



Costs Decision

Inquiry Held on 14-17 and 21-24 August 2018

Site visit made on 24 August 2018

by Phillip J G Ware BSc(Hons) DipTP MRTPI

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

Decision date: 28th November 2018

Costs application in relation to Appeal Ref: APP/R1038/W/17/3192255 Land at Deerlands Road, Wingerworth

- 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 Ripon Homes Ltd for a full award of costs (or in the alternative a partial award) against North East Derbyshire District Council.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for a residential development of up to 180 dwellings, public open space, landscaping, highway and drainage works and associated infrastructure.
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Decision

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

Procedural matter and background

2. The Council stated in their response to the appellant's costs claim that it had been submitted out of time as I had directed that it be submitted by 28 October. It was submitted at 2045 hours on that day and the Council therefore had the agreed amount of time to respond to it – as they did. It was not out of time.
3. Many of the matters raised in this costs report relate to comparisons with a residential development immediately to the south of the appeal site. This development, which has been built, was approved on appeal in August 2013¹. The scheme as approved was for 51 dwellings and is known as Spindle Drive.

The submissions for Ripon Homes Ltd

4. At the time of the Spindle Drive permission the Council did not have an up to date development plan, and for that reason the Inspector applied the 'tilted balance' in the 2012 Framework. The principle of the development, location/accessibility and landscape were all issues raised in that decision.
5. In the appeal which I have recently decided (the 2018 case) the Council is in the same position regarding national policy, the development plan and the tilted balance stemming from the National Planning Policy Framework (the Framework). The Council now claim a (contested) five year supply of housing land, but the tilted balance is engaged in any event because of the lack of an

¹ APP/R1038/A/13/2192646

- up to date development plan. (The Council does not rely on the emerging Local Plan.)
6. With that background, Council officers twice recommended the grant of planning permission for the 2018 scheme (in the context on the first occasion of a lack of five year housing land supply and in the alleged presence of such a supply on the second occasion). However planning permission was refused, although three reasons for refusal were subsequently withdrawn as there was no evidence to support them.
 7. The scheme should clearly have been approved as there is no up to date Local Plan, the Neighbourhood Plan does not address housing issues, the tilted balance applies, and the considerations in favour of the scheme – especially the provision of 40% affordable housing – weigh heavily in favour of the proposal.
 8. The 2013 appeal decision should have been a key material consideration in the Council’s approach to the 2018 appeal, for the following reasons:
 - The Council’s current position is the same as in 2013 as regards national policy and the development plan. The Local Plan position is virtually identical – in fact the Local Plan is even more out of date. In addition the Secretary of State has been in correspondence with the Council regarding possible intervention due to the lack of progress in replacing the out of date Local Plan. In written evidence before the 2018 Inquiry the Council initially alleged that the Local Plan was up to date, but accepted during the Inquiry itself that it was out of date.
 - The tilted balance is triggered by the local plan position, as it was in 2013. Even if the Council can demonstrate a 5 year housing land supply, which is disputed, the tilted balance is still triggered.
 - The 2018 site is outside the Settlement Development Limit, as was the Spindle Drive appeal site. The position is the same as in that decision.
 - Although the emerging Local Plan has progressed since the 2013 decision it is still not part of the development plan. The Council does not rely on the emerging Local Plan.
 - The appeal site shares the Spindle Drive access. The bus service and local facilities are virtually unchanged – in fact local facilities have improved since 2013. This matter was considered by previous Inspector who found the Spindle Drive site to be accessibly located. The Council has also acted inconsistently in relation to the grant of planning permission on sites further from local facilities.
 - The benefits of the appeal scheme, especially the provision of 40% affordable housing, are considerable and are essentially the same as in 2013.
 9. The fact that the 2013 scheme was not on the same site is not relevant. It is immediately adjacent, and the circumstances are identical or slightly worse from the Council’s viewpoint.
 10. The Supreme Court judgement in *Suffolk Coastal District Council v Hopkins Homes Ltd and SSCLG*, and *Richborough Estates Partnership LLP and SSCLG v Cheshire East Borough Council* makes it clear that settlement

boundary/countryside policies based on out of date plans which are themselves based on out of date housing requirements can be given less weight.

11. The Council offered no expert landscape evidence to defend the landscape point in a composite reason for refusal. This matter had been considered, albeit on the adjacent site, by the Spindle Drive Inspector.
12. With all this background, Council officers recommended the appeal scheme for approval. On the first occasion this was in the context of the absence of a five year housing land supply, and on the second in the context of a claimed five year supply. This latter recommendation recognised that the presence of a housing land supply was not determinative.
13. Overall the Council acted unreasonably and failed to justify the remaining reasons for refusal. The expense of the appeal and the Inquiry was unnecessary. The fact that the appellant called witnesses to address matters not eventually pursued by the Council is irrelevant. It is up to the appellant to decide how it presents its case.
14. In the alternative, a partial costs award is sought arising from the production by the Council of two new proofs of evidence on the first day of the Inquiry, leading to an adjournment. This fresh and substantial evidence at such a late stage was unreasonable and led to unnecessary costs.

The response by North East Derbyshire District Council

15. The first week of the Inquiry was taken up with consideration of the housing land supply position. If the appellant's position was that its case on the planning balance was so overwhelming then it was not necessary to take up time on the housing position.
16. The Spindle Drive appeal decision was extensively discussed at the Inquiry. The situation was very different at that time as the Council did not have a five year housing land supply and the decision was made in the light of the Council's Interim Planning Policy 2010. The tilted balance then applied, and that appeal decision stated that policies in the Local Plan concerning housing were out of date. But this was a reference to the state of affairs at that time and not a reference to the provisions of the local development plan as a whole.
17. The landscape issue raised by the Council at the 2018 Inquiry was very limited. It was not a wider landscape point and had not been addressed in the Spindle Drive decision.
18. Since 2013 there has been the decision in the Hopkins Homes case and the publication of the 2018 Framework.
19. The fact that the Council did not accept the recommendation of officers is irrelevant, as they are entitled to do so. The question is whether the Council acted so unreasonably as to justify an award of costs – it did not.
20. The appellant's decision to present evidence on matters where the Council had withdrawn its reason for refusal was the appellant's choice. It was unnecessary.
21. Overall the Council's case at the Inquiry was reasonable and was supported by independent evidence.

22. The application for partial costs is not resisted. It was accepted that the material provided on the first day of the Inquiry should have been produced earlier.

Reasons

23. 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.
24. In this case the application was recommended for approval by Council officers on two separate occasions, but the Council took the decision to refuse permission against officer advice. This is not in itself unreasonable, as Members are entitled to take a different decision to that recommended by officers. What matters is whether the decision can be supported by substantial advice.
25. An unusual feature of the 2018 appeal was the existence of a 2103 appeal decision at the directly adjoining site – Spindle Drive. This 2013 decision has many similarities to the 2018 scheme, which were discussed at considerable length at the 2018 Inquiry. The appellants were the same in both cases and many of those who appeared before me had also appeared at the 2013 Inquiry. The details of the earlier proposal and Inquiry were therefore very well known to the parties. That previous decision was a material consideration in relation to the scheme I was dealing with, and the conclusions of my fellow Inspector need to be considered in the light of what has changed since that time.
26. The most important matter is that the development plan position has worsened since that time. My colleague found the Local Plan to be out of date - thus triggering the 'tilted balance' in the context of national policy at that time – the 2012 Framework. The extant Local Plan remains the same as in 2013, though obviously even more out of date. The slow progress of the replacement Local Plan has led the Secretary of State to write to the Council concerning possible intervention. The emerging Local Plan was not relied on by the authority, and the duly made Neighbourhood Plan does not (quite reasonably) address the matters at large in the appeal.
27. Overall, the 2018 development plan position leads directly and inescapably to the application of the tilted balance (now under the 2018 Framework). This is, at the very least, the same position as at the time of the previous 2013 decision or, if anything, a worse position due to the passage of time. The fact that there were some interim policies apparently operating at the time of the previous decision is of no consequence in relation to the development plan position.
28. As well as the development plan position, there are three other matters which highlight the similarity of the two schemes, and which further emphasise the importance of taking very full account of 2013 decision. Firstly both the current appeal site and the Spindle Drive site are outside, but close to, the Settlement Development Limit of Wingerworth as defined in the Local Plan. Secondly the current appeal site shares its access with the Spindle Drive site, and the bus stop and bus services are unchanged. The routes by bus, on foot and by bicycle to various services are similarly unchanged, although the evidence at the Inquiry was that the services themselves have improved slightly since 2013. Finally, the main benefit of the current scheme – the

- provision of 40% affordable housing - is the same now as it was at the time of the Spindle Drive decision.
29. In addition, the evidence at the Inquiry was that, in the time since the 2013 decision, the Council has granted planning permission for schemes in less accessible locations.
 30. With that background, it was clear to me that the development plan was out of date, and that the tilted balance now set out in paragraph 11 of the Framework was engaged. This is the same position, if anything even clearer, than at the time of the Spindle Drive decision.
 31. The Council's position in its written evidence was that the Local Plan was not out of date, at the Inquiry it was agreed that the Local Plan was out of date, and in closing at the Inquiry that the position had not changed. As I indicated in my decision on the s78 appeal, I prefer the evidence of the Council's professional witness at the Inquiry. The only manner in which the Council suggested that the position might have changed since 2013 in its favour was that the Framework had been updated and that the Hopkins Homes case had been handed down (though it was not clear how these matters assisted the Council's position).
 32. The only matter where it could be suggested that the Spindle Drive decision was not directly comparable was in relation to landscape impact. Obviously, although the two sites are adjacent, the detailed landscape impact is different. Potentially this could be a factor in differentiating the Spindle Drive and 2018 appeals. However the difference in landscape impact is limited, especially as the Council's position was that the effect of the 2018 appeal scheme is localised and, especially given the Council's decision not to call landscape evidence at the Inquiry, this is not a significant difference between the two schemes.
 33. For all the above reasons the Spindle Drive decision is clearly and directly comparable to the 2018 appeal and it was incumbent on the Council to demonstrate why a different decision should be made. It failed to do so.
 34. Two other matters arose in the Council's response to the costs claim, which need to be dealt with briefly. The Council criticised the fact that the appellant took up inquiry time dealing with the question of five year housing land supply (as did the Council). However this is perfectly reasonable as this was a material consideration, and would have increased in importance had I decided that the Local Plan was not out of date for any other reason. The second criticism by the Council was that the appellant called witnesses to deal with matters no longer in dispute following the Council's decision not to pursue some reasons for refusal. However it is for the appellant to decide how to present its case, and I would have intervened had I felt that some witnesses were not helpful in dealing with third party concerns or my questions.
 35. In summary, the Council persisted in objecting to a scheme on grounds which the Spindle Drive Inspector had previously indicated to be acceptable. The only other matter which could have potentially represented a material change in circumstances – landscape impact – was not substantially pursued by the authority. In addition, by granting permission for other developments further from local facilities, the authority has not decided similar cases (in relation to accessibility) in a similar manner. The Council delayed development which should clearly have been permitted in line with officer recommendations,

having regard to its accordance with the development plan, national policy and other material considerations.

36. I find that unreasonable behaviour, as described in Planning Practice Guidance, has been demonstrated and that a full award of costs is justified. There is therefore no need to decide the partial application.

Costs Order

37. 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 North East Derbyshire District Council shall pay to Ripon Homes Ltd, the costs of the appeal proceedings described in the heading of this decision, such costs to be assessed in the Senior Courts Costs Office if not agreed.
38. The applicant is now invited to submit to North East Derbyshire District Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

P. J. G. Ware

Inspector

COSTS DOCUMENTS

1	Appellant's claim
2	Council's response
3	Appellant's final response