



## Costs Decisions

Inquiry held on 27 February to 1 March and 5 to 7 March 2024

Site visit made on 7 March 2024

**by Patrick Hanna MSc MRTPI**

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

**Decision date: 18<sup>th</sup> September 2024**

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### **Costs application [A]**

**in relation to Appeal Ref: APP/W3710/W/23/3327049**

**Land located to the south of The Long Shoot, Nuneaton, Warwickshire**

- 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 Nuneaton and Bedworth Borough Council.
  - The inquiry was in connection with an appeal against the refusal of planning permission for erection of up to 500 dwellings with land for primary school, public open space, landscaping, sustainable drainage system (SuDS) and vehicular access points. All matters reserved except for means of access.
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### **Costs application [B]**

**in relation to Appeal Ref: APP/W3710/W/23/3327049**

**Land located to the south of The Long Shoot, Nuneaton, Warwickshire**

- 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 Nuneaton and Bedworth Borough Council for a full award of costs against Gladman Developments Ltd.
  - The inquiry was in connection with an appeal against the refusal of planning permission for erection of up to 500 dwellings with land for primary school, public open space, landscaping, sustainable drainage system (SuDS) and vehicular access points. All matters reserved except for means of access.
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### **Decisions [A] and [B]**

1. Application [A] for an award of costs is partially allowed in the terms below.
2. Application [B] for an award of costs is refused.

### **Procedural Matters**

3. As set out above, there are two costs applications relating to the same appeal. I have considered each application on its merits. However, to avoid duplication, I have dealt with both applications together. Both main parties should properly be described in these decisions as 'applicants' for the purposes of their own respective applications for award of costs. To avoid confusion, they are hereafter referred to as the appellant and Nuneaton and Bedworth Borough Council (NBBC). The cases and replies were made in writing and therefore there is no need to repeat them here.

### **Reasons**

4. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may be awarded against a

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party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

### ***Costs application [A]***

5. The appellant's application is made on procedural grounds, relating to NBBC's conduct at the inquiry including the late submission of new evidence in the form of NBBC's note of housing shortfall (IN17).
6. Paragraph 47 of the PPG gives examples of when unreasonable behaviour by a planning authority may result in an award of costs, including:
  - delay in providing information or other failure to adhere to deadlines, and
  - introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.
7. The circumstances of the submission of IN17 were, in summary, as follows. NBBC's planning witness was questioned in cross-examination about the housing trajectory in the Nuneaton and Bedworth Borough Plan (2019)(BP) and her rebuttal, which had been jointly authored with NBBC's housing supply witness. A concession was made relating to the shortfall against the trajectory, the need for housing, and the presumption in favour of sustainable development as set out in policy DS8 of the BP. Following cross-examination, but before re-examination, NBBC indicated that it wished to clarify the position regarding the shortfall. The next morning, IN17 was produced. The appellant raised an objection, and I asked each party for written submissions on the admissibility of the document, as well as reminding NBBC of the risk of costs. The document was then accepted into the inquiry after I had considered the submissions.
8. The appellant's concerns relate to two key matters. First, the late document was perceived as being an attempt to renege from the concession and, second, the introduction of substantial new information.
9. Much of the concern stems from the joint rebuttal. NBBC's planning witness had indicated that she was unable to answer questions on part of the rebuttal as she had not written it. It was subsequently agreed between the parties that the rebuttal would be taken as correct and, in the cross examination that followed, the concession was made. NBBC argues that the appellant should have deduced the separate roles for each NBBC witness and directed questions to each separate witness session accordingly. However, to my mind it is clear that a joint rebuttal should be expected to be equally attributable to both witnesses unless otherwise stated. The document itself gives no indication that its authorship was in fact divided.
10. For the witness to disassociate from elements of the joint rebuttal, particularly given that the other witness's evidence had already been heard, introduced substantial procedural unfairness into the inquiry procedures. Although there is no evidence to suggest it was intentional, the joint rebuttal was nonetheless misleading. There is nothing inherently incorrect or inappropriate about producing a joint rebuttal, but each author must be equally willing to answer for it. Consequently, the act of renegeing from the joint rebuttal represents unreasonable behaviour.
11. This led to NBBC wishing to correct what it considered to be factual inaccuracies that had forced the concession. Rather than clarifying the position

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through re-examination, NBBC asserted that the absence of the NBBC housing supply witness from proceedings at that particular time meant instructions could not be taken, resulting in the subsequent production of IN17. However, that position only arose because of the confusion caused by the joint rebuttal. Had NBBC's planning witness been able to respond to her rebuttal, the need for further instruction is unlikely to have arisen.

12. It will be seen from my appeal decision that, ultimately, it was not necessary for me to establish whether there were indeed any factual inaccuracies or not, and the concession was not, in the end, determinative. Nevertheless, the production of IN17 required the appellant to provide a response to the substantive point raised by NBBC as well as to new information that had been included in the document.<sup>1</sup> Even though the appellant did not in the end dispute all of the points made in IN17, the appellant nonetheless had to respond to them, incurring additional expense in doing so.
13. Furthermore, the introduction of IN17 delayed the inquiry. The appellant initially required time to read, consult and instruct on the document. Delay also arose as a result of my direction requiring both parties to produce written submissions on admissibility, which I considered to be necessary given the highly irregular timing of IN17. In the end, the appellant agreed to respond to IN17 in writing after the close of the inquiry, which avoided the need to resume at a later date and the additional expense that would have entailed. Although the inquiry did not overrun its original timetable, it did sit for a morning longer than it otherwise would have.
14. For these reasons, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of preparing and responding to the late submission of IN17, and a partial award of costs is therefore warranted.

### ***Costs application [B]***

15. NBBC's application is made on substantive grounds, namely that the appeal should never have been brought as the deficiencies in the highways evidence made it untenable for the appeal to succeed.
16. The guidance at paragraph 53 of the PPG states that an appellant is at risk of an award of costs being made against them if the appeal had no reasonable prospect of succeeding, and unreasonable behaviour may occur when:
  - the development is clearly not in accordance with the development plan, and no other material considerations such as national planning policy are advanced that indicate the decision should have been made otherwise, or where other material considerations are advanced, there is inadequate supporting evidence.
17. NBBC's concerns regarding the adequacy of information are in summary that, firstly, the application submission was deficient due to inappropriate use of 2022 survey data and lack of sensitivity testing. Secondly, the appeal evidence was inadequate due to omitted cumulative assessment, reliance on the 2022 data, isolated junction modelling, and failure to carry out VISSIM modelling.
18. It can be seen from my appeal decision that I have concluded that the appellant was unable to demonstrate that the proposal would not have severe

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<sup>1</sup> Identified as the 2022-23 Annual Monitoring Report; the recalculation of shortfall against trajectory in the BP; the number of dwellings in the Homes England projects; and a revised trajectory for allocated site HSG2 in the BP.

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residual cumulative impacts on the road network. In doing so, it follows that insufficient information was provided to enable an alternative conclusion to be reached. However, it is equally clear that I reached my conclusion after examination of detailed evidence and in light of a concession at the inquiry from the appellant's highways witness.

19. This concession does not in itself mean that the appellant's highways evidence was inherently inadequate. The tests on adequacy of information<sup>2</sup> and severity of impact are both matters that were agreed by the parties to involve judgement. The appellant submitted sufficiently detailed evidence to set out its case, explained its position properly, and provided reasoning for reaching its judgement. On that basis, therefore, it was not unreasonable of the appellant to have pursued the case it did, notwithstanding that one point on this position was subsequently resiled from.
20. Whilst the omission of data, or indeed the use of unsupported alternative data, as identified above, may make the evidence less reliable, a judgement must still be made as to the extent of its reliability, as I have done in the appeal decision. Indeed, in respect of the strategic road network it can be seen that I have concluded that, despite the various flaws, the evidence when taken as a whole is sufficiently robust to reach the judgement that the impacts would be acceptable.
21. The appellant had earlier indicated it would provide some of the additional information requested by NBBC, however those undertakings were not followed through. This has led to clear frustration being expressed by NBBC, to which I am sympathetic, but on the other hand it is not unreasonable for the appellant to have subsequently concluded that there was already sufficient information available for the decision maker to reach a judgement. In addition, the omissions identified by NBBC relate to the advice provided in protocols and guidance documents, but these are not development plan policy requirements. They offer guidance only.
22. A particular point must be made in respect of VISSIM. At my direction in the second case management conference, the VISSIM modelling was not accepted into the inquiry. In turn, the appellant made it clear that it did not rely on that modelling to present its case. My direction was made to ensure fairness, given the lateness of the proposed submission and the time that would have been required to properly assess such evidence. It would be irrational for me to now award costs for VISSIM modelling not having been submitted.
23. Unreasonable behaviour may occur where the development is clearly not in accordance with the development plan. In this case, the dismissal of the appeal came down to a relatively narrow point relating to forecast traffic conditions on Eastboro Way, on which a judgement was made. Had this particular point not arisen, it can be seen that I would have reached a different conclusion on the appeal. In addition, despite the asserted inadequacy of information, I concluded that the impact on the strategic road network would not be severe. In short, this appeal is far from being a case that was clearly not in accordance with the development plan, notwithstanding the adequacy or otherwise of the supporting evidence.

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<sup>2</sup> With reference to R (Hawkhurst Parish Council) v Tunbridge Wells Borough Council [2020] EWHC 3019 (Admin)

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24. The appellant did not withdraw either the application or the appeal despite requests from NBBC. However, the appellant was fully entitled to expect both to proceed to determination, so long as it had put forward a reasonable case in support of its position, which I have found above that it did.
25. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not occurred and an award of costs is not justified.

**Costs Order [A]**

26. 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 Nuneaton and Bedworth Borough 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 preparing and responding to the late submission of IN17; such costs to be assessed in the Senior Courts Costs Office if not agreed.
27. Gladman Developments Ltd is now invited to submit to Nuneaton and Bedworth Borough 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.

*Patrick Hanna*

INSPECTOR