
Costs Decision

Site visit made on 4 January 2017

by Daniel Hartley BA Hons MTP MBA MRTPI

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

Decision date: 12 January 2017

Costs application in relation to Appeal Ref: APP/E5900/W/16/3158430 5 Hertsmere Road, Tower Hamlets, London E14 4AN

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Pure Gym Limited for a full award of costs against the Council of the London Borough of Tower Hamlets.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for change of use of the ground floor unit from comprising 1510 sq m of A1 (food retail) to D2 (health club and gym) without compliance with condition No 02 previously imposed on planning permission Ref PA/99/0498.
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Decision

1. The application for a full award of costs is allowed in the terms set out below.

Reasons

2. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably, and thereby caused the party applying for costs to incur unnecessary expense in the appeal process. The appellant's application for a full award of costs is based upon the procedural and substantive matters which I shall deal with in turn below.

Procedural Matters

3. I have considered the email and letter correspondence between the appellant and the Council (including the Planning Department, Highway Authority and Environmental Health Service). Initially the Council did not determine the application as they considered that there was a need for a noise assessment report in respect of the air conditioning plant. I acknowledge that planning permission No PA/99/0498 does not impose any restrictions in terms of when the air conditioning plant can operate. Hence, it would be possible to keep the air conditioning units on 24 hours per day. However, the gym does not operate 24 hours a day (due to the hours of use planning condition restriction) and based on what the appellant has said, the air conditioning units are not always turned on when the gym is not operational.
 4. I consider that it was reasonable for the Council to request a noise assessment report relating to the operation of the plant particularly in respect of the proposed extended hours of use. The extended hours of use would be during hours when people are more likely to sleep and hence it was entirely
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reasonable for the Council to want to consider the effect of a more regular use of the air conditioning units during this time. In respect of this matter, I do not consider that the Council acted unreasonably, and hence the appellant did not incur unnecessary expense in the appeal process.

5. Notwithstanding the above, the appellant submitted a revised noise assessment report in January 2016. The appellant asked the Council for updates numerous times and it was not until April 2016 that the Council's Environmental Health service commented that they were no longer responsible for providing comments on planning applications. There appears to be some confusion between the Planning Department and the Environmental Health service about this matter, and the appellant was left in a position where there was a lack of certainty about feedback on this issue. I find that there were significant delays in respect of this matter and, in any event, it was incumbent upon the Local Planning Authority (LPA) to respond to the appellant one way or another.
6. The above delays and confusion were compounded in respect of comments from the Highway Authority. It would appear that the LPA thought that the Highway Authority had required additional information. The Highway Authority subsequently confirmed, sometime later, that there was no need for additional transport information. In fact, on the evidence that is before me, it would appear that all relevant transport information was submitted in November 2015, as well as at planning application submission stage.
7. In April 2016, and after a number of email exchanges, the Highway Authority confirmed to the appellant that *"my original comments related more to the possibility of a noise increase during night time hours as a result of additional patronage during those hours, and that is something that EH would consider"*. There was clearly no objection from the Highway Authority at this time, but despite this, the LPA requested on 21 June 2016, the submission of a car parking plan which would *"illustrate the number of car parking spaces being allocated for the users of the gym"*. This request appears to have subsequently been rescinded by the LPA.
8. After several months of email exchanges, the LPA finally agreed that the main issue related to the effect of the proposal solely upon the living conditions of the occupiers of residential properties due to pedestrian and vehicular movements/activity. This view was not conveyed to the appellant until August 2016 (a significant period after the submission of the noise impact assessment report), by which time it was then suggested to the appellant that they withdraw the planning application.
9. Taking into account the chronology of events above, I conclude that the Council were responsible for significant and unnecessary delays in the consideration of the planning application and that from the date when the noise assessment report (Red Acoustics) was submitted, it failed to respond to the appellant in a reasonable, timely and cooperative manner. This is the sort of procedural unreasonable behaviour referred to in paragraph 052 of the Planning Practise Guidance, and for the above reasons I therefore consider that the appellant has incurred unnecessary expense in the appeal process.

Substantive Matters

10. Whilst the proposal would result in more pedestrian and vehicular activity in the locality from the gym during the extended hours of use period, this does not mean that any such activity automatically equates to material harm in respect of the living conditions of the occupiers of surrounding residential properties. It is incumbent upon the LPA to provide reasoning as to why the scale / magnitude of increased activity would cause significant harm to residents in the context of existing environmental conditions.
11. In this case, the appellant provided evidence relating to arrival and transport mode share data. The information, data and overall conclusions were not disputed by the Council, and for the reasons outlined in the appeal decision I consider that such evidence was reasonable and relevant.
12. I do not consider that the Council has provided a robust assessment of the proposal in terms of the reasons why it thinks that the likely scale of pedestrian and vehicular activity would cause material harm to the living conditions of the occupiers of surrounding residential properties. The Council raises concerns about the potential for customers to *"seek out areas for free parking"*, but I have found that this would be unlikely as there are car parking controls in operation within the immediate area (a point that was acknowledged by the Highway Authority). The Council has not reasonably substantiated its case in terms of *"unresolved"* highway impacts and, furthermore, it has failed to demonstrate why there would be unacceptable noise and disturbance effects or why the scale of traffic generation would *"unacceptably impact on the amenity of residents"*.
13. For the reasons outlined above, and in the absence of any robust evidence to the contrary, the Council has failed to reasonably substantiate the reasons why it would have been minded to refuse planning permission. For this reason, I therefore conclude that the appellant has been put to wasted time and expense in pursuing this appeal.

Conclusion

14. I find that unreasonable behaviour resulting in unnecessary and wasted expense, as described in the PPG, has been demonstrated. Therefore, the application for a full award of costs is justified.

Costs Order

15. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the London Borough of Tower Hamlets shall pay to Pure Gym Limited, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
16. The applicant is now invited to submit to the London Borough of Tower Hamlets, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Daniel Hartley

INSPECTOR