
Costs Decision

Hearing Held on 29 June 2020

Site visit made on 1 July 2020

by David Richards BSocSci DipTP MRTPI

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

Decision date: 23 July 2020

Costs application in relation to Appeal Ref: APP/H1840/W/19/3241879 Corner Mead, Newland Lane, Droitwich Spa, Worcestershire WR9 7JH

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Build 1 for a full award of costs against Wychavon District Council.
 - The hearing was in connection with an appeal against the refusal of outline planning permission for up to 9 self-build dwellings including new means of access off Newland Lane.
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Decision

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

The submissions for Build 1

2. The Appellant submits that the Council has acted unreasonably in refusing planning application ref 19/01679/OUT for the reasons set out in this letter and an application for a full award of costs is therefore made.

1. Failure to have regard to a material planning consideration

3. The Appellant has submitted up-to-date evidence in the form of very recent appeal decisions on the correct interpretation of the way in which planning permissions can be counted towards the supply of self-build plots. These appeal decisions were submitted to the Council in the original Planning Statement dated July 2019 (see Appendix 3 of APS Statement of Case) and again with the Appeal Statement of Case. These appeal decisions are compelling, they are directly relevant to this appeal on a point of principle and they clearly supersede the very dated decisions the Council continues to seek to rely upon.
4. The Council have failed to even acknowledge the appeal decisions provided by the Appellant or provide any up-to-date evidence or explanation as to why these decisions are not relevant to this appeal. They have simply ignored them.
5. It is unreasonable for the Council to continue to maintain that the permissions granted can be counted towards the supply of self-build when they have confirmed that none of those permissions have any secure mechanism in place to ensure that they are delivered in a way that meets the legal definition of self-build and custom housebuilding as defined in the 2015 Act.

6. This unreasonable behaviour has led to costs being incurred by the Appellant through the instruction of a Planning Consultant to produce additional evidence and attend the appeal hearing.

2. Providing information that is manifestly inaccurate or untrue

7. In accordance with the relevant regulations, the Council publishes an Annual Progress Report (APR) at the end of each year in respect of self-build and custom housebuilding. This is published on the Council's website for members of the public and officers of the Council to use in respect of preparing relevant planning applications and determining such applications.
8. The 2019 APR clearly states "In the first base period between 1st April 2016 and 30th October 2016, there were 51 entries on the Register". It goes on to say that a Local Eligibility Condition was introduced in June 2017 i.e. during the second base period.
9. The Council then state that all those on the register prior to 30th May 2017 were automatically allowed onto Part 1 of the register if they provided an update form with the relevant additional information. No further information or detail is provided in the APR. The APR is the go to piece of evidence for applicants, self-builders and the Council itself when assessing applications of this nature. The Appellant has spent a considerable sum of money promoting this site on the basis of the information in the published APR's.
10. The Council have very recently deviated from their own published APR which has consistently and as recently as December 2019 confirmed that the correct figure for the first base period is 51 entries. Nowhere in the 2019 APR (or the previous two APR's) does it mention that this figure has dropped to 11 as the Council now claim.
11. If the Council's recent claim that there are only 11 entries on the Part 1 register is found to be correct, which the Appellant submits most strongly that it is not, then false and misleading information has been published for the last 4 years in the APR's. If the Appellant's position is correct, then false and misleading information has been presented to this Appeal.
12. The planning application was submitted in good faith on the premise of the figure of 51 so to now change this without justification is wholly unreasonable.

3. Deliberately concealing relevant evidence at appeal

13. The Appellant is aware that the Council is deliberately concealing important evidence in relation to need which is pertinent to this appeal. The Council has sought to obtain a legal opinion on whether they can legitimately count permissions without any secure mechanism in place to ensure dwellings meet the legal definition of self-build and custom housebuilding.
14. The Appellant has also obtained a legal opinion which confirms the Appellant's position is the correct one. The Appellant has offered to exchange opinions however the Council has refused to do so citing that their legal opinion constitutes "privileged legal advice".
15. The only conclusion one can draw from this is that the Council's legal opinion does not support their position. There is no other logical reason why they would withhold this information.

16. The Appellant has submitted their legal opinion and the Inspector is invited to have regard to it. The withholding of evidence by the Council has prevented the Appellant and the Inspector from being able to properly assess the allegations made by the Council on the subject of how to correctly count planning permissions.

4. Introducing fresh evidence at a late stage

17. The Council provided the Appellant with new figures on self-build demand on 19 June. These figures have never been disclosed before and they directly contradict the official published figures contained in the APR's for 2017, 2018 and 2019 on self-build and custom housebuilding. This information has clearly been available to the Council for a considerable period of time but has not been previously disclosed. This has not afforded the Appellant with sufficient time to interrogate the new evidence prior to the hearing.

5. Not agreeing a Statement of Common Ground in a timely manner

18. The Council has failed to respond in a timely manner to the draft Statements of Common Ground submitted to them. The Council has consistently left their review of the SoCG to the last minute with a 10-week hiatus between 2 April and 10 June despite several requests for feedback. The Council have also sought to query matters in the most recent draft statement which they have not queried in earlier versions. At the time of writing the Council was still refusing to agree to matters of fact.

6. Appellant's Conclusion

19. The Council has continued to maintain a position which is untenable, is based on out-of-date appeal decisions and has failed to recognise or have regard to more up-to-date evidence and appeal decisions on the correct way to count planning permissions for the provision of self-build and custom housebuilding.
20. In light of the above and having regard to the PPG a full award of costs against the Council's unreasonable behaviour is requested.

The response by Wychavon District Council

1. Failure to have regard to a material planning consideration

21. It is the council's view that the appeal decision letters submitted on behalf of the applicant (at appendices 3, 7 and 8 of the of the appellants Statement of Case) are not directly relevant to this appeal and are therefore not compelling.

Appeal Decision Ref: APP/X2220/W/17/3176895 - Land to the west (beyond) Strathfleet, Victoria Road, Kingsdown

22. The main issue in this appeal is the fact that the appeal site was just outside development boundary. The Inspector considered that settlement boundaries are not necessary determinative in themselves and should be informed by the facts on the ground. This differs from the council's position, in that the site immediately adjoined the development boundary for Kingsdown, whereas the appeal site is some distance from the development boundary for Droitwich.

Appeal Decision Ref: APP/G2435/W/18/3214451 Land off Hepworth Road, Woodville DE11 7DW

23. This appeal addresses how North West Leicestershire Council (NWLC) suggested planning permissions granted could be counted towards the number of consents for self build, which differs from the council's approach in this case. The council have only included planning approvals which have specified self build in their description; this amounts to 6 consents for 11 self build plots. In addition, the council are of the view that the 27 planning permissions granted for 35 new dwellings are also counted towards meeting the demand for self build units because they are accompanied by a signed CIL Self-Build exemption form.
24. Conversely, NWLC included all single new dwellings and although admitted that not all of them would be for self-build, suggested that at least some of them would be – but did not quantify how many. The Appellant's counsel opinion helpfully explains that 'neither the NPPF nor the NPG provides guidance on the proper approach to be taken to this issue' (para 18) – therefore, the council contends that it is for the Inspector to consider whether the council have taken the right approach.
25. The Appellant's Statement of Case sets out that this appeal decision supports the contention that in order for a permission to legitimately count as a self-build serviced plot under the legal definition; secure arrangements must be in place to ensure the development meets the definition. In the absence of any other mechanism, based on the facts of the appeal the Inspector concluded that it was necessary to have some mechanism in place, concluding that a legal agreement was the only way of meeting the need for self-build dwellings. This differs from the council's position in relation to the permissions that have been granted in the District.
26. Paragraph 8.7 of the council's Statement of Case responds directly to this matter, setting out its' view that it is not unreasonable to conclude that the permissions set out above would meet the identified demand despite the lack of a section 106 legal obligation as the permissions could, based on the facts of the case include self-build and custom housebuilding. They would therefore meet the definition of a plot which the applicant has indicated "could include self-build and custom housebuilding" in accordance with s2A(6)(c).
27. These would include situations where relevant policies relating to the location of development (for example policy SWDP2) meant it was not appropriate to insist on a s106 obligation, but the proposal was clearly intended to be self-build. For example a full planning application where the applicant had shown that the intended occupant had already acquired the land, as a serviced plot, and played a full part in the design of the dwelling. In such cases it would be likely that a CIL self-build exemption would also be claimed.
28. It is a matter of planning judgement as to whether the permissions granted for self-build units in the District would meet the need reflected on the register. As the permissions granted could be relied upon by a person on Part 1 of the register it is perfectly reasonable to assume the permissions would meet the demand for self-build housing.

APP/W0530/W/19/3230103 - Green End/Heath Road, Gamlingay - Allowed 23 September 2019

29. It is the council's view that this appeal decision is not directly comparable to the appeal to which is the subject of this hearing. In the case of Gamlingay the purported shortfall in the delivery of self-build housing was uncontested by the LPA. South Cambridgeshire DC was one of the Right to Build Vanguard Authorities and at the time of the appeal had 400 people on the SB Register. The Inspector considered the shortfall to be significant.
30. This differs to the council's position now in that officers have contested the view that there is a shortfall in self build housing provision. The council has granted sufficient permissions to meet the need of 11 self build dwellings in the first base period – i.e. 6 planning consents for 11 new self/custom build dwellings and 27 planning permissions for 35 new dwellings accompanied by a CIL self build exemption form, which can be counted towards meeting the demand.
31. Furthermore, the relevant development plan policies were silent on the matter of self-build housing strategy. This is not the case here as policy SWDP14 of the South Worcestershire Development Plan covers the matter of self-build housing provision.
32. APP/P1615/W/18/3213122 - The Meadows, Bromsberrow Heath, Ledbury - Allowed 17 April 2019
33. Whilst the site was outside the settlement boundary the Inspector noted that; 'Moreover, neither national nor CS policy imposes an outright restriction on development outside defined boundaries, but each case would have to be considered on its own particular circumstances.' The site is adjacent to development boundary on 3 of its 4 sides and at least half of the site is classed as PDL. The Self Build Register included 73 households registered between 1 April 2016 and 30 October 2018. The Council indicated that by 30 October 2018, it had granted permission for 42 self-build plots, although the appellants dispute whether 2 of the cited permissions relate to self-build houses secured by legal agreement. According to the information contained in the Council's table, 63 permissions are required by 30 October 2020, of which 42 have been given. Even accepting that disputed figure, it would still mean that a further 21 need to be granted by 30 October 2020, with 10 more by 30 October 2021 and not, as suggested in paragraph 5.11 of the Council's appeal statement, by 30 October 2022. Moreover, of the 42 plots which the Council says it has granted permission for, it is relevant that 41 of them appear to have been granted via the appeal process.
34. Therefore, and given the lack of any clear policy within the development plan regarding such housing or evidence of local initiatives to promote it, the Inspector did not share the Council's apparent confidence that the requirement would be met. This differs to the position in Wychavon in that the council has contested the appellants view, as the council has granted sufficient permissions to meet the need of 11 self-build dwellings in the first base period – i.e. 6 planning consents for 11 new self/custom build dwellings and 27 planning permissions for 35 new dwellings accompanied by a CIL self build exemption form, so they can be counted towards meeting the demand.

2. Providing information that is manifestly inaccurate or untrue

35. The council produces an annual progress report on self build – which includes both a summary position on the number of people/groups registered on the self

build register and the number of relevant planning permissions to help meet the demand. The Progress Report is misquoted by the appellants agent. The latest version (Dec 2019) states, in full,:

36. *The Wychavon District Self-Build and Custom Housebuilding Register was established on 1st April 2016 and has been available ever since for individuals and organisations to complete the online form. In the first base period between 1st April 2016 and 30th October 2016, there were 51 entries on the Register. Since the first base period and the introduction of the Self-Build and Custom Housebuilding Regulations 2016, the Register went through an update in May and June 2017 in order to introduce a Local Eligibility Condition to enable entries to be split into Part 1 and Part 2. All those already on the Register prior to 30th May 2017 were automatically allowed on to Part 1 of the Register if they provided an update form with the relevant additional information by 30th June 2017.*
37. The council clarified the position in their original appeal statement that 11 people submitted an update before 30 June 2017, therefore this is the number of people who were on part 1 of the self-build register for the first base period.
38. The reason for the reduction from 51 to 11 has been conveyed to the agent on a number of occasions and is not therefore without justification as suggested in the application for costs. The figure of 11 is not a recent claim as suggested by the appellant, in fact the matter was discussed with the appellant's agent as early as August 2019.

3. Deliberately concealing relevant evidence at appeal

39. The legal opinion referred to is deemed by the council to be legally privileged information and is not submitted as part of the council's case. In any case the counsel's advice was sought in relation to an earlier planning application elsewhere in the district and not the appeal proposal. Prior to the council seeking this advice (in January 2020) the appellant's agent had previously advised that they too had a legal opinion but to date has not disclosed this.
40. Counsel's Advice dated 16 February 2020 was subsequently submitted by the appellant on the 19 June, just days before the hearing.
41. The council is under no obligation to share a legal opinion and generally does not do so –this is no different to any other appeal.

4. Introducing fresh evidence at a late stage

42. If this refers to the copy of the Register (date of registration and identification numbers only) provided to the appellants on 19 June, this is not fresh evidence but rather then this is the latest position regarding the self build register at 18 June. This reflects advice provided by the council to the appellant throughout the planning application process and subsequent appeal.
43. This showed that for the first 4 base periods (i.e. up to 30/10/2019) 85 people were on the register, of which 49 were on part 1 – the figure had reduced from 87 (50 Part 1 and 37 Part 2) because 2 people had requested to be removed from the register since 30 Oct 2019. The difference is therefore negligible between the Dec 2019 report and the updated June 2020 report. It is not new evidence it merely backs up the council's figures.

5. Not agreeing a Statement of Common Ground in a timely manner

44. The drafting of the SoGC has been a matter of on-going discussion between the appellant and the council since the submission of the appeal in January; with the council providing their initial comments in relation to the first draft on 11 February. An amended draft was submitted by the appellant on 6 March, to which the council responded on 16 March. A subsequent draft was then submitted by the appellant on 2 April.
45. There was a pause in the negotiations however when the appeal hearing scheduled for 31 March was postponed, due to the extraordinary circumstances of Covid-19, with no timeframe for when or indeed how the appeal would proceed. Whilst unfortunate, this delay on the council's behalf was in part due to other more urgent work commitments including supporting the entire planning department staff in setting up working from home and the logistics of a virtual Planning Committee, to name but a few, due to matters beyond the control of officers. Without a rescheduled hearing date the matter was not deemed a priority under the circumstances.
46. Upon receipt of notification of the re-scheduled appeal on the 9 June, the council provided further comments to the appellant in relation to the SoCG the following day (10 June). At this stage the final amendments were very minor in nature.
47. The council provided final comments in relation to the draft Statement of Common Ground on 19 June, in response to a further amended draft which was received on 16 June, to enable a signed copy to be submitted to the Inspector prior to the hearing on 29 June.
48. The council first highlighted the inaccuracies within the figures at paragraph 2.30 of the SoCG in an email to the appellant on 11 February, which reflected the council's Statement of Case. The council's concerns were re-iterated in an email to the appellant on 10 June, which set out the main matters of disagreement, which included again the fact that the council do not agree with the figures in para 2.30 of the SoCG. It was suggested that, should the appellant not agree, that the matter would need to go to 'Matters in Dispute'. The appellant's subsequent draft of the SoCG highlighted again the disagreement with the figures.
49. Officers have queried the origins of one of the statements under the heading self-build definition, which cannot be found in the regulations or NPPG, namely:
- 2.25 - In order to comply with the legal definition of self-build and custom housebuilding, permission must be subject to the following obligations:
- a) the self-build dwelling must be occupied only by a person registered by the Council and recorded on the Self-Build Register pursuant to Section 1 of the 2015 Act;
- At the time of writing the appellant's agent has not been able to clarify the origins of this statement.
50. It is clear that the council has endeavoured to work with the appellant to agree a SoCG and has responded in a timely manner in so far as it was able to do so.
51. The council has at no point refused to agree to matters of fact.

Reasons

52. Paragraph 030 of the Planning Practice Guidance (the PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded where:
- a party has behaved unreasonably; and
 - the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
53. Paragraph 031 of the PPG confirms that the word “unreasonable” is to be used in its ordinary meaning. It then goes on to categorise unreasonable behaviour as either being; procedural, or substantive.
54. I have considered the points raised by the Appellant in turn.
55. With regard to the allegation that the Council has simply ignored relevant appeal decisions, the Appellant places great reliance on the decision concerning land off Hepworth Road, Woodville DE11 7DW¹. While it is important that like cases are decided in a like manner, an appeal decision provides a reasoned response to the specific evidence presented. It does not have the force of case law. For reasons set out in the appeal decision to which this claim relates, insofar as the cited decision is intended to substantiate the Appellants’ proposition that only those permissions which are subject to an obligation securing the delivery of self-build and custom housebuilding should count towards meeting the duty under the 2015 Act, I consider that this is an unduly restrictive interpretation for which I can find no support in the NPPF or associated PPG. There are many policy compliant sites which could contribute to self-build needs where it would be inappropriate to require an obligation to be entered into. In the Woodville decision, the need for an obligation derives from it being an exception site, where the justification for departing from the development plan requires that secure arrangements are in place. The same is true of the appeal proposal. However, that is not to say that an obligation is necessary in all circumstances.
56. I now turn to consider the accusation that the Council has provided information that is manifestly inaccurate or untrue.
57. I have accepted that the Council’s analysis is deficient, and in my view further analysis is necessary to relate permissions granted to data from Part 1 of the register. I have also agreed that the Council has not sufficiently justified revisiting the 2016 Register and omitting those who did not respond to a request for further information. However, the Council has submitted an arguable case, supported by evidence which was set out in the Appeal statement. The discrepancy between the need figure of 51 included in the Annual Progress reports, and the figure of 11 relied on by the Council as being the extent of need in the first base period was explained at the hearing, and conveyed to the Appellant at an early stage. While I found the discrepancy somewhat confusing and have disagreed with the Council’s analysis, I do not consider that it has crossed the threshold of unreasonable behaviour. This is a case where conflict with the development plan is clearly acknowledged. The Council’s position that the SWDP is up to date in the light of an undisputed 5-

¹ APP/G2435/W/18/3214451

year housing land supply is at the very least arguable, and in the circumstances it is not surprising that it should seek to defend an area defined as open countryside from development.

58. With regard to the allegation of deliberate concealment of relevant evidence, this refers to undisclosed Counsel's opinion which the Council said supported its case that it was legitimate to count planning permissions unsupported by a restrictive obligation towards meeting the need for self-build dwellings. The Appellant surmises that the only reason the Council did not share the opinion was that it did not, in fact, support the Council's case. This amounts to speculation on which I am unable to comment. It is not incumbent on the Council to share legal advice. It is not unusual for Appellants to commission their own legal advice in support of their key propositions.
59. That advice (dated 16 February 2020) was heavily reliant on the precedent of the Woodville case discussed above. It recognised that that decision is not binding, though it is an important material consideration. I have explained why I do not consider it is necessary in all circumstances to have a binding mechanism in place to secure the development as self-build, all though in other respects the decision I have reached on the appeal reflects aspects of the argument advanced by Counsel. However, I do not consider that the Appellants recourse to legal advice was occasioned by unreasonable behaviour on the part of the local planning authority, but was part of the evidence base which the Appellant chose to bring in support of its case.
60. With regard to the matter of introducing fresh evidence at a late stage, the Council responds that this was simply an update on the register as it currently stands, which did not materially affect the outcome of the appeal. As I have found in the Appellant's favour on the planning issues, I agree that the new information did not materially prejudice the Appellant and can be seen as an example of an on-going dialogue between the Appellant and Council in the run up to the Hearing.
61. Finally, I have considered whether the Council acted unreasonably in failing to agree the Statement of Common Ground (SoCG) in a timely manner. To my mind, a considerable measure of agreement was established at an early stage, and there was agreement on such matters as relevant planning policies, physical impacts of the development, locational sustainability and conditions in the event of the appeal being allowed. It is however, in my experience, unrealistic to expect that all matters can be agreed, particularly where the interpretation of policy is contested. There appears nothing unusual or unreasonable in the Council's behaviour in respect of the Statement of Common Ground.
62. For all these reasons I find that unreasonable behaviour leading to unnecessary or wasted expenditure has not been established, and an award of costs is not justified.

David Richards

INSPECTOR