
Costs Decision

Site visit made on 26 May 2020

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 July 2020

**Costs application in relation to Appeal Ref: APP/C2708/X/19/3242132
Leeds Liverpool Canal adjacent to The Rendezvous Hotel, Keighley Road,
Skipton BD23 2TA**

- The application is made under the Town and Country Planning Act 1990 (the 1990 Act), sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Malcom Weaving for a full award of costs against Craven District Council.
 - The appeal was against the refusal of a certificate of lawful use or development for a use described as a 60ft restaurant and function boat. The boat will be used for private, tourist and commercial events to be carried out whilst cruising on the canal.
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Decision: the application is refused.

Reasons

1. The Planning Practice Guidance 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 or wasted expense in the appeal process. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include acting contrary to, or not following, well-established case law; failure to produce evidence to substantiate each reason for refusal on appeal; and refusing to enter into pre-application discussions, when a more helpful approach would probably have resulted in the appeal being avoided altogether.
2. The essence of the applicant's claim is that the local planning authority has failed to produce any evidence of substance to demonstrate its position that the use would involve the making of a material change of use. The applicant also considers that the local planning authority has construed the facts and the judgment in *Thames Heliports*¹ in such a way as to fit the particular circumstances of the case. Furthermore, it is the applicant's view that the local planning authority had regard to elements of the proposal that did not form part of the application made under section 192 of the 1990 Act, and in so doing acted beyond its powers. The local planning authority then failed to provide adequate reasons for its decision. The applicant also considers that, throughout the application process, the local planning authority failed to engage in discussions about the proposal. It is contended that the behaviour

¹ *Thames Heliports Plc v London Borough of Tower Hamlets* [1997] 74 P.& C.R. 164

of the local planning authority caused the applicant to incur unnecessary and wasted expense.

3. This application for costs is in relation to a somewhat unusual proposal in a planning context. In summary, the use for which the certificate of lawful use or development (LDC) was sought may be described use of a boat approximately 18.5 metres in length for private, tourist and commercial events to be carried out whilst cruising on the 4 or 5 mile stretch of the Leeds Liverpool Canal between Skipton and Kildwick. It is clear from the description that the use for which the LDC was sought only related to when the boat was actually in motion on the canal. On my reading, the phrase on the application form *whilst cruising on the canal* by definition excludes the time when the boat is stationary at its mooring so that passengers could embark and disembark.
4. To my mind, that is a false proposition. As a matter of logic, the use for which the LDC was sought could not and would not operate without passengers onboard the boat. It is clear from the information submitted with the application that those passengers would board the boat from the towpath opposite The Rendezvous Hotel. Nevertheless, the proposal before the local planning authority omitted that integral element of the use and that much was clear from the description on the application form.
5. In relation to an application made under s192 of the 1990 Act, the local planning authority does not have the power to modify the terms of the application without the express agreement of the applicant. The Council has provided a log of email communication with the applicant but, as far as I can tell, the Council did not request a change in the description of the use for which the LDC was sought. The Council therefore determined the LDC application as originally made.
6. The Officer Report for the LDC application contains a note, highlighted in bold text, acknowledging that the proposal excludes the mooring element. It then goes on to explain that, in the case officer's opinion, the mooring is a necessary requirement to facilitate the operation of the boat and cannot be excluded from the assessment. In conducting that assessment, the report concluded at paragraph 9.17 that the proposed works to the towpath would also require planning permission under section 55 of the 1990 Act.
7. It is apparent from the Officer Report that the Council did turn its mind to the mooring element of the proposed use, an element that was specifically excluded from the description of the proposal. It follows that the Council did, at least in part, base its decision on matters that it ought not to have taken into account. The Council may be said to have acted unreasonably in that respect.
8. I do, however, have considerable sympathy with the Council in terms of the position in which it found itself when considering the LDC application. As indicated above, in my view the activity of embarking and disembarking the boat is an integral part of the wider operation of a restaurant boat. As an academic exercise, I can fully understand that the applicant was entitled to submit the LDC application on the basis that he did. In practice, in my opinion it is not possible to divorce the mooring element from the use of the boat when cruising on the canal, as the applicant did. I can therefore also fully understand the predicament of the Council when faced with a proposal that it considered was not a practical proposition.

9. Furthermore, the applicant is not entirely blameless in terms of causing that predicament. The application purported to relate to the use of the boat only when cruising on the canal, but the address to which the application related was stated as being "Land adjacent to The Rendezvous Hotel". There is no mention in that address to the stretch of the canal between Skipton and Kildwick on which the boat was intended to cruise.
10. In addition, the site plan submitted with the original LDC application showed a boat-shaped area edged red that included part of the grounds to The Rendezvous Hotel and part of the canal towpath. Despite purporting to relate only to use when the boat was cruising on the canal, no part of that red-edged area shown on that plan was actually within the Leeds Liverpool Canal. A second site plan submitted during the course of the application process did include part of the canal within the red-edged area, together with a small section of the towpath directly opposite The Rendezvous Hotel. There is, therefore, no indication on either of these plans of the stretch of the canal away from The Rendezvous Hotel on which the boat was intended to cruise.
11. Faced with the address to which the application related and the site plans that only showed an area immediately surrounding The Rendezvous Hotel itself, all provided by the applicant, I can understand how the Council fell into the trap of considering matters that it properly ought not to have taken into account. The Council should have avoided that trap, but it was the applicant who provided the conditions that made falling into that trap a possibility.
12. The applicant considers that the local planning authority has construed the facts and the judgment in *Thames Heliports* in order to support its position, rather than to apply the principles held by the court to be good law. Reference is made to the *Thames Heliports* judgment in the Officer Report, such that it is apparent that the Council had regard to the relevant case law². The reference to that judgment there is relatively brief but, so far as it goes, it seems to me that the Council's interpretation of the law was essentially correct.
13. In *Thames Heliports*, the Court of Appeal declared that the proposal before it could constitute a change of use for the purposes of section 55 of the 1990 Act but deliberately declined to make a declaration as to whether the proposal constituted the making of material change of use because that would involve a value judgement entrusted to the local planning authorities and not the court. In this case, the Council is the local planning authority and therefore perfectly entitled to apply the facts of the case to the relevant law in order to arrive at a value judgement as to whether a material change of use had occurred. Consequently, whilst I have ultimately arrived at a different conclusion, I do not find that the Council acted contrary to, or was not following, well-established case law. It therefore did not act unreasonably in that respect.
14. The applicant also criticises the local planning authority for failing to engage in discussions about the proposal. In some respects, I can understand the Council's reluctance to engage in further discussions about the LDC application when, from its perspective, the applicant had previously reneged upon commitments made during discussions on the earlier planning application. Nevertheless, it seems to me that a number of the issues that ultimately caused the Council to fall into the trap of considering irrelevant matters could

² The citation in the Officer Report is to the earlier High Court judgment but, given that the Court of Appeal essentially upheld the findings of the lower court, I do not consider that to be critical in this case.

have been ironed out if meaningful discussions had taken place. For example, it would have been helpful to discuss the address of the application site, the application plans that would be necessary, the scope of the proposal and whether the terms of the application should have been modified to include the mooring of the boat.

15. However, the Planning Practice Guidance indicates that it would be unreasonable behaviour on the part of a local planning authority not to enter into pre-application discussions, *when a more helpful approach would probably have resulted in the appeal being avoided altogether* (emphasis added). On the information available to me, and principally from the reasoning in the Officer Report, I am not persuaded that pre-application discussions would ever have reached the point where the Council conceded that the proposed use did not constitute development for the purposes of section 55 of the 1990 Act. I therefore do not envisage that there was ever a realistic prospect that pre-application discussions would probably have resulted in the appeal being avoided altogether. On that basis, the failure of the Council to enter into pre-application discussions did not constitute unreasonable behaviour for the purposes of the Planning Practice Guidance.
16. I conclude that the Council did act unreasonably in only one respect, specifically by considering matters that it properly ought not to have taken into account. However, the Planning Practice Guidance is very clear in stating that an award of costs may only be made against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process (emphasis added).
17. It is clear from paragraphs 9.15 and 9.16 of the Officer Report that the Council considered that the proposed use away from immediate vicinity of The Rendezvous Hotel constituted development for purposes of section 55 of the 1990 Act. The Council's consideration of an irrelevant matter did not ultimately change the outcome of the application. Consequently, the LDC application would have been refused in any event and an appeal against that decision would still have been necessary. It follows that the applicant did not incur any unnecessary or wasted expense in lodging that appeal as a direct result of the Council considering an irrelevant matter. In the absence of any unnecessary or wasted expense having been incurred, an award of costs against the Council is not justified.

Paul Freer
INSPECTOR