Costs Decision

Inquiry held on 13 – 15 December 2016

Site visit made on 13 December 2016

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 Gloucester City Council for a partial award of costs against Barwood Development Securities Ltd.
- 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.

Decision

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

The submissions for Gloucester City Council

2. The Council's claim for partial costs addresses the appellant's behaviour related to the emerging s106 Obligation which dealt with, amongst other matters, affordable housing and community facilities.

3. The background is that the course of discussions on the Statement of Common Ground was difficult and protracted. This was then complicated by the unexpected arrival of a draft unilateral Obligation with clauses which had not been previously discussed. There was then difficulty in obtaining clarification of the appellant's position on the Obligation, and the Council responded by way of rebuttal evidence.

4. The appellant, contrary to their stated practice, did not produce the draft Obligation at an early stage, or give full opportunity for comment. In particular the change at a late stage from a bilateral Obligation, which had been discussed for some time, to a unilateral Obligation put the authority in difficulties and was unreasonable. The Council's comments on the Obligation were treated as a waste of time by the appellants.

5. The Council presented detailed arguments regarding fundamental legal flaws in the draft unilateral Obligation, some of which were accepted by the appellant during the course of the Inquiry. The Council incurred the unnecessary expense of preparing these legal submissions and the appellant unreasonably refused to discuss the Obligation. The Council incurred wasted costs and was

prejudiced by the lack of proper negotiation on the draft Obligation. As a result the Council's detailed comments were "..frozen out and were not properly presented to or considered by the Inspector".

The response by Barwood Development Securities Ltd

6. It was stated at the Inquiry that the Council's advocate would wait to see what was being said against the authority before deciding whether to lodge a costs claim against the appellant. This does not conform to the guidance as, if the appellant had behaved unreasonably, this would have been apparent before seeing the appellant's costs claim. This is especially the case as most of the matters in the Council's claim related to matters which had taken place before the Inquiry opened.

7. The appellant agreed some of, but not all, the dates set out in the costs claim, but the appellant acted reasonably and speedily throughout the discussions on the Obligation. The Council's numerous comments were dealt with in a timely fashion and, in total, the Council had a six week period up to the close of the Inquiry to raise any points it wished. A total of 140 comments were made by the authority (including those made on behalf of the County Council) and all were addressed by the appellants, who made numerous changes to the document. However many of the Council's comments were very generalised and it was difficult to address them efficiently.

8. The suggestion that the Council's comments were 'frozen out' is strongly resisted. Two sessions dealing with the Obligation were held at the Inquiry dealing with legal issues of principle and matters of detail. The Council was given full opportunity to pursue any of the points it had made in correspondence, and the Inspector gave the Council ample opportunity to raise any concerns. There were no outstanding matters at the end of the Inquiry.

9. The Council's position on the s78 appeal was that it wished the Inspector to issue a 'minded to grant' letter subject to settling the s106 obligation in relation to the amount of affordable housing. This shows that the authority had no intention of agreeing any Obligation by the end of the Inquiry, and this would have put the appellant in the position of being unable to agree the affordable housing element. The appellant was entitled to submit a unilateral Obligation in a form of its choosing.

10. The work which the Council did on the Obligation would have had to be done in any event, regardless of the timing. There were no additional costs. The Council's legal submissions could have been avoided if the Council had accepted that a unilateral Obligation could be used, and provided comments on this approach. The points in the submissions were simply addressed by drafting changes following discussion at the Inquiry.

11. The Council wanted the chance to offer comments on the Obligation and it was given that chance over a sufficient period. The appellant was responsive to the Council's submissions and the remaining points were not raised at the Inquiry and cannot be pursued by the Council through the costs claim.

Reasons

12. 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.

13. The parties set out in some detail the (largely agreed) history of discussions between them related to the unilateral Obligation (which began life as a bilateral Obligation). The fact that these discussions took place is welcomed and is in accordance with guidance. The Council clearly made numerous comments on the principle and the detail of the emerging Obligation – some of which resulted in changes to the document and others which did not. That process is unexceptional and there is nothing in the history of the discussions which demonstrates unreasonable behaviour on the part of the appellants.

14. The Council's legal submissions on the draft Obligation, produced before the Inquiry, was a helpful document. It was part of the process of commenting upon the emerging Obligation, assisted the discussion at the Inquiry and resulted in a number of amendments to the draft. However the fact that the Council considered it necessary to submit that document does not in any way suggest that the appellants were behaving in an unreasonable manner.

15. The Council refers to the change from a bilateral Obligation, which had been discussed for some time, to a unilateral Obligation. Given the fundamental difference between the parties related to affordable housing, which was the sole ground of objection to the development by the Council, it must have been clear that a bilateral Obligation was never going to be concluded. The timing of the switch to a unilateral Obligation may have been comparatively late in the process, but the content of the Obligation remained similar in many respects.

16. The timescale of the discussions about the Obligation, which continued during the Inquiry itself, is the subject of complaint by the Council. The evidence suggests that there was around six weeks when discussions on the Obligation were in hand and this is more than sufficient for the Council to have made its comments. There is nothing related to the timescale which suggests that the appellant was behaving unreasonably in this respect.

17. The above matters do not demonstrate that the appellant behaved unreasonably in relation to the discussions related to the Obligation. In any event, the work which the Council did on the emerging Obligation would have had to be done at some stage in the process and there was no additional expense demonstrated.

18. The appellant's criticism of the timing of the Council's costs claim is noted, and certainly there does not seem to be any reason why lodging the claim was dependant on sight of the appellant's costs claim. However this does not go to the merits of the claim itself.

19. The Council also stated that their detailed comments on the Obligation were not properly presented to or considered by me. This allegation is most surprising as the Obligation was discussed in two separate sessions of the Inquiry. These sessions were in round table format and I heard in some detail from advocates and witnesses alike. At no stage was there any suggestion that the Council's views were not fully put to me, nor did the appellant seek to curtail discussions – which I would not allowed in any event. This matter adds nothing to the Council's claim for costs.

20. Overall, the guidance is that all those involved should behave in a reasonable way and follow good practice, including in terms of timeliness. Appellants should cooperate with the other party in discussing the appeal. I find that the appellants clearly heeded this advice. 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	Council's costs claim
2	Appellant's response to costs claim