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## Costs Decision

Inquiry held from 11 to 14 January 2022

Accompanied site visit made on 18 January 2022

**by David Cliff BA MSc MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 23 February 2022**

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### **Costs application in relation to Appeal Ref: APP/Z2260/W/21/3280446 Land on the northwest and southeast sides of Shottendane Road, Margate, Kent, CT9 4NF**

- 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 Gladman Developments Ltd for a full award of costs against Thanet District Council.
  - The inquiry was in connection with an appeal against the refusal of planning permission for 'outline planning application for up to 450 residential dwellings (including market and affordable housing), structural planting and landscaping, formal and informal public open space and children's play area, sustainable urban drainage, with vehicular access points, including associated ancillary works and operations from Hartsdown Road, Shottendane Road and Manston Road. All matters reserved with the exception of access'.
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### **Decision**

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

### **Procedural matters**

2. Due to time constraints at the Inquiry and following agreement by the parties, the appellant's application for costs, the Council's response to the application and the appellant's response were all provided in writing in accordance with an agreed timetable.

### **Reasons**

3. Planning Practice Guidance (PPG) states that irrespective of the outcome of an appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs unreasonable expense in the appeal process.

*Accordance with the development plan, national policy and other material considerations*

4. The PPG includes an example of unreasonable behaviour as preventing or delaying development which should clearly be permitted having regard to its accordance with the development plan, national policy and other any other material considerations. My interpretation of this guidance is that it infers a combination of three matters require consideration, not just accordance with the development plan. This is relevant to the matter of the interpretation of

paragraph 11 of the National Planning Policy Framework which I return to below.

5. The Council's first reason for refusal relates to the provision of affordable housing. This reason does not make reference to a particular development plan policy, rather it refers to Strategic Priority 3 of the Thanet Local Plan and the objectives of the National Planning Policy Framework. The second reason for refusal, on the matter of a legal agreement to secure delivery of the necessary planning obligations, includes reference conflict with Local Plan Policy SP23 covering affordable housing. There is some lack of clarity here, but the Council's case as subsequently set out in its evidence seeks to argue that the scheme could provide for a greater provision of affordable housing, this being a matter requiring consideration by Policy SP23.
6. As referred to in my appeal decision, there was a disagreement between the parties on the correct interpretation of paragraph 11 of the Framework. The Council's argument leads to a situation where 'the tilted balance' would be engaged as the lack of a five year housing land supply means the policies which are most important for determining the application are out-of-date. The proposal, notwithstanding other representations, could not therefore be considered as according with an up-to-date development plan in the context of paragraph 11 (c) of the Framework.
7. In the context of paragraph 11 of the Framework, whilst in this case the appeal outcome would be the same no matter which of the two routes is followed, taking account of the acute need for affordable housing along with other harm, there is sufficient scope for the Council to have acted as it did in refusing the application without this amounting to unreasonable behaviour on this ground.

*Failure to substantiate the reason for refusal*

8. Although the issue of viability is not specifically raised in any of the reasons for refusal, the Council subsequently provides its views, and associated evidence, on the acceptability of the viability assessment information provided by the appellant in its Statement of Case and Mr Hestor's Proof of Evidence.
9. As a result of the evidence provided by the Council during the appeal stage, and presumably discussions between the parties, the appellant provided (including in Mr Couldrey's rebuttal evidence) further assessment of alternative scenarios based on what might be policy compliant mixes, but it appears that this was the first time this was provided. It was not done as part of its application submissions up to the Council's determination.
10. In its evidence, the Council has raised concern regarding the assumptions used in the appellant's financial viability appraisal (FVA), specifically that it was not based on policy compliant housing mix and sizes. Whilst the evidence has led me to the conclusion that a more viable result would not be achieved by changing the assumptions on this basis, it does not appear to be unreasonable for this to be raised as a matter of concern by the Council. As the Council states, its appointed viability consultants did not consider the matters of mix, tenure, size and types, rather they focused on the costs and values inputs.
11. With regard to build costs, the Council in its Statement of Case made clear that it does not challenge the viability outputs set out in the submitted FVA. The Council's approach to building costs only emerged in Mr Hester's Proof of

Evidence. There is some inconsistency in approach here. Although this is not to say that the Council's point on building costs was not in terms of its merits an unreasonable point to raise given the arguments put forward to support it. Whilst such arguments for the Council were not advanced at the Inquiry by a professional surveyor, that is not to say that the justification provided by Mr Hester in his evidence should not carry some weight.

12. The conclusions in my decision on matters such as building costs and developer profit have meant that I have given more weight to the appellant's evidence. However, the different assumptions led to a situation where it was reasonable for the Inquiry to explore in order that I could come to a reasoned overall conclusion on the affordable housing issue.
13. It was open for the Council to provide its own detailed viability assessment. Whilst it did not do so, the Council did provide evidence which required consideration in my decision, including certain assumptions within it and on the weight to be given to the appellant's FVA. As outlined above, the need to consider policy compliance mixes and sizes is a reasonable one, no matter why this exercise led. Whilst matters concerning build costs and developers profit were not raised by the Council's appointed consultants, the Council is not obliged to follow such advice. There is sufficient weight to the Council's arguments for these to need consideration during the Inquiry and to consider the appropriateness of the appellant's affordable housing proposal for this strategically important site, particularly taking account of the clear need for affordable housing in the district.
14. Therefore, I do not consider that the Council has failed to substantiate its reasons for refusal.

*Vague assertions*

15. Following the Council's Statement of Case (SoC) the appellant requested that the Council provide details of the scenarios it wished for the appellant for consider in its evidence, including the assumptions and inputs it suggests should be addressed. The SoC did, however, state that the appellant's FVA does not test or take into account alternative assumptions around the number, mix of sizes, tenures and types of homes that could be provided. Further, it states that it does not test the Council's preferred policy mix of sizes and types of homes. This would seem to provide some basis for alternative scenarios to be provided by the appellant in response, particularly as it appears at that stage that there was no indication whether or not such scenarios would be capable of providing for more affordable housing. In spite of the results of subsequent assessment work, there appears to have been uncertainty on this matter at the earlier stage.
16. The Council has sought, albeit with rather limited evidence, to show that the scheme could be optimised to provide more affordable housing. Given its uncertainty regarding the mix and sizes considered in the appellant's FVA and despite the limited evidence, its position and evidence on these matters does not amount to a vague assertion.
17. In spite of previous disagreements on paragraph 11 of the Framework, the appellant's Costs Reply notes<sup>1</sup> that this is a case where it is established that the

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<sup>1</sup> Paragraph 11

tilted balance is engaged. The matters of consideration arising are matters of planning judgement and, taking account of the importance of affordable housing in both local and national policy considerations along with its concerns regarding the FVA, the Council's position on this does not amount to situation where it has acted unreasonably.

*Other considerations*

18. When the Council framed its reason refusal, it is not clear at that stage what evidence it had to support its position on affordable housing, a point that has been agreed by Mr Hester. However, my conclusions on costs have taken account of all the evidence that has been provided as part of the Inquiry.
19. Whilst the appellant draws attention to advice from Council officers to Members that refusal would lead to a high risk of being overturned at appeal with costs awarded against the Council, it remains necessary to consider the substance and facts of both cases regarding costs following the giving of evidence. The reasons set out above set out my considerations.

**Conclusion**

20. I conclude that for the reasons set out above, unreasonable behaviour resulting in unnecessary expense during the appeal process has not been demonstrated. An award of costs is therefore not justified.

*David Cliff*

INSPECTOR