

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 RESPONSE TO
COUNCIL / COUNTY COSTS APPLICATION**

Introduction and Summary

- 1 The Council's and County's costs applications should be dismissed. There has been no unreasonable conduct by the Appellant, whether as alleged or at all. Further, the County is not a main party in this appeal (for whatever reason, it never applied for or wanted such status), and it has not sought to identify any "exceptional circumstances" relating to procedural matters that are the only circumstance which could justify an award of costs in favour of a witness [NPPG at 16-055, 16-056].

Ancient woodland

- 2 The Appellant's case in relation to ancient woodland, and specifically the path through W2 which Natural England proposed and supported, does not amount to unreasonable conduct. The Appellant relies on its full Closing Submissions on ancient woodland issues to demonstrate that its position is both reasonable and correct. It is not proposed to repeat those Closing Submissions here (either generally or where a particular matter is more fully covered there).
- 3 The Appellant responds briefly to the points highlighted by the Council:
 - 3.1 **Detailed design of the improved path through W2.** The Council complains in effect about the absence of a detailed design for the path. But that is not necessary at this outline stage, and certainly Natural England did not require further specificity before supporting the scheme. Sufficient clarity is available for the judgments that need to be made at the outline stage. Nothing material regarding the overall acceptability of the path proposal turns on the sorts of matters the Council now latches on to. The Inspector is well aware from the Appellant's overall evidence of its case as to why the improved path will not cause loss or deterioration to W2. It is unclear how matters concerning locked

gates within the fences to assist with management amounts to unreasonable conduct which has caused the Council unnecessary costs.

- 3.2 **Current condition of the existing path through the ancient woodland.** The Council's interpretation of the "existing condition" section of the Standing Advice is demonstrably wrong. The Appellant's (and Mr Rose's) approach is correct and on any view reasonable.
- 3.3 **Mr Rose's evidence on deterioration.** It is unfair and unreasonable for the Council to allege that Mr Rose's evidence amounts to the "invention of a policy test". Mr Rose was giving his good faith and entirely reasonable appraisal of what degree of impact on (eg) species of flora would be necessary to cause "deterioration" to the ancient woodland (ie, worsen its condition). Further, Mr Rose's explanation is a more than reasonable application of the concept of "deterioration" (a term undefined by the NPPF, or anywhere else) to the particular matters he was being asked about, and the Inspector is invited to accept it.
- 3.4 **Natural England.** This is a case where Natural England plainly determined to - and did - provide bespoke advice on the acceptability of the Appeal Scheme including with respect to the ancient woodland, so the lengthy citation at §21 of the costs submission goes nowhere. The reality is that the Council knows perfectly well that, even if it is correct on ancient woodland impact (contrary, of course, to the Appellant's primary position), Natural England's support for the Appeal Scheme is, of itself, a sufficient indication of the reasonableness of the Appellant's position. There is no answer to this point, and the Inspector should not have been troubled with a costs application from the Council traversing ancient woodland issues.

Highway matters

- 4 Again, the Appellant relies on (without repeating) its Closing Submissions to explain why its position on highway safety is not just reasonable, but correct. Once more, it is not reasonable that the Inspector has been troubled with a costs application reliant on such disputed matters.
- 5 As to the additional commentary in the costs application which does not reflect points made by the Council in its own closing submissions:
- 5.1 **Amendments to access proposals.** The appeal process contemplates the acceptability of *Wheatcroft* amendments, so the Appellant cannot be criticized for pursuing such a route (and making applications which satisfied the *Wheatcroft* criteria – as the Inspector determined). Further, 21P made changes which the County Council sought, with a view to trying to reduce the issues before the Inquiry and save costs. While of course 21P was not agreed, an indication of the extent to which it saved Inquiry time as compared with its

predecessor (21K) is that Ms Hutton's cross examination of Mr Twinberrow reduced to just over 1 hour from the earlier prediction of up to 4 hours.

- 5.2 **Twinberrow evidence on swept paths.** Again, the Appellant relies on, without repeating, its Closing Submissions to the effect that Mr Twinberrow's evidence is both reasonable and correct. Mr Twinberrow cannot fairly be criticized for dealing with swept path issues orally at the Inquiry. It was totally unclear to the Appellant what swept path issues the County proposed to raise on 21P until Mr New's evidence in chief the day before, as the County had not set them out in writing.
- 5.3 **Road safety auditor assessment.** It is surprising to see points like those at §29 of the costs application where none of these points is made in the Council's Closing Submissions. Nor is there any force in these points. First, it is nitpicking to complain about the absence of a "full" RSA for 21P. The road safety auditor did a "full" RSA on 21K (Twinberrow App 22), and was entirely comfortable providing by email his assessment on the extent to which issues identified were addressed by 21P and the further information provided to him (Twinberrow Apps 24 and 29). This is a "form over substance" complaint, and not one that Mr New ever raised. Second, the road safety auditor has not been misled about "departure from standards" issues in circumstances where (i) no "standard" applies directly here, as DMRB applies to trunk roads / motorways, and (ii) the road safety auditor was fully aware what DMRB said, a matter on which he exercised his own judgment in determining that 21P was acceptable. The third point is pure speculation, and not credible anyway, the road safety auditor having provided his independent and definitive view over an extended period of considering relevant matters.

The County Council's costs application

- 6 The County Council's application presumably only relates to costs of the highway issues, as the County (consistent with its status as witness, not main party) was not present for any other parts of the Inquiry. On this basis, the application should be dismissed for the reasons given above.
- 7 In any event, as the County Council is not (and never sought to be) a main party, it is not entitled to apply for costs "merely" on the basis that another main party caused unnecessary costs through unreasonable conduct. There are additional requirements on an interested person who appeared only as a witness of another main party – that it demonstrate "exceptional circumstances" and that it confines any costs application to procedural matters (not substantive matters). This is plain from the NPPG at 16-055, and 16-056. The County Council has not sought to address these additional requirements in its application, and it cannot do so anyway. Its application should be dismissed for these reasons too.

Conclusion

- 8 The Inspector is respectfully invited to dismiss the Council's and County's costs applications.

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LONDON

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