The Planning Inspectorate

Costs Decision

Site inspection on 3 August 2022

by John Whalley

Inspector appointed by the Secretary of State

Decision date: 15 August 2022

Costs application by Questmarc Limited made in connection with appeal ref: APP/N5090/X/21/3288781 15 Parkhurst Road, London N11 3EN

- The application was made under the Town and Country Planning Act 1990, Sections 174, 322 and Schedule 6, and the Local Government Act 1972 Section 250(5).
- The application was made by Questmarc Limited for a full award of costs against the London Borough of Barnet Council.
- The appeal was made by Questmarc Limited against the refusal by the Council to issue a certificate of lawful development in respect of the use of existing dwelling as 2 no. self-contained flats at 15 Parkhurst Road, London N11 3EN.

Decision

1. The application for an award of costs is not allowed.

Submissions made by Questmarc Limited

2. The Council acted unreasonably in its reasoning and justification which underpinned the refusal of the application for a certificate of lawful use.

3. The Council had fundamentally failed to consider this case in accordance with the 'balance of probability', as set out in PPG Para.: 006. Circular 10/97 confirmed at Para 8.15 that if a local planning authority have no evidence of their own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

4. The Council had applied a far stricter assessment criteria, closer aligned to the 'beyond a reasonable doubt' than that of 'balance of probability' advocated by the PPG, in assessing the application. That led to the refusal of the application, despite the Council being satisfied that sufficient evidence showed the first floor flat to have been continuously utilised as a self-contained dwelling during the 4 year material period. It was also accepted that the ground floor flat had been used as a self-contained dwelling for $3^{1}/_{2}$ years in the same period. That was enough to discharge the 'balance of probability' test.

5. Also, the Council made a clear error by affording no weight to the evidence dated prior to August 2017. That provided crucial context to the application. It showed that the property had been subdivided and in

continuous use as two separate flats for a number of years prior to the August 2017 start date for the Application's material period.

6. There was no evidence to indicate that No. 15 was used differently to 2 self-contained flats. It was unreasonable for the Council to refuse the application on the basis that insufficient evidence was been submitted to prove the continuous use of the ground floor flat for a 6 month period between August 2017 and February 2018. The Applicants should have their costs.

Submissions made by the London Borough of Barnet Council

7. The Council said they had acted reasonably throughout the application process and in coming to their decision that inadequate information/evidence had been provided.

8. The Appellants' statutory declaration document submitted was insufficient. It was not signed or witnessed in front of a solicitor. There was no witness name or adequate address details and no official stamp of the legality of the statutory document. Also, the second statutory declaration document submitted stated that the ground floor flat was occupied by a family member of the owner for a period of twenty-three months, but no other details were submitted as to the names of the occupier.

9. Continuity of use was a pre-requisite for lawfulness of a use by passage of time. It was not enough to have changed a use 4 or 10 years ago, for a use to be immune from enforcement action. That use must have continued for the relevant period. It was not enough that a building or land be available or suitable for the use in question for the relevant period, it must be put to that use, (*Swale BC v FSS & Lee* [2005] EWCA Civ 1568). The gap in the evidence between August 2017 and February 2018, in addition to the ambiguity of the statutory declarations was considered sufficient to determine the Certificate use as unlawful.

10. The Council was fully aware of 'time limits' within s.171(b) of the Act. That was why the Council did not give weight to the evidence that suggested occupancy before the 4 year period for the certificate was applied for. Whilst such pieces of evidence provided a case of evidence for the sub-division, the Council had to be satisfied that the ground floor flat was subdivided and in use continuously for the four years prior to the Certificate application being submitted. The 4 year period was crucial to s.171(b). It was not unreasonable to have given no weight to evidence which fell outside the 4 year period.

11. Within the lifetime of the application, the Council went beyond its role as the assessor of the evidence submissions provided, by advising the Appellants to provide additional evidence to support the application. The Council initiated working with the Appellants for a positive outcome through telephone calls by strongly advising the submission of utility bills to account for the missing period. That was the reason the application for a certificate failed. The Council had acted reasonably with the aim of a positive outcome in accordance with para. 38 of NPPF 2021.

12. The Appellants should not have their costs.

Inspector's conclusions

13. Irrespective of the outcome of the appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party or parties applying for costs to incur unnecessary or wasted expense in the appeal process.

14. In my view, the Appellants' complaint against the Council is largely based upon a disagreement with their decision based upon the merits of the case, rather than against any unwarranted behaviour. The Council accepted that the Appellants' evidence dated from 15 July 2010 to up to 12 October 2017 could provide evidence that conversion had taken place during that time. It seems to me that the Council, rather than refusing to take any account of the use of the dwelling before 2017, decided to give it little or no weight because of what they considered to be a lack of evidence of continuity of use.

15. As was held in *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 a use can only become lawful if it continues throughout the relevant immunity period, such that the LPA could have taken enforcement action at any time. The critical question is whether the use was continuous, not whether the building was continuously fitted out or intended for residential use, (*Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)). It may not be fatal if a few days elapse between one tenant moving out and another moving in, particularly if works to further the breach, such as redecoration, took place during that time. But a break that is significant as a matter of fact and degree would result in the four year clock starting again after a resumption of the use. It was entirely fair for the Council, having been unconvinced on the evidence submitted that a lawful use had been gained before 2017, to adjudge that the ground floor flat had not been shown to have been continuously occupied in the 6 months between August 2017 and February 2018. Almost fulfilling a 4 year period is not enough for the purposes of s.171B of the Act.

16. Not accepting the evidence which purported to show an LDC should be issued was not an indication of unreasonably behaviour by the Council.

17. An application for costs needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. In my view, that was not done. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in Planning Practice Guidance, was not demonstrated. An award of costs against the Council is not justified.

John Whalley

Inspector