

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: 22 November 2022

Costs Application Appeal Ref: APP/Z4310/X/22/3298015
71 Woodcroft Road, Liverpool L15 1HS

- 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 Sam O'Flaherty against Liverpool City Council (LPA)
 - The appeal was in relation to a refusal by the LPA of an application for a Lawful Development Certificate (LDC)
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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.

The application for costs

3. An application for a full award of costs is being made on the basis that the LPA took into account immaterial considerations; failed to provide full and proper reasoned explanations; failed to accurately record the decision and failed to correctly notify the Appellant of their appeal rights. As a consequence the appeal should not have been necessary.
4. It is stated that the LPA has erroneously considered the date of 27th September 2021 in their assessment of the application. In their *Cost Response* document the LPA disagree that this is the case, and that a '*typographical error occurred which accidentally used the incorrect date*'. However in assessing the application, Officers fully and properly considered the correct relevant date, that is 26 October 2021.
5. It is stressed that the LPA's assessment only once refers to the correct date of 26 October 2021, but twice refers to the incorrect date of 27 September 2021. The incorrect date of 27 September 2021 is also recorded on the decision notice. It is therefore considered that the LPA has not fully and properly considered the correct relevant date. As a result, the Appellant has incurred expenses relating to obtaining planning and legal advice on whether the decision is reasoned and justified.
6. It is considered that the LPA have taken into account immaterial considerations, as set out in the Appellant's original submission and that they should have been afforded an opportunity to respond to the 'evidence' considered by the LPA from third parties. The Appellant disagrees with the LPA's contention it was not necessary to put the responses to the Appellant.

7. It is contended that the LPA has behaved unreasonably by not allowing the opportunity to comment on evidence canvassed by the LPA. This unreasonable behaviour is compounded by the fact the Appellant's agent specifically asked for an opportunity to review and comment on the evidence before a decision was made, as set out in the full Statement of Case.

8. It is stated that the Appellant had no choice but to appeal the decision and has incurred costs associated with obtaining legal and planning advice.

9. Reference is again made to the LPA's costs response which refers to the fact that the Appellant had not provided any further evidence to dispute the comments by neighbours and, therefore, that *'the procedure of informing the Appellant of the specific nature of the comments during the application would have no bearing on the application outcome or subsequent appeal.'*

10. The Appellant disagrees with the LPA and stresses that the Officer's report states that the neighbours' evidence included a statement that the property had not been in use as a HMO. This evidence has not been provided to the Appellant who has provided tangible and clear evidence that confirms the property was occupied as an HMO at the time.

11. It is contended that if the Appellant had been given an opportunity to comment on any evidence that countered the tenancy agreements and statutory declaration submitted with the application to confirm the date the change of use occurred, they would have explained that occupancy is not required to demonstrate a change of use and that the matter must be considered 'in the round'.

12. It is stated that the LPA now widely accepts this argument regarding occupation and use, following losing appeals referenced in the full Statement of Case. Had the Appellant been given the opportunity to present this argument in response to the evidence canvassed by the LPA, it is considered that the appeal could have been avoided.

13. Other evidence from a *'campaign member'* who reported people moving in was misquoted by the Officer. The evidence was that *'if this was before the 17 June, it was only a day or so.'* However, the Officer Report stated, *'one comment from an objector states that a resident believed people were moving into the house 'a few days before the 21st June'.*

14. In any case it is argued that this information was hearsay and should not have been given any weight in the determination of the application. The LPA has unreasonably considered this 'evidence' sufficient to outweigh the tangible evidence of the statutory declaration and signed tenancy agreements. There is no reasoned justification provided in the Officer's assessment for why this hearsay evidence should be sufficient to counter the Appellant's evidence.

15. It is further stressed that the 'evidence' does not tally with another consultation response from a neighbour who stated that *'a family was moved in earlier this year'*. The Officer's Report does not consider this consultation response any further in their assessment, nor is it made clear why this comment was immaterial, but the

comment about occupiers moving in shortly before the 17 June was considered determinative despite both comments being hearsay from neighbours who want to prevent HMOs in the area.

16. Even if the comment was accurate, and the tenants had moved in shortly before 17 June, rather than the date confirmed in the statutory declaration and tenancy agreements, this would still precede the Article 4 Direction. The LPA do not provide any reasoned justification for why this 'evidence' should be relied upon, or why it should result in refusal of the application if it were to be considered accurate. This lack of reasoned justification is considered to amount to unreasonable behaviour.

17. Regarding procedural matters, the LPA Costs Response states that they acknowledge the inconsistency of the decision notice, which records that the use was lawful, with other parts of the notice indicating refusal. The LPA also acknowledged the legal commentary on this point contained in the Full Statement of Case. However, they state that *'in appealing this decision the Appellant has clearly accepted the position that a certificate refusing to grant a certificate of lawfulness has been issued'*.

18. It is stressed that the LPA also claims that *'they are legal matters on which the Appellant has chosen to seek independent legal advice and for which other remedies could have been sought'*. However, the LPA has not expanded upon this and the Appellant was only able to accept the position that the certificate had been refused, and that an appeal was the correct route, after seeking legal and planning consultancy advice. Once the erroneous decision had been issued, an appeal was the only remedy. The only way the Appellant could know this was to seek professional advice and incur the associated costs.

19. It is also noted that the LPA failed to inform the Appellant of their appeal rights. This is accepted in the LPA Costs Response, though they consider it a *'technical issue'*. The Appellant disagrees and considers this a material issue. 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.

20. It is further indicated that the LPA Costs Response accepts there were a number of *'technical issues'* and *'technical errors'* in both the Officers report and decision notice. However, the Appellant considers the LPA have also failed to provide reasoned justification for reaching their decision and behaved unreasonably when determining the application. As a result, the Appellant has incurred legal costs and planning consultancy costs associated with this appeal.

21. An additional costs application is made on the basis that the Council was late in notifying neighbours of the appeal and gave the 1 August 2022 as the deadline for submitting comments. The original deadline for third party comments, established by the Planning Inspectorate, was the 1 July 2022. On this basis, the Planning Inspectorate accepted the third-party comments sent to them by the Officer on 1 August, after initially returning them.

22. By failing to notify neighbours of the correct deadline for third party comments in a timely manner, the Council have behaved unreasonably and caused unnecessary delay to the appeal process. Further costs have been incurred by the Appellant by having to instruct the agent to review the late comments and prepare a further submission of final comments.

23. The substance of the Officer's comments relate to the number of existing HMOs on the street. The appeal property already exists and operates as a small C4 in Use Class HMO. Therefore, granting the appeal will not result in any increase in the number of HMOs on Woodcroft Road. Other comments relate to waste management, cleanliness and noise. The comments are general and not specifically about number 71 Woodcroft Road. The Appellant is a responsible landlord and these matters also are not for consideration as part of this appeal. Nonetheless, if such issues do exist, there are mechanisms outside of the planning system that can address them.

24. The only matter to consider during this appeal is whether the Appellant has provided sufficient evidence to demonstrate that, on the balance of probabilities, the existing use of the property as a small C4 Use Class HMO is lawful.

The LPA response to the application for costs

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

26. It is argued that the City Council has not taken into account any immaterial considerations in the determination of the certificate application. The Appellant states that the Council has erroneously used the date of the 27 September 2021, instead of the 'relevant date' which was the 26 October 2021. The Council does agree that this is the case, and a typographical error occurred which accidentally used the incorrect date.

27. However, it is stressed that in assessing the certificate application, Officers fully and properly considered the correct relevant date, 26 October 2021, and this has been referred to in the Officer's report. This is stated to be a minor technical error and has no bearing on the appeal which is made on the grounds of whether the evidence that was submitted was sufficient to issue a certificate. It is not accepted that the Council failed to provide a full and reasoned and justified decision when considered in the round with the detailed Officer's report which details what has and has not been taken into consideration where materially necessary.

28. With regard to not giving the Appellant an opportunity to comment on the comments by objectors it is stated that not all comments received from neighbours were considered to be immaterial and are justified, well-reasoned and give clear local knowledge of the use of the property and their belief of the activities associated with the property.

29. It is stressed 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 which are not material, including the impact from the increased proliferation of HMOs in the area, have not been considered further.

30. The Council considers that it is clear from the Officer's report, what has and has not been taken into consideration when considering the application, including the provision of evidence by the appellant. The Council disputes the claims that the

report is ambiguous. The Council also states that 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 residents, and on the basis of a site visit conducted by the case officer, neither of which can be disputed by the appellant.

31. The Council further indicates 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 Officer's report which lists the comments received. Therefore, it is contended that the procedure of informing the Appellant of the specific nature of the comments during the application would have no bearing on the application outcome or subsequent appeal. The Council is not clear what else the Appellant could be asserting constitutes 'immaterial' considerations.

32. Turning to procedural matters the Council acknowledges that the informative suggests that a certificate of lawfulness has been granted and is inconsistent with the other parts of the notice indicating a refusal. The Council also acknowledges the legal commentary on this point contained within the Appellant's Statement of Case. This has unfortunately arisen due to a technical error which was not picked up before the notice was issued.

33. However, in appealing this decision the Appellant has clearly accepted the position that a certificate refusing to grant a LDC has been issued. This is also clear when looking at the overall evidential matrix including the Officer Report. The issues arising from the incorrect informative are not matters that go to the weight of evidence on which the decision and the resulting appeal are to be made.

34. It is stressed that these are legal matters on which the Appellant has chosen to seek independent legal advice and for which other remedies could have been sought. The Council does not therefore consider this to have any bearing in relation to the costs application. Neither does the fact that the Decision Notice indicated that the Appellant had 6 months to appeal the decision. Again, this was a technical issue which has no bearing on the appeal which is made on the grounds of whether the evidence that was submitted was sufficient to issue a certificate.

35. With regard to the additional claim for costs the Council acknowledges that there was a delay of approximately 4 weeks in notifying residents of the appeal. The Agent for the appellant states that further costs have been incurred by the Appellant by having to instruct the agent to review the late comments and prepare a further submission of final comments. As the Inspectorate are aware, there was a delay in a number of appeals around this date, for which the Local Planning Authority has explained the reasoning behind.

36. It is stressed that the Inspectorate allowed for the inclusion of the late comments, which the Local Planning Authority are grateful for, and whilst a delay of 4 weeks is unfortunate, we would not agree that this time delay amounts to a reason for an award of costs.

37. In summary the Council considers that its decision to refuse the Existing Lawful Development Certificate was reasonable and well founded and respectfully requests that the claim for costs be dismissed.

My Assessment of the application

38. In my appeal decision I have already referred to the Council's various administrative errors with regard to the application itself, the decision notice and references to relevant legislation. I concluded that none of those went 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. If the LPA decision was not so hopelessly reached, then an appeal against their decision was inevitable.

39. 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. So too, in my view, were the errors in the decision notice and the incorrect advice regarding the time for an appeal to be made.

40. Various e-mail communications between the parties suggest to me that the Officers might have been affected by the issues regarding the proliferation of HMOs in this part of the Liverpool and the Council's decision to issue the Article 4 Direction. This could account for the significant delay in reaching a decision but, whatever the reason, this constituted unreasonable behaviour in the application process, as opposed to the appeal process.

41. However, in eventually reaching its decision I do not consider that, in taking into account relevant neighbours' evidence regarding the use of the property (the alleged immaterial considerations), the Council acted unreasonably. Having taken into account the application evidence it was not unreasonable to consider the evidence from others regarding the use of the property and how it was occupied.

42. I acknowledge that this evidence was weak and was not directly shared with the appellant's agent(s). However, the Council decided that it was sufficient to cast doubt on the appellant's evidence relating to the Class 4 HMO use of the property and, in any case, those representing the appellant were fully aware of the comments through the Officer Report. As indicated in my appeal decision I found that the Council's decision was unsound and that a LDC should have been issued by the Council.

43. I now turn to the contention made on behalf of the appellant that the appeal was not necessary at all and that there had been '*no option but to appeal*'. However, once the Council had issued its refusal and irrespective of the unreasonable errors and omissions in reaching that decision, the appellant had two options: to appeal the decision or to accept it. Not surprisingly it chose to appeal the decision and from that point onwards it was inevitable that the appeal would proceed to a decision with the parties setting out and being responsible for how they dealt with their respective cases.

44. It was unreasonable of the Council to mislead the appellant with regard to the time in which an appeal could be made. However, the appellant was professionally represented by a Chartered Town Planner (and later a legal team) and all aspects of planning practice, law and procedures should have been known and available to the applicant/appellant through this professional representation. The LDC appeal

guidance is clear and it should have been obvious that the Council had unreasonably made another administrative error but one which, in my view, should not have needed further and separate legal advice in addition to the professional assistance already in place.

45. The appeal was then made on behalf of the appellant who had decided to take additional legal advice as part of his case against the Council's decision. How the appeal was taken forward was a matter for the appellant. In making the appeal and despite the Council's unreasonable actions (during the application process that led up to it), once the appeal was made it was up to the parties to submit their respective statements and any other submissions in order for an assessment to be made as to whether or not the LPA decision was sound.

46. In conclusion on this application therefore, I consider that the Council's unreasonable behaviour was in relation to the manner in which they dealt with the application in terms of their error-strewn administrative actions. But I do not accept that the Council's failures in this respect led to unnecessary loss and expense in the appeal process itself which I have concluded was necessary and inevitable. Furthermore, I cannot see how it could have been avoided if the appellant wished to acquire a LDC for the property.

47. I can fully understand the frustrations of the appellant with regard to the Council's unreasonable behaviour with regard to the LDC application. However, the considerable costs incurred by the appellant in the appeal process (including the legal and agent's costs) result from the manner in which he chose to argue his case.

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

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

Anthony J Wharton

Inspector