



Costs Decision

Inquiry opened on 20 June 2023

Site visit made on 28 June 2023

by David Wildsmith BSc(Hons) MSc CEng MICE FCIHT MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24th July 2023

Costs application in relation to Appeal Ref: APP/K3605/W/22/3313510 47 Portsmouth Road, Thames Ditton, Surrey, KT7 0TA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Elmbridge Borough Council ('the Council') for a partial award of costs against Aldi Stores Ltd ('the appellant').
 - The inquiry was in connection with an appeal against the refusal of planning permission for the demolition of existing buildings on site and the erection of a Class E retail unit alongside access, car parking and associated works.
 - The Inquiry sat for 7 days on 20-23 and 27-29 June 2023.
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Decision

1. The application for an award of costs is refused.

The submissions for the Council

2. The application for costs was submitted in writing and further, brief points were added orally after the appellant had made its response. In summary, the Council seeks a partial award of costs to cover the costs of its noise expert, Mr Peckham, and the costs of the Council's barrister's time engaging with the noise evidence.
3. The thrust of the Council's claim is that the Environmental Noise Report (ENR) submitted by the appellant to support its planning application disclosed multiple instances of the predicted noise effects during deliveries to the proposed Aldi store being beyond the threshold at which BS4142¹ indicates that there would be a significant adverse effect – i.e. +10dB above background noise level. The appellant sought to justify its position by arguing that a number of contextual factors should be taken into account, such as World Health Organisation Guidelines for Community Noise, the existing ambient noise climate, a comparison with the existing use of the site, various mitigation measures and a Delivery Management Plan. In the Council's view such arguments are hopeless.
4. The appellant maintained its position, and in a Rebuttal Proof of Evidence (PoE) produced by the appellant's noise expert, Mr Metcalfe, it was suggested that Mr Peckham had misapplied BS4142.
5. On Day 2 of the Inquiry the appellant submitted a letter indicating that it was willing to accept the imposition of conditions covering such matters as the switching off of refrigeration units on delivery lorries prior to the vehicles entering the site; the turning off of reversing alarms during deliveries with deliveries being carried

¹ BS4142:2014+A1:2019: 'Methods for rating and assessing industrial and commercial sound'

out under the supervision of a pedestrian marshal; and the installation of acoustic absorptive panels within the service bay area. This prompted Mr Metcalfe to re-work the noise calculations, which were then submitted to the Inquiry on Day 3. However, these revised figures still disclosed a significant adverse effect and it was not until Mr Metcalfe explained to Mr Peckham that the appellant would also be prepared to be bound by a condition limiting the delivery times that it could be shown that the significant adverse effect could be avoided altogether.

6. This was made clear in the Supplementary Statement of Common Ground (SoCG) on noise matters, dated 27 June 2023, which indicated, amongst other things, that the appellant would accept restrictions on delivery times to between 0700 and 1900 hours Monday to Friday; 0800 to 1900 hours on Saturdays; and 0900 to 1900 hours on Sundays and Bank Holidays.
7. These delivery times were more restrictive than those requested by the appellant up to this point. It would not have been in order for the Council to impose this more restrictive condition against the appellant's will, as this would have been at odds with the guidance in Paragraph 005 of the Planning Practice Guidance² (PPG) as it would have placed an unjustifiable and disproportionate financial burden on the applicant and it would therefore have failed the test of reasonableness.
8. Had the appellant adopted this position on delivery hours initially, the material attempting to justify the significant adverse effects would not have been necessary and the time incurred by the Council's noise witness and barrister would have been avoided. For reasons set out in full in the written costs application the appellant acted unreasonably, causing the Council to incur unnecessary and wasted expense.

The response by the appellant

9. This was also made in writing. The appellant maintains that it did not act unreasonably. In summary, the appellant explains that the basic position is that the Council's Environmental Protection Officer (EPO) assessed the appellant's ENR and considered that noise concerns could be addressed by planning conditions, with the requested delivery times of 0700 to 2200 hours Monday to Saturday, and 0800 to 1900 hours on Sundays. The EPO raised no objection to the proposal and this position was reported to Members of the Council's Planning Committee, together with an overall recommendation that the application should be approved, with conditions. However, without any further expert noise evidence Members resolved to refuse planning permission.
10. Mr Metcalfe sought to address the Council's concerns as expressed in its Statement of Case (SoC) and during main SoCG discussions with Mr Peckham, in his PoE submitted to the Inquiry. However, the fundamental difference between the appellant's approach and the Council's approach was that Mr Peckham would not contextualise the noise measurements as expressly outlined in points 1 to 3 at Section 11 of the BS4142:2014+A1:2019 Technical Note prepared by the Acoustics & Noise Consultants. The aspects of Mr Metcalfe's approach, criticised in paragraph 4(a) to (e) of the Council's written costs application, are all reasonable contextual considerations supported by BS4142.
11. It was only upon the exchange of Rebuttal PoE that the appellant was able to understand the specific concerns of the Council. At no stage did the Council ask the appellant if it would be prepared to accept the restrictions which have now led to

² Paragraph: 005 Reference ID: 21a-005-20190723

the agreed position in the Supplementary SoCG. The Council's approach assumes that Mr Peckham's evidence was correct. But it is the appellant's view that Mr Peckham, up to his rebuttal, misapplied the BS4142 standard by not taking relevant site context considerations into account.

12. The appellant points out that the Inquiry found itself in a position where a noise reason for refusal was withdrawn and not defended once conditions were agreed. There is simply no evidence that the appellant has behaved unreasonably and the costs application is completely misguided. It should therefore be dismissed and no award of costs should be made.

Reasons

13. 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.
14. It is apparent that from an early stage the Council accepted that the noise impact from mechanical plant and services could be adequately controlled by an appropriate planning condition, and that the noise impact from car parking activities would be acceptable. This meant that the only area of disagreement between the Council and the appellant related to the noise impact likely to occur during deliveries to the proposed foodstore.
15. I have noted that the Council's EPO had assessed the appellant's ENR and was content that the proposed delivery times of 0700 to 2200 hours on Monday to Saturday and 0800 to 1900 hours on Sundays would not result in unacceptable indoor noise levels for nearby residential occupiers. Accordingly, the proposal was presented to Members of the Council's Planning Committee with a recommendation for approval, to include suggested conditions covering the control of noise from air conditioning/cooling plant; store opening hours; delivery hours as above; and a Service and Delivery Plan.
16. However, Members chose not to accept their Officer's advice, and refused planning permission for a number of reasons, one of which asserted that the proposed development would harm the amenity of surrounding neighbours, particularly in the evening. As such the proposal was considered to be at odds with a number of adopted development plan policies, but I note that Development Management Plan Policy DM5, which amongst other things deals specifically with pollution from noise, was not referenced in this reason for refusal.
17. Nonetheless, the Council's SoC confirmed that it was the likely noise impact from deliveries to the proposed store that was of concern to the Council, and Mr Peckham prepared his PoE accordingly, with Mr Metcalfe preparing his PoE to respond to the Council's position as detailed in its SoC. The respective positions of the parties were set out in the agreed main SoCG, including the different approaches to assessing the acceptability of likely noise impact from deliveries, adopted by the 2 expert noise witnesses. This is how matters stood at the opening of the Inquiry.
18. Matters moved on as the Inquiry progressed, with the letter submitted by the appellant on Day 2 confirming that it would be content to be bound by a number of conditions which would address some of the noise concerns. However, although the Council maintains in its application for costs that this was significant new information which had not been submitted in accordance with the Inquiry timetable,

it seems to me that the suggested conditions only covered matters which had already been agreed to in principle by the appellant at the time this application was placed before the Planning Committee. As I read things, the matters agreed to would all reasonably fall within the remit of a Service and Delivery Plan, which had been referred to in the ENR and was covered by proposed condition 15 in the Officer's Report to the Planning Committee.

19. I do acknowledge that at no time until the Supplementary SoCG was placed before the Inquiry had the appellant indicated that it was prepared to accept more restrictive delivery hours, and that it appears to be this specific change of position which led to agreement between the parties. But neither had the appellant moved from its position, set out in Mr Metcalfe's PoE and Rebuttal PoE, that the noise impact during the previously requested delivery periods of 0700 to 2200 hours Monday to Saturday, and 0800 to 1900 hours on Sunday would not result in a significant adverse impact on nearby neighbours, once contextual considerations had been taken into account.
20. Whilst I had read the differing opinions expressed by Mr Metcalfe and Mr Peckham on this matter in their respective proofs and rebuttals, none of this evidence was tested by cross-examination, and I am therefore unable to come to a firm view on the merits of either position. But more importantly, I do not need to, as the Supplementary SoCG on noise matters showed that with the conditions as finally agreed between the 2 parties – including the more restrictive delivery hours - both sides were satisfied that no significant adverse impact would arise. As such it was not necessary for me to take this matter any further.
21. The upshot, however, is that in these circumstances I cannot say that the appellant has acted unreasonably. It held to its position on the acceptability of the noise impact during its preferred delivery periods, as it was quite entitled to do, and I note that this position had been accepted by the Council's EPO. Although the restricted delivery hours condition finally agreed upon could well have made such matters more certain at an earlier stage, there is nothing to suggest that the appellant was holding on to an unreasonable position, or otherwise acting unreasonably. With these points in mind I consider that the work undertaken by both the Council's noise witness and its barrister, in reaching this final position, was therefore necessary.
22. Taking all the above points into account I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. The application is therefore refused.

David Wildsmith

INSPECTOR