

Sandown Park Appeal – APP/K3605/W/20/3249790

Grounds of Partial Costs Award

30 November 2020

1. Costs can be awarded against a party in a planning appeal if that party has behaved unreasonably, and if the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Both categories are satisfied here, under each heading.
2. The allegation of unreasonable behaviour is made by the appellant against the local authority on the following grounds.

Reason for Refusal 1: Air Quality

3. The original planning application made on 22 February 2019 was accompanied by an Environmental Statement (CD5.43, Chapter 8) which concluded that, based on the worst case predicted impact, the overall significance of potential air quality effects was classified as negligible. In addition, air quality effects as a result of the operation of the development were considered to be not significant. This report was not challenged by the local authority's Environmental Health Officer, and the officers report to the planning committee on 1 October 2019 confirmed that the EHO had no objection on air quality matters subject to a compliance with the suggested conditions (CD7.3, Paragraph 9.8.7.6), and officers recommended approval of planning permission. However, this information and the officer recommendation was rejected by members of the planning committee on 1 October 2019 without any additional technical evidence before them to address any alternative scenario including alleged increased congestion as a result of the proposal. Reason for refusal 1 on the refusal notice dated 3 October 2019 makes reference to air quality as an "other harm". As a consequence of the reason for refusal, the appellant reasonably addressed air quality matters in its statement of case, served on 25 March 2020 (SOC 1/17).
4. In its statement of case of 18 June 2020 (SOC2/1) (and confirmed at the Case Management Conference on 20 August 2020) it was clear that the local authority continued to maintain its case that there was harm to air quality caused by the proposed development, including during the public inquiry, but without any technical evidence relied on to demonstrate such harm. As a result of this, and notwithstanding the lack of evidence produced, the appellant incurred expense in addressing air quality matters in evidence (JCR6) (incurring not only the costs of the air quality consultant, but also legal and planning consultancy fees arising from the production of such evidence).
5. At no time during the appeal process has the local authority produced any technical evidence to justify its case and assertions that there would be any harm to air quality caused by the development. It was unreasonable for the local authority to fail to do so, and continue to assert such harm without any technical evidence to quantify or substantiate this allegation when an allegation of any harm had been refuted by the appellant based on the technical evidence of an air quality consultant. This constituted unreasonable behaviour which caused unnecessary and wasted expense to the appellant during the appeal process.

Reason for Refusal 2: Heritage

6. The original planning application was accompanied by a technical statement (CD5.39) by a suitably qualified heritage consultant (EDP) which confirmed that, in heritage terms, that the proposals are compliant with legislation and both local and national planning policy. This report was not challenged by the local authority officers or their consultants. However, it was rejected by members of the planning committee, without any other specialist or other evidence to dispute the heritage consultant's report, and a policy relating to heritage matters (DM12) was included in the second reason for refusal as "other harm" issued in the refusal notice dated 3 October 2029. The conclusion that there was harm to heritage was unreasonable in the circumstances.
7. As a result of the reference to policy DM12 in the refusal notice, the appellant instructed the heritage consultant to draft a response to be included in its statement of case which was issued on 25 March 2020 (SOC1/12). Subsequently, the local authority in its statement of case (which was delivered on 18 June 2020, two weeks after the Inspector's deadline for lodging it) confirmed that the reference to DM12 in the decision notice was an error, and the local authority withdrew the heritage objection. However, by this time, the appellant had incurred costs in addressing the heritage objection contained in reason for refusal 2.
8. The above constitutes unreasonable behaviour by the local authority which caused the appellant to incur unnecessary and wasted expense during the appeal process.

Unreasonable behaviour due to the local authority's failure to adhere to clear PINS advice in Procedural Guide: Planning Appeals – England and the Inspector's directions concerning the submission of evidence

9. Prior to the Case Management Conference (CMC) on 20 August 2020, the appellant had made it clear in a letter to the Inspector dated 31 July 2020 (Annex 1 herewith) the inadequacies of the local authority's Statement of Case. See the letter for the full terms and effects of the points made. Further, the letter confirmed that the Inquiry Procedure Rules require notification of all documents to be disclosed, and PINS Procedural Guide (particularly section J3) requires full disclosure of the details of a local authority's case and the arguments being put forward by them. The letter also confirmed that, if the local authority was to rely on technical evidence or introduce new facts, matters, arguments or methodology in its proofs of evidence, the appellant would make an application for costs for unreasonable behaviour. In that context, the appellant asked that the local authority immediately disclose all such evidence and arguments at an early stage.
10. At the CMC on 20 August 2020, the local authority (via its Counsel Dr Ashley Bowes) confirmed to the Inspector and appellant that the local authority's evidence would not include a new Landscape and Visual Impact Assessment.
11. At the CMC the Inspector directed that proofs of evidence be no longer than 3,000 words if possible (annex 2). The appellant's consultancy team went to great lengths to respect this, paring draft proofs down to comply with the Inspector's direction. However, the local authority

totally ignored the Inspector's direction, and proofs of evidence were considerably longer than 3,000 words, in particular Mr Webster's proof, which was 26,956 words, and 70 pages long.

12. Contrary to the local authority's submissions at the CMC – a Landscape and Visual Impact Assessment was provided in Mr Webster's proof of evidence. Mr Webster had no good answer under cross examination as to why this information had not been forthcoming earlier, or why notice had not been given to the Inspector and appellant. Further, under cross examination, Mr Webster confirmed that he could not give expert evidence on planning, to which much of his proof of evidence was directed.
13. It was unreasonable for the local authority to provide a totally inadequate statement of case on, in particular, landscape issues, not to properly and in a timely manner engage with the appellant and to submit proofs of evidence on landscape containing totally new landscape assessment based on previously undisclosed information and methodology. Until the exchange of proofs, there was no warning sent to, or contact with the appellant by e-mail, telephone or otherwise and it was wholly in defiance on the Inspector's direction at the CMC, confirmed in writing as well as the PINS Procedural Guide Section J. This constituted unreasonable behaviour which directly caused the appellant to incur unnecessary and wasted expense in the appeal process.
14. By way of additional information, this required detailed work by the appellant's consultancy team, and cost to the appellant. This work was not anticipated in the local authority's Statement of Case (SOC2/1), needed to be done after exchange of proof for the first time, and at very short notice when the consultancy team had professional time allotted for other clients and work. It was extensive and required preparation of rebuttal evidence which was kept at a minimum having regard to the guidance.