



Ministry of Housing,
Communities &
Local Government

Chloe Ballantine
Rapleys
First Floor 33 Jermyn Street
LONDON
SW1Y 6DN

Our Ref: APP/K3605/W/20/3249790

12 May 2021

Dear Madam

**LOCAL GOVERNMENT ACT 1972, SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990, SECTIONS 78 and 320
APPEAL BY JOCKEY CLUB RACECOURSES LTD
SANDOWN PARK RACECOURSE
APPLICATION REF: 2019/0551**

APPLICATION FOR A PARTIAL AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying you of his decision on the above named appeal.
2. This letter deals with Jockey Club Racecourses Ltd application for a partial award of costs against Elmbridge Borough Council. The application as submitted and the response of the Elmbridge Borough Council are recorded in the Inspector's Costs Report (CR), a copy of which is enclosed.
3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.
4. The Inspector's conclusions and recommendation with respect to the application are stated at paragraphs CR25-37. The Inspector recommended that a partial award of costs is justified on the basis of unreasonable behaviour which resulted in the appellant incurring unnecessary expense.
5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's

Andrew Lynch, Decision Officer
Planning Casework Unit
Ministry of Housing, Communities & Local Government
3rd Floor, Fry Building
2 Marsham Street
London, SW1P 4DF

Tel 0303 444 3594
Email: PCC@communities.gov.uk

conclusions in his report and accepts his recommendations. Accordingly, he has decided that a partial award of costs, as specified by the Inspector at paragraphs CR38-39 is warranted on grounds of unreasonable behaviour on the part of Elmbridge Borough Council.

6. Accordingly, the Secretary of State, in exercise of his powers under section 250(5) of the Local Government Act 1972 and sections 78 and 320 of the Town and Country Planning Act 1990, HEREBY ORDERS that Elmbridge Borough Council shall pay to Jockey Club Racecourses Ltd its partial costs of the inquiry, limited to the following:
 - a) costs incurred in relation to the production of the air quality appendix to the appellant's Statement of Case, excluding any costs attributable to work that was carried out before the issue of the Council's decision notice;
 - b) costs incurred in relation to the production of the heritage appendix to the appellant's Statement of Case, excluding any costs attributable to work that was carried out before the issue of the Council's decision notice; and
 - c) costs incurred in relation to the production of the rebuttal proof of evidence of Ben Connolley in response to the proof of evidence of David Webster, excluding any costs attributable to work that was carried out before the submission of the main proofs of evidence.

Such costs to be taxed in default of agreement as to the amount thereof.

7. You are invited to submit to Elmbridge Borough Council details of those costs, with a view to reaching agreement on the amount. Guidance on how the amount is to be settled where the parties cannot agree on a sum is at paragraph 44 of the Planning Practice Guidance on appeals, at <http://tinyurl.com/ja46o7n>

Right to challenge the decision

8. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
9. A copy of this letter has been sent to Elmbridge Borough Council.

Yours faithfully,

Andrew Lynch

Andrew Lynch

This decision was made by the Secretary of State and signed on his behalf.

Costs Report to the Secretary of State

by David Prentis BA BPI MRTPI

an Inspector appointed by the Secretary of State

Date 10 February 2021

TOWN AND COUNTRY PLANNING ACT 1990
ELMBRIDGE BOROUGH COUNCIL
APPLICATION BY JOCKEY CLUB RACECOURSES LTD
REGARDING
SANDOWN PARK RACECOURSE

Sandown Park Racecourse, Portsmouth Road, Esher

File Ref: APP/K3605/W/20/3249790

File Ref: APP/K3605/W/20/3249790

Sandown Park Racecourse, Portsmouth Road, Esher

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Jockey Club Racecourses Ltd for a partial award of costs against Elmbridge Borough Council.
- The Inquiry was in connection with an appeal against the refusal of planning permission for:

Hybrid planning application for the redevelopment of Sandown Park Racecourse involving: Outline application for development/redevelopment of sections of the site to replace/modify existing operational/associated facilities, and to provide up to 150 bedroom hotel (Use Class C1), family/community zone, residential development up to 318 units (Use Class C3) and to relocate existing day nursery (Use Class D1), all with car parking, access and related works following demolition of existing buildings and hardstanding (for access only).

Full application for the widening of the southwest and east sections of the racecourse track including associated groundworks, re-positioning of fencing, alterations to existing internal access road from More Lane and new bellmouth accesses serving the development.

Summary of Recommendation: That the application for a partial award of costs be granted in the terms set out below

The submissions for Jockey Club Racecourses Ltd¹

1. Costs can be awarded against a party in a planning appeal if that party has behaved unreasonably and if the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Both categories are satisfied here, under each heading.

Reason for refusal 1 – air quality

2. The application was accompanied by an Environmental Statement (ES)² which concluded that the overall significance of potential air quality effects would be negligible. In addition, air quality effects as a result of the operation of the development were considered to be not significant. The officers' report confirmed that the Environmental Health Officer had no objection on air quality matters subject to compliance with the suggested conditions³ and officers recommended approval. This information was rejected by members of the planning committee without any additional technical evidence before them to address any alternative scenario, including the alleged increased traffic congestion. Reason for refusal 1 refers to air quality as "other harm". Consequently, the appellant reasonably addressed air quality matters in its Statement of Case on 25 March 2020⁴.
3. The Council continued to maintain its case that there would be harm to air quality in its Statement of Case of 18 June 2020⁵, at the case management conference (CMC) on 20 August 2020 and at the Inquiry without any technical evidence. Consequently, the appellant incurred expense in addressing air quality matters in

¹ The full submissions are at CD8.24

² CD5.43, chapter 8

³ CD7.3, paragraph 9.8.7.6

⁴ SOC1/17

⁵ SOC2/1

evidence⁶, namely the costs of the air quality consultant, together with legal and planning consultancy fees arising from the production of this evidence.

4. At no time during the appeal process has the Council produced any technical evidence to justify its assertions that there would be harm to air quality. That was unreasonable behaviour, given that the allegation of harm had been refuted by the technical evidence of an air quality consultant. It caused unnecessary expense to the appellant during the appeal process.

Reason for refusal 2 - heritage

5. The application was accompanied by a heritage assessment⁷, prepared by a suitably qualified heritage consultant which confirmed that the proposals would comply with relevant legislation and national/local planning policy. The assessment was not challenged by the Council's officers. However, it was rejected by the planning committee without any specialist or other evidence to counter the heritage assessment. Policy DM12, which relates to heritage matters, was included in the second reason for refusal. In these circumstances the allegation of harm to heritage assets was unreasonable.
6. As a result of the reference to Policy DM12 in the refusal notice, the appellant instructed the heritage consultant to draft a response to be included in its Statement of Case (issued on 25 March 2020)⁸. The Council's Statement of Case was delivered on 18 June 2020, two weeks after the Inspector's deadline for lodging it. It confirmed that the reference to DM12 in the decision notice was an error and the Council withdrew the heritage objection. However, by this time the appellant had incurred costs in addressing the heritage objection contained in reason for refusal 2.
7. This amounted to unreasonable behaviour by the Council which caused the appellant to incur unnecessary and wasted expense during the appeal process.

Failure to follow advice in the Procedural Guide: Planning Appeals – England and the Inspector's directions

8. The appellant drew attention to the inadequacies of the Council's Statement of Case in a letter to the Planning Inspectorate dated 31 July 2020⁹. The letter confirmed that the Inquiries Procedure Rules require notification of the documents to which reference will be made. The Procedural Guide (particularly section J3) requires full disclosure of the details of a Council's case. The letter also confirmed that, if the Council was to rely on new technical evidence, or introduce new facts, matters, arguments or methodology in its proofs of evidence, the appellant would make an application for costs. In that context, the appellant asked that the Council disclose all such evidence at an early stage.
9. At the CMC on 20 August 2020, the Council confirmed that it would not be producing a new Landscape and Visual Impact Assessment (LVIA). The Inspector directed that proofs of evidence should be no longer than 3,000 words if

⁶ JCR6

⁷ CD5.39

⁸ SOC1/12

⁹ CD8.24, part 2 of 3

possible¹⁰. The appellant's team went to great lengths to respect this, paring draft proofs down to comply with the direction. However, the Council totally ignored the direction. Its proofs of evidence were considerably longer than 3,000 words. Mr Webster's proof, dealing with openness and visual impact, was 26,956 words and 70 pages long.

10. Contrary to the Council's statements at the CMC, Mr Webster's proof of evidence did include a LVIA. At the Inquiry Mr Webster could not explain why this information had not been forthcoming earlier or why there had been no notice of it. Moreover, under cross-examination, Mr Webster confirmed that he could not give expert evidence on planning, to which much of his proof of evidence was directed.
11. The Council's Statement of Case was totally inadequate, particularly on landscape matters. The Council did not engage with the appellant in a timely manner. Without warning, the landscape proof introduced a wholly new LVIA based on previously undisclosed information and methodology. This was in defiance of the Inspector's direction at the CMC and contrary to section J of the Procedural Guide. This constituted unreasonable behaviour which directly caused the appellant to incur unnecessary and wasted expense in the appeal process.
12. The LVIA was not anticipated in the Council's Statement of Case¹¹. It required detailed work by the appellant's consultancy team after the exchange of proofs. This work was done at very short notice at a time when the team had allocated time for other clients. The work was extensive and included preparation of rebuttal evidence which was kept to a minimum having regard to the guidance. This caused additional and unnecessary cost to the appellant.

The Response by Elmbridge Borough Council¹²

13. The Council strongly resists the application on all grounds.

Approach

14. The appeal process is intended to be costs neutral. In order to justify an award of costs, a party must demonstrate: (i) unreasonable behaviour on the part of another party and (ii), that the unreasonable behaviour has caused the other to suffer wasted expense.
15. The statutory power to award costs only bites on the appeal process itself¹³. The Secretary of State has no power to award costs for matters which have occurred other than "*at the inquiry*". The Council accepts that this embraces all aspects of the appeal process. The power to award costs against a local authority runs from the first act of the authority in the appeal process, which is the filing of an appeal questionnaire¹⁴. Actions which pre-date the filing of the appeal questionnaire will be outside the ambit of the costs regime.

¹⁰ CD8.24, part 3 of 3, annex B

¹¹ SOC2/1

¹² The full submissions are at CD8.25

¹³ CD8.25, part 2 of 8, Local Government Act 1972, section 250(5)

¹⁴ Town and Country Planning (Inquiries Procedure) (England) Rules 2000, rule 4

Air quality

16. In its Statement of Case the Council made plain that air quality formed no part of its case¹⁵. The point was repeated at the CMC. The Inspector's note of the CMC records that:

"In relation to air quality, Dr Bowes confirmed that this did not form part of the Council's case. He would not be calling a witness on this topic, nor would the planning witness be covering it."

17. It is simply wrong to assert that the Council argued that there would be harm to air quality during the Inquiry. No evidence was led on this matter and no case was put to the appellant's witnesses. Whilst reason for refusal 1 did refer to air quality, it was clarified in the Statement of Case and confirmed at the CMC that this matter was not part of its case. In any event, the appellant's evidence was not that there would be no harm to air quality, rather that there would not be a "significant" impact. The Council did not act unreasonably within the appeal process.

Heritage

18. The Council has never said that there would be an adverse effect on the significance of heritage assets. The reference to Policy DM12 in the decision notice was plainly an error, as confirmed in the Council's Statement of Case. The appellant could have clarified this with the Council prior to launching its appeal, thereby avoiding the costs of a further statement. On the application of normal costs principles, the appellant has failed to mitigate its loss. It has apparently sought to chase-up costs to take advantage of an error on the decision notice. The Council did not therefore act unreasonably within the appeal process.

Landscape

19. The Council has consistently maintained objections in relation to impacts on the openness and purposes of the Green Belt and on the character and appearance of the area within the reasons for refusal and the Statement of Case. The appellant was therefore on notice that its case on these matters would be challenged and it should have expected detailed evidence on townscape character, visual effects and openness.
20. At the CMC, the Council said that it would not submit a Landscape and Visual Impact Assessment. Technically it did not do so because it submitted a Landscape and Visual Appraisal¹⁶. In any event, the substantive differences between what the appellant expected and what the Council did are significantly overstated. The appellant would have expected the Council's landscape proof to arrive at different judgments and to make methodological criticisms. The appellant was told in advance that the Council wished to rely on five additional viewpoints. The information in the Council's proof was not therefore unexpected.

¹⁵ SOC2/1, paragraph 6.38

¹⁶ GLVIA3, paragraph 1.1.1, states that a LVIA is a document to support an Environmental Statement

21. Whilst it is true the Council's proofs exceeded 3,000 words, summary proofs were provided in accordance with legal requirements¹⁷. The CMC note indicated that proofs should not exceed 3,000 words "*if possible*". Regrettably, it was not possible to adequately explain the Council's case in fewer than 3,000 words. Nor did the appellant achieve this. Its landscape, visual and Green Belt case spanned the Landscape and Townscape Visual Appraisal, the Green Belt Statement and the Green Belt Review in addition to the Statement of Case and the proofs of Mr Clarke and Mr Connolley.
22. The Procedural Guide is not law¹⁸. In any event, the Council complied with the Procedural Guide. It submitted a Statement of Case within an extended deadline that had been expressly agreed with the appellant and the Planning Inspectorate. The Statement of Case was a "*succinct statement supporting the reasons for opposing the development*" which highlighted the "*differences between the evidence supplied by the appellant.....and the arguments being put forward by the local planning authority*"¹⁹. It made it clear that the Council did not agree that the openness of the Green Belt would be preserved and that the Council would argue that the character and appearance of the area would be unacceptably harmed.
23. The Council did not therefore behave unreasonably within the appeal process. In any event, the appellant was not put to any expense which it would not otherwise have incurred in order to respond to the Council's case.

Conclusion

24. The Council has not behaved unreasonably within the appeal process. Moreover, even if it has, the appellant has not been put to expense which it would not otherwise have been required to incur, in order to prepare for the appeal in response to the Council's Statement of Case. The application for costs should be refused.

Inspector's conclusions

25. The Planning Practice Guidance 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.

Air quality

26. Reason for refusal 1 lists air quality amongst the types of harm which should be weighed in the Green Belt balance. The reason also alleged conflict with Policy DM5 which is a policy that covers air quality. Insofar as air quality formed part of a reason for refusal, that objection was withdrawn by the Council's Statement of Case in the following terms:

"The Council remains concerned that any increase in the number of visitors to the upgraded racecourse, as well as the planned increase in residents, would not sustain and contribute towards compliance with relevant limit values" in accordance with paragraph 181 of the NPPF. That said, the Council acknowledges

¹⁷ Town and Country Planning (Inquiries Procedure) (England) Rules 2000, rule 13.2

¹⁸ CD8.22, Procedural Guide, paragraph 1.1.1

¹⁹ CD8.22, Procedural Guide, Annex J, paragraph J.3.1

the mitigation measures proposed by the appellant and does not intend to advance evidence from an air quality witness to defend this part of the first reason for refusal.” (paragraph 6.38)

27. To my mind that amounted to a withdrawal of the air quality objection. If the appellant was in any doubt on that point, any such doubt was removed at the case management conference where the Council confirmed again that it would not be calling evidence on air quality. There was no subsequent attempt to resurrect the air quality objection and at no point did the Council submit any technical evidence to which the appellant needed to respond.
28. Air quality was one of the topics covered in the ES which included full details of the methodology used. That work was not challenged by the Council. The appellant submitted an appendix to its Statement of Case dealing with air quality. The appendix did not take matters forward in any technical sense because, to a large extent, it re-presented technical work that had already been done in the ES. However, the appendix included comments on the officers' report and the reasons for refusal. The air quality consultant had to spend some time reviewing the officers report and reasons for refusal.
29. The Council did not substantiate its objection on air quality grounds. That amounted to unreasonable behaviour. Although the objection was withdrawn, by that time the appellant's air quality consultant had spent some time reviewing and commenting on the reasons for refusal. In my view that amounted to unnecessary expense.

Heritage

30. The second reason for refusal did not mention heritage directly but did allege conflict with Policy DM12 which is a heritage policy. Whether or not Policy DM12 was referred to in error, from the appellant's perspective this looked like an objection on heritage grounds. The appellant was entitled to rely on the decision notice as written. Insofar as heritage impacts formed part of a reason for refusal, that objection was withdrawn by the Council's Statement of Case in the following terms:

“Whilst harm to the character of the area will be clearly demonstrated, the Council does not say that there will be specific, additional harm to the significance of any designated or non-designated heritage assets. The inclusion of policy DM12 in the reason for refusal was an error”. (paragraph 6.66)
31. The application was accompanied by an Archaeological and Heritage Assessment. This was a comprehensive and detailed document and the Council did not produce any contrary evidence to which the appellant needed to respond. The appellant produced an appendix to its Statement of Case dealing with heritage matters. To a large extent this document re-presented policy analysis and technical assessments that had been covered in the Archaeological and Heritage Assessment. However, as with air quality, the appendix included comments on the officers' report and the reasons for refusal. This would have required some time input from the heritage consultant.
32. The Council did not substantiate the objection on heritage grounds contained in reason for refusal 2. That amounted to unreasonable behaviour, even if the objection was raised in error. Although the objection was subsequently

withdrawn, by that time the appellant's heritage consultant had spent some time reviewing and commenting on the reasons for refusal. In my view that amounted to unnecessary expense.

Landscape

33. The Procedural Guide states that the local planning authority's Statement of Case must be accompanied by the documents and factual evidence that will be relied on. Whilst the Procedural Guide does not have the force of law, it is nevertheless a material factor when assessing whether a party has behaved in a reasonable way. The Planning Practice Guidance gives examples of unreasonable behaviour which may result in an award of costs. One such example is introducing fresh and substantial evidence at a late stage, necessitating extra expense for preparatory work that would not otherwise have arisen.
34. In this case the appellant raised a concern in its letter of 31 July 2020 that the Council's Statement of Case was described in general terms whereas some of the issues to be covered (including landscape and Green Belt) could be highly technical. The appellant sought early disclosure of any additional technical evidence. That was a reasonable concern, so I raised the matter at the CMC. In answer to my question, the Council confirmed that it would not be producing a new Landscape and Visual Impact Assessment. However, the Council's landscape proof of evidence contained a large amount of new technical assessment.
35. In the context of this costs application, it matters not whether this was a Landscape and Visual Impact Assessment or a Landscape and Townscape Visual Appraisal. Nor does it matter that the material was embedded in a proof rather than being presented as a separate document, or that the additional viewpoints were mentioned at the CMC. The key point is that this was extensive new evidence of a technical nature that was not disclosed before the exchange of proofs. The fact that the appellant might have expected this to happen is beside the point. The applicant wanted, reasonably, to see the material in time to deal with it in its proofs. In my view, submitting this amount of technical evidence at a late stage amounted to unreasonable behaviour.
36. The consequence was that the appellant had to prepare a rebuttal proof on landscape matters. No doubt some of the work involved would still have been needed if the Council's evidence had been made available sooner. Even so, the appellant would have incurred additional expense as a result of the work having to be done at short notice after its main proofs had been submitted.

Conclusion

37. I conclude that there was unreasonable behaviour which resulted in the appellant incurring unnecessary expense. The conditions for a partial award of costs have been met.

Recommendation

38. I recommend that the application for a partial award of costs be granted.
39. If the Secretary of State is minded to grant the application, and make a costs Order, I recommend that the Order be limited to the following:

- a) costs incurred in relation to the production of the air quality appendix to the appellant's Statement of Case, excluding any costs attributable to work that was carried out before the issue of the Council's decision notice;
- b) costs incurred in relation to the production of the heritage appendix to the appellant's Statement of Case, excluding any costs attributable to work that was carried out before the issue of the Council's decision notice; and
- c) costs incurred in relation to the production of the rebuttal proof of evidence of Ben Connolley in response to the proof of evidence of David Webster, excluding any costs attributable to work that was carried out before the submission of the main proofs of evidence.

David Prentis

Inspector



Ministry of Housing, Communities & Local Government

www.gov.uk/mhclg

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.