



Costs Decision

Inquiry held on 2 to 5 July 2024

Site visits made on 1 and 4 July 2024

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12TH JULY 2024

**Costs application in relation to Appeal Ref: APP/L5810/C/24/3339372
Petersham Nurseries Ltd, Petersham Road, Petersham, Richmond,
TW10 7AB**

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Francesco Boglione of Petersham Nurseries Limited for a full award of costs against the London Borough of Richmond-upon-Thames.
 - The inquiry was in connection with an appeal against an enforcement notice alleging a failure to comply with condition Nos U27543NS04 and U27544NS05 of planning permission Ref 08/4312/FUL granted on 29 July 2009.
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Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (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. Costs may be awarded on procedural or substantive grounds. The PPG lists examples of unreasonable behaviour.

The case made by the applicant

3. In summary, the applicant claims that the Council has displayed unreasonable behaviour resulting in wasted and unnecessary expense in the appeal process as follows: -
 - The Council has been unable to substantiate its position that the breach of planning control would cause any harm in respect of all the reasons for issuing the notice.
 - The Council do not dispute any of the findings in the appellant's noise and lighting assessments and the concerns raised about traffic movements and human activity associated with the breach of planning control have not been based on an objective assessment. In respect of noise and disturbance, the Council relied heavily on complaints which were not substantiated, and some were accepted at the inquiry as being inaccurate or unconnected with Petersham Nurseries. The appellant should not have had to complete a noise assessment in this context and the noise/disturbance case that was maintained by the Council was done so without any reasonable technical evidence.

- No rebuttals were provided in respect of the appellant's technical evidence which was submitted as part of the appeal, and which was the subject of further public consultation. There was no attempt to even try to narrow issues at this stage.
- The Council has not suitably explained how or why cumulative harm would be caused from vehicle movements and/or parking and did not carry out a baseline assessment of its own prior to taking enforcement action.
- The Council should have considered the weak contribution that the site makes to the Metropolitan Open Land (MOL) and its witness conceded, at cross examination stage, that there was not in fact any conflict with two of the MOL purposes, i.e., paragraph 143(a) and (c) of the National Planning Policy Framework 2023 (the Framework. Furthermore, the Council has not reasonably substantiated its position that there would be conflict with the MOL's purpose in paragraph 143(d) of the Framework.
- The Council has failed to substantiate its position in respect of adverse lighting impacts.
- The Council has failed to consider the impacts on the business, and social and economic impacts, in respect of its decision that it was expedient to take enforcement action.

The response of the Council

4. In summary, the Council's response to the appellant's application for costs is as follows: -
- The costs application should be considered in the context of unauthorised development taking place as well as the Council's refusal previously to extend café/restaurant opening hours.
 - The effect of the breach of planning control on the MOL is a matter of planning judgement and, in this regard, the Council has substantiated its position. The contribution that the site makes to the MOL is not relevant when considering whether the breach of planning control has or has not resulted in inappropriate development in the MOL.
 - The Council did not rely on conflict with MOL purposes in paragraph 154 (a) and 154 (c) of the Framework in its proof of evidence and it was reasonable for it to reach the view that harm would be caused to the purpose in paragraph 154 (d) of the Framework. This is notwithstanding its conclusion that no harm would be caused to the Petersham Conservation Area, or to designated or non-designated heritage assets arising from the breach of planning control.
 - The Council was not making a technical case in respect of the reasons for issuing the enforcement notice. Therefore, it did not need to put in technical evidence on the issues raised in the reasons for issuing the enforcement notice.
 - Noise and disturbance in respect of the breach of planning control was raised by the community in the form of nine complaints sent to the local planning authority (LPA). Furthermore, noise complaints were raised in respect of the

lawful development certificate application which was considered by the LPA prior to a decision being made to take enforcement action.

- The LPA did consider the benefits of the breach of planning control when it decided to underenforce. The appellant spoke at the Planning Committee meeting and set out the benefits it relied on. This included a detailed written submission on 12 September 2023 explaining the benefits that would be lost if enforcement action was taken.
- Some of the technical reports submitted by the appellant were not relevant to the reasons for issuing the enforcement notice such as those relating to air quality, ecology, and heritage matters.

Whether unreasonable behaviour resulting in unnecessary or wasted expense

5. While I have not agreed with the Council that the breach of planning control amounts to inappropriate development in the MOL, this does not mean that it failed to reasonably substantiate its position on this matter. It is largely a matter of planning judgement in terms of whether the extent of additional traffic, car parking, movements and activity on surrounding roads and pathways, arising from the breach of planning control, had caused cumulative visual harm to the openness and/or character of the MOL/area.
6. I find that the Council's 'cumulative' case was essentially that while there is some car parking and activity in surrounding roads when Petersham Road is closed (i.e., in the evening), use of the site in the evening for café/restaurant purposes adds more traffic and activity to surrounding roads and pathways than would otherwise be the case. I am satisfied that the Council did reasonably substantiate its position that cumulative harm would be caused to the openness of the MOL, the character of the area, and in general disturbance terms, even though I did not agree with them on these matters in my enforcement appeal decision. These are essentially matters of subjective planning judgement.
7. Notwithstanding the above, the Council's witness agreed at the inquiry that there would be no conflict with some of the purposes of the MOL, i.e., no conflict with paragraphs 143(a) and (c) of the Framework. However, the evidence does not indicate that the Council were specifically claiming any such conflict in terms of their statement of case or proof of evidence. I do not interpret the comment made in paragraph 2.14 of the Council's statement of case that '*the appeal site has been designated as part of the MOL to prevent urban sprawl and keep it in open use*' as inferring specific conflict with any MOL purpose. In this regard, I do not find that the Council has displayed unreasonable behaviour resulting in wasted time and expense for the appellant in addressing these matters.
8. However, and, as per my reasoning in my enforcement appeal decision, while the Council's witness maintained in cross examination that there was conflict with paragraph 143(d) of the Framework, for the reasons outlined in my enforcement appeal decision I do not find that this position was reasonably substantiated. Therefore, the appellant was put to wasted time and expense in dealing with this matter.
9. In considering whether the breach of planning control amounted to inappropriate development in the MOL, it was not necessary for the Council to

consider the contribution that the appeal site makes to the MOL. The appeal site is in the MOL and, accordingly, it was necessary that the breach of planning control was assessed against the requirements of local and national planning policies. When considering whether the resultant development amounts to inappropriate development in the MOL, local and national planning policies do not require the decision maker to consider what contribution the site makes to the MOL. The appellant focussed on this matter at the inquiry, but I do not agree that Council were required to do this. Whether the site is or is not included in the MOL in the future is a matter that is required to be considered as part of a development plan review.

10. In respect of alleged harm caused to surrounding residents from noise, I find that the Council relied too heavily on the so-called noise complaints received. The evidence is that some of these complaints either did not relate to Petersham Nurseries or were not fully investigated with the submission of detailed records of any findings as part of the appeal process.
11. I do not find that the Council undertook a thorough and objective assessment of noise in considering whether it was expedient to take enforcement action and, furthermore, upon receipt of the appellant's noise assessment/surveys as part of the appeal, did not opt to provide a rebuttal and/or attempt to concede certain points or to narrow issues. In fact, at the inquiry the Council raised no objection at all in terms of the findings in the appellant's noise assessment.
12. The Council's witness said at the inquiry that he had discussed the appellant's noise assessment with relevant experts. However, he provided no comment in terms of what was said. In respect of this issue, which incidentally I do find is a technical matter, I find that the Council has displayed unreasonable behaviour resulting in the applicant wasting time and expense.
13. In terms of alleged harm caused from lighting, I do not find that the Council has reasonably substantiated most of its views. While it may not have been necessary for it to have undertaken its own technical assessment prior to deciding that it was expedient to take enforcement action in terms of lighting issues, it was necessary for it to substantiate its concerns both in writing and at the inquiry. It was confirmed and agreed at the case management conference (CMC) (and in the subsequent note from me) that in terms of lighting the concern of the Council related to *'car headlights and external lights, including lights around the perimeter of the site (including on Church Lane)'*. Reference is specifically made to *'light from the site'*, *'vehicle light'* and *'headlights at night'* in the Council's statement of case.
14. In my decision, I have found that the festoon lighting on Church Lane has led to some harm being caused to the character of the area and to foraging bats. It is only in this regard that I find that the Council's decision to take enforcement action was necessary. However, in respect of the alleged lighting harm from any other external lighting at the site, coupled with car headlights, I consider that the Council did not reasonably substantiate its position and hence acted unreasonably resulting in wasted time and expense on the part of the applicant. Again, the Council did not provide a rebuttal in terms of the appellant's technical evidence relating to lighting and/or attempt to concede certain points or to narrow issues at the inquiry.
15. I find that the Council has reasonably substantiated its position in terms of alleged harm caused to the character of the area from vehicular parking,

movements, and human activity in the evening. While I do not agree with the Council's position on the character issue, I find that it is reasonable that the Council took the view that more vehicles and human activity in surrounding streets and pathways in the evening, in addition to those vehicles and human activity unconnected with Petersham Road, had resulted in harm being caused to the character of the area. This is essentially a matter of planning judgement, and, in this regard, I do not find that the Council has displayed unreasonable behaviour resulting in wasted time and expense in appeal process.

16. While it would appear that the Council did not liaise directly with the appellant about the likely impact of the issued notice on the viability of the business, or its impact on social, economic or other benefits, I am not certain that it would have been able to reach a definitive and full view on this, in any event, owing to the fact that at the inquiry Ms Boglione indicated that the company was not in a position to disclose financial information and/or accounts due to '*commercial sensitivity*' issues. I accept that it would have perhaps been prudent for the Council to have discussed matters more closely with the appellant but, in this case, there is no dispute between the parties that there was a breach of planning control occurring when the notice was issued.
17. There is extensive planning history relating to the appeal site. Given the high-profile nature of Petersham Nurseries as a garden centre and café/restaurant in the Borough and beyond, I find it unlikely that the Council's Planning Committee, who considered the expediency of taking enforcement action, would not have been generally aware of the various benefits associated with the operation of the business.
18. In any event, I find that the general benefits attributed to Petersham Nurseries, including those benefits arising from the evening 'supper clubs', was broadly considered by the Council in deciding that it was expedient to take enforcement action. I accept that the comments in the enforcement committee report about the restaurant operation being '*highly successful*' and the restaurant operations being '*highly regarded*' is a broad-brush approach to the consideration of so-called benefits. However, the evidence is that the appellant also spoke at the Planning Committee meeting when enforcement action was being considered by elected members, and outlined the benefits that would be lost if enforcement action was taken. The evidence is that this included a detailed written submission on 12 September 2023.
19. I am therefore satisfied that the evidence indicates that the benefits arising from the unauthorised development were reasonably considered by the Planning Committee, and, in a balanced manner, as part of the enforcement decision making process. On balance, I do not therefore consider that the Council acted unreasonably in respect of this matter.
20. I agree with the appellant that some of the technical reports (e.g., air quality, heritage, and ecology) were not needed to address the reasons for issuing the Notice. I assume that the appellant prepared these to respond to third party representations and given my designated heritage asset statutory duties. In this regard, the Council has not demonstrated unreasonable behaviour leading to wasted time and expense in the appeal process.
21. I accept that the appellant has operated in breach of two planning conditions. Clearly, unauthorised development should not be condoned. However, this does not obviate the need for the Council to reasonably substantiate its

position in terms of the expediency of taking enforcement action. As outlined above, the Council has not reasonably substantiated its reasons for taking enforcement action in some identified areas. While the Council may have refused planning permission previously for extending opening hours for the café/restaurant, this does not in itself mean that it is not required to substantiate all the reasons for taking enforcement action.

Conclusion

22. For the reasons given above, I conclude that the Council has displayed unreasonable behaviour resulting in unnecessary or wasted expense in respect of the appellant preparing for and addressing alleged conflict with the MOL purpose as outlined in paragraph 143 (d) of the National Planning Policy Framework 2023, lighting impacts from car headlights and external lighting from the appeal site (excluding the Festoon lights on Church Lane), and noise impacts. Consequently, a partial award of costs is therefore warranted.

Costs Order

23. 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 London Borough of Richmond-upon-Thames shall pay to Petersham Nurseries Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in preparing for and addressing the alleged conflict with the MOL purpose as outlined in paragraph 143 (d) of the National Planning Policy Framework 2023, lighting impacts from car headlights and external lighting from the appeal site (excluding the Festoon lights on Church Lane), and noise impacts; such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to the London Borough of Richmond-upon-Thames, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

D Hartley

INSPECTOR