The Planning Inspectorate

Costs Decision

Inquiry Held on 12 to 15 March and 9 to 12 April 2024
Site visit made on 11 March and 23 April 2024

by R Aston BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 July 2024

Costs application in relation to Appeal Ref: APP/W3710/W/23/3330615 Weddington Road, Weddington, Nuneaton CV10 0TS

- 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 & Bedworth Borough Council for a full award of costs against Gladman Developments Ltd.
- 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 development described as *'Outline planning application for the erection of up to 700 dwellings with public open space, retail unit (use class F2), landscaping, and sustainable drainage system (SuDS) and vehicular access point from Weddington Road. All matters reserved except for means of access'*.

Decision

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

The submissions for Nuneaton and Bedworth Borough Council

2. The Council makes an application for a full award of costs pursuant to Part 16 of the NPPG. There is of course a right to appeal; but, as the PPG makes clear, that must not be exercised unreasonably. The Council contends that the Appellant has acted unreasonably in bringing this appeal in that the appeal had no reasonable prospect of succeeding. This relates especially to the highways case and the inadequacies of the documentation submitted. This, in itself, has resulted in the unnecessary and wasted expense of the entire appeal.

3. The Appellant has unreasonably disregarded the Local Plan Inspector's report in respect of further residential development to the north of Nuneaton in the plan period; and has unreasonably disregarded the requirement of Policy NE5 (sequential approach), despite being aware of the Local Plan and having had an agreement/interest in developing the site for 5 years. These points simply add to the submission that the appeal had no reasonable prospect of success.

4. The application then lists a-q the main examples of the inadequacies of the highways documentation/evidence presented by the appellant. These include simplistic isolated junction modelling, use of TEMPRO, modelling uncertainty, no use of NBWA outputs at all, no reflection in the modelling work of Padge Hall farm, lack of consideration of reassignment, impacts on highway safety not considered from increased queues and journey times. Trip rates not being agreed, no evidence of how a 15% modal shift would be achieved, lack of

transport assessment, no information to enable determination of severity. Reliance on limited 2023 data, no Travel plan is submitted when an important contention is modal shift. No information of the mobility hub.

5. The Appellant has sought to contend that the Council cannot demonstrate that there would be severe impacts and/or unacceptable highway safety impacts, despite having submitted inadequate information (and this only on 14th December 2023) and having indicated that a full TA and IJM modelling would address WCC's concerns (neither of which were presented).

The response by Gladman Developments Ltd

6. The costs application is audacious, incomplete and an utter waste of time. A costs application is not a place to re-run the merits of your case – that is for closing submissions. The application is made on the premise that the Council is bound to win this appeal and that the appellant is bound to lose. Having regard to the evidential situation which the Council faces, it is as audacious as it is arrogant for the Council to base its costs application on such a premise.

7. The application is incomplete. It fails to say anything about the nature of the costs regime and fails to put it in the proper context. If the Council is going to try to deter appellants from using the right of appeal, as it is attempting to do, then it is incumbent on the Council to put the relevant dicta of the Secretary of State before the Inspector

8. Secondly, the Council has failed to say anything about great tracts of the evidence submitted and examined at length which support the Appellant's case. They will no doubt submit in Closing that this evidence is wrong or insufficient, but the Appellant has advanced a positive case which has every prospect of success.

9. The costs application is an utter waste of time because there are plainly matters at issue for the Inspector to consider and weigh in a planning balance. In Closing, the Appellant will set out the reasons why the appeal should be allowed. If permission is granted, then that is a complete answer to the costs application. It will then be clear that the appeal was both reasonable and necessary. The premise of the application then crumbles and falls away. Even if the Appeal were dismissed, that would not mean the Appellant was unreasonable in bringing the appeal.

10. The costs application is predominantly about the highways case. To succeed in this costs application, the Council has to: (1) persuade the Inspector that the impacts of the proposal would be severe (a high bar) and therefore that the highways impacts alone amount to a clear reason to refuse planning permission, but importantly also; (2) make a finding that there was no prospect that any decision maker could have come to any other conclusion.

11. The Council has no assessment of its own. Its entire case is reliant on criticism. It has no modelling work to compete with that which the Appellant relies upon. The Council's case, as presented to the Inquiry, was not to the effect that the impacts would be severe. Rather, its case was that it did not know. It wanted more or different information. That is where the debate has centred. It is therefore already difficult to see how the Council gets to the point of showing that residual impacts would be severe.

12. Mr Sheach's cogent written, illustrated, and tabulated material is balanced, clear and coherent. His oral evidence is likewise. It is untenable and unreasonable to argue that such a case is bound to fail, which is the premise of this costs application. It is a truly audacious submission to make. It is audacious to complain bitterly and at length about how long one is going to have to call evidence and cross-examine and to require two whole hours to make closing submission in respect of a case which is simultaneously said to have no prospects.

13. The point being made is that the Examining Inspector's report was not addressed in the way which the Council wishes in the Appellant's evidence. This is simply a point for the Council to make submissions on if so, advised in response to the Appellant's case and the way they have justified the proposals. It is not costs point at all.

The final response on behalf of the Council

14. The Council's final comments can be summarised as:

- It is hardly arrogant or audacious or contrived for the council to be concerned about public expenditure, having heard evidence and still of the opinion that the appeal had no reasonable prospect of success.
- The Council has properly reserved their position since the CMC. The application does not seek to re-run closings. The appellant knows the case it has to meet.
- We do not suggest the Inspector should look at the example without considering all of the evidence.
- The application was not incomplete. The relevant tests have been identified.
- There is no need to refer to three examples where there may be a lack of prospective success where the three examples given do not directly apply to the present circumstances and the examples are expressly stated not to be exhaustive.
- The fact that time has been taken to go through the highways documentation does not imply at all the appellant's case must therefore be strong. Rather, it is required expose flaws, that is the proper purpose of the public inquiry.
- It is noted only severity is referred to and not unacceptable impact on highway safety.
- Para 12 does not address the point that the county council is unable to say there would be impacts because relevant information has not been provided. It does not address the arguments set out in paragraph 53 and FF of the closing as to the proper interpretation of the frameworks highways policies. With respect, para 12 as written underlines the unreasonableness of the appellant's approach.
- The Inspector expressed surprise the local plan Inspector's report had not been referred to during the cross examination of Mr Tate and it is accurate to say that the report was in effect disregarded and did not recognise it as an omission.

- The previous application was determined before the LP was adopted on 11 June 2019; 4 years elapsed before the current application was made.
- This is not a tactical application, perhaps the response is technical. The point about glass houses is not relevant if the appeal had no reasonable prospects of succeeding on highways grounds any lack of a housing land supply need not affect the outcome at all.
- Makes reference to new points raised in respect of modelling protocols, the timing of the Richborough Estates and Padge Hall Farm applications with both being accompanied by a Transport Assessment, lack of reference to reassignment in commentary on junctions 12, 13, 72 and 73 and securing a 15% modal shift.
- Hawkhurst case, no disagreement between the parties, can refuse if inadequate.

Reasons

15. National Planning Practice Guidance (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 expense in the appeal process. The main question I must answer in this application is whether the appellant acted unreasonably because the appeal had no reasonable prospect of success.

16. Dealing with the content of the application first, all costs applications must be made formally before an Inquiry closes, and at a relevant point. Such an application was eventually indicated, made and the parties were afforded adequate time to deal with it. I note the appellant's concern regarding the content of the application but references were included and I am satisfied a costs application has been set out sufficiently for me to deal with it.

17. In terms of highway matters there is a plethora of guidance and advice but no development plan or other policy requirement to submit the evidence in the form the Council wanted. It is entirely reasonable for an appellant to undertake their own work, assessments, surveys and then present that evidence with the application and then at appeal. If the Council continues to maintain its objection, then it can act and defend its position accordingly, as it did.

18. Overly detailed analysis and criticism of the omission of some perceived important technical data or statistical difference is entirely common in such cases, highways modelling and assessment by its very nature is subject to a number of competing variables and factors which affect both inputs and outputs. This appeal was against non-determination for an application submitted in January 2023 and I note a common theme in the evidence regarding what I consider to be unfortunate but entirely common place delays in communications between the parties in agreeing data, responding on technical points and so on with challenges and delays on both sides in agreeing certain matters.

19. Against this background and despite the postponement of the Inquiry, the appeal timetable did not allow for the submission of further evidence in the form of a revised December 2023 Transport Assessment and additional traffic modelling work. The Council and Rule 6 Party objected to those submissions and then at the Inquiry focused heavily on their omission. To my mind it would

hardly be fair to criticise the appellant as being unreasonable when my procedural ruling in the planning appeal was to not accept the evidence.

20. In any event it was entirely clear from the Case Management Conference that the appellant's case was not dependant on any of this work as their own analysis and assessment had not indicated the proposal would result in severe or unacceptable impacts. The appellant had properly made clear and reserved their position on this issue. Whilst I appreciate that the Council disagrees with the appellant's approach and consideration of the matters, interpretation of objective highways evidence also requires associated planning judgements to be made and all with a degree of inherent subjectivity.

21. Even if my interpretation of the impacts were found to be incorrect, for example if I have misunderstood the evidence or if circumstances change, in considering their approach that insufficient information had been submitted, the Council should have also been aware that I could reasonably take a different view. I did and broadly agreed with the appellant's assessment of the impacts in the associated appeal decision, albeit with some caveats. There is nothing that leads me to a conclusion of unreasonable behaviour in the appellant's approach to this issue.

22. Whilst not necessarily a costs point, a local plan examination is testing the soundness of a proposed strategy and the Inspector's report itself is proposing modifications and setting out the reasons for them, in this case all under different national policy[1] and guidance at that time. Here, the development plan has a strategy that was found sound subject to main modifications, including a new policy (DS8) which requires further action to be taken by the Council where needs are not being addressed.

23. The policy requires a number of judgments to be made on a case by case basis and does not exclude other action being considered and taken. Ultimately, whether it is for site selection or assessment of a development proposal, a balancing exercise reflecting the presumption in favour of sustainable development within paragraph 11 d) ii of the Framework is also required.

24. In a case where that presumption may be engaged and policies argued as being 'out of date', it is not sufficient to contend there may be 'black letter' harm to the strategy but then find it is of limited or little weight just because a supply cannot be demonstrated. It is more nuanced than that in my view and the consideration of adverse impacts requires an understanding of the approach and reasons underpinning that adopted strategy to then allow for consideration of the weight to be given to any identified harms and associated conflicts with the development plan. The examining Inspector's report is clearly a consideration and a helpful starting point but a number of site specific and bespoke judgments have to be made. In no way does the report provide a blanket restriction on further development north of Nuneaton otherwise Policy DS8 would not have been recommended as a main modification.

25. The Council had also confirmed a shortfall against the requirement of 1603 but in the weeks before the Inquiry 1083 dwellings were removed from the deliverable supply compared to the published position in January 2024. The appellant's evidence appeared to me to lead to a clear change in evidence relating to a potentially important material consideration and my subsequent

[1] 2012 National Planning Policy Framework.

approach to the determination of the appeal. The Council's revised land supply position was clearly precarious and open to challenge requiring only 78 dwellings to be removed from the supply to fall below the four year period from the stated position of 4.06 years and engage the presumption in favour of sustainable development. I agree with the appellant that this does not sit well with a costs claim that the Council's case is so strong the appeal was always bound to fail. Nor does the fact that the Council started with no less than seven putative reasons for refusal.

26. I found in the associated appeal decision that the development plan strategy had stalled. This was acknowledged at the housing land supply round table discussion by the Council's Assistant Director of Planning who outlined that the service had needed improvement and the Council had taken various actions to do so, in particular to assist in the delivery of the strategic plan allocations. Such changes did not occur overnight and consequently the Council should have been acutely aware of the situation they find themselves in regarding proposals for major housing developments on sites outside of settlement boundaries and not allocated in the plan or the upcoming review. That is what the combination of factors I have identified, including the shortfall, triggering of Policy DS8 and an identified (or contended) lack of a 4/5 year housing land supply allows for. Recently in this Borough it has been inevitable that applications for such greenfield sites would be pursued and the policy approach tested.

27. This is also the second proposal in five years to develop the appeal site from the same appellant, an experienced appellant who has clearly invested a lot of time and resources in the pursuit of its development or allocation. Mr Tait for the appellant gave his views in the associated planning appeal on the various planning merits and ultimately concluded that this was a suitable site for a number of reasons. It was not an unreasonable position to take and neither were the approaches of the appellant's other professional witnesses including Mr Sheach on highway matters, who simply offered an alternative and cogent alternative approach.

28. As correctly identified by the appellant for this type of proposal what is required in such cases is an exercise of balancing competing, complex and often uncertain social, economic, and environmental benefits and impacts, to be weighed in whatever balance is required. Whilst I have not agreed with some of the appellant's conclusions and refused planning permission, a positive case was presented on its merits.

29. Against this backdrop it was not only the lack of reference to the Inspector's report by the appellant that I was surprised by, because in such circumstances I had not anticipated or expected that any party would consider making such an application. Nonetheless it was, but none of the examples given in the PPG[2] that outline the types of behaviour which could lead to a substantive award against an appellant are relevant here. Even though I have refused planning permission, in no way do I agree with the claim by the Council that this was a proposal that had no reasonable chance of succeeding. The fundamental disputes between the parties could only have been resolved at appeal.

[2] Paragraph: 053 Ref: 16-053-20140306.

30. I note the appellant's final request in their response to this application. However, I see no need for me to admonish the Council for making the application suffice to state that I do consider it to be ill-judged and without merit or any substantive or determinative evidence of unreasonable behaviour by the appellant.

31. For these reasons, neither in substantive or procedural terms has unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, been demonstrated. Therefore, the application for an award of full or partial costs is refused.

Richard Aston

INSPECTOR