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## Costs Decision

Site visit made on 12 January 2021

**by John Felgate BA(Hons) MA MRTPI**

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

**Decision date: 8 March 2021**

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### **Costs application in relation to Appeal Ref: APP/K3605/W/20/3259700 Land at Apps Court Farm, Hurst Road, Walton-on-Thames KT12 2EG**

- 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 Apps Court Farm Limited for a full award of costs against Elmbridge Borough Council.
  - The appeal was against the refusal of permission for "use of land for events site".
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### **Decision**

1. The application for a full award of costs is refused, but a partial award is granted, in the terms set out below.

### **Reasons**

2. The national Planning Practice Guidance (the PPG) advises that costs may 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 examples given in the PPG include where insufficient regard is paid to national policies; where a refusal reason is not substantiated; and where a refusal could have been avoided by conditions.

#### *Refusal Reason 1: Green Belt*

3. The Council's decision to refuse permission on Green Belt grounds rested on their concern regarding temporary structures and paraphernalia, and that these might remain on the site for long periods of time or even permanently. By the Council's own admission, this meant basing their decision on what they saw as a worst-case scenario. This approach to decision making, effectively looking for problems rather than solutions, does not sit well with the NPPF's advice that authorities should approach decisions in a positive and creative way, working positively with applicants.
4. Having regard to NPPF paragraph 146, there is no doubt that the Council was right to take into account the effects of the proposed use on the Green Belt's openness. But, from the evidence before me, it seems that no attempt was made to assess the actual extent of that impact, in terms of what was either likely or realistic, rather than theoretically possible. This would have required the Council to consider the numbers, types and sizes of structures likely to be actually needed for different types of events. Instead, the case officer's report simply stated that the amount of paraphernalia was likely to be large. This assumption was unsubstantiated, and remains so in the Council's subsequent evidence. The extent to which the Council focussed their consideration solely on the worst case scenario was therefore disproportionate and lacking in balance.

5. Furthermore, no serious consideration was given to the scope that was available for limiting or controlling the perceived impact, by means of conditions. Only after the appeal was made did the Council suggest a condition for the removal of temporary structures when not in use. If that condition were not considered sufficient to mitigate the harm, it could if necessary have been supplemented by a limit on the number of event days, but the Council failed to even contemplate such a condition in this context. From NPPF paragraph 146, it should have been clear to the Council that in the case of changes of use of land, the thrust of national policy is broadly supportive. It was therefore incumbent on them to fully consider whether any adverse effects could be mitigated, and if so, whether the Green Belt's openness would then be adequately protected. This they failed to do.
6. In considering the Green Belt issue therefore, the Council failed to apply national policy in a rational way, failed to consider whether the harm could be overcome by conditions, and failed to substantiate their objection. In all these respects, the decision to refuse on Green Belt grounds was unreasonable.

*Refusal Reason 2: (a) Noise*

7. As originally submitted in May 2018, the application contained no detailed information on noise. The Council eventually sought further information, but not until late November 2019 when the matter was raised in a consultation response from the Environmental Health Manager. In January 2020 the applicants submitted a Noise Management Strategy. In May 2020 the case officer's report advised that this information was insufficient to enable the proposed use to be fully assessed. On that basis, it was concluded that it was not possible to rule out an adverse noise impact.
8. I agree that the Council's wish for some form of noise assessment or strategy might have been anticipated by the applicants at an earlier stage. However, that shortcoming was more than matched by the Council, in their failure to raise the issue during the preceding 18 months, and their subsequent failure after January 2020 to seek the further information that they considered still to be lacking. Better engagement on their part could have potentially avoided the need for the noise issue to become a reason for refusal.
9. Secondly, whilst the officer's report acknowledged the dual involvement of the Licensing regime, it did so only in the context of highway requirements. There is no evidence that the role of Licensing was ever considered in relation to noise. Nor is there any sign that NPPF paragraph 183 was taken into account, which makes it clear that planning decisions should avoid duplication with other such regimes. In subsequent submissions, the Council has not disputed that large and medium-sized public entertainments will be subject to the Licensing system. Proper attention to the potential for controlling noise through Licensing conditions could have avoided or significantly reduced the need for the issue to be contested in the subsequent appeal.
10. In addition, the Council failed to consider properly whether any residual noise issues could be addressed through conditions. NPPF paragraph 54 makes it clear that authorities should always consider whether objections can be overcome by conditions in preference to refusal. In this case, with regard to noise, the officer's report was silent on the point. The Council now argues that, without advance knowledge of the applicants' intentions, a condition limiting

the number of events would not have been reasonable. However, nothing prevented the Council from seeking that information if they thought it necessary, nor indeed from forming their own view as to the number that they considered acceptable. In any event, there is no evidence that the possibility of controlling noise through conditions, either of that kind or any other, was considered at all.

11. In considering the issue of noise therefore, the Council failed to engage proactively with the applicants to see whether the issue could be resolved, and also failed to consider the powers available under other regimes, or the scope for conditions. They also failed to have proper regard for relevant national policy. In all these respects, the decision to refuse permission on noise grounds was unreasonable.

*Refusal Reason 2: (b) Lighting*

12. The lack of information on lighting was also raised in the Environmental Health Manager's response in November 2019, but in this case no request for further information appears to have been made to the applicants. In the case officer's report in May 2020, the section on lighting merely stated that the lack of detailed information made it impossible to assess the impact. In the circumstances, this reflected more on the failings of the Council than the applicants. Again, the applicants might reasonably have been expected to anticipate the issue, but any failing in that respect was outweighed by the Council's own failure to communicate their eventual concerns on the matter, during the two years that the application was under their consideration.
13. In their response to the costs application, the Council suggest that no satisfactory condition could have been devised, because of the number of variables. But this seems to be contradicted by their appeal statement, which states that the condition proposed at that stage would enable the impact of lighting on neighbouring residents to be fully assessed. Clearly it is true that different events will have varying requirements, but the Council has not substantiated its contention that this precluded them from dealing with the lighting issue by condition. Given the cursory nature of the discussion in the case officer's report, it appears that the Council simply failed to give any consideration to this possibility.
14. On the matter of lighting therefore, the Council failed to identify the issue until it was too late to engage in any dialogue, and then compounded their error by failing to consider the scope for conditions. In both these respects, the Council's behaviour was unreasonable.

*Refusal Reason 4: Air Quality*

15. The matter of air quality was another that was raised in the Environmental Health Manager's response in November 2019. The Council's failure to communicate that issue to the applicants prior to their decision to refuse permission was unreasonable behaviour.
16. However, the appellants' subsequent Air Quality Assessment report, submitted at the appeal stage, failed to show conclusively whether the proposed development would have a significant impact. And ultimately, my conclusion that the development would be acceptable in this regard, subject to conditions,

was one that rested on the balance of probability rather than clear evidence one way or the other.

17. On that basis, even if that report had been requested and submitted in a timely manner, prior to the Council's determination of the application, the issue relating to air quality would still have been finely balanced. In those circumstances, it would not have been unreasonable for the Council to refuse permission on grounds relating to air quality. Even though I have subsequently come to a different conclusion, for the reasons set out in my appeal decision, this does not make the Council's view unreasonable in this case.
18. It therefore cannot be said in this case that, the Council's unreasonable behaviour, in failing to seek the required information prior to determination, was solely responsible for air quality becoming an issue in the appeal. In this particular respect, it has not been demonstrated that the unreasonableness led to unnecessary or wasted expense.

### *Conclusion*

19. In respect of the issues relating to Green Belt, noise and lighting, I have found the Council to have behaved unreasonably, causing the appellants to incur unnecessary or wasted expense in the appeal process. A partial award in respect of these three issues is therefore justified.

### **Costs Order**

20. 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 Elmbridge Borough Council shall pay to Apps Court Farm Limited, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in respect of refusal reasons Nos 1 and 2, relating to Green Belt, noise and lighting; such costs to be assessed in the Senior Courts Costs Office if not agreed.
21. The applicant is now invited to submit to Elmbridge Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*J Felgate*

INSPECTOR