

**PLANNING APPEALS COMMISSION**

**THE PLANNING ACT (NORTHERN IRELAND) 2011  
SECTION 205**

**Claim by Mr Gary Mullan  
for an award of costs against Derry City and Strabane District Council in respect of  
appeal 2022/A0135**

**Report  
by**

**Commissioner Kieran O'Connell**

**Planning Authority Reference: LA11/2021/0393/F**

**Report Date: 21<sup>st</sup> March 2024**

**1.0 BACKGROUND**

- 1.1 A claim for an award of full costs against Derry City and Strabane District Council was made on behalf of Mr Gary Mullan on 19th October 2023.

**2.0 CLAIMANT'S CASE**

- 2.1 The basis of the claim is that Derry City and Strabane District Council (DCSDC) has acted unreasonably by causing an unnecessary planning appeal.
- 2.2 This unreasonable behaviour of the Council has resulted in the Claimant encountering the unnecessary expense of appealing this decision to the Planning Appeals Commission. The Planning Officers presented this application to the Planning Committee with the recommendation to approve.
- 2.3 The Planning Committee, whilst it is their prerogative to reach a different conclusion to the planning officer's recommendation, it needs to be backed up by sound, clear, and logical planning reasons following an informed debate on the matter as found in similar appeals for costs under PAC decisions 2017/A0117, 2018/A0081 & 2018/A0082.
- 2.4 Planning Committee members, on this occasion, rejected the planning officer's recommendation. This has been done on the basis of non-valid and unsupported planning reasons without any creditable [sic] evidence, legislation or planning policy to support its refusal following the debate by members.
- 2.5 The decision notice of the Council in this planning appeal is not valid. It has been refused without any creditable [sic] evidential issues to support the reasons for refusal in this instance. The refusal reasons are not clear, precise or give a full explanation of why the proposal is unacceptable to planning policy as required under Paragraph 5.72 of the SPPS.
- 2.6 The guiding principle under the SPPS NI for Planning Authorities, "in determining planning applications is that sustainable development should be permitted, having regard to the development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interest of acknowledged importance".
- 2.7 The Council in their Planning Committee reports and refusal notice has failed to demonstrate how this proposal will cause 'demonstrable harm' to interests of acknowledged importance, nor has any justification or addendum been provided to the committee reports to demonstrate this. DCSDC cannot retrospectively at this stage provide creditable evidence in their SOC to support this refusal of planning permission.
- 2.8 The first refusal reason seems to be centred on two points, firstly, it indicates "as the impact of a HMO along this street would unacceptably affect the existing character of the area and use of land that ought to be protected in the public interest due to an overprovision of HMOs in the locality".

- 2.9 Committee members, in making their determination, indicate worries about what the provision of another HMO along this street would have on the character of the area and talk about an overprovision of HMOs in the locality but this is a subjective opinion not supported by any credible, factual, or substantive evidence. When deciding on the application they were not aware of how many HMOs, either lawful or unlawful, are situated on this street to make an informed judgement to refuse planning permission contrary to the planning officer's recommendation.
- 2.10 The second part of the refusal refers to the size of the HMO and the impact on residents. Again, this is an opinion not supported by any credible evidence. Committee members are very aware that the size and operation of HMOs are covered under separate legislation endorsed by the NIHE. DCSDC, has failed to produce any credible evidence to substantiate its reasons for applying refusal reason 1 to the decision notice.
- 2.11 Refusal reason two has been included on the decision notice for no genuine reason or again supported by any credible evidence. The Claimant is entitled to be treated fairly by council officers' and members. He encountered the expense of providing not one, but two car parking assessments carried out in August 2021 and December 2021. Both these assessments confirm ample car parking is available to service this proposal and both have gone unchallenged until the committee debate.
- 2.12 No evidence has been provided nor has any genuine reason been provided to support the second refusal reason on lack of car parking when two assessments concluded that ample parking is available and gone unchallenged.
- 2.13 The Council's refusal of planning permission on these grounds has resulted in the Claimant having to launch an unnecessary planning appeal putting him at unnecessary expense in defending the appeal by the instruction of a Planning Consultant.
- 2.14 The Claimant therefore asks that he be awarded costs.

### **3.0 RESPONDENT'S CASE**

- 3.1 Paragraph 12 of the Commission's Costs Awards Guidance states that the Commission will normally award costs only where all four stated conditions, set out below, are met:
- 1) The claim relates to a relevant type of appeal
  - 2) The claim is timely
  - 3) The party against whom the award is sought has acted unreasonably; and
  - 4) The unreasonable behaviour has caused the party claiming costs to incur unnecessary or wasted expense.
- 3.2 There is no issue in respect of points 1 and 2. In respect of point 3 the word unreasonable is to be used in its ordinary meaning, as established by the courts in *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774. Unreasonable behaviour may be either procedural or substantive. No allegation of procedural unreasonableness is raised by the Claimant. In terms of substantive unreasonableness, the Claimant's argument may be summarised using its own words as a failure to provide "credible [sic]" evidence to

substantiate refusal reason one and “no evidence” to substantiate refusal two. In addition, the Claimant states that the “refusal reasons are not clear, precise or give a full explanation of why the proposal is unacceptable under planning policy as required under Paragraph 5.72 of the SPPS”.

- 3.3 In relation to refusal reason one, within the Minutes of the Planning Committee attached, it is clear, the refusal reason is supported by evidence. This explains why the Claimant is required to argue that there is no “creditable” evidence. The refusal reason is clearly policy based. The Claimant does not argue otherwise in his claim for costs.
- 3.4 In relation to refusal reason two, it is clear from the minutes of the Planning Committee that Members based their decision on substantiated evidence based on experience of parking issues and related traffic issues at this location being reported to elected members on a regular basis.
- 3.5 In relation to the Claimant’s issue in relation to the validity of the refusal reasons, we respectfully disagree with their assertion and are satisfied that the refusal reasons are in compliance with the Strategic Planning Policy Statement for Northern Ireland (SPPS).
- 3.6 Where a Planning Authority has exercised its duty to determine a planning application in a reasonable manner, an award of costs should not be made against it. A mere disagreement on the weight to be given to evidence cannot be a ground for an award of costs. The Claimant’s proposed costs claim only serves to highlight its disagreement with the decision made by DCSDC. Refusal of the application would not constitute unreasonable behaviour or warrant a claim for costs.
- 3.7 Finally, in respect of point four the Claimant argues that unreasonable behaviour in respect of point three has resulted in their Claimant having to launch an unnecessary planning appeal putting him at unnecessary expense in defending the appeal by the instruction of a Planning Consultant. DCSDC are of the opinion that there is credible and verifiable evidence as set out in the minutes to the Planning Committee that they fully understood the nature of the proposal, debated the merits of the proposal, and based their decision on substantive evidence that was relevant to planning policy and provided refusal reasons which are in compliance with the SPPS.
- 3.8 The reasons for refusal are clear and now fall to be considered by the Commission during the planning appeal.

#### **4.0 CONSIDERATION**

- 4.1 The Commission’s publication ‘Costs Awards Guidance’, states that costs will normally only be awarded where all four of the following conditions are met:
  - The claim relates to a relevant type of appeal;
  - The claim is timely;
  - The party against whom the award is sought has acted unreasonably; and

- The unreasonable behaviour has caused the party claiming costs to incur unnecessary or wasted expense.

#### Eligibility

- 4.2 The planning application to which this appeal relates was made in accordance with the Planning Act (NI) 2011 (the Act). An appeal was made in accordance with Section 58 of the Act against the refusal of full planning permission for a change of use from a single occupancy dwelling house to a House of Multiple Occupancy by Derry City and Strabane District Council. The Commission therefore has the power to make an order as to the costs of parties in accordance with Section 205 of the Act.

#### Timeliness

- 4.3 Paragraph 20 of the 'Guidance on Costs Awards in Planning Related Appeals' states that in the case of an appeal proceeding by exchange of written representations, any costs claim must accompany the claiming party's final written submission. As the claim for costs was submitted with the claiming party's Statement of Case, it was made in a timely manner.

#### Unreasonable Behaviour

- 4.4 The Commission's Costs Award Guidance sets out some examples of behaviours that may be found to be unreasonable. The first relates to causing an unnecessary appeal. One instance in which an appeal may be judged to have been unnecessary is where the Planning Authority was unable to produce any credible evidence to substantiate its reason for refusing planning permission.
- 4.5 The Claimant makes reference to three Commission cost claims. However, these have not been provided within the Appellant's evidence, nor has he illustrated how those cases are comparable to this appeal. Each case falls to be considered on its own merits, and whether an application complies with planning policy or not is a matter of planning judgment. The Planning Committee can, accept, depart from, or give alternative weight to the various arguments and material planning considerations before it, which may differ to that of their officers'.
- 4.6 Notwithstanding the Planning Officer's recommendation to grant planning permission, the Respondent's corporate position on the proposal is set out in the reasons for refusal as per its decision notice dated 7<sup>th</sup> October 2022.
- 4.7 The first reason for refusal refers to Paragraphs 2.3 and 4.12 of the SPPS and states that, if permitted, it would unacceptably affect the existing character of the area and that the use of land ought to be protected in the public interest due to the over provision of HMOs in the locality. It further states that it would impact the well-being of the residents of the property due to its size. The second reason for refusal does not refer to any planning policy, however, it does state the harm that would be caused by the appeal proposal. As such, I consider that the grounds for refusal set out in the decision notice explain why the proposal was considered unacceptable by the Council.
- 4.8 The Council's failure to provide a statement of case is unhelpful, and the Planning Committee minutes are scant, however, they do set out that members used their local knowledge of the area to form the view that there was an overprovision of

HMOs which would have an impact on its character and that insufficient parking was available. I also note that these issues were raised by objectors to the application, which also would have formed part of the decision-making process.

- 4.9 Whilst I agree with the Appellant that the Council's evidence could have been better articulated to justify its concerns on these matters, I am broadly content that the Planning Committee minutes provide adequate reasoning.
- 4.10 With regard to the Council's concerns pertaining to the size of the HMO, the Case Officer Report to the Planning Committee clearly sets out the sizes of the rooms within the HMO and indicates that 'overall, this proposal complies with the SPPS with regard to provision of amenity of the future occupants.' It further states that 'with regard to the NIHE standards, this is not a planning policy, however it is acknowledged that this property has met these standards.' The only argument provided by the Planning Committee within the minutes of the meeting relates to concerns over the lack of ensuite bathrooms and the size of HMOs in a general sense. No justification has been given for departing from their Officer's recommendation, which clearly sets out that the proposal would comply with Planning Policy and the HMO standards. In the absence of credible evidence to substantiate this element of the first reason for refusal or credible evidence to justify the departure from the advice given by the Planning Officers on this issue, I must conclude that the Council acted in an unreasonable manner on this discrete issue.

#### Unnecessary Expenses

- 4.11 The Claimant applied for a full award of costs, however for the reasons given, I reject a full award of costs. I have found that the Respondent has not displayed unreasonable behaviour which resulted in an unnecessary appeal. Nor does it follow that costs will be awarded to a party just because the appeal has been decided in their favour. I consider that the costs of the appeal proceedings, should be limited to those costs incurred in respect of dealing with the discreet matter relating to the size of the HMO.

## **5.0 RECOMMENDATION**

- 5.1 I recommend to the Commission that a partial award of costs is made.

### **Order**

It is hereby ordered that Derry City and Strabane District Council shall pay to Mr Gary Mullan the costs of the appeal proceedings, limited to those costs incurred in respect of dealing with the discreet matter relating to the size of the HMO.

On receipt of this order Mr Gary Mullan may submit details of those costs to Derry City and Strabane District Council with a view to reaching agreement on the amount. If the parties are unable to agree, the claimant may refer the matter to the Taxing Master of the High Court for a detailed assessment.

**COMMISSIONER KIERAN O'CONNELL**

## **List of Documents**

Claimant: Costs Claim (Lee Kennedy Planning)

Respondent: Response to Costs Claim (Derry City and Strabane District Council)