
Costs Decision

Hearing Held on 31 January 2023 and 13 February 2023

Site visit made on 31 January 2023

by R Sabu BA(Hons) MA BArch PgDip ARB RIBA

an Inspector appointed by the Secretary of State

Decision date: 27th March 2023

Costs application in relation to Appeal Ref: APP/A2280/W/22/3293828 Patman's Wharf, Upnor Road, Lower Upnor

- 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 Mr Alan Patman of The Patman Trust for a full award of costs against The Medway Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for change of use from boat storage yard to residential, erection of six x 3 bed terraced houses and two x 2 bed apartments with associated landscaping and parking.
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Decision

1. The application for an award of costs is partially allowed in the terms set out below.

The submissions

2. The costs application and the Council's response were submitted in writing. The Applicant added to their application during the hearing and the Council's response and Applicant's final reply were heard orally at the hearing.
3. Additional points raised by the Applicant during the hearing include an incomplete Statement of Case by the Council, Council not sharing legal advice with the Applicant with respect to the use of the jetty and late evidence being offered at the hearing.

Reasons

4. The Planning Practice Guidance (PPG) 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.
5. It adds that examples of unreasonable behaviour by local planning authorities include:
 - lack of co-operation with the other party or parties;
 - delay in providing information or other failure to adhere to deadlines;
 - introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen;

- 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;
 - failure to produce evidence to substantiate each reason for refusal on appeal; and
 - not determining similar cases in a consistent manner.
6. During the hearing, the Council requested to submit late evidence which was, in their view, critical to their case. In order for the Applicant to sufficiently review the evidence, the hearing was adjourned and reconvened on another day.
 7. The Council explained during the hearing that they were only able to visit the site a few dates before the hearing due to work commitments. It was during this visit that they observed barges being docked at the jetty which resulted in further evidence being put together prior to the opening of the hearing. The reason for the site visit occurring only a few days prior to the hearing does not justify the request to submit late evidence at the hearing, in my view.
 8. An updated Statement of Common Ground (updated SoCG) was submitted shortly before the reconvened hearing which confirmed that the Council no longer wished to submit the late evidence. The updated SoCG also set out that the parties agreed a noise mitigation scheme that would, in their view, provide an acceptable noise climate for future residents of the scheme. Although this resulted in the Council no longer contesting the reason for refusal, I see no reason why this position could not have been agreed at an earlier stage of the appeal. As such, the request to submit late evidence during the hearing constitutes unreasonable behaviour and as a result the Applicant incurred wasted expense during the appeal process in attending the reconvened hearing.
 9. A significant length of time transpired from the submission of the Applicant's initial Noise Impact Assessment to the Council's determination of the planning application. The Noise Impact Assessment was submitted in July 2020 during the Covid pandemic and the issue of noise is pertinent to the case. Therefore, the Council did not behave unreasonably by selecting a time when activities returned to a reasonable level before providing their assessment in terms of noise.
 10. With respect to the lawfulness of operations at the neighbouring site including the use of the jetty, the Council consider that that the jetty is within the remit of the Marine Maritime Organisation rather than the local authority. It also confirmed that in their view there is no planning breach that could be enforced against relating to the adjacent site.
 11. The issue of noise generated on the adjacent site would have needed to be tested at a hearing in any event given the areas of disagreement with regard to methodological dispute and differences in sound measurements taken. As such, even if the Council behaved unreasonably by not considering the lawful use of the adjacent site during the application process, this has not resulted in wasted expense during the appeal process.
 12. The Applicant referred to planning permission granted at Sandacres and Fleet House. These sites are located to the north of Upnor Road and a greater

distance from the jetty than the appeal site. As such, they are not directly comparable to the appeal case. The Council has not therefore behaved unreasonably with respect to determining similar cases in a consistent manner.

13. The appeal procedure was changed, however, this was not due to any unreasonable behaviour by the Council. Rather, it was the result of the complexity of the issue that arose from the submission of the various Noise Impact Assessments and supplementary statements.
14. With respect to Freedom of Information requests, even if the Environmental Health Officer's comments were made public, this would not have prevented the need for an appeal as the Council's decision would not have altered. As such, even if the Council behaved unreasonably, this has not resulted in wasted expense in the appeal process.
15. The Council appears not to have carried out the 'tilted balance' as per paragraph 11d of the National Planning Policy Framework. However, the Council made it clear during the hearing that in their view, the adverse impacts of the proposal significantly and demonstrably outweighed the benefits. As such, even if they had applied the provisions of paragraph 11d, this would not have altered their decision and an appeal would not have been avoided. Therefore, the Applicant has not incurred unnecessary expense in this respect.

Conclusion

16. For the reasons outlined above, I conclude that a partial award of costs, to cover the expense incurred by the Applicant in attending the reconvened hearing, is justified.

Costs Order

17. 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 The Medway Council shall pay to Mr Alan Patman of The Patman Trust, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in attending the reconvened hearing on 13 February 2023; such costs to be assessed in the Senior Courts Costs Office if not agreed.
18. The applicant is now invited to submit to The Medway Council, to whom whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

R Sabu

INSPECTOR