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## Costs Decision

Site visit made on 18 November 2020

**by Terrence Kemmann-Lane JP DipTP FRTPI MCMI**

**an Inspector appointed by the Secretary of State**

**Decision date: 08 February 2021**

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### **Costs application in relation to Appeal Ref: APP/V2255/W/20/3253055 Black Cottages, Mutton Lane, Ospringe, ME13 8UH**

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Mr Ed Jacobs for a full award of costs against Swale Borough Council.
  - The appeal was against the refusal of planning permission for the erection of 2 No. dwellings and car ports.
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### **Decision**

1. The application for an award of costs is allowed.

### **Reasons**

2. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

#### *The Application*

3. The Council has acted unreasonably in refusing the application, identical to that considered under Appeal Reference APP/V2255/W/19/3220316. The single ground of refusal given repeats that given on the application the subject of that earlier appeal. In determining the 2019 appeal, the Inspector did not agree with that reason for refusal and dealt specifically and properly with the issues raised in the refusal notice. The Council has ignored the Inspectors reasoning and conclusions and has repeated the same reason for refusal.
4. The council's criticisms of the earlier Inspector's decision are without merit and unjustified. The council holds entrenched views which have affected its objectivity in dealing with this application. In refusing the current application the Council has forced the applicant to appeal, incurring costs and delays, significantly prejudicing the appellant's position by unreasonably refusing the application in conflict with the 2019 appeal Decision. Thus, unnecessary costs and wasted expense have been incurred by the appellant in consulting and appointing a planning consultancy to consider and make the appeal.

#### *The Rebuttal*

5. The Council chose to refuse the application, despite the previous appeal decision (notably on fewer grounds), as the Council contends that the Inspector misdirected himself in relation to the balancing act between relevant

development plan policy and other material considerations. He chose to ignore the primary reason for refusal; and misinterpreted planning policy. The decision to refuse the current application was taken after careful consideration by the planning officers, before taking advice from the legal team, leading to a consensus opinion that the previous appeal decision was flawed. Had the appeal been allowed, the Council would have been fully justified and successful, in challenging that decision on the basis of misdirection. Had the SAMMS payment not been overriding, the previous Inspector's decision may have been different. This conclusion is supported by the same Inspector's more recent appeal decision (provided with this rebuttal) where he did properly deal with the balancing exercise. The previous appeal decision on the appeal site offers no evidence that the Inspector would have found the material considerations, ie the housing land supply situation, to outweigh the clear development plan policy if the balancing exercise had been carried out correctly.

6. Somewhat surprisingly, the Inspector did not identify the unsustainability of the site (first refusal reason) and its position with regard to the Swale Settlement Strategy and Policy ST3 of the local plan within the 'Main Issues' for the appeal. Indeed, in his entire report, the Inspector only makes reference to the Settlement Strategy and Policy ST3 briefly in paragraph 21, where he goes on to confirm that *'it is undisputed that the site is outside of the Ospringe village boundary'*. Here he appears to accept that the development is contrary to the local plan policy, and it would then be logical for him to see if other matters outweighed that policy objection. However, he notes that the foundations of the former building were still visible and concludes that *'the re-use of previously developed land ...would be consistent with the advice provided in para 79 (c) of the framework and with policy ST3 of the LP'*. But paragraph 79 (c) refers to *'redundant or disused buildings'*.
7. There are no buildings on the site, thus he misdirected himself in respect of the circumstances on the ground. The Inspector's reference to paragraph 79 of the Framework is a further misdirection in itself; the issue here is not that of *isolation*, it is one of policy regarding development outside the established built-up area boundary. The policy position is that the site lies outside any established built up area boundary, not the re-use of redundant buildings nor the previous use of the site.
8. Then, in paragraph 20, he refers to the lack of an identifiable a 5-year supply of housing land and the failure to deliver the past three-year housing target, but astonishingly states that *"as the appeal is dismissed on the main issue of its effect on the SPA, I have not pursued this matter further"*: the primary issue is thus ignored. This is in contrast to the decision of the same Inspector on a recent case in the Borough (copy decision submitted) which dealt with all the issues, similar to the current case, and rejected the appeal.
9. The council has not ignored the findings of the previous Inspector, but alarmed by the errors and inconsistencies in his decision, paid very careful attention to the Inspector's findings. Indeed, whilst disagreeing with the Inspector's view on the proposed design, appreciated that he justified his decision on that issue, and therefore that was not a refusal reason in the current case, demonstrating that the council paid full regard to the Inspector's decision. The appellant must also have been aware of the irregularities within the previous appeal decision, but chose to make the appeal regardless.

10. The council's action in this case does not constitute unreasonable behaviour, and the appellant has not been put to unnecessary expense: the claim for costs should be dismissed.

## Conclusions

11. As will be seen from my decision, I have allowed the appeal, but that of course does not necessarily mean that costs follow.
12. The basis of the council rebuttal is that the previous appeal decision could not have been relied upon by the appellant, because of the criticisms that the council makes of the Inspector's reasoning in that decision, and that the appellant should have recognised the shortcomings. In effect, the council says that its reasons for refusal were not adequately addressed previously, and therefore it was entitled to approach the current appeal application unfettered by the previous appeal decision.
13. It is not appropriate for me to respond to the council's criticism as such, and therefore I will confine myself to determining what a reasonable person would understand from the decision in appeal reference APP/V2255/W/19/3220316. In doing so, I will only briefly touch on the issue concerning the Medway Estuary and Marshes Special Protection Area, which was not raised in the council's refusal reasons in my case, although it was quite clearly an unresolved issue.
14. The decision notice for the application, that is the subject of the appeal that I have dealt with, carried 1 reason for refusal. This read: "*The proposed development, by virtue of its position within a rural area outside of any built-up area boundary, would represent unsustainable development and cause demonstrable harm to the character and amenity value of the countryside, contrary to policy ST3 of Bearing Fruits 2031: The Swale Borough Local Plan 2017*". This raises 3 sub-issues; i) the site is in a rural area, outside any built-up area; ii) it is unsustainable development; iii) it will harm the character and amenity value of the countryside.
15. I have been supplied with a copy of the previous Inspector's decision letter (DL), dated 23 July 2019, but of course I do not have all the documentation that lies behind that decision, or knowledge of the way that the arguments were put. Nevertheless, I can look at each of the current sub-issues in turn to see what a reasonably knowledgeable reader would conclude.
16. As far as sub-issue i) is concerned, 'rural area outside any built-up area', in paragraph 21 of the DL the following statements can be found: "*would be contrary to its rural restraint policy ST3 of the LP, which seeks to avoid development outside of established built up boundaries as identified in the settlement strategy. It is undisputed that the site is outside of the Ospringe village boundary*"; and "*it would represent the re-use of previously developed land and would be consistent with the advice provided in para 79 c) of the Framework and with policy ST3 of the LP*".
17. Turning to sub-issue ii) 'unsustainable development', in DL paragraph 22, the following is found: "*Whilst the council states that its location is some distance from Faversham, the appeal site is well positioned to make full use of the local facilities in Ospringe which are within a reasonable distance and it is within*

*walking distance of the public transport network and other facilities associated with the local residential use”.*

18. As to sub-issue iii) ‘harm the character and amenity value of the countryside’, at DL paragraph 24 the conclusion is set out that *“the development proposed would have no harmful effects to the character and amenity value of the surrounding countryside”.*
19. In addition, having clearly removed any argument about the 5-year supply of housing land in DL paragraph 20 (I will remark on this shortly), the DL deals in the ‘Other matters’ section with the 3 sub-issues that I have just considered. Quite clearly these 3 matters upon which the council based its refusal reason were weighed and judged in the favour of the appeal proposal. If this were not so, under the heading of ‘Conclusion’ they would surely have augmented the matters that stood against the proposal – although to do so would stand in face of the previous statements that I have highlighted.
20. Turning briefly to the way in which the DL deals with the 5-year supply of housing land (DL paragraph 20), which is criticised by the council, it is not an unusual approach for Inspectors to take when dealing with a written representation appeal, when another issue is determinative of the decision. A written representations appeal is rarely a suitable vehicle to determine this matter when the parties have opposing evidence that cannot be fully tested, as can be done in a hearing or inquiry.
21. I come to the clear conclusion that, although one professional may feel critical about the way another has expressed his reasoning, especially if the decision has not gone the way argued for, it is nevertheless incumbent upon that professional to establish the meaning of the decision and the extent to which it has a bearing on a subsequent decision. This is especially so when it is the decision of one who acts for the Secretary of State in deciding a planning appeal. In this case, when the DL is read with dispassion, the meaning is clear. The previous Inspector, dealing with the identical scheme to that before me, found that there was, at that time, only 1 reason to dismiss the appeal – *“the benefits of the development proposed would not outweigh the harm to the SPA”.* The issue of the SPA is not raised in the refusal reasons of the case before me: that has now been dealt with, although it was not settled at the time of the refusal, much as in the previous appeal.
22. In light of the above, the current appeal proposal should not have been refused for the reason given, and since it was, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

### **Costs Order**

23. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Swale Borough Council shall pay to Mr Ed Jacobs the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

24. The applicant is now invited to submit to Swale Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*Terrence Kemmann-Lane*

INSPECTOR