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## Costs Decision

Inquiry Held on 12-15 February 2019

Site visit made on 14 February 2019

**by Alex Hutson MATP CMLI MARborA**

an Inspector appointed by the Secretary of State

**Decision date: 8<sup>th</sup> April 2019**

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### **Costs application in relation to Appeal Ref: APP/B1740/W/18/3209706 Land next to School Lane, Milford on Sea, Lymington SO41 0TU**

- 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 Pennyfarthing Homes for a full award of costs against New Forest District Council.
  - The inquiry was in connection with an appeal against the refusal of planning permission for 42 dwellings comprised: 17 detached houses; 8 semi-detached houses; 11 terraced houses; 6 flats; garages; parking; landscaping; estate roads; junction access; footpaths; open space; play area; 5 allotments; and cycleway.
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### **Decision**

1. The application for a full award of is refused. However, a partial award of costs is allowed in the terms set out below.

### **The submissions for Pennyfarthing Homes**

2. The applicant puts forward that without good reason, the Council has been inconsistent in its decision making when considering the approach it has taken when determining other similar planning applications. This includes where viability has been a factor and where starter homes have been included in the overall housing mix. Furthermore, that through such inconsistency, the Council has prevented or delayed development which should have been permitted having regard to its accordance with the development plan, national policy and other material considerations. The applicant highlights that the officer report which recommended the approval of the proposal had regard to evidence on viability to support such a recommendation, whereas it is not clear that this was the case when the Council made its final decision to refuse planning permission even though there was no alternative viability evidence to justify this. In addition, the applicant considers that the Council has not adequately justified its approach to viability matters as part of the appeal to satisfactorily defend its refusal of planning permission. For these reasons, the applicant takes the view that the Council has acted unreasonably and thus unnecessary costs in the appeal process have been incurred as a result.

### **The response by New Forest District Council**

3. The Council points out that it must always be open to reach a different decision to that reached on similar previous cases when it believes there are differences between the cases or if it considers previous decisions were mistaken. The

Council sets out that, in light of this, inconsistency *per se* should not be a reason to award costs as it will be necessary to consider the Council's reasons for coming to a different conclusion. In any event, the Council is of the opinion that it has not acted in an inconsistent manner including when considering starter homes against its development plan definitions of affordable housing or its consideration that such housing would meet the needs of some members of the community, albeit not those in greatest need. The Council also notes that whether or not starter homes should be considered as affordable housing is not a determinative factor in the appeal as either way, the level of affordable housing proposed falls below the relevant development plan policy targets. Rather, the Council identifies that the appeal turns on matters of viability and that the proposed housing mix would only be acceptable should the applicant's viability arguments succeed.

4. With regard to viability, the Council sets out that the members of its planning committee need not accept officer advice even if they have done so on other occasions. It further notes that whilst there is no reference to viability in the reasons for refusal on the decision notice, it makes clear that members were unhappy with the level of affordable housing on offer. The Council indicates that viability is likely to have been known to the applicant as a matter of concern in the refusal of the planning application on the basis that the applicant highlighted on the appeal form that viability was a matter that would need testing at appeal. Leading on from this, the Council identified that it reviewed its case subsequent to the lodging of the appeal and that the expert it used for this purpose advised that a greater level of affordable housing could be provided. The Council sets out that it was prepared to defend its case at appeal and did so on this basis, thus substantiating its reason for refusal and providing justification for reaching a different decision to that reached on planning applications for other similar sites.
5. For these reasons, the Council considers that it has not acted unreasonably. Moreover, the Council points out that even if it had, the area of dispute between the main parties which materially affects the outcome of the appeal is narrow. As such, the Council suggests that the appeal could have been determined in a fraction of the time taken, such as a single day, and consequently that it should not be required to bear any costs beyond this.

### **Reasons**

6. The Planning Practice Guidance (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.
7. I acknowledge that each case should be considered on its own merits and that the Council is not duty bound to follow the advice of its professional officers. However, if a different decision is reached to that of its officers, the Council must demonstrate on planning grounds why a proposal is unacceptable and provide evidence to substantiate that reasoning.
8. It is apparent that planning permission has been granted on numerous other sites allocated in the Local Plan with a notably lower level of affordable housing than the 70% target set out within the relevant development plan policies. The reasons for granting such consents, I am informed, was predominantly due to matters of viability. Such an approach has thus been established in the past

and it is reasonable to have consideration to and be consistent with this approach as part of other planning applications where the planning policy context is similar. There is nothing substantive before me to indicate that the Council considers previous planning permissions granted on other allocated sites, where a lower than target level of affordable housing was provided, were taken in error.

9. The officer report in this case clearly takes the matter of viability into account, which, agreed by the independent District Valuer Services (DVS), concludes that the level of affordable housing on offer, including if starter homes are to be included, is the maximum to secure a viable development. However, the Council's committee minutes and reason for refusal on its decision notice makes no reference to viability having been a consideration in the decision making process. It is not sufficient for members to be 'unhappy' about the level of affordable housing on offer without having considered viability or at least setting out why they disagreed with the viability evidence. Furthermore, as the applicant points out, it seems that, other than the viability assessment (VA) agreed with the DVS as part of the planning application, no other VA to contradict its findings were before members when the decision was made to refuse the application. It is therefore not clear to me on what reasonable basis the decision to refuse the application was reached.
10. In addition, whilst the Council's decision notice identifies conflict with some development plan policies in respect of affordable housing targets, including CS15 of the Core Strategy and MoS1 of the Local Plan, it does not appear to consider Policy CS15 of the Core Strategy as a whole, which makes provisions for viability to be taken into account to justify a reduced level of affordable housing. Indeed, given that the Council indicated in an email dated 24 August 2018 that it was of the view that viability was not an issue in the sense that it considered financial details were not disputed, this suggests to me that for the Council to pursue the viability argument to justify its reasons for refusing the proposal in the way it did at the Inquiry came as a considerable afterthought.
11. I therefore see no credible reasons as to why a different approach was taken in the decision making process in respect of the proposal in this case than that in respect of proposals and subsequent planning permissions relating to other sites where viability has been a matter for consideration.
12. It can also be seen that the Council's own VA as part of the appeal, whilst indicating some additional units of affordable housing could be provided over and above the number proposed, finds that the development plan policy targets for such housing cannot be met. Additionally, it can be seen from my decision that I consider the Council's viability evidence to be lacking in robustness. This is notable in its deficient justification for using a different data set of residential build costs than the data set used by the DVS, the applicant and the consultants involved in the consideration of viability in the emerging Local Plan process.
13. It is not surprising that, whilst the Council's decision notice does not mention viability, the applicant envisaged viability would need testing given that it is this matter which would justify a reduction in the affordable housing offer against the targets of development plan policies. Notwithstanding the ultimate narrowness of the issues, given the complexity of matters relating to viability and the level of public interest in the appeal, the Inquiry process seems

appropriate and I note that the Council had no strong objections to such a process subsequent to the applicant requesting it.

14. It therefore seems to me that, in light of the above, the Council has been inconsistent in its decision making and on determining the application, failed to adequately take matters of viability into account. Consequently, having regard to this and on the basis that I have found the proposal to be acceptable in all respects, the Council unreasonably pursued their arguments on viability and thus prevented or delayed development which should have been permitted having regard to its accordance with the development plan, national policy and other material considerations.
15. Given the above, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated. However, given that the area of relevant dispute between the main parties which the appeal turns on relates solely to matters of viability, it was, in effect, only this matter which needed testing at the Inquiry. Consequently, I take the view that the applicant has only incurred unnecessary or wasted expense in the appeal process to address this matter. Thus, only a partial award of costs is justified in light of this.

### **Costs Order**

16. 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 New Forest District Council shall pay to Pennyfarthing Homes, the costs of the appeal proceedings, insofar as they relate to addressing matters of viability.
17. The applicant is now invited to submit to New Forest District 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

*Alex Hutson*

INSPECTOR