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## Costs Decision

Inquiry Held on 25 – 28 January 2022

Site visit made on 31 January 2022

**by Andrew Dawe BSc(Hons) MSc MPhil MRTPI**

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

**Decision date: 12<sup>th</sup> April 2022**

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### **Costs application in relation to Appeal Ref: APP/D3830/W/21/3281350 Land East of Turners Hill Road, Fellbridge, Crawley, RH10 4HH (grid ref. 5333519, 139402)**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Mr Grant Stevenson of Rainier Developments (Copthorne) Ltd for a full award of costs against Mid Sussex District Council.
  - The inquiry was in connection with an appeal against the refusal of planning permission for the development of a 64 bed care home (Class C2) and associated infrastructure, including a new access road, car park and landscaped gardens.
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### **Decision**

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

### **The submissions for Rainier Developments (Copthorne) Ltd (submitted in writing)**

#### **Introduction**

2. This application is made in accordance with the Planning Practice Guidance on costs ("the guidance"). It is made in line with the PPG which states:

*"All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions"<sup>1</sup>.*

3. It is an application for a full award of costs against Mid Sussex District Council (hereinafter 'the Council').
4. Costs play an important part in the appeal process. The aim of the costs regime includes this<sup>2</sup>:

*"Encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up*

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<sup>1</sup> Paragraph: 035 Reference ID: 16-035-20161210

<sup>2</sup> Paragraph: 028 Reference ID: 16-028-20140306

*to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay.”*

5. All good costs applications should be short. That is because the point being made should be simple and obvious. That is exactly the position here.

### **Relevant Guidance**

6. Costs may be awarded where a party has behaved unreasonably and where that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process<sup>3</sup>. The word “unreasonable” is used in its ordinary meaning: see *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774.
7. In the context of an application for costs, such behaviour may be procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal<sup>4</sup>. This application relates to the latter.
8. As to the type of behaviour which may give rise to a substantive award of costs against a local planning authority, particular attention is drawn to the following examples in the PPG (not exhaustive)<sup>5</sup>:
  - 8.1 Preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations;
  - 8.2 Refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead;
  - 8.3 Acting contrary to, or not following, well-established case law;
  - 8.4 not determining similar cases in a consistent manner.

### **Submissions**

#### Location and Accessibility

9. The Council has objected to this proposal on grounds that it is an unsuitable location for a care home, raising concerns about accessibility and access to public transport. It is a fundamental part of their case against the proposal and features expressly and clearly in the reasons for refusing the Appellant’s scheme.
10. Yet what the Appellant has discovered is that the Council has very recently just granted planning permission for a care home on the site immediately next door on 18 February last year.
11. The Council did not disclose this to the Appellant: neither during or after the planning permission was granted. The Appellant discovered it through diligent

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<sup>3</sup> Paragraph: 030 Reference ID: 16-030-20140306

<sup>4</sup> Paragraph: 031 Reference ID: 16-031-20140306

<sup>5</sup> Paragraph: 049 Reference ID: 16-049-20140306

- enquiry. The Council should have disclosed this. It is completely inappropriate for the Council not to have done so.
12. The very latest time that the Council should have disclosed this was when the decision was made to approve the adjacent care home. In fact the Council should have done so when it was submitted. But the Council kept very quiet about it.
  13. The planning application, the subject of this appeal was submitted to the Council on 19 August 2020 (for all dates see the Planning SCG, page 10 onwards). In the Autumn of 2020 the application was subject to extensive consultation discussion and a Design Review Panel.
  14. There was considerable discussion with officers about the application. This led, on 27 January 2021, to a pack of updated and revised documentation being submitted to the Council.
  15. The Rowan application for a C2 care home was submitted at this time – January 2021.
  16. The Appellant has discovered this afternoon that Council consulted on the Rowan's application on 20 January 2021. Neither the Appellant, nor its agents were consulted about the Rowan application.
  17. The Rowan application was granted on 18 February 2021.
  18. The Appellant continued to discuss the application with the case officer. No mention was made at this time, or ever, of the Rowan application or the fact that by February 2021 it has been granted planning permission.
  19. Further information was submitted to the Council in February 2021, yet again no mention was ever made of the Rowan application or the fact that by February 2021 it had been granted.
  20. The application the subject of the appeal was refused by the Council on 7 July 2021.
  21. Yet again no mention was ever made of the Rowan application or the fact that by February 2021 it had been granted. In their report in respect of the appeal application there was no consideration by officers of the Rowan application or the planning permission. This despite the fact that it was in fact mentioned by a local resident in their representations.
  22. The care home that is the subject of the appeal was rejected for being located outside the settlement boundary. This is the first reason for refusal.
  23. The Rowan care home is immediately adjacent and also located outside the settlement boundary. It was granted planning permission.
  24. The permission for the care home on the site immediately adjacent is for a children's care home. The site is PDL. These differences are not relevant to the location and accessibility of the site for a care home. The location is where it is located and the accessibility relates to the access to public transport, including the frequency and quality of the bus service, the location of the bus stops, the ability to walk to the bus stops, and the ability to access other relevant services such as local shops.

25. The Council rejected the appeal proposal on the basis of its location and claimed it was contrary to Policy DP21 – the third reason for refusal.
26. The Council granted permission for the Rowan care home without any alleged breach of DP21.
27. The care home that is the subject of the appeal was rejected for being located away from existing settlements. This is also part of the third reason for refusal.
28. The Rowan' care home is located immediately adjacent and was not rejected for being located away from existing settlements. It was granted planning permission.
29. If anything there is likely to be more movement to and from a young persons care home, compared to an elderly persons care home. The Rowan care home has 25 car parking spaces. The Planning Statement supporting the Rowan care home permission, refers to this parking be needed for staff, visitors and residents (page 10, para 50) and "Around 50% of residents have a vehicle to be kept on site for mobility and access." (page 11 para 51)
30. What it reveals is this is a perfectly acceptable location for a care home.
31. The Council have tried to argue the bus services for the appeal site are poor. But they were emphasized in terms of addressing the sustainability credentials of the Rowan care home.
32. The Council have tried to highlight the appeal proposal is not near to school, doctors surgeries etc. Yet these are services which are located where people live: doctors visit care homes.
33. None of this was considered relevant in respect of the Rowan proposal. This despite the fact this is where young people live.
34. The whole of paragraph 84 of the NPPF (2019) was relied upon by officers in support of the Rowan (not just the last sentence about PDL). But this paragraph was ignored for the appellant's appeal proposal. Instead other paragraphs of the NPPF were relied upon reject the appeal care home. These other paragraphs were not cited in the officers report for the Rowan.
35. Mr Tunnell tried to suggest that the factors listed by the officers in respect of the reasons why the care home was acceptable in this location on page 7 of the Rowan report (i.e. "Furthermore, etc) and the conclusions on the very end of the report were mostly concerned highway safety. They plainly were not. They were relied upon to show why the location was judged acceptable for a care home, including the nature of the residents and their needs and mobility.
36. The Council have plainly acted in a wholly inconsistent way. The Appellant has a cast iron case against the Council in terms of consistency in decision making. That is also a failure to properly understand the law on the need for consistency in decision making.
37. The Council have no objection to the proposal on any other technical matters.

#### Landscape and Visual Harm

38. The Council's case on landscape and visual impact is unreasonable. There is no reason for refusal relating to landscape and visual impact. Moreover, the Council

has no expert evidence to support its case on this issue, and call no landscape witness. What is written in the planning proof is not substantial evidence in support of the case put forward.

39. The site is exceptionally well contained. It is impossible to build on a greenfield site and not cause some adverse impact. But that does not make the proposal unacceptable.
40. The Council's design officer accepted the proposal would be well screened from public view.

#### Need

41. The Council's case against the Appeal proposal is therefore largely predicated on an alleged lack of need. This is hopeless. The Government has made clear there is a "critical need" for this type of accommodation. Added to which this is an area with a very high proportion of elderly people.
42. The Council seems to argue there is no need for more bedspaces. Yet it accepts that it is a reasonable expectation that care home bed will be single occupancy and en suite provision. In light of Covid 19 that point is beyond argument.
43. On the basis of this, the Council plainly does accept an unmet need of 658.
44. The Council has sought to then rely on sites in the pipeline or with planning permission. This is a figure of 203 bedspaces which the Council seeks to rely on to reduce the unmet need to 445 bedspaces.
45. But the pipeline supply does not have operators. One does not even have planning permission. Also these sites will not address the current unmet need.
46. The need they would be addressing is future need. Yet the need figures increase yet further by 2025.
47. This is even before one turns to consider the existing provision and the nature of it, is completely inadequate against modern standards.
48. The Council do not rely on expert evidence to address these points.
49. The Council call no evidence to dispute the Appellants qualitative case.
50. The Council sought to rely on the SHMA. But quickly abandoned that idea after Mr. Newton Taylor the way in which this has been done is both inappropriate and inconsistent with neighbouring authorities.
51. The Council's case on need is utterly unconvincing.

#### **The response by Mid Sussex District Council (submitted in writing)**

52. The Appellant has applied for a full award of costs against the Council.
53. The Council resists the application, which is utterly unmeritorious, unreasonably pursued and is nothing more than a thinly veiled strategic ploy on the part of the Appellant to try and strengthen its case on the merits before the Inspector.

54. At times, it is difficult to follow the points which the Appellant has pursued in the written application. The Council reserves the right to respond further to any of those points if they are clarified.

#### Sustainability

55. The Appellant complains that the Council acted unreasonably because it failed to inform the Appellant that planning permission had been granted for an adjacent site at Rowan (paragraphs 13 – 24 above) and because it was unreasonably for the Council to adopt an “inconsistent” position as between the two applications (paragraphs 25 – 39 above).
56. Mr Young QC appeared to labour under the misapprehension that planning permission had only just been granted at Rowan. In fact, planning permission was granted at Rowan on 18 February 2021 (almost a year ago) and five months before the application the subject of this appeal was determined, in July 2021. It is not, therefore, a “recent” approval.
57. Mr Burden accepted in cross-examination that he did not criticise the Council in respect of the publicity of the application at Rowan. A site notice was erected and neighbour notification letters sent out. As Mr Burden accepted, if the Appellant did not become aware of the application, that is not the Council’s fault, nor does it demonstrate that the Council acted unreasonably.
58. It is not the responsibility of a local planning authority officer to draw to the attention of applicants for planning permission other planning decisions on nearby land. Local authority planning officers have quite enough to do already and the pressures on local authority planning officers are well known. If it was anyone’s job to make sure that the Appellant kept abreast of decisions on nearby development sites, it was Mr Burden’s. His failure to do so is not a failing which can be laid at the door of the Council.
59. The Rowan permission was then specifically referred to in the officer’s report for this application (CD 8.15). It is difficult to see how the Appellant can possibly criticise the Council for a failure to draw its attention to the Rowan decision from this point onwards given that explicit reference to it is made in the body of the officer’s report. Again, if anyone should have picked up the significance of the reference to planning permission having been granted at Rowan, it is Mr Burden (or one of the Appellant’s other consultants). The fact that Mr Burden failed to read the officer’s report for one of his own applications carefully enough to pick up what he now says is such a vital consideration in the determination of this appeal, is telling. For Mr Burden nonetheless to maintain that the Council is somehow at fault for his failure to properly read the committee report is nothing less than astounding.
60. The obvious reason why the Rowan decision was not of such significance to Mr Burden at the time and the obvious reason why it was not referred to by the officer in her assessment of the application, is that the Council has adopted an entirely consistent position between the two applications. As Mr Burden accepted in cross examination, the Council found both proposals to be located in an unsustainable location. That is clear, as Mr Burden accepted, from the penultimate paragraph of the committee report (CD 8.15), which provides that: *The site is not considered to be in a sustainable location in relation to access to shops and other services and there will be a reliance on the private motor car.*”



61. Mr Young QC has accused the Council of not understanding the law. In North Wiltshire District Council v Secretary of State, Mann LJ said that, in deciding whether there is an obligation to provide reasons for departing from a previous decision, "*a practical test for the [decision-maker] is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case?*" In this case, the officer in the Rowan decision found that the appeal proposals would be located in an unsustainable location. The officer in this application agreed with that assessment. There was no need to provide an explanation as to any difference between those judgments because there was none.
62. As Mr Burden accepted, the Council's approach to the issue of sustainability between both applications has been entirely consistent.
63. As Mr Burden accepted, the Council granted planning permission at Rowan despite the fact that the site was unsustainably located because there were material considerations which outweighed the unsustainable location, as set out in the final paragraph of the committee report. Those considerations have nothing to do with sustainability, namely the need for the development, the PDL status of the land and the fact that the proposals would re-use the existing built form of the residential development on the site. Given that it refers to issues which, as the Appellant accepts, have nothing to do with sustainability, the final paragraph of the report cannot sensibly be understood as providing reasons as to why the Council considered the site to be sustainable. The final paragraph of the report is plainly concerned with the overall planning balance and, in particular, whether there were considerations to outweigh the unsustainable location.
64. The balance of considerations in this appeal is obviously different. This is a greenfield site. The proposals would not re-use existing built form. This would be a large a care home for older people for which, in the Council's judgment, there is a moderate need.
65. The Appellant may disagree with the judgment reached by the Council but it is plainly not unreasonable for the Council to have exercised a different planning judgment in this case as to whether the need for the proposal was such as to overcome the sustainability objection and the conflict the Council identified with Policy DP12.
66. As to the Appellant's other points, the proposal at Rowan was found to be acceptable in principle (notwithstanding that it was outside the settlement boundary) because it was previously developed land, to which specific policies in the Development Plan attached. The appeal site is not previously developed land and so does not benefit from those policies.
67. As to fact that no breach of Policy DP21 was identified in the Rowan decision, Mr Burden accepted that the officer had found that the site would be located in an unsustainable location.

### Landscape

68. This part of the application is misconceived. The Appellant suggests that there is no reason for refusal relating to landscape. As the Inspector pointed out at the CMC, the first reason for refusal identifies that "*the proposal would not protect the intrinsic character and beauty of the countryside and would have an*

*intrusive and harmful urbanising impact on the landscape.*" The fact that there is no separate reason for refusal is irrelevant.

69. The effect of the proposed development on the landscape character and appearance of the site and surrounding area was identified as a main issue by the Inspector and Mrs Brockhurst's proof of evidence is expressly addressed to that issue (see paragraph 1.21).
70. The Council's evidence is properly set out in the proof of evidence of Mr Tunnell and based, in part, on the Appellant's own LVIA (which identified that the proposals would have adverse effects on landscape character).
71. The other points made in the application are either incomprehensible or go to the merits of the Council's judgment. The Appellant may disagree with the Council's judgment but the Council's position is plainly not unreasonable.

#### Need

72. The Council's case is not predicated on a lack of need and the Appellant's application is otherwise misleading as to the Council's position.
73. The Council has accepted (as set out in the SoCG and in Mr Tunnell's proof) that there is a need for this type of development and that the replacement of older facilities to provide entirely ensuite accommodation would be beneficial.
74. Mr Newton Taylor confirmed in his oral evidence<sup>6</sup> that, having regard to the need for bedspaces and the current and pipeline supply of bedspaces, his concern was not with the quantum of bedspaces but rather with the quality of bedspaces. It is striking that, despite the Appellant's heavy reliance on qualitative deficiencies in care home accommodation in the district at the inquiry, that was not an issue which was considered sufficiently important even to mention as a benefit of the proposal in the Appellant's representations to the Site Allocations DPD, the Appellant's Statement of Case or, indeed, Mr Burden's own proof of evidence, as Mr Burden accepted in cross examination.
75. For the reasons given by Mr Tunnell, the Council considers that, taken in the round, the benefits of the appeal proposals should attract moderate weight and would not outweigh the unsustainable location of the site and the conflict with Policy DP12. All of the Appellant's other disparate complaints go to the weight to be accorded to the benefits of the proposals in the planning balance. Again, while the Appellant may disagree with the Council's judgment, that does not mean that the Council's position is unreasonable.
76. For all these reasons, this application should be dismissed.

#### **Verbal reply by Rainier Developments (Cophorne) Ltd to the Council's response**

77. With reference to the Rowan officer report (core document 8.15), with respect to the above paragraph 65 of the Council's response, in particular on page 7 of that report relating to where it says that: 'The views of the Parish Council are acknowledged on location sustainability however.....'; use of the word 'however' is contrasting, acknowledging that the Council's witness in this appeal did not interpret as that.

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<sup>6</sup> Cross-examination



78. At the end of the Rowan officer report it states that: 'The site is not considered to be in a sustainable location in relation to access to shops and other services and there will be a reliance on the private motor car'; and then the following paragraph starts with the word 'however' and includes reference to the nature of the use. While the Council did say that it would not be sustainable, it does provide a very clear rejection by the use of the word 'however'. With respect to consistency, the Council does not do that on the appeal site and does not adopt the same approach. The appeal proposal was refused in relation to being an unsustainable location, whereas the Rowan application was not.

### **Reasons**

79. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only 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.

#### *Location and accessibility*

80. In respect of the matter of the Council not informing the Appellant of the adjacent Rowan planning application and decision, I note that the Appellant was not directly consulted on the application. However, it was the case that a site notice was posted. Furthermore, whether or not that adjacent proposal was mentioned in discussions between the Council and Appellant in respect of development of the appeal site, I consider that firstly it would have been quite possible for, and reasonable to have expected, the Appellant to have undertaken a search of their own as to any potential developments locally that may affect their proposals. I also note that reference to Rowan having been granted planning permission for a care home was mentioned in the officer report relating to the appeal scheme, albeit only briefly within the summarised third party representations and clearly not a direct notification of that permission to the Appellant. Even if that reference was missed by the Appellant, an investigation they conducted, albeit close to the date of the Inquiry, lead to their discovery of that planning permission in time to raise it in the context of the Inquiry.
81. Secondly, whilst I acknowledge that issues relating to the sustainability of the location are similar between the two cases, given their similar uses and locations, the circumstances are different in respect of nature of the respective sites. A balanced decision was taken in respect of Rowan highlighting, despite it being considered as an unsustainable location in relation to access to shops and other services and likely reliance on the private motor car for access by staff, mitigating outweighing factors in that case. As well as the identified need and the fact that the residents would have a high dependency and would not be making unaccompanied trips, these included it being an existing developed site with residential use, in contrast to the undeveloped appeal site and being on a fairly major route such that it would not result in a significant increase in journeys; that it is on a bus route, albeit without any detailed analysis of the quality of services and facilities; and it included provision for EV charging points.
82. In these respects, there are clearly similarities between the two proposals. However, taken as a whole, the circumstances were different, notably given the added factor in the balance relating to the appeal scheme comprising development of an undeveloped site. This factor is reflected in the Council's

first reason for refusal which states, amongst other things, that the proposal would not protect the intrinsic character and beauty of the countryside and would have an intrusive and harmful urbanising impact on the landscape. As such, I consider any failure to mention the Rowan proposal in discussions between the Appellant and Council would not necessarily have been expected. Furthermore, for the same reasons, I do not consider there to have been an inconsistent approach to decision making whereby considerations such as the access to bus stops and EV charging in the Rowan decision were matters within the balance, not espoused as being factors indicating a fundamentally sustainable location. This is apparent in the conclusion to the officer's report, despite some confusion introduced earlier in that report where it is stated, having referred to most of the above mitigating factors, that it is considered that from a highway safety perspective the application complies with policy DP21 of the Mid Sussex District Plan and policy CDNP10 of the Neighbourhood Plan.

83. I note the Appellant's comment about there having been no consideration of accessibility of the Rowan site within the application material for that proposal, and that there was no transport assessment submitted with the application or a Travel Plan secured. As referred to above, the Council did nevertheless deal with the matter of the sustainability of location in the officer report. Notwithstanding those circumstances, and whether or not it was appropriate for the Council not to make comparisons with the Rowan application in its officer report relating to the appeal proposal, the situation remains that there were sufficient differences between the two planning applications to cause the Council to reasonably come to different conclusions. This is notwithstanding my decision on the appeal.

#### *Landscape and visual harm*

84. Given the nature of the proposed development, relating to the site in question and in the location concerned, it was reasonable for the Council to have considered those matters that culminated in the first of its reasons for refusal that I have referred to previously. Furthermore, I have found in my decision that there would be some harm to the landscape character and appearance of the site and surrounding area and conflict with relevant policies, albeit limited.
85. Notwithstanding my appeal decision, I also consider that the Council clearly presented its concerns in respect of the first main issue identified in my decision, through its officer report, decision notice, proof of evidence and presentation of evidence to the Inquiry.

#### *Need*

86. The Council has made it clear in its evidence that it accepts that there is a need for older persons accommodation and acknowledged the benefits of ensuite accommodation. Notwithstanding my findings and conclusions in my appeal decision, the Council has reasonably presented evidence in respect of the extent of the need, how it considers it would be met, and accordingly the weight to be afforded to it, and taken that into account within its overall planning balance.
87. Notwithstanding my decision on the appeal, I consider that the Council clearly presented its consideration in respect of this issue, through its officer report, proof of evidence and presentation of evidence to the Inquiry.

*Conclusion*

88. In conclusion on this application, I therefore find that the Council behaved reasonably in determining the application and in defending its decision at appeal and that, therefore, the Applicant's costs in pursuing the appeal were not unnecessarily incurred and wasted. For this reason, neither a full or partial award of costs is justified.

*Andrew Dawe*

INSPECTOR