

Costs Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 18 November 2022

Costs application

Appeal Reference: APP/Z4310/X/22/3296202

177 Alderson Road, Liverpool L15 1HQ

- 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 Mr Tom McConnon against Liverpool City Council
 - The appeal was in relation to the use of the property as a Class C4 House in Multiple Occupation (HMO).
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Decision

1. The application for an award of Costs is refused.
2. Planning Practice Guidance (PPG) states that, irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary loss and expense in the appeal process (my underlining).

The application for an award of costs

3. A full award of costs is applied for on the basis that the Council acted unreasonably by taking into account immaterial considerations; failing to provide full and proper reasoned explanations; failing to give the Appellant the opportunity to provide better information and failing to notify the Appellant of his appeal rights. It is contended that the appeal should not have been necessary.
4. Firstly it is indicated that the LPA erroneously took into consideration an enforcement complaint regarding an alleged 8-9 person occupancy of the property. This is factually incorrect. There is no enforcement complaint relating to the appeal property. The complaint actually related to No 65 Alderson Road. This is stated to be an immaterial consideration and amounts to unreasonable behaviour that led to an unnecessary appeal.
5. It is contended that the Officer has taken objectors' word on their complaints without firm evidence, without seeking further or better information and without having its own evidence to support the weight they applied to those objections in their resultant decision making.
6. It is considered that the LPA has behaved unreasonably by not allowing the opportunity to comment on the 'evidence' provided by objectors. The Appellant felt they had no choice but to appeal the decision and has incurred costs associated with obtaining legal and planning advice associated with the preparation, submission, and management of the appeal.

7. It is stressed that the Officer's Report includes several further inconsistencies. The wrong '*specified date*' was noted in the decision; there was a failure to identify the correct section of the Act for the certificate; an additional test of '*unrelated*' individuals as determinative to HMO use was inserted; the wrong definition of a small HMO was referred to and reference to 6 rather than 4 individuals sharing the HMO was made.

8. It is argued that the Tenancies were given reduced weight in the decision-making process, despite no reasoned explanation of how they have been considered demonstrative of the use or occupation during the relevant period. Whilst three are recorded, the officer dismisses one for being '*rolling*' without any explanation, or how they consider that to affect the asserted use. Dates have also been incorrectly recorded of those agreements.

9. Consequently, these have been considered determinative in demonstrating a planning use despite those agreements only being capable of attesting to agreements being in place, not determinative to the planning use of the Property.

10. It is contended that the Council has failed to provide any contrary evidence but has chosen to undermine or disregard certain documents, without any explanation of the assessment and/or consideration of the decision. It is argued that the LPA failed to deal with the crux of the application: that is whether or not the use of the Property was proven to be a Class C4 HMO use on the date of the application.

11. It is indicated that the Appellant's letter from the Landlord, submitted in support of their application, is listed in the documents within the Officer's Report, but that the report incorrectly stated that it is undated. A comment is also made to suggest that because the letter is not in the form of an affidavit it can only be given limited or no weight. It is stressed that this is in comparison to a neighbour's letter which is not in the form of an affidavit, but which is given great weight and considered as a '*third party representation*'.

12. It is indicated that there is no reason given for applying a different standard of weight to the same format of '*evidence*' and that this is an example of the Council's unreasonable and unjustified behaviour, applying inconsistent principles to the evidence.

13. Under '*Issues*', only one issue is cited: '*Is the use of the premises as a C4 HMO lawful? Use Class C4 (houses in multiple occupation) relates to small houses occupied by between three and six unrelated individuals, as their only or main residence, whoshare basic amenities such as a kitchen or bathroom*'. This fails to identify the relevant/specific date for consideration under S191 of the Town and Country Planning Act 1990 (as amended).

14. It is stressed that this inaccurately recites Use Class C4 which does not refer to '*unrelated individuals*', but the distinction from dwellinghouses which operate as '*single households*'. Whilst likely that the individuals will be unrelated, the Council's recording of what it considered here potentially means that anyone of those six occupants could push the classification out of C4 if they were related to another e.g., if two siblings were occupying the Property, under the Council's recorded consideration this could not be considered C4. This is wrong and legally incorrect.

15. Only in the Introduction in the Officer's Report is the specified date correctly identified. This suggests that the form of report is templated, and that section remained when drafting the Officer's Report. There is nothing to

support or record any due consideration of the specified date in the assessment or final decision or decision notice.

16. At the date of the Application the use as Class C4 small HMO could be proven to have occurred in line with permitted development (so not requiring planning permission) and, as a consequence, would not give rise to the Council being entitled to take enforcement action. This is inadvertently accepted in the report where it is accepted that the Article 4 Direction is of no issue.

17. However, it is indicated that the officer then goes on to dismiss consideration of the fact of that change, accepting that at the date of effect of the Article 4 Direction (17 June 2021) the Appellant had exercised their right to change the use from C3 to C4.

18. The Officer specifically focused on whether '*three unrelated individuals*' resided at the property on the specified date. This was never part of the application which sought certification for the existing use as a small HMO and accordingly, even if '*vacant*' at the specified date, the permitted use was still as a small HMO. The evidence submitted demonstrates that the property was occupied by between 3 and 6 persons who shared amenities.

19. It is indicated that a lawful use does not stop being a use without there being a material change in that use, or that use being legally abandoned. There is no suggestion that the use has been abandoned and there is also no material change in this case and none recorded or suggested by the Council in its decision.

20. It is contended that the Council failed to properly apply basic planning principles and failed to consider the application presented to the Council, by bringing into that consideration immaterial and misleading misinterpretations of legislation. The Appellant considers that this amounts to unreasonable behaviour by the LPA which has resulted in a costly appeal process.

21. It is also indicated that the LPA failed to inform the Appellant of their appeal rights and that the Appellant had to seek swift professional advice to confirm that in fact there is no time limit for submitting an appeal against this type of application, despite the decision notice stating they had to appeal within 6 months of the decision. It is argued, therefore, that the Appellant incurred legal costs in obtaining advice to confirm the legal position resulting from an ambiguous and error-ridden decision notice and Officer's report.

22. The Appellant has also incurred costs by having to consult a Chartered Town Planner to provide planning advice on the decision, and to prepare, submit, and manage the appeal – which the Appellant, the Law firm, and the agent consider could have been avoided if the LPA had not behaved unreasonably. It is appreciated that only costs associated with the appeal process can be recovered.

The response to the application by the Council

23. The Council does not consider that it has behaved unreasonably in refusing the certificate of lawfulness. Nor does the Council consider there have been any procedural errors or issues relating to its handling and consideration of the certificate.

24. The Council does not accept that it has taken into account any immaterial considerations in the determination of the application. It is stressed that not all comments received from neighbours were considered to be immaterial and most are justified; some are well-reasoned and give clear local knowledge of the use of the property and their belief of the activities associated with the property.

25. It is indicated that, in considering existing LDCs, Officers have a duty to weigh in the balance evidence submitted in dispute of the certificate with the evidence provided in support. In the Officer's report, only those comments received from neighbours which can be considered 'material' to the issuing of the certificate have been further considered and elaborated on. That is, the dates of occupation of the property. Those matters which are not material, including the impact from the increased proliferation of HMOs in the area, have not been considered further.

26. It is considered that it is clear from the Officer's report, what has and has not been taken into consideration when considering the certificate application, including the provision of evidence by the appellant. The Council disputes the claims that all representations received were immaterial. Specifically, the issue of whether three unrelated residents were living together using shared facilities was raised by the objector and corroborates the fact that a married couple and one additional person resided at the property at the relevant time.

27. This supports the question that three unrelated individuals, as required under Use Class C4, did not occupy the property. It is well-defined that Use Class C4 (HMOs) relates to small, shared houses occupied by between three and six unrelated individuals, as their only or main residence, who share basic amenities such as a kitchen or bathroom.

28. It was not considered necessary, in this specific case for the evidence to be put to the appellant for response, given that it was provided as specific local knowledge by the neighbouring resident, and on the basis of a site visit conducted by the enforcement officer, neither of which can be disputed by the Appellant.

29. It is also the case that the Appellant has not provided any further evidence to dispute the comments of the neighbours within their appeal statement following the production of the officers report which lists the comments received. Therefore, the procedure of informing the Appellant of the specific nature of the application comments has had no bearing on the application outcome or subsequent appeal.

30. The Appellant claims that equal weight is not given to the neighbour objection and the letter from the previous landlord. It is considered that the neighbours stating that a married couple, living as a single household sharing a room, were living at the property is corroborated by the names on a tenancy agreement. However, the letter from a previous owner/landlord claiming 4 tenants resided at the property on a rolling month by month contract is not corroborated by other documents such as tenancy agreements and as such this document was considered unreliable as it has not been witnessed legally.

31. It is not clear what else the Appellant could be asserting constitutes 'immaterial' considerations and further commentary of the evidence which led to the refused certificate has been considered in the Council's appeal statement. The Council considers that its decision to refuse the LDC was reasonable and well-founded.

My Assessment

32. In my appeal decision I have referred to the claim on behalf of the appellant that the Council took into account immaterial considerations; failed to provide full and proper explanations and failed to notify the appellant of his rights of appeal. I have concluded that none of those matters go to the heart of the matter before me: that is, whether or not the LPA's decision to refuse the LDC was or was not sound. I do not consider that the LPA decision was so hopelessly unsound, so that an appeal was not necessary.

33. However, having considered this costs application I can only agree with the case put forward on behalf of the appellant that, during the course and consideration of the LDC application, the Council acted unreasonably and, in my view, sometimes unprofessionally. Whilst understanding issues relating to delays caused by the pandemic, the considerable delay in dealing with the case was unreasonable in itself.

34. So too was the Council's error in referring to an enforcement notice that had nothing to do with the appeal property. The complaint actually related to No 65 Alderson Road.

35. With regard to the LPA taking into account objectors' comments without firm evidence and not sharing that evidence with the appellant, I agree that this also amounted to unreasonable behaviour. However, again this does not go to the heart of whether or not an appeal was inevitable and there is nothing to suggest that a chance to counter this evidence would have changed the LPA's decision so that an appeal would not have been necessary. In any case, those acting professionally on behalf of the appellant were aware of the comments from the Officer Report and thus were not denied a chance to comment at this appeal stage.

36. I acknowledge that the errors and inconsistencies in the Officer's Report also amounted to further unreasonable behaviour. These included the wrong '*specified date*' in the decision; the failure to identify the correct section of the Act for the relevant certificate; the additional test of '*unrelated*' individuals as determinative to HMO use; the wrong definition of a small HMO and the reference to 6 rather than 4 individuals sharing the HMO. This again indicates a lack of professionalism and accuracy on their part but again does not alter the fact that, on the information before them, they refused to issue an LDC and thus an appeal was inevitable.

37. With regard to the Tenancy evidence being given reduced weight and the Officer failing to clarify the reference to a 'rolling' tenancy, these were matters of judgement for the LPA. The wrong dates referred to again indicate the LPA's unprofessional handling of the application, but again I consider that the overall outcome was always going to be that an appeal could not be avoided.

38. I do not accept that the Council failed to deal with the crux of the application. They certainly did not deal with it efficiently, but they did take into account the evidence submitted in support of the application and reached a decision. I have disagreed with their interpretation of the evidence but, nevertheless, the LPA was entitled to reach a decision on the information before them. It is also the case that in the Officer's report, only those comments received from neighbours which were considered 'material' to the issuing of the certificate were considered.

39. The Council's failure to identify the relevant/specific date for consideration under S191 of the Town and Country Planning Act 1990 (as amended) and the inaccurate recitals relating to Use Class C4, also point to the Council's errors and unreasonable behaviour with regard to their handling of the application. However,

the introduction of the Officer's Report quotes the correct specified date.

40. I have noted that the LPA failed to inform the Appellant of their appeal rights. However, the appellant was professionally represented for both the application and the appeal by a Chartered Town Planner. There should not have been any misunderstandings, therefore, regarding the correct interpretation of planning law, practice and procedures and particularly the fact that there is no time limit for submitting a LDC appeal. Furthermore, it was the appellant's choice to seek further legal advice relating to what the appellant's agent refers to as 'ambiguous and error-ridden decision notice and Officer's report'.

41. I do not agree that the basic costs of preparation submission and management of the appeal could have been avoided. This is the case even though I have acknowledged the LPA's unreasonable behaviour in relation to the application itself.

42. In conclusion on this costs application I consider that the Council's unreasonable behaviour was completely in relation to the manner in which they dealt with the application. But I do not accept that the Council's failures in this respect led to unnecessary loss and expense in the appeal process itself. I consider that this was necessary, and inevitable and I cannot see how it could have been avoided once the LPA had refused to issue a LDC for the property.

43. I can understand the frustrations of the appellant with regard to the Council's unreasonable behaviour. However, the costs incurred in the appeal process (including all the legal and agent's costs), in my view, result from the manner in which the appellant chose to make the appeal.

44. If it is considered that the appellant has a legal case to recover any costs incurred due to the unreasonable administrative errors; unreasonable delays and consequential matters such as loss of rent then, in my view, this is a separate matter between the parties.

45. I have concluded that these are not matters, however unreasonable, which as a matter of fact and degree, resulted in the appellant incurring unnecessary loss and expense in the appeal process itself.

Formal Decision

46. For the above reasons the application for an award of costs against the Council is refused.

Anthony J Wharton

Inspector