



Costs Decisions

Inquiry held on 31 January and 1 to 3, 7, 9 to 10 and 28 February and 1 to 3 and 9 March 2023

Site visit made on 10 March 2023

by **O S Woodward BA(Hons.) MA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 18/04/2023

Costs application A - in relation to Appeal Ref:

APP/Z0116/W/22/3308537

Land at Broomhill/Brislington Meadows, Broomhill Road, Bristol BS4 4UD

- 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 Homes England for a full award of costs against Bristol City 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 planning permission for the development of up to 260 new residential dwellings (Class C3 use) together with pedestrian, cycle and vehicular access, cycle and car parking, public open space and associated infrastructure.
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Costs application B - in relation to Appeal Ref:

APP/Z0116/W/22/3308537

Land at Broomhill/Brislington Meadows, Broomhill Road, Bristol BS4 4UD

- 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 Bristol City Council for a full award of costs against Homes England.
 - 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 planning permission for the development of up to 260 new residential dwellings (Class C3 use) together with pedestrian, cycle and vehicular access, cycle and car parking, public open space and associated infrastructure.
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DECISIONS

1. Application A – The application for an award of costs is allowed in the terms set out below.
2. Application B – The application for an award of costs is refused.

BACKGROUND

3. Planning Practice Guidance (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 expense in the appeal process. The PPG also advises that the behaviour of parties during the time of the planning application can be taken into account in deciding whether unreasonable behaviour has occurred,

although the costs themselves can only be awarded in relation to unnecessary or wasted expense at the appeal. The PPG further advises that in an appeal against non-determination the Council should explain their reasons for not reaching a decision within the time limit and why permission would not have been granted had it been determined.

APPLICATION A

The submissions for Homes England

4. An application for full costs for unreasonable behaviour was made in writing. The application claims unreasonable conduct on behalf of the Council that has led to unnecessary and/or wasted costs in the appeal process being incurred by Homes England. The written submission provides full details of the claim, which I summarise below.
5. The evidence in relation to veteran trees by Mr Forbes-Laird in his Proof of Evidence was substantial evidence submitted at a late stage. The Statement of Case did not disclose the Council's objection in this regard or its eventual reliance on Paragraph 11(c) of the National Planning Policy Framework (the Framework). In the period from 16 December 2022 and 6 January 2023, the Council did not provide Homes England with a full list of the alleged veteran trees. The Planning Committee was not informed of Mr Forbes-Laird's position and could not have been because Mr Forbes-Laird himself had not concluded his position at the time the committee was held. This position could not, therefore, have informed the putative reasons for refusal. Likewise, the Officer's Report does not consider this issue. The Council's pre-application response and the tree officer's comments¹ did not make it clear that veteran trees were to be part of the Council's case as eventually presented.
6. The Council acted unreasonably by preventing development which should clearly be permitted, because the proposal accords with the site allocation Policy BSA1201 of the Site Allocations and Development Management Document 2014 (the SADMP). The Council's case relied on an objection on the loss of hedgerows and trees, the proposed green infrastructure link, and design and landscape harm. None of the objections had substance. The Council maintained an in-principle objection to development on the appeal site in direct contradiction of the site allocation.
7. No explanation has been provided by the Council of why the application was not determined within statutory time limits, contrary to PPG.
8. The Council's application for costs is without merit because it is predicated on the stance that there are veteran trees and itself constitutes unreasonable behaviour that has resulted in wasted expense in response.

The response by Bristol City Council

9. This was provided in writing which provides full details of the response. In summary, the Council accepts that veteran trees as an issue was introduced into the Inquiry at the stage in the process. However, the reason for this was that Homes England had not undertaken an acceptable tree survey in the first place. It was the responsibility of Homes England to identify the alleged veteran trees. The Council acted with diligence and speed once it became

¹ Dated 7 July 2022, 10 September 2022 and 24 November 2022

aware of the issue. The Council provides delegated authority to officers to make decisions in the course of an Inquiry. This provides the power to present evidence on veteran trees even if not considered as part of the Planning Committee.

10. The Council's approach to site allocation Policy BSA1201 of the SADMP is that 300 homes are not 'priced in', which was also partly the approach adopted by Homes England. Veteran trees are clearly an objection with substance. It is not reasonable to expect the Council to consider whether or not conditions could have been used to protect the alleged veteran trees, if necessary. It is clear that the proposal is not fully and without debate in accordance with Policy BSA1201 of the SADMP.
11. The Council has at all times accepted the principle of residential development on the appeal site and has not departed from that position.
12. The application for costs on behalf of the Council is not unreasonable. It is necessary given the unreasonable conduct of Homes England.

Reasons

Veteran trees

13. The Council's Report to Committee includes a section on trees and assesses the proposed loss of trees subject to the Tree Preservation Order. However, it does not mention veteran trees, not even the oak trees. It does not criticise the Arboricultural Impact Assessment, dated March 2022 (the AIA). The initial report, before the amendment sheet of 7 December 2022, does not include a putative reason for refusal in relation to harm to veteran trees and/or irreplaceable habitats. The final putative reasons for refusal, as agreed by the Planning Committee, include the third reason, which relates to the loss or deterioration of irreplaceable habitat. It does not specifically mention veteran trees but this is the only logical irreplaceable habitat on the appeal site. However, the T6 oak tree is identified as a veteran tree in the AIA. No other veteran trees were alleged by the Council, at that time, to exist on the appeal site. None of the putative reasons for refusal allege deficiency in the AIA.
14. The Council's Statement of Case (the SoC), which followed the Report to Committee, says² that evidence will be provided regarding veteran trees, and that the proposal is contrary to Paragraph 180(c) of the Framework. However, the SoC does not specifically highlight veteran hawthorns. The SoC also directly references³ the final Arboricultural Officer comments, which also do not refer to veteran hawthorns. The SoC does not mention that the AIA is deficient.
15. The Council has, earlier in the process, highlighted the potential for veteran trees on the appeal site. For example, the Council highlighted the possible presence of veteran trees in its pre-application response in January 2020 and the Council's Arboricultural Officer also mentioned potential veteran hawthorns in a preliminary comment, dated September 2022. However, none of those objections remained at the point that the proposal was taken to Planning Committee or in the Statement of Case. Nor, at any stage, did the Council explicitly highlight concerns with the AIA. Therefore, because the AIA only identified the oak tree T6 as being of veteran status, the only reasonable

² Paragraph 3.6.1

³ Paragraph 5.6

understanding of the third putative reason for refusal is that it only related to T6. It would not be reasonable for Homes England to infer from a pre-application response from early 2020 or since superseded comments from the Arboricultural Officer that the reason for refusal was intended to relate to more than that one tree.

16. However, all the alleged veteran hawthorn trees are within groups in the AIA. None of them are identified as individual trees. BS5837:2012 states⁴ that a tree survey should record all trees with diameter 75mm or more, or 150mm or more if within groups. All the alleged veteran hawthorn trees, even using the smaller diameters in the evidence provided by Homes England, are in excess of 150mm. Often, significantly in excess. The AIA does not identify any of them, categorise any of them, or even indicate that there might be trees of value, even if not of veteran status, within those groups that could not be accessed. The AIA specifically highlights that access was difficult for other groups of trees on the appeal site but does not do so for any of the groups that the alleged veteran hawthorns sit within. The AIA is, therefore, deficient.
17. Policy BSA1201 of the SADMP states that proposals for the appeal site should retain or incorporate important trees and hedgerows within the development which will be identified by a tree survey. Because the AIA was deficient, it was not possible for the Council to fully assess the proposal against this criteria until later in the application and appeal process. It is not the Council's obligation to assume that an AIA, particularly one that has been submitted by a competent arboricultural practice such as The Environment Partnership, is deficient. The responsibility lies with Homes England.
18. Therefore, whilst the Council has introduced the topic of veteran trees in so far as it relates to the alleged veteran hawthorns at a late stage in the process, I do not view this as unreasonable behaviour. If the AIA had correctly identified the alleged veteran hawthorns then this issue could have been tackled earlier in the process. I acknowledge that at the time the Statement of Case was submitted the Council's arboricultural witness had visited the appeal site and had begun to identify alleged veteran hawthorns. However, the Council was entitled to wait until it had finished its research before introducing the topic to the Inquiry. In any event, this has not led to wasted expense by Homes England because the topic would have needed to be discussed, irrespective of the timing.

Policy BSA1201

19. The policy considerations are complex and the policy on important trees and hedgerows involves subjective judgments and carefully considered application to the proposal. The effect of the proposal on the character and appearance of the area also involves subjective judgment and the Council raised specific concerns beyond the principle of development of the site. This is a reasonable and defensible position to object to the proposal.
20. Whether or not the site allocation 'prices-in' any harms of the proposal is also a complex discussion involving careful consideration of the meaning of the estimated 300 homes number against the development considerations also set out in the policy. The application of the policy involves planning judgment and there is reasonable disagreement. The Council's objections to the proposal

⁴ Paragraph 4.2.4

were on substantive grounds, within the context of the Policy BSA1201 site allocation. The consideration of whether or not conditions could have been used to suitably control the proposal is wrapped up in this wider debate. The Council did not object to the principle of development. It was therefore not unreasonable behaviour on behalf of the Council.

Green infrastructure link

21. The above conclusion is with one caveat, regarding the proposed green infrastructure link to Eastwood Farm Site of Nature Conservation Importance. The evidence put forward by the Council on this topic related to the proposed siting of residential buildings along the relevant access corridor⁵. However, it did not grapple with the fact that even allowing for those proposed buildings, a 12m wide link would still be proposed, and is secured through the Parameters Plans and Design Code. This is wider than the minimum 10m width indicated by the Council both in its evidence at the Inquiry and by its Nature Conservation Officer in its pre-application response.
22. The Council also raised concerns⁶ regarding the fragmentary nature of the link, isolation to the rest of the appeal site, and the effects of lighting. However, lighting can be controlled by condition and is also a point directed primarily at ecology rather than green infrastructure. The proposed green infrastructure would link to the remainder of the appeal site when the proposed landscaping is complete. There would likely be periods during construction where existing habitat loss would need to be managed and the timings suitably controlled but this could be secured by condition(s). In any event, this is also primarily an ecological consideration rather than one related to green infrastructure.
23. Overall, the proposal clearly met with this policy requirement. Therefore, on this ground alone, the Council's behaviour was unreasonable and the behaviour led to wasted expense on behalf of Homes England in defending this topic at the Inquiry.

Non-determination

24. Despite being an allocated site, the proposal required careful consideration of multiple competing issues, not in the least trees and hedgerows. It is a complex proposal with substantive reasons for why longer than the standard time limit was required for determining the application. The appeal was lodged by Homes England less than six months following submission of the planning application. This is not an unreasonably long timescale for consideration of an application of the complexity of the appeal proposal. I do not view it, therefore, as unreasonable behaviour for the Council to not have determined the application within the standard time limit.

Costs application

25. As set out above, I have not found the Council's approach on veteran trees to constitute unreasonable behaviour. Although I have not awarded costs against Homes England (see Application B below), the application for costs did not constitute unreasonable behaviour in itself. Indeed, I have agreed with the Council that Homes England's conduct was, in part, unreasonable, with regard to the AIA. The legitimacy or otherwise of the 'fallback' position lies in the

⁵ Paragraph 58 of Mr Collins' Proof of Evidence

⁶ Paragraphs 6.1 to 6.7 of Mr Higgins' Proof of Evidence

territory of professional judgment. The ground in relation to the timing of the submission of the veteran tree evidence by Homes England partially relates to the issues with the AIA and therefore also links to the behaviour of Homes England.

Conclusion

26. I therefore find that unreasonable behaviour by the Council resulting in unnecessary or wasted expense, as described in PPG, has been partially demonstrated and that a partial award of costs is justified.

Costs Order

27. 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 Bristol City Council shall pay to Homes England, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in dealing with the green infrastructure link; such costs to be assessed in the Senior Courts Costs Office if not agreed.
28. Homes England is now invited to submit to Bristol City 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.

APPLICATION B

The submissions for Bristol City Council

29. An application for full costs for unreasonable behaviour was made in writing. The written submission provides full details of the claim. In summary, the grounds for the claim are that Homes England failed to identify veteran trees, or at least trees of merit, on the appeal site. They should have done so because the Council had previously made them aware of the potential issue and because it is a requirement of Policy BSA1201 of the SADMP. The AIA which supported the planning application was deficient to the extent that it did not even identify the alleged veteran trees as individual trees. This led to substantial costs to the Council in defending those points. This is a procedural issue.
30. Homes England also submitted late evidence with regard to the alleged veteran trees which needed a response. In particular, they submitted evidence by Tom Popplewell in rebuttal to Julian Forbes-Laird's evidence and the Charles Crawford 'fallback' position. The veteran tree issue took up considerable time at the Inquiry. The 'fallback' position is unlawful and unreasonable conduct. No meaningful evidence was provided with regard to the Paragraph 180(c) of the Framework test. This is a substantive issue.

The response by Homes England

31. This was provided in writing which provides full details of the response. In summary, none of the alleged veteran trees are veteran which means that the Council's case for the appeal is unreasonable. The fact the trees are of merit is not a relevant consideration because the AIA was adequate for outline planning application stage, in accordance with BS5837:2012 and its position on tree

- groups and that assessment of individual trees within a group should only be undertaken if there is a need to do so.
32. The Council did not flag to Homes England that veteran trees needed to be considered. The pre-application advice does not allege a failure to identify veteran trees, only that there are such trees present on site. The Council visited the appeal site several times and their tree officer provided three sets of comments in 2022. None of these comments allege that Homes England's tree survey was inaccurate or that there were veteran trees that had not been identified. The tree officer even made Tree Preservation Order 1404 which covered one of the alleged veteran trees. The identification or otherwise of veteran trees therefore clearly lies in the territory of professional judgment. Homes England were not, therefore, unreasonable in their conduct in identifying trees.
33. We provided extensive evidence with regard to Paragraph 180(c) of the Framework, including evidence from both Mr Roberts and Mr Connelly. The evidence of Mr Popplewell was submitted in accordance with the agreed timetable and was as soon after the receipt of Mr Forbes-Lairds evidence as was reasonable to expect. The 'fallback' position is not an abandonment of the 'priced-in' approach and is not a materially different proposal. Even if it is decided that there was unreasonable behaviour, it has not led to unnecessary or wasted costs. The appeal would still have been necessary and would still have been allowed because the alleged veteran trees are not fatal to the case.

Reasons

34. As I have established in my Costs Application A above, Homes England's behaviour was unreasonable with regard to the failure to properly assess the alleged veteran hawthorn trees, which were clearly of merit and distinct from the other trees within their identified groups within the AIA. This has implications for the appeal, partly because of the Policy BSA1201 of the SADMP requirement to retain important trees and hedgerows and partly because of the need to consider the implications of Paragraph 180(c) of the Framework regarding irreplaceable habitats even if only on a precautionary basis.
35. However, precisely because of that policy requirement and also because the Council and Homes England continued to disagree on the importance of the trees even after they had been correctly identified, this issue would have needed to have been explored at the Inquiry in any event. The deficient AIA caused this issue to be tackled through late evidence. However, the nature and extent of the evidence did not materially change because of the timings. The unreasonable behaviour of Homes England has not, therefore, led to unnecessary or wasted costs on behalf of the Council.
36. The 'fallback' position is a different scheme from the appeal proposal and time was required to consider the implications of the 'fallback' and various points during the Inquiry process. However, the 'fallback' was an attempt to provide an alternative solution, in the event that the trees were found to be veteran, which is a reasonable approach for Homes England to take in response to the Council's veteran tree evidence. It was supported by evidence and reasonable planning grounds were put forward in defence of the proposition.
37. The Council's new evidence on the hawthorn veteran trees was provided at the exchange of Proofs of Evidence. Homes England responded to this at the

exchange of rebuttal evidence two weeks later. For such a complex part of the evidence, this was plainly reasonable behaviour, and, as established above, Homes England could not reasonably have predicted such evidence in advance of the exchange of Proofs of Evidence.

Conclusion

38. Taking all of the above into account, I find that unreasonable behaviour by Homes England resulting in unnecessary or wasted expense by the Council, as described in PPG, has not been demonstrated.

O S Woodward
INSPECTOR