
Costs Decision

Inquiry Held on 9 – 11 and 18 January 2024

Site visit made on 8 January 2024¹

by David M H Rose BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 Feb. 2024

Costs application in relation to Appeal Reference:

APP/W3330/W/23/3329488

Land at North End, Creech St Michael, Somerset

- 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 partial award of costs against Somerset Council.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for: 'The erection of up to 100 dwellings with public open space, landscaping, sustainable drainage system (SuDS), and vehicular access point. All matters reserved except for means of access'.
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Decision

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

Preliminary Matter

2. The application for a partial award of costs was made in writing, with a written reply from the Council and a written response from the Appellant, before the close of the Inquiry. The submissions are set out in summary form.

The submissions for Gladman Developments Ltd

3. The application for a partial award of costs relates to the costs of preparing supplementary evidence on housing land supply.
4. The Appellant, prior to the preparation of its evidence², sought clarification from the Council on a number of matters relating to the inclusion of sites in the five-year housing land supply set out in the Strategic Housing and Economic Land Availability Assessment (SHELAA).
5. The Council's reply³ purported to provide some of the information and indicated that it was updating its evidence on major sites '*which will be submitted with our Proof of Evidence*'.

¹ I made a further unaccompanied visit to the locality of the appeal site on 12 January 2024

² On 7 November 2023

³ Dated 15 November 2023

6. Further exchanges took place resulting in the Appellant raising a query⁴ as to why some of the completions data provided was different from that used in the SHELAA.
7. The Appellant's draft Statement of Common Ground on housing land supply⁵ was acknowledged⁶ with the indication that *'The SoCG is being reviewed, there will be areas we agree on. Will come back to you in due course'*.
8. Thereafter the Council expressed the view⁷ that *'..... it would be more beneficial to produce a SoCG post exchange of Proof of Evidence (PoE) The Council in its PoE will be providing updated position with regard to small sites, windfalls, large sites and phosphate impacted applications. In addition, the Council will not be relying on some of the sites currently within the draft SoCG'*.
9. The Appellant immediately informed the Council that it was not content with this approach; the SoCG was intended to shape the preparation of evidence; concern was expressed that the Council seemed to be proposing a review of its supply position; and consideration would be given to making a costs application.
10. The Council's response⁸ criticised the Appellant claiming that the draft SoCG was late; the costs warning was overly aggressive; the Council's officers needed to prioritise working on their proofs; and the Council was intending to provide *'the most up to date information on 5 year supply That is rather the point of a proof of evidence on 5 year supply'*.
11. The Inspector advised⁹ that *'The SoCG should lead and inform the evidence and not vice versa'*; and *'The starting point for HLS is the 2023 SHELAA, followed by a review of any sites within the SHELAA which are considered unlikely to contribute to the 5 year supply – the exercise should be limited to taking out such sites rather than adding new sites'*.
12. The Appellant sought¹⁰ clarification from the Council as to which sites were in dispute and received some information by return, the day before evidence was due to be exchanged.
13. On receipt of the Council's evidence, it became clear that its position had changed significantly:
 - a. the evidence in the proof on a number of sites was different from the evidence in the SHELAA;
 - b. five new sites which were undeliverable at the base date were included in the evidence;
 - c. the evidence included the actual data on small sites as at 1st April 2023 (the previously available data having related to the position at 1st April 2022);
 - d. the evidence included a different position on phosphate affected sites from that which had been provided in November;

⁴ On 28 November 2023

⁵ Sent to the Council on 30 November 2023

⁶ On 4 December 2023

⁷ On 5 December 2023

⁸ Dated 6 December 2023

⁹ On 6 December 2023

¹⁰ On 7 December 2023

- e. the proof included the evidence relied on for category (b) sites for the first time, despite the Appellant asking for it on 7 November; and
 - f. the proof removed some sites which were previously in the supply and which the Appellant's expert had critiqued in his proof. This critique could have been avoided had the Council given earlier notice that those sites were no longer relied upon.
14. As a consequence, the Appellant gave notice¹¹ that it would have to provide supplementary evidence which was submitted with a SoCG on 21 December 2023.
15. Accordingly, it is alleged that the Council behaved unreasonably in that it:
- a. was obviously planning to update its position in significant respects as part of its case to the Inquiry;
 - b. the late disclosure of evidence followed the Appellant's timely requests for information and data which, if it had been made available, would have allowed the Appellant's first proof to address the Council's case;
 - c. the Council did not provide the evidence for the inclusion of category (b) sites until the exchange of proofs even though it had been requested and much of the evidence in Appendix D to the Council's proof predated the exchange date;
 - d. the Council's criticism of the Appellant for the late provision of a draft SoCG is misplaced as a deadline had not been set and, even if it had been, the case to be relied on by the Council had not been shared with the Appellant; and
 - e. the Council gave no clear indication of the case the Appellant had to meet prior to the exchange of evidence despite the Appellant's requests for the relevant information.
16. In summary, the Council's conduct was unreasonable as it represented a serious failure to co-operate in narrowing issues prior to the preparation and exchange of proofs. As a consequence, the Appellant had to provide a supplementary proof to address the Council's case.
17. Therefore, unreasonable conduct as set out in Planning Practice Guidance is made out in the following terms:
- a. a lack of co-operation with another party;
 - b. delays in providing information;
 - c. not agreeing a SoCG in a timely manner; and
 - d. introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen.

The response by Somerset Council

18. The Council refutes the allegation that it has failed to co-operate with the Appellant. In all respects, and with particular regard to requests for information, evidence of timely responses demonstrates that the Council was genuinely seeking to assist.

¹¹ On 12 December 2023

19. The Council did not fail to disclose information in a tactical manner; nor was it deliberately refusing to enter into the SoCG; and it was clear that it did not have the resources to agree matters before the submission of its proof of evidence.
20. The fact was that the work involved in producing the SoCG was substantial alongside all other aspects of the appeal. In any event the delay was not unreasonable.
21. Further, the Council denies that its case changed in its entirety. The position on some sites changed but it is not uncommon for proofs of evidence to provide additional information, and the same point could be made about the Appellant's proof of evidence. Indeed, the full explanation as to why the Appellant was contesting various sites was not revealed in many respects before the exchange of proofs and the Council was required to prepare its own rebuttal proof to counter this.
22. The Council's stance reflects the default position that whilst there might be a SHELAA, it is incumbent to provide the most up-to-date information as part of the five-year assessment.
23. At no time has the Council refused to share information. The point is that it was busy collating that information to share through the proofs of evidence and it was not in a position to share it before then. The introduction of new sites, not forming part of the SHELAA, reflected the novel nature of the phosphate issue.
24. Hence, the Council's behaviour was not unreasonable, and an award of costs is not justified.

Reasons

25. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
26. Although the application and the response provide a commentary on events prior to the Inquiry, the nub of the issue, in my opinion, turns on the failure to agree a SoCG prior to the preparation and exchange of proofs.
27. Whilst the limited resources of the Council are acknowledged, it should have been obvious, from the main issues (two and four) defined at the Case Management Conference, that housing land supply was one of the key issues to be determined and the consequences for the resultant planning balance.
28. As such, the sites to be relied on by the Council should have been available as part of a SoCG to identify matters of agreement and disagreement between the parties in order to inform the proofs of evidence. Although the Council responded to requests for information, it is evident that it did not give sufficient priority to agreeing a SoCG.
29. Indeed, as early as mid-November, its course was set on providing information in its proof in preference to devoting resources to a SoCG. This left the Appellant with no option other than producing its own proof on the basis of the information available to it and to second guess what the Council would be relying on.

30. Whilst it is not disputed that the Inquiry should be provided with the most up-to-date information, the Council's proof included substantial new evidence that the Appellant could have not reasonably anticipated. This could largely have been avoided had the parties been working to a SoCG. As a consequence, the Appellant was faced with re-basing its evidence and submitting a supplementary proof to reflect the evidence relied on by the Council.
31. The parties in combination provided substantial evidence and supporting material. Whilst the Council complains that it too was faced with submitting a supplementary proof, this was entirely of its own making and failure to work towards a common starting point.
32. In conclusion, I consider that the Council's failure to agree a SoCG in a timely manner, and the resultant implications for the Appellant, amounted to unreasonable behaviour. As a result, the Appellant incurred unnecessary expense in having to revisit its evidence on housing land supply.

Costs Order

33. 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 Somerset Council shall pay to Gladman Developments Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the preparation of the Supplementary Proof of Evidence of Ben Pycroft and related Appendices; such costs to be assessed in the Senior Courts Costs Office if not agreed.
34. The applicant, Gladman Developments Ltd, is now invited to submit to Somerset 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.

David MH Rose

Inspector