

Land at Bird in Eye Farm, South of Bird in Eye Hill, Framfield, Uckfield TN22 5HA

APPEAL REF: APP/C1435/W/22/3307820

**COSTS APPLICATION ON BEHALF OF
WEALDEN DISTRICT COUNCIL
AND EAST SUSSEX COUNTY COUNCIL**

Introduction

1. Wealden District Council ('the Council') and East Sussex County Council ('ESCC') apply for a full award of costs against the Appellant.
2. The Council first made an application for costs with its hearing statement. The Council confirmed at the CMC that it would vary its application following hearing of the evidence. The hearing statement application dated is therefore superseded by this application which is made on behalf of both the Council and ESCC.¹
3. The Planning Practice Guidance states that: '[T]he right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding' (Ref ID 16-053-20140306)
4. This appeal has no reasonable prospect of succeeding on the basis of (a) the fact that it would cause loss and deterioration of ancient woodland, and/or (b) the proposed vehicular access is unsafe. The Appellant has failed to provide sufficient evidence to address those reasons for refusal. This is addressed below.
5. For the avoidance of doubt, this application focusses on the aspects of the Appellant's case which meet the high bar of unreasonableness. The remainder of the reasons why this scheme should be refused are set out in the Council's closing submissions.

¹ Both WDC and ESCC have shouldered their own costs of defending the appeal. As such, it is necessary for both councils to make an application for costs.

Loss or deterioration of ancient woodland

6. The Council's full submissions on the loss and deterioration of ancient woodland will be set out in its closing submissions. For the purposes of this costs application, the Council's focus is on the proposed path through ancient woodland to the SANG land to the south of the development area and the Appellant's evidence on that issue.
7. The NPPF is clear that permission should be refused where there is loss or deterioration of ancient woodland (para 180(c)) and the Appellant has confirmed that permission should not be granted if this is the case.²
8. The Appellant's evidence in relation to ancient woodland was given by Mr Hyett and Mr Rose. Both asserted that there would be no loss or deterioration of ancient woodland. However, the position taken by these witnesses was untenable and unreasonable. This is particularly the case in relation to:
 - a. the inability to give basic details of the nature of the proposed path and associated infrastructure;
 - b. the reliance of the current condition of the ancient woodland, contrary to the standing advice; and
 - c. the invention of a policy test which is not found anywhere in the NPPF, the standing advice, the ecological impact assessment, the arboricultural assessment or the proofs of evidence.

Each of these factors is addressed briefly in turn.

(a) The nature of the path and associated infrastructure

9. The Council's reason for refusal alleged both loss and deterioration. The consultation response of the Forestry Commission stated that the path through the ancient woodland would lead to loss of that habitat.³ The Appellant accepted that it was for it to show that its scheme was acceptable in planning terms and would not lead to the loss and deterioration of ancient woodland.⁴
10. The Appellant's evidence asserted that there would be no loss or deterioration without being able to give even basic details of the path, including how wide it would be⁵ and what form the bridge would take⁶. Both Mr Rose preyed in aid flexibility of width and alignment (how flexible, no one knows). No one knows if both witnesses had the same versions of the path in their head when giving their evidence.

² Mr Brown Evidence in Chief and Cross Examination 21 September 2023

³ CDB21 as confirmed by Mr Hyatt in cross-examination, day 2, 13 September 2023.

⁴ Cross examination Mark Rose, day 4, 15 September 2023

⁵ Mr Hyatt cross-examination day 2, 13 September 2023, Mr Rose cross-examination day 4, 15 September 2023

⁶ Mr Rose cross-examination day 4, 15 September 2023

11. Indeed, it is notable that nowhere in the ecological impact assessment, the arboricultural assessment or the proofs of evidence does the Applicant mention that the existing footpath would be materially widened. Under cross examination Mr Rose accepted that the photographs in appendix 6 to Mr Rainbow's proof were a fair reflection of the current path. The only document before the inquiry which gave a width of the proposed path was the SANG management plan which stated that the path would be c.2m.⁷ Over a length of 100m the potential implications of this are a new surfaced area of approximately 200m². The assertions of 'no loss or deterioration' without taking this into account is patently unreasonable.
12. Further, it emerged during cross examination of Mr Rose that the path would require two gates within it in order to manage the area around the path. This 'detail' was not one which had been appreciated by the Appellant, revealed in its evidence or considered by it.

(b) Current condition of the ancient woodland

13. Mr Rose's proof states that:

'It is proposed that the existing informal track leading through off-site ASNW W2 be formalised and upgraded; to provide resilience against the projected increase in use, ensure year-round SANG functionality and to focus/absorb the recreational impact. The formalised route will follow the existing informal footpath, which is already characterised by bare compacted earth... Use of this route will therefore avoid direct impacts to woodland ground flora, and will not result in soil compaction' (para 4.17(1))

14. Under cross examination Mr Rose, in fact accepted, that there would be loss of ground flora and there would be soil compaction.⁸
15. What is also clear from the above excerpt is that the Appellant's case (at the stage of the proofs) justified its footpath as not resulting in loss or deterioration solely by reference to the existence of the current footpath. First, that point wholly ignores the fact that the path will be materially widened (as set out above). Second, it is based upon an argument which is wholly contrary to the Standing Advice. The Standing Advice states:

'Existing condition of ancient woodland, ancient and veteran trees

Where a proposal involves the loss or deterioration of ancient woodland or ancient or veteran trees you should not take account of the existing condition of the ancient woodland or ancient or veteran tree when you assess the merits of the development proposal. Its

⁷ CDA23 para 6.9

⁸ Cross Examination Day 4, 15 September 2023

existing condition is not a reason to give permission for development. A woodland or tree in poor condition can be improved with good management.’⁹

16. During his evidence, Mr Rose sought to argue that a decision-maker should take into account the condition of the ancient woodland in deciding whether there was loss or deterioration and only if one then considers there is loss or deterioration go on to discount the existing condition. The position is entirely circular and completely untenable. It is also wholly inconsistent with Mr Rose’s latter concession that the use of the woodland by ‘shooting parties’ (of which there was no evidence before the inquiry) should be discounted, if indeed it occurs, as the existing condition of the woodland should be discounted.
17. The advancement of a case which is contrary to the standing advice is clearly wholly unreasonable.

(c) Invention of a Policy Test

18. Whilst on the witness stand, Mr Rose sought to impose a policy test to explain why he had reached the view that the new footpath was not loss or deterioration of ancient woodland. He stated that for such loss or deterioration to occur one had to consider the habitat as a whole. He explained that this meant that ‘there would have to be a material change to the abundance of species their distribution and their conservation status within that woodland parcel’. Under cross examination he accepted that this was ‘his interpretation’ and that it is not one which is found in the NPPF, the standing advice of any other document including any appeal decision. He further accepted that it was not found anywhere in his proof or the ecological assessment. It is not a test which was put to Mr Rainbow in cross examination.¹⁰
19. It is simply unreasonable to invent and impose a test which has no basis in any policy or guidance. The NPPF is clear that the test is whether the development would result in ‘the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees).
20. Mr Rose accepted that the definition of a habitat is ‘the natural home or environment of an animal, plant or other organism’¹¹. Applying that definition, on any view, the path would (as set out in the evidence of Mr Rainbow) would lead to the loss of ancient woodland habitat. The point is unarguable and the Appellant’s approach is untenable and unreasonable.

Position of Natural England

⁹ CDG.3

¹⁰ Day 4 15 September 2023

¹¹ Cross examination day 4 15 September 2023

21. It is expected that the Appellant will fall back on the fact that, it claims, that Natural England supports the path. However, that ignores the fact that Natural England's main consultation response was very clear to advise that:

‘Ancient woodland, ancient and veteran trees You should consider any impacts on ancient woodland and ancient and veteran trees in line with paragraph 180 of the NPPF. Natural England maintains the Ancient Woodland Inventory which can help identify ancient woodland. Natural England and the Forestry Commission have produced standing advice for planning authorities in relation to ancient woodland and ancient and veteran trees. It should be taken into account by planning authorities when determining relevant planning applications. Natural England will only provide bespoke advice on ancient woodland, ancient and veteran trees where they form part of a Site of Special Scientific Interest or in exceptional circumstances.’¹²

22. The position of Natural England on the SANG does not circumvent the need to comply with national policy and for this to be addressed by the Appellant in demonstrating the acceptability of its scheme.
23. Ultimately the Appellant has acted unreasonably as it has simply asserted no loss or deterioration without: (a) any detailed information of what the path actually entails, (b) relying upon the current condition of the ancient woodland, contrary to the standing advice¹³, and (c) inventing a policy test in relation to loss and deterioration.
24. The failure to acknowledge that its scheme involves the loss and/or deterioration of ancient woodland as a result of the footpath through ancient woodland is unreasonable and has caused the Council to incur wasted costs of defending the appeal which is ultimately doomed to fail given the Appellant did not argue that the appeal should be allowed if its appeal scheme would lead to such loss and/or deterioration. A full award is therefore sought.

Highway Safety

25. The Appellant made an appeal for non-determination in September 2022. At that point there was an outstanding objection from ESCC which is the statutory consultee on highways. A body whose views Mr Twinberrow accepted should be afforded significant weight¹⁴. Since that time the Appellant has proposed multiple amendments to its access proposals (the only detailed element of the scheme). This has resulted in two *Wheatcroft* amendments.
26. Any reasonable applicant for planning permission should not ‘chance its arm’ through the appeal process hoping to arrive at a safe access (and a withdrawal of an objection from the statutory consultee). Rather, this should be an issue which is sorted out prior to or at the

¹² CDB.12

¹³ CDG3 page 7

¹⁴ Cross examination day 6, 20.9.23

application stage. It is unreasonable for an Appellant to use the appeal process (and cause all parties to run up significant costs) in order to try to sort out a fundamental issue with its scheme.

27. Further, and in any event, the Appellant's gamble has not paid off. The version of the access at the point of the Inquiry accompanied the proof of Mr Twinberrow (Plan 5330/021 ('Rev P')¹⁵). Mr Twinberrow included swept path analyses of this junction in his appendix 28. These demonstrate the clear potential for conflict (which Mr Twinberrow accepted in cross examination would amount to serious accidents¹⁶) between 12m rigid HGV vehicles (which currently and will continue to service the light industrial uses at the farm) and other vehicles looking to enter the appeal site.
28. Mr Twinberrow's proof did not properly address the issue of the swept paths associated with revision P. This was despite the fact that the Highway Authority had raised concerns with the tracking drawings via email dated 17 August 2023 (Twinberrow Appendix 25). Mr Twinberrow sought to address the swept paths in his oral evidence based upon assertions about driver behaviour without any supporting evidence. Further, in response to a question from the Inspector he confirmed that the design would result in a 'blind spot' for a car wishing to turn right out of the access junction where an HGV is turning right into the junction.
29. Ultimately, the Appellant has failed to demonstrate that its junction is safe. It is no answer for it to rely upon its stage 1 safety audit ('RSA'). First, no full RSA has been done on revision P. Second, as emerged during the cross examination of Mr Twinberrow by Ms Cook, the safety auditor had been informed that the access design did not involve departures from standard (Twinberrow, Appendix 22 para 2.1). A fact which Mr Twinberrow accepted was not the case. Third, the road safety auditor was not informed of the position of the highway authority and therefore it can't be said that the auditor would maintain its position in light of the stance of the statutory consultee.
30. Ultimately, the access proposal put forward by the Appellant is demonstrably unsafe and the appellant's evidence, based on assertion, is incapable of overcoming this reason for refusal. The Council has incurred unnecessary wasted costs of defending the appeal. Further, the use of the appeal process to try and address this issue was unreasonable.

Conclusion

31. The Council and ESCC therefore apply for a full award of costs on the basis that the Appellant has failed to exercise its right to appeal reasonably and has failed to provide sufficient evidence to address two of the reasons for refusal and has used the appeal process to gamble on being able to achieve safe access (something it has failed to demonstrate).

¹⁵ Appendix 28 Twinberrow

¹⁶ Cross examination day 6, 20.9.23

This has resulted in the Council and ESCC incurring wasted costs in defending the appeal which ought not to have been pursued on the basis of the evidence the Appellant has presented.

Victoria Hutton
39 Essex Chambers

2 October 2023