
Costs Decision

Inquiry Opened on 6 February 2018

Site visit made on 13 February 2018

by Keith Manning BSc (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2018

Costs application in relation to Appeal Ref: APP/N2345/W/17/3179177 Keyfold Farm, 430 Garstang Road, Broughton, Preston, Lancashire PR3 5JB

- 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 Wainhomes (North West) Ltd for a full award of costs against Preston City Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for residential development for up to 130 houses.
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Decision

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

Preliminary and Procedural Matters

2. The inquiry was in respect of two appeals, conjoined for a single inquiry. For convenience they have been respectively referred to, following my pre-inquiry note of 20 December 2017, as **Appeal A** (site A/appellant A) and **Appeal B** (site B/appellant B).
3. Both applications subject to appeal were for housing and were made in outline.
4. The Inquiry sat between 6 and 9 February 2018, inclusive, and I conducted my formal visit to the appeal site on 13 February, combining this with my equivalent visit to the site of Appeal A.
5. (Appeal A is referenced APP/N2345/W/17/3179105 (LPA Ref 06/2016/0736). Site A is Land off Sandy Gate Lane, Broughton, Preston, Lancashire PR3 5LA and the proposal in that case is for up to 97 dwellings. Appellant A is Hollins Strategic Land LLP.)
6. Each application for costs is determined on its individual merits but, given the circumstances and turn of events at the inquiry there is in practice little to distinguish them beyond the embellishments of the respective advocates in their written applications and orally; and I therefore summarise them in identical terms. The Council's response was essentially common to both and is also therefore summarised in identical terms. Equally there is no distinction to be drawn in the substance of my decisions on the individual costs applications.
7. This costs decision is in respect of **Appeal B**.

The submissions for Wainhomes (North West) Ltd

8. These were made in writing supplemented by oral submissions in counter-response but the gist is as set out below.
9. The Council's persistence in fighting the appeal was unreasonable given the categorical declaration in the Memorandum of Understanding ('MoU', signed September/October 2017)¹ between the three Councils party to the Joint Central Lancashire Core Strategy that, pending the adoption of a replacement, the housing requirements set out in Policy 4 of this component of the development plan would continue to apply. It may have been assumed at the time of refusal earlier in 2017 that there was a five year supply but had that earlier position been scrutinised that would clearly have been found not to be the case, a point underlined by the Council's use of more recent statistics.
10. Using the figure in the development plan was, moreover, the correct approach in the context of the second bullet point of paragraph 47 of the National Planning Policy Framework (the Framework), rather than the use of Objectively Assessed Needs postulated in an unexamined Strategic Housing Market Assessment, even if the development plan figure is higher. Furthermore the development plan in this case requires the supply to be calculated across the whole of the development plan period with appropriate adjustment for previous under-performance, whereas the Council attempted to calculate it across only the remaining part of the plan period thereby excluding its past underperformance.
11. The situation is quite straightforward and various legal rulings cited and other appeals, including in other authorities, either address different circumstances or cannot be uncritically applied to the facts of the land supply in Preston at the present time. The joint critique of the appellants A and B led to such a complete negation of the Council's erroneous and ill-founded case on housing land supply that it conceded it was insupportable on the second day of the inquiry and declined even to pursue the balance of its case manifest in the single reason for refusal and acknowledged that the so-called 'tilted balance' of the presumption in favour sustainable development set out in paragraph 14 of the Framework must apply. Moreover, in doing so, it accepted that in the absence of a five year housing land supply there was no basis for resisting the development.
12. The Council's irrational and misguided approach, has led to an inquiry that was unnecessary, has delayed the development proposed and its failure to withdraw its reason for refusal until the inquiry actually took place has rendered the unnecessary costs of preparing fully for the inquiry, and conducting it, unavoidable for the appellant. This is a clear example of unreasonable behaviour meriting a full award of costs.²

The response by Preston City Council

13. This was made orally and the principal points are set out below.
14. In a technical sense the reason for refusal has not been withdrawn, as the Council no longer has jurisdiction, but the basic premise of the applicant, that it was reliant on being able to demonstrate a five year land supply, is accepted.

¹ CD47

² Or, as has been submitted in counter-responses, a partial award from the date of the MoU.

15. At the time of refusal the relevant land supply was as at March 2017 and no doubt predicated on the development plan but the approach advanced at the inquiry was not in play then.
16. The Pear Tree Lane decision in Chorley, issued on 30 November 2017, used a similar approach and found an adequacy of supply and was reasonably considered authoritative. Only subsequently at this inquiry has that been shown not to be the case. Therefore the Council's use of a similar approach doesn't cross the threshold of unreasonableness.
17. Moreover, the legal cases referred to (*Hunston* and *Zurich*) have not been relied on erroneously as they do not in fact address precisely the circumstances here so there was no contradiction of well-established case law.
18. The Council's witness did not accept that his position was contrary to the memorandum of understanding but rather that not taking the backlog into account was implicit in the MoU. Whilst this does not say exclude the backlog it does not say include it either.
19. Reliance on an unexamined SHMA was a misjudgement that doesn't reach the threshold of unreasonableness, especially in view of the Pear Tree Lane case.³ It is accepted that the Council has not sustained its position on housing land supply but this is a mistake as to weighting of factors rather than an irrational position.
20. There is in any event a distinction between a failure to produce evidence and a failure to substantiate it. This case falls into the latter category because detailed evidence was produced but it failed to withstand scrutiny under cross-examination.
21. Given that was the case the Council did act promptly to review its case and this was an example of good, rather than unreasonable, behaviour in the inquiry process.
22. All in all the application for costs is resisted.

Reasons

23. Parties to an appeal are normally expected to bear their own costs. The costs regime is intended to introduce discipline into the appeal process by preventing unreasonable behaviour within it, albeit the manner in which an application is initially handled can be indicative of unreasonableness. Bearing the primary purpose of the costs regime in mind it is not intended to be punitive of genuine error in complex areas of interplay between evidence, policy, case law and other material considerations.
24. Housing land supply and policy in relation to it is a complex and moreover a constantly moving picture as is evident from current consideration of a standardised methodology. Be that as it may, from all that I have seen and heard in this case, I am satisfied that the Council considered they could demonstrate an adequate land supply at the time of decision and quite understandably and reasonably followed a presumption that the settlement hierarchy and the policies in the development plan which, amongst other things, define it, should prevail. I am, moreover, satisfied that it produced its

³ CD28 Ref APP/D2320/W/17/3173275

evidence at the time of the inquiry in all good faith as to what was a supportable approach.

25. The Memorandum of Understanding between the three relevant authorities is somewhat discursive and focused upon Objectively Assessed Needs for the Strategic Housing Market Area, although clear that in order to distribute housing appropriately the development plan requirement is the basis for doing so. It seems the issue of Objectively Assessed Needs and the avoidance of potential double-counting of backlog figures across the area, amongst other things, was the primary focus of much evidence at the Pear Tree Lane Inquiry and the decision was made on the basis of what the Inspector took from the examination of it at the inquiry and with all other factors considered led to a conclusion of adequate supply in, specifically, Chorley. This, along with other decisions and certain aspects of case law were fed into an evidential mix in support of the Council's case which appeared superficially well-founded and, I have no doubt, was considered supportable notwithstanding the underlying approach to the backlog acknowledged earlier in the year by the Council's witness bearing in mind the effective silence of the Memorandum on that matter. Whatever the merits of the Memorandum as a document which purports to clarify, it patently does have the potential to confuse and cause those involved to lose sight of how the supply calculation works out in its basics, certainly within Preston, quite apart from the addition to the mix of matters such as student housing, empty homes and persistence or otherwise of under-delivery, all of which are germane to the calculation of five year supply.
26. All in all the situation appears to have become confused and confusing even, it seems, for those most closely involved locally and who put forward a considerable body of evidence at this inquiry in what was undoubtedly a respectable attempt to interpret matters as they thought they stood in the weeks leading up to it. I do not consider against that background that there was conscious irrationality on the part of the Council and certainly there was no lack of relevant evidence on the part of the Council even if it ultimately did not withstand scrutiny - under cross-examination that was especially notable for being thoroughly researched and effectively executed.
27. Evidence that is found to be flawed under that level of scrutiny can be indicative of the inherent complexities sometimes encountered in planning policy and practice and the events at this inquiry classically illustrate the value of the inquiry process in getting to the heart of the matter under consideration, through the examination of evidence. In this case that was helped in no small measure by the straightforward and frank answers of the Council's witness as the questioning led inexorably towards its ultimate realisation that, contrary to its expectation, albeit misconceived, the Council could not demonstrate the requisite five year supply of deliverable housing sites and, moreover, that the correct application of various factors to the relevant statistics indicates the current shortage to be severe.
28. That being so, the Council, rather than denying the reality with which it was confronted, acted immediately to concede that the case it had rested on an assumption of adequate land supply could not be sustained. On that basis it declined to pursue it further.
29. That prompt action shortened proceedings quite considerably, as the sole protagonists remaining in opposition to the appeal were the Parish Council

representatives and others from the locality. Unfortunate and disheartening though that must have been for those local objectors and challenging though the situation actually may be for the Council in having to reconsider its approach more widely, the Council's action in this case was, in my view, an exemplar of responsible and reasonable behaviour in the conduct of appeal proceedings, as its advocate has submitted.

30. All in all, the inquiry appears to me to actually have been a necessary process to ascertain the situation upon which the grant of permission for the proposed development at issue, contrary to important facets of the development plan, relies, namely a demonstrable shortage of deliverable housing sites in the context of relevant policy. The Council was lacking in judgement in certain important respects but that of itself does not amount to unreasonableness. As far as the inquiry process itself was concerned, and the appeal proceedings more generally, I concur, in the light of all the relevant circumstances and having appropriate regard to the Planning Practice Guidance, with the view expressed by the Council's advocate, that the requirements for an award of costs including, most notably, unreasonable behaviour in the appeal process, are not met.
31. On the basis of the reasons outlined above, and having taken all other matters raised into account, I therefore conclude that the application for costs should not, on balance, succeed.

Keith Manning

Inspector