
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: 23 March 2023

Costs Application: Appeal Reference: APP/W0734/X/22/3306250
59 Crescent Road, Middlesbrough TS1 4QP

- 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 for a full award of costs is made by Mr Faraz Khaliq (Two Tees Woolley Limited) against Middlesbrough Council.
 - The appeal was in relation to a Lawful Development Certificate for 3 self-contained flats.
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Decision

1. The application for 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. It is contended that the LPA has acted unreasonably in refusing to issue a LDC and that a full award of costs is justified. It is indicated that following refusal of the LDC the appellant sought to engage with the LPA in line with the Planning Inspectorate's Procedural guidance. It is stressed that a note was submitted setting out relevant legislation and case law to support the appellant's position that the relevant period for immunity is 4 years and not 10 years as contended by the LPA.
4. It is indicated that based on this submitted information the LPA refused to alter its position and thus leaving the appellant no alternative but to appeal the decision in order to challenge the interpretation adopted by the LPA. It is stressed that the LPA provided no further information to support or justify its position that the 10 year period of immunity was the correct period and that the use was Sui Generis.
5. It is argued that the LPA has acted unreasonably and contrary to well-established case law and has not provided any alternative case law which supports their case. In asserting that any occupation of the 3 flats would lead to a Sui Generis use, the LPA has incorrectly reached a conclusion. It is claimed that the evidence submitted, including references to case law and another appeal decision ('Reading'), clearly sets out that in order for student accommodation to be a Sui Generis use then it has to be '*different in some way to a normal block of flats*'.
6. It is further argued that the LPA's assessment is unfounded and substantially flawed due to the Officer's misinterpretation of the Use Class Order and controls of development as outlined in the Town and Country Planning Act 1990.
7. Furthermore it is indicated that the appellant sought to re-engage with the LPA with a view to submitting a revised application (rather than pursuing the appeal) but that Officers were unwilling to change their position which has ultimately led to the

prevention and delay in issuing an LDC in accordance with the relevant legislation. It is contended, therefore, that it is wholly evident that the LPA acted unreasonably in refusing to issue the LDC; that there was no justifiable basis to withhold a certificate and that a full award of costs is justified.

The Council's response to the application for costs

8. The Council does not accept that it acted unreasonably in refusing the LDC application. With regard to the appellant's accusation that the LPA failed to engage with the appellant, reference is made to a brief resume of the timeline from receipt of the LDC application to the subsequent lodging of the appeal. This shows a series of e-mails and communications with the appellant dating from 11 February 2022 through to 15 November 2022.

9. It is indicated that the LPA had contacted the owner during the course of the application to clarify that the use of the premises was for student accommodation. The use by students had been confirmed by the appellant in April 2022. Based on the submitted LDC application documents the Council concluded that the use of the premises was in a Sui Generis, rather than Class C3 residential use.

10. The Council accepts that a review document, which included reference to case law and the 'Reading' decision had been submitted after the LDC had been refused. However it is indicated that this did not refer to a revised LDC application being made to the LPA. The Council states that there was only reference to the fact that the appellant was keen '*to establish the quickest and easiest route to regularise matters*'.

11. The Council indicates that it did consider the review documentation and had responded with the reasoning as to why this additional information did not substantially alter the Council's opinion that the accommodation was considered to comprise student accommodation and, therefore, fell into a Sui Generis use.

12. The Council does not accept the appellant's contention that there was '*significant well-established case law evidence*'. It is stressed that the single case law provided was the *Van Dyke v SSE (1993) JPL 595 (CA)*, a case relating to the 4 year rule and that the '*Gravesham*' case had been referred to in the 'Reading' decision. The Council refers to the fact that in their response to the appellant dated 17 June 2022, it had set out its reasoning as to why it retained its position that the use of the premises was in a Sui Generis use.

13. In the response the Council had acknowledged that there was a clear difference of opinion and that its own position was not likely to change and, therefore, the only option would be for the appellant to appeal the LDC decision.

14. Reference is made to the appellant's cost statement and it is rejected that the LPA failed to engage with the appellant. It is stressed that it was willing to consider any additional information but, in the event, this was not considered sufficient to alter the Council's position. It is further stressed that the LPA did not act contrary to well-established case law and that in fact none had been submitted at the time of the LDC application.

15. With reference to *Gravesham* it is accepted that this case sets out that a distinctive characteristic of a dwellinghouse is its ability to provide facilities required for day-to-day private existence. However, it is indicated that the case also noted that the use to which the building is put may also be relevant but is not conclusive and that this is mentioned in the 'Reading' case. It is contended therefore, that there is a 'grey area' in terms of what comprises student accommodation.

16. Based on how the property has been let and managed it is still the view of the LPA that the premises comprise student accommodation and that it has acted reasonably both in relation to the application stage and the appeal proceedings. It is not considered that it acted unreasonably or that its actions led to unnecessary loss and expense in the appeal process for the appellant. It is considered, therefore, that an award of costs cannot be justified.

The appellant's reply to the Council's response.

17. It is not accepted that the timeline submitted by the Council indicates that they have reasonably engaged with the appellant. It is stressed that it took 7 weeks for the LPA to seek clarification of further information which in fact was provided the following day. After submitting the review information it took a further month of chasing for a meeting but the LPA then made it clear that it was not willing to alter its position that the use was Sui Generis.

18. With regard to the interpretation of case law it is contended that the LPA continue to misinterpret case law with regard to the use of the building. It is stressed that the fact that the flats are occupied by students does not automatically mean that they are in a Sui Generis use and the LPA has not provided any caselaw to support its position. Furthermore, it is considered that an LPA should be competent enough to know and be able to interpret the relevant legislation correctly.

19. Reference is again made to the *Van Dyke* and *Gravesham* cases and the fact that the LPA highlighted that regard must be had to the actual use to which the building is being put. It is contended that this is further evidence that their reasoning is flawed. It is further contended that the LPA has misinterpreted the 'Reading' case in that Nationally Described Space Standards are irrelevant to this case as the LDC is seeking to regularise a breach in planning control which occurred in excess of 4 years ago.

20. It remains the appellant's firm contention, therefore, that the LPA's reasoning to refuse the LDC is unfounded and substantially flawed and that a full award of costs against the Council is justified.

My assessment.

21. From all of the submissions it is clear that the appellant and the Council have reached fundamentally different conclusions relating to how the property is actually being used and occupied, as a matter of fact and degree. The starting point was the conversion into three flats and, as can be seen from my appeal decision, there is no dispute regarding the current layout of the property as three flats. But there is also no evidence that the house provides communal or hall of residence type student accommodation.

22. There is, therefore, a clear dispute between the parties about the character of usage. The main issue is, has the property been used in a way that demonstrates a use that is fundamentally 3 separate flats (whoever the occupants are), or is it used as a property that has the characteristics of typical or normally recognised student accommodation? I have dealt with this, in essence, in my appeal decision and have agreed with the appellant's stance that the property comprises 3 separate flats.

23. However, based on the initial LDC application and the information provided at that time, the Council interpreted the submission as being related to a 'student accommodation' use, (therefore being a Sui Generis), as opposed to a normal and separate Class C3 residential use of each of the 3 flats. On the basis of the appeal submissions I have not agreed with the Council but the appeal submissions included the review information which had been provided after the decision had been made.

24. Based on the initial LDC application, even though I have disagreed with the LPA, I consider that the Council was entitled to reach the conclusion it did and to decide not to issue an LDC. At that point the appellant submitted the review information but this did not alter the LPA's conclusion regarding the use of the property. Again, in my view the Council was entitled in my view to reach that conclusion. I have decided that it was not a sound conclusion and, therefore, issued an LDC, but I do not consider that it was unreasonable behaviour which led to an unnecessary appeal, thereby leading to unnecessary loss and expense for the appellant.

25. Even after the review information had been submitted the Council indicates that it had explained why their stance had not changed. It was inevitable from then that the only recourse for the appellant was to appeal the decision. From that point the costs of the appeal were the responsibility of the parties.

26. In situations such as this an LPA is entitled to reach an alternative conclusion as long as the decision is explained and reasoned. From the submissions I am satisfied that the LPA has set out its reasoning. Even though I have not agreed that their reasoning was sound, I consider that it was a matter of planning judgement which the LPA was justified in taking.

27. In conclusion, therefore, and having taken into account all of the application and appeal submissions I do not consider that the LPA acted unreasonably to the extent that it led to the unnecessary loss and expense for the appellant in the appeal process. It follows that the application for a full award of costs is refused.

Anthony J Wharton

Inspector