
Costs Decision

Site visit made on 30 May 2024

by John Felgate BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 June 2024

Costs application in relation to Appeal Ref: APP/U4610/W/24/3338086 8 Station Avenue, Coventry CV4 9HS

- 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 Mohammed Abubakir for a full award of costs against Coventry City Council.
 - The appeal was against the grant subject to conditions of planning permission for change of use from hot food takeaway/café to retail.
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Decision

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

Reasons

2. The Planning Practice Guidance advises that costs may only be awarded against a party who has behaved unreasonably, and thereby caused another to incur unnecessary or wasted expense, in the appeal process. Consequently, in order for an award to be justified, it is necessary for the applicant to demonstrate not only that unreasonable behaviour has taken place, but also that this was the direct cause of unnecessary expense; and also that this was incurred in contesting the appeal itself, rather than in any other way.
3. In the present case, the appellant Mr Abubakir states that his main aim throughout was to secure a permission that would allow the premises to be open for longer than the previously permitted hours. Initially, it appears that Council officers suggested this should be done by means of a Section 73 application, for a variation of the existing condition, and an application was submitted accordingly. But later, officers changed their minds and requested that this first application be withdrawn, and be replaced by an application for a change of use. This led to the Council's decision being delayed for some months beyond what the appellant considers should have been necessary. It is argued that this delay was the cause of the business needing to close for some time, and a new tenant having to be found. When the application was eventually put to the Planning Committee, the permitted hours were reduced to less than those recommended by officers, and the appellant questions whether Committee members properly understood that, for him, the extended hours were the main purpose of the application.
4. The Council's change of mind on the procedural question, between S73 or a change of use, indicates that they themselves now see their initial advice to the appellant as erroneous. Given the particular circumstances of this site, with the possibility of permitted development rights, but also considerations relating

to mixed use or sui-generis use, the issue was evidently not as simple as it may have seemed at first sight. But nevertheless, more care should have been taken. Consequently, whilst I have no doubt that the initial advice was given in good faith, in the circumstances it seems to me that in giving that advice the Council acted unreasonably.

5. However, there is no evidence that this mistake, or the resultant delay, made any difference to the Council's eventual decision. It follows that, even if the correct advice had been given, and the correct procedure followed from the start, the Council would still have been likely to have imposed the same limits on the opening hours. The appeal would therefore still have been necessary, and similar costs incurred in that process. In this regard therefore, the Council's unreasonable behaviour does not appear to have led the appellant to incur unnecessary or wasted expense.
6. With regard to the effects of the delay on the operation of the business, including any loss of rent or takings, the appellant's assertions have not been substantiated with any evidence. But in any event, any such losses would not meet the test of having been incurred within the appeal process. Any such claim would therefore fall outside the scope of a costs award.
7. Turning to the matters raised in relation to the Planning Committee, I have paid careful regard to the advice given to members. I agree that the officers' report was not without shortcomings. The report presented a somewhat confused account of the application, and as to the reasons why planning permission for the change of use was required. But nevertheless, it did make clear that the question of the hours was seen as an important consideration. This is evident from the opening Summary, which stated that the application *"seeks planning permission for alternative hours of operation, as well as change of use..."*, and also paragraph 1.4 which stated that *"...the main consideration in regard to this application is the impact the variation of condition would have on residential amenity"*. Whilst not necessarily endorsing these comments, it seems to me that Committee members reading these paragraphs could not have failed to be aware that the matter of the hours was an important issue before them.
8. With regard to the officers' recommendation, the report was again not without some flaws. In paragraph 2.5, the report stated that *"...it is the considered opinion that the hours of operation ...should be reduced to 07.30am – 9pm..."*. Whereas, paragraph 2.3 stated that *"an agreement"* had been reached (although it is not stated with whom), relating to hours of 06.00 – 23.00; albeit that this was subject to a one-year temporary period. In addition, the Committee Minutes also state that a late representation was received from the Environmental Protection department, 'recommending' 07.00 – 20.00. I am therefore inclined to agree that there may have been a lack of clarity as to which hours were actually being recommended by the officers advising the Committee. These shortcomings were unreasonable. But all of the alternatives were clearly made known to Committee members, and there is no suggestion that members were unaware of the scope available to them to come to their own decision. On balance, I find no evidence that the poor quality of the advice given by officers on this occasion had any significant influence on the Committee's eventual decision regarding the hours condition. It therefore seems likely that, even had the officers' report been clearer as to the

recommendation, Condition 2 would have still been imposed in its present form, and thus the appeal would still have been necessary.

9. In this context, I also note that there appears to be a difference between the hours which are stated to have been agreed in the Minutes, of 07.00 – 20.00, and those which appear in the Council's decision notice, of 07.30 – 20.00. It is not clear which of these morning opening times was intended. This unexplained discrepancy therefore seems to me to amount to another instance of unreasonable behaviour. However, the appellant has made it clear throughout that his preferred opening times would be 06.00 - 23.00. So, even if the slightly more generous starting time suggested in the Minutes had been carried through into condition 2 of the decision notice, this would not have given the appellant the times that he was seeking. Again therefore, it appears that the appeal would still have been needed, and was not made necessary by the Council's error.
10. Further errors and confusion are also apparent in paragraph 4.3 of the Council's officer report, which refers to a proposed outbuilding; and in an unnumbered paragraph which states that developer contributions would be required. Neither of these appears to be relevant to the application. Overall, the Council's handling of the application fell well short of the standards that should be expected. However, none of these matters appears to have affected the outcome, and thus none has had any evident bearing either on the need for the appeal, or the costs incurred in it.
11. With regard to the merits of the Council's decision itself, although I have come to a different view as to the opening hours that are acceptable in this location, this does not mean that the Council's decision was unreasonable. Ultimately, the decision turned on the specific circumstances of the site and the proposed use. As such, it depended on a planning judgement. In these circumstances, the decision reached by the Council was not unreasonable.
12. In summary, although the Council's handling of the application did amount to unreasonable behaviour in a number of respects, there is no evidence that this had any bearing on the need for an appeal, or added to the costs incurred by the appellant in that process. I therefore conclude that a costs award has not been shown to be justified.

J Felgate

INSPECTOR