The Planning Inspectorate

Costs Report to the Secretary of State for Housing, Communities and Local Government

by Paul Singleton BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Date: 13 December 2018

TOWN AND COUNTRY PLANNING ACT 1990

APPLICATIONS FOR AN AWARD OF COSTS

MADE BY

BIRMINGHAM CITY COUNCIL

AND

BLOOR HOMES (WESTERN)

Inquiry Held on 2-5,10-12 and 16 October 2018

Site of former North Worcestershire Golf Club Ltd, Hanging Lane, Birmingham B31 5LP

File Ref: APP/P4605/W/18/3192918

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- The applications are made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- **Application A** is made by Birmingham City Council for a partial award of costs against Bloor Homes (Western).
- **Application B** is made by Bloor Homes (Western) for a partial award of costs against Birmingham City Council.
- The inquiry was in connection with an appeal against the refusal of outline planning permission, with all matters reserved except for access, for the demolition of the club house and development of up to 950 dwellings, public open space, primary school, multi-use community hub, new access points and associated infrastructure.

Summary of Recommendations: (i) that Application A is refused; and (ii) that Application B is allowed and that a partial award of costs is made in the terms set out in the report.

APPLICATION A

1. The Council submitted an application (Document AC1) for a partial award of costs against Bloor Homes (Western) (Bloor) prior to the commencement of the Inquiry. That was subsequently withdrawn and replaced by a revised application for a partial award of costs on different grounds. That application (Document AC3) was made in writing at the Inquiry. Bloor's reply to the application (Document AC3) was submitted in accordance with the timescales agreed at the Inquiry but no final response was submitted by the Council.

The Submissions for Birmingham City Council

2. The application is made in relation to the five year housing land supply (5YHLS) case advanced by Bloor. The Council contends that Bloor acted unreasonably in presenting that case because it had no reasonable prospect of success because it was based on four misconceived propositions. These are:
   i) A failure to understand the meaning of 'deliverable'[1] in relation to sites included in the 5YHLS;
   ii) A failure to understand that the evidence presented by Mr Willet did not support a reduction in the number of assumed completions on City Centre apartment schemes with detailed planning permission by some 2,000 dwellings;
   iii) A failure to understand that Bloor carried the burden of proof in respect of 80% of the sites which were in dispute; and
   iv) A failure to understand the significance of undisputed evidence about windfalls.

The Response by Bloor Homes

3. Bloor contends that, by reason of its decision to withdraw the first application for costs and replace it with a new application on completely different grounds, the

[1] Note that the Council uses the word 'delivery' in bullet i) of its claim but the debate at the Inquiry was concerned with the meaning of the word 'deliverable' as defined in the glossary to the revised NPPF.

Council has no credibility with regards to making costs applications. The second application is said to be without merit.

4. The Council is not able to demonstrate a 5YHLS and there is a pressing need for more housing in Birmingham. Bloor's case at the appeal is not dependent upon it being able to demonstrate that the Council does not have a 5YHLS as required by the National Planning Policy Framework (NPPF). However, it is entitled to challenge the robustness of the claimed supply and is right to do so as this may be an important factor in the determination of the appeal.

5. Bloor has not misunderstood the meaning of 'deliverable' in relation to sites included in the 5YHLS. The definition given in the revised (2018) NPPF has changed from that in the 2012 NPPF and, for this reason, the currency of the judgment in the St Modwen case[2] is debased.

6. The 50% deduction (1,956 dwellings) from City Centre apartment schemes is made by Mr Harley, not by Mr Willet. He applies the principle explained in Mr Willet's market evidence to his planning evidence. Bloor is aware of the burden of proof. It is for this reason that it has accepted over 90% of the Council's claimed 5YHLS in those categories for which Bloor carries the burden of proof. Sites have only been deducted where there is clear evidence that there is a problem with the likely delivery of the proposed housing.

7. Windfalls are in dispute because the windfall allowance in the 5YHLS is largely unsubstantiated by any tangible or credible evidence. The Council has no evidence to show what sites actually make up their claimed past completions on windfall sites. This is of particular concern as the Council is overwhelmingly dependent on windfalls to meet its housing targets. For these reasons the application should be rejected.

Conclusions

8. 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.

9. The Objectively Assessed Need (OAN) for new housing is for 89,000 new homes over the plan period (to 2031) of the Birmingham Development Plan (BDP). The BDP does not make provision for the full OAN to be met within the City boundary and a large proportion of that need is to be provided outside of Birmingham. In these circumstances, the question as to whether the Council is able to demonstrate a 5YHLS is a relevant consideration in relation to an appeal for a major housing proposal within the City boundary and could, potentially, be of considerable significance in determining the outcome of the appeal.

10. As set out in my appeal report I do not agree that the changes to the definition of 'deliverable' in the revised NPPF are as significant as Bloor seeks to argue. However, the changes are important, in particular as they place a new burden of proof on the Council to justify the inclusion within its 5YHLS of dwellings on sites with outline planning permission and on various categories of site with no

[2] St Modwen Developments & SSCLG & East Riding of Yorkshire Council & Save Our Ferriby Action Group [2017]EWCA Civ 1643 at CD C2

planning permission. In those circumstances it was entirely reasonable for Bloor to seek to challenge the claimed 5YHLS.

11. In making that challenge Bloor has acted in a proportionate manner in that it has, in the main, challenged sites in those categories for which the Council bears the burden of proof. It has only challenged a small number of specific sites in categories which, under the terms of the definition, benefit from the presumption that new housing will be delivered within 5 years. This shows that Bloor has understood that it carries the burden of proof in respect of the major part of the claimed supply.

12. In my report on the appeal I have found that the Council has not provided the clear evidence required to demonstrate a realistic prospect that housing completions will take place within 5 years on a number of the sites for which it carries the burden of proof. I have, accordingly, recommended that a total of 847 dwellings be removed from the claimed 5YHLS. This reduction does not take the identified supply below the 5 year threshold. However, my conclusion that this number of dwellings should be taken out of the claimed supply confirms the legitimacy of Bloor Homes' challenge to the sites in these categories.

13. I have not recommended any reduction in the windfall allowance within the 5YHLS. However, the fact that the Council has not kept records that accurately record the status of the sites claimed as 'windfall' completions means that its data as to the level of past completions cannot be verified. The evidence on windfalls was not, therefore, undisputed as the Council suggests.

14. In my report I conclude that Mr Willet's evidence does not support the reduction, by nearly 2,000 dwellings, in the assumed completions in City Centre apartment schemes with detailed planning permission that Bloor makes in its planning evidence. I do find that that evidence might, arguably, support a slightly higher figure than that contended by the Council. In reaching that conclusion, I have exercised my judgement as to the period over which Mr Willet's attrition rate should reasonably be applied and am unable to conclude that the approach adopted by Bloor in its planning evidence was unreasonable.

15. For these reasons, and based on findings and recommendations set out in my appeal report, I do not consider there to be any sound grounds for concluding that the advancement of its case in respect of the 5YHLS amounted to unreasonable behaviour on Bloor's part. Accordingly, I recommend that the Council's application for a partial award of costs against Bloor Homes (Western) should be refused.

APPLICATION B

16. The application for a partial award of costs against the Council (Document AC2) was made in writing at the Inquiry. The Council's reply (Document AC4) and Bloor's final response to that reply (Document AC5) were both submitted in accordance with the timescales agreed at the Inquiry.

The Submissions for Bloor Homes (Western)

17. Although seeking a partial award of costs the application in practice seeks the payment of the full costs incurred by Bloor in pursuing the appeal after the 28 June 2018. The application states that this was the date on which the Council withdrew its Reason for Refusal (RfR) 2. Bloor contends that the withdrawal of

that reason left the Council with no arguable case against the proposal and, had the Council acted reasonably it would also have withdrawn RfR 1. Bloor claims that the costs incurred in preparing for and attending the Inquiry would have been unnecessary but for the Council's unreasonable behaviour. The grounds of the application can be summarised as follows.

18. Two decisions[3] in which full awards of costs have been made against a Council are referred to. In both cases the Council had refused planning permission and had subsequently withdrawn its reasons for refusal and evidence in support of those reasons at a late stage in the appeal process. In determining those costs applications, both Inspectors found that the Council had acted unreasonably in failing to reassess its possession at an earlier date and that, but for that unreasonable behaviour, the appeal Inquiry would not have been necessary.

19. It is acknowledged that the circumstances are different in the current appeal because the Council did present evidence in support of RfR 1. However, there has to be a category of case where the Council's case is unreasonable in that it causes the whole Inquiry to proceed even where it does call evidence that seeks to substantiate the reason(s) for refusal. It cannot be right that a Council can be protected from a costs claim simply because it called evidence on each and every reason for refusal. That would be perverse because it would reward the wasteful use of Inquiry time which is a precious and expensive resource.

20. The Council's case at the Inquiry rested on the conflict alleged with a single policy in the BDP (Policy PG1). Its planning witness accepted in cross-examination that a conflict is alleged only with the first part of Policy PG1 and that, if no conflict with that part of the policy is found, the Council's case evaporates. The appeal proposal is plainly not in conflict with Policy PG1 since that policy is concerned with setting targets for growth. It requires that the Council must deliver 51,100 new homes by 2031 but does not say that non-allocated sites should not be granted planning permission. The BDP and the Council are largely dependent upon the development of non-allocated sites if they are to deliver the housing requirement.

21. The Council's claims that the site cannot be regarded as a windfall are not credible. Its arguments on this matter ignore the definition of 'windfall sites' in both the 2012 and 2018 versions of the NPPF and reflect a serious misreading of the NPPF. The Council's case is based on a misunderstanding of the law and planning policy which say that proposals that accord with the development plan should be allowed. The appeal scheme is such a proposal.

22. The Council's handling of this case is inconsistent with the approach that it took in granting planning permission for the redevelopment of the Hall Green Greyhound Stadium Site[4] for housing which it did treat as a windfall site. Both versions of the NPPF make it clear that a windfall site does not have to be a brownfield site.

23. Even where a conflict with the development plan is identified it is incumbent on the Council to balance any such conflict with the benefits of the proposal which in

[3] APP/E3525/W/17/3183051 dated 1 February 2018 & APP/Q3115/W/17/3186858 dated 29 May 2018 both appended to Document AC2
[4] Appeal Core Documents CD S32

this case are substantial, significant and overwhelming. The Council's planning witness failed properly to discharge his duty with regards to that balancing exercise, in particular by refusing to aggregate the material considerations and benefits in the balancing process. The balancing exercise should have made it abundantly clear to the Council that outline planning permission should have been granted for the proposal.

24. Paragraph 49 of the PPG identifies the following examples of unreasonable behaviour by a local planning authority:

- Preventing or delaying development which should clearly have been permitted, having regard to its accordance with the development plan, national policy and other material considerations.
- Acting contrary to, or not following, well-established case law.
- Persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable.
- Not determining similar cases in a consistent manner.

25. Having regard to that guidance, the Council has acted unreasonably and the appeal Inquiry was unnecessary. As a result, Bloor has incurred unnecessary or wasted expenses with regard all of its costs in preparing for and attending the Inquiry that were incurred after the 28 June 2018.

The Response by Birmingham City Council

26. The Council asserts that, as a matter of general principle, the Secretary of State should be slow to grant costs awards on the basis of one party's approach to the disputed issues because that invites an approach of re-litigating the merits. The Inquiry process is designed to allow multiple parties to articulate their assessments and opinions in an open forum. It is inimical to punish individual parties because an adverse judgement is formed about the merits of their case. An award of costs under this head is, in theory, permissible but it would require an extreme judgement to be made that the party's position was not even arguable.

27. Furthermore the Inquiry has made an important contribution to issues of importance to the planning system by giving a voice to the local community and providing the Secretary of State to clarify the meaning of 'deliverable' and 'windfall sites' as they are used in the revised NPPF.

28. The Council contends that at the heart of Bloor's application for costs is a tendentious, partial and unfair description of the merits of the Council's case. This provides no basis at all for an award of costs to be made against the Council.

Final Reply by Bloor Homes (Western)

29. Bloor states that the Council's written response does not provide a proper answer to the costs application. The test set out in that response, of whether a party's case is "not even arguable" is not relevant to the planning appeal regime. The correct test is whether the Council has acted unreasonably, for example by preventing or delaying development which clearly should have been permitted.

This standard has been comfortably met since it is obvious that the proposal is in conformity with the development plan.

30. In pursuing its first reason for refusal the Council has either misunderstood or misapplied its own development plan and the sole policy that it relies upon. The Council's tortured reading of that policy and the NPPF amounted to a desperate attempt to deny that which is most obvious; namely that the site is a windfall site and the Council is largely dependent on windfall sites to meet its housing requirement. An award of costs is justified because the Council should have allowed the proposal after the second reason for refusal was withdrawn.

Conclusions

31. 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.

32. I agree that a test of whether the Council's case was not even arguable is not the correct basis on which the application should be decided. The costs regime uses the term "unreasonable" in its ordinary meaning and does not apply a higher or different test. PPG sets out examples of what might constitute unreasonable behaviour in relation to planning appeals and it is correct for the Secretary of State to have regard to that guidance in considering this application.

33. As acknowledged by the Council's planning witness, the Council's case at the Inquiry was founded on an alleged conflict with one part of a single policy in the adopted BDP. The first reason for refusal did not allege a conflict with any other development plan policies. Although the planning witness suggested in his oral evidence that there would be a conflict with the final bullet of Policy TP28 this would only arise if the proposal is found to be in conflict with PG1. Policy TP28 was not cited in the Council's decision notice.

34. The main purpose of PG1 is to set targets for housing and other forms of development that the Council intends to achieve over the 20 year plan period. Unlike many other policies in the BDP it does not include requirements or criteria against which development proposals can be assessed and, in form and structure, it can reasonably be described as a strategic rather than a development management policy. In my appeal report I agree with the appellant's view that it is difficult to see how any housing application could be found to be in breach of Policy PG1.

35. Importantly, Policy PG1 makes no reference to the acceptability or otherwise of applications for housing development on unallocated or 'windfall' sites, notwithstanding that the BDP is heavily dependent upon there being sufficient completions on such sites in order to meet the 51,100 new dwellings target. In my view, the Council's arguments as to why the appeal site cannot be regarded as a windfall site are founded on a misreading of the definition of windfall sites in both versions of the NPPF and its assertion that the appeal proposal conflicts with Policy PG1 for that reason represents a misapplication of that policy. Had the Council properly applied its own development plan and national planning policies when determining the application I do not think it could reasonably have refused planning permission solely on the grounds set out in Reason 1.

36. In my appeal report I also find that the Council's arguments that windfall sites can only be of small or medium size are inconsistent with its development management practice as evidenced by its acceptance that the redevelopment of the 4.3 hectare Hall Green site redevelopment for 210 dwellings would constitute a windfall site. The size of the site and scale of development in that application was far in excess of the maximum size threshold that the Council contended at the appeal Inquiry should apply to windfall sites.

37. Had it refused planning permission solely on the grounds of RfR 1 the Council could reasonably have been found to have failed to determine similar cases in a consistent manner and to have prevented or delayed development which should clearly have been permitted, having regard to its accordance with the development plan, national policy and other material considerations. Both of these circumstances are cited as examples of unreasonable behaviour in PPG paragraph 49.

38. Permission was not, however, refused on these grounds alone but also on the grounds set out in RfR 2 which were only overcome by the appellant making significant changes to the appeal scheme. Hence, even if it is found that the inclusion of RfR 1 on its decision notice constituted unreasonable behaviour on the Council's part, that would not have rendered the lodging of the appeal unnecessary. At the time that it resolved to withdraw RfR 2 the Council should, in my view, have recognised the need also to review the merits of its case with regard to RfR 1. There is no evidence that it did so.

39. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that applications for planning permission should be determined in accordance with the development plan unless material considerations indicate otherwise. This establishes the primacy of the development plan but also places a duty on the decision maker to carry out a balancing exercise in which any development plan conflict is weighed against the potential benefits and any other material considerations that might weight either in favour or against the proposal.

40. The officer report to the meeting of the Planning Committee at which the outline application was determined is included in the Appeal Core Documents at CD K2. The site's 'in principle' suitability for housing development is dealt with in paragraphs 6.6 and 6.7. It is notable that there is no specific reference in these paragraphs to Policy PG1 or to any other specific development plan policy. Paragraph 6.7 states simply that, because the site had recently been considered and rejected by the BDP Examining Inspector and the Council is able to demonstrate a 5YHLS, the application "is *contrary to the BDP and so is objectionable in principle*". No other development plan harm is alleged.

41. The report is deficient because it includes no advice to the Committee as to whether the development of up to 950 dwellings, including 35% affordable homes, should be regarded as a benefit of the proposal or as to what weight should be given to that potential contribution to meeting Birmingham's housing needs. The report does set out the officers' views that the proposed Development Framework did not pay due regard to the site constraints and identifies potential harms to the arboricultural assets and ecological features on the site and to the principles of good design. It was these concerns that underpinned RfR 2.

42. The report's conclusions are in paragraphs 7.1-7.3. Paragraph 7.1 restates the alleged conflict with the development plan (again without any reference to any specific policy) and the concerns about inadequate consideration of the site's constraints and paragraph 7.2 repeats the concerns about potential arboricultural, ecological and design harm. Paragraph 7.3 states that it was for these two reasons that the Council concluded that the proposal did not constitute sustainable development and could not be supported. Although this section does not directly refer to a balancing exercise, it shows that the Council had regard to material considerations other than the alleged development plan conflict in reaching its decision to refuse planning permission. As RfR 1 expressly alleges conflict with s38 (6) of the 2004 Act it is clear that the Council was fully aware of the need for such a balancing exercise to be undertaken.

43. Following the receipt and consideration of Bloor's amended proposal and revised Development Framework the Council formally resolved not to defend RfR 2. The effect of that resolution was that the Council accepted that all the other harms that had been taken into account in its determination of the application had fallen away and that the only remaining 'harm' was the alleged conflict with the development plan. In my judgement, it was incumbent on the Council, at that stage, to review the balancing exercise previously carried out. There is no evidence that this was done.

44. The report[5] to Planning Committee on 5 July 2018 did no more than seek a formal resolution that the Council should not defend RfR 2 but should continue to defend RfR 1. The report indicates that its recommendations were based on Counsel's advice that, by not seeking to defend RfR 2, the Council's case at the Inquiry would have more credibility since it would be seen to have acted reasonably. That advice is not appended and there is nothing in the report to show that consideration was given to what implications the withdrawal of RfR 2 might have on the planning balance set out in the original officer report. Equally, there is nothing in the Council's reply to the costs application to suggest that consideration was given at that stage to the need for, or desirability of, revisiting the balancing exercise required under s38 (6).

45. In my judgement the failure to give consideration to these important matters at that stage of the appeal process means that the Council acted unreasonably in continuing to defend RfR 1 in the appeal process.

46. PPG paragraph 032 states that an application for an award of costs should clearly demonstrate how any alleged behaviour has resulted in unnecessary or wasted expense. Bloor's application seeks the full costs of preparing and presenting its case from the date the Council resolved to withdraw RfR 2. However, the only explanation given as to why those costs constitute unnecessary or wasted expenditure directly related to the alleged unreasonable behaviour by the Council is given in Bloor's final reply in Document AC5. This states that the costs award is justified "*because the Council should have allowed this proposal after the second reason for refusal was withdrawn*" (paragraph 6).

47. That outcome would not have been possible because, even if the Council had resolved on 5 July 2018, to withdraw both reasons for refusal that would not have resulted in a grant of planning permission and the appeal would have

[5] Appeal Core Documents CD K3

remained live. I cannot say with certainty that, in those circumstances, the appeal Inquiry would have been unnecessary. There was a significant level of public interest in the appeal proposal and this is one of the considerations in determining the most appropriate procedure under which an appeal should be progressed. It would be unusual for a Public Inquiry to be held where the Council is not presenting any evidence and there is no Rule 6 party. However, as the Inspectorate had already indicated that an Inquiry should be held, it is not certain that a change in procedure would have been agreed even if the Council had confirmed its intention not to call evidence in defence of RfR 1.

48. Also relevant in considering the extent of any unnecessary or wasted expenditure is that Bloor called expert witnesses to deal with landscape and design, trees, ecology and transport. Following the withdrawal of RfR 2 these matters were not contested by the Council. Although there was a need to respond to third party concerns, the decision to call expert witnesses in all of these areas was, in my judgment, by choice rather than necessity. I do not consider that these costs can reasonably be described as constituting unnecessary or wasted expenditure that resulted from any unreasonable behaviour on the Council's part. These costs should, therefore, be excluded from any award of costs made in this case.

49. I find that, but for the Council's unreasonable behaviour in not reviewing and withdrawing RfR 1 at the same times as RfR 2, there would have been no need for Bloor to present the evidence that it did on conformity with the development plan, windfall sites and the 5YHLS. This element of Bloor's costs can accordingly be treated as unnecessary or wasted expenditure resulting from that unreasonable behaviour. It should be noted that the Council's evidence is that the resolution not to defend RfR 2 was made at a meeting of 5 July 2018, not 28 June as suggested in Bloor's application. The 5 July is, accordingly, the earliest date from which any assessment of unnecessary or wasted expenditure should be made.

50. For these reasons, and subject to the Secretary of State's conclusion in respect of the planning appeal, I recommend that there are grounds for allowing the application and making a partial award of costs. I also recommend that any award made should be restricted to costs incurred by Bloor after the 5 July 2018 and should exclude any costs directly related to the calling and presentation of expert evidence in relation to highways, arboricultural assets, ecology, and landscape and design matters.

Recommendations

51. For the reasons set out above I recommend:

    i) In respect of Application A that there are no grounds for concluding that Bloor Homes (Western) acted unreasonably in advancing its case on the 5YHLS and that the application should be refused.

    ii) In respect of Application B that, subject to the Secretary of State's conclusions in relation to the planning appeal, the application is allowed and a partial award of costs should be made against the Council in the terms set out above.

Paul Singleton

INSPECTOR