



Costs Decision

Hearing Held on 17 January 2023

Site visit made on 18 January 2023

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 March 2023

Costs application in relation to Appeal Ref: APP/D0121/C/19/3238791 & APP/D0121/W/19/3238762

Land at Summer Lane, Banwell, North Somerset

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Ms Kathleen Kiely for a partial award of costs against North Somerset Council.
 - The Hearing was in connection with an appeal against an enforcement notice alleging, without planning permission, the material change of use of agricultural land to a use as a single pitch traveller site, and the refusal of planning permission for the stationing of caravans for residential purposes as a single pitch gypsy traveller site.
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Decision: the application is refused

The submissions for Ms Kathleen Kiely

1. The application only concerns the behaviour of the local planning authority from the submission of the report by TGS Acoustics at statement stage.
2. The applicant accepts that it was reasonable for the Council to request a noise report, but considers that it was then subsequently unreasonable for the Council to maintain an objection on noise grounds following submission of that report. Specifically, the applicant considers that it was unreasonable for the Council not to withdraw, subject to conditions, its reason for refusal relating to noise upon receipt of the report by TGS Acoustics. The applicant considered all along that the issues raised in relation to noise could have been adequately dealt with by the imposition of a condition(s). The Council now agrees but, the applicant notes, it was only once the Inspector had questioned the Council on their illogical and unreasonable position regarding a personal consent to overcome noise issues did the Council accepted the matter could be overcome by condition(s).
3. Despite the time available to them, the Council failed to produce evidence to substantiate their reason for refusal in relation to noise. The only documentation submitted in relation to noise was not a technical report and at the Hearing the Council accepted that the calculations within that document could not be substantiated. The applicant considers that additional unnecessary work and expense have been incurred responding to noise issues since the submission of the noise report by TGS Acoustics, including preparation for and attendance at the Hearing on the 17 January 2023 by Mr Tim Green of TGS Acoustics between the hours of 10:00 and 15:30, and the attendance of Mr Matthew Green of Green Planning Studio Ltd for one day of the Hearing.

The response by North Somerset Council

4. The Council does not accept that it acted unreasonably or put the applicant to any significant additional work beyond that was necessary. The Council pursued an objection on noise grounds because there were differences in opinion as to whether the noise attenuation levels the development could achieve even with a 2m barrier fence, such that conditions could not be agreed. The applicant maintained their view that acceptable living conditions could be provided for the occupiers in relation to noise, even without the need for any noise conditions, until the discussion on conditions at the Hearing on the afternoon of Wednesday 18 January 2023.
5. It was conceded by the applicants during the Hearing that the mobile home would not achieve the degree of sound attenuation that was originally portrayed in the noise report. This then became a fundamental consideration in the justification for an acoustic ventilation scheme to be a necessary condition. This would not have been demonstrated had it not been for the appeal. The LPA considers therefore that the applicant has not incurred unnecessary or wasted expense in the appeal process.
6. The Council considers that, had the applicant agreed the noise conditions before the Hearing, then this would have overcome its objections on noise grounds. However, they did not agree those conditions. The Council consider that any additional work carried out by Mr Tim Green of TGS Acoustics prior to the hearing was minimal. Mr Tim Green's attendance at the Hearing confirmed that a number of noise conditions were required to mitigate the noise levels to make occupation on the site acceptable.
7. The Council considers that the noise conditions which were agreed on Wednesday afternoon in the Hearing with the acoustic ventilation condition, which was finally agreed, would secure through conditions acceptable living conditions for the occupants that otherwise would not have been acceptable and would not have been achieved had it not been for the appeal and the evidence at the Hearing. The Council considers that it has not acted unreasonably and as such considers that a partial award of cost as claimed by the appellant is not justified.

Reasons

8. The 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 costs to incur unnecessary or wasted expense in the appeal process. The PPG 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 PPG provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include not reviewing their case promptly following the lodging of an appeal, as part of sensible on-going case management, and failure to produce evidence to substantiate each reason for refusal.
9. By way of background, the source of the issue that culminated in this application for costs arose even before the planning application subject to Appeal B was determined. The Council requested a noise report before the application was determined. The applicant did not dispute that there was a need to submit a

noise report, merely that if the application was going to be refused in any event for other reasons, this would be dealt with during the appeal process.

10. The application was determined without a noise report being submitted. One of the reasons for refusal related to noise. The reason was phrased as “*it has not been demonstrated* that acceptable living conditions for future occupiers can be provided, particularly in relation to noise and pollution from the nearby motorway....” (emphasis added). The implication of that wording is clear: had a noise report been submitted, there is a *possibility* (and I put it no higher than that) that the matter could have been addressed during the consideration of the application and the reason for refusal avoided altogether.
11. The award of costs in appeal proceedings arises predominantly in response to behaviour during the appeal process. Herein lies the first procedural matter. The appeal against the refusal of the planning application, received by the Council on 16 July 2020, indicated that a noise survey was being produced. The full noise report was only submitted at ‘statement’ stage on 25 September 2020. Two points arise from that.
12. Firstly, the decision to produce a noise report at appeal stage was a tacit acknowledgement that a noise report was necessary to demonstrate that acceptable living conditions for future occupiers of the appeal site could be provided. Indeed, as part of his application for costs, the applicant states in terms that a noise report was required. On the basis that the applicant recognised the need for a noise report even before the application was determined, I have great difficulty in understanding why a noise report was not provided at application stage. In my view, had a noise report have been provided as part of the planning application as requested by the Council, much if not all of what followed could have been avoided.
13. The second point that arises is that the submission of the noise report at appeal statement stage put the Council in a very difficult position. The Council did not have the opportunity to produce its own noise evidence in response, given the very short timescale involved. Furthermore, it is possible that any attempt to submit it’s own noise assessment may have been returned by the Planning Inspectorate as constituting new evidence. In my view, the submission of the noise report at statement stage during the appeal process was at best unhelpful and at worst unreasonable given that the applicant recognised the need for a noise report whilst the planning application was still under consideration by the Council. As it happens, the Council responded to the appellant’s noise report with comments from its environmental protection team. Those comments identified perceived flaws in the methodology of the appellant’s noise report but concluded that, on balance, the development could be permitted subject to conditions relating to ventilation.
14. In that sense, the applicant is entirely correct. It appears that matters relating to noise could have been dealt by the Council at application stage through the imposition of conditions. But that could have only happened if the applicant had provided a noise report at application stage. The obvious corollary is that was it was the decision of the applicant not to submit a noise report at application stage that prevented any possibility of the matter being resolved earlier and which, ultimately, resulted in her incurring the additional costs that she did.

15. Thereafter, the need for noise conditions, including an acoustic ventilation system, remained an area of disagreement between both parties. The Council confirms that it would not have been able to withdraw from its position because it considered that appropriately worded noise conditions were required to ensure that acceptable living conditions could be achieved for the occupiers of the appeal site. By that point, a line in the sand had been drawn and from then on it was inevitable that noise would become an issue in dispute at the Hearing.
16. It seemed to me that the Council's position relating to noise shifted emphasis slightly during the weeks immediately before the Hearing and at the Hearing itself. Prior to the Hearing, the Council's stated position was that the scheme would be acceptable (in noise terms) subject to appropriately worded conditions. At the Hearing, Mr Perkins, the Council's noise witness, made what I took to be a wider criticism of the applicant's noise report and survey. These included an alternative means of calculating noise levels (CRTN methodology) and questions concerning the applicant's base data on which the conclusions in the report were based.
17. I make no criticism of the Council in that respect, given that it was responding to the evidence provided by the applicant. But it does highlight that the discussion that ensued at the Hearing was wider in scope than just whether a noise condition should be imposed. Again, I go back to the decision of the applicant not to submit a noise report at application stage. Had that been the case, discussion at the Hearing would most likely have been much narrower in scope and confined to just whether the conditions suggested by the Council to mitigate the impact of noise met the relevant policy tests set out in the PPG. In the event, it was clearly important that the appellant's noise witness, Mr Tim Green, was present for that discussion on noise matters. As it happened, that discussion took up a good proportion of Day One of the Hearing, from approximately 10:30 to 15:30.
18. My interpretation of the above sequence of events is that the entire issue relating to noise at appeal stage could, and in all probability would, have been avoided had the applicant submitted a noise report with the original planning application. Had the noise report been submitted at that time, based on the Council's position as stated before the Hearing opened, it is entirely possible and indeed likely that the Council would have withdrawn that reason for refusal and indicated that its objections relating to noise could have been overcome by the imposition of conditions.
19. I note that the Council conceded the reason for refusal relating to highway issues in exactly that way. I see no reason why the Council could not have dealt with the noise issue similarly, assuming a noise report been submitted earlier. In that scenario, the issues relating to noise would not have been discussed at any length at the Hearing, and certainly not as a main issue. It is unlikely that the applicant would have needed a noise witness to attend the Hearing and certainly not for the length of time that Mr Tim Green did. It follows that the applicant would not have occurred any significant expense dealing with the noise issue at the Hearing.
20. In the event, on 23 December 2022 the Council submitted to the Planning Inspectorate its comments on noise issues in response to the previous Inspector's Pre- Hearing Note issued in October 2021. That was some 14 months after the previous Inspector's Pre- Hearing Note was issued and only some 23 calendar days prior to the Hearing (albeit those 23 days covered the Christmas/New Year holiday period, and therefore considerably fewer working days). At face value, the

timing of the submission of the Council's comments appears unreasonable in the context of the PPG.

21. However, that submission must be viewed in the context of a meeting between the applicant's agent and Council officers on 12 December 2022 and the exchange of emails that followed that meeting. At that meeting, the Council explained its position and confirmed that it would insist on a condition requiring the submission of a noise mitigation strategy (which would include an acoustic ventilation system). Of particular relevance to this costs application, in an email dated 21 December 2022 the Council advised (i) that their noise expert would be attending the Hearing; (ii) that his statement would be provided shortly and (iii) that it *had reassessed its position* and finds that the noise barrier would not perform as well as the appellant's noise report suggested (emphasis added).
22. Two points flow from the above. Firstly, the email confirms that the Council did review its case as part of sensible on-going case management. I recognise that the PPG includes the word "promptly" in that regard but this must be viewed on a case-by-case basis. In this case, the Council's position remained essentially unchanged throughout and was consistently communicated to the applicant. The Council's reassessment of its position in December 2022 was prompt in the context of responding to the discussion held a week or so previously, and did not result in any significant departure from that long-held position. In my opinion, the Council cannot be said to have acted unreasonably in that respect.
23. The PPG indicates that a local planning authority will be at risk of an award against them if it fails to produce evidence to substantiate each reason for refusal. The email dated 21 December 2022 clearly indicated the Council's intention to defend its position at the Hearing. The Council fielded a suitably qualified witness to present its case at the Hearing. Although I did not find wholly in favour of the Council in relation to the noise issue, the written and oral evidence given by the Council's witness was sufficient to cast significant doubt over the validity and reliability of the data that underpinned the applicant's noise survey and subsequent report.
24. The Council's initial position that a personal permission was an appropriate means to mitigate the impact of noise was wholly illogical: the impact of noise would have been no less severe irrespective of who occupied the site. In that sense, maintaining that position right up to the Hearing could be regarded as constituting unreasonable behaviour. However, I come back to the fundamental point rehearsed above: had the applicant submitted the noise report at application stage, the only point that would then have been discussed at the Hearing is whether the personal condition proposed by the Council met the policy tests set out in the PPG. Clearly, it would not have done so but there would have been a discussion on conditions at the Hearing in any event and the Council's adherence to its position did not, in isolation, incur the applicant in any additional or unnecessary expense.
25. In that context, I go back to the way in which the Council's reason for refusal on noise grounds was phrased: specifically, that "it has not been demonstrated that acceptable living conditions for future occupiers can be provided". The precise wording of that reason for refusal is crucial. The Council was not saying that acceptable living conditions for future occupiers could not be provided. The

Council was saying that it had not been shown that acceptable living conditions for future occupiers can be provided. That is an important distinction. To my mind, the evidence presented by the Council was sufficient to demonstrate that the applicant had not shown that acceptable living conditions for future occupiers can be provided and therefore qualifies as substantiating that particular reason for refusal. It follows that the Council cannot be said to have acted unreasonably in that respect in the terms set out in the PPG.

26. With that in mind, I go back to the timing of the submission of the Council's comments in December 2022. Whilst the delay in submitting those comments appears unreasonable, that must be viewed in the context of everything that had gone before and which occurred afterwards. By that time, the Council had little choice. The line in the sand had already been drawn. The Council had made its position quite clear and was consistent in that position. The applicant's decision not to submit a noise report with the original planning application triggered a chain of events that ultimately necessitated that the issue of noise became a main issue at the Hearing. This required that the applicant was professionally represented in relation to noise issues prior to the Hearing, at the lengthy discussion on noise matters that took place at the Hearing, and at the site visit.
27. In my view, apart from proposing a personal permission based on noise impact and which itself incurred the applicant no unnecessary expense, the Council cannot be said to have acted unreasonably at any point during the appeal process. In the absence of any unreasonable behaviour, the PPG makes it clear that any award of costs is not justified.

Paul Freer
INSPECTOR