The Planning Inspectorate

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

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Date: 2 February 2018

TOWN AND COUNTRY PLANNING ACT 1990

SWINDON BOROUGH COUNCIL

AINSCOUGH STRATEGIC LAND LTD

Inquiry opened on 7 November 2017

Land at Lotmead Farm, Swindon SN4 0SN

File Refs: APP/U3935/W/16/3154437, APP/U3935/W/16/3154441

File Refs: APP/U3935/W/16/3154437, APP/U3935/W/16/3154441
Land at Lotmead Farm, Swindon SN4 0SN

- 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 Swindon Borough Council for a full award of costs against Ainscough Strategic Land Ltd.
- The inquiry was in connection with appeals against:
    a. The refusal of planning permission for demolition and/or conversion of existing buildings on site and redevelopment to provide up to 2,600 residential units, community/retail uses, business/employment uses, open space, strategic landscaping and other green infrastructure, associated road and drainage infrastructure, indicative primary access road corridors to the A420, improvements and widening of existing route off Wanborough Road (outline application with all matters reserved save the detailed access off Wanborough Road).
    b. The refusal of planning permission for up to 200 residential units with open space, landscaping and associated roads and drainage infrastructure (outline application with all matters reserved save the detailed access to Wanborough Road).

Summary of Recommendation: The application for a full award of costs be allowed.

The Submissions for Swindon Borough Council[1]

The main points are:

1. The appellant acted unreasonably in forcing the refusal of the applications and appealing rather than resolving issues during the course of those applications or by subsequent applications. There had been extensive meetings and correspondence between the Council and Ainscough before the submission of the applications and during their consideration. The Council requested further information and changes on numerous points, including a draft regulation 22 request[2]. In the absence of that material the Council reasonably requested extensions of time for determination and proposed meetings to resolve the issues. The refusal of such a request in June 2016 forced the Council to decide the applications[3]. Appeals were promptly made.

2. The amendments indicated at the pre-inquiry meeting were substantial and necessitated putting back the date of the inquiry. It is only since then that the appellant has started to remedy the reasons for refusal. The amendments submitted at the end of June 2017 were even more wide-ranging. A major viability issue was raised in July and has since been deferred. Further notes and explanations have been produced since, notably on transport and canals. The scheme has continued to evolve through rebuttals (children's play provision) and oral evidence (temporary school options). The state of play at the start of the inquiry caused its adjournment to the second week. The extent of progress during the adjournment of the inquiry illustrated that the issues ought to have been resolved without an appeal.

[1] C1 and C3 [*footnotes refer to documents detailed in the documents list appended to the report on the appeals*.]
[2] C3 Appendix 8: The matters covered included drainage, flood risk and the Canal, education, heritage, open space and recreation, highways, trees, pollution and ecology.
[3] C3 paragraphs 22 and 23 provide the Council's comments on the Fees Regulations.

3. The conduct of the appellant in using the appeal process to evolve the scheme is contrary to advice in the Planning Practice Guidance and the Planning Inspectorate's Procedural Guide on the purpose of the appeal system[4]. The appellant should not have proceeded in this way and acted unreasonably in doing so. Furthermore, the appellant was not in a position to make its full case at the time of appeal. The appellant acted unreasonably in appealing a scheme which as determined could not be approved because of the lack of information supplied and the need for amendment. Substantial efforts have been required to enable the appeals to be dealt with fairly.

4. Evolution of a scheme by an appeal is onerous for the local planning authority. Much greater time and cost is involved. The extremely late submission of documents involved significant extra resources and pressure on officers given the time for consideration and the need to liaise with third parties. These effects were compounded by the need to consider the original and proposed amended schemes.

5. The Council has been put to the wasted costs of the appeals, preparing and presenting evidence and instructing Counsel. That is a very significant additional burden over and above the costs of resolving the planning applications. Costs involved in negotiating the legal agreements and the assessment of the viability material would be excluded from the quantum of costs claimed but that does not alter the terms of the costs award sought.

6. The costs application should be upheld regardless of the outcome of the appeals. The remaining issues are limited in scope and it is highly unlikely that even taken together they would have led to an appeal. If one or both appeals are dismissed then the appellant will have failed to remedy the defects in their scheme. If the appeals are allowed then those matters should have been sorted out by Ainscough in the course of the applications before the authority. In the unlikely event that an appeal would have needed to be brought, it would have been very much more narrowly focused and have been dealt with much quicker at less cost. These circumstances do not justify the discounting of the costs award from full costs to a substantial partial award.

7. A number of matters in the appellant's response are able to be clarified[5]. In particular, the applications were not anywhere close to being capable of approval on the determination date of 30 June 2016 for the reasons set out in the decision notices. The ES was incomplete, other outstanding matters included objections from Highways England and Historic England and no legal agreements were in place to secure the necessary infrastructure. The ES Addendum was necessary to complete the EIA, address issues raised during the application process and to address fundamental changes to the scheme after the appeals were lodged.

8. The Council's position on education matters has not changed since November 2015. The ES Addendum and revised plans addressed issues raised by the Council at application stage. The new information enabled the Council to agree draft planning conditions on a number of issues including noise, air quality and tree protection. The local planning authority considered that the Phase 1 planning application submitted in March 2017 was the same as that under appeal.

[4] C1 paragraphs 8 to 16 set out the guidance relied on.
[5] C3 includes detailed responses to a number of the matters raised in the appellant's response.

Following confirmation that the appeal was not to be withdrawn, the decision was made to decline to determine the new application.

9. A review of the appellant's response to the costs application does not alter the Council's contention that the appellant acted unreasonably, leading to wasted costs.

The Response by Ainscough Strategic Land Ltd[6]

The main points are:

10. The Planning Practice Guidance is clear that all parties are expected to behave reasonably throughout the planning process. The appellant has on many occasions been frustrated by the behaviour of the Council through the failure to respond to issues in a timely manner, reneging from previously agreed positions and persistent requests for further information, which in the vast majority of cases has been unnecessary to determine the applications and fully capable of being dealt with by condition. There are many examples of the Council behaving unreasonably, resulting in the appellant incurring significant additional costs[7]. The appellant has chosen not to make a counter application for costs but has preferred to focus on the merits of the applications.

11. Reasonable behaviour was shown by the appellant throughout the application and appeal process. The right to appeal was exercised well beyond the statutory timescales for determination and after the applications had been refused, rather than by way of non-determination[8]. More particularly, pre-application advice was sought from the Council over a period from December 2013 to May 2015. Extensive consultation and considerable endeavours to liaise with the Council took place. The appellant was frustrated by the lack of a reasonable approach by the Council, who the appellant considered was continually finding problems rather than solutions. In that context a fourth request by the Council for an extension of time was refused. The appellant was within its right to do so and such action was not unreasonable after a period of 14 months from validation.

12. The Council did not have to refuse the applications – it was its decision to do so. The appellant remained prepared to engage with the Council beyond the end of June 2016 to move the applications forward but wished to retain flexibility. The applications were refused, irrationally in the appellant's view, based on a misunderstanding of the Fees Regulations. The appellant cannot be said to have forced the refusals. The decision to appeal was not taken lightly but was considered to provide the best chance of expediting the grant of planning permission for schemes that would deliver much needed housing on an allocated site in the Local Plan.

13. The appellant has not sought to evolve the scheme during the course of the appeals but has instead responded in a timely manner to the contextual changes which have influenced the appeals and acted in the interests of positive planning to secure sustainable development on an allocated site as quickly as possible. The changes to the Indicative Masterplan were minor. An ES Addendum was submitted to ensure any external changes in circumstances have been

[6] C2
[7] C2 paragraphs 14 and 61 for examples
[8] C2 Appendix 1 provides a timeline of engagement, notes of meetings and correspondence.

appropriately assessed in accordance with the EIA Regulations. The opportunity was taken to explore with the Council whether reasons for refusal could be addressed by providing additional detail on the plans and to respond to the Council's revised position on education. The aim was to try and narrow down the number of issues at the inquiry and to agree a statement of common ground, as encouraged by the Procedural Guidance. No parties have been prejudiced and the Council has confirmed that it was able to deal with the amendments.

14. The original inquiry date was not postponed only because of the proposed submission of amendments and an ES Addendum. The postponement was due to the Inspector's desire that to ensure efficient use of inquiry time both parties should use the intervening period to continue to work constructively to narrow down the matters in dispute. There was substantial contact with the Council before the postponement of the inquiry, as shown by the timeline.

15. The number of reasons for refusal is considered to be exceptional. The quantity and complexity of these reasons has naturally resulted in the submission of information during the course of the appeal. This is notwithstanding the appellant's ongoing belief that many of the reasons for refusal were not necessary and, as has been demonstrated through the course of the appeal, many of the Council's issues could have been dealt with positively by condition in accordance with paragraph 187 of the Framework. The changing circumstances beyond the appellant's control, the complexities associated with the wider strategic allocation (such as a number of land owners and delivery of strategic infrastructure) were additional reasons for the necessity to update information and which contributed to the exceptional circumstances of the appeal.

16. The appellant has presented robust and detailed evidence on both the original and amended schemes to the inquiry, which demonstrate the original scheme was capable of approval. It was not unreasonable for the appeals to have been progressed in the face of the refusals by the Council. The proposals (and subsequent appeals) are not without merit, contrary to the development plan or incapable of approval because of alleged lack of information supplied. The Additional Statement of Common Ground makes clear many of the Council's reasons for refusal have been addressed through the agreement of a planning condition or suitable planning obligation and such resolution has not been reliant on additional information. The preference is for the appeals as amended to be determined by the Secretary of State. The appeal schemes as determined by the Council are also acceptable and should be allowed if ultimately determined by the Secretary of State.

17. A fresh application for Phase 1 was submitted in March 2017 but the Council chose to exercise section 70B of the 1990 Act and declined to validate it. The appellant at all times has been willing to cooperate with the Council in the lead up to the inquiry. However, it proved difficult to progress the infrastructure obligations. Much progress was made during the course of the inquiry. This cannot amount to unreasonable behaviour on the part of the appellant[9].

18. The differences between the parties have remained a constant in respect of heritage, open space and pitch provision. The appeal process was the appropriate

[9] C 2 paragraphs 49 to 52 provide the details

mechanism to examine these remaining differences which are critical to the development.

19. The Council has failed to demonstrate that the appellant has behaved in any way unreasonably through any procedural or substantive action.

INSPECTOR'S CONCLUSIONS

References to earlier paragraphs in the Report are in square brackets []

Preliminary considerations

20. 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.

21. The appellant, when responding to the costs application, maintained the Council acted unreasonably. However no application for costs was made and therefore no conclusions will be made on these claims. [10]

22. The Council's decision to decline to validate a fresh application for the Phase 1 site is not within the remit of this costs application and will not be considered further. [8, 17]

23. A lot of background material has been submitted by both parties in relation to the processing of the planning applications in order to support their respective positions and interpretation of events. In this respect the Planning Practice Guidance advises that although costs can only be awarded in relation to wasted or unnecessary expense at the appeal, behaviour and actions at the time of the planning application can be taken into account in considering whether or not to award costs.

24. As a general principle, an award of costs does not necessarily follow the outcome of the appeal. However, a reasonable expectation is that the costs decision will be consistent with the appeal decision. Relevant matters covered in some detail in the Report on the appeals are whether the amended schemes should be accepted for consideration at appeal and the extent to which the use of planning conditions may resolve objections and outstanding matters. I have concluded that the appeals should be determined on the basis of the original schemes, not the amended proposals.

25. The costs application is in respect of the Masterplan and Phase 1 appeals. The submissions made on behalf of the Council and the appellant dealt with the two appeals concurrently. I will do likewise in the conclusions because the same considerations apply to each appeal.

Conclusions on costs application

Refusal of the applications and subsequent appeals

26. There was a period of some 14 months between the validation and the determination of the applications. During this period the Council and the appellant attempted to progress the schemes in order to achieve a successful outcome. Three extensions of time were agreed. The appellant did not agree to the Council's request for a fourth extension of time. The evidence does not show that the appellant caused deliberate delay simply to obtain a fee refund. However the Council, while offering a way forward, made clear that if further time was not agreed the applications would be refused given the outstanding objections, inadequate supporting evidence and deficiencies of the ES. I can see no basis for the appellant's description of the Council's move as irrational. The appellant

should have been fully aware of the consequences of not granting an extension of time and that refusals of planning permission were the probable outcomes. In effect the appellant did invite a refusal. The Council was 'forced' to determine the applications. [1, 7, 11, 12]

27. The appellant decided to exercise the statutory right of appeal, which the costs response confirms was not done lightly and was based on a careful consideration of the merits of the reasons for refusal. In so doing, a reasonable expectation is that due account would have been taken of Planning Practice Guidance and the Procedural Guidance. The appellant should have been confident that the grounds of appeal were sound and a full case could be made, with full particulars being disclosed in the written statement of case. [3, 12]

28. The statements of case that were submitted made assertions saying 'it will be demonstrated' but without providing the supporting evidence[10]. The appellant is of the opinion that most of the reasons for refusal, bar approximately four, could have been dealt with by appropriately worded planning conditions. There is very little, if anything, to substantiate this view. No conditions were put forward at the time to support the appellant's case. Subsequent information and details have enabled planning conditions to be agreed on a number of aspects of the schemes. Biodiversity is one example. I agree with the Council that the appeals had no reasonable prospect of succeeding, without amendments and additional information. [3, 12, 16]

29. I conclude that the appellant's course of action amounted to unreasonable behaviour. The Council has incurred unnecessary expense because of the need to consider the original schemes in preparing and presenting evidence. [4, 5]

Use of the appeal process

30. An important consideration is whether the appeal process has been used to evolve the scheme and if so was it unreasonable behaviour. The Procedural Guidance is clear that what is considered by the decision maker should be essentially what was considered by the local planning authority and on which interested people's views were sought. If an applicant thinks amending the application proposals would overcome the reasons for refusal, normally a fresh application should be made. [3]

31. Changes were made to the illustrative masterplan and also to the parameter plans and the masterplan site boundary. Each change may be minor but when taken together the amendments to the schemes are very significant. The ES Addendum was not confined to ensuring the EIA was up to date and took account of prevailing policy and guidance. It also responded to changes in the proposals, notably in education provision and addressed outstanding matters on topics such as surface water drainage, access and archaeology. [2, 7, 13]

32. The appellant's stated position is that the changes were not necessary to ensure the proposals constitute sustainable development. Nevertheless the appellant also fairly accepts the opportunity was taken to explore outstanding issues with the Council and that the changes were an attempt to narrow down the issues in dispute. The extensive reasons for refusal suggest the changes would have been

[10] I made this observation at the Pre Inquiry Meeting – CD 3.11

more appropriately pursued through a fresh application, in accordance with the guidance. The appellant's chosen approach indicates that some at least of the reasons for refusal and changes sought by the Council were justified. [8, 13]

33. At the Pre Inquiry Meeting on 5 May 2017 the appellant indicated the scope of the proposed amendments at that point in time and anticipated the ES Addendum would be publicised very shortly after, on 8 May. The primary reason I encouraged a postponement of the 8 June inquiry date was to enable everyone involved in the appeal process to have adequate preparation time for the inquiry. To have adhered to the inquiry timetable current at that time or to have allowed slippage in submission dates for evidence and documents in the run up to the June inquiry would have been unrealistic and unfair, bearing in mind the need for full consultation on the additional information and the lack of any progress on planning conditions and obligations. [2, 14]

34. In the event the ES Addendum and scheme amendments were submitted on 30 June and were more extensive than described at the Pre Inquiry Meeting. These factors alone indicate that the amendments were not minor. The documentation confirms that over the period from November 2016 to May 2017 the Council was aware of at least some of the matters being reviewed by the appellant. Nevertheless, the relevant date is that of formal submission, which then enables consultation and notification of all interested parties. Moreover, over the following months additional amendments and information were submitted by the appellant and corrections made to submitted documents. All matters considered I have no doubt that the scheme has evolved during the appeal process. [2, 3, 14]

35. The appellant seeks to justify the need for submission of updated information and amendments by exceptional circumstances. The number of reasons for refusal is unusual but signals the unacceptability of the original schemes across a range of planning issues. If the appellant was satisfied the proposals were acceptable as they stood, amendments would not be necessary. The fact that the Lotmead lands are within a strategic allocation has not evidently been a reason for any complexities in the proposals in dispute. Changes to policy and certain sources of base data were outside the appellant's control but they did not prompt all the amendments to the proposals, amongst which were the amendments to school provision, the Wanborough Road improvements, the alignment of the internal access road and green infrastructure. Much new supporting information specific to the site and proposals has come forward. [2, 15]

36. For these reasons I do not consider there were the exceptional circumstances to support pursuing the amendments within the appeal process. Even if there was, the *Wheatcroft* principle still has to be satisfied. The Procedural Guidance states "Where, exceptionally, amendments are proposed during the appeals process the Inspector will take account of the *Wheatcroft* principles when deciding if the proposals can be formally amended".[11]

37. I conclude that the appellant did not follow the Procedural Guidance. The appeal process was used to evolve the scheme and this amounted to unreasonable behaviour. I concluded in the Report on the appeals that the amended schemes should not be considered. If that is the case, the expense incurred by the Council in preparing and presenting evidence was wasted. In the event the Secretary of

[11] Procedural Guide Planning Appeals England Annexe M paragraph M.2.2

State decides that the amended schemes are able to be determined, the probability is that the process has been more onerous for the local planning authority in time and resources, resulting in unnecessary expense to that extent.

Outcomes

38. In the amended schemes dispute remained over heritage, open space, the Southern Connector Road and, to a limited degree education issues. The Council maintain that the costs application should be upheld whatever the outcome of the appeals. The appellant considers the inability to resolve these issues demonstrate the appeal process was the appropriate mechanism to follow. [6, 18]

39. There are 2 distinct points. Firstly I have concluded that the pursuit of the appeals was unreasonable because (a) the original proposals had no reasonable prospect of success, and (b) the appeals were made with the intention at the outset of using the appeal process to narrow the issues in dispute. The fact not all issues were resolved does not overcome the unreasonable course followed.

40. Secondly, it cannot be known whether the same position would have been reached if amendments to the proposals had been pursued through an application. In those circumstances there would be a greater probability of compromise on both sides, outside of the adversarial appeal process. The normal development management process has been avoided.

41. The fact that an Additional Statement of Common Ground was agreed and legal agreements were finalised during the inquiry in November confirm that the parties were able to cooperate and resolve matters between them. The progress made over that week or so enabled efficient use of inquiry time and was commendable. Nevertheless, this progress has limited significance as to the outcome of the costs application, having regard to the differing perspectives of the Council and the appellant. [2, 8, 16]

Overall conclusions

42. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated in that:

    i. appeals were made on the original schemes when there was no reasonable prospect of success, and

    ii. the appeal process was used to evolve the schemes, which was contrary to Procedural Guidance.

43. A full award of costs is justified. As the Council rightly acknowledged a costs award would not extend to those costs incurred in negotiating the legal agreements and assessment of viability material which already are covered by undertakings from the appellant.

44. In the alternative, if the Secretary of State decides to accept the amended schemes for consideration, a partial award of costs would be justified, limited to the costs incurred by the Council in preparing and presenting a case on the original schemes and the additional costs incurred in dealing with the amended schemes through the appeal process.

45. No award of costs would be justified only if the Secretary of State decided to accept the amended schemes for consideration and concluded that the appeal

process was not used to evolve the schemes. Under such circumstances no unreasonable behaviour would have been demonstrated and no unnecessary expense incurred by the Council.

RECOMMENDATIONS

Appeal ref APP/U3935/W/16/3154437

46. I recommend that the application for a full award of costs be allowed.

Appeal ref APP/U3935/W/16/3154441

47. I recommend that the application for a full award of costs be allowed.

Diane Lewis

Inspector