The Planning Inspectorate

Costs Decision

Site visit made on 31 January 2019

by G Powys Jones MSc FRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 March 2019

Costs application in relation to Appeal Ref: APP/J1860/W/18/3212655
Land at The Oxhey, Bushley, Tewkesbury, GL20 6HP

- 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 Miss Sorrel Griffiths for a full award of costs against the decision of the Malvern Hills District Council.
- The appeal was made against the Council's decision to refuse planning permission for change of use of land from agricultural to mixed use for agricultural, commercial dog exercise area and amenity area for dog walking (sui generis) without complying with a condition attached to planning permission Ref 17/00533/FUL, dated 21 September 2017.

Decision

1. The application for an award of costs is refused.

Reasons

2. The *Planning Practice Guidance* (the Guidance) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

3. The Guidance provides examples of where local planning authorities may be at risk of an award made against them having regard to the substance of the case. The appellant considers that several of the instances cited in the Guidance are relevant. I shall deal with these in turn.

   Preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

4. Bearing in mind that the use was commenced on an unauthorised basis prior to the grant of planning permission, and has continued since, I do not consider that the Council could justifiably be accused of delaying or preventing development. The matter in dispute is not the principle of the use, but the hours of operation.

   Failure to produce evidence to substantiate each reason for refusal on appeal & vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.

5. The application was refused for a single reason, and the Statement of Case produced by the Council is directed to explain why the application was refused permission. It does so more than adequately in my view. The use had subsisted before the application that led to this appeal was made. The Council rightly took into account local representations, including those made by the Parish Council, as to the perceived effects of the use. The evidence gathered as a result of consultation was conflicting, and it seems to me that the Council adopted a precautionary approach for this reason. I do not consider this to represent unreasonable behaviour.

   Refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead.

6. The proposed development was extant, and had previously been granted permission, albeit retrospectively. The development had therefore gone ahead. The matter at issue here was the hours of operation, not the principle of the use.

   Acting contrary to, or not following, well-established case law.

7. Apart from a reference to *Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774*, which clarifies the meaning of unreasonableness in this planning context, the appellant does not cite any well-established case law. The appellant's reliance on this example of possible unreasonable behaviour is noted but it is for me to judge, having regard to the case referred to, whether or not the Council acted unreasonably.

   Imposing a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and obligations.

8. I consider the condition in dispute, directed to regulating the opening hours of a facility having the capacity to cause annoyance and nuisance to local residents, to be necessary, relevant to planning and the development, enforceable and precise. Whilst I concluded in my decision on the substantive appeal that the hours of operation set by the Council were too restrictive, this is a consequence of the application of its judgment and does not amount to reasonable behaviour.

   Not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.

9. The Council disputes this, and the appellant has not produced any convincing evidence to support its reliance on this example of possible unreasonable behaviour. The Council defended its stance with credible evidence.

10. The appellant also points to what she regards as '*errors … in the whole process'*. The Council has acknowledged its error in respect of the imposition of the limitations on hours of operation originally imposed in the condition in dispute.

However, I consider this to be the result of an administrative oversight rather than unreasonable behaviour.

11. It is also said that the officer recommendation changed from one committee to another. This in my experience is unusual, but officers are entitled to change their minds, and their actions in this regard is not considered unreasonable.

12. Other matters raised in the application for costs relate more to the substance of the case rather than examples of unreasonable behaviour. However, the appellant does point to the Environmental Noise Report produced for the appeal, which by definition was not available to members when its original decision was made. Whilst I found the report to be useful in certain respects, the consultant points out in the final chapter of the report:

'..the assessment of noise disturbance from dog barking is not one which falls into a simple assessment by comparison with guidance values or consideration of decibel level. The impact of dog barking depends on several factors..'

13. The report was therefore caveated, and did not convince me that the Council's original decision could be justifiably regarded as unreasonable.

14. Finally, issues in respect of the Breach of Condition Notice do not fall within the ambit of this appeal.

15. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has not been demonstrated. Accordingly, the application for costs is refused.

G Powys Jones

INSPECTOR