The Planning Inspectorate

Costs Decision

Inquiry held on 11-12 May 2021
Site visit made on 14 May 2021

by Katie McDonald MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7th June 2021

Costs application in relation to Appeal Ref: APP/D2320/W/20/3265785 Land off Lower Burgh Way, Eaves Green, Chorley

- 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 Chorley Council for a full award of costs against Taylor Wimpey UK Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for the erection of 201 dwellings, associated access, drainage and the provision of public open space and landscaping.

Decision

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

Preliminary details

2. The full written submissions are set out in Annexes to this Decision.

The summary of submissions for Chorley Council

3. The costs application for the full costs of the appeal was made in writing prior to the Inquiry, yet an award of partial costs is also proposed to disregard the costs associated with the education dispute.

4. In summary, the sole reason for refusal was viability and the lack of a contribution to affordable housing. The appellant appealed on this basis and its original statement of case asserted its approach was right. However, the matter fell away during the run up to the Inquiry based upon the appellant revised financial viability assessments. This related to the extent that the appellant could contribute to all necessary obligations.

5. The only remaining matter of dispute was the education contribution. The education issue was not live at the time of the appeal and so cannot justify the refusal. In the appeal, the point should have been dropped well before the Inquiry. Had it been, the Council would have adjusted its approach to this case accordingly.

6. There is a long history to the application, originally submitted in 2016, with unexplained, changing financial viability assessments (FVAs), missing information and changing scales of contributions throughout. There is no evidence that anything changed from Dec 2020 to March 2021 to justify that change of position. The appeal should never have been brought, viability

should never have been challenged and the whole process has been caused by the basic unreasonableness on viability.

The summary response by Taylor Wimpey UK Limited

7. The response was made in writing prior to the Inquiry. In summary, Taylor Wimpey UK Limited (TW) contends that it acted entirely reasonably in keeping its viability position under review and acted expeditiously when, on the advice of its expert consultants, it became apparent that the inputs into the viability assessment had become such that TW could viably offer a policy compliant scheme. That was entirely reasonable.

8. Secondly, even if the Council can establish there has been unreasonableness, it needs to demonstrate that such unreasonableness has caused directly wasted expense. In this case, the only costs for which the TW could conceivably be liable are those which were incurred by the LPA in relation to the viability issue between the start of the appeal on 22 December 2020 to early March 2021, when the Appellant informed the LPA in writing of its improved viability position.

9. An inquiry would still have been required irrespective of the viability issue because the education contribution remained a substantive issue in dispute. Since it became apparent that the education issue remained the only live issue between the parties the LPA had not requested, nor had the Inspector directed, that the mode of appeal should be changed to a hearing or to written representations. As such, the costs of an appeal and the Inquiry were unavoidable.

Reasons

10. The Planning Practice Guidance (PPG) 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. Appellants are required to behave reasonably in relation to procedural matters on the appeal, for example by complying with the requirements and deadlines of the appeals process.

11. There have been clear difficulties between the parties' viability evidence over the course of 5 years, with the Council ultimately refusing the application on the lack of a contribution towards affordable housing. The chronology of events tells of changing evidence on various matters relating to financial viability and allegations that the Council were being obstructive[1]. While these matters add background, events prior to the appeal are outside the scope of the costs award.

12. Clearly, TW appealed based on viability as this was the reason for refusal. Their statement accompanying the appeal says as much, but with a revised affordable housing offer of 10% (20 no.) discounted market sale units (at 80% of open market value) OR 5% (10 no.) social rent units, yet with no playing pitch contribution.

13. The Planning Inspectorate Procedural Guidance at Annex J advises that it is the appellant's responsibility to ensure that, at the time they make their appeal they are able to provide full disclosure of the details of their case and the

[1] Committee Report Addendum

arguments being put forward. Annex F also sets out that there is normally no opportunity to add to the statement during the process so the appellant should only make their appeal when they are certain that they have finalised their case. However, RICS Guidance Note, "Assessing viability in planning under the National Planning Policy Framework 2019 for England" (March 2021) observes that FVAs may need to be updated for market movements during the planning process prior to a determination or appeal.

14. It was expected that TW would update their FVA prior to the Inquiry and TW's Statement of Case said that evidence would be presented by a cost expert to demonstrate that the level of standard, development and abnormal construction costs adopted in the updated FVA prepared by the TW's valuation expert were robust and supported by factual evidence wherever possible.

15. However, as part of the ongoing discussions and challenges from the Council, TW indicated in February a revised offer would be forthcoming. In early March, another FVA was sent to the Council, which showed sales values at the blended price the Council had contended for previously, but also introduced a new list of abnormals amounting to some £1.47 million - many of which were asserted to be significantly different from those worked up by TW previously.

16. Following a request from the Council, a summary of these costs was provided which the Council disputed. The option agreement had also still not materialised. The Council sent its report to TW to address the viability argument in mid March, which made clear that it would be asking me to require all the historic abnormals and costs reports. This was reviewed internally by TW, and 2 days before the Case Management Conference (CMC), TW indicated that it was not going to contest the viability case and the site was now viable with all policy compliant contributions. At the CMC, no explanation was given for this change of position, and I was advised all FVAs would be withdrawn. This was confirmed in a Viability Statement of Common Ground and it was agreed between parties that no FVAs would be presented as evidence.

17. TW's changing position, amendments to the evidence between December and March and the dropping of its viability case entirely are largely unexplained. I can understand the Council's frustrations. Indeed, there is little evidence to indicate why it changed its approach on viability matters, aside from an alleged increase in house prices.

18. That said, the Planning Inspectorate encourages parties to work together to narrow the matters of dispute. This is what the appellant has essentially done, albeit in a protracted and perplexing fashion.

19. Therefore, the pursuit of the appeal on what appears to be inconsistent financial evidence was arguably unwise, but, because the appellant narrowed the matter of dispute and attempted to work with the Council, I am not persuaded this translates into unreasonable behaviour as described in the PPG.

20. Consequently, the application for costs is not justified. It follows that unnecessary or wasted expense has not been incurred.

Katie McDonald

INSPECTOR

ANNEXE 1

The Council's Costs Submission

1. This is an application by the Council for the full costs of the appeal (alternatively for the all the costs of the appeal less the costs of the education dispute on the basis that that issue would have been decided by written reps).

2. The sole reason for refusal was viability. The Council, on advice, simply did not believe that this development was not viable with policy compliant affordable housing ("AH") and other s.106 contributions. It refused because it did not accept the Financial Viability Assessments ("FVAs") including the gross development values ("GDV"), the standard costs (base build plus externals), the abnormal costs or the Benchmark Land Value ("BLV").

3. Its position was clearly articulated and explained at all times. Whichever way the Council looked at it, policy compliant development was clearly viable – whether by reference to TW's own costs provided in 2016 properly inflated since; actual GDVs from the adjoining site properly adjusted to reflect house price inflation (and omitting incentives), the history of negotiations and the information relied on by TW in previous FVA; a correct understanding of the interplay between abnormals and BLV, correct standard costs inputs which did not include double counting and/or a realistic BLV.

4. The Council was not prepared to compromise on the basis of what it considered to be a fundamentally flawed viability argument.

5. TW contended that e.g. the Council's position on BLV/abnormals had "fundamentally misinterpreted the guidance" (Report to Committee addendum) and claimed that the Council was being "obstructive" in the face of a "fair and robust offer". TW was thus robustly asserting that its approach was right and the Council's was wrong. Its stance was repeated in its statement of case. It appealed on that fundamental premise – but we now know the contrary is the case.

6. Rather than demonstrate that which it has consistently asserted and which formed the basic premise of its appeal, it has been unable to demonstrate lack of viability and has given up on every point rather than present its evidence and have it tested. That is the epitome of unreasonableness. It appears to the Council that TW appealed in the hope that in doing so it would induce the Council to negotiate, to cave in or do a deal. When the Council refused to budge, TW very quickly accepted that the AH was viable rather than provide the basic information required to allow their FVA to be tested. Even then it still went through contortions to try to salvage something from the wreckage to try to demonstrate that the appeal had not always been misconceived – but it did so by inexplicably inflating abnormal costs by £1.47m above those that TW had itself assessed. Rather than try to defend that approach, it quickly caved in on that too.

7. This appeal was a gamble backed by no credible evidence or analysis that has backfired on TW and it should bear all the costs of that gamble. The FVAs were flawed from the outset; TW stuck to them knowing that the inputs were far different from those it had promoted earlier and then when challenged, gave up.

Viability in this Appeal

8. In December 2020, having revisited viability in the light of increased house values on the adjoining site (first phase undertaken by TW of 88 units) up to that point [ASoC/4.8], TW appealed asserting that it could only afford 5% social housing or 10% intermediate (each having the same effect the appraisal). A new FVA demonstrating this was promised (ASoC/4.7) based on the same standard build costs and similar BLV but increased sales values (ASoC4.9).

9. In January 2021, the inspector's decision in Warburton Lane, Trafford was published. In that case the same expert team as now acting for TW acted for the developer (Mr Nesbitt - Cushman & Wakefield on viability and Mr Bushell on costs against Trebbi (Mr Lloyd) acting for Trafford and lost on every relevant viability point. The Inspector there applied current house price inflation, properly understood the interplay between BLV and abnormals and only had to address a few of Mr Bushell's most extreme costs assumptions to find the scheme was likely to be viable at 45% AH plus other s.106 obligations (against a case put that the scheme was not viable even with 0% AH).

10. In February 2021, the promised FVA had still not been provided. The Council set out requests for further information to allow it to test TW's case [Doc 1]. It wished to test all the Appellant's evidence in detail including to understand how and why standard costs had changed over time, how GDV had been inflated to reflect house price inflation; the justification for the abnormals and BLV and how the BLV sat with the option agreements – the latter having been repeatedly promised but never provided.

11. Rather than provide the basic information to allow their case to be tested, on 2nd March 2021, TW (after 4 years of asserting that the development was not viable with policy compliant AH) offered policy compliant AH based on "increased revenues" and the "calculated abnormal costs" but claimed none of the other s.106 requirements could be afforded [Doc 2]. How GDV had changed from December 2020 to March 2021 to justify the jump from 5% (social housing or 10% (intermediate) to 30% AH with a policy compliant mix between those dates is still not explained. The GDV required to take the scheme from 5% to 30% is around £3 – 4m. Even if the 3/3/21 assessment was based on March values which seems impossible, house price inflation between December 2020 and March 2021 cannot explain this jump.

12. A summary valuation was provided the next day [Doc 3]. Whilst the new GDVs were (at last and save for approach to incentives) broadly acceptable (and consistent with the values asserted by the Council from the outset), there had been substantial changes in abnormals compared to the last detailed assessment in September 2019/February 2020 without explanation (about £1.467m[2] higher although exact comparison is not possible and would have been the subject of cross examination). It appeared to be that jump in abnormals which meant the other s.106 obligations were said to be unaffordable

13. By way of example only, in 2016 TW who actually deliver estates up and down the country estimated the costs of the public open space at £66,000 (a figure

[2] The Council's expert has assessed the differences in the absence of any explanation as to how and why the figures have changed from those put forward by TW in 2016.

the Council accepted) but in the new summary they were put by Mr Bushell at £771,037 – more than 10 x as much and nearly enough alone to make full policy compliance viable. Additional costs of building regulations (even those were not to come into force until 2025) were included for the whole development at £751,285. Other abnormal costs bore very little resemblance to the costs which TW had assessed in 2016.

14. Unsurprising, the Council immediately made it clear that it needed to test the new information thoroughly (4th March) and on 7th March 2021 TW provided a summary of abnormals (Doc 4). That raised far more questions than it answered (see Council response of 9th March 2021: Doc 5) and the Council made clear (para 15) that Mr Bushell's abnormals would be tested thoroughly. The underlying material for his assumptions was sought. TW said that the detailed material "will be addressed within the proofs [of its experts]". [Doc 6]. The Council indicated that it would be seeking all those documents at the CMC on 24th March 2021. Mr Heather was asked to test the new material as best he could on what he had although obviously in the absence of the detailed costs material normally provided (see e.g. the two lever arch files provided by TW in 2016 which were apparently now not relied on) there was no ability to test the assumptions underpinning the detail. On 19th March (Friday at 14.35) Mr Heather's report was provided.

15. On the following Monday morning, the Appellant dropped its viability case in its entirety without further explanation.

16. TW accepts that full policy compliant development is viable – see statement of common ground. None of the material requested has been provided and the Option Agreements (which are required to be provided on request under the NPPG and RICS rules) have inexplicably still not been provided. The effect of the inevitable concession is that the assertions on which TW's case has rested since August 2019 cannot be tested. The Council's refusal to accept those assertions has been completely vindicated.

17. At the CMC on 24th March 2021, TW confirmed that it would not be providing an explanation for its change of position on viability.

18. The picture is thus as follows:

    (a) permission was refused because the Council simply did not accept the viability information presented. The high level of standard build costs remained unexplained, the GDVs were inaccurate and the BLV did not reflect the very high abnormals;

    (b) 6 months later and having updated its data, TW appealed claiming that it would produce expert evidence on costs, values and viability which showed that only 5%/10% AH was viable;

    (c) when basic information was sought (para 10 above) to allow that assertion to be tested rather than provide that material and allow it to be tested, the Appellant accepted that policy compliant affordable housing was viable (miraculously the refusal to concede by the Council had led to around £3 - £4m being found on no new evidence between late December 2020 and very early March 2021 just doing the exercise the Council had asked to be done);

however at that point an increase in the abnormals was said to make other s.106 obligations unaffordable – that was a desperate last throw of the dice and was rapidly dropped.

19. TW claim that the onus was on the Council to provide a contrary FVA to show viability if that is what the Council was arguing for. That is misconceived in principle. TW decided to raise viability and had the onus of demonstrating the lack of viability – and had to put forward an evidenced FVA that withstood scrutiny. Requests for information followed to allow its FVA to be tested (especially on costs) and flaws in the FVA were highlighted but not corrected. Rather than engage on those matters in June 2020, the Council's approach was said to be fundamentally misconceived and obstructive. TW appealed on that basis. It was the appeal and its approach which was fundamentally misconceived.

20. It appears that TW were hoping that the Council would give up, or compromise or not be able to afford to fight the case properly. When it realised that the Council was not going to lets its patently flawed assertions pass, it gave up. That is the epitome of unreasonable behaviour.

Education

21. The viability concession extends to the viability of the education contribution and the only point now (latterly) made is that the CIL tests are not met. The Council's own expert's proof shows that (even on his methodology) there was insufficient spaces in 2026. His case on the data appears to be have been arrived at before he had the data and has been stuck to even with the data.

22. The education issue was not live at the point of the appeal and so cannot justify the stance at that time or the bringing of the appeal. In the appeal, the point should have been dropped well before now. Had it been, the Council have adjusted its approach to this case accordingly.

The Viability History

23. The above unreasonableness on viability is further compounded by the history.

Repeatedly Changing Offers

24. The 2016 FVA claimed nil AH could be provided (0%) and only £2985 of s.106 contributions was viable. That was not accepted by the Council. Detailed consideration of costs and values ensued – including a schedule from TW of its assessed abnormals (Doc 7) and 2 lever arch files of information justifying the costs. Over a prolonged period TW gradually conceded ground until a deal was reached at 17% social housing AH (17%)with overage clause based on a GDV of £200psf (and standard build costs including contingencies and professional fees of £88.39 all in). That position was reached after painstaking negotiations and finally agreed in March 2019.

25. In that process TW used its costs and its assessment of abnormals based on its expert knowledge and its experience including on the site next door– no doubt the best evidence of what the scheme would actually cost. Mr Lloyd for the Council was ultimately able to agree those costs.

26. As part of that process in January 2019, a cost analysis from Mr Bushell which arrived at a standard cost of £122.70 all in (compare the £88.39 above) was

introduced but was rapidly dropped by TW and much lower costs accepted by TW.

27. In September 2019, TW's position changed dramatically and it claimed that it could not afford any AH (0%). A new FVA was submitted. The standard costs had changed significantly. Mr Bushell was being relied on. No costs report was provided (despite repeated requests). It was said at the time that the scheme was not viable with the agreed level of AH which only "became clear as development on the 88 unit scheme progressed and following an internal review of viability" (Lichfield letter of 6th December 2019). The reliance on the 88 unit scheme is not understood – the values actually achieved there triggered the full overage clauses – it was able to provide full AH. It was claimed that errors had been made by TW but these were never identified. A very significant change in inputs was adopted. TW no longer using its own costs but those of C&W and Mr Bushell.

28. The position was confirmed in Feb 2020. At the time of the report in June 2020, TW asserted that the scheme was not viable and that the Council's approach was misconceived and obstructive. In its appeal it offered (5%). It has now conceded 30%.

29. This "yo – yo" of viability would have been the subject of significant cross-examination but for the concession – it makes no sense and seems to have largely arisen from reliance on Mr Bushell's costs rather than TW's own, actual costs. Lest it be said that TW costs were broadbrush – see below for what was said about them at the time.

Changing Inputs

30. Many inputs have changed but by far the most significant in the present circumstances is the approach to abnormals.

31. Even Mr Bushell attributed abnormals of £5.2m in 2019 (FVA 2019) with a "costs report" which was to be provided "in due course" (para 8.38). It was never received. The jump in abnormals is set out above and does not bear scrutiny.

32. On other matters, costs were provided by TW and C&W in 2016 – 2019 and TW was content to rely on them. The real world costs of TW showed viability in early 2019 for the 17% plus overage agreement. Nothing adverse changed between early January 2019 and September 2019 except the appointment of Mr Bushell (in conjunction with C&W) and the substitution of his costs for TW real world costs.

33. In the final throw of the dice in March 2021, it was Mr Bushell's abnormals which were relied on but they were wholly implausible and collapsed on the first (even partial) exposure to scrutiny.

Conclusion

34. TW precipitately appealed on the basis of plainly flawed FVAs. Rather than produce evidence to support its stance, it has progressively dropped its positions when challenged resulting in the absurd position that there is now a statement of common ground that, on the only reasons for refusal, the Council was entirely correct – the scheme is viable. There is no evidence that anything changed from Dec 2020 to March 2021 to justify that dramatic volte face. The

appeal should never have been brought, viability should never have been challenged and the whole process has been caused by the basic unreasonableness on viability.

ANNEXE 2

The appellant's response

1. This is the Appellant's written response to the Local Planning Authority's (LPA) application for the full award of its costs or, alternatively, for all of its costs of the appeal less the costs associated with the education issue by reason of the claimed substantive unreasonable behaviour of the Appellant in relation to viability issue.

2. The LPA's application is resisted. It should be dismissed since it discloses no credible basis for a finding of substantive unreasonable behaviour and/or any consequential loss. No full (nor indeed any partial) award of costs is thus justified.

Test for an award of costs

3. In order to secure a full or partial award of costs, in accordance with the Secretary of State's policy, the LPA must show :
    (a) that the Appellant has behaved unreasonably; and
    (b) the unreasonable behaviour has directly caused it to incur unnecessary or wasted expense in the appeal process.

4. Both of the above elements need to be met for an award of costs, full or partial, can be made.

Summary of Appellant's response

5. For the reasons set out below the LPA's fails to establish either limb of the test. In summary, the Appellant contends:
    (a) it acted entirely reasonably in keeping its viability position under review and acted expeditiously when, on the advice of its expert consultants, it became apparent that the inputs into the viability assessment had become such that Appellant could viably offer a policy compliant scheme. That was entirely reasonable;
    (b) even if the LPA can establish there has been unreasonableness (which is strongly denied) it needs to demonstrate that such unreasonableness has caused directly wasted expense. In this case, the only costs for which the Appellant could conceivably be liable are those which were incurred by the LPA in relation to the viability issue between the start of the appeal on 22 December 2020 to early March 2021 when the Appellant informed the LPA in writing of its improved viability position. It is plain, that an inquiry would still have been required irrespective of the viability issue because the education contribution remains a substantive issue in dispute. Since it became apparent that the education issue remained the only live issue between the parties the LPA has not requested, nor has the Inspector directed, that it was suitable for the mode of appeal to be changed to a hearing or to

written representations. As such, the costs of an appeal and indeed of a public inquiry were unavoidable.

Detailed submissions

6. The starting point in terms of planning appeal costs is that each party to any planning appeal is required generally to meet its own costs. Cost awards in planning appeals are the exception and establishing unreasonableness is a high bar to meet.

7. For, exceptionally, such an award to be made, the policy tests identified above must be shown to have been met.

8. The LPA has not here shown either of those tests to be met. There is thus no basis for awarding costs. It is notable that much within the LPA's costs application concerns engagement between the (now) Appellant and the LPA at the planning application stage and thus before the current appeal was lodged. It is, of course, the case that a costs award concerns only costs at the appeal stage and thus what occurred prior to the making of an appeal is not a matter over which the Inspector has any remit. It may be that what occurred at application stage can provide some context but what it cannot do is itself be relied on as unreasonable behaviour such as to justify an award of costs. And, for the avoidance of doubt, the Appellant does not accept that it acted at all unreasonably in the conduct of its planning application at any stage, including prior to the start of the appeal.

No unreasonable conduct

9. Throughout the appeal, the Appellant has engaged professional advisers of the highest calibre in respect of viability and costs, namely Mr. Derek Nesbitt MRICS APAEWE, a partner of Cushman and Wakefield and Head of Residential, Development, North West, together with Mr. Gary Bushell FRICS MAE QDR APAEWE. Cushman and Wakefield are amongst the leading consultants in the field of land valuation and viability, as is Mr. Nesbitt. Mr Bushell of ExpertQS is likewise a highly experienced costs consultant.

10. The Appellant took advice from its consultant team throughout the application and the appeal process and followed that advice. There is a duty on parties to an appeal to keep their cases consistently under review. Keeping the viability position under review and responding to market changes and new evidence is not only desirable, it represents best practice. The FVAs and other viability information in this appeal have been prepared in line with RICS Guidance. As the latest RICS Guidance Note, "Assessing viability in planning under the National Planning Policy Framework 2019 for England" (March 2021) observes:

    3.9.4 FVAs may need to be updated for market movements during the planning process prior to a determination or appeal.

11. That is precisely what the Appellant has done here. Far from being unreasonable this was an entirely reasonable approach to take.

12. The Appellant's consultants reviewed and subsequently revised various inputs of the viability appraisal in line with new information and up to date analysis between the start of the appeal in December 2020 and the start of March 2021. As soon as the Appellant was advised by its consultants in early March that the appeal scheme could viably support a policy compliant position it made that

known to the LPA. Far from the way in which the LPA seeks to characterise it, that is entirely reasonable behaviour.

13. With regard to the LPA's costs application at para. 11 it is the case, as a matter of fact, that the Appellant's position on affordable housing offer changed between December 2020 and formally in March 2020, from 5% (social housing) or 10% (intermediate) to a policy compliant quantum 30%. However, the Appellant provided information to the LPA to explain the basis of its revised offer made in early March 2021.

14. On 3 March 2021, the Appellant provided a summary appraisal to the LPA explaining its revised viability position which meant that it could, at that date, viably provide a policy compliant affordable housing contribution without the s.106 contributions. And, following a request for the further information from the LPA, on 7 March 2021, C&W provided information in a detailed document entitled Financial Viability Assessment Summary Note ('March Note') which expanded the basis of the revised offer. At the same time, the Appellant also provided a Summary of Costs prepared by Mr Bushell of ExpertQS used to inform the updated position. This contained an explanation of the methodology adopted in assessing the abnormal costs and external site costs.

15. The March Note included a range of supporting information based on the latest available evidence at that time. It included details of the net achieved sales data from the adjacent Taylor Wimpey new build development, the latest Land Registry House Price Index for Chorley, the standard build cost and abnormal development cost assessment prepared on an objective basis by the Appellant's Cost Expert, Mr Gary Bushell of ExpertQS, and the RICS Red Book-compliant Existing Use Valuation prepared by specialist rural surveyors MacMarshalls Rural Chartered Surveyors & Planning Consultants on behalf of the Appellant (1.8). The revised inputs are summarised at pages 3-4 of the March Note.

16. As a consequence of the updated appraisal assumptions, C&W concluded that the proposed scheme could deliver a policy compliant quantum and tenure mix and CIL payments and advised the Appellant accordingly, thereby leading to the revised affordable housing package to be provided. At that stage, there was no identified surplus to provide the S106 contributions. However, and as a matter of fact, the Appellant through its consultants offered an explanation of the revised offer made in early March 2021. That was an entirely reasonable approach. The fact that the LPA may not accept or agree those matters, or requested more information does not mean that the Appellant has acted unreasonably.

17. Between 7 March and 22 March the viability was reviewed again internally by the Appellant's advisers, following the receipt of the Sanderson Weatherall (SW) report provided by the Council on 19 March. At that stage, the Appellant's consultants advised that the s.106 contributions could viably be delivered. The Appellant informed the LPA and the Inspector of its revised position at the earliest possible opportunity having been so advised.

18. It is the case, as a matter of fact, that the Appellant did not provide a further FVA or other viability evidence to explain the revised position at 22 March 2021. This is because it did not need to. The Appellant was then offering a fully policy compliant scheme. A viability appraisal is not required by national or indeed local policy where a proposed development delivers in full all that policy

requires. As such, the production of further information was neither warranted nor proportionate, not least since disclosure of information concerning the viability of a proposed development unavoidably requires disclosed of sensitive financial information which a developer should only be required to do where necessary. No such necessity arose here.

19. Finally, and taking a step back from the detailed chronology presented by the LPA, it is important to take stock of where the parties have ended up at the start of the inquiry. As parties are encouraged to do, and as set out above, the Appellant has reviewed its position to arrive at a position where there is now common ground on viability and the Appellant is putting forward a fully policy compliant scheme in terms of quantum and tenure mix of affordable housing. It is unnecessary and disproportionate to burden the inquiry with a detailed exposition as to how precisely the viability position evolved and the final position was eventually arrived at, and why. The point is that the evidence was kept under review by appropriately qualified experts and once it became apparent that a fully viable scheme was achievable, common ground was reached.

20. More generally, if, in these circumstances, an appellant were to be exposed to penalisation in costs for reaching agreement then there will be little or no incentive for appellants to keep their positions under review and seek consensus. A costs award in these circumstances would be a deterrent to future constructive engagement of the kind which has been demonstrated here.

No basis for a full costs award – inquiry required in any event

21. The LPA seeks a full costs award for the entirety of its costs of the inquiry. Even if the LPA can establish that there has been unreasonableness in relation to the Appellant's approach to viability (which, it is submitted, it cannot), the contention that it should be awarded all of its costs on the inquiry is unarguable. That is because:

    (a) the only costs that could conceivably be relevant are those which were incurred by the LPA in relation to viability between the start of the appeal in December 2020 and 3 March 2021, when the Appellant informed the LPA that it was able to provide a policy compliant scheme;

    (b) costs that are unrelated to the appeal (for example, costs in relation to the planning application) are ineligible for a costs award. None of the costs, relating to before the appeal are recoverable. The Inspector's jurisdiction to make an award of costs applies only to the conduct and costs in the appeal.

    (c) in any event, irrespective of the resolution of the viability issue (which is the sole ground for the LPA's costs application) the appeal and the inquiry would have been required. That is because an inquiry is/was required to resolve the live issue of the substantial education contribution approximately £0.5million which the LPA say is required. That issue, raised for the first time on 25 February 2021 some two months after the start of the appeal, has necessitated the production and testing of expert evidence that is unrelated to the viability issues. The education contribution issue was raised at a very late stage. Planning permission was refused by the LPA on 29 June 2020.

The education contribution was never identified in the Committee Report as a separate s.106 contribution. The LPA published its Infrastructure Funding Statement in September 2020 but did not raise the request for a substantial education contribution until 25 February 2021.

22. At no stage, including when it became apparent that the only remaining live issue concerned education contributions, has the LPA requested that the inquiry be downgraded to a hearing or written representations nor has the Inspector so directed (see Inspector's Note 14 April 2021 paras. 3-4). Therefore, it is not possible for the LPA properly to suggest now that an appeal and/or the costs of the inquiry were capable of being avoided; they were not. Thus costs associated with the preparation of the inquiry are out of scope of this application. There is simply no relationship between the alleged substantive unreasonableness and the costs of the inquiry. The costs associated with the education contribution which necessitated the inquiry were not incurred as a result of the alleged unreasonableness. Indeed, the LPA itself appears to recognise this in its alternative application for a partial award of costs.

Overall

23. For the reasons given, the Inspector is requested to reject this application in full.

ANNEXE 3

The Council's final response

1. The Appellant (entirely predictably) attempts to show that it adopted a reasonable stance of keeping the viability position under review and changing position as the facts change. If:
    (a) the Appellant's original viability position was even arguably justified rather than misconceived in principle and on the facts;
    (b) that position was then kept under active review as facts changed rather than only changed at the last minute when the reality dawned of what a full viability challenge by the Council would entail (having to explain the historic approach on all matters and the volte face on those matters since – forced by the basic fact that the original position was misconceived)

    there would be good grounds for resisting costs. But that is not this case. The facts tell a completely different story.

Failure to engage with the substance of the costs claim

2. The Appellant's submissions simply fail to engage with the substance of the Costs Claim. The Council had predicted what the defence of the Appellant would be to the costs claim and for that reason considered the background in some detail. The Appellant has to gloss over that detail in order to sustain its defence.

3. The short point is that the agreed position in the Viability Statement of Common Ground was not reached by the Appellant undertaking reasonable reviews as facts changed. On a correct understanding of the facts, the Appellant has been forced to concede (whether expressly or by necessary

implication) all the matters which were necessary to its original position. It finally recognised that the game was up – it could either give up or reveal all the evidence on which its misconceived position was based. We know it could not do the latter because its case would collapse in a heap of contradictions (as e.g. the costs case and BLV case by the same experts collapsed at Warburton Lane) and it thus had no choice but to concede.

4. On conceding the sole issue in the case, the Appellant expressly declined to explain the final volte face (and its partial attempts to do so in its costs response are not evidence but submission) and has not provided a final FVA to show what assumptions in its earlier work have been dropped. However, the mere fact of the current SOCG necessarily demonstrates that the essential premise of its appeal has been conceded.

5. It has not: (1) provided any of the costs reports since 2020 - when it is entirely clear that those costs reports and the Viability SoCG are necessarily inconsistent; (2) set out its current position on BLV even though the Viability SOCG and the position in its FVAs are necessarily inconsistent; (3) explained how abnormals suddenly jumped by £1.47m when it is entirely clear that that jump was patent nonsense and inconsistent with the position in the Viability SOCG; (4) explained what changed between December 2020 and March 2021 to suddenly yield 30% AH and full s.106 obligations – when the December 5% offer was claimed to be on up to date values and costs[3].

Response to the points raised

6. It is said that the focus on the pre-appeal history is flawed. That is wrong:
    (a) cross-examination of the Appellant's viability witnesses would have focused on the basic point that the approach at the time of the appeal to costs, GDV, abnormals was inconsistent with the actual costs relied on by TW at all earlier stages. When, in February 2021, the Council pressed for the costs reports of TW itself prepared in 2016-18 underpinning the original 2016 FVA (19th February 2021) and an explanation for the differences, the Appellant refused to provide them until exchange of proofs and instead immediately made its 30% offer to avoid being told by the Inspector at the CMH to provide the historic documents;
    (b) the history is directly relevant as to whether the volte face of the Appellant was a valid response to changed facts or consequent on the realization that its case was unravelling and that pursuing it would reveal the historic inconsistencies between the true costs of major national housebuilders and the costs claimed in the FVA.

7. It is asserted that the Appellant has engaged experts of the highest calibre. When their evidence was recently tested in full in a public inquiry, they lost on all points. Whether their evidence (and especially that of Mr Bushell) could be trusted was to be a key issue in this inquiry. Rather than allow his £1.47m jump in abnormals to be tested the Appellant gave up. The facts belie any claim that the Appellants had any faith that their experts' case would withstand public scrutiny. The Inspector is well aware that costs were not awarded in

[3] Para 12 asserts that the viability appraisal was updated between December and March "in line with new information". The Appellant has repeatedly declined to explain what that "new information" was. There was none – save the misconceived £1.47m jump in

Warburton Lane (FN3) but this case is to be assessed on its own merits. A review of the history shows that on every point bold assertions have been made and then quietly dropped when challenged. That is a classic example of unreasonableness.

8. It is said (para 12ff) that new information was relied on between December and March and the viability exercise was amended in the light of that new information. The Appellant has repeatedly declined to explain what "new information" emerged between December 2020 and March 2021. The Financial Viability Assessment Note provides none and in fact was, as the Council would have shown in evidence, based on the position as it was in December 2020. The Costs Summary provides no "new information" but just a misconceived increase in abnormals based on work done by December which has never been revealed. The whole premise of the defence that things changed between December 2020 and March 2021 justifying the change in position is assertion only and is inconsistent with the evidence. It may be said that there was new evidence on values – this is factually wrong and unevidenced. The change in the viability case between December 2020 (5%) and March (30%) is said to be consequent on house price inflation in that short period. On the contrary, the December approach had failed to address house price inflation which had already occurred up to that date. The reality is that the move to 30% was based on HPI most of which occurred well before the appeal was lodged.

9. It is claimed that the case was reviewed again from 7th March to 22nd March "following the receipt of the SW report" (para 17). That is wrong. SW was received on the Friday evening 19th March and the concession was made first thing on the following Monday morning just two days before the CMH. This chronology is wholly inconsistent with a proper review being undertaken. In fact, the timing of the dropping was no coincidence. The Council had made clear that it would be asking the inspector to require provision of all the historic abnormals and costs reports at the CMH and (for reasons set out above) the Appellant could not risk that.

10. It is said (para 18) that no final FVA was required. That is correct but the consequence is that the Appellant has not even started to explain how it has reached its current position. It was asked by counsel for the Council to do so at the CMH and expressly declined. It has chosen not to provide any material to sustain its assertion that the change in viability offer was based on changed facts.

11. Bizarrely, (para 19) the Appellant relies on where we have "ended up" – implying that the system has worked. The correct position is that the Appellant took a gamble that the Council would cave or do a deal on AH – the Council was not prepared to negotiate on the basis of misconceived FVAs and it was patently right. The position we have ended up at is exactly where this was always going to end up; very significant costs have been incurred in the process. The Council should not be made to pay for the Appellant's gamble which has so badly backfired.

Quantum

12. It is agreed that no costs prior to December 2020 can be claimed. However, the claim for costs arises from the misconceived and unreasonable appeal in December 2020 which led to all subsequent costs. The fact that the viability case was finally conceded late in March 2021 does not mean that that is the cut

off for costs. There would have been no appeal and therefore no costs of any of the appeal but for the unreasonable appeal on viability grounds.

13. As to education, the education issue would not have arisen if there had been no appeal. The mistake of the Council on education would have gone unnoticed. In any event, had the sole issue been just education contribution: (1) the case would have been heard by written reps; (2) no QC would have been engaged; and (3) the costs of the appeal would not have been incurred.

14. Full costs should be awarded.