Ministry of Housing, Communities & Local Government

29 April 2021

Mr Paul Burley
Montagu Evans LLP
5 Bolton Street
London
W1J 8BA

Our Ref: APP/V2255/W/19/3233606

Dear Sir

LOCAL GOVERNMENT ACT 1972, SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990, SECTIONS 78 and 320
APPEAL BY QUINN ESTATES LIMITED AND MULBERRY ESTATES (SITTINGBOURNE) LIMITED
AT LAND AT SOUTH-WEST SITTINGBOURNE/WISES LANE, SITTINGBOURNE
APPLICATION REF: 17/505711/HYBRID

APPLICATION FOR A FULL AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying you of his intention to agree with the Inspector's recommendation on the above named appeal.

2. This letter deals with Quinn Estates Limited and Mulberry Estates (Sittingbourne) Limited application for a full award of costs against Swale Borough Council. The application as submitted and the response of the Council are recorded in the Inspector's Costs Report (CR), a copy of which is enclosed.

3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.

4. The Inspector's conclusions and recommendation with respect to the application are stated at paragraphs CR83-104. The Inspector recommended that a partial

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award of costs is justified on the basis that the Local Planning Authority (LPA) acted unreasonably by failing to provide clear and precise putative reasons for refusal (in relation to RfR 2 (f), (h) and (i)) and through delay in producing those reasons and engaging with the appellants to agree matters of common ground in a timely manner. The Inspector concluded that the LPA's unreasonable behaviour resulted in the appellants incurring unnecessary expense.

5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in his report and accepts his recommendations. Accordingly, he has decided that a partial award of costs, as specified by the Inspector at paragraph CR103 is warranted on grounds of unreasonable behaviour on the part of Swale Borough Council.

6. Accordingly, the Secretary of State, in exercise of his powers under section 250(5) of the Local Government Act 1972 and sections 78 and 320 of the Town and Country Planning Act 1990, HEREBY ORDERS that the Council shall pay to the developer its partial costs of the inquiry proceedings, limited solely to the unnecessary or wasted expense incurred in respect of the Council's failure to substantiate putative RfR 2 (f), (h) and (i), such costs to be taxed in default of agreement as to the amount thereof.

7. You are invited to submit to Council details of those costs, with a view to reaching agreement on the amount. Guidance on how the amount is to be settled where the parties cannot agree on a sum is at paragraph 44 of the Planning Practice Guidance on appeals, at http://tinyurl.com/ja46o7n

Right to challenge the decision

8. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.

9. A copy of this letter has been sent to Swale Borough Council.

Yours faithfully,

Philip Barber

Authorised by the Secretary of State to sign in that behalf

The Planning Inspectorate

Costs Report to the Secretary of State for Housing, Communities and Local Government

by S R G Baird BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Date: 20 February 2020

TOWN AND COUNTRY PLANNING ACT 1990

&

THE LOCAL GOVERNMENT ACT 1972

APPLICATION FOR AN AWARD OF COSTS BY

QUINN ESTATES LIMITED AND MULBERRY ESTATES (SITTINGBOURNE) LIMITED

AGAINST

SWALE BOROUGH COUNCIL

Inquiry Held on 26 November 2019

Land at south-west Sittingbourne/Wises Lane, Sittingbourne

File Ref: APP/V2255/W/19/3233606

File Ref: APP/V2255/W/19/3233606
Land at south-west Sittingbourne/Wises Lane, Sittingbourne

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Quinn Estates Limited and Mulberry Estates (Sittingbourne) Limited for a full award of costs against Swale Borough Council.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for:

  outline planning permission for up to 595 dwellings including affordable housing; a 2-form entry primary school with associated outdoor space and vehicle parking; local facilities comprising a Class A1 retail store of up to 480 sq. m GIA and up to 560 sq. m GIA of "flexible use" floorspace that can be used for one or more of the following uses – A1 (retail), A2 (financial and professional services), A3 (restaurants and cafes), D1 (non-residential institutions); a rugby clubhouse/community building up to 375 sq. m GIA, 3 standard RFU sports pitches and associated vehicle parking; a link road between Borden Lane and Chestnut Street/A249; allotments: and formal and informal open space incorporating SUDS, new planting/landscaping and ecological enhancement works; and

  full planning permission for the erection of 80 dwellings including affordable housing, open space, associated access roads vehicle parking, associated services, infrastructure, landscaping and associated SUDS.

Summary of Recommendation: The application for a full award of costs be granted in part.

Preliminary Matters

1. I have prepared a separate report with a recommendation on the appellants' appeal. The application for a full award of costs was submitted by the appellants on 11 December 2019. The inquiry was adjourned to permit the local planning authority (lpa) to respond in writing. The lpa's response was received on 19 December 2019 and the appellants' final response was received on 23 December 2019. The inquiry was closed in writing on 23 December 2019. Copies of the appellants' application and the lpa's response are referred to in the documents list attached to my report (Docs 3 & 6).

The Appellants' Application

The material points are:

2. The application was validated in November 2017 and during the lpa's consideration of the application and in response to queries from the statutory consultees, the appellants provided a series of clarifications. To assess matters and inform a decision, the lpa paid for technical expertise to review several of the technical assessments. These included independent reviews of the appellants' landscape and visual assessment work, and air quality assessments (CDs A41 & A34). The lpa engaged Kent County Council's (KCC) Ecological Advice Service to advise on ecological matters. Separately, KCC as highways authority (HA) and a statutory consultee provided extensive information to the lpa. Against this background, it is a general theme of the lpa's defence that,

without any attempt to explain or justify the reversal in its position, all that advice has now been cast aside.

3. By January 2019, all technical matters were resolved to the satisfaction of the Head of Planning (HoP) and his report recommended that planning permission should be granted (CD B1). In reaching this decision, the HoP and its statutory consultees expressly dismissed the representations made on behalf of Borden Parish Council (BPC) by Railton on highways and by Professor Peckham on air quality. This was referred to in the January 2019 Committee Report (CDs D3 & D35). The lpa has since adopted these positions as its own despite them conflicting with the views of its own expert consultees and the HoP. Again, there has been no attempt to explain or justify this radical change of position.

4. At the January 2019 meeting, Members resolved to grant consent subject to the completion of a S106 Agreement, with the Agreement returned to Members for a final decision (CD B2). Following local elections in May 2019, the make-up of Planning Committee changed. As the application had remained unchanged since the January meeting, it was this political agenda that resulted in the change of the lpa's position. A CIL compliant S106 Agreement was presented to Members in June 2019. The Committee Minutes show that the Members, despite there being no new material considerations to take account of, determined that the entire application should return to them for deliberation (CD B6 & B7). Following this decision, the appellants submitted their appeal against non-determination in July 2019. At an Extraordinary Planning Committee Meeting in August 2019, Members determined that if the appeal had not been made the application would have been refused (CDs B3 & B4).

Unreasonable Conduct – Procedural

5. The lpa failed to co-operate with the appellants in a positive manner. Despite a legal requirement for reasons for refusal to be clear and precise, the putative reasons for refusal (RfR) dated 6 September 2019 were vague and generalised. It was simply impossible for the appellants to know either from the putative RfRs, or from the lpa's Statement of Case (SoC) which simply repeated the RfRs, what points the lpa was likely to be taking in its evidence.

6. The appellants submitted a list of clarification points to the Planning Inspectorate (PINS) on 20 September 2019 (Doc 3 Appendix 7). The aim of the appellants' queries was to provide focussed evidence and to proceed with evidence as soon as possible before exchange of evidence was due on 29 October 2019. The request for clarification was repeated during the Case Management Conference on 24 September 2019.

7. The lpa provided clarification on transport and air quality matters on 30 September 2019 (CD D2). The appellants wrote to PINS on 3 October 2019 to request clarification on the outstanding heritage, ecology and climate change issues (Doc 3 Appendix 8). At this point, the appellants highlighted that proofs had been drafted without the benefit of clarifications being agreed on all matters, that the clarification response did not cover heritage, ecology or climate change issues, or the identity of the lpa's witnesses. The appellants advised that the lack of co-operation would be picked up in a subsequent application for cost (Doc 3 Appendix 8). The lpa issued a clarification on

matters relating to ecology, heritage and climate change on 4 October 2019 so the appellants' team understood, or at least, thought it had understood, the lpa's case for the first time only a couple of weeks before proofs were to be exchanged (Doc 3 Appendix 9). That is unreasonable behaviour, made worse because the lpa's evidence does not conform to these clarifications.

Delay in providing information or other failure to adhere to deadline

8. The lpa's failure to provide clarifications of the putative RfR in good time meant that the appellants needed to draft evidence without any direction regarding the matters in dispute. At the time of exchange on 29 October 2019, the lpa did not provide summary proofs of evidence on air quality or landscape matters despite each proof being substantially above the 1,500-word limitation set out within the Planning Appeals (England) Procedural Guide (August 2019) (Doc 3 Appendix 10). The summaries were only provided on 5 and 9 November. This meant that the appellant's witness team were unable to draw upon a summary of the respective proofs, which were substantial and required a trawl through the evidence to understand the points of the case.

9. Further, the lpa provided a list of further documents that it intended to refer to in respect of the climate change putative RfR on 16 October 2019, which was less than 2 weeks before submission of evidence. In response to this the appellants highlighted that the lpa's evolving position on climate change and other matters was unreasonable as it was providing extra justification for a putative RfR that was not included in its SoC (Doc 3 Appendix 11).

Not agreeing a Statement of Common Ground in a timely manner or not agreeing factual matters common to witnesses of both principal parties

10. To expedite the Statement of Common Ground (SoCG), the appellants prepared topic-based chapters that were sent to individual witnesses for agreement. The appellants received late and/or insufficient responses from the lpa's witness team which meant that a basic, and substantially incomplete, SoCG was submitted to PINS at the beginning of the inquiry. The lack of engagement from the lpa and its witness team meant that the appellants' team was forced to prepare significant additional evidence than would have been necessary were the material differences with the lpa identified before the inquiry. The lpa's reference to timings for submissions in this inquiry being a "Rosewell" case are irrelevant, the timelines were more than adequate to allow the lpa to define the putative RfR and instruct witnesses.

Failing to provide precise putative RfR, delaying the appellants' progress in preparing evidence through the need for multiple clarifications

11. The lack of clarity regarding the RfR and delays in received clarifications from the lpa to narrow the focus of evidence is dealt with above. The lack of engagement by the lpa and its witness team resulted in unnecessary additional work being generated by the appellants. For example, it was not clear from the putative RfRs: (i) what "*key elements*" of the traffic proposals are said to "*lack clarity*" or why, or what "*flaws*" in the modelling work are relied on; (ii) what impacts on biodiversity were of concern; (iii) what heritage assets were of concern and why; or (iv) what concerns there were on the air quality modelling.

12. None of those deficiencies were cured by the lpa's SoC, which simply repeated but did not elaborate on the putative RfRs. Nor were they cured by the late "clarifications". In every case, the lpa's witnesses provided evidence that went beyond the scope of those clarifications. For example, the heritage witness gave evidence on the Heart's Delight Conservation Area (CA); the ecology witness gave evidence on a range of species (bats, dormice, amphibians etc.); the highways witness built his whole case on challenges to the VISSIM modelling and the climate change witness referred to a range of planning policies which are, not referenced anywhere in the RfR, SoC or clarifications.

13. This has led to a need for significant rebuttal evidence and wasted inquiry time. The appellants had to prepare rebuttal evidence on matters of ecology (twice), air quality, transport and landscape, in response to the assertions made in the lpa's evidence that were not identified in the putative RfR or SoC. Indeed, in general, the appellants have been required to extend the scope of its evidence to deal with matters which, it turned out, were not in dispute, because of the vagaries of the lpa's case, and because of the absence of engagement on an SoCG until after submission of evidence.

14. The above shows a lpa attempting to broaden the scope of the already-broad putative RfR by broadening its case very late in the day. That is unreasonable and has resulted in the appellants incurring additional costs. The lpa's response provides no answer to this key point.

Unreasonable Conduct – Substantive

RfR1

15. The lpa's highways witness accepted there was no evidence from the lpa to suggest that the appeal scheme's cumulative residual impact would be severe or that its impacts on highways safety would be unacceptable (Framework paragraph 109). That means there is, even on the lpa's case, no basis to dismiss the appeal on highways grounds and the putative RfR has not been substantiated. The failure to provide evidence to substantiate the reason is unreasonable and wasted substantial inquiry time and preparation time by the appellants. The lpa's concerns on rat-running could, it turned out, be dealt with by condition. Thus, including rat-running points in the highways evidence is unreasonable.

16. The lpa's highways witness failed to provide any evidence on the key premise of the lpa's case, i.e. that the appeal scheme is said to be worse in highways terms than a Policy MU3 compliant scheme. The highways witness acknowledged that evidence would have been "helpful". In fact, his failure to produce it was a glaring omission which meant that there was no evidential foundation to support most elements of the lpa's case.

RfR2(a)

17. The lpa's approach is predicated on the assumption that a Policy MU 3 compliant scheme is deliverable (LPA18 paragraph 4.53). The lpa has provided no evidence to support that, and what evidence there is suggests the opposite. The lpa submitted evidence to the Local Plan inquiry indicating that the

appellants' alternative scheme, MUX1a (equivalent to the appeal scheme), is a better scheme. However, it omitted that key fact from its planning evidence. The failure to provide evidence to substantiate the putative RfR is unreasonable and has wasted substantial inquiry time. It also failed to follow well-established case law i.e. the principle that alternative schemes are irrelevant other than in exceptional circumstances where they are likely to come about (Doc 26).

RfR2(d)

18. The lpa's planning witness accepted that the putative RfR was predicated on the assumed delivery of the allocated site i.e. without the LR. There is no evidence to support that proposition from the highways witness or any witnesses. Failing to provide evidence to support a RfR is unreasonable conduct.

RfR2(e)

19. The lpa's planning witness accepted that points about housing mix and tenure could be addressed "*later*", i.e. through reserved matters applications (LPA19 paragraph 4.76). The attempt to justify a refusal based on matters that can be dealt with by condition is unreasonable.

RfR2(f)

20. The approach of the lpa's planning witness to this putative RfR relies on the assumption that a Policy MU 3 compliant scheme could come forward acceptably without the LR (LPA18 paragraphs 4.80 & 4.84). Again, there is no evidence to support that proposition from the highways witness or any witness. Failing to provide evidence to support a putative RfR is unreasonable conduct.

RfR2(h)

21. This putative RfR is vague and ambiguous, it resulted in the lpa's ecology witness substantially expanding the scope of his evidence in the proof, far beyond the lpa's original "clarifications". In any event, the RfR depends on the net gain argument which the lpa accepts can be acceptably resolved by planning condition. As such, it should never have been a reason for refusal. The lpa's climate change witness's request that the appeal be determined against future planning guidance was nonsensical, and not grounded in any relevant planning policy or law. The witness seeks the Secretary of State (SoS) to apply a series of policies and statutes which simply do not apply to this case. This approach is unreasonable.

RfR2(i)

22. The heritage putative RfR was, totally unevidenced. There was no evidence on the scale of vehicle movements which had been assessed. That made it impossible for the lpa's heritage witness to quantify the level of any heritage effect, despite this being the basis of her complaint about the scheme. In the proof, the witness relied on new heritage assets not referred to in the putative RfR, SoC or "clarifications". The putative RfR is predicated on "*significant*" vehicle movements - assertion without evidence. Neither heritage or highways

witnesses, nor anyone else for the lpa, has evidenced what "*significant*" means, or why it causes harm in heritage terms.

RfR3

23. The lpa's air quality witness did not even consider a comparison between a Policy MU 3 scheme and the appeal scheme. Nor was there an attempt to express his conclusions with reference to what he accepted is the relevant planning guidance [CD D10]. That constitutes a failure to produce evidence to substantiate the reason, and that is unreasonable behaviour. To suggest that the witness was unable to give evidence on the "*extent of the* impact" on air quality or how that impact fell to be assessed under relevant guidance is untenable. If that was the case, then the lpa should not have called him to give evidence.

Conclusions

24. The lpa's case is littered with vague, generalised and inaccurate assertions about the scheme's impacts which are unsupported by objective analysis. The appellants do not accept the lpa's response that "*there is more than one way to assess*" effects i.e. they can be assessed without any attempt at quantification Many of the concerns are unclear from any of the putative RfRs, the lpa's SoC, or from the "clarifications" and are capable of being dealt with by condition if required.

25. The appellants have wasted an enormous amount of time responding to points which have been withdrawn, and rebutting points which were not set out in the putative RfRs. Inquiry time has also been wasted because in the end, most of the issues in dispute were narrow, and many could be resolved by planning condition. In the end, albeit the lpa accepted this was a "tilted balance" case under Framework paragraph 11(d)(ii), it failed to provide any evidence which seeks to address that balance properly, i.e. by weighing any benefits against any harms. Overall, the time spent, and the time and effort devoted to the topics in writing the evidence, was unnecessary and unhelpful for a scheme which had a positive recommendation for approval, and which the Planning Committee in January 2019 resolved to approve.

26. The undeliverability of the allocated site did not emerge from the appellants' rebuttal evidence on highway matters, it came from the HoP's report.

27. For the above reasons, the SoS is requested to require the lpa to pay the appellants' full costs associated with the appeal.

Response by the Local Planning Authority

The material points are:

28. The putative RfR have been substantiated, and the lpa has acted reasonably throughout, particularly when judged in the context of an appeal against non-determination under the Rosewell Review procedures.

29. Costs do not "*follow the event*"', costs will only be awarded where a party has behaved unreasonably, and importantly that this has directly caused another party to incur unnecessary or wasted expense in the appeal process. The decision maker may disagree with the submissions being made but can still accept that those submissions are reasonable to make. It is also important to take account of the resources and time available to deal with the preparation of an appeal on a complex matter such as this. To give some indication of scale, there were over 2000 documents related to the matter on the Council's website when the appeal was submitted.

The Background to the application and appeal

30. The appellants have glossed over the history leading up to the making of its appeal. Despite being submitted in November 2017, the application was not ready for presentation to Members until January 2019. There have been several necessary amendments, and further consultation on the additional information that was submitted. The Masterplan and other drawings were replaced. The version of the illustrative Masterplan submitted with the appeal in July 2019 was revision D and the final one at the inquiry was revision J.

31. The Environmental Statement (ES) had to be supplemented on several occasions. The ES was submitted in September 2017 (CDs A11 & 12). Addendums to the ES were submitted in May and June 2018 (CDs A14 to A20). Following the substantial criticisms made of it, the Addendum Landscape and Visual Impact Assessment is a complete replacement. The Transport Assessment Addendum (TAA) also relied upon new work, using the bespoke model, which superseded the work in the TA (CD A20). The ES Addendum Summary October 2018 set out the assessments and findings of the ES addendum information in relation to air quality, ecology, landscape, archaeology and transport assessments (CD A33). A further ES Addendum was submitted in December 2018 (CD A35). As this development is an Environmental Impact Assessment development, each of these revisions needed proper public consultation. The appellants also agreed to extend the period for determination, which reflects the reasonable approach that both parties were taking in the circumstances.

32. Although not part of the specific costs' submissions, there is a sour note where it refers to a "*political agenda*" resulting in a change of position, which was not pursued at the inquiry. There is no substance in this point. It would be a perverse basis for any award of costs to be made on the basis that the decision lies with elected Members and not with the officers.

33. The view of the lpa is that expressed by the Planning Committee, up until that point anything else is simply the view of the officers. The Planning Committee reached its conclusions on all the matters before it, the application, the responses from the statutory consultees, including the Parish Councils, local objections and supporting representations. It is clear from the HoP's report that the recommendation to approve was a balanced one, and that several harmful impacts arising from the scheme had been identified, as well as its benefits. The Members were entitled to consider whether the weight to be given to the benefits and harmful impacts arising from the scheme should be applied in a different way to that of the HoP. That is how the planning system works.

34. No final decision was made at the January 2019 meeting. The Planning Committee in August 2019 disagreed about where the planning balance should be struck. The Members also responded to concerns about the level of information that had been provided, and the recent declaration of a climate change emergency. The Members' decision was a reasonable response to the contentious proposal before them. It is the Members who are asked to make these decisions and to be locally accountable for them.

35. It is important to bear in mind, that the inquiry process following the Rosewell Review has concertinaed the process and brought several deadlines forward. When it comes to judging the reasonableness of the lpa's actions, and what it can be reasonably expected to do, this needs to be seen in the context of an appeal against non-determination. By its very nature, the lpa is not starting from a defined position. The appeal was made before the views of the Members were known. The delay was not due to a lack of co-operation and officers could not "second guess" what the Members would decide.

36. The lpa was not able to agree what the common ground was on the significant considerations until it had taken the matter back to the decision-making committee. Quite simply, it was starting from a position where it did not know what, if any, of the matters would be in dispute. Once notified of the appeal, the lpa arranged an Extraordinary Planning Committee meeting at the earliest opportunity.

37. Following the decision that the matter would have been refused, some further delay was inevitable. The lpa needed to ensure that it had substantial evidence in support of the putative RfR if they were going to be pursued at the appeal. The lpa needed time to seek relevant expert witnesses who were prepared to act. The witnesses confirmed, that they only agreed to accept the lpa's instructions having satisfied themselves that they could support the reasons relevant to their area. As the Inspector will recall, it had not been possible to instruct some of those witnesses by the time of the CMC. The lpa could not therefore provide much more detail on the specific topics until the expert witnesses had been able to comment on them. It would be unreasonable to expect a party to provide details it was actively seeking but did not yet have.

Unreasonable conduct – Procedural

Lack of co-operation

38. The substance of this complaint is that the appellants asked for clarification. The putative RfR are clear and precise. There are 3 main reasons, and 2 of them were about a lack of adequate information. The other is about the overall planning balance, and it sought to itemise the harms that needed to be considered. Each reason for refusal refers to the headline points and policies. The appellants sought further clarification, and this was given when it was available.

39. The climate change topic is a fast-moving area, and the list of documents was amended at the earliest opportunity. In the event, the appellants spent no time in their own evidence on this. Rather, they simply take the point of principle,

that the Acts and considerations were not relevant to planning. This is a point they made as early as 16 October 2019, in an email.

40. The CMC was a moment to take stock, and a sensible timetable for further action was set by the Inspector. Despite what is said at paragraph 8 above, the appellants were told during the CMC that the lpa did not yet have a full quota of witnesses, and also that it needed to report the heritage, climate change and ecology matters back to the Members at their next meeting, 3 October 2019. These points were then clarified to the appellants on 4 October, in accordance with the agreement at the CMC. The appellants' sending of a further email on 3 October was not relevant to this. The further points were set out in a written Technical Note on Air Quality and Highways, as was suggested at the CMC (CD D38). Not all those points were answered, as the highways and air quality witnesses explained in their evidence at the inquiry.

41. The preparation of the evidence was able to proceed to the timetable, and the inquiry was able to proceed as scheduled. The provision for rebuttal evidence also assisted. The appellants try to rely upon the late identification by the lpa of its witnesses as part of its case relating to a lack of co-operation. This is an unfair criticism in the circumstances of this appeal. The lpa was not able to approach potential witnesses until the putative RfRs had been provided by the Members. The lpa then had to find such witnesses to appear for it within a very compressed timescale. Several witnesses approached were unable to offer their services, due to the short timescales leading to the inquiry because of the new procedures following the Rosewell Review. This added delay to the process of appointing witnesses, but it would be wrong to suggest that this amounted to unreasonable behaviour by the lpa.

Delay in providing summaries

42. The sole issue is that the summaries for the air quality and landscape matters were not provided separately. It is common in a proof of evidence to provide a "Conclusions and Summary" section, and the separate summaries from the lpa's highways and air quality witnesses simply draw on that. The appellants would have been able to understand the case it had to meet from the proofs. The allegation that some costs were wasted is rejected.

43. It is in the nature of the SoC that further documents can be added to the list. The intention behind the additions was to assist in the preparation of the proofs of evidence and to avoid the need for any late adjournment. The fact that no additional time was spent on this by the appellants is demonstrated by the simple dismissal of the lpa's case by the appellants' planning witness in his proof and oral evidence. The same point had been made by email and in the SoCG. No new documents were referred to by the witnesses in their proofs.

44. As for the Core Documents list, it was sensible to treat this as a work in progress. A certain tolerance had to be shown to enable this to happen. For instance, the lpa's planning witness had to update the references in his proof as the earlier numbering was changed by the appellants. The inquiry was provided with a full set.

Not agreeing the Statement of Common Ground

45. The appellants criticise the way in which the SoCG was agreed. Whilst it is not accepted that the delays that occurred were unreasonable in the circumstances. The work that has been done has meant that this document is far more extensive than would normally be the case, and it has proved to be useful in shortening the time that has needed to be spent at the inquiry. Such delays as there have been have not caused any unnecessary expense.

46. At its start, the inquiry had a series of proofs of evidence and some rebuttal evidence. These did not seek to repeat areas where matters are not in dispute. Indeed, there is little in the proofs of evidence that is unnecessary, and the parties have proceeded on a sensible basis in producing the main evidence. There is no evidence to support the appellants' assertion that they had to produce "*significant additional evidence*" in any proof (14).

47. The history of the SoCG shows that additional work was required, especially once it was decided to try to produce one between the witnesses on each topic. The first draft SoCG submitted by the appellants was substantially incomplete. The appellants advised in August that they were preparing a second draft. This came some 6 weeks later and was still substantially incomplete. This is the version that arrived just before the CMC, at which point it was agreed that topic-based proofs would be included. These topic areas were drafted by the appellant and there was substantial discussion. The timeline shows that the highways and landscape sections were still under discussion late in the process and had not been seen by the lpa as late as 7 November 2019. The drafts also included assertions about the evidence that the lpa's witnesses could not agree.

48. The timeline of work on the SoCG was:

19 July -	first Draft SoCG was submitted by the appellants with appeal bundle, the lpa's stance on the appeal had not yet been determined;
02 August -	first draft quickly superseded. Appellants advise that the SoCG needs further work and would be submitted in the next 2 weeks;
17 September –	lpa's SoC submitted in line with agreed deadline;
19 September –	revised SoCG was received from the appellants, some 6 weeks after the email of 2 August;
24 September –	the CMC call was held, where the need for a topic-based SoCG was agreed;
24 September -	a supplementary section for SoCG on Affordable Housing was received from the appellants;
25 September –	the appellants requested clarification of the putative RfR;
30 September –	as agreed at the CMC, the lpa circulated the Technical Note on Transport and Air Quality matters;

4 October –	the appellants provide a Housing Land Supply Position Statement. Lpa provide further clarity on heritage, climate change and ecology reasons;
7 October -	appellants chasing response re SoCG;
8 October –	lpa advise appellants with details of the witnesses to date for discussions to start on topic-based sections of SoCG;
	appellants seek comments on S106 and SoCG. Appellants advise that the topic-based sections on Ecology and Heritage would be submitted within a week;
11 October –	lpa submits response to appellants' Housing Land Supply position;
16 October -	lpa submits further list of documents re climate change;
	appellants complaining about lpa's 16 October list;
	lpa confirms details of climate change witness and confirmation that climate change SoCG sent to him;
17 October –	lpa confirms it does not intend to call a viability witness;
18 October –	appellants send first draft ecology SoCG;
	lpa sends confirmation of remaining witnesses;
29 October -	all proofs submitted in accordance with agreed deadline;
1 November –	lpa sends tracked changes to main SoCG;
	lpa provides response to SoCG sections on ecology, transport, heritage and air quality;
4 November –	climate change section of SoCG supplied;
	appellants decline lpa's invitation to meet to discuss draft S106 obligations;
7 November –	appellants circulate revised version of SoCG;
	appellants advise that SoCG sections on highways and landscape not yet ready to submit to lpa;
8 November –	lpa submits CIL compliance schedule to appellants.
12 November –	lpa asks for appellants' position on additional obligations sought;
	appellants respond saying that a conference call on S106 may be suitable way forward;
12 November –	lpa submits draft list of planning conditions (further to those in committee report);
14 November –	appellants confirm to PINS that SoCG largely agreed;
12/22 November –	series of emails between lpa and appellants picking up points on SoCG;

21 November – appellants and SBC agree final drafting of landscape SoCG.

Failing to provide precise putative reasons for refusal

49. As the SoC highlights, the appellants should have been aware of the highways case it had to meet. The appellants would also have been aware of the Railton report since it has been available since October 2018. It was the appellants' choice to remain silent on it.

50. The appellants adopt the absurd position that if there is one additional item added by an expert witness, then the whole of their evidence is unreasonable. This ignores the professional obligations on expert witnesses to give their true opinion, and to set out the basis for their opinions and what they have and have not considered. The lpa's heritage witness added evidence on the likely effect on Heart's Delight CA, as a matter of her judgment, and the appellant' expert was able to deal with that point in oral evidence.

51. The lpa's ecology witness reviewed the evidence about the alleged enhancement and gave his own evidence on the range of species that had been surveyed and the adequacy of that work (e.g. birds, bats, dormice, amphibians etc.). Both the ecology witnesses knew and explained that Biodiversity net gain is about an assessment of the combination of habitats and species that are likely to be affected.

52. The lpa's highways witness has been trying to understand the traffic modelling from the beginning and explained his concerns in his earlier report for BPC and in his proof of evidence. The appellants knew that there were challenges to the model (VISSIM or otherwise) which would need to be explained by them. The way that the lpa's witness has chosen to explain it (and not explain it) has been the subject of detailed evidence. The list in the lpa's SoC includes the reference to the Railton Transport and Highways Review dated October 2018 submitted as a response to the planning application on behalf of BPC and posted on the Council's website on 23 October 2019. The first time that the appellants engaged with the criticisms made by this work was in their proof of evidence. Although the modelling results are presented as if they were "sensitivity tests", they are the first time that points about the higher level of impacts have been assessed. It was reasonable for the appellants to be required to do so. Furthermore, as the lpa's highways witness stated, whilst he could accept that the results suggested that his concerns could be met, the issue remained that the modelling itself is a "black box" to the public and to those who seek to understand it.

53. The lpa's climate change witness concentrates in his evidence on the way in which Policy DM 19 should be addressed, as did the Sol Environment report relied upon by the appellants (CD A77). The other policy references in his proof are there as the LP is to be read as a whole. No inquiry time was wasted on this as the appellants did not engage with the points in their evidence.

54. The way in which the inquiry progressed does not support the assertion that the appellants have "…*been required to extend the scope of its evidence to deal with matters which, it turned out, were not in dispute*". There was a failure in the application to address many areas, highways, air quality and ecology, that

needed to be addressed in evidence. It was reasonable for the lpa to include this in their putative RfR.

55. It was sensible for provision to be made as part of the inquiry timetable for possible rebuttal proofs, and they were produced for different reasons for each topic. It was reasonable for them to be produced and contrary to the appellants' assertion they did save inquiry time.

56. The appellants' first rebuttal on ecology was needed as the survey work was old, and clearly patchy, and biodiversity net gain requires a review of the species as well as the habitats affected. The appellants' second rebuttal reworked the DEFRA Metric in the light of reasonable criticisms made by the lpa. The lpa accepted the late production of this second rebuttal as a sensible measure that saved inquiry time and that the lpa had adequate time during the inquiry to review it.

57. As for air quality, both main witnesses had to produce new evidence in the light of the new monitoring data that had been collected. As the SoCG recorded including the earlier versions, the lpa had to reserve its position on air quality as the appellants had updated the air quality assessment in its proof of evidence. As the inquiry heard, the appellants did not rely upon the earlier work. Due to a change in circumstances, this new work used the real-world data that had been collected. Both main parties acted as reasonably as they could in such circumstances.

58. On highways, the main issue was about the lack of information that had been provided and the appellants' highways rebuttal only partially answered the queries about the use of VISSIM and the assumptions that had been made. This was part of the ongoing debate about the lack of adequate information, on which the experts disagreed and on which discussions were held, very late in the day, given that the lpa's expert had set out his points back in October 2018. As the lpa made clear, the appellants have still failed to resolve those concerns, and the lpa has done what it could to narrow the issues between the experts. Sometimes, there will always be reasonable differences, and this is one of those instances where the experts did not see eye to eye despite discussions.

59. On landscape, the rebuttal dealt with one very short point about to the possibility of a 'T' junction connecting the allocated site to Borden Lane rather than the possible roundabout. This took very little inquiry time to deal with and could have been dealt with orally. The necessary evidence was already before the inquiry. It was a point of detail and not a point that would be expected to be in a SoC.

Unreasonable conduct – substantive

60. The appellants say that they have taken each putative RfR in turn. However, there are several that have not been addressed and for which no award of costs is sought. The lpa's witnesses gave their professional opinion, as confirmed by their expert declaration. Whilst their conclusions may not be accepted by the SoS, it was reasonable to reach a different view on the evidence.

The relevance of Policy MU 3

61. The appellants are wrong in their criticism of the reliance by the lpa on the Policy MU 3 allocation as a comparison; this is a clear example of a reasonable difference of opinion between the parties. The lpa's case is a reasonable one. As there is a deliverable allocation in the LP, it is a baseline as the starting point. It is an allocation in a recently adopted LP and tested through a LP inquiry. To have ignored this would be undermining the plan-led system. It is then a proper approach to assess the additional elements to that and the advantages and disadvantages of developing additional land. Those additions would need separate assessment on their own terms as was accepted by the appellants' witnesses.

62. The appellants' assertion that the Policy MU3 allocation was undeliverable was an opportunistic one, that emerged from the appellants' highways rebuttal proof. That assertion did not form part of the planning case as set out in the Planning Statement, the SoC and the appellants' planning evidence and took on an unexpected and perverse significance (Doc 5 paragraphs 11 to 17). Despite saying that the allocation is undeliverable, the appellants still seek to rely on the fact that there is an allocation to assert that there is an "*in principle*" support in planning terms for their development. Policy MU 3 was not in the original submission draft LP for several reasons, including its status as part of the existing Important Local Countryside Gap (ILCG). The allocation in the LP was only made "on balance", and as a choice between several competing sites, each of which was the subject of sustainability appraisal. If it was not deliverable in highway terms, it would not have been allocated.

Other issues

63. No criticism is made of some of the putative RfR. RfR 2(b) refers to development of land within an ILCG. As such landscape and planning evidence was required. RfR2 (c) refers to the loss of B&MV agricultural land. Regardless of what conclusion is reached on this application for costs, the cost of this proof of evidence and attendance cannot be part of any wasted costs against the lpa. At the CMC it was made clear that this was a planning issue, and there was no need for an agricultural witness. Calling an agricultural witness was the appellants' choice. It was therefore appropriate for the lpa to ask a few questions for clarification. Indeed, on the agricultural land point, the witness's own evidence picked up omissions in earlier survey work, regarding the quality of the land at the north-western end of the appeal site.

64. RfR2 (g) refers to the failure of the proposed S106 agreement to provide adequate mitigation. No criticism is made of the work done on this ground, which has required an alteration to the Agreement that the appellants had not previously accepted. The work done on this cannot be part of any wasted costs.

65. RfR1 relates to highways where the appellants try to make the argument that there was no basis to dismiss the appeal on highways grounds. This is a dismal failure to read what the putative RfR says on transport. Most of the reason relates to the lack of information about the highways impact. The lpa is in the position where there is an absence of the relevant information, and as such has

had to present a negative case i.e. that the application fails to demonstrate that the scheme would not cause unacceptable highway impacts.

66. The ES work remains inadequate and the lpa's criticisms were reasonable, were explained in detail in the lpa's highways evidence, and are shared, certainly at the Reg 25 stage, by those advising the SoS. Rather than do the work requested, the appellants declined to provide the further information (Doc 36).

67. The way in which the lpa's officers and the statutory consultees responded to the representations made on behalf of BPC by Railton on highways and Professor Peckham on air quality has been covered in evidence. The appellants refer to the lpa "*expressly*" dismissing the "*representations*" made by Railton and by Professor Peckham. This reflects the appellants' continuing confusion over the HoP's report to the Committee. That report does not represent the view of the lpa, but rather the professional assessment of the HoP which he reports to the Committee for a decision. Much of the information requested in the October 2018 Railton Report was only provided in the appellants' proof of evidence, and not before. The criticism remains that the model is a "black box"', and there are some demonstrable errors.

68. The allegation that rat-running could be dealt with by condition is an odd one, as the proposed condition is not accepted by the appellants. The lpa relied upon the evidence of its highway's expert. This was based on his experience, the available traffic evidence, where the appellants had only looked at Chestnut Street (southbound), and no assessment anywhere of northbound flows, local objectors' evidence and journey times. The appellants may criticise him for not putting numbers on it, but that is not a ground for saying that he has acted unreasonably. There is more than one way to assess the adverse effects. The lpa's highways witness did address the fundamental difference between the Policy MU 3 allocation and the appeal scheme in terms of the highway layout.

69. RfR2 (a) is harm to the landscape arising from the development of land within the open countryside beyond the allocated site. This is an odd basis indeed for the appellants to suggest that the landscape evidence was advanced on the basis that the allocated site is deliverable and "*that failure to provide evidence to substantiate the RfR was unreasonable and has wasted very substantial inquiry time*". The adverse visual and landscape impacts of development in this area have always been controversial. Given that it would be a larger, affect a larger area, and take up more of the existing open gap between the settlements it would have been necessary to assess the landscape and visual impacts of the appellant's scheme.

70. It is also suggested that the lpa "*failed to follow well-established case law (i.e. the principle that alternative schemes are irrelevant other than in exceptional circumstances where they are likely to come about*.". The reference made it is to Lisle Mainwaring v Carroll [2017] EWCA Civ 1315; [2018] J.P.L. 194 (Doc 26). This is a point addressed in the planning evidence and submissions (Doc 5 paragraphs 11 to 17). The submission made by the appellants that the Policy MU 3 allocation is not a material consideration is wrong in law. It would be unreasonable to ignore the baseline, as set in the recently adopted LP. There is indeed no "one size fits all" rule about the relevance of alternative schemes, see paragraph 19 of the judgment, citing Sullivan LJ in Langley Park School for

Girls Governing Body. This appeal scheme does cause harm. There is an alternative scheme, set out in the allocation, which avoids some of the harm and reduces other harm. Therefore, as a matter of fact and degree, the Policy MU 3 allocation is a material consideration or, as this is in the context of a costs application, it is reasonable to reach that conclusion.

71. What the appellants say about RfR2 (d) and affordable housing is a bad point. The lpa's position is that providing the LR has led to the reduced provision of affordable housing was justified and explained by the lpa's planning witness. It does not rely on a comparison with the level of provision that might be made on a detailed scheme that met the terms of the Policy MU 3 allocation. The appeal scheme fails to deliver the full quantum of affordable housing required under Policy DM 8, and the appellants' justification for this is based upon the additional costs of the LR to Chestnut Street. There is a simple difference between the lpa and appellants. The appellants take the position that there are wider highways benefits to the appeal scheme that outweigh a series of harmful impacts, including delivery of the full quota of affordable housing. The lpa's position is that any such benefits do not outweigh these adverse impacts, including the failure to provide the full quota of affordable housing. It is a matter of fact that the scheme does not deliver the level of affordable housing as required in Table 7.3.1 of Policy DM 8. It is part of the planning balance.

72. The putative RfR was clearly limited, and the supporting evidence was provided in the planning evidence. It was confirmed at the CMC that no viability witness was likely to be required and on 17 October, the lpa advised the appellants that a viability witness would not be called. The lpa acted reasonably and no costs were wasted on this point in any event.

RfR2 (e) - an appropriate mix of housing

73. It is not understood why it is said that it is unreasonable to rely on this point. The housing mix is a major local issue, and this development does not provide an appropriate mix of housing. The appellants in the planning evidence accept it is a negative point in the planning balance (APP20 paragraph 4.38). It is also incorrect to say that this can just be varied as required at reserved matters stage. Phase 1A is set, and the appellants' viability evidence, says that later phases would not be viable if a greater number of smaller units were included (APP20 paragraph 4.35). There is a reasonable expectation that this weighting of the mix towards larger units would continue to be relied upon by a developer under reserved matters applications. It would be wrong to simply dismiss this as a point to be dealt with under reserved matters, and it is reasonable for the lpa to make this criticism as part of this appeal.

RfR2(f) - the effect of the LR on the character and appearance of the development.

74. It is not unreasonable to criticise the adverse effect on the urban design of this large housing development of a local distributor road. It is a point made in the evidence by BRAD, and in the lpa's planning evidence. It is a point that is also clearly stated in Policy MU 3. This part of the application for costs essentially refers back to the alleged unreasonableness of relying on the ability of the

allocated site to come forward. It is not unreasonable to rely on that as a material planning consideration in this case.

RfR 2 (h) - adverse impacts upon biodiversity within the site

75. The appellants' criticisms are misconceived. The general concerns remained, and the lpa provided such clarifications as it was able. The lpa's witness acted reasonably in reviewing the survey evidence available and applying his professional judgment to it. In any event, it would have been necessary to check if the 2016/17 surveys were complete and/or needed updating. The appellants' ecologist did not treat net gain as a requirement, but only as a preference and the evidence reflected that. However, the appellants' planning witness accepted that net gain is required on this site. Unfortunately, the appellants' planning witness was not present when the ecologist gave evidence, and it appears that he was not told what was said.

76. Once it is accepted that net gain is required, then it was essential to review the biodiversity evidence to demonstrate that there would be a net benefit. As the appellants' ecologist accepted, that requires one to look at the effect on the protected species as well as on the habitats. The lpa's ecologist was asked to give his professional view, and he reviewed the work that had been done and has informed the inquiry accordingly i.e. from the inadequate Skylark mitigation.

77. Net gain was not a matter that was simply to be dealt with by condition. The appellants' ecologist did not accept it as a policy requirement. Furthermore, the appellants do not accept the condition that would use the Metric, or one that has a requirement to ensure that the gain is measurable. It remains disputed within the evidence whether a 10% net gain can be achieved within the site itself. It was a topic on which evidence had to be called and tested. It was reasonable for the lpa to do so.

RfR2 (h) - adverse impacts upon climate change considerations.

78. The appellants mischaracterise what the lpa's climate witness has said. The witness has given evidence to describe the problem, to point out what the current policies fail to address, and then deal with how the appeal should deal with this as a material consideration. It is the appellants who have taken an unreasonable stance, in limiting themselves to considering issues of policy alone. The appellants' comments on the SoCG from 8 October onwards also confirmed that their position was that the legislation relating to climate change is not relevant to planning. The appellants assert that the Climate Change Act 2008 "*does not include any development control criteria and, therefore, is not relevant in this case.*" The lpa submits that it is a material planning consideration, and that new development should not be approved that is not fit for purpose (Doc 5 paragraphs 101-114). Whilst the appellants' approach is very blinkered, the lpa's case was clear, reasonable and substantiated.

RfR2 (i) - harm to heritage assets

79. The appellants' assertion that the opinion of the lpa's heritage expert is not reasonable is a poor point. The lpa's expert has given detailed evidence to substantiate this part of the putative RfR. Both the lpa's and appellants' experts were in broad agreement on the analysis of the possible impacts on heritage interests. The appellants' expert agreed there would be impacts from the LR and the Chestnut Street roundabout that would necessitate the use of screening and a buffer. The evidence submitted with the scheme forecasts a significant increase in vehicle movements on Chestnut Street, which passes through the Chestnut Street Conservation Area and Listed Buildings (LB). The only substantial point of difference between the witnesses is about the other conclusions that can be drawn from the highways evidence. Yet this is not a numbers game. The extent to which the likely impact on heritage assets is "significant" is a matter of judgment. Heritage evidence cannot be reduced to a score sheet. Indeed, that is not what the appellants' witness does; he exercised judgment. It was reasonable for the lpa to rely upon the evidence of its expert in the same way.

RfR3 - air quality modelling submitted with the application is inadequate

80. The evidence from the lpa's expert was substantial, and addressed 3 main points – the bad modelling, the likely increase in pollution and its redistribution rather than its reduction and poor mitigation. Whilst it may be possible to disagree with his conclusions, he has given detailed and specific evidence. The extent of the impact, and its assessment under the PPG, was for others to assess, once the impact on air quality could be agreed. However, it was not possible for the lpa's witness to get to that stage. This is a topic where a large amount of the previous work was overtaken by new data and evidence by the time of the inquiry. The appellants' witness did not rely upon the older modelling work that had been submitted as part of the ES and the ES Addendum, which the lpa's witness had criticised. New modelling work was set out in the proof of evidence some 4 weeks before the inquiry, and to which it was reasonable for the lpa to produce a rebuttal.

81. It was also reasonable for the Members to take BPC's evidence into account, and to consider that the applicants had not properly addressed it. Whilst the consultees had criticised BPC's report, the lpa's witness had provided detailed rebuttals to that, the most relevant are appended to the proof. These are: the "Air Quality Report for BPC" June 2018 by the University of Kent, submitted as a response to the planning application and posted on the Council's website July 2019; the response to "Review of Borden Parish Council Air Quality Assessment" October 2018 by the University of Kent, submitted as a response to the planning application on behalf of BPC, posted on October 2019; the Response to "Air Quality Evidence Review" submitted January 2019 by the University of Kent, submitted as a response to the planning application on behalf of BPC, posted on 07/01/19); the Response to the HoP's report January 2019 by the University of Kent, submitted as a response to the planning application on behalf of BPC, posted January 2019; and the diagram of "Comparison of developer 2025 predictions (V1.3) with Swale Borough Council measurements for NO^2" submitted June 2019 by the University of Kent, on behalf of BPC, posted June 2019.

82. For the above reasons, the SoS should refuse the appellant's application for costs.

CONCLUSIONS

83. 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 aims of the costs regime is encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case and encourage lpas to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case and not to add to development costs through avoidable delay.

84. The appellant's history of the application, the lpa's consideration of it, the reference to a possible political reason for the change in approach, and the lpa's response on these matters are part of the background context and do not form part of the appellant's application for costs and have not featured in my consideration of the merits of the application.

85. Article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 requires that where planning permission is refused, the lpa must state clearly and precisely the full reasons for the refusal, specifying all policies and proposals in the development plan that are relevant to the decision. The purpose of a RfR is to tell applicants how their proposal has fallen short and what elements must be addressed either to make it acceptable in a revised application or what evidence would need to be submitted in appeal.

86. The putative RfR relating to highways, heritage, air quality and climate change and biodiversity fall considerably short of the requirement to be clear and precise. Rather, they are, vague and generalised. Indeed, the lpa's response notes that, "*Each reason for refusal refers to the headline points and policies.*" [38]. The vague and generalised nature of the reasons required the appellants to seek clarification from the lpa on more than one occasion of what some of the putative reasons meant. The notes of the CMC indicate that when asked for clarification of several of the reasons, the lpa indicated that a meeting of the Planning Committee was scheduled for 3 October where officers were requesting clarification from the Members on the nature of the concerns relating to biodiversity, climate change and heritage. Given that the officers would have been present at the June and August Planning Committee meetings, this action does not suggest that they themselves fully understood the putative reasons on these matters.

87. In relation to putative RfR1, the appellants' email of 20 September 2019 listed 8 substantial areas that needed clarification, demonstrating the highly generalised and vague nature of the reason. In relation to air quality, the appellants' request for clarification covers 3 substantial matters. Putative RfR 2 (i) on heritage matters did not, other than a general reference to Borden and Chestnut Street (albeit qualified by the words "*in particular*") refer to any other assets. Had the appellants relied solely on this reason, and not sought clarification, it

would have come as a surprise when they received the lpa's proof to find that 5 additional assets were raised. Moreover, the lpa's proof included one asset that was not referred to in the clarifications provided following the October Committee meeting i.e. impact on the Hearts Delight Conservation Area, albeit that addition did not result in material additional work by the appellants. Moreover, the proof of evidence of the lpa's heritage witness contained the following, "*…it is implied on the reason for refusal but not explicitly stated…*". When asked whether the reason was precise, the witness responded that it was "not precise". These matters reinforce my conclusion that the lpa failed to provide putative RfR that were clear and precise.

88. Linked to the above point is that at the date evidence was submitted, the lpa did not supply summary proofs of evidence for the landscape and air quality witnesses [8]. The landscape summary proof, apart from the first 2 paragraphs, which detail the witness's qualifications and sets out the professional declaration, is the same as the conclusions in the proof of evidence. As to the air quality proof, the first 19 paragraphs largely relate to describing the background, the site, the putative RfR, national policy and legislation, all of which the appellants' expert would be familiar with. The remainder of the proof is brief, albeit paragraphs 27, 28 and 29 have multiple subparagraphs and there are 2 paragraphs numbered 29. Whilst the lpa failed to adhere to the deadline, the appellants' experts were not required to "*trawl through the evidence to understand the points of the case*" and as such I consider no unnecessary expense was incurred.

89. Notwithstanding my conclusion on the issue of summary proofs, I consider the lpa acted unreasonably in failing to provide clear and precise putative RfR and that the appellants incurred unnecessary costs in seeking to obtain clarification.

90. As to the SoCG, an agreed statement is essential to ensure that the evidence considered at the inquiry focuses on the material differences between the appellant and the lpa. The SoCG is to provide a commonly understood basis for the appellant and the lpa and to provide context to inform the SoC and the subsequent production of proofs of evidence. Whilst implementation of recommendations of The Independent Review has resulted in tighter timetabling of inquiries, there is as far as I am aware of no relaxations when the inquiry relates to a case for non-determination and inquiries continue to be arranged in accordance with the provisions of the relevant Inquiries Procedure Rules.

91. The June Planning Committee did not determine the application rather a decision was deferred for the application to be considered at an Extraordinary Planning Committee Meeting. The appellants appealed against non-determination on 19 July and submitted a draft SoCG. The parties were notified on 6 August of the date of the inquiry and that it would be timetabled as a Rosewell case. These letters indicated that the lpa must submit a completed agreed SoCG by 10 September 2019.

92. The Extraordinary Planning Committee did not meet until 29 August to determine what action it would have taken. The resolution was that the application would have been refused and drafting of the putative RfR was delegated to the HoP. The full putative RfR were issued on 6 September. This timeline and the fact that the lpa had no witnesses in place to agree common

ground on the matters at issue meant that it was unable to meet its responsibility to submit an agreed SoCG by the deadline of 10 September.

93. Whilst the failure of the lpa to meet this deadline is a potential ground for an award of costs, that is not the crux of the matter and, in itself, did not lead to unnecessary costs being incurred. The issue is that the putative RfR were, vague and generalised and by the CMC on 24 September the lpa still did not have a full complement of witnesses. The requested clarifications of the reasons were not complete until 4 October, and it was not until 18 October that details of the remaining witnesses were confirmed. All this must be seen against the backdrop of a deadline to submit evidence by 29 October.

94. I have some sympathy for the officers who were coordinating the lpa's responses [37]. However, the timetabling of an inquiry following the recommendations of The Independent Review requires all parties to change behaviours. Although the evidence was submitted in time to meet the deadline and the inquiry opened as scheduled, this was against the backdrop of the delay in producing putative RfR and delivering a witness team for the appellants to engage with. This meant that, as evidenced by the narrowing of issues during evidence and the appellants submitting rebuttal proofs additional work was required by the appellants. Accordingly, I consider the lpa acted unreasonably, which resulted in the appellants incurring unnecessary expense.

95. The appellants had demonstrated to the highway authority (HA) and Highways England, the strategic highway authority, through the running of a micro-simulation model, the parameters of which had been agreed with the HA, that with the implementation of off-site highway works, the scheme would not have an unacceptable effect on either the local or strategic highway network. Putative RfR1 presents a negative slant in that there was a lack of information, that the modelling work was flawed, and the mitigation proposed all failed to demonstrate that the scheme would not cause unacceptable impacts on the highway network. I accept it is entirely legitimate for the lpa's highways expert to have, based on his professional experience and local knowledge, doubts, which I would characterise as an informed "hunch". However, for that to translate into a RfR and substantiated it has to be supported by technical evidence.

96. The lpa acknowledged that it did not produce evidence that the scheme's cumulative residual impact would be severe or that its impacts on highway safety would be unacceptable i.e. the Framework paragraph 109 test. Moreover, in relation to rat running, the lpa's concerns on potential impact was not supported by objective evidence, rather it was assertion. Assessing impact, its magnitude and the significance of the effect requires professional judgement. However, to be able to make the judgement that traffic would have a significant effect requires, in the first instance, objective evidence. Otherwise, conclusions would be no more than an educated guess. Drawing this together, I consider the lpa acted unreasonably in failing to produce evidence to substantiate the first putative RfR.

97. The failure to substantiate the highways case has significant implications for the lpa's heritage putative RfR. The heritage reason and the judgement as to the extent of the harm relied on a reference to significant vehicle movements and

rat running. However, within the highways and the heritage evidence there was no objective basis to judge whether the movements would be significant and conclude on the magnitude of heritage harm. This is especially so when the conclusions are based on a sliding scale i.e. negligible, minor, moderate major and extreme [LPA16 Appendix B page 10]. On this basis, I consider the lpa failed to substantiate the heritage RfR (2i). The lpa also acted unreasonably by introducing in its evidence at the inquiry an allegation of harm to the Hearts Delight Conservation Area and Listed Buildings. There had been no reference to this asset either in the putative RfR, the SoC or the clarifications on heritage harm. Whilst the evidence was fresh and introduced at a late stage, it was not substantial, and I am not convinced that this addition resulted in the appellants incurring additional expense.

98. A substantial part of the appellants' application for costs refers to the lpa's cases being predicated on the deliverability of the Policy MU 3 allocation. The allocation is in a recently adopted plan and it is not unreasonable for the lpa to use this as the baseline and a material consideration. In coming to my conclusion on the merits of the application, I used, where appropriate, the allocation as a baseline and a material consideration. RfR2 and its constituent parts seek to balance of the benefits of the scheme against potential harms. In this context, I consider that RfR2 (a), (b), (d) and (e) were reasonable positions for the lpa to adopt, given that part of the site would be located within the countryside outside the settlement boundary determined by the LP and within an ILCG. In relation to affordable housing, part of the site is located within the rural area where, under Policy DM 8, a different requirement for affordable housing sought exists. Regarding RfR2 (e), the appellants acknowledged that the proposed housing mix was a departure from the current Strategic Housing Market Assessment in that the mix is skewed to larger dwellings to pay for infrastructure. Given the LP plan policies and requirements, these putative RfRs are reasonable judgements for the lpa to make and the lpa was able to substantiate those reasons with evidence. In relation to the lpa's concerns regarding the loss of agricultural land, it was for the appellants to decide how to respond to the putative RfR and their choice was to call an expert witness.

99. Putative RfR2 (h) refers to climate change and biodiversity. The LP contains a relevant policy, Policy DM 19 and in June 2019 the Council declared a Climate Change Emergency with an objective to make the Borough carbon neutral by 2030. The declaration of a climate emergency and its objectives are a material consideration [Doc 29]. In this context, seeking to test the proposal against this material consideration is not unreasonable and the lpa was able to substantiate its concerns with evidence.

100. Regard biodiversity, the putative RfR2 (h) is generalised and vague and the evidence submitted by the lpa expanded beyond the lpa's clarifications. An example of this is shown by the lpa's reference to the Dormouse. There is no indication within the lpa's evidence of KCC's Ecological Advice Services advice to the lpa that the appellants' evidence provided a good understanding of the ecological interest of the site and that the ecological impact associated with this development could be mitigated. This is a key baseline and material consideration that the lpa omitted from its evidence. The reference to the appellants' ecologist not accepting that net gain is a policy requirement does not detract from the fact that the appellants' evidence does seek to show that, in

line with Policies DM 28 and MU 3, a net gain and in the case of Framework paragraph 175d a measurable net gain could be achieved. It was reasonable for the lpa to challenge that conclusion, however, in doing so it failed to substantiate its quantitative assessment that there would be a biodiversity loss of some 20%. Accordingly, I consider the lpa acted unreasonably and the appellants incurred additional expense.

101. Putative RfR2 (f) concentrates on impacts on the development and the key words are "*through the site*" and "*the development*". The lpa's evidence highlights that the landscape, heritage and ecology evidence confirm harm in the context of this reason. However, the ecology evidence makes no reference to the LR in terms of the effect on the character and appearance of the development. The heritage evidence refers to the LR and roundabout onto Chestnut Street in the context of harm to the Chestnut Street Conservation Area and Listed Buildings, not the character and appearance of the development. The landscape evidence deals with putative RfR 1(a) and (b) and makes no reference to RfR 2 (f). The only apparent reference to the actual words of this putative RfR relates to the LR facilitating through traffic. However, there was no attempt to quantify this or consider what effect that part of the LR through Phase 1A would have and whether the proposed landscape treatment of its margins would provide mitigation or that in subsequent phases any recognition that the reserved matters applications could deal with the effect of the LR. Accordingly, I consider the lpa did not substantiate putative RfR2 (f).

102. The evidence on the air quality impacts of the development is complicated and was subject of significant change during the life of the application and the appeal. Whilst I did not agree with the lpa, it raised legitimate concerns in this area and, whilst its evidence may have flaws, the lpa substantiated those concerns. Accordingly, I consider the lpa did not act unreasonably in relation putative RfR 3.

Conclusions

103. For the above reasons, I consider the lpa acted unreasonably by failing to provide clear and precise putative RfR and through delay in producing those reasons and engaging with the appellants to agree matters of common ground in a timely manner. The lpa failed to substantiate putative RfR 2 (f), (h) and (i). I consider the lpa's unreasonable behaviour resulted in the appellants incurring unnecessary expense. Accordingly, a partial award of costs is justified.

Recommendation

104. I recommend that the application for a full award of costs be granted in part.

George Baird

Inspector

Ministry of Housing, Communities & Local Government

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RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand,London,WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act
With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act
Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.