The Planning Inspectorate

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

by P W Clark MA MRTPI MCMI

an Inspector appointed by the Secretary of State for Communities and Local Government

Date: 11 January 2016

TOWN AND COUNTRY PLANNING ACT 1990

COSTS APPLICATION BY

BOVIS HOMES LIMITED AND MILLER HOMES LIMITED

AGAINST

CHELTENHAM BOROUGH COUNCIL

Inquiry held on 22 - 25 September and 29 September - 2 October 2015

Land at Kidnappers Lane, Leckhampton, Cheltenham

File Ref: APP/B1605/W/14/3001717

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Land at Kidnappers Lane, Leckhampton, Cheltenham

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Bovis Homes Limited and Miller Homes Limited for a full award of costs against Cheltenham Borough Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for residential development of up to 650 dwellings; mixed use local centre of up to 1.94 ha comprising a local convenience retail unit Class A1 Use (400 sq m), additional retail unit Class A1 Use for a potential pharmacy (100 sq m), Class D1 Use GP surgery (1,200 sq m) and up to 4,500 sq m of additional floorspace to comprise one or more of the following uses, namely Class A Uses, Class B1 offices, Class C2 care home and Class D1 Uses including a potential dentist practice, children's nursery and/or cottage hospital; a primary school of up to 1.721 ha; strategic open space including allotments; access roads, cycleways, footpaths, open space/landscaping and associated works; details of the principal means of access; with all other matters to be reserved.

Summary of Recommendation: The application for an award of costs be refused.

The Submissions for Bovis Homes Limited and Miller Homes Limited

1. The claim is based on both substantive and procedural matters.

2. The first element of the substantive claim is that the Council acted unreasonably by preventing or delaying development which should clearly have been permitted, in that it continued to pursue the allocation of the site for development through the Joint Core Strategy (JCS) process whilst simultaneously refusing permission on two grounds of principle, without weighing the benefits of the scheme in the balance. Three recent decisions awarded costs because of a Council's failure to have carried out a planning balance. When the Council eventually resolved not to defend six of the nine reasons for refusal, there had been no change in circumstances so it can be inferred that its reasons were hopeless from the start.

3. The second element of the substantive claim is that the Council acted unreasonably by putting forward no evidence to support its reasons for refusal in what should have been a full Statement of Case. It did not review its case promptly following the lodging of the appeal, but instead delayed for five months, until just three months before the submission of evidence. The appellant incurred unnecessary and wasted expense in preparing its case based on all nine reasons for refusal until the Council's review of its case was made public. Within the three reasons for refusal which the Council did pursue was a matter relating to pollution. The Council did not confirm that it was not going to pursue this point until a week before the opening of the Inquiry. This again caused the appellant wasted expense in preparing its case on this point.

4. The third element of the substantive claim is that the Council's case in respect of landscape and transport were based on vague, generalised or inaccurate assertions, unsupported by objective analysis. It ignored or contradicted the evidence which the Council was itself putting forward in the context of the JCS examination.

5. The fourth element of the substantive claim is that the Council failed until the last minute to respond to the appellant's statement of case which made it clear that

housing land supply would be a major part of its argument. The first time that the appellant was made aware of the Council's position on a five-year supply was when it received the Proof of Evidence by which time the appellant had spent a considerable expense in establishing both the housing requirement and the housing supply position.

6. The first element of the procedural claim is that the Council's Statement of Case was not fit for purpose; not stating any documents or data that the Council intended to rely upon other than its committee minutes; not advising of any new traffic data; not citing any relevant legal or appeal cases.

7. The second element of the procedural claim is that the Council did not adhere to the timetable in respect of preparing a Statement of Common Ground (SoCG). It did not respond to the appellant's suggestions until 3.5 days before the opening of the Inquiry.

8. The third element of the procedural claim is that the Council's initial objection to an amended site boundary, followed after about nine months, just about one month before the opening of the Inquiry, by advice that it would not be objecting at the appeal was unreasonable and caused wasted time and expense in preparing submissions and evidence on the point.

The Response by Cheltenham Borough Council

9. The JCS examination and the s78 appeal are fundamentally different processes. Inclusion in a proposed development plan does not preclude consideration of an application. On the transport issue, the evidence to the JCS examination has yet to be prepared, let alone tested, so there can be no conceivable argument that it is fixed or determined.

10. Although an outline application, the proposal is made in considerable detail and it is the specifics which are found wanting. The Council's transport witness stated in terms that it was no part of the case that there was no transport solution possible; simply that what was proposed was untested and unknown. All parties are judging the application on the basis of the details before them. Conditions would not have averted the need to refuse.

11. So far from making vague, generalised or inaccurate assertions, the Council's evidence was professional and has been accepted as such. The general thrust of the Council's transport evidence, and of the appellant's criticism of it, is that it requires less vague, generalised or inaccurate assertions than the appellant's evidence.

12. The Council had to consider more than one legal opinion before reviewing its decision. That inevitably took time but the Council did not unreasonably delay. The Statement of Case could not do more than was known at the time, in advance of the appointment of expert witnesses. Its failure to be more specific has not involved the appellant in unnecessary costs.

13. It may be a truism that the reasons for refusal that were not pursued should not have been uttered in the first place but the costs arise from reasons which were pursued. The Council withdrew its reasons in enough time to avert the preparation of proofs. The decision not to pursue the pollution point was given by phone, confirmed in writing later. The appellant could have relied on the earlier information. Third parties pursued points which the Council did not, so

the appellant would have had to prepare a response in any event; unnecessary costs were not incurred.

14. A detailed SoCG, produced late, is of more use than a thin SoCG, produced on time but lacking in content. There was communication between the Council and the appellant on matters relating to the SoCG well before the response 3.5 days before the opening of the Inquiry. It would have been a waste of time to try and finalise a SoCG prior to the decision not to pursue some of the reasons for refusal. The appellant was more dilatory in finalising the s106 agreements.

15. The Council minutes show that members made their decisions in the context of government guidance and the financial implications. The planning merits of the proposal are explicitly accepted in Mr Hemphill's evidence. It is not necessary for there to be a record of the consideration of the planning balance; it is sufficient that it was done; and it was done on two occasions. Mr Hemphill's evidence that that was done should be accepted; the appellants have no evidence to the contrary. The absence of a record of the balance gives rise to no unnecessary costs. Since third parties challenge the point, the appellant's work was not wasted in any event. The circumstances of the three costs decisions referred to differ from the current appeal.

16. The Council was right to proceed cautiously in relation to the proposed revised site boundary, as was done with the later proposed amendment in relation to the omission of a proposed bus stop. It needed advice from experts to be satisfied that no issue arose. Far from being uncooperative, the Council incurred expenditure in assisting in the publicity for the latter amendment.

Conclusions

17. National Planning Practice Guidance (Guidance) 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 or wasted expense in the appeal process.

18. In my substantive report, I have advised that the appeal be dismissed so, clearly, I agree that the development should not have been permitted. Whether or not the Council explicitly recorded its consideration of the planning balance in reaching its decision does not affect my conclusion that its decision was a reasonable one to take and so, if the decision was not to be accepted, then the appeal as a whole was unavoidable. I therefore cannot agree with the element of the claim that the Council has acted unreasonably by preventing or delaying development which should clearly have been permitted.

19. A reading of my substantive report should make it clear that my recommendation supports three of the Council's original nine reasons for refusal (premature to Local Green Space determination; residual cumulative impact on transport and adverse impact on character of landscape). The Council's sixth reason for refusal (loss of agricultural land) was accepted by the appellant, albeit argued that it was outweighed by other considerations. There is no suggestion that the Council's tardy clarification of its position raised new matters which required additional cost. It follows that the appellant's costs in relation to these four matters were not unnecessary or wasted, no matter how unreasonably late the Council was in clarifying its position.

20. As the Council points out, agreement on the s106 agreements which disposed of the ninth reason for refusal (infrastructure) was only reached in the closing stages of the Inquiry and not because of delay on its part. These matters needed to be resolved if permission were to be granted and so, any costs incurred in dealing with them were not unnecessary or wasted.

21. The Council's response to the costs claim accepts, as a truism, that its other four reasons for refusal should not have been uttered. To that extent, together with its very late notification of its decision not to pursue the pollution point, its behaviour was unreasonable. But, as the Council points out, once the appeal was under way, third parties could, and did, pursue matters which the Council dropped. Comprehensive development (second reason for refusal), flooding (seventh reason for refusal), pollution (part of the fourth reason for refusal) and, to a lesser extent, retail impact (eighth reason for refusal) were all pursued by third parties at the Inquiry, so the appellant's costs in relation to those matters were not wasted or unnecessary.

22. That leaves only the first reason for refusal (prejudice to JCS housing allocations) as both unreasonable and with the potential to give rise to unnecessary or wasted costs. But, in fact, this point was central to the appellant's argument of the benefits of the scheme through housing provision and so, would have been argued whatever the Council's position. And although the Council's tardy communication of its position on the housing land supply point was unreasonable, the appellant's costs were not wasted because two third parties argued firstly that there were alternatives to the JCS allocation which was therefore unnecessary and inappropriate and secondly that the housing land supply position did not justify this appeal proposal. In consequence, the appellant had to argue the points at the Inquiry anyway.

23. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Guidance, has not been demonstrated and I therefore conclude that an award of costs is not justified.

Recommendation

24. I recommend that the application for an award of costs be refused.

P. W. Clark

Inspector

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Miss Sarah Clover, of Counsel	Instructed by Ms Cheryl Lester, Solicitor to Cheltenham Borough Council

FOR THE APPELLANT:

Jeremy Cahill QC	Assisted by Thea Osmund-Smith, of Counsel and instructed by Fiona Milden, Associate Planning Director, Bovis Homes and David Birchall, Managing Director, Miller Homes Strategic Land

DOCUMENTS

1 Cost Claim
2 Costs Response on behalf of Cheltenham Borough Council