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Costs Report to the First Secretary of State

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an Inspector appointed by the First Secretary of State

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TOWN AND COUNTRY PLANNING ACT 1990

David Wilson Estates & Messrs D B and J F Briggs

Harborough District Council

Inquiry held on 10-13 & 17-19 May 2005

Land at Wistow Road/Warwick Road, Kibworth, Leicestershire

File Refs: APP/F2415/A/04/1152503 & 05/1176004

(HDLP) Alterations. The reliance on policy ALT1 is curious given that that policy is directed at the *order* of release rather than the timing or basis of release. The "therefore" in the reason for refusal looks somewhat misplaced.

7. The background to the alleged inadequacy of the shortfall is important. HDC adopted the Alterations in a form chosen by them with a ranking and trigger mechanism of their choosing after having regard to the Inspector's recommendations. Officers advised that the trigger had been reached and KB/1 should be released [*Document CD17*] – supported by the view of the Government Office (GO-EM). The members' decision [*Document HDC2 paragraph 4.4.1 & Document CD18*] was to complain of the difficulty of making a decision without clear guidance (paragraph 1), but then to allege the shortfall was not sufficient to justify release (paragraph 2) and then to say the decision to release should be tested at a public inquiry (paragraph 3). That decision making process fails to recognise that the job of members is to make decisions, not simply pass the difficult ones to the First Secretary of State with all the attendant delay and expense.

8. Circular 8/93 Annex 3 paragraph 26 makes it plain that in deemed refusal cases the local planning authority must show they had specific and adequate reasons for failing to make a decision and they should substantiate the putative reasons for refusal. The only reason for a failure to reach a decision here is the abdication of responsibility to take an unpopular decision.

9. By the time of consideration of the most recent application at Committee in March 2005 [*Document CD20*], members had been advised by their own officers and independent and experienced consultants that the case for release was made out as provided for in the Local Plan and that LCC's position was untenable [*Document CD20 page 7, first complete paragraph last sentence*]. The position of Kibworth was different from Great Glen. Kibworth was supported by HDC's officers and Atkins Consulting called to re-assess the matter. Atkins had a different view of Great Glen and recommended refusal of planning permission in that case. The only basis for rejecting the advice of officers and consultants is from Councillor Mrs Roeber. It is manifestly inadequate producing no evidence to deal with the shortfall issue and in any event relies on the LCC's approach which is materially different to HDC's approach [*Document HDC3 paragraphs 3.4-3.8*].

10. Crucial to a sound approach to the land availability issue is the selection of an appropriate method of calculation. Members had had clear advice from Leading Counsel [*Document CD22*] that the residual method was the appropriate method. GO-EM had indicated the same and LCC do not dispute that it is the appropriate method. The suggestion that members had not had an answer as to whether the annual average method was defensible is wrong. Leading Counsel was asked [*Document CD22(d) paragraph 3.1(a)*] whether the method was acceptable and defensible. He advised [*Document CD 22 (b)*] that:

    i. the residual method was clearly preferable for reasons which were given (see pages 2 and 3); and,

    ii. whilst it would be possible for the Council to rely on the annual average basis it would "present difficulties defending such an approach at appeal" – (see page 3 bottom), in other words it was not defensible.

It is noteworthy that Leading Counsel was not asked to provide any further written clarification of that view.

11. Councillor Mrs Roeber's evidence demonstrates the reluctance to accept that approach in the face of overwhelming evidence, in reality because it produces the wrong result. It is unreasonable and borders on the perverse to cling to an inappropriate methodology in these circumstances. There is simply no support from any quarter for such an approach and yet without being able to demonstrate that such an approach is appropriate HDC's case has no foundation.

12. Having disentangled Councillor Mrs Roeber's own views from those to be attributed to HDC in her proof of evidence, paragraphs 3.4 – 3.6 [*Document HDC3*] remain as part of HDC's case. In evidence they say "we were guided by the County Council" but the LCC position is to accept the residual method but reject the notion that any shortfall could justify release.

13. The upshot is quite clear; members rejected the advice of consultants and their own officers with no sound basis for so doing (Circular 8/93 Annex 3 paragraph 9). There is no evidence to support the view of unjustified release that the reason for refusal advances against the background of:

    i. a clear Alterations policy for release;

    ii. a reliance on a minimum 3 year land supply;

    iii. the clearest possible evidence of deficiency; and,

    iv. national policy guidance stressing the importance of continuity of supply.

14. In the context of the reason for refusal the remainder of Councillor Mrs Roeber's evidence is irrelevant and appears more directed at re-running the Local Plan/Local Plan Alterations arguments.

Unnecessary Expense

15. If HDC had not behaved unreasonably it would have granted planning permission for the appeals proposals and an inquiry would have been avoided with all its attendant cost and delay. The appellants accordingly claim the costs of, and occasioned by, the need to come to inquiry.

The Response by Harborough District Council

16. HDC does not consider that it has behaved unreasonably. Without prejudice to this assertion, if HDC is found to have behaved unreasonably, such unreasonable conduct has not caused David Wilson Estates to incur or waste expense unnecessarily. In the circumstances, no award of costs, whether total or partial, should be made.

Annex 2, Circular 8/93; Procedural requirements

17. Within paragraph 3(1) to Annex 2, Circular 8/93, failing to provide an adequate pre-inquiry statement of case is given as an example of unreasonable behaviour. The circumstances leading to this situation are set out in HDC's response. No prejudice has been caused to David Wilson Estates. David Wilson Estates can point to no abortive work in preparing for the inquiry related to HDC's failure to serve a statement of case. No time has been lost at this inquiry.

18. Other than by reason of failing to serve a statement of case, HDC has not acted unreasonably within the terms of Annex 2. It has not failed to provide any required

information; it has not introduced any new grounds of appeal or issues; and it has not caused this inquiry to be unnecessarily prolonged. The reason for refusal was accurately set out in evidence by Councillor Mrs Roeber.

19. Further HDC has not caused David Wilson Estates to call a professional witness unnecessarily. At the meeting of HDC's planning committee on 24 March 2005, HDC resolved that it would have refused planning permission for a single reason. Paragraph 2 of the resolution was an informative and did not form a putative reason for refusal. No argument of this sort has been advanced at this inquiry.

20. Whilst HDC expressed dissatisfaction with the content of the planning application, in particular, the contents of the section 106 agreement, highways provision and absence of a masterplan, it expressly did not indicate that it would have refused planning permission on the basis of such disquiet. At an early stage, HDC indicated to David Wilson Estates' representatives that it did not raise any technical objections to the development of KB/1. This agreement was reflected in the terms of the Statement of Common Ground negotiated by Atkins Consulting signed on 11 April 2005.

21. Witness evidence prepared on behalf of David Wilson Estates in relation to landscape issues and highways was not prepared with regard to paragraph 2 of the resolution. Landscape evidence was required to inform the First Secretary of State of principal issues C(iii) and E as set out at the PIM [*Document INQ1*]. Highways evidence was required in relation to principal issue D as set out at the PIM. Rebuttal evidence in relation to landscape and highways issues was prepared in response to criticism levelled at KB/1 by those acting on behalf of John Littlejohn Ltd. In the light of John Littlejohn Ltd's concession on 12 May 2005, this rebuttal evidence was in fact withdrawn. HDC had nothing to do with the preparation of that evidence and its cost should not be laid at HDC's door.

Annex 3 Circular 8/93: Substance of the case

22. Paragraph 7 – HDC has not prevented, inhibited or delayed development which could reasonably be permitted, in the light of the development plan, so far as it is material to the application, and of any other material considerations. On David Wilson Estates' and John Littlejohn Ltd's own evidence, given the failure of HDC to adopt SPG on 24 November 2004, release of KB/1 and GG/2 would not accord with the Alterations policies of the HDLP. Whether or not 'other material considerations' are taken into account within the internal framework provided by policies ALT/1 and ALT/2 of the HDLP, tension between the former LSP/HDLP and the JSP/RSS8 calls for the exercise of planning judgement.

23. Paragraph 8 – HDC has not acted unreasonably in providing the single putative reason for refusal; it is complete, precise, specific and relevant to the application. A comprehensive description of the factual background was provided [*Document HDC2*] and evidence was produced [*Document HDC3*] to substantiate the reason. Full reference was made by Councillor Mrs Roeber to the adopted HDLP, Alterations, LSP, JSP, RSS8 and national guidance. Whilst in cross-examination she accepted that some elements of her evidence reflected her personal views, sufficient evidence to make good HDC's case remained intact. All tiers of planning policy were properly taken into account by HDC and a clear explanation provided of why the proposed development should not be permitted. As the evidence in the course of this 7 day inquiry has demonstrated, there is no single right answer. There are different views. Resolution of the tension between the LSP/HDLP and

the JSP/RSS calls for the exercise of planning judgement. Paragraph 8 indicates that in cases where issues are finely balanced, an award of costs would be inappropriate.

24. Paragraph 9 – Planning authorities are not bound to adopt officer advice or that of its external consultants. HDC considers that for the reasons set out before this inquiry, it had proper planning grounds for taking a decision contrary to the advice it had received. HDC thoroughly considered and properly understood advice received from LCC, as the strategic planning authority and primary consultee. Paragraph 12 – On David Wilson Estates' and John Littlejohn Ltd's own evidence, given the failure of HDC to adopted SPG20 on 24 November 2004, release of KB/1 and GG/2 would not accord with the Alterations policies of the HDLP. In this case, the development plan consists of RSS8, the JSP and the HDLP including Alterations. Paragraph 26 – HDC failed to determine either application relating to KB/1 within the statutory period. However, HDC has subsequently produced evidence to substantiate its single putative reason for refusal.

25. Paragraph 28 – On 24 March 2005, HDC resolved that it would have refused planning permission for a single reason. Paragraph 2 was an informative and did not form a putative reason for refusal. No argument of this sort has been advanced at this inquiry. Whilst HDC expressed dissatisfaction with the content of the planning application, in particular, the contents of the section 106 agreement, highways provision and absence of a masterplan, it expressly did not indicate that it would have refused planning permission on the basis of such disquiet.

Wasted expenditure

26. From the chronology set out [*Document HDC6 paragraph 1.1*], it is clear that these appeals were recovered by the First of Secretary of State pursuant to directions dated 18 June 2004 and 14 March 2005 respectively. Paragraph 9 of Annex 1 makes plain that parties involved in a called-in appeal are in a different position from that faced in a planning appeal. Paragraph 9 does not deal explicitly however with appeals recovered by the First Secretary of State for his determination under section 79 of the Town and Country Planning Act 1990. In the absence of express reference to the present circumstances, and by way of clarification, HDC accepts that the guidance in paragraph 9 does not apply to these inquiries.

27. From the outset, LCC has objected to possible adoption of SPG20 by HDC and to both applications at KB/1. Had it resolved that it was minded to grant planning permission for either application, by reason of the size of the site, its greenfield status and its high level of importance, HDC would have been obliged to refer the matter to GO-EM. Whilst this inevitably involves a degree of conjecture, the First Secretary of State has expressed his interest in both applications by recovering their determination. Consistency of decision making would suggest that given the characteristics of KB/1 and an outstanding strategic objection from LCC, a public inquiry would have been held in any event.

28. In the circumstances, HDC's actions have not, in any way, put David Wilson Estates to abortive expense in terms of the preparation of evidence on any issue that the First Secretary of State would not ordinarily have required them to prepare. The length of the inquiry to deal with Kibworth would have been shorter, but for the decision of the Planning Inspectorate to co-join the David Wilson Estates' appeals and the John Littlejohn Ltd appeal.

29. Without prejudice to the above, if the submissions of HDC are not accepted, David Wilson Estates would be entitled to receive costs only in respect of work properly referable to this

public inquiry, as opposed to work undertaken in support of the planning application. Given that both planning applications were originally in detail, a considerable amount of detailed work was commissioned from consultants by David Wilson Estates in any event in support of the planning applications. Costs referable to preparation of the section 106 legal agreements would not be recoverable. A detailed section 106 agreement would have been required, irrespective of HDC's decision making.

30. By reference to the paragraphs in David Wilson Estates application [*Document DWE28*], it was contended HDC's case is not necessarily incompatible with those elements of LCC's case identified (at paragraphs 6(i) and (ii)). And, that policy ALT1 incorporates consideration of policy ALT2 by reference – so that they are intertwined and must be taken together (paragraph 8). The background to the alleged inadequacy of the shortfall is of historical interest (paragraph 9). There is nothing wrong with HDC looking to the strategic planning authority, but there are differences. Councillor Roeber's evidence, in particular paragraph 3.2-3.6 [*Document HDC3*], clearly explains the Council's position. It would be wrong to expect the degree of sophistication in her evidence as from a professional witness. And there is no need, so long it provides a clear substantiation of the reason – which it does (paragraph 11). The decision was made upon the basis of a shortfall of 70 derived from the residual method of calculation (paragraph 13).

Further Response on behalf of David Wilson Estates & Messrs D B and J F Briggs

31. First, with regard to paragraphs 2.2 & 2.3 [*Document HDC6*], the failure to serve a statement of case has caused difficulties; it is not satisfactory in circumstances where members disagreed with their officers and consultants. HDC's failure to follow the Inspector's instruction regarding the preparation of a statement of case at the PIM is its responsibility [*Document INQ/1*]. The delay that then ensued having to appoint another consultant lies entirely at HDC's door. And, second, although it may be considered as background, the application is not founded on the considerations contained within Annex 2 of the Circular.

32. In relation to paragraph 2.8 [*Document HDC6*], the landscape and highway evidence was not prepared in response to paragraph 2 of the resolution because the appellants did not know what evidence HDC might present at the inquiry – and that is in fact the case. A landscape objection is raised by Councillor Mrs Roeber – the substantive witness dealing with the merits of the case and HDC's position – and elsewhere on highway matters [*Document HDC3 paragraph 3.17 & 3.20*]. The evidence prepared does directly address that produced by HDC.

33. This case is not "finely balanced". In evidential terms HDC relied on LCC and LCC had a different case. The assertion that HDC thoroughly considered and properly understood the advice received from LCC is a bold submission in light of Councillor Mrs Roeber's evidence and the different position of LCC. The refusal reason is about sufficiency, not the argument raised by LCC and in this application [*Document DWE28 paragraph 6(i)*].

34. The guidance at paragraph 9 of Annex 1 does not apply. As for paragraphs 4.3 and 4.4 of HDC's response, HDC had been expressly told [*Document CD37*] to decide how to address the shortfall and whether – outwith appeals – to release Kibworth/1 in August 2004, after the appeals were made. As for paragraphs 4.5 and 4.6, they relate to the assessment of the amount of costs and not the principle. A procedure exists for the amount to be determined by an independent party if required. In considering whether Councillor Mrs Roeber's evidence provides the substance to support the putative reason

for refusal, regard has been given entirely to the substance of her evidence on behalf of HDC, not her sophistication as a planning witness.

Conclusions

35. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

36. It has not been alleged any procedural failure on the District Council's part has given rise to wasted expenditure. Also, on my reading, it is not suggested that the Council's deemed reason represented other than a single objection relating to the housing shortfall.

37. Turning to the substantive matter at the heart of the application, a Council is not bound to adopt the advice of their officers or, indeed, externally appointed consultants. It will, however, be expected to show reasonable planning grounds for taking a decision contrary to such advice and be able to produce relevant evidence to support its decision in all respects. That was not done in this case in my opinion. I make plain this is not intended as a criticism of the Council's principal witness at the inquiry. But, it is necessary to demonstrate that there is some reasoned basis upon which the Council's objection is founded. In my assessment, the stance taken by the Council was entirely lacking in substance and not supported by cogent evidence and reasoning. This was not a case where I believe the issues were finely balanced. Accordingly, I consider the evidence presented at the inquiry did not meet the requirements of the Circular.

38. In my view, thereby, the Council failed to produce relevant evidence to substantiate its deemed reason for refusal and show it had reasonable grounds for taking a stance contrary to the advice if its officers. This is unreasonable behaviour, as advised by paragraphs 8, 9 and 26 of Annex 3 and has, furthermore, delayed development which I believe could reasonably have been permitted. I consider it has given rise to the appellants incurring unnecessary expense as a result of having to pursue the matter to appeal.

39. Having regard to the terms of the Council's response in respect of 'wasted expenditure' and in otherwise seeking to define the scope of the costs, the amount of costs necessarily and reasonably incurred in relation to the appeal proceedings is a matter for the parties to settle by negotiation or, failing that, by detailed assessment. This report is limited to my consideration of the principle of whether or not costs should be awarded by a costs order. The order determines the broad extent of an award and not the amount of costs.

40. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 8/93, has been demonstrated and I therefore conclude that a full award of costs is justified.

Recommendation

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

INSPECTOR