access their bins.
17. Although the Council has used the terms 'smell' and 'odour' interchangeably, it is clear that its concerns relate to the potential for future occupants to be able to smell the bins from inside the adjacent kitchen and for their living conditions to be adversely affected as a result. The Council has not provided a detailed odour assessment. However, it is not unreasonable to take the view, in general terms, that bins can give rise to issues with odours. Nor was it unreasonable for the Council to reach the view that ground floor commercial occupants travelling to and from their bin storage area and opening and closing the back gate could create noise and disturbance given the proximity of those areas to ground floor residential windows. Therefore, whilst I have come to a different conclusion on those matters, the Council has clearly articulated its concerns and justified its reason for refusal with reference to the specific proposal and

¹ Application references: 14F/2269 and 17F/0318.

² Application reference: 17F/1966

the layout of the site, and it was not unreasonable for it to reach the conclusions it did as a matter of planning judgement.

18. The Council's finding that reliance on an extractor fan for the ventilation of the ground floor kitchen would be unacceptable is not unreasonable as a matter of judgement, having regard to the living conditions of its occupants. Additionally, even if the positions of the residential and commercial bin stores were swapped as suggested, that arrangement would still necessitate the opening and closing of commercial bins and the rear gate close to a ground floor kitchen/dining area window. Therefore I cannot be certain that such an arrangement would have addressed the Council's concerns in any event, and it was not unreasonable in maintaining its objection on that basis or concluding that those matters could not be dealt with by condition.
19. Therefore, having regard to the PPG I conclude that the Council has not acted unreasonably with regard to its third reason for refusal.

Conclusion

20. The Council did not act unreasonably in the manner in which it determined the application or with regard to its first and third reasons for refusal. Therefore, overall the Council's behaviour has not delayed a development which should clearly have been permitted having regard to its accordance with the development plan, national policy and any other material considerations.
21. However, with regard to the Council's second reason for refusal I conclude that unreasonable behaviour resulting in unnecessary and wasted expense has been demonstrated. A partial award of costs is therefore justified. However, for the reasons given, that award is limited solely to the expense incurred by the appellant in contesting the Council's second reason for refusal as part of this appeal.

Costs Order

22. 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 Liverpool City Council shall pay to Arthistory Ltd the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in contesting the Council's second reason for refusal in the appellant's submissions for this appeal, such costs to be assessed by the Senior Courts Office if not agreed.
23. The applicant is now invited to submit to Liverpool City Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Jillian Rann
INSPECTOR