
Costs Decision

Site visit made on 13 February 2017

by Zoe Raygen Dip URP MRTPI

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

Decision date: 21 March 2017

Costs application in relation to Appeal Ref: APP/V2004/W/16/3164176 Aldi Stores Ltd, Sutton Road, Hull HU7 0AH

- 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 Aldi Stores Ltd for a full award of costs against Kingston-upon-Hull City Council.
 - The appeal was against the refusal of an application for planning permission for a store without complying with conditions attached to planning permission Ref 14/01430/FULL, dated 7 April 2015 together with the erection of a 4metre high acoustic fence to rear landscape area (to rear of Tynedale) - Revised proposal to incorporate acoustic fence .
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Decision

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

Reasons

2. The National 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 the costs to incur unnecessary or wasted expense in the appeal process.
 3. The PPG makes it clear that a Council is at risk of an award of costs if it prevents or delays development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations, fails to produce evidence to substantiate each reason for refusal on appeal and makes vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
 4. The application was refused on two grounds. Firstly, the effect on the living conditions of neighbouring residents due to increased early morning disturbance. In this instance Council officers recommended to the Planning Committee that the planning application be granted. However this was on the basis of a slightly amended proposal to that the subject of the current appeal which deleted reference to the extension of the delivery hours on a Sunday and a Bank Holiday. It is clear though that Members of the Council did not agree and resolved to refuse the application in its original form relating to opening and delivery hours, which prior to the late amendment by the appellant officers were recommending refusal of. This was based on the comments received by the Council's Environmental Health Officer (EHO).
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5. It is clear from those comments that while the EHO was supportive of the use of an acoustic fence, she had concerns, given the amount of complaints received from the public, about the ability of the other measures around the manoeuvring process to adequately mitigate the noise and disturbance caused.
6. Nevertheless I found little evidence before me which demonstrated that the Council had fully considered the suitability of conditions to address these concerns, but instead made an assumption that a breach of planning control would be made. I understand the frustration of the Council that conditions have been attached to previous planning permissions which continue to be breached. Nevertheless, the Council's own Committee report regarding the application stated that enforcement action had been taken in respect of a Breach of Condition Notice which had been complied with demonstrating that the condition relating to hours of delivery is enforceable.
7. The applicant stated in its evidence that similarly worded conditions had been used elsewhere, and I found no obvious reason to disagree and find otherwise. Consequently, the Council in reaching its decision failed to fully substantiate its view as to why it considered that such conditions would not comply with the tests of paragraph 206 of the National Planning Policy Framework (the Framework).
8. The Council therefore has not adequately demonstrated that it applied the tests of paragraph 203 of the Framework, which requires local planning authorities to consider whether otherwise unacceptable development could be made acceptable through the use of conditions. In this respect, it did act unreasonably.
9. The extended length of time taken to make the decision must have caused the appellant some concern. However I have had sight of the lengthy email exchange between various parties regarding the noise mitigation measures. I therefore consider that the delay was down to a genuine attempt by the Council officers to reach an acceptable solution. Consequently the Council did not act unreasonably in this respect.
10. The Council's second reason for refusal relates to the effect of the acoustic fence on the character and appearance of the area. The effect of a proposed development on the character and appearance of an area is a relatively subjective matter, often determined by an exercise of judgement in the particular circumstances of the case. While I have not agreed with the Council in my decision, in this instance I am satisfied that the Council's statement adequately states why in its opinion the proposed fence would be harmful.
11. Turning to the matter of wasted expense the unreasonable behaviour I have identified did lead to the applicant having to submit an appeal when the mitigation measures identified could reasonably have been dealt with by the imposition of conditions. Irrespective of the amount of expenditure involved, this resulted in unnecessary expense for the appellant in the preparation of his appeal submission. Given my findings, a partial award of costs is justified and, to this extent, the application succeeds.

Costs Order

12. 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 Kingston-upon-Hull City Council shall pay to Aldi Stores Ltd, the costs of the appeal proceedings described in the heading of this decision.
13. The applicant is now invited to submit to Kingston-upon-Hull City Council, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Zoe Raygen

INSPECTOR