

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 REPLY TO
COUNCIL RESPONSE ON
APPELLANT’S APPLICATION FOR COSTS**

Introduction

- 1 This is the Appellant’s reply to the Council’s response to the Appellant’s costs application.
- 2 It is not understood why the Council alleges (Council response, §1) the Appellant refused to tell the Council the grounds of its application. The Appellant complied with the directions made by the Inspector when the Council raised the matter at the Inquiry. No direction for some earlier summary of grounds was sought. Further, formulation of the costs application was not a planning matter, nor had its ambit been finally determined by the Appellant itself on Day 7, so nothing arises from the unusual attempt to cross examine Mr Brown on the scope of an application still then under consideration.
- 3 Council response §3 is not correct. Any reasonable impartial observer would regard the Council’s conduct in relation to this application/appeal to have been difficult throughout, and (in the absence of any other explanation) the fair inference is that the Council perceives a need to satisfy the demands of local residents in the Uckfield/Framfield area to oppose substantial new housing proposals. Such demands of local residents to this effect were on clear display during and before this Inquiry.

[1] Unreasonable objection to the Appellant’s instruction of Christopher Boyle KC as its counsel for the Appeal

- 4 The Council’s response is without merit:
 - 4.1 The Council is completely wrong to allege (response §8) that “Mr Boyle ought not to have accepted instructions”, ie because he had breached Bar Council rules by taking a case where he was conflicted. The Council’s evidence (Bending w/s

§11) confirms that, when first instructed by the Appellant (some considerable time ago), Mr Boyle KC applied his mind to whether any conflict objection could be taken, and satisfied himself that no such legitimate complaint could be raised and that there was no requirement on him to seek a waiver from the Council.

- 4.2 Mr Boyle KC was obviously correct in that view.
- 4.3 Rule 21(3) would apply had Mr Boyle KC advised the Council on the extant application/appeal. That is the “particular matter” which the language of the Rule speaks to. Not a different scheme which went through the planning system 15 years ago. Generally, a professional is free to act against a former client unless in respect of the “particular matter” on which the former client was advised, or if the professional retains relevant “confidential information”. The Council has made no attempt to set out what relevant “confidential information” it claims Mr Boyle KC retained in his head from so long ago (if it actually still claims this).
- 4.4 Of particular significance, the Council’s response fails to grapple with the unreasonableness of raising an objection (even if, which is denied, it had a legitimate, technical point), rather than waiving / choosing not to raise an objection where this would not cause it any prejudice. This key question is squarely raised in the Appellant’s costs application at §8.3, but the Council offers no response. What prejudice would the Council suffer from Mr Boyle KC (as distinct from alternative counsel) representing the Appellant? Absent Mr Boyle KC retaining relevant “confidential information” in his head (an allegation the Council was happy to level in its June letter, but is now unable to offer even the remotest support for), how could the Council’s interests possibly be adversely affected by the identity of the Appellant’s counsel? In the vacuum of any engagement with these issues by the Council, the inference set out at §9 of the Appellant’s costs application may fairly be drawn.
- 4.5 The Council’s letter, on a fair reading, contains both an overt threat to report Mr Boyle KC to the Bar Council and a clear implicit threat to re-direct work away from his chambers. It put Mr Boyle KC, his chambers and the Appellant in a completely impossible position, with only 6 weeks to go before proofs were to be exchanged. There was no practical choice but to instruct alternative counsel. It does not lie in the Council’s mouth to say the Appellant could have ignored the distractions to preparation of its case while the Council complained to the Bar Council as it had threatened, and upped the pressure on chambers which its complaint letter had initiated.

[2] Unreasonable pursuit of locational sustainability objections

- 5 The Inspector now has copious submissions on the reasonableness of the parties’ cases on locational sustainability, which there is no need to repeat. The Council continues to

fail to look at sustainability issues in the “round”, or take account of the wider Wealden context (or where Uckfield sits within this).

- 6 It is surprising that the Council (response §15) queries whether the Secretary of State’s 2009 decision was that sustainability was not a standalone reason to refuse a scheme on the appeal site. That appeal failed on housing need grounds only: [CD/K1, DL18, DL52]. Where the Secretary of State considered there were other “standalone” objections that would justify a refusal in relation to any of the 3 appeals, she said so. See (eg) DL25 (landscape impact at Downlands). The Secretary of State’s conclusion on BIES is at DL55, and again makes clear that the appeal failed on need alone. If the Secretary of State had considered sustainability matters as a standalone reason to refuse consent, this would have been expressly stated in DL55 (rather than referring merely to “drawbacks”), as will be apparent from a comparison with the Downlands conclusion at DL52.
- 7 While it is correct that the Rule 6 party made points on locational sustainability too, the Rule 6’s highways evidence has essentially followed the Council’s approach. Indeed, Mr White’s evidence appears even to have been sent to the County in draft (with Ms Cook’s amendments), presumably so the County’s feedback could be incorporated – see the email at p3 of SMB’s Appendix A.6. In these circumstances, it is not credible that the Rule 6 party would have pursued its objection if the Council had (as it should have) not done so (and thus not sought witness evidence from the County on locational sustainability).

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

- 8 Again, the Inspector is familiar with the issues. The short points – to which the Council’s response provides no persuasive answer - are that (i) the Council should have focused any 21P objections on genuine prejudice points (ie, inability to comment or provide a consultation response) rather than deliverability / validity points which it must have appreciated would be disputed (and thus un-resolvable in its favour on the first morning of the Inquiry); and (ii) thereafter, the Council should have taken stock of its deliverability/validity complaints and realised that any concerns would be addressed by a condition. On any view, substantial time was taken on these issues at the Inquiry which was unnecessarily incurred, and this can be recognised in an appropriately crafted costs order.

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

- 9 Once again, the Inspector is familiar with the underlying issues and there is no value in detailed repetition. Brief corrections of the Council’s response are these:

- 9.1 As regards §32, the Appellant has made submissions elsewhere as to the bespoke advice which Natural England chose to give regarding the scheme it had devised with the Appellant and was content to support.
- 9.2 §34 is a rose-tinted view of whether Mr Rainbow’s very limited consultation response reflects the “kitchen sink” approach found in his proof, and the Inspector will be able to make her own assessment as to the overall reasonableness of his evidence.
- 9.3 §38 makes no sense. If the Council had not resolved on a putative reason for refusal relating to irreplaceable habitats, the issue would not have troubled the Inquiry, and there would have been no need for the extensive proofs or approx. 2 days of oral evidence on the topic.
- 9.4 As regards §39a-c, the Council has supplied the Inspector with the draft SoCG where it added extensive text simply setting out its case (a document the Appellant sought to spare her having to read), but the Inspector will now be able to see for herself that this document would not have been remotely helpful. This is why Mr Rose emailed Mr Rainbow (copying relevant planning officers) on two occasions in late August – because Messrs Rose and Rainbow would have been able to have a useful conversation and agree numerous matters (in a useful SoCG) which ended up unnecessarily taking up time at the Inquiry. Nowhere in its 13 page response (with 3 attachments) is the Council able to offer even a fig-leaf of an explanation as to why Mr Rainbow (and the Council) ignored Mr Rose’s two emails, at a time Mr Rainbow was apparently able to prepare 2 rebuttal proofs.
- 9.5 §39e is not correct. The Appellant is not criticising the cross-examination of its witnesses. It is pointing out how on numerous occasions issues were aired through Mr Rainbow’s proof and evidence in chief, and (in light of Mr Rainbow’s responses in cross examination) not then pursued with the relevant Appellant witness. The Inspector will have her own notes of the cross-examinations of Mr Rose and Mr Hyett, and no doubt will refer to these on the disagreement between the parties as to their scope.

Conclusion

- 10 The Appellant has not “forgotten” the points listed at §41 of the response, rather the position is that:
- 10.1 Other consultation letters on ancient woodland matters would have been readily and expeditiously dealt with at an appeal, given Natural England’s support and assuming (as should have been the case) that the Council raised no putative reason for refusal on the matter.

- 10.2 A heritage session could have been accommodated within a 1 day hearing, the premise of which is that the Council had confined its case within appropriate and reasonable bounds.
- 10.3 Drainage matters could equally have been dealt with in a roundtable session within the context of a 1 day hearing. This is what would have been required if the hearing format had remained, as would have been appropriate had the Council's case been formulated within reasonable parameters.
- 10.4 The Council should have overruled the County's unreasonable complaints about locational sustainability, and reached the judgment that the issue did not justify refusal of permission and so should not be raised in a putative reason for refusal. There is no evidence the County would have sought Rule 6 status to run such arguments without Council support, and on that basis it is highly likely the Rule 6 would not have pursued the matter either.
- 11 Overall, it is the Appellant's best estimate that the Council's unreasonable conduct, which prevented the expeditious and proportionate resolution of this appeal at a 1 day hearing, is responsible for 80% of its appeal costs. In the alternative, the Appellant maintains its application for an award of costs reflecting the specific matters identified where the Inspector agrees that the Council's conduct crossed the line into unreasonableness.

ANDREW TABACHNIK KC

39 ESSEX CHAMBERS

LONDON

6 October 2023