Land at Bird in Eye Farm, South of Bird in Eye Hill, Uckfield

LPA ref: WD/2021/2198/MAO

PINS ref: APP/C1435/W/22/3307820

APPELLANT'S APPLICATION FOR COSTS

Introduction

1 The Appellant applies against the Council for a partial award of its costs of the above-captioned Appeal, either (i) reflecting 80% of its appeal costs, alternatively (ii) reflecting the particular matters about which specific complaint is advanced below (insofar as the Inspector finds the complaints well-founded).

2 Costs can be awarded where a party has behaved unreasonably thereby causing another party to incur unnecessary costs: NPPG at 16-028, 16-030.

3 Examples of costs awards against LPAs on substantive grounds include (NPPG at 16-049):

- Failure to produce evidence to substantiate each reason for refusal;
- Vague, generalized or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis;
- Refusing planning permission on a planning ground capable of being dealt with by conditions;
- Persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable.

4 Examples of costs awards against LPAs on procedural grounds include (NPPG at 16-047):

- Lack of co-operation with the other party or parties;
- Not agreeing a statement of common ground in a timely manner;
- Introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen;
- Providing information that is shown to be manifestly inaccurate or untrue.

5 In addition, it can be noted that the Standing Advice at [CD/G3, p6] provides: "You should work with the developer to make sure there's enough suitable evidence to make a decision"; and Ms Turner confirmed in XX that a failure to co-operate with the developer as expected would be unreasonable.

6 Generally, as a reasonable impartial observer would consider, the Council's approach to this Appeal has been to be as difficult as possible (there being numerous manifestations of this trait, as set out below). It can reasonably be inferred (no other explanation having been offered by the Council for its conduct) that the Council has been difficult because of a perceived need to satisfy the demands of local residents in the Uckfield / Framfield area to oppose substantial new housing proposals. Whatever the precise cause, the Council's approach - which is exemplified by the matters particularised below - has substantially increased the time this Appeal has taken, and accordingly the costs incurred by the Appellant to see it through.

[1] Unreasonable objection to the Appellant's instruction of [redacted] as its counsel for the Appeal

7 [redacted] had been instructed by the Appellants on this particular application/appeal for a substantial period and had been booked to attend this Appeal. However, the day after the CMC, the attached complaint letter dated 27 June 2023 was sent by the Council to [redacted]'s chambers (Landmark) complaining that [redacted] would be breaching professional rules in continuing to represent the Appellant. The letter threatened to report [redacted] to the Bar Council, and it is absolutely clear what message was being communicated to [redacted]'s chambers about redirection of future instructions by the reference to the Council "mainly us[ing] Landmark for all our

planning work and advocacy". In view of the very short timeframe before service of proofs and thereafter this Inquiry, the Appellant could not countenance the distractions that would arise from a protracted dispute with the Council over this issue and so felt forced to instruct alternative counsel. That necessarily increased the Appellant's costs, not for the Inquiry itself, but because of the need to pay for the duplication of substantial reading in (and site visit) in July 2023 by alternative counsel, which [redacted] had already done.

8 The Council's raising of its complaint concerning [redacted] was manifestly unreasonable, evidencing a wholly disproportionate lack of co-operation (and perspective) and disregarding its overarching responsibility to ensure this Appeal is dealt with in a cost-effective manner. The complaint letter was unreasonable conduct by the Council because:

8.1 There was no "conflict of interest" by [redacted] contrary to Rule 21(3), and it is absurd to suggest that [redacted] would have accepted instructions had he considered a conflict to exist. The fact that [redacted] had represented the Council at the 2008 appeals and that a sustainability objection was (again) to be pursued by the Council in this appeal is nothing to the point. The words "in the particular matter" in Rule 21(3) refer to the existing appeal, but [redacted] had of course never acted for the Council in relation to the current application/appeal. The absence of any credible suggestion that a "conflict of interest" existed is confirmed by the fact that it is impossible to understand how the Council's sustainability objection would be any weaker by the mere fact that the Appellant was represented by [redacted] (as opposed to alternative counsel).

8.2 Nor was there any credible breach of Rule 21(4). It is nonsensical to suggest that [redacted] retained in his head from a case in 2008 "confidential information" belonging to the Council which would somehow have a bearing on the determination of a sustainability objection 15 years later (and where the "tilted balance" would be in play). Certainly, the Council's letter makes no attempt to identify what category of its relevant "confidential information" [redacted] allegedly retained, and it is inconceivable the Council could credibly

do so. What could possibly be confidential about walk distances, bus routes etc, especially from 15 years ago?

8.3 In any event, as the Council's letter acknowledges, it was open to the Council to waive any objection (even if, contrary to the foregoing, it had one). It was completely unreasonable for the Council not to do so. Primarily this is because the Council cannot credibly point to any prejudice that it would have suffered from [redacted] (as opposed to alternative counsel) representing the Appellant, whether generally or specifically in relation to sustainability matters. [redacted] did not retain any of the Council's relevant "confidential information" from 15 years before, and there was no other respect in which the Council's position was prejudiced simply because it was [redacted] (rather than someone else) instructed for the Appellant. Further, the Council did not need to be asked for permission to waive any objection – it should simply not have raised the issue and written its complaint letter.

9 The Council's conduct was the epitome of a lack of co-operation. It was an aggressive and disproportionate move, especially coupled with threats about Bar Council escalation and impact on future work streams should chambers not arrange the desired objective. The only fair inference is that the letter (sent around 6 weeks before proofs were to be exchanged) was intended to disrupt the Appellant's preparations for the Appeal, and to put pressure on the Appellant to withdraw the Appeal. This objective was not achieved, but the Council did (as explained above) cause the Appellant to incur substantial unnecessary costs while alternative counsel read in (and visited the site) during July 2023.

[2] Unreasonable pursuit of locational sustainability objections

10 It was substantively unreasonable for the Council to raise and pursue through the Inquiry an "in principle" objection based on locational sustainability matters. In particular:

10.1 The Secretary of State made clear in the 2009 decision that locational sustainability was not a sufficient reason to refuse planning permission. Fast forward 15 years, and the position is that there is no evidence or indication of some material change of circumstance, nor that the force of the sustainability objection (primarily put forward based on the walking environment on Framfield Road) has improved. This is a clear example of "persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable" (or at any rate, not a sufficient basis for a refusal), one of the examples of substantive unreasonableness exemplified in the NPPG.

10.2 Further and in any event, the Secretary of State's decision was taken at a time when the Council could demonstrate a 5 year supply. Now, the position is that it cannot and has not been able to for 7 years. In consequence, the tilted balance applies to this argument, setting up a much higher hurdle for the Council to secure a refusal based on these matters. Frankly, it is fanciful for the Council to contend that its locational sustainability case could "significantly and demonstrably outweigh" the Appeal Scheme's benefits. The Council should have recognized this when determining its putative reasons for refusal, and locational sustainability should have played no role in this Inquiry. In any event, the matters relied on by the Council failed to take account of the fact that Uckfield is one of the (if not the) most sustainable locations in the District – as the Council's own 2013 Core Strategy makes clear. Uckfield town centre is thriving and well equipped with numerous attractive facilities. It is absurd that the Council did not face this reality, but chose instead to pursue objections largely centred on grumbles about footway widths, and walk distances to bus stops found acceptable at a recent appeal decision in Polegate [CD/K7].

11 For these reasons, locational sustainability should not have been a putative reason for refusal and should not have played any part in the Inquiry. The Appellant has been made to incur unnecessarily the costs of preparing for and arguing these matters at the Inquiry.

[3] Unreasonable technical objections to the admission and thereafter acceptability of plan 21P

12 By way of context, it should be noted that the Council has been difficult throughout this Appeal on the topic of minor, non-prejudicial amendments to (eg) surface water outfall or access junction proposals. For example, in a 21 July 2023 email in response to a request for a meeting to discuss the revised surface water outfall proposals, WDC Drainage informed the Appellant (copying the Council's planning officers) that it had been "informed that as this matter is subject to appeal and a probable public inquiry, I must decline your offer to discuss this information in a meeting". Similarly, the Council adopted a position of root and branch opposition to the introduction of 21K for consideration during the Appeal – see the Council's Statement of Case at [CD/C4, §4.4*ff*], a position maintained at the CMC. However, the Appellant does not say that these particular matters ultimately resulted in material additional costs being incurred by it. They did, however, delay discussions between the parties, and they form the background to the additional costs that were unnecessarily incurred by the Appellant in addressing the Council's obstructive approach to the minor, non-prejudicial changes shown on 21P.

13 It was unreasonable for the Council to object to the introduction of 21P at the start of the Inquiry. The Council's desire to "keep out" 21P appears to have been driven by a recognition that its safety arguments would be fundamentally undermined by 21P. It is unfortunate the Council has pursued an approach such that anything making a planning consent at the Appeal Site more likely was to be opposed. This is not the positive and constructive approach NPPF 38 expects.

14 The Council's opposition to the admission of 21P failed to focus on the key issue – whether it (or anyone else) would be caused any prejudice. When this point was "boiled down to", it was plain no credible objection could be mounted. The main parties at the Inquiry had all been provided (and had taken) the opportunity to make their comments about 21P (in highways and any other terms), and there had been a 3 week consultation exercise with all members of the public who had been consulted on the original application (as explained in the Appellant's proofs), so ensuring that they were not prejudiced either.

15 The Council failed to focus on the prejudice issue (or lack thereof), but instead sought to oppose admission of 21P based primarily on purported concerns about deliverability of 21P and validity of the appeal. Neither of these concerns (even if well-founded, which they were not) was a legitimate basis for opposing the admission of 21P. Unfortunately, substantial time was spent by the Appellant's team the day / evening before the Inquiry opened preparing to address these irrelevant objections (the Council's counsel having, quite appropriately, given notice of the points the Council intended to raise), and such matters unnecessarily elongated the discussion about 21P's admission during the morning of Day 1. The Appellant has unnecessarily had to incur costs addressing such matters.

16 Thereafter, the Council maintained complaints about deliverability and validity as substantive objections to the Appeal, but it was unreasonable to do so. On any view, the matter was capable of being addressed by a Grampian condition (such as draft condition 18), not least given the fact that (as the Council knew) the Berrys are the landowners to the north of the B2102 (just as they are of the Appeal Site). The NPPG recognizes that "refusing planning permission on a planning ground capable of being dealt with by conditions" is an example of substantively unreasonable conduct, and by analogy pursuing fundamental objections where a condition will address the concern is unreasonable. Overall, this is a case where the Council's approach of looking to create whatever difficulties it could for the Appeal Scheme resulted in it taking unreasonable technical arguments and forgetting its duty to approach development "in a positive and creative way" [NPPF para 38].

[4] Unreasonable objection that loss or deterioration to irreplaceable habitats would occur, coupled with unreasonable manner of pursuing this objection

17 The Council's case on loss/deterioration to irreplaceable habitats was both (i) substantively unreasonable, and (ii) pursued in a "kitchen sink", ever-evolving and otherwise procedurally objectionable manner.

18 As regards the substantive weakness of the Council's objection:

18.1 The Council has never had good reason to disagree with Natural England's support for the Appeal Scheme in relevant respects. Natural England had worked collaboratively with the Appellant, was itself the source of the suggestion that the path through W2 be improved to facilitate a varied circular walk, and its officers had visited the Appeal Site on multiple occasions. It is unclear why the Council has a propensity to refuse to accept Natural England's advice for no good reason, but it does not appear that the Council has learned from the PINS letter [**CD/E30**] castigating it for ignoring Natural England's advice (as part of an attempt by the Council to promote a new local plan with no material new development at Uckfield). The planning system is rendered (as here) unmanageable and unduly expensive for appellants where a Council refuses without good reason to act on the advice of the statutory consultee with whom the material part of the Scheme was devised.

18.2 The evidence on which the Council relied at the Inquiry came from Mr Rainbow. What is astonishing is that his objections at consultation stage (save in relation to the original drainage outfall route – which was omitted during the application stage) was limited to how the improved path through W2 should be constructed. The litany of complaints contained in his proof were not points he made originally, and there has been no explanation from him or the Council as to how his proof came (by contrast) to advance the "kitchen sink" objection pursued. The Council's approach was not just procedurally unreasonable. These matters undermine the credibility of the substantive case the Council sought to confect.

18.3 More generally, the Council's objections regarding the SUDs basin, the improved path through W2 which Natural England suggested, visited and endorsed, and in relation to buffer zones which are apparently too small by an unspecified amount, were all substantively unreasonable. They were largely advanced based on "Vague, generalized or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis", contrary to the NPPG.

19 As regards procedural unreasonableness by the Council affecting the "irreplaceable habitats" issues, the Appellant relies on the following matters:

19.1 The absence of an SOCG on these matters was entirely down to the Council. The Appellant's initial draft was returned with a mark-up from the Council's planners which sought to set out *in extenso* what the Council's position was. This would not have been a helpful document given the availability of proofs. So, the Appellant determined that the sensible course was for Mr Rose to seek to deal direct with Mr Rainbow to document what was agreed. Mr Rose made several attempts to make contact with Mr Rainbow – emails dated 21 and 29 August 2023 to Mr Rainbow (and the Council's planning officers) refer. Mr Rose's emailed approaches received no response or engagement, although Mr Rainbow was apparently able to prepare a rebuttal proof served on 31 August 2023 (and another one 10 days or so later). No explanation has been provided why Mr Rose's approaches were ignored, without the courtesy of any reply. That is a very great shame in respect of an irreplaceable habitats SOCG, where it is now evident that many of the points raised by Mr Rainbow in his proof were either the product of misunderstanding by him, or would have been disposed of and agreed in an SOCG, following a short discussion. All of this would have saved considerable preparation time, as well as time at the Inquiry. Examples include – the alleged impact of the SUDs basin; the concern about the spread of invasive species; dust; air quality; light / car headlight issues; alleged impact on bats; swales impacting tree RPAs; water table matters; construction methodology for the improved path through W2; and alleged impact on veteran trees.

19.2 The Council's / Mr Rainbow's case was both ever-evolving and pursued on a "kitchen sink" basis. This was unreasonable. It was not reasonable for Mr Rainbow to write a proof which went so dramatically beyond anything he had commented on in his application stage consultation responses. His litany of new arguments lacks credibility. There is no explanation as to why (if these were valid objections) his earlier consultation responses made no complaint about (eg) – the SUDs basin, the size of the buffer zones, the principle of

improving the path through W2 (as distinct from what materials to use to do so), the alleged impacts of noise, light etc etc.

19.3 Further, it is a mark of the unreasonableness of the Council's approach to this issue how many points it floated through Mr Rainbow's evidence, only for those points not to be pursued with the relevant Appellant witness. Mr Rose was not questioned about impacts on bats, spreading invasive species, light or car headlight matters, air quality, dust or the impacts of the swales. Mr Hyett was not challenged regarding alleged impact on veteran trees, nor on construction methodology for the improved path. Ms Hensler was not challenged by the Council in relation to water table or SUDs basin matters. There was a clear pattern of points being "tried out" via Mr Rainbow, and then in many cases abandoned. Such an ever-evolving approach is not reasonable. It is the symptom of a "kitchen sink" approach, which does not reflect the very limited scope of the relevant witness's (Mr Rainbow's) actual identified concerns at application stage.

20 This topic took up significant time, both in preparation and at the Inquiry. None of these costs would have been incurred if the Council had made a realistic appraisal of its position. Further or alternatively, the procedural aspects highlighted above increased the duration and thus cost to the Appellant of the Inquiry's consideration of the matter.

Quantum and Conclusion

21 If the Council had reasonably scoped its putative reasons for refusal, and thereafter conducted itself reasonably, this Appeal should have been capable of being resolved at a 1 day hearing assessing the limited residual points on plan 21P and s106/condition matters.

22 Taking a broad-brush approach, the Appellant considers that the Council's unreasonableness is responsible for 80% of the costs it has incurred on this Appeal, and this is the order it seeks. Alternatively, the Appellant seeks an award of costs reflecting

the specific matters identified above (or such of them where the Inspector agrees that the Council's conduct crossed the line into unreasonableness).

ANDREW TABACHNIK KC

39 ESSEX CHAMBERS

LONDON

2 October 2023