The Planning Inspectorate

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

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

Date: 3 December 2015

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

SOLIHULL METROPOLITAN BOROUGH COUNCIL

APPEAL BY GALLAGHER ESTATES

Inquiry held on 13 and 14 May 2013 and the 6 and 9 September 2013 and then resumed on the 9 June 2015 and then again on the 15 and 16 September 2015.

Lowbrook Farm, Lowbrook LAne, Tidbury Green, Solihull B90 1QS

File Ref(s): APP/Q4625/13/2192128

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- 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 Gallagher Estates for a full award of costs against Solihull Metropolitan Borough Council.
- The inquiry was in connection with an appeal against the refusal of on an application for planning permission for Development of a maximum of 200 dwellings, highway infrastructure, open space and associated works.

Summary of Recommendation: That a partial award of costs is made.

The Submissions for Gallagher Estates (Documents ID327 and ID49)

1. In summary both the Council's reasons for refusal reflect a confused interpretation of development plan policy, asserting a misplaced reliance upon Green Belt policy where the adopted development plan policy makes clear the site is not within the Green Belt. For the same reasons the Council has failed to have proper regard to national policy set out in the National Planning Policy Framework (the Framework). The site is not within the Green Belt but the Committee Report treated the site as if it were.

2. The Council has failed to learn the lesson of how to treat applications made in respect of safeguarded land in no less than two recent Inspector's decisions, both unchallenged by the Council. There have been no material changes since either decision, respectively Moat House Farm and Lays Lane (both included in evidence). There are outstanding objections to the (then) emerging local Plan. The plan in this regard can therefore carry no additional further weight despite post-dating both appeals as there are outstanding fundamental unresolved differences of legal opinion. Moreover, if exceptional circumstances were found to exist by the Local Plan Inspector, they would be subject to challenge in the High Court. This has subsequently come to pass.

3. The Council Committee report placed inappropriate weight on its emerging Local Plan where the process of examination had not started. It treated the intention to return the site to the Green Belt as a fait accompli, which is both unfair, inconsistent with the Framework and with two recent appeal decisions issued where the same argument about the intended return of the site to the Green Belt was considered and rejected.

4. There were no landscape objections in the decision notice issued, yet the scheme had been the same throughout. The landscape evidence at the Inquiry therefore suffers fundamental flaws.

The Response by Solihull Metropolitan Borough Council (Documents ID28 and ID49)

5. The Council do not accept they have adopted a confused interpretation, it has sought to apply and account for the dichotomous elements within then relevant development plan policy (policy H2 of the SUDP). The Council has not placed reliance on Green Belt Policy in this appeal and has not treated the site as if it were in the Green Belt. Neither has the Council failed to take account of national policy set out in the Framework; this is referred to in the committee report. This report also refers to unresolved objections to the emerging local plan and of the

intention to return the site to the Green Belt, one of many issues to be considered in the planning balance. The Committee made its judgement fully aware that the land was not in the Green Belt, in fact clearly understanding the intent to return it there through the local plan process. The Council reaffirm that the site was not treated as Green Belt, nor was this relied upon in evidence at the Inquiry.

6. The appeal decisions at Lays Lane and Moat House Farm were not analogous and did not resolve the dichotomy that policy H2 of the SUDP creates. In any event, things have moved on since the appeals, the DSLP had now moved to its final phase of consideration – thus meriting greater weight than hitherto. The intention to return the site to the Green Belt was not a fait accompli but a clear proposal of the DSLP, which has been reasonably presented on the basis of exceptional circumstances. As emerging policy at a late stage in its adoption process, the committee were entitled to give significant weight to the intention or returning the land to the Green Belt. The SUPD did not identify the appeal site for development. That as a matter of fact was the position before members when they refused permission. They were bound to reach a decision on the basis of the policy position as it prevailed at the time, which is precisely what they did. The Committee made its decision on the expectation at the time that the appeal site was proposed for inclusion in the Green Belt, an approach endorsed by the LP Inspector. Members could not have reasonably anticipated the outcome of litigation which took place in excess of a year after their decision.

7. The final version of the decision notice does refer to landscape issues, reflecting the views of the landscape officer. This landscape evidence evaluates the impact of the development in landscape quality and visual terms. landscape and environmental effects were not considered in any detail when the land was safeguarded. The Council has taken account of the considerations of paragraph 14 of the Framework, acknowledging there is a balance between allowing sustainable development but judging it against any harmful effects that may arise. This is what the Council has done.

8. It would be unnecessarily punitive to award costs against the Council for the reopening of the Inquiry following the outcome of the litigation in respect of the SLP. The Council made representations that the outstanding issues could be dealt with in writing. It would be wrong to burden the public purse by awarding costs for the three additional days it has taken to deal with the matters raised.

Inspector's Conclusions

9. The Government's Planning Practice Guide includes advice relating to the award of costs in appeal proceedings. Amongst other things, it advises that parties normally meet their own expenses and costs may only be awarded against a party who has behaved unreasonably and this has directly caused another party to incur unnecessary or wasted expense in the appeal process.

10. The costs regime is intended to encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case. Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include: preventing or

delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations, failure to produce evidence to substantiate each reason for refusal on appeal, presenting vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis, or not determining similar cases in a consistent manner.

11. The matter at the heart of this application for costs is the extent to which the Council had in its mind, both when preparing the Committee report in respect of this case, and when determining it, the extent to which the application site was to be considered 'Green Belt land' and the application of policy as a result. In my view, the committee report and the reasons for refusal (specifically the version appended to the amended decision notice) present a confused and ultimately paradoxical picture that gave undue weight to the identified development plan policies and to the putative designation of the site in the emerging Solihull Local Plan. This has also led to undue emphasis being given to the perceived harms the development would cause in relation to national policy set out in paragraph 14 of the National Planning Policy Framework (the Framework).

12. At the outset the policy consideration of the report makes clear the site comprises safeguarded land under policy H2 of the then prevailing SUDP. Although the report then goes on to establish the need to consider the existing allocation against the future designation of the land as Green Belt, it quickly moves on to applying the functions of the policy to keep the land clear and available for future housing – (limiting development on safeguarded sites to only uses which would be allowed in the Green Belt under policy C2 and those which would not prejudice the long-term use of the site for housing). This, it seems to me, is in effect applying the H2 safeguarding policy as a proxy Green Belt policy.

13. This is made clear at the outset of the section in the report entitled 'Role of the open space and coalescence' , which 'makes clear that Green Belt policy still applies until such time as the site is designated for housing under future reviews of the UDP'. However, policy H2 indicates that strong development control measures will apply limiting development, inter alia, to those 'allowed in the Green Belt under policy C2'. This is surely a safeguarded land policy and not a Green Belt policy as such. This is the first clear indication in my view, that in the Council's mind, the site be afforded a de facto 'Green Belt status'. This much is further confirmed in the paragraphs that follow in the report, which set out government policy on Green Belt in the Framework.

14. Following on from this, the report asserts that the 'Lowbrook Lane site holds important attributes of Green Belt', and goes on to cite the Norton Lane appeal, an actual Green Belt case, as a relevant consideration, at some length. The critical section of reasoning states 'It is then incumbent to consider how the application site performs in terms of its Green Belt function as described in the NPPF and mirrored by policy C1 of the SUDP. I am in no doubt that the proposed development of 200 houses would significantly reduce the openness of the Green Belt (as allocated in the DLP) and would extend the built form of Tidbury Green into the defined Green Belt. In so doing I consider that the proposal would not only compromise the fundamental aim of Green Belt policy to prevent urban sprawl by keeping land permanently open, but would also lead to a weakened and less defined boundary to the Green Belt for reason that the valley within

which the River Cole lies would be eroded by built form and would no longer have sufficient presence in its landscape.'

15. Leaving aside the first reason for refusal set out on the decision notice, with its unequivocal reference to Green Belt functions, the second reason for refusal, and the one that follows the content of the report, states that the development 'would have a detrimental impact on the purposes of including land in the Green Belt…'.

16. These extracts include clear references to national Green Belt policy, and indeed actually refer to SUDP (policy C1), not DLP (P17) Green Belt policy. In my view any fair reading of this part of the report would lead a reasonable person to a conclusion that, in the mind of the writer, or that of the decision maker reaching a judgement upon it, that the site was indeed in the Green Belt.

17. In concluding on the 'Green Belt issue' the report returns to an acknowledgement that the site as 'safeguarded land' is excluded from the Green Belt and that the DLP adds the site to the Green Belt. At this point the report indicates the DLP is 'at an advanced stage, though it still has unresolved objections relating to the site, such that it may be afforded more than limited weight. It is therefore appropriate that the proposals are considered against Green Belt policy.'

18. In light of this conclusion, and mindful of the force of the reasoning already set out, the question then arises as to whether the Council behaved unreasonably in applying the degree of weight to emerging development plan Green Belt policy that it did.

19. The critical reference here is the acknowledgement that although at an advanced stage, the plan was subject to unresolved objection. Notwithstanding this observation, the report goes on to say that it is considered 'consistent with the Framework' and so can be afforded 'more than limited weight. It is therefore appropriate that the proposals are considered against Green Belt policy'.

20. Whilst consistency with the Framework is not defined in the report, any such approach would have to have regard to paragraph 216 of Annex: Implementation. This makes clear that the weight to be apportioned to the relevant policies of emerging plans should be considered according to the stage of preparation to which the plan has reached; the extant to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater weight that may be given) and the degree of consistency with the Framework.

21. It is the case that at the time of the preparation of the report and the determination of the application The DLP was at an advanced stage of preparation, although objection to it was acknowledged. However, the extent and trenchancy of this objection is not referred to. The appellant had made repeated and very considered objections, including written legal submissions, to the inclusion of the land within the Green Belt as part of the DLP examination process. The trenchancy of this opinion was given further force by the advice that, should the land be included in the Green Belt, such a move would be challenged in the High Court. Moreover, the Council were fully aware of the magnitude of these objections at the time of the preparation of the report and the determination of the application. Whilst careful to avoid consideration through the lens of hindsight, it is clear that this represented a very substantive

'unresolved objection' to an action that would, if effected, have very significant consequences for the future land use functions of the land.

22. Paragraph 216 of the Framework makes clear that the degree of significance of an unresolved objection has a direct bearing on the weight to be apportioned the relevant policy. It is clear that the significance of the unresolved objection to the draft policy must proportionately diminish the weight given to that draft policy. It follows that its application as a major justification for refusing planning permission should, at the very least, be exercised with due caution. The reasonable conclusion has to be that the Council have behaved unreasonably insofar as in their minds, the reasoning of the report had put the site within the Green Belt. Consequently the full force of draft policy was to be applied in this case. It was on the basis of this reasoning and argument expressed in the report and subsequently endorsed by the Council at Committee that the application was refused.

23. The Lays Lane and Moat House Farm appeal decisions are analogous insofar as the safeguarded land consideration is concerned. The messages on the up-to-datedness of policy H2 as a policy relevant to the supply of housing were unambiguous in both cases. The absence of a resolution to 'the dichotomy that policy H2 creates', as the Council terms it, is not the issue. It is clear from both decisions that as an out of date policy under the terms of paragraph 49 of the Framework, this would, under any interpretation, diminish its weight in the balancing exercise required. It also follows that any 'Green Belt consideration' that may be applied by the Council to policy H2 would need to also be diminished accordingly. Therefore I conclude the Council has also behaved unreasonably in not accounting for the conclusions reached in the two relevant decisions.

24. It is the case that the landscape evidence largely omitted consideration of the past evaluation of the site as safeguarded land. Indeed it also omitted a balanced consideration of the merits of the scheme in relation to harm identified. These are shortcoming of the evidence, reflected in the reasoning of the appeal report. However, the body of the reasoning addressed visual impact and a measure of harm. This is a separate matter from Green Belt harm and is reflected in the reference to draft policy P10 in the reason for refusal; on this account no unreasonable behaviour is found.

25. However, it is clear that much of momentum behind the recommendation to refuse was the adverse effect on the Green Belt. That said, it is not known what the outcome would have been at the time of determination (notwithstanding the final terms on which the appeal was determined) if the Council had considered the landscape harm alone against the presumption in favour of sustainable development set out in the fourth bullet point of paragraph 14 of the Framework. What is known however, is that if consideration of Green Belt harm were removed from the equation, the magnitude of overall harm would have been significantly reduced; thus potentially having a significant influence on the outcome of the decision.

26. However, on these terms it may still be reasonably concluded that the Council could have come to a decision to refuse that application on grounds of landscape impact alone. So, the Council has behaved unreasonably insofar as the appellant has had to produce a considerable amount of evidence to rebut the assertion of Green Belt harm which they should not have had to do. However, they have not

done so in reasonably seeking to oppose an application they considered would result in a degree of harm to landscape character.

27. It is also the case that the Council sought a resolution to outstanding matters through the submission of written evidence in an effort to avoid further Inquiry sitting time. However, their evidence at the time of this consideration was that the Council was able to demonstrate a five year supply of housing land, albeit that this could not be sustained later through the supply period. This being the prevailing position, it was concluded that it would be necessary to test the housing land supply evidence as the Council argued they had a five year supply of land. The necessity for doing this was made clear at the June sitting of the Inquiry where members of the public (those most affected by the proposed development) felt that as this matter stood, the Council's position was robust on account of the supply position. The testing of this evidence through the Inquiry process was therefore necessary in the public interest.

28. In conclusion, at the time of the determination the application site was not, as a matter of fact, in the Green Belt. However, the Council has behaved unreasonably in its interpretation of the Green Belt policy position and the weight they apportioned to the draft policy of the plan in this case. In this regard, they have acted unreasonably. Insofar as the appellant has had to commit considerable resources to rebutting the Green Belt and associated policy issues, this has resulted in unnecessary and wasted expense on their behalf. However, that is not to say that the Council were precluded from arriving at a like conclusion (to refuse consent) on landscape grounds alone. In this respect it is not right to say they have prevented or unreasonably delayed development which should clearly have been permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

Inspector's Recommendation

29. In light of the all of the above, I recommend that the application for a full award of costs be declined, though a partial award made, limited to those costs incurred in respect of the Green Belt and policy related matters.

David Morgan

Inspector