



Costs Decision

Site visit made on 15 February 2021

by Sarah Colebourne MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 March 2021

Costs application in relation to Appeal Ref: APP/U5930/W/20/3260519 24 Poppleton Road, Leytonstone, London, E11 1LR

- 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 Mrs M Goldstein for a full award of costs against the Council of the London Borough of Waltham Forest.
 - The appeal was made against the refusal of planning permission for the conversion of the existing property from two self-contained flats (Use Class C3) to a large HMO (Retrospective).
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Decision

1. I allow the application for a partial award of costs.

Reasons

2. The government's Planning Practice Guidance (PPG) states 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.
3. The applicant seeks a full award of costs and contends that the Council acted unreasonably, in relation to both procedural and substantive matters, on the grounds of a) Assessment of the proposal; b) Failure to produce evidence; c) Impact on amenity; d) Section drawing.

a) Assessment of the proposal

4. In relation to the Council's first reason for refusal, the loss of a family-sized dwelling, part of the applicant's case stemmed from the lawful use of the property. The applicant had provided comprehensive evidence as part of another application (ref 193007) for a certificate of lawful use or lawful development (LDC) for the use of the property as two flats which was pending during the course of the application for the appeal proposal. Although that application was subsequently decided by the Council as not lawful, that was because an LDC relates to continuing uses of land and cannot be granted in respect of a previous use. The decision stated that the submitted documentation was not sufficient to support the claim that the property had been in use for four years or more prior to the date of application. The appellant claims that the Council did not consider the lawful use of the site correctly during the course of the application for the change of use.
5. The Council's officer's report was based on the planning history of the site, the fact that the use as two flats had not been established through an LDC and its

council tax records. Whilst the detailed evidence submitted with the appeal was not submitted as part of the application, the Council's evidence provided as part of its Costs Rebuttal shows that an email from the applicant's agent during the course of the application requested that the evidence that formed part of the LDC application be taken into account as part of the change of use application. Although in its Costs Rebuttal, the Council says that it had already seen the applicant's evidence during the numerous discussions regarding the site's lawful use, on the basis of the officer's report there is no reference to that evidence and I have nothing before me to suggest that the Council asked for it. It was unclear to me whether or not the appeal evidence was the same as that submitted for a previously refused LDC for continuous use as two flats in 2019 (ref 180142) as I did not have full details of that.

6. My appeal decision explains that lawful use is not dependent on an LDC to establish and can be based on evidence instead. My decision found that, for the purposes of the appeal, the evidence supported the applicant's claim that the previous lawful use of the property was as two flats.
7. However, I cannot be certain that even if the Council had taken that evidence into account during the course of the application, it would have agreed with my findings. Moreover, even if it had agreed that the previous lawful use was as two flats, it seems clear on the basis of its submissions that it would have objected to the loss of the three bedroom flat as it considers that to be a family-sized dwelling, notwithstanding that I explained in my decision why I disagree with that. Thus, the need for the appeal would not necessarily have been avoided. However, some of the work for the appeal including the legal opinion provided by Counsel concerning the Council's approach, could have been avoided.
8. The PPG does not allow costs to be claimed for the period during the determination of the application but behaviour and actions during that time can be taken into account in the consideration of a costs award. For the reasons given above, I conclude that the lack of engagement regarding the applicant's request for the consideration of evidence of use as two flats during the application amounts to unreasonable behaviour in procedural terms and substantive terms, justifying a partial award of costs in this regard.

b) Failure to produce evidence

9. The Council's case for the appeal relied on its officer's report and did not challenge the detailed evidence of the previous use as two flats provided by the applicant for the appeal or the applicant's claim that lawful use is not dependent on an LDC to establish and can be based on evidence instead. Neither did it withdraw its first reason for refusal in the light of that evidence.
10. The PPG says that where a local planning authority has failed to produce evidence to substantiate each reason for refusal on appeal or has prevented development that should clearly be permitted according to the development plan, they are at risk of a substantive award of costs due to unreasonable behaviour. I find that is the case here because the Council failed to provide adequate evidence to support its decision in regard to the effect on the supply of family-sized units issue.

c) Impact on amenity

11. The PPG advises that local planning authorities are at risk of a substantive award of costs due to unreasonable behaviour if they fail to determine similar cases in a consistent manner.
12. The applicant says that the Council was inconsistent in its decision making because it did not include noise as a reason for refusal in relation to a refused permission (ref 171632) for the change of use of the property from a small HMO and a flat to an eight bedroom HMO which she considers is a more intensive use than the appeal proposal. The Council says that was because it compared the use as an eight bedroom HMO to the former use as a small HMO and a flat as stated in that application rather than to the previous use as two flats as stated in this case.
13. Although I reached a different conclusion from the Council regarding the impact in this case, I agree with the Council that whilst the two proposals are similar, the use as a small HMO and flat differs in terms of the number of potential occupants from the use as two flats. The Council was entitled to reach a different conclusion from me and did not determine the applications inconsistently in this respect. The need for the appeal in relation to this matter could not, therefore, have been avoided and I find that no unreasonable behaviour occurred in this regard.

d) Section drawing

14. The applicant claims that the Council had ample time to request a section drawing to assist in its assessment of the impact of the proposal on the living conditions of the future occupiers. The Council says it did not do so because it considered the proposal unacceptable in principle. However, it is clear that had it done so then it is likely that its objection on this matter would have been resolved. Moreover, even following the submission of that drawing with the appeal, the Council did not respond or withdraw that reason for refusal. Had it reviewed its case promptly following the lodging of the appeal and done so, that would have then narrowed the matters of the appeal as required by the PPG and would have avoided the need for additional work by the applicant in the appeal in regard to this matter.
15. Furthermore, the applicant says that the Council behaved inconsistently in this regard because that reason for refusal was not part of its refusal for application ref 171632. Although the Council says that its reasons were fully explained in its report, I agree with the applicant that there was some inconsistency because although the two proposals were not identical, the size and layout of bedrooms should have been considered in the same way in both cases.
16. For these reasons, I find that the inconsistency regarding this matter amounts to unreasonable behaviour in substantive terms and the lack of engagement during both the application and the appeal processes amounts to unreasonable behaviour in both procedural terms and substantive terms.

Conclusion

17. For the reasons given above, and notwithstanding my findings in regard to ground c), I find that unreasonable behaviour, in both procedural and substantive terms, resulting in unnecessary or wasted expense as described in

the PPG has been demonstrated in regards to grounds a), b) and d) and that a partial award of costs is justified.

Costs Order

18. 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 the Council of the London Borough of Waltham Forest shall pay to Mrs M Goldstein the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in dealing with the appeal on grounds a), b) and d); such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicants are now invited to submit to the Council of the London Borough of Waltham Forest, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Sarah Colebourne

Inspector