



Costs Decision

Site visit made on 20 January 2023

by Lewis Condé Msc, Bsc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 May 2023

Costs application in relation to APP/J1860/W/22/3304685

Land at North Lodge, Main Road, Hallow, Worcester WR2 6HP

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Chris Kilburn against the decision of Malvern Hills District Council.
 - The appeal was against the refusal of an application under Section 78 of the Town and Country Planning Act 1990 (as amended) for 'Permission in Principle for residential development of up to three dwellings and associated vehicular access'.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

Reasons

2. The National Planning Practice Guidance (PPG) advises that parties in planning appeals normally meet their own expenses but costs may be awarded against a party who has behaved unreasonably and that conduct has directly caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

Submission for Applicant

3. The applicant contends that the Council has behaved unreasonably procedurally, through seeking to introduce a further reason for refusal at the appeal stage. It is also claimed that the Council behaved unreasonably on substantive grounds by maintaining that it could demonstrate a five-year housing land supply (5YHLS), during the course of the appeal. This is despite evidence from various other recent appeals suggesting otherwise.
4. As such, the applicant highlights that unnecessary expenses have been incurred. These are said to relate to the professional time and fees associated with the final appeal comments and subsequent rebuttal of the Council's claims to maintain a 5YHLS.

The Response by Malvern Hills District Council

5. The Council contends that it did not seek to introduce any new reasons for refusal. Instead, it states that reference to the Hallow Neighbourhood Development Plan (HNDP) in its appeal statement was merely to show that if it could not demonstrate a 5YHLS, then the proposal would still fail the relevant tests outlined at Paragraphs 11, 12 and 14 of the National Planning Policy Framework (the Framework). It is further indicated that the original officer

report referenced the HNBP, as well as related comments provided by the Parish Council.

6. In respect of housing land supply, the Council maintains that it had a five-year supply at the time of the original determination of the application (February 2022), with the original appeal decisions provided by the appellant coming several months before the determination of the application.
7. The Council further indicates that whilst the five-year housing land supply figure has fluctuated since the original decision, at the time of the appeal it considered it was able to demonstrate a supply of 5.06 years. This was based on the findings of an interim statement of the South Worcestershire Councils Five Year Housing Land Supply (November 2022) (the 'Interim Statement') in which each authority area was indicated to be working towards calculating and publishing its individual land supply position.
8. The South Worcestershire Councils Five Year Housing Land Supply Report (December 2022) (SWCFYHLS) also adjudged Malvern Hills District Council to have a 5.06 year supply of housing. The Council has acknowledged during recent appeals that its housing land supply dropped below five years, as some sites within the SWCFYHLS were found not to be deliverable within the relevant timescales.
9. However, the Council argues that it can again demonstrate a 5YHLS following the latest calculations of its position that were published in the South Worcestershire Council's Five Year Housing Land Supply Report Addendum (April 2023) (the Addendum Report). In respect of its 5YHLS, the Council is therefore of the view that it has presented a consistent position during the appeal, based on available evidence at the relevant time.

Reasons

10. As will be seen from my main decision, I agree with the Council that the proposal is in conflict with Policy SWDP2 of the South Worcestershire Development Plan 2016. Both main parties have also acknowledged that it was only after the original application decision that the Council was found to not have a 5YHLS. As such, I do not consider the Council's refusal of the original application to be unreasonable, nor do I consider that an appeal could have been avoided in this instance.
11. Despite this, I have concerns about the Council's subsequent approach to this appeal. I appreciate that the Council highlighting that the proposed development conflicts with the HNBP may not technically have resulted in the introduction of a new reason for refusal during the appeal. However, for all intents and purposes, identifying that the proposal conflicts with the HNBP and therefore fails to gain traction from Paragraph 11 of the Framework (the applicant's key justification for the proposal), essentially equates to a new issue/reason for refusal.
12. This is a fundamental matter that the applicant had to address late in the appeal process. Clearly, the HNBP was adopted significantly before the determination of the original application, whilst the Parish Council also commented on the application raising attention to the policies of the HNBP. I am not aware of any material change in circumstances with respect to the HNBP since the time of the application. As such, if the Council was genuinely

concerned regarding the proposal's conflict with the HNBP this should have been expressed in the officer's assessment of the scheme and through its decision notice, as opposed to being introduced via the appeal.

13. Turning to housing land supply, the appellant has provided various evidence to indicate that the Council has been unable to demonstrate a 5YHLS. This initially consisted of appeal decisions from between April 2021 and November 2022¹. Notably, the appeal decision of 15 November 2022, relating to Old Hills, Callow End (ref: APP/J1860/W/22/3295623), found that the Council's shortfall equated to between 157 and 809 dwellings (depending on methods of calculations).
14. Despite this, the Council maintained that during the current appeal it could demonstrate a 5YHLS. This was originally based on the findings of its Interim Statement (November 2022) that was published around the same time as the appeal decision referred to above.
15. However, I do not consider the Interim Statement holds up to scrutiny. It provided no details of sites that were to be relied upon for delivery of homes nor their delivery rates, or whether any appropriate buffer was applied. It also did not include supply positions for each of the established housing market sub-areas adopted under the South Worcestershire Development Plan. The lack of background information as to how the stated land supply positions were reached undermines the credibility of the Interim Statement.
16. In line with the Interim Statement, the subsequent SWCFYHLS (December 2022) also adjudged Malvern Hills District Council to have a 5YHLS (5.06 years). However, the Council has since recognised that some sites within the SWCFYHLS were not deliverable, and I have been made aware of recent appeals whereby Malvern Hills District Council has acknowledged that it could not demonstrate a 5YHLS².
17. Subsequently, the South Worcestershire Council's Five Year Housing Land Supply Report Addendum (the Addendum Report), was published in April 2023. Based on the updated evidence within the Addendum Report the Council argues that it can once again demonstrate a 5YHLS. However, I note that the findings of the Addendum Report have not been relied upon by the Council in respect of two other recent appeals³ highlighted by the applicant, which suggests an inconsistency in approach.
18. Nevertheless, I recognise that maintenance of a 5YHLS is a fluid situation, while the results of the Addendum Report may not have been suitably available in time to be debated in the recent appeals referred to by the applicant. Nonetheless, even if this were the case, I have fundamental concerns over the robustness of the Addendum Report's findings (as discussed in my main decision).

¹ Appeal Ref: APP/J1860/W/19/3242098: Land South of Bransford Road, Rushwick (decision date 6 April 2021); Appeal Ref: APP/J1860/W/21/3289643: Land at Leigh Sinton Farms, Leigh Sinton Road (B4503), Leigh Sinton, Malvern (decision date 5 July 2022); and Appeal Ref: APP/J1860/W/22/3295623 Land at (OS 8349 4918), Old Hills, Callow End, Worcestershire (decision date 15 November 2022).

² Appeal References: APP/J1860/W/22/3309338 & APP/R1845/W/22/3309343 - Both relate to Land off Areley Common, Astley Cross, Stourport on Severn DY13 0JW; and APP/J1860/W/22/3306186 - Land at Berrow Green Road, Martley.

³ Appeal Ref: APP/J1860/W/22/3311888 - Geraldine Road, Malvern; and Appeal Ref: APP/J1860/W/22/3306186 - Land at Berrow Green Road, Martley.

19. Additionally, I note that at least one of the limitations to the methodology that was used to calculate the housing land supply within the Addendum Report was already known to the Council. This is evidenced through a statement of common ground between the Council and another party in respect of a separate appeal⁴. The Council should therefore have been aware that the Addendum Report would not provide an accurate representation of the Council's current five-year housing land supply position.
20. Finally, the Council has also referred to a recent appeal decision from May 2023⁵ in which the Inspector accepted that the Council could demonstrate a five-year housing land supply based upon the findings of the December 2022 SWCFYHLS. However, it is clear from the appeal decision that no substantive evidence was submitted to refute the Council's position in that appeal. Therefore, my view does not turn on this matter.

Conclusion

21. In light of all of the evidence before me, I find that unreasonable behaviour by the Council, resulting in unnecessary and wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

22. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Malvern Hills District Council shall pay to Mr Chris Kilburn, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in relation to the applicant's final comments and subsequent rebuttal to the Council's claims that it could demonstrate a 5YHLS; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to Malvern Hills District Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Lewis Condé

INSPECTOR

⁴ Addendum Statement of Common Ground on Housing Need and Supply in respect of Appeal Reference APP/J1860/W/22/3313440, Land at (OS 8579 4905), Post Office Lane, Kempsey (signed 19/04/23).

⁵ Appeal Reference: APP/J1860/W/22/3304214, Woodston Farm, Lindridge, Tenbury Wells WR15 8JG (decision date 16 May 2023).