The Planning Inspectorate

Costs Decision

Inquiry held on 25 April 2017
Site visit made on 27 April 2017

by S R G Baird BA(Hons) MRTPI

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

Decision date: 14 August 2017

Costs application in relation to Appeal Ref: APP/A1720/W/16/3156344 Land north of Cranleigh Road and West of Wicor Primary School, Portchester, Fareham, Hampshire

- 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 Persimmon Homes South Coast for a full award of costs against Fareham Borough Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for residential development of up to 120 dwellings together with a new vehicle access from Cranleigh Road, public open space including a locally equipped area of play, pedestrian links to public open space, surface water drainage and landscaping.

Decision

1. The application for an award of costs is allowed in the terms set out below.

The submissions for Persimmon Homes South Coast

2. The local planning authority (lpa) has behaved unreasonably regarding the substance of its case[1]. This application is for a full award of costs on the basis that the unreasonable behaviour has led to wasted costs incurred by the appellant in having to prosecute an appeal for a matter which should have been granted permission. In the alternative, it is for a partial award for the costs of and associated with considering the issue of housing land supply (HLS), which should have been an agreed matter i.e. that the lpa cannot demonstrate one.

3. The lpa asserts that it can demonstrate a 5-year HLS. This assertion rests on a purported ability to use as the requirement figure, (a) numbers derived from the Core Strategy (CS), (b) the Local Plan Part 2: Development Sites and Policies and (c) the Local Plan Part 3: The Welbourne Plan[2] which do not and do not purport to derive from an assessment of Objectively Assessed Need (OAN)[3]. The lpa accepts that measured against the OAN, it cannot demonstrate a 5-year housing land supply[4]. Such a position is contrary to the Framework, established case law and appeal decisions. Ultimately, the lpa was unable to be supported by the evidence of Mr Blaxland[5], the witness called to support the lpa's case after an earlier witness withdrew.

[1] Planning Policy Guidance paragraph. 049 Ref ID16-049-20140306, bullet points 1, 5, 6, 7.
[2] Proof of Evidence of Mr Hutchinson for the lpa; Table paragraph 8.3.1.
[3] Mr Brown for the appellant, Appendices SB1 & SB6, X-Examination of Mr Blaxland (lpa).
[4] Housing Statement of Common Ground and X-Examination of Mr Blaxland.
[5] X-Examination of Mr Blaxland.

4. As is clear from Framework paragraph 47 and established by Gallagher[6] the establishment of a Framework-compliant housing requirement in a Local Plan (LP) is a 2-stage process. The first stage is to establish a "Policy Off" OAN, and then to consider the extent to which its delivery might be constrained by policies in the Framework to arrive at a "Policy On" housing requirement. As is established by the Court of Appeal in Hunston[7] , that second "Policy On" stage cannot be undertaken by an Inspector in a S78 appeal. Consequently, as the Court found, where there is no Framework compliant housing requirement in the development plan, the Inspector must look for and apply the best evidence of the unconstrained or "Policy Off" OAN and use that to test the ability of the lpa to demonstrate a 5-year HLS.

5. The lpa's housing requirement derived from the adopted parts of the development plan is accepted not to derive from any assessment of OAN[8]. The lpa[9] accepts that this position is in conflict with the Framework and, therefore, out-of-date in their own terms. This is the position despite the adoption of LPs 2 and 3 after the publication of the Framework, as neither was itself Framework complaint, and so neither "cured" the failure of the pre-Framework CS of being non-Framework compliant[10]. As a result, Hunston would have the 5-year HLS judged not against the out-of-date, non-Framework compliant development plan figure, but against the best assessment of an unconstrained "Policy Off" OAN. Here, that is agreed to be the 420 dwellings per annum (dpa) OAN derived from the PUSH SHMA, April 2016.

6. The matter was considered in the Navigator appeal[11], where the Inspector concluded that it was not appropriate to use the non-Framework compliant development plan figure, but rather the PUSH SHMA OAN. This was taking into account, and accorded with, PPG[12], the Ministerial Statement (MS)[13], and the case law of Hunston and Gallagher. Remarkably, in the light of the clear and unchallenged findings of the Navigator appeal, the lpa has set its face against recognising that it should be assessing its 5-year HLS against the SHMA OAN. In the Annual Monitoring Report (AMR), the lpa asserts that it considers it "premature" to use the "Policy-Off" OAN until such time as it has established a "Policy-On" requirement figure through the Local Plan Review.

7. The AMR purports to excuse this position by noting that since the Navigator decisions, LPs 2 and 3 have been found sound and adopted. However, as accepted by lpa, neither of these documents amounts to or is founded upon a Framework compliant assessment of OAN and so they simply continue, rather than cure, the failure of the development plan to have a Framework compliant figure. As such, their adoption is irrelevant to the validity of the conclusion in the Navigator case that the correct measure is the PUSH SHMA OAN.

8. The lpa's stance is, therefore, contrary to the judgement of the Court of Appeal in Hunston, as was accepted by Mr Blaxland in cross-examination, and

[6] Gallagher Homes Limited, Lioncourt Homes Limited & Solihull Borough Council [2014] EWHC 1283 (Admin).
[7] City & District of St Albans & The Queen (on the application of) Hunston Properties Limited, Secretary of State for Communities and Local Government & anr, {2013] EWCA Civ 1610.
[8] Mr Brown Appendix SB6
[9] X-Examination of Mr Blaxland.
[10] X-Examination of Mr Blaxland.
[11] APP/A1720/A/14/2220031.
[12] 0-030
[13] Strategic Housing Market Assessments 19 December 2014.

is apparent even without such a concession. Where, as here, the development plan does not contain a Framework compliant housing requirement for the purposes of testing the 5-year HLS, it is not appropriate to carry on using an out-of-date, non-Framework compliant figure until such time as the forward planning process provides a new, Framework complaint "Policy On" requirement. What has to be done at a S78 appeal is to judge the 5-year HLS against the best assessment of the "Policy Off" OAN. That is agreed to be the PUSH SHMA OAN of 420 dpa. It is further agreed, in this case, that the lpa cannot demonstrate a 5-year HLS against that figure.

9. The lpa's stance on calculating its 5-year HLS is therefore contrary to the Framework, PPG, established case law and relevant Inspector decisions and is, within the meaning of the PPG costs advice unreasonable conduct on behalf of the lpa as regards the substance of its case. That unreasonable conduct has led directly to the unnecessary need of the appellant to pursue an appeal in this matter. As the lpa's Committee Report and Statement of Case make plain, this refusal was predicated on the assertion that there was a 5-year HLS, that the settlement boundary policies consequently carried full weight and that the development was in breach of a S38 (6) development plan without justification. That case could not be asserted once, — as must always have been the proper analysis — it was accepted that the lpa could not demonstrate the necessary 5-year HLS, that Framework paragraph 49 applied and that the Framework paragraph 14 tilted balance was engaged.

10. The case promoted through the lpa's advocate at this inquiry has sought to rely on the principle in Hopkins Homes[14] that out-of-date policies, as a matter of law, may be still found to be determinative[15], but such an argument is an embroidery after the event, not to be found in the lpa's case - either in the Committee Report or the Statement of Case. Those documents undertake a simple S38 (6) balance on the basis that Framework paragraph 49 was not triggered, and there is no suggestion in them that planning permission should or could have been refused when weighed in the tilted balance of Framework paragraph 14 (2) as is the case once it is recognised, as it now must be, that Framework paragraph 49 is, indeed, in play. As such, this appeal should have been unnecessary and a full award of costs is sought.

11. In the alternative, even had the lpa not been unreasonable in refusing the application notwithstanding the fact that its policies were out-of-date, it was unreasonable to continue to argue that it could demonstrate a 5-year HLS, and cause the unnecessary expense of having the matter considered at this inquiry, taking considerable time both in presentation and preparation. A partial award is therefore sought of all costs associated with the HLS issue.

The response by Fareham Borough Council

12. The appellant seeks a partial or a complete award of costs, premised entirely upon an assertion that the lpa was unreasonable to contend it had a 5-year HLS in the light of Hunston, passing reference to Gallagher and the Navigator decision. There are 2 answers to those applications. First, the lpa was right in law to have assessed the HLS in the way in which it did. PPG makes it

[14] Suffolk Coastal District Council & Hopkins Homes Limited & secretary of State for Communities & Local Government, Richborough Estates Partnership LLP & Cheshire East Borough Council & Secretary of State for Communities & Local Government. [2106] EWCA Civ 168.
[15] Note the "normal" position at the start of paragraph 47, the "incentive" at paragraph 48 and the wrning of the consequences of using out-of-date policies at paragraph 35.

clear[16] that the starting position, so far as calculating housing matters is concerned, should be to work to the LP numbers: "*Housing requirement figures in up-to-date adopted Local Plans should be used as the starting point for calculating the 5 year supply. Considerable weight should be given to the housing requirement figures in adopted Local Plans...*" This advice is post-Hunston. Also, post-Hunston, PPG does not state that the starting-point was the OAN, still less an untested OAN, but rather the housing requirement figures in the LP.

13. PPG is qualified by the words "*up-to-date*", and goes on to state that the starting-point might change if "*significant new evidence comes to light*", and that "*where evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying sufficient weight, information provided in the latest full assessment of housing needs should be considered.*" However, the requirement is simply to consider them, not to apply them automatically as a proxy for the housing requirement that may emerge after examination and through the Plan-making process. Indeed, and post-Hunston, PPG goes on to state, in terms, that: *"... the weight given to these assessments should take account of the fact they have not been tested or moderated against relevant constraints.*"

14. The Ministerial letter, which post-dates Hunston, is in a similar vein. The letter makes it clear that the starting presumption is that one should work to the requirement derived from extant LPs rather than anticipate what may emerge through the Plan-making process by pre-emptively working to an OAN currently identified in a SHMA. That letter, which has never been withdrawn, states as follows: *"... the outcome of a Strategic Housing Market Assessment is untested and should not automatically be seen as a proxy for a final housing requirement in Local Plans. It does not immediately or in itself invalidate housing numbers in existing Local Plans.*" Thus, post-Hunston and from the words of the Minster himself, an untested SHMA is not automatically to be seen as a proxy for a final housing requirement in LPs; and does not immediately or in itself invalidate housing numbers in existing LP. That is because it is untested; and until it is tested one cannot know what housing requirement the LP process may eventually produce.

15. Whilst the Ministerial letter goes on to make it clear that lpas will need to consider SHMA evidence carefully, and that such an assessment provides important new evidence which, where appropriate, will prompt lpas to "*consider*" revising the housing requirements in their LP, that is expressly anticipated to take place "*over time*". Moreover, that is re-emphasised in the letter that "*adequate time*" must be afforded to lpas in this regard. The PUSH SHMA update 2016 was published in April 2016, only 4 months prior to the date upon which this appeal was lodged, which is barely any time at all. Finally, and remembering the Ministerial warning about "*untested*" SHMAs, it is also to be noted that the PUSH SHMA update is clear, itself, in stating that it has no statutory status within any development plan, and that it does not supersede any housing policies or proposals within adopted LPs. Its status and position within the evidence base for the use of lpas is clearly set out[17] within of the document. The PUSH SHMA update 2016 is unequivocal in stating that it is to be used only as part of the evidence base upon which LPs

[16] ID: 3-030 20140306
[17] Paragraphs 1.2, 1.8, 1.9 & 1.10

can be developed and has not been published for immediate use as a proxy or replacement for housing policies within current LPs. Indeed, to treat it as such would not only run counter to the Ministerial letter and PPG, but create a scenario in which the development plan and its associated policies could be rendered out-of-date as soon as an untested OAN is published in a SHMA; and that would compromise both the plan-led system and the plan-making process.

16. Unsurprisingly, given that PPG and the Ministerial letter both post-date Hunston, and were written with that case firmly in mind, nothing in that case mandates an approach contrary to PPG or the Ministerial letter. It is vitally important to understand what the case actually decided. Hunston was a case in which it was not even suggested that the LP contained any housing requirement of any relevance at all. Indeed, there was "*no definitive housing delivery requirement*" in any relevant Plan at all. It was in that circumstance that the Inspector had chosen to adopt, for decision-making purposes, the housing requirement in a revoked Regional Spatial Strategy. However, that choice was found to be an error of law for 2 reasons: first, the Inspector was not entitled to use a housing requirement figure from a revoked plan "*as a proxy for what the Local Plan process may produce eventually*"; and second, neither could the Inspector pre-empt the plan-making exercise and attempt to anticipate what housing requirement the LP process may eventually produce.

17. The following points fall to be made. First, it was in the absence of any housing requirement in any LP, and because the Inspector was not entitled to revert to a revoked Plan or to pre-empt the Plan to be made, that all which was left to which regard could be had in Hunston was OAN. Second, that is an entirely different situation to that which pertains here. Here, there is a CS and very recently adopted LPs 1 and 2 and they yield a stepped housing requirement. Indeed, one which, in the latter years, is higher than OAN. Third, through adopting the approach which it has, the lpa is not, as the Inspector in Hunston wrongly had, seeking to rely only upon the requirements of the revoked Regional Strategy, or the CS which was based upon it. Fourth, Hunston decided that it was not open to a decision-maker to attempt to anticipate what housing requirement the LP process may eventually produce and that is precisely what both PPG and the Ministerial letter had in mind when, respectively, PPG states that whilst "*considerable weight should be given to the housing requirement figures in adopted Local Plans...*", *"... the weight given to these assessments should take account of the fact they have not been tested*"; and when the Ministerial letter states that, because "*the outcome of a Strategic Housing Market Assessment is untested*", it "*should not automatically be seen as a proxy for a final housing requirement in Local Plans*" and "*does not immediately or in itself invalidate housing numbers in existing Local Plans.*" Fifth, it follows that it would be a legal error if here the decision maker was bound by Hunston to assess whether or not the lpa has a 5-year HLS by reference to the untested OAN for Fareham identified in the PUSH SHMA update. That is an issue which has to be tested by the housing requirements of the extant LPs, even though they are not directly sourced in an assessment of OAN, but for the latter years exceed it.

18. Similarly, the case of Gallagher is also to be distinguished. This is not a case about decision-taking, but Plan-making; and the Navigator decision is, likewise, to be distinguished. It is a creature of its particular time, having been issued in January 2015, 5 months before the Inspector's report was

published for LPs 2 and 3, and before they were adopted. Hunston, Gallagher and the Navigator decision are all plainly to be distinguished. Furthermore, and even if it were to hold otherwise on the law, which would be a legal error in itself, it was plainly reasonable of the lpa to make the legal submissions which it did, for which reason neither award of costs can properly be made. Second it is proper to give determinative weight to all of the, conceded, breaches of LP policy even if it was held that the lpa did not have a 5-year HLS, a matter of which Mr Knappett for the appellant was completely unaware because of his ignorance of the established legal principles decided in Crane[18], Phides Estates[19] and Suffolk Coastal.

19. So far as the required approach to decision-taking in respect to the breach of those policies is concerned, this was quite obviously unknown to Mr Knappett, for the appellant. He was quite open that he had not read any of the leading authorities and was wholly unaware of the recent line of cases that make it quite clear that even when development constraint policies are to be deemed out-of-date, whether by reason of housing shortfall or otherwise, they can still have determinative effect against a proposal. Being ignorant of the law in these regards, Mr Knappett never even considered applying the ultimate planning balance as required by law, considering what weight to attach to either side of that balance in line with established legal principles.

20. The starting-position is, of course, Section 38 (6) - planning applications and appeals are to be decided in accordance with the development plan unless material considerations indicate otherwise. Further, the Crane judgment held that Frameworks paragraphs 14 and 49 do not modify or dis-apply this statutory framework. Rather, the key question is how much weight should be attached to either side of the S38 (6) planning balance when the development plan policies which stand in the way of a housing proposal are to be deemed out-of-date by reason of housing shortfall and that proposal would make some contribution towards meeting that shortfall. That is an issue upon which 2 further judgments looking at both sides of the planning balance — neither of which Mr Knappett knew anything about.

21. In the first, Phides Estates, it was made it clear that Framework paragraph 14 does not prescribe the weight to be attached to a contribution towards meeting a housing shortfall as a benefit to be put in the balance against any adverse effects. This is a matter for the decision-maker. Moreover, it will depend on not just the extent of the shortfall, but upon "how long the deficit is likely to persist". In other words, if action is being taken to meet housing needs in the medium-longer term, the weight to be attributed to the ability to reduce a shortfall in housing land supply in the short term can properly be reduced. This point was then re-iterated, and elaborated upon, in the Hopkins Homes case which addressed the other side of the planning balance; the weight to be attributed to the breach, by a housing proposal, of development constraint policies which are to be deemed out-of-date by reason of housing shortfall. This confirmed that determinative weight can properly be given to out-of-date development plan policies, and that the breach of such policies can properly justify the refusal of housing proposals even when there is a housing shortfall. Moreover, Hopkins Homes set out certain considerations

[18] Ivan Crane & Secretary of State for Communities & Local Government & Harborough District Council [2015] EWHC 425 (Admin).
[19] Phides Estates (Overseas) Limited & Secretary of State for Communities & Local Government & Shepway District Council & David Plumstead.

which can lead to attribution of such determinative weight, and the second, which flows from Phides Estates, albeit now looking at the other side of the planning balance, is directly relevant: "*the action being taken to address*" the HLS shortfall. Here, that action is very considerable indeed, most notably through the promotion of the strategic site at Welbourne by which the lpa is not just making plans, but taking affirmative action, to meet all its housing needs in the medium to long term, so that in the terms of Phides Estates any housing deficit "is likely to persist" for only the short term.

22. The end result is hostile applications, ones such as this are not in accordance with the development plan, need not be allowed in order to meet a short term housing need in circumstances in which an authority, like Fareham, is positively planning to pursue the large-scale, strategic delivery of greenfield sites to meet those needs in the medium-later term. It simply is not right that the inevitable time-lag before such schemes can be delivered leaves lpas vulnerable to applications which cut across the strategy it is pursuing, and pursuing precisely to fix the broken housing market and boost significantly the supply of housing in accordance with Government policy.

23. Given this, the lpa were reasonably entitled to refuse permission for all of the reasons that they gave even if they were wrong on the 5-year HLS, and the inquiry would have taken place in any event, and especially so noting (1) the acknowledged loss of the highest quality agricultural land; (2) the acknowledged harm to landscape; (3) the entirely reasonable case made by the lpa that this harm was to a "valued" landscape, protected by the Framework; and (4) the contribution to housing which is in the pipeline in result of Welbourne Garden Village.

Reasons

24. PPG advises that, irrespective of the outcome, 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.

25. In seeking the boost significantly the supply of housing, Framework paragraph 47 highlights that LPs should meet the full, OAN for market and affordable housing in the housing market area, as far as is consistent with the policies set out in the Framework. The basis of the lpa's consideration of this proposal is set out in the officers' report to the Planning Committee and is predicated on the basis that, the 5-year HLS position is based on the requirements of the adopted LPs 2 and 3 and that PPG says that the "…*housing requirement figures in the adopted Local Plans provide the basis for calculating the five year supply."* [20]

26. The lpa's starting point is, in my view, an unfortunate precis of PPG advice. PPG says that lpas should have an identified 5-year HLS at all points during the plan period and that housing figures in up-to-date adopted LPs should be used as the starting point and given considerable weight. However, PPG goes on to qualify these statements by adding, "*…unless significant new evidence comes to light*". Moreover, PPG cautions that evidence which dates back several years, such as that drawn from revoked regional strategies may not adequately reflect current needs. The Ministerial letter of December 2014 does not, in my view, change that advice rather it reinforces the PPG.

[20] CD 7 page 10 – Land Supply

27. Assessing whether a plan is up-to-date is not just a temporal exercise; rather it is an assessment of whether the plan policies are consistent with national planning policy as espoused in the Framework. Here, the CS housing figures are acknowledged as not being Framework compliant in that the adoption of the CS pre-dates the Framework and it was produced in the context of the no longer extant Regional Strategy. Whilst LPs 2 and 3 were adopted after the publication of the Framework, the starting point in the report to Committee conflicts with a legal opinion obtained in August 2014 by the lpa which confirms that LPs 2 and 3 "*…merely deal with the allocation of sites for a quantity of housing which has been identified as needed, rather than dealing with the assessment of the need for housing.*" In this context the development plan figures fall to be considered as inconsistent with the approach adopted by the Framework and the logical next step should be to consider what other evidence exists. Such an approach would, in my view, be consistent both with PPG and Ministerial advice.

28. Here that evidence is the work undertaken to produce the South Hampshire Strategic Housing Market Assessment (SHMA). That was the position adopted in the Navigator appeal in December 2014[21]. In that decision, the Inspector went on to conclude that the 2014 SHMA represented a respectable and credible picture of the OAN for housing in Fareham. That decision was not challenged by the lpa and as such the approach it adopts is an important material consideration.

29. I have taken careful note of the lpa's submissions that the Ministerial letter of December 2014 highlights that the consideration of revisions to housing figures should be a process taken over time. When the lpa made its decision on the appellant's application in March 2016 it had before it 3 important and material pieces of information. These were, SHMA evidence that identified a housing requirement materially above that set out in the development plan, the August 2014 legal opinion that LPs 2 and 3 did not deal with the assessment for the need for housing and the unchallenged outcome of the Navigator appeal. As far as I can determine none of these matters featured in the lpa's consideration of the starting point for assessing the 5-year HLS. Moreover, in the period running up to the opening of the inquiry, the lpa had the results of the April and June PUSH assessments of the OAN for Fareham. Both reports indicate an increasing need for housing and although untested, they still represent a respectable and credible picture of the OAN for housing in Fareham. The December 2014 Ministerial letter does not define a time period for consideration of updated information, rather it refers to a "…reasonable period…" In the circumstances described above, it strikes me that since January 2015, the date of issuing the Navigator appeal, a reasonable period of time has elapsed to assess the impact of the more recent housing figures. It is prescient to note that the lpa acknowledges even using its own supply figures when the up-to-date OAN figures are used to derive the 5-year supply, which includes the contribution of Welbourne, it cannot demonstrate a 5-year supply of deliverable housing land.

30. In light of the above, I consider the lpa acted unreasonably in asserting that it had a 5-year supply of housing land at the time of the application and in continuing to assert that position at the inquiry. In these circumstances I consider the appellant incurred unnecessary expense in having to address this

[21] APP/A1720/A/14/2220031 paragraph 31.

matter. In this case the lpa also has objections to the scheme in terms of an unacceptable landscape and visual impact and the loss of Best and Most Versatile Agricultural land. The absence of a 5-year supply is a matter which informs the planning balance. The planning balance is a matter of professional judgement and I am not in a position to determine whether, if the lpa had accepted at the time of the application it did not have a 5-year HLS supply, the benefits of the scheme would have outweighed its concerns regarding landscape and agricultural land. In these circumstances it would still have been necessary to bring the matter before the Secretary of State for a decision. In this context, I consider a partial award of costs is justified limited to those costs dealing with the issue of housing land supply.

Costs Order

31. 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 Fareham Borough Council shall pay to Persimmon Homes South Coast, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in dealing with the issue of housing land supply; such costs to be assessed in the Senior Courts Costs Office if not agreed.

32. The applicant is now invited to submit to Fareham Borough 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.

George Baird
Inspector