



Costs Decision

Inquiry held on 25-28 April & 3-5, 18 May 2023

Accompanied site visit made on 2 May 2023

by I Jenkins BSC CENG MICE MCIWEM

an Inspector appointed by the Secretary of State

Decision date: 14 August 2023

Costs application in relation to Appeal Ref: APP/J1860/W/22/3313440 Land At (OS 8579 4905) Post Office Lane, Kempsey, Worcestershire

- 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 Lantar Developments Ltd for a partial award of costs against Malvern Hills District 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 outline planning permission for the erection of up to 30 dwellings and associated works with all matters reserved for future determination except for access.
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Decision

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

Reasons

2. The costs application by the appellant and the response from the Council were made in writing¹, with minor additional comments made orally at the Inquiry, which I have also taken into account.
3. Parties in planning appeals normally meet their own expenses. However, the *Planning Practice Guidance* (PPG) 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.
4. In summary, the appellant contends that the Council behaved unreasonably by raising a concern that the proposal would potentially result in the loss of an 'Important Hedgerow' and in seeking to argue that it can demonstrate a five-year supply of housing land. The appellant seeks a partial award of costs associated with the work involved in responding to each of those matters.

'Important hedgerow'
5. The examples given by the PPG of the type of behaviour which may give rise to a procedural award against a local planning authority include introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would otherwise not have arisen.
6. The Council's second reason for refusal indicated that the proposal would result in *'the loss of an important ecological feature, a hedgerow, detrimental to*

¹ Inquiry document nos. 51, 54 and 63.

biodiversity'. However, the Council's *Statement of Case*, dated 20 February 2023, confirmed that, since the appeal was lodged, a consultation response had been received from its Natural Heritage & Biodiversity Officer which confirmed that the matter had been resolved, through information submitted, such that *'The Council does not, therefore, intend to uphold references to ecology, biodiversity... in their reasons for refusal.'* In her consultation response, dated 19 January 2023, the Council's Natural Heritage & Biodiversity Officer stated that *'a total of approximately 70 m of native hedgerow will be lost...along the northern boundary of the site...This particular hedgerow...does not meet the criteria of an Important Hedgerow as defined by the Hedgerow Regulations 1997'*. The *Statement of Common Ground*, dated 2 March 2023 by the Council and the appellant, stated in relation to that hedgerow *'...it is not an 'Important Hedgerow' with reference to the Hedgerow Regulations 1997'*. The *Statement of Common Ground for Landscape and Visual Matters*, dated 3 March 2023 by the Council and the appellant, stated *'It is a matter of agreement between the Council and the appellant that the frontage hedgerow has not been identified to be an 'Important Hedgerow' with reference to the Hedgerow Regulations 1997'*. Having reviewed the appellant's proofs of evidence, the Council re-confirmed by email, dated 4 April 2023 that it was not promoting an ecology reason for refusal.

7. I consider that together, these documents clearly and unambiguously indicate the hedgerow *'has not been identified to be an 'Important Hedgerow', the Council was content that the hedgerow 'is not an 'Important Hedgerow' with reference to the Hedgerow Regulations 1997', and it did not intend to pursue the matter further at appeal.*
8. However, the Council's proof of evidence on landscape and visual impact contradicted its previously clear position, stating *'the question of whether the hedgerow fronting the site is 'important' or not remains unanswered'*. The email which followed from the Council, dated 21 April 2023, indicated that it *'has now carried out further investigations and has some concern that the hedgerow may qualify as an 'Important Hedgerow' for the purposes of the regulations.'* However, it stated *'for the avoidance of doubt, the Council does not wish to raise an argument on the grounds of ecological or archaeological impacts'*. I consider in practice that is exactly what it had done. This was on the basis of what was acknowledged by the Council to be a partial investigation, which it confirmed it did not intend to complete for the purposes of the appeal. There is no evidence before me to show that it could not have done so. In my judgement, the Council's approach amounted to introducing a new matter of potentially considerable importance at a late stage, leaving the appellant with no option but to produce evidence to respond to the potential issue itself. In my appeal decision, I have found, on the basis of the evidence presented, it appears unlikely that the hedgerow along the frontage of the site is an *'Important Hedgerow'* under the terms of the *Hedgerow Regulations 1997*.
9. I conclude that in relation to this matter, the Council behaved unreasonably by introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would otherwise not have arisen and that this resulted in the appellant incurring expense in the appeal process which would not otherwise have been necessary.

10. I therefore find, in relation to this matter, that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has been demonstrated and in relation to which a partial award of costs is justified.

Five-year housing land supply

11. I acknowledge that in previous appeals where the Council has assessed five-year supply on the basis of the joint planning area, its approach has not been supported.² In relation to appeal Ref. APP/J1860/W/21/3289643, costs were awarded against the Council for continuing to promote a plan-wide approach in circumstances where it had not been demonstrated that there were sufficient material changes prior to that appeal to justify considering the matter again. However, the same plan-wide approach is not promoted by the Council in the case before me. It has promoted a District-wide, single authority approach.
12. The Inspector who determined appeal Ref. APP/J1860/W/21/3289643 also found that, *'based on the evidence before me I cannot conclude that it has been demonstrated that the joint approach, nor the individual [single authority] approach, should be followed in the absence of these being tested at examination or through a position statement.'* However, I do not know the full circumstances of that case, such as the details of the single authority approach promoted by the appellant there. In my appeal decision, I have found, on the basis of the evidence before me, that a single authority approach should be followed and is supported by the PPG. Furthermore, I have found that suggested approach (ii), favoured by the appellant, and approach (v) (the plan-wide approach) are not to be preferred.
13. In this case, the Council promoted suggested approach (i), a single authority approach as regards the need generated by an updated standard method but not a fully updated supply, an approach which had not at that time been the subject of a previously determined appeal. Whilst acknowledging that its approach was imperfect, the Council judged it to be preferred by comparison with the other four approaches identified by the appellant. Based on approach (i), the Council estimated that the five-year deliverable housing land supply requirement was met.
14. Since the close of my Inquiry, two appeal decisions³ have been published which do not support suggested approach (i) and this appears to have led in part to awards of costs against the Council in those cases. However, it is not self-evident that the circumstances in those cases were directly comparable to those in the case before me, which for example involved the consideration of the merits of five particular alternative approaches. I have determined this costs application on its own merits.
15. I recognise that, in the run up to the Inquiry, the Council's claimed position with respect to the extent of the demonstrable housing land supply changed. From a starting point marginally in excess of a five-year supply⁴ to a marginal deficit, due in part to appeal decision findings, and then back to a position of excess, having taken account of updated inputs to the standard method published in March 2023. Responding to changing relevant circumstances

² For example, APP/J1860/W/21/3267054, APP/J1860/W/19/3242098 and APP/J1860/W/21/3289643.

³ APP/J1860/W/22/3306186 and APP/J1860/W/22/3304685.

⁴ CD 4.8 Statement of Common Ground on Housing Need and Supply, 20 February 2023.

outside of its control does not amount to unreasonable behaviour on the part of the Council in my view. At the Inquiry, the Council has provided substantial evidence in support of its preferred approach. Whilst, in my appeal decision, I do not support suggested approach (i), in my judgement, it was not unreasonable for the Council to pursue it. I conclude that the Council did not behave unreasonably in arguing that it could demonstrate a five-year supply of housing land.

16. I therefore find, in relation to this matter, that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has not been demonstrated. A partial award of costs in relation to this matter is not justified.

Costs Order

17. 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 Lantar Developments Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the work carried out to address whether the proposal would lead to the loss of an 'Important Hedgerow' as defined by the *Hedgerow Regulations 1997*; such costs to be assessed in the Senior Courts Costs Office if not agreed.

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.

I Jenkins

INSPECTOR