

Costs Decision

by Phillip J G Ware BSc(Hons) DipTP MRTPI

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

Decision date: 24 February 2017

**Costs application in relation to Appeal Ref: APP/U1620/W/16/3149412
Land to the south of Winnycroft Lane and north of the M5 motorway,
Matson, Gloucester**

- 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 Barwood Development Securities Ltd for a full award of costs against Gloucester City Council.
 - The Inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for the erection of up to 420 dwellings and community space/building as well as associated landscaping, public open space, access, drainage, infrastructure, earthworks and other ancillary enabling works.
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Decision

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

The submissions for Barwood Development Securities Ltd

2. The Council has sought to prevent or delay development that should clearly be permitted. The development has been considered by the Council's Planning Committee on four occasions, always subject to positive recommendations, but the resolutions to grant permission subject to various amounts of affordable housing has always exceeded officers' recommendations. It was unreasonable to disregard the advice of officers, supported by the technical expertise of independent valuers. The Council was advised by its officers in April 2016 that such action would expose the authority to a costs claim.
 3. The resolutions to grant permission subject to 20% affordable housing were a rigid expectation rather than a balanced judgement. The Council were fully aware that this amount of affordable housing was not deliverable. The development should clearly be permitted in the light of policy and other material considerations.
 4. The Council then failed to produce evidence to support its most recent position that not less than 10% affordable housing should be provided. It made generalised assertions unsupported by objective analysis and did not produce respectable evidence to justify the Council's stance. It commissioned but then discarded viability advice. The evidence before the Inquiry was unjustified for a number of reasons, including changed evidence related to values and, most importantly, a flawed cash flow.
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5. The authority ignored and/or failed to give sufficient weight to national policy in terms of the need to release land given the absence of a five year housing land supply, national support for sustainable development, and the necessity of a flexible approach towards s106 requirements.
6. The Council failed to consider any more helpful approach, such as the appellant's suggestion of binding RICS arbitration. The appellant is entitled to full costs for all these substantive matters.
7. In terms of procedural matters the authority failed to adhere to deadlines and delayed matters unreasonably. The Council's change in viability advisers, clearly intended to allow the Council to obtain advice favourable to their position, confused and delayed matters. Additionally, the Council did not release its cashflow evidence, despite repeated requests, until a week prior to the Inquiry. It also failed to agree common ground in a timely manner. Despite a very full draft Statement of Common Ground being provided in April 2016, common ground was not finally settled until the first day of the Inquiry.
8. The change from a bilateral Obligation to a unilateral Obligation was necessitated by the Council's position. It was not a 'game changer' and did not justify further delay on the Council's part.
9. The appellant was put to unnecessary expense in a range of substantive and procedural respects. If only the procedural element is subject to an award of costs, then the wasted time spent dealing with the Statement of Common Ground, the Statement of Agreed Valuation Facts (SAVF) and requests for cashflow, together with one day of unnecessary Inquiry time, should be the subject of a partial award.

The response by Gloucester City Council

10. The planning application was unclear in relation to the affordable housing element and was the subject of extensive negotiations and discussions with the applicant. It was not delayed unreasonably. For example a viability review was submitted by the appellant some seven months after the application was received. Discussions have continued with the appellants throughout the application and appeal process.
11. The authority gave due weight to national policy and the five year housing land supply position, but gave greater weight to the need for affordable housing and a balanced community on the site. These are clearly material considerations.
12. The Council has sought to deal with the proposal in a positive manner, and at no time has there been a recommendation or resolution that the application should be refused.
13. The Council's position has been clear since the July 2016 Committee resolution, which was to seek not less than 10% affordable housing. That was the case put to the Inquiry by highly competent experts.
14. The Council's advocate signed the SAVF after it was made clear that the Council had considerable reservations about the baseline figure. The witness's subsequent evidence proceeded from that heavily caveated starting point and had to deal with the appellant's ever changing viability evidence. The assertion that the Council's witness resiled from the SAVF (in relation to the revenue

figure) is incorrect for that reason. He was "overtly pressurised into venturing a different preferred value".

15. The appellant's draft Statement of Common Ground was not a concise document but a long and detailed statement comprising 54 pages. The Council could have agreed a very basic statement, but this would not have been helpful. Considerable progress had been made with the statement but the arrival of a unilateral Obligation in early November was a 'game changer' which had the effect of putting consideration of the statement on hold until there was clarification of the appellant's changed position.
16. The appellant has failed to identify the alleged unnecessary expenditure which it attributes to the alleged procedural misconduct. The assertion of expense is global and, in any event, the matters could not have led to unnecessary expenditure. The evidence was dealt with in a straightforward manner and there were no delays and no adjournments.

Reasons

17. The Planning Practice Guidance 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.
18. The Council considered this proposal on a number of occasions and each time the authority took a view different from that recommended by officers and retained advisors. On each occasion the Council resolved to support the proposal subject to a certain level of affordable housing, and it was the approach towards affordable housing where Council Members took a different view from officers. But this is not unreasonable provided the authority was able to substantiate its position on appeal.
19. The Council's case was presented at the Inquiry by appropriately qualified and experienced witnesses, who gave detailed evidence in support of the stance of the authority. This evidence was more than general assertion and comprised a comparatively detailed analysis and professional opinion.
20. There were a number of aspects of the Council's evidence which, in my decision on the s78 appeal, I found less than persuasive. These included the cash flow analysis and the land value position.
21. In relation to the land value position, the advocate signed the SAVF on behalf of the authority. This is unexceptional. However the Council also stated that this was only after it was made clear that the Council had considerable reservations about the baseline figure. I have no record or recollection of any such reservations being expressed, and I would not have accepted an agreed statement with such reservations. It was then stated in the Council's response to the costs claim that the witness was "overtly pressurised into venturing a different preferred value". This is incorrect. The witness was asked by the appellant's advocate on three occasions which land value he preferred. The advocate then indicated that he was moving on, but I intervened to explain that I was left uncertain as to the position, and asked the witness for clarification – which he gave. At no time did the witness, or indeed his advocate, express any concern about the questions either from the appellant or myself, which did not amount to pressure to prefer any particular value and only sought clarity.

22. However, leaving these matters aside, the extent to which the authority gave weight to national policy, in relation to housing land supply, sustainable development, and a flexible approach is a matter of weight in the planning balance. Obviously the appellant placed great emphasis on these matters, but the authority also gave consideration to them in evidence. The fact that the Council concluded that these matters did not outweigh the perceived harm arising from the lack of affordable housing in the scheme does not mean that it acted unreasonably. This is a matter of planning judgement.
23. Overall the authority did not make vague or generalised assertions about the impact of the proposal, rather it put forward substantial evidence to support its position. The fact that I concluded that some of the analysis put forward by the authority was wanting does not mean that the authority acted unreasonably in putting it forward. In the light of the importance of the provision of affordable housing I conclude that the authority did not prevent or delay development which should clearly be permitted, having regard to the development plan, national policy and other material considerations. The appellant was not put to unnecessary expense in relation to substantive matters.
24. Turning to the appellant's claim concerning procedural matters it is clear that there were substantial discussions between the parties on a range of issues during the course of the appeal. Overall there appears to have been a reasonable level of cooperation. The result of these discussions was a Statement of Common Ground which was of considerable assistance in considering the appeal. At times this process could have been swifter, but these were complex matters, including a very substantial draft Statement of Common Ground put forward by the appellant and the change from a bilateral to a unilateral Obligation. There is nothing to demonstrate that the Council was acting in a deliberately tardy or unreasonable fashion. The procedural costs claim therefore fails.
25. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

P. J. G. Ware

Inspector

COSTS DOCUMENTS

1	Appellant's costs claim
2	Council's response to costs claim
3	Appellant's final comments