The Planning Inspectorate

Costs Decision

Inquiry Held on 17-19 & 25-27 May 2021
Site visit made on 28 May 2021

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th September 2021

Costs application in relation to Appeal Ref: APP/J1860/W/21/3267054
Land off Claphill Lane, Rushwick

- 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 Lioncourt Strategic Land for a full award of costs against Malvern Hills District Council.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for outline planning permission for residential development of up to 120 homes (Use Class C3), access, public open space, landscaping, car parking, surface water attenuation and associated infrastructure (all matters reserved except access).

Decision

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

Procedural Matters

2. The costs application was submitted in writing. I have taken into account the Government's Planning Practice Guidance (PPG) in reaching my decision.

3. As referred to in my appeal decision, since the Inquiry, the revised National Planning Policy Framework (the Framework) has come into force. The Appellant has commented that much of the substance of the Framework which is material to the appeal has not changed and that in the main the changes would be more relevant to any future reserved matters. The Council has not raised any comments in relation to this matter. I too am satisfied that the revised version has not materially altered the consideration of those issues pertaining to the appeal. For clarity, any references to the Framework within my reasoning section relate to the revised version, including where applicable, different paragraph and footnote references to the previous version, the wording of those relevant parts of the Framework having remained unchanged. In the sections containing the submissions of the parties, I have left the paragraph references relating to the previous version of the Framework unchanged but have inserted the new references where applicable in brackets.

4. As also referred to in my appeal decision and since the Inquiry, a South Worcestershire Five Year Housing Land Supply Report (the SWFYHLS report) has been published for consideration by the three Councils concerned of Worcester City, Wychavon District and Malvern Hills District. This concludes that on a joint basis the three Councils can demonstrate 5.76 years' worth of

deliverable housing sites. Whilst this has not been formally published, pending its reporting to the relevant Committees of those Councils, and acknowledging that there is no certainty that it will remain unaltered or be endorsed by all of the Councils, the circumstances are such that it is in an advanced position towards such publication. In my appeal decision I have therefore treated it as a material consideration and have also made reference to it below.

The submissions for Lioncourt Strategic Land

5. The Appellant believes the Council has acted unreasonably in the case of this appeal, such to the extent that the Appellant has wasted expense and a full award of costs is being sought or at the very least a partial award of costs in respect of matters and evidence needed to be prepared and presented in respect of housing land supply matters. This is having regard to Guidance within the Planning Practice Guidance (PPG) on this matter and on the summary basis that:

    - The matter of housing land supply position of the Council is important to the determination of the appeal;
    - It was a matter which was a principal focus of the evidence which the Council and Appellant's in that case submitted at a recent appeal in the District in Rushwick, concerning an appeal by Custom Land appeal (APP/J1860/W/19/3242098) a decision which was issued on the 6 April 2021;
    - In that appeal the Inspector concluded that the Council could not demonstrate a 5 year housing land supply (HLS);
    - That decision was issued before exchange of evidence in respect of this appeal;
    - The Council in its acknowledgement of the appeal decision in their email to the Planning Inspectorate dated 7 April 2021, stated that the "decision has significant implications for the Council's position and arguments for the Claphill Lane case, particularly in regard to housing land supply and policy status." The Council asked for extensions of time to complete the Statement of Common Ground (SOCG) and to prepare an updated main Planning SOCG;
    - The Appellant wrote to the Council on a number of occasions seeking clarification of their position, even with the offer to re-submit an application to the Council;
    - The Council advised on the 8th April at 17.56 that "it has been decided that our position on 5 year HLS for this Inquiry will be much the same as for the Bransford Road Inquiry";
    - The Council's submitted evidence in respect of housing land supply which by comparison to the Custom Land appeal is essentially the same, with the same re-rehearsed arguments by the same Witness;
    - The Council's Planning Witness confirms in his evidence that "The Council does not agree with the conclusion in the Bransford Road decision that the Standard Method should apply now, and is reasonably entitled to say that again";

- An example in the PPG of a behaviour of a Local Planning Authority (LPA) which may lead to an award of costs is when a LPA continue in "persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable". This is particularly apt in this case given the position on housing land supply is of some considerable significance to the approach to determination of the application and the planning balance;

- The Council has sought to repeat an argument in direct conflict with the findings of an Inspector in a very recent appeal decision, knowingly doing so and with some suggested entitlement to do so even when admitting that the Custom Land appeal had "significant implications for the Council's position";

- The Council has not changed or even revisited its Statement of Case, nor has it formally advised Planning Committee of the Custom Land decision and sought any new or updated position of "the Council" in the context of the significance of the Custom Land decision;

- The Council's evidence pays lip service to the decision and fails to properly and genuinely grapple with the implication of a lack of housing land supply, its implications for the decision making process, and most importantly a genuinely proper and considered re-approach to the planning balance in this case, more have attempted to demean its importance.

6. The Appellant believes that they have wasted expense in having to present HLS evidence in this case, and given the implications of such an absence of a HLS to the approach to decision taking and the planning balance, believe that the council has not properly re-assessed the planning balance as they should have done in the context of the Custom Land appeal, either with the Council Members or in its evidence, such that the appeal may not have been necessary at all.

The response by Malvern Hills District Council

Full Award versus Partial Award

7. The Appellant's costs application is made on the basis of alleged unreasonable behaviour in respect of the Council's 5 year HLS case. The Appellant claims that they have been caused wasted expense due to the need to prepare and present evidence in respect of HLS matters. A full, or at least partial, award of costs is sought. Further, the application asserts that *"given the implications of such an absence of a HLS to the approach to decision taking and the planning balance"* they *"believe that the council has not properly re-assessed the planning balance as it should have done in the context of the Custom Land appeal, either with the Council Members or in their evidence, such that the appeal may not have been necessary at all"*.

8. As to that, it is noted that the Appellant does not put its position particularly strongly in stating that it *"may not have been necessary"*. And that is perhaps unsurprising. Mr. Greenwood clearly does consider the Custom Land appeal (also known as the 'Bransford Road appeal decision') in his written evidence [paragraphs 3.2-3.3] as does Mr. Roberts [paragraphs 1.10; 2.13-2.19]. It has been explained why the Council has maintained its position and that was

elaborated upon by Mr. Greenwood in oral evidence. He was clear that discussions had been had with officers, the Chairman of the Planning Committee, ward council members and leaders as to the appeal decision and that support had been given to proceed as the Council has. There was no procedural need to report the appeal decision back to the Committee for a decision in this regard. No doubt it will also be further explained by Mr. Roberts. It cannot be properly suggested that it has not been factored into Mr. Greenwood's planning balance, given he is aware of and refers to said decision, and in any event, he is clear in his evidence, both oral and written, that even if there is no 5 year HLS he considers that the harm arising from the development would significantly and demonstrably outweigh any benefits. That is a view the Appellant does not agree with, but that does not make it an unreasonable one. It is not unusual that an Inspector finds, in the circumstances of a case, that even in the absence of a 5 year HLS an appeal should be dismissed. The Appellant's costs application is not put any higher, nor advanced in any more detail, as to why the Mr. Greenwood's position is unreasonable insofar as considering the tilted balance to fall in favour of dismissing the appeal, rather than simply a different exercise of planning judgement to theirs; and it was not put to Mr. Greenwood that this was so.

9. Accordingly, as a starting point, the Council asserts that even if the Inspector were of the view that the Council's 5 year HLS case has been unreasonable, he should not find that this renders the entirety of the Council's case so. Realistically the most the Appellant could achieve is a partial award of costs.

Wasted Expense on that basis

10. Putting aside for a moment the merit in the Appellant's case insofar as the reasonableness or otherwise of the Council's 5 year HLS case, it is appropriate to emphasise the remit of the wasted costs sought on the basis of such a potential partial award.

11. Should the Inspector agree with the Council that it has not acted unreasonably in advancing an alternative position that even without a 5 year HLS the appeal should be dismissed – and he does not need to agree with the Council's case to conclude that it was not unreasonable - a public inquiry was still required. As was the instruction of all of the other experts and counsel. This is a matter of the extent of preparation and sitting time rather than that there should have been none at all.

12. Wasted costs could only then extend to the preparation and presentation of their 5 year HLS evidence – which is what the application appears to seek notwithstanding the 'add on' comment as to the potential for the inquiry not being required. Breaking this down this means:

    11.1 As to preparation:

    - The preparation of Mr. Austin-Fell's evidence by him;
    - Very limited time for Mr. Tait to address such evidence in his Proof of Evidence, given he simply relies upon and regurgitates what Mr. Austin-Fell says;
    - More limited counsel preparation time than might otherwise be so given the sites evidence is to be heard by way of roundtable

with more limited time spent on formal Examination in Chief and Cross Examination;

11.2 As to presentation:

- A maximum of 2 days of inquiry time is scheduled to be spent on 5 year HLS evidence;
- It is unlikely that the full extent of scheduled time will be used;
- Given his reliance on Mr. Austin-Fell's evidence, barely any time was spent by Mr. Tait presenting evidence at inquiry on 5 year HLS.

13. Furthermore, even the extent to which the alleged wasted expense of preparing and presenting evidence on 5 year HLS is recoverable should be questioned. The Appellant is quick to draw attention to the Custom Land Appeal and criticises the Council for re-running its case there. However, in that case the Appellant did not take up time disputing sites. That was in this Appellant's gift here too. The Appellant has added to its workload when it could simply have run the same argument the Appellant did at Bransford Road. That would have taken considerably less time and expense than requiring a detailed consideration, and back and forth negotiations, as to individual sites.

14. Accordingly, any wasted costs, if the Council is found to have acted unreasonably, should be focused entirely on the time the Appellant has spent addressing the argument the Council ran at the Custom Land Appeal only and not any new issues dealt with in the context of this case for the first time.

Unreasonable behaviour

15. With all that said, the Council does not accept that it has acted unreasonably in running the arguments it has here with regard to the proper way in which 5 year HLS should be calculated – based on the sub-area not district-wide, and based on the most recent 2020 Annual Monitoring Report (AMR) which was produced at a time when the South Worcestershire Development Plan was under 5 years old rather than the Standard Method (SM).

16. It is correct that those are arguments which were raised in the Custom Land appeal (APP/J1860/W/19/3242098) and it is also correct that the Inspector there concluded that the Council could not demonstrate a 5 year HLS. Whilst the interpretation of planning policy is a matter of law, that Inspector was exercising planning judgement in coming to their decision. Their decision is not one of a court and not binding in the same way that a legal precedent may be. It is a material consideration and it is within this Inspector's gift to take a different view.

17. As to whether he should, the Inspector is referred to the written evidence of Mr. Roberts which is not rehearsed in this document; specifically paragraphs 2.1 to 2.19, and 4.3 to 4.16. Further, by the time the Inspector comes to consider the Appellant's costs application the Inspector will have the Council's closing submissions, which he is also asked to take into account, and he will also have heard Mr. Roberts' oral evidence.

18. Though Mr. Choongh made comments during cross-examination of Mr. Greenwood that he would have made a costs application against the

Council were he acting in the Custom Land appeal, the Appellant's costs application is not brought on the basis of the merit or otherwise of the arguments the Council runs regarding the appropriate interpretation of the National Planning Policy Framework (the Framework) and PPG as to the calculation of 5 year HLS. It is that those arguments have been run before an Inspector recently that is said to be in issue. Allied to that, any costs incurred before the Bransford Road decision should not be payable as there is no argument made in the Appellant's costs claim that the Council's 5 year HLS position was unreasonable before that decision was issued.

19. The Appellant relies in their application on the PPG, citing an example of behaviour of an LPA which may lead to an award of costs as when a LPA continues in "persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable". The 5 year HLS argument is not in and of itself an objection to a scheme or elements of it, it is more overarching than that. Further, this is not the same scheme as the Bransford Road case, so the PPG reference is analogous at best. There is nothing in the PPG that specifically addresses this situation. As Mr. Greenwood noted, it is not uncommon for one Inspector to decide a matter based on an interpretation of policy and then another Inspector to take a different view.

20. The Council has actively cooperated with the Appellant throughout the course of the appeal process to reduce the matters at issue and therefore the overall costs.

CONCLUSION

21. For all of the reasons set out above, the only just outcome would be for the Appellant's costs application to fail. It does not satisfy the required test and should not have been made.

Reply by Lioncourt Strategic Land to the Council's response

22. We do not respond to that part of the Council's response which seeks to quantify how much time and expense has been taken up with addressing the issue of 5 year HLS. It is not necessary at this stage to quantify the wasted expense; all the appellant has to do is to show that the unreasonable behaviour in question has led it to incur work and expense that would not otherwise have been necessary. There is and can be no doubt that that test is satisfied. Quantification is a step in the process that follows on from the costs award in principle.

23. Neither is it correct or fair to criticise the Appellant for calling evidence on individual sites. Where a council claims to have a 5 year HLS the appellant is entitled to call evidence to prove that it does not have a 5 year HLS, and to show the extent of the shortfall. As the Council's own evidence states, the weight to be attached to the shortfall depends in part on the extent of the shortfall. It will be recalled that Mr Greenwood described the shortfall as 'minor'. The Appellant is entitled to challenge that by seeking to show that not all of the sites factored into the Council's land supply are deliverable, and that even on its own approach to the requirement the supply is lower than that claimed.

24. The mainstay of the Council's defence to the costs application appears to be that the Bransford Road appeal inspector was exercising planning judgment in deciding that the Council could not demonstrate a 5 year HLS. That is simply wrong. As Mr Roberts accepted, his position rests squarely on a particular interpretation of Framework paragraph 73 (now para. 74 in the new version of the Framework). The interpretation of planning policy is a matter of law. As he also accepted, there is only one correct interpretation of the paragraph 73 – in a case where footnote 37 (now 39 in the new version of the Framework) does not apply (and no one contends that it does apply), paragraph 73 either requires application of the SM as soon as the plan is 5 years old or it only requires application of the SM once the LPA has updated its AMR. The Council put its legal interpretation of paragraph 73 to the inspector at the Bransford Road inquiry, and did so with the assistance of experienced planning counsel. Having heard legal submissions from both sides, that inspector summarily dismissed the Council's argument (it got the short shrift it deserved). It is clearly unreasonable for an authority to simply ignore that ruling and run the same point again.

25. What the Council is in effect doing is asking the inspector to disagree with that earlier inspector, without putting forward any new additional legal arguments or pointing to any material change in circumstances. Such would of course be very difficult to do given only a very limited passage of time since the recent Bransford Road decision. That is unreasonable behaviour – the earlier ruling may not be legally binding, but the Secretary of State's (SoS) inspectors cannot simply make wholly inconsistent rulings on the law within a matter of weeks without giving any reasons. Hence the guidance in the costs circular that it is unreasonable for parties to ignore what the SoS has said about an issue in an earlier appeal in the absence of a material change of circumstances.

26. Even leaving aside the egregious behaviour of running the same point again, the fact is that the Council's argument on the SM simply does not reach the threshold of respectability – which is another example of unreasonable behaviour. It is not an argument that any reasonable inspector could possibly accept. It involves asking an inspector to ignore clear government policy that where a plan is more than five years old and found to require updating, housing requirements must be calculated using the SM. It would have been a materially different policy had the SoS wanted to say that the housing requirement set out in adopted policies should continue to be used until LPAs update their AMR, whenever that might be.

27. The full award of costs is justified on the basis that this LPA has simply not genuinely accepted the Bransford Road Inspector's ruling on 5 year HLS and has not genuinely carried out the planning balance exercise applying the tilted balance. It made the decision to reject this application and fight the appeal on the basis that it had a 5 year HLS and this application is contrary to the plan. When it was told by a planning inspector that it did not have a 5 year HLS it should have reported that decision to full planning committee, accepted that it did not have a 5 year HLS and then carried out the planning balance exercise in fresh report to committee and put it before the members. The Officers reporting and advice to Members in their planning balancing must surely have been different if they did so and Members too would have had to at least reconsider their own planning balancing. Had it properly done so the likelihood is that this inquiry could have been avoided altogether.

Reasons

28. The PPG advises that, irrespective of the outcome of the appeal, costs may only 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.

29. In this case the Appellant refers to another appeal decision, relating to a different scheme and site within the District, at land south of Bransford Road, Rushwick[1]. That decision was issued on 6 April 2021 and therefore in advance of this Inquiry and the submission of proofs of evidence (PoEs). The Council therefore had the opportunity to consider the implications of that decision in relation to this appeal in producing its PoEs and presenting evidence at the Inquiry.

30. An example of unreasonable behaviour which may result in an award of costs is where the local planning authority persists in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable. Although that other decision was not for the same proposal and that the issue concerning housing requirement and supply is not to do with the scheme itself, examples of unreasonable behaviour set out in the PPG are not exhaustive. Furthermore, the matter of housing requirement was a common consideration for both the Bransford Road appeal and this one, relating to the same District, regardless of that other appeal being dismissed.

31. My colleague in the Bransford Road appeal dealt clearly with the matter of housing requirement in relation to paragraph 74 of the Framework, in light of the SWDP having become more than five years old, finding that the 5 year HLS should be based on local housing need (LHN) using the standard method (SM) rather than that set out in the adopted SWDP. That was a clear finding, and although not legally binding, there has been no material change in circumstances since that decision relating to this issue. This is emphasised by my decision where, having considered the evidence submitted in this case, I have come to the same clear finding as my colleague, demonstrating the clarity of the position as set out in the Framework and PPG.

32. I note that the implications of the Bransford Road appeal for the current appeal have been the subject of discussions with Council officers, the Chairman of the Planning Committee, ward council members and leaders, and that support had been given to proceed with an unchanged position on the matter of housing requirement. However, for the above reasons, the Council had no substantive basis to persist with its different approach leading up to and at this Inquiry following that other decision.

33. The finding on housing requirement was important in terms of triggering the tilted balance under paragraph 11(d)ii of the Framework, notwithstanding the implications of the subsequent submission of the SWFYHLS report. However, notwithstanding my decision, it was reasonable for the Council to have pursued its position at the Inquiry in respect of the first three main issues. This is on the basis that, even with a finding of no 5 year HLS, the Council still considered that the adverse impacts of granting permission would significantly and

[1] Appeal Decision Ref. APP/J1860/W/19/3242098

demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole, which is a matter of planning judgement.

34. Furthermore, the matters concerning the deliverability of a small number of housing developments in relation to the HLS figure were considered in the context of the Appellant's position on housing requirement and so would reasonably have been dealt with at the Inquiry even if the Council had conceded in respect of the use of the SM. It is also the case that this costs application has come about as a result of the Bransford Road appeal decision and I consider that it would be unreasonable for the Council to be liable for any costs incurred by the Appellant on this matter prior to that decision.

35. For the above reasons, relating solely to the evidence concerning housing requirement, again notwithstanding the findings of the SWFYHLS report, I therefore find that the Council behaved unreasonably in continuing to defend its position at appeal, since the Bransford Road decision, that the 5 year HLS should be based on housing requirement in the SWDP rather than LHN using the SM; and that, therefore, the applicant's costs in pursuing that element of the appeal were unnecessarily incurred and wasted. For this reason, a partial award of costs is justified.

Costs Order

36. 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 Malvern Hills District Council shall pay to Lioncourt Strategic Land, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred since the Bransford Road appeal decision in respect of the issue of whether the 5 year HLS should be based on housing requirement in the SWDP or LHN using the SM, as referred to above; such costs to be assessed in the Senior Courts Costs Office if not agreed.

37. Lioncourt Strategic Land is now invited to submit to Malvern Hills 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.

Andrew Dawe

INSPECTOR