

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

**COUNCIL'S RESPONSE TO
APPELLANT'S COSTS APPLICATION**

1. This is the Council's response to the Appellant's costs application dated 2 October 2023. It is highly regrettable that the Appellant has refused to tell the Council the basis on which this proposed application for costs would be made until after the close of the evidence. The PPG states that 'Applications for costs should be made as soon as possible' (ID16-035-20161210).
2. It is notable that when the Council's planning witness was asked what grounds the Appellant intended to make a costs application on the answer was limited to something about 'drainage' and the issue of sustainability. This application now proposes 6 grounds which the Appellant has 'dredged up' in what appears to be a tit-for-tat approach in light of the fact that the Council indicated and provided a costs application months ago.
3. The grounds make a series of unevidenced and unsubstantiated assertions and allegations. One example (para 6) is that the Council is acting on a 'perceived need to satisfy the demands of local residents in the Uckfield/Framfield area to oppose substantial new housing proposals'. This, and the other pejorative 'throwaway' comments are utterly unfounded and frankly ought to be beneath the Appellant. The Inspector has heard all of the evidence at the Inquiry and, there can be no doubt that the Council's reasons for refusal are well-founded and evidenced.
4. None of the grounds raised come close to demonstrating (a) that the Council has behaved unreasonably or (b) that the Council's behaviour has resulted in wasted or unnecessary expense. Each ground is addressed below.

Objection to instruction of [REDACTED].

5. This ground makes a very serious allegation. Despite this, it is made without any witness evidence upon which the assertions are based. In particular, there is no witness evidence from Landmark Chambers or from [REDACTED] C. Further, the submissions made give a partial account of what occurred with regards to the Council's concerns over the instruction of [REDACTED].
6. A witness statement from Mr Chris Bending, Director of Place, at the Council is attached to this response and this comprehensively refutes the allegations made by the Appellant.
7. As stated by Mr Bending, the first time the Council became aware that [REDACTED] was representing the Appellant was at the CMC. The Council immediately raised its concerns during that meeting. This is because the Bar Standards Handbook ('Handbook') provides that barristers have ongoing duties to their former clients. The Handbook provides that:

'You must not accept instructions to act in a particular matter if:

...

.3 there is a conflict of interest, or real risk of conflict of interest, between the prospective client and one or more of your former or existing clients in respect of the particular matter unless all of the clients who have an interest in the particular matter give their informed consent to your acting in such circumstances; or

.4 there is a real risk that information confidential to another former or existing client, or any other person to whom you owe duties of confidence, may be relevant to the matter, such that if, obliged to maintain confidentiality, you could not act in the best interests of the prospective client, and the former or existing client or person to whom you owe that duty does not give informed consent to disclosure of that confidential information'

8. Here, the matter was the development of the appeal site. [REDACTED] had previously represented the Council at an appeal for residential development at the Bird in Eye site. The Council did not give its consent for [REDACTED] to act against it as part of this appeal. As such, [REDACTED] ought not to have accepted instructions. To suggest that the Council was unreasonable in insisting that the Bar Handbook should be followed is untenable. This is particularly the case given that [REDACTED] would have been privy to privileged information when undertaking work for the Council with regards to the appeal site.

9. The Council properly raised its concerns with Landmark Chambers in the letter appended to the Appellant's costs application. The letter gave Landmark Chambers the 'opportunity of commenting on whether you consider this part of the code of conduct has been contravened. If so, what steps you will take to correct this conflict.'
10. As set out in the witness statement of Mr Bending, the Council held an MStTeams call with Mr Newhall of Landmark Chambers on 4th July 2023. Significantly, during that call Landmark indicated that the potential for a conflict of interest was discussed with the Appellant when they first instructed [REDACTED]. Despite this, neither Landmark Chambers nor the Appellant contacted the Council to seek its views and/or to seek its consent for [REDACTED] to act.
11. Following the discussion of the issue with Landmark Chambers it was [REDACTED] who decided to return his instructions.
12. Notably, neither the Appellant, nor Landmark Chambers, nor [REDACTED] asked the Council to waive any objection to the representation of the Appellant by [REDACTED]. Further, had the Appellant or Landmark Chambers or [REDACTED] disagreed with the Council's concerns then [REDACTED] could have continued to act and the matter may well have been determined in a forum outside of the Inquiry. In short, the Council did not force the Appellant's hand.
13. The inference which the Appellant seeks to draw at paragraph 9 is absurd and entirely without evidence. As explained in the witness statement of Mr Bending, the Council was understandably concerned that [REDACTED] had ongoing duties to the Council as his former client. It raised the issue as soon as it knew of the issue. The suggestion that the Council's motives were to 'disrupt the Appellant's preparations' or to 'put pressure on the Appellant to withdraw' its appeal is baseless.
14. Overall, it is hopeless to argue that the Council acted unreasonably in raising an issue with regards to the representation of the Appellant by [REDACTED]. It was based upon the proper application of the Bar Handbook. Further, and in any event, the Council did not force the hand of the Appellant. It was the decision of [REDACTED] to withdraw. A decision which

the Appellant accepted. Therefore, there is no basis for finding that the Council acted unreasonably in contacting Landmark Chambers to raise objection to the instruction of [REDACTED], nor is there any basis for finding that this caused the Appellant to incur additional cost.

Locational sustainability

15. This ground is simply untenable. It is based upon an assertion that ‘the Secretary of State made clear in the 2009 decision that locational sustainability was not a sufficient reason to refuse planning permission’ (para 10.1). That statement is nowhere in the appeal decision (it is noted that the costs application doesn’t cite any paragraph numbers). Rather sustainability was part of the reason (together with the location outside of the settlement boundary) why permission was refused (see CDK.1 DL para 37 and IR754-8). Indeed, the Secretary of State explicitly held that the Appeal Site would not ‘offer a choice of pedestrian/cycle routes into town’ (para 37 DL and para 755 IR). The policy test is now whether there would be a ‘genuine choice’ of sustainable transport modes (NPPF para.105).
16. The appellant goes so far as to allege that the Council is ‘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’ (para 10.1). This allegation is simply untenable and is not based upon a fair or proper reading of the 2009 decision.
17. At paragraph 10.2 the Appellant states that ‘it is fanciful for the Council to contend that its locational sustainability case could “significantly and demonstrably outweigh” the Appeal Scheme’s benefits’. The Appellant’s own planning witness accepted in cross examination that locational sustainability could be an issue which significantly and demonstrably outweighs the benefits of an appeal proposal.¹ That is clearly the case here. The very significant issues with regards to sustainable connectivity have been comprehensively addressed in the evidence of Mr New and in the Council’s closing submissions and therefore they aren’t repeated here. However, in short summary to reveal the ridiculousness of this costs application:

¹ Cross examination Mr Brown day 7 28 September 2023

- a. The location of the appeal site attracted an objection from ESCC as statutory consultee (a body whose views which Mr Twinberrow accepted should be given significant weight);
 - b. The unsuitability of Framfield Road for walking and cycling were damningly identified by Sustrans in 2017 (CDI.18);
 - c. The only relevant guidance relating to cycling clearly demonstrates that Framfield Road will exclude most users for that mode of transport²; and
 - d. The significant distances to facilities and the quality of the walking routes (including the traffic on Framfield Road, pavement widths, obstacles and gradients) render the route wholly unattractive and unlikely to be used by pedestrians as supported by numerous guidance documents cited at paragraphs 109, and 113 of the Council's closing submissions. It is notable that the Appellant's counsel opted not to cross-examine Mr New at all on the issues with regards to the quality of walking and cycling routes.
18. Finally, the Appellant forgets that the rule 6 party also called evidence on the unsustainability of the Appeal Site (through the evidence of Mr White). Therefore, even if the Council had not raised a putative reason for refusal dealing with sustainability (which is unthinkable given the Site's location) the Appellant would have had to address the issue in any event.
19. Overall, it is hopeless for the Appellant to suggest that the Council's case was unreasonable and it is hopeless to suggest that this caused the Appellant to incur additional costs.

Technical objections and Plan 21P

20. At paragraph 12 the Appellant asserts that the Council has been 'difficult' and makes a series of complaints which it then states did not result in material additional cost being incurred. The Council wholly rejects the Appellant's characterisation. The Appellant has sought to make multiple amendments to its appeal scheme throughout the appeal. The Council has itself (and at its own cost) carried out consultation on amendments (Rev K) which the Appellant later

² CDI.22 figure 4.1

went on to abandon. As the Appellant explicitly states that its complaints in paragraph 12 of its application have not led to material additional costs being incurred, they will not be addressed further here.

21. The Appellant goes on to allege that the Council's approach to Rev P was 'unreasonable' and seeks to claim the costs of preparing to argue whether it should be admitted the night before the appeal opened.
22. Again, the Appellant, without evidence makes an unfounded allegation as to the Council's motives. It claims that the Council's approach to Rev P was based upon a desire to 'keep out' Rev P on the basis its safety arguments would be undermined (para.13). This is nonsense. ESCC, the statutory consultee, objected to Rev P just as it had done to Rev K and the other accesses before it. The Appellant was swapping one unsafe access for another. As set out below, the Council's objection to Rev P arose from the objection of the County Council to its deliverability within the highway boundary and the implications of that.
23. Rev P appeared in the proof of Mr Twinberrow (along with another potential access proposal 'Rev M'). It was only by email on the eve of the inquiry (11 September 2023) that the Appellant confirmed that it was to make a *Wheatcroft* application for the Inquiry to consider Rev P. As soon as possible, counsel for the Council (quite properly) informed Kings Counsel for the appellant that the Council would object to the application on the basis that the works were not deliverable in the boundary of the highway and their impacts had not properly been assessed.
24. The Council's position was based upon the expert advice of the statutory highway authority that the new access was undeliverable within the boundary of the highway and, the County Council objected to the access proposals on that basis. The County Council advised that the works would have implications for a hedgerow to the north of the carriageway and the trees to the south. As stated in the Council's closings, the Appellant had fair warning of ESCC's position and could have (if it had been able to) demonstrated the deliverability of its proposals but chose not to do so.

25. The position of ESCC had two major implications. First, it went to whether the access was deliverable and therefore whether the entirety of the scheme could be built out. Second, if third party land was required in order to deliver the appeal proposal (as the statutory consultee had been indicated) then the application would be invalid as notice had not been given to the third party landowners³ and additional ecological and arboricultural impacts would not have been assessed.
26. It was perfectly proper for the Council to raise these issues as part of its response to the *Wheatcroft* application. Contrary to the Appellant's submissions, the sole issue was not one of 'prejudice' (para 14 of the Appellant's costs application). If the effect of a *Wheatcroft* application would be to render an application invalid then clearly it should be refused by an Inspector. The *Wheatcroft* case is not exhaustive of when amendments may or may not be accepted by an Inspector. Rather the Inspector has an overarching discretion as to whether an application should be accepted.
27. In any event, the issues the Council raised did go to the issue of prejudice. It was concerned about impacts to third party land to the south. It was also concerned that the true impacts of the road widening had not been assessed and this had not been consulted upon.
28. In any event, if the Council's approach to Rev P was considered to be 'unreasonable' it hasn't involved the Appellant incurring any additional costs. First, the Appellant was proposing to amend its scheme it had to make a *Wheatcroft* application for doing so and had to prepare to make that application. Second, the Council (as is admitted by the Appellant at paragraph 15) quite properly and appropriately put the Appellant on notice of its objection in order to ensure that the Appellant had fair warning of the points it wished to raise. The costs claim relates to

³ Contrary to Articles 13(1) and 14(1) of the Town and Country Planning (Development Management Procedure) Order 2015. The importance of this issue was made clear by the High Court in *R(oao Pridmore) v Salisbury District Council* [2004] EWHC 2511 (Admin) the High Court held that an applicant was required to provide notice prior to a planning application being made and this could not be corrected (see paras 25 and 26). In *R(oao O'Brien) v West Lancashire BC* [2012] EWHC 2376 (Admin) the High Court disagreed and held that the certificate must be provided at least 21 days before the planning application is determined by a local planning authority (paras 25 and 26). Whichever approach is correct, the statutory scheme does not provide for a new certificate to be provided during the appeal.

time spent by Mr Tabachnick in preparing to address those points. However, barristers are paid brief fees to attend inquiries. These cover preparation for the inquiry and the first day. They cover addressing all issues which arise at the inquiry. As such, the Appellant cannot have incurred any additional costs as a result of needing to respond to the Council. It is notable that the Appellant hasn't provided any evidence of additional costs incurred.

29. Further, and finally, the Appellant would have to have addressed the issue of deliverability in any event. The issue remained live in the appeal. The Appellant's own planning witness accepted that deliverability was material to the benefits which could be accorded to the appeal scheme⁴. Further, issues over deliverability led to the justification for a proposed Grampian condition which would ensure that the highway works were demonstrated to be deliverable within the boundary of the highway. In this regard, it is notable that the terms of the condition, and in particular the fact that it should specific deliverability within the boundary of the highway, was only agreed on the last day of the inquiry. It was not suggested by the Appellant in those terms.

30. Overall, the Council's approach to the *Wheatcroft* application was perfectly proper and reasonable. Once the Inspector made her ruling the Council accepted it and moved on. In any event, the Appellant has not demonstrated that it has incurred any additional costs as a result of submissions made over the *Wheatcroft* application and therefore this ground of the application should be refused.

Unreasonable objection in relation to Ancient Woodland

31. An application for costs on this ground is wholly specious. As set out in the Council's closing submissions and costs application the Appellant's case with regards to ancient woodland was not only weak it was demonstrably unreasonable (those points aren't repeated here). The Council can only surmise that the Appellant didn't listen to the untenable evidence given by its own witnesses Mr Rose and Mr Hyatt.

⁴ Cross examination by Ms Cook day 7, 21 September 2023

32. This ground continues to promote the Appellant's misapprehension that Natural England gave comprehensive advice on this issue. As set out in the Council's costs application, Natural England positively advised that the Council should itself 'consider any impacts on ancient woodland and ancient and veteran trees in line with paragraph 180 of the NPPF' and apply the Standing Advice and the terms of the NPPF.⁵
33. The Appellant seeks to make a point about the extent of Mr Rainbow's consultation response. This ignores the fact that Mr Rainbow explained at the Inquiry that his consultation response (30 November 2021, CDB.16) was made in tandem with Mr Massheder (12 November, CDB.13), the Council's tree officer. The Appellant also ignores the fact that Mr Rainbow's consultation response was followed by objections from the Forestry Commission (6 January 2022, CDB.21) and Woodland Trust (10 December 2022, CDB.31). Finally, the Appellant ignores the fact that it appealed for non-determination before any officer's report was written or any additional input could be given by Mr Rainbow and other consultees into the consideration of the application. It is entirely reasonable for a witness to take account of all available evidence when writing their proof of evidence. Not to do so would be unreasonable.
34. The Appellant states that Mr Rainbow's consultation response was limited to how the improved path through W2 should be constructed (para 18.2). This is wrong. The consultation response raised issues with regards to light, noise and potential for trampling. It also went on to state 'The Level of pedestrian impact on the site will significantly increase leading to greater impacts: direct impacts of trampling, compaction & and disturbance of ancient woodland habitat and indirect impacts including noise and disturbance'. The consultation response went on to state that the proposals would result in indirect and direct degradation and loss of ancient woodland contrary to paragraph 180(c) NPPF, the Standing Advice and saved policy EN13.⁶
35. The reality is that consultation responses will always be less detailed than evidence given at a public inquiry when the issues are considered in greater detail. That is clearly not unreasonable.

⁵ CDB.12

⁶ CDB.12

36. Indeed, this ground of challenge is particularly extraordinary given the Appellant didn't even address the impacts of the widening of the footpath in either its Ecological Impact Assessment or its Arboricultural Assessment (whether this was direct loss, pruning, noise, interruption to the movement of wildlife). Nor did it address the lack of management of W2, issues over the interruption of wildlife, pet predation or any justification for the size of the buffer.
37. The Appellant is simply wrong to assert that the Council's objections regarding the SUDs basin, the path through W2 and buffer zones were unreasonable and unsupported by evidence (para 18.3). Mr Rainbow is a qualified ecologist of many years. His credentials were not challenged by the Appellant. He provided a proof and oral evidence to the inquiry. Many of the concerns which he raised were supported by key consultees such as the Forestry Commission and the Woodland Trust. Overall, Mr Rainbow was a credible and reasonable witness. Further, the Appellant's own witnesses accepted that it was for the Appellant to show that its scheme would not lead to the loss or deterioration of ancient woodland.⁷ The Council's concern with regards to the buffer was that the Appellant had not justified it by reference to the indirect impacts (such as noise and light) which would emanate from the appeal site. That position is wholly in line with the standing advice.⁸
38. In any event, it is entirely unclear how the Council's position has caused the Appellant additional or wasted cost. Even if the Council hadn't raised a putative reason for refusal based upon the impact upon ancient woodland and veteran trees (which is unthinkable, given the nature of the scheme) the Appellant would have had to comprehensively evidenced its position in light of (a) the consultation responses of the Forestry Commission and the Woodland Trust and (b) the strict policy test.
39. Addressing the points made by the Appellant at paragraph 19 of its costs application in turn:
- a. The Council attempted to agree an SoCG with the Appellant (as is admitted in paragraph 19.1). The Appellant unilaterally decided that the document would not be useful. It is nonsense to argue that the Council refused to enter into an SoCG. The Appellant drafted an Ancient Woodland SoCG and submitted it to the Council on the

⁷ XX Mr Hyatt, day 2, 12 September 2023

⁸ CDG.3 pp.7-8

morning of 8 August 2023. The Council reviewed that document and submitted it to the Appellant with tracked changes on the morning of 14 August 2023. A copy of the email sent to the appellant with the track changed version of the SoCG is appended to this costs response. As this demonstrates, the Council was entirely prepared to sign an SoCG with agreed and disagreed matters. The SoCG was based upon the model PINS template. It was the Appellant which decided unilaterally to abandon the SoCG.

- b. The Appellant alleges that it tried to contact Mr Rainbow in August (i.e. after proofs of evidence submitted) in relation to a new SoCG. Since the Inquiry closed, Mr Rainbow has been signed off work due to ill health. Therefore, it has not been possible to take instructions from him in relation to this. However, and in any event, it can be noted that the Appellant was the one which unilaterally threw out the SoCG. It cannot now argue that it should be able to do this and then be able to insist that the Council should prepare an entirely new document after proofs have been delivered.
- c. Further, the production of an SoCG after the preparation of proofs would not have saved any time or cost overall in any event. Many of the issues which the Appellant lists at the end of paragraph 19.1 remained disputed during the inquiry: e.g. the impact of footpaths upon root protection areas of Veteran Trees, whether the buffer was sufficient to attenuate light and sound and the effect of the SUDs basin in reflecting light and sound. Other issues required the Appellant to produce evidence before the Council, through Mr Rainbow, could properly update its position (e.g. the spread of invasive species through the water flow regime of the SUDs basin);
- d. At paragraph 19.2 the Appellant alleges that the Council did not raise issues such as the buffer zones, noise, light and the principle of improving the path through W2 at the consultation stage. That is wrong as can be seen from CDB13 and CDB16 and has been addressed above. In any event, as stated above, it is patently not unreasonable for the Council's witness to take account of all available evidence at the stage of preparing for an inquiry (including additional consultation responses). Further, as was accepted by the Appellant's own witness, the impact upon ancient woodland had to be considered cumulatively. It was (and is) necessary to take account of all impacts on

the ancient woodland when reaching a view as to whether it would be subject to loss and/or deterioration;

- e. At paragraph 19.3 the Appellant then seeks to criticise the cross-examination of its witnesses. First, the points it makes are wrong. Mr Hyatt was cross examined on paths within root protection areas – that is exactly the issue which concerns the Council with regards to Veteran Trees⁹. Further, Mr Hyatt was also cross examined on the size of the buffers and the failure of the Appellant to tailor the buffer in accordance with indirect impacts such as light and noise (light being the particular concern in relation to bats).¹⁰ Further, Mr Rose was cross examined on the introduction of foreign matter to the ancient woodland including nutrients and pathogens¹¹. Counsel did not cross-examine Ms Hensler because the Council was content to accept her rebuttal proof which explained that the SUDs would not be full all the time. As Mr Rainbow explained in his evidence, this didn't entirely address the concern it simply meant that the impacts of the SUDs in reflecting light and sound would only occur for part of the time. If the complaint is that the Council's cross-examination was 'efficient' then this positively saved inquiry time rather than wasted it.
40. Overall, this ground for costs is hopeless. The Council's reason for refusal and its defence of that reason for refusal was entirely reasonable. The contention that this wasted inquiry time or caused the Appellant additional cost is simply untenable.

Conclusion

41. The Appellant argues that absent unreasonable behaviour from the Council, the appeal could have been resolved at a one day hearing (para.21) dealing solely with highway safety and the s106. This is demonstrably wrong. It forgets the following: (a) that the Forestry Commission and Woodland Trust had objected to the application on the basis of its impact upon ancient woodland, this is a matter which would have to have been addressed by the Appellant whatever

⁹ Day 2 Inquiry, 13 September 2023

¹⁰ Day 2 Inquiry, 13 September 2023

¹¹ Day 4 Inquiry, 15 September 2023

the Council's position, (b) the Inspector required the issue of heritage to be addressed at the inquiry despite the fact this was not a reason for refusal, (c) the Rule 6 party raised the issue of drainage which involved one day of inquiry time and was not an issue raised separately by the Council, (d) the statutory highway authority and the rule 6 party objected to the proposal on the basis of locational sustainability.

42. The contention that the Council's unreasonableness has amounted to 80% of the costs of the appeal (para.22) is unfounded and unevidenced. Even if all of the Appellant's allegations were made out there is no basis for an 80% costs award, Indeed, given the position of key consultees, the issue of heritage and the position of the rule 6 party the Inquiry would have lasted a similar length of time even had the Council not participated.

43. In conclusion, the Appellant's cost application has made a series of unfounded and inappropriate allegations which are unsupported by evidence. As set out above, each of the grounds is baseless and there is no good reason to find (a) that the Council has behaved unreasonably, or (b) that any unreasonable behaviour has caused the Appellant additional cost.

Victoria Hutton

39 Essex Chambers

3 October 2023