
Costs Decision

Inquiry held on 26 to 29 January 2016

Site visit made on 28 January 2016

by Anthony Lyman BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 21 March 2016

Costs application in relation to Appeal Ref: APP/L3245/W/15/3127978 Land to the rear of 10 Gorse Lane, Bayston Hill, Shropshire, SY3 0JJ

- 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 Shropshire Council for a partial award of costs against Galliers Homes.
 - The inquiry was in connection with an appeal against the refusal of outline planning permission for residential development (with access).
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Decision

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

The submissions for Shropshire Council

2. At the opening of the Inquiry, the Council gave notice of its intention to seek an award of costs relating to their expenditure incurred in dealing with the issue of five year housing land supply (HLS). The publication of a number of recent appeal decisions, particularly one relating to Longden Road, Shrewsbury¹, should have led to the appellants withdrawing their evidence on HLS. Despite being invited to do so on two occasions before the Inquiry, the appellants pursued the issue.
3. Procedurally, the appellants acted unreasonably by introducing at the Inquiry a new argument, unsupported by any evidence, that the housing requirement of 27,500 was not acceptable. The appellants' evidence to the Inquiry was based on that requirement figure and provided no alternative. The appellants' behaviour was substantively unreasonable in that the Inquiry followed a recently published appeal decision in which almost identical evidence was dismissed by that Inspector, including evidence from the appellants' consultant in this appeal, raising the same points.
4. The importance of the Shropshire Council Site Allocations and Management of Development Plan (SAMDev) Inspector's Report, and subsequent appeal Decisions, should have prompted a rapid change in the appellants' position on HLS. The appellants have not adjusted their position to the changes adopted by the LPA in terms of supply. Paragraph 9 of the Conover Decision² rejects the appellants' consultants' arguments regarding an annualised versus the Council's phased approach. It is wholly unreasonable that the appellants failed

¹ APP/L3245/W/15/3011886

² APP/L3245/W/15/3007929

to accept that Decision, and promoted the same arguments at this Inquiry. Had the appellants not pursued their HLS arguments, the Inquiry could have concluded in three days.

The response by Galliers Homes

5. The appellants had reason to ensure that HLS was satisfactorily covered at the Inquiry, having incurred significant additional costs on this matter following the change in procedure from a Hearing to an Inquiry, largely as a result of the Council having submitted late evidence on HLS before the Hearing was opened. The HLS situation can change between local plan examination and a s78 appeal, and appeal decisions in this area are not consistent.
6. The appellants accept that, since the presentation of their consultant's evidence to two other appeals³, nothing significant had changed to any of the sites in the supply. However, the appellants argue that there are three reasons why further discussion was merited at this Inquiry. These include, i) that the Decisions referred to above did not reflect any discussions about the SAMDev Inspector's report which did not assess the HLS against an objectively assessed need; ii) in the case of the Condover Hearing, only limited time was given to discussing HLS, and the lack of sufficient evidence at the Hearing is reflected in the Inspector's Decision; iii) the appellants' original appeal statement in June 2015, discussed both housing supply and housing delivery.
7. The appellants consider that a full objectively assessed housing need (FOAN) would be higher than the core strategy figure of 27,500. However, in the absence of a FOAN, the appellants used the core strategy figure and deny that the lack of a FOAN was an entirely new argument at the Inquiry. Without a FOAN a Council cannot demonstrate a HLS.
8. The majority of work and preparation in relation to this topic had already been undertaken by the parties before the Inquiry, and the only possible cost in contention is the two hours of Inquiry time spent on the matter.

Reasons

9. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only 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.
10. The week before the Inquiry opened, two appeal Decisions had been published, in which each Inspector had concluded that Shropshire Council could demonstrate a HLS. Furthermore, the SAMDev had been adopted by the Council only the month before the Inquiry following the Inspector's Report that found it sound. The appellants' planning and HLS expert witness had given evidence at one of the above appeals challenging the existence of an HLS using arguments that appeared similar to those presented to this Inquiry. Given these very recent events, the advice in PPG, and the Court of Appeal Judgement relating to Hunston Properties Limited⁴, I questioned in my opening whether it was necessary for Inquiry time to be spent discussing in depth

³ APP/L3245/W/15/3007929 (Condover) and APP/L3245/W/15/3003171 (West Felton)

⁴ St Albans City and District Council v Hunston Properties Ltd and Secretary of State for Communities and Local Government, [2013] EWCA Civ 1610.

whether or not the Council had a five year HLS, unless there had been any recent significant statistical changes.

11. The appellants stated that they wished to proceed with the issue at the Inquiry despite the Council's notification that a costs application would ensue. However, the appellants' cross examination of the Council's expert witness on HLS, focussed initially on the validity of the housing requirement of 27,500 homes. The appellants argued that, as it was not a FOAN, a HLS could not be demonstrated, and referred to a recent appeal Decision for a site in Leicestershire⁵. This was not an argument put forward in the appellants' proof of evidence which was based on the 27,500 figure. The appellants' evidence had argued that a HLS did not exist, largely on the basis of the difference between using an annualised approach, compared to the Council's use of a phased trajectory, and on the deliverability of some sites.
12. Following an objection from the Council to the introduction of new evidence, and an interjection by myself about the introduction of the new argument, the appellants subsequently terminated the cross examination, withdrew their evidence on HLS and stated that their witness would not be called on that matter. The introduction of a new issue in cross examination, without evidence to support the proposition that the requirement figure of 27,500 was incorrect, was procedurally unreasonable behaviour by the appellants.
13. In response to this costs application, the appellants stated that they had wished to pursue the arguments on HLS at this Inquiry and found it frustrating that *'this case was upgraded to an Inquiry in order to discuss 5YS but then curtailed due to the outcome of a Hearing that gave around 2 hours discussion time to 5YS'*. I attach little weight to this argument given the amount of evidence relating to the existence of an HLS in recent Decisions/SAMDev Inspector's Report, which cumulatively amounted to far more than the 2 hour discussion at one Hearing claimed by the appellants.
14. A previous appeal decision is a material consideration that should be taken into account having regard to the importance of ensuring consistency in decisions⁶. PPG advises that an appellant is at risk of an award of costs being made against them if, amongst other things, the appeal follows a recent appeal decision in respect of a similar development where the Secretary of State or an Inspector decided that the proposal was unacceptable, and circumstances have not materially changed. Although HLS figures can fluctuate, given the very recent publication of the Decisions referred to above, one of which considered evidence from the appellants' expert witness similar to that put forward in this appeal, I consider that the appellants' behaviour was substantively unreasonable.
15. I find, therefore, that unreasonable behaviour resulting in unnecessary expense has occurred, but only in respect of the housing land supply issue. A partial award of costs is warranted in this respect.

Costs Order

16. 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

⁵ APP/G2435/W/15/3005052

⁶ North Wiltshire District Council v Secretary of State for the Environment and Clover – (1993) 65 P. & C.R. 137

Galliers Homes shall pay to Shropshire Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred relating to the housing land supply issue.

17. The applicant is now invited to submit to Galliers Homes to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Anthony Lyman

INSPECTOR