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## Costs Decision

Hearing Held on 3 November 2020

Site visits made on 28 October 2020 and 10 November 2020

**by David Richards BSocSci DipTP MRTPI**

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

**Decision date: 4 January 2021**

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### **Costs application in relation to Appeal Ref: APP/Y3425/W/18/3202676 Land off Saddler Avenue, Aston Lodge Park, Stone Staffordshire**

- 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 Fradley Estates for a full award of costs against Stafford Borough Council.
  - The hearing was in connection with an appeal against the refusal of outline planning permission for up to 20 affordable dwellings.
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### **Decision**

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

### **The submissions for Fradley Estates**

2. The hearing concerned the redetermination of the appeal following the quashing of the original decision dated 17 December 2018 by the High Court. That decision was the subject of an Inquiry held on 16 & 17 October 2018.
3. The appellant seeks a full award of costs on substantive and procedural grounds.

#### *Substantive grounds*

4. Local planning authorities are at risk of an award of costs if they prevent or delay development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
5. The application was the subject of two officer reports to committee, dated May 2017 and November 2017 respectively. The May 2017 report recommended approval of the application subject to a section 106 obligation. Councillors were clearly warned by officers that a refusal could attract costs in the event of the matter going to appeal. During the period when the s106 obligation was being negotiated, representations were made to the Council by the Aston Lodge Residents Association. The Council took legal advice, which identified tensions within the plan relating to the interpretation of LP Policy C5 which would allow for approval or refusal to be justified<sup>1</sup>. These were reported in the second

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<sup>1</sup> "The final legal advice, therefore, is that subject to consideration of relevant government guidance and local plan objectives, policies and accompanying text identified, a balanced planning judgement can be made. Policies and guidance in this case could lead to different interpretation, which subject to due and proper consideration, could lead to legally sound decisions to either approve or refuse the application."

committee report in November 2017, leading to a recommendation of refusal for the reasons set out in the decision notice. In respect of Policy C5 A refusal reason 1 states that the proposal:

*" ... does not comply with the basic requirement of Policy C5 A of The Plan for Stafford Borough Residential Proposals outside the Settlement Hierarchy relating to rural exceptions sites in that it would not provide affordable housing in rural communities and consequently does not satisfy Key Objective 25 the Plan or the provisions of Spatial Principle 6 Achieving Rural Sustainability in that it would not support sustainable rural communities."*

6. On this basis, the application was refused by the Council. At the previous Inquiry the Council's witness (Mr Holmes) agreed that the site does qualify as a rural exceptions site, that a needs assessment is not required and that the proposal complies with Policy C5 and with the development plan as a whole. On that basis, the Appellant considers that the proposal should have been approved without delay subject to the completion of the s.106 obligation.
7. The refusal reasons also refer to Policy SP7 and SP4, in addition to C5.
8. The Council has been very disingenuous in its presentation of the case at this hearing today.
9. Policy SP7 is not relevant to the determination of the appeal, and the Council has not submitted any evidence to substantiate conflict with it. This amounts to unreasonable behaviour. Paragraph 8.3 of the signed Statement of Common Ground (SoCG) confirms the Council's acceptance that the proposal complies with Policy C5. The Council has not submitted any substantive evidence to demonstrate any conflict with criteria A to D of C5. Policy SP4 is concerned with the distribution of housing across the Borough. No evidence has been submitted apart from paragraph 7.4 of the Council's statement. This does not substantiate any conflict with the policy. There is in fact an under-provision of affordable housing and no evidence that granting permission will skew the distribution of development or undermine the strategy.

#### *Procedural grounds*

10. Firstly, the Council has not responded to requests (e.g. in respect of agreement of an SoCG) in a timely fashion. A draft SoCG was submitted to the Council on 12 June 2020 before the case conference. It took the Council 3 months to respond, and then only after several e-mail promptings. A draft of the Flood Risk Sequential and Exception Tests were submitted on 14 September 2020. The Council's response was very slow, and then only addressed the Appendices. It did not identify any fundamental issues. Late observations were only received after 7 weeks. The Council has used concerns about how the tests were applied to try and 'engineer' a further reason for refusal in its late observations and at the hearing. This amounts to unreasonable behaviour, in that the Council has not responded in a timely fashion.
11. Secondly, the Council has put forward misleading information, as set out in the Appellant's first rebuttal statement.

12. The Council has been economical with the truth in relation to the planning history of the site and the S.52 Agreement, omitting a crucial part of the planning history in an attempt to bolster its argument about SP7.
13. Thirdly, the Council has sought to introduce new reasons for refusal at a late stage.
14. The Council's statement presents figures on housing delivery against Local Plan housing targets which conflict with what has been agreed in the SoCG. This is a deliberate attempt to give a rosier picture of the affordable housing position in the Borough and suggest that the Council has over-delivered, whereas the SoCG figures, which show that housing delivery for rural areas is actually below target, are taken from its own housing monitoring report.
15. The Council's Monitoring Report to March 2019 shows that when housing completions and commitments are considered together then the distribution of housing is generally in line with the plan's target (as agreed in para 10.5 of the SoCG), and there is no justification for the Council to suggest now that the distribution would be undermined by this scheme.
16. The Council has shifted its ground in suggesting now that the proposal would be in conflict with paragraphs 77 – 78 of the NPPF. Conformity with national policy is part of the test of soundness for a statutory local plan should be in conformity with the NPPF. The Council agreed in the SoCG that the proposal complies with the local plan, so it cannot be in conflict with the NPPF.
17. The Council is now suggesting that the Appellant must demonstrate rural housing need to support the proposal. The Council now appears to be saying that rural exception schemes must be promoted in conjunction with a registered provider, contrary to the position it previously agreed in paragraph 8.2(d) of the SoCG, i.e. that the affordable housing s.106 obligation provides the necessary control of occupancy by a registered provider.
18. In paragraph 7.18 of its statement, the Council suggests that there may not be sufficient demand to fill up the 20 affordable houses proposed. However the Council granted permission for a further 20 affordable homes at Lichfield Road, Stone after the original (now quashed) decision was issued on this appeal. The suggestion also conflicts with the agreement in the SoCG that there is a continuing need for affordable housing in the rural area and the appeal dwellings will make a meaningful contribution to affordable need.

### *Conclusion*

19. For these reasons, the Appellant submits that a full award of costs against the Council is justified on the basis of unreasonable behaviour leading to unnecessary or wasted expense. The appeal should never have come before the Secretary of State in the first place.

### **The response by Stafford Borough Council**

20. Counsel for Stafford Borough expressed astonishment that the Appellant had entered a costs claim for the whole appeal proceedings (including the previous Inquiry) without giving prior notice, and without putting the claim in writing. At the previous Inquiry there was an express agreement between Counsel for the opposing parties that there would be no costs claim in the light of concessions on certain matters made by the Council at the Inquiry.

21. The proceedings should be split into two parts: proceedings up until the previous decision was issued, and the subsequent proceedings leading up to the current hearing. There is a legal principle ('estoppel by representation') in that if one party makes a statement on which another party is intended to rely, they cannot afterwards resile from the statement. Applied to this case, the Appellant made a voluntary agreement with the Council regarding costs, and cannot now go back on that.
22. At the previous Inquiry, the Appellant's counsel cross-examined the Council's Planning witness. The Inquiry was adjourned following concessions by the planning witness. Agreement was reached that the Appellant would not apply for costs if the Council agreed not to pursue opposition to the scheme, and agreed to accept a s.106 obligation. That was agreed and the Inquiry proceeded, resulting in permission being granted by the Inspector subject to the negotiated s.106 obligation. (That decision was subsequently quashed).
23. It is wholly improper for the Appellant to now resile from the agreement made with the Council and pursue a costs application covering this first part of the proceedings. The Inspector is invited to conclude that the Appellant is estopped from following this course of action.
24. The second part of the application alleges unreasonable behaviour on the part of the Council in relation to the lead up to the hearing. It is suggested that the Council has departed from the agreed position in the SoCG at paragraphs 8.2, 8.3 and 11.6. Counsel for Stafford Borough made it quite clear in opening and closing that the Council does not derogate from statements made in the SoCG.
25. However, it is entirely legitimate for the Council to comment on the Appellants documentation and highlight certain issues with it.
26. Discussion on housing need at the hearing reflected the Appellant's submission of a deed of variation to the s.106 executed in 2018, at a late stage, which included a cascade to the whole Borough in the event of local need for affordable housing proving insufficient to fill the dwellings. Extending the cascade to include the whole Borough inevitably raised questions about the extent of local need, which the Appellant has failed to demonstrate. It was the Appellants choice to submit the variation and it is accordingly a problem of their own making. The Council has every right to explore the implications of the deed of variation and its effect on the status of the appeal site as a rural exception site.
27. With regard to the material submitted in the sequential test, it was riddled with errors of approach, fact and interpretation. The Council was entitled to identify and highlight sloppy analysis to avoid the tribunal being misled.
28. In answer the allegation that the Council has tried to put a favourable spin on the housing supply position, the information set out in the Council's statement is not misleading. There is no justification for saying that the Council was trying to falsify anything. From 2014 to 2020, 209 affordable dwellings have been delivered per annum. It is accepted that the earlier figure was 164. It was entirely reasonable for the Council to highlight that delivery has improved considerably in more recent years.
29. In every case cited by the Appellant the Council was entitled to comment on the evidence, and query the Appellant's conclusions. The Appellant has not in

the event been put to any wasted expenditure by the Council's behaviour, which was in all respects reasonable. The hearing was completed well within the 2 days reserved for it and in fact closed on day 1. The costs application must fail as the Appellant has not demonstrated unreasonable behaviour on the part of the Council leading to wasted expense.

### **Reasons**

30. 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.
31. With regard to the application for costs for the earlier Inquiry, the Appellant does not dispute that an agreement was made between the Appellant and the Council that the Appellant would not apply for costs if the Council withdrew its outstanding grounds for dismissal of the Appeal. Accordingly I do not consider it reasonable for the Appellant to apply retrospectively for costs in respect of the original Inquiry.
32. With regard to the hearing held to consider the redetermination, this did not result from a challenge by the Council, but by the Aston Lodge Resident's Association. The Council did not have any agency in bringing about the circumstances which required the case to be redetermined. Once the original decision was quashed, it was inevitable that a hearing would have to be arranged given the nature of the arguments being advanced. It was not the result of unreasonable behaviour by the Council.
33. With regard to the Council's submissions to the hearing, the Council agreed a statement of common ground (SoCG) covering essential policy matters, from which it did not subsequently resile. The Appellant states that the Council was very slow to agree the SOCG, and then sought to introduce new reasons for refusal.
34. To my mind, these allegations are unjustified. The Council did make some criticism in relation to the Deed of Variation to the s.106 agreement, which the Appellant subsequently withdrew. It also made some criticism of the way in which the Applicant approached the sequential and exceptions tests in respect of flood risk. However this discussion was made necessary by the change to the flood mapping by the Environment Agency. I do not consider it was unreasonable of the Council to comment on the Appellant's evidence, or to provide some further background on the provision of affordable housing in the Borough. While I have agreed with the Appellant on the applicability of Policy C5 and the effect of the proposal on the Settlement Strategy in this case, these are complex matters that are inherently open to different interpretations. None of this amounts to unreasonable behaviour in my view.
35. These matters would have had to be considered at the hearing in any event, in the light of objections maintained by the Rule 6 party and other interested parties. The need for the sequential and exception tests was the subject of new evidence which had not been before the original Inquiry. The hearing was arranged for two days, though only one was needed.
36. Accordingly I do not consider that the Appellant has demonstrated unreasonable behaviour on the part of the Council, or has been put to

unnecessary or wasted expense in the appeal process. The application for a full award of costs therefore fails.

*David Richards*

INSPECTOR