



## Costs Decisions

Inquiry Held on 12-21 September 2023

Site visit made on 18 September 2023

**by H Butcher BSc (Hons) MSc PGDip MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 18<sup>th</sup> October 2023

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### **Costs application 1 in relation to Appeal Ref: APP/C1435/W/22/3307820 Land at Bird in Eye Farm, South of Bird in Eye Hill, Framfield, Uckfield TN22 5HA**

- 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 Wealdon District Council and East Sussex County Council for a full award of costs against Croudace Homes Ltd.
  - 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 the erection of up to 290 dwellings, associated landscaping, informal open space and strategic SANG, with access from the B2102.
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### **Costs application 2 in relation to Appeal Ref: APP/C1435/W/22/3307820 Land at Bird in Eye Farm, South of Bird in Eye Hill, Framfield, Uckfield TN22 5HA**

- 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 Croudace Homes Ltd for a partial award of costs against Wealdon 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 planning permission for the erection of up to 290 dwellings, associated landscaping, informal open space and strategic SANG, with access from the B2102.
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## Decisions

### **Costs Application 1**

1. The application for a full award of costs is refused.

### **Costs Application 2**

2. The application for a partial award of costs is refused.

### **Procedural Matter**

3. The costs applications were made in writing after the closure of the inquiry following a prescribed timetable.

## **Costs Application 1**

### **The submissions for Wealden District Council and East Sussex County Council**

#### *Ancient Woodland*

4. The appellant's case that the proposal would not result in the loss or deterioration of ancient woodland had no reasonable prospect of success. The appellant's witnesses in respect of ancient woodland matters were unable to give basic details as to the nature of the path through ancient woodland. They also took into account the current condition of the ancient woodland contrary to Natural England's (NE) standing advice 'Ancient woodland, ancient trees and veteran trees: advice for making planning decisions'<sup>1</sup>. Furthermore, they relied on a test which had no basis in any policy or guidance. The appeal would have failed on this point alone therefore, a full award of costs is sought as the Council incurred wasted expense defending the appeal in full.
5. The consultation response from NE advised consideration of any impacts on ancient woodland and ancient and veteran trees in line with paragraph 180 of the National Planning Policy Framework. In any event, the position of NE in this appeal does not circumvent the need to comply with national policy.

#### *Highway Safety*

6. Similarly, the appellant had no reasonable prospect of succeeding in respect of highway safety matters. At the time of making an appeal for non-determination there was an outstanding objection from the Highway Authority (HA). The appellant latterly submitted multiple amendments to the proposed access to resolve this. This matter should have been resolved prior to or at application stage. It was unreasonable of the appellant to use the appeal process to overcome such a fundamental issue. The Council also raise concerns over the Road Safety Audit. Ultimately, the access put forward was unsafe, based on assertion, and incapable of overcoming the objection from the HA.

### **The response by Croudace Homes Ltd**

#### *Ancient Woodland*

7. Sufficient detail was provided in respect of the improved path. The appellant's approach to the current condition of the existing path was correct. The witnesses' evidence was given in good faith and was an entirely reasonable appraisal of their positions. NE provided bespoke advice on the acceptability of the scheme with respect to ancient woodland.

#### *Highway Safety*

8. The amendments to the access proposals satisfied the Wheatcroft criteria as determined by the Inspector and saved Inquiry time. The road safety auditor provided his independent and definitive view over an extended period of time considering all relevant matters.

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<sup>1</sup> Core Document G.3

*Other Matter*

9. The appellant queried whether the County Council are entitled to apply for costs.

**Reasons**

10. As set out in Planning Practice Guidance (PPG) costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

*Ancient Woodland*

11. It will be seen from my decision that I considered sufficient information was provided to the Inquiry to enable me to understand the nature of the path upgrades proposed through the area of ancient woodland in order to determine if any loss or deterioration would occur.
12. It is not unusual or unreasonable for witnesses to have differing views as to the interpretation of evidence. The appellant's witnesses explained how they came to their expert opinions at the Inquiry. The purpose of an Inquiry is to test evidence. Whether their approach to the evidence was flawed or not I find no unreasonable behaviour in this case.
13. Whilst there was much weighing against the matter of ancient woodland in this case, not least NE standing advice and comments from the Forestry Commission, I, nevertheless have some sympathy with the appellant given the encouragement they received separately from NE in respect of the creation of a path through the ancient woodland to serve the Suitable Alternative Natural Green Space. It is therefore understandable why the appellant advanced their case as they did and overall does not amount to unreasonable behaviour.

*Highway Safety*

14. The submission of amendments to the proposed access was not unreasonable behaviour on the part of the appellant. Although the appeal process should not be used to evolve a scheme, in my view the changes were not fundamental and, in any event, as I determined in my Ruling during the Inquiry, all persons who should have been consulted on the amended access plan were given the opportunity to do so. Furthermore, the revised plans proved useful in allowing the points at issue to be narrowed. I therefore find no unreasonable behaviour in this regard.

*Other Matter*

15. As set out in the PPG interested parties who have taken part in the appeal process, including statutory consultees, may apply for costs.

*Conclusion*

16. I find that unreasonable behaviour on the part of the appellant resulting in unnecessary or wasted expense to the Council has not been demonstrated. The Council's application for a full award of costs is therefore not justified.

## **Costs Application 2**

### **The submissions for Croudace Homes Ltd**

#### *Instruction of Counsel for the Appellant*

17. The Council objected to the barrister appointed by the appellant; Mr Boyle KC, shortly after the Case Management Conference, and wrote directly to Landmark Chambers on this matter. The appellant did not want the distraction of a protracted dispute regarding this point and so felt forced to instruct alternative counsel. This therefore resulted in the duplication of work and additional costs.
18. Although Mr Boyle KC had represented the Council in 2008 it was unreasonable of the Council to raise a complaint. Mr Boyle KC would not have represented the Council had he considered a conflict to exist. Given the passage of time, in particular, no conflict existed.

#### *Locational Sustainability Objection*

19. The Council's pursuit of a locational sustainability objection was unreasonable. The 2009 Secretary of State decision at the appeal site<sup>2</sup> determined that sustainability was not sufficient a reason to refuse planning permission, and there is no evidence of any material change of circumstance in the years that have followed. The appellant was made to incur unnecessary costs preparing for and arguing these matters at the Inquiry.

#### *Unreasonable Objection to the Admission of Drawing No 5330/021 Rev P*

20. It was unreasonable for the Council to object to the submission of this plan at the start of the Inquiry. Their objection failed to focus on the key issue which was whether anyone would be prejudiced by its acceptance. They also unreasonably raised concerns about deliverability and validity of the appeal in respect of this plan which were not a legitimate basis for opposing its admission.

#### *Ancient Woodland Objection*

21. The Council have never had good reason to disagree with the support given to the appeal scheme from NE, and who worked collaboratively with the appellant and were, indeed, the source of the suggested path through ancient woodland.
22. The Council's case in respect of ancient woodland evolved throughout the Inquiry. This was unreasonable behaviour. Furthermore, the Council did not agree a Statement of Common Ground (SOCG) on Ancient Woodland matters which would have saved Inquiry time as many of the Council's witness' points were the product of misunderstanding or could have been agreed separately following a short discussion. The topic took up significant preparation and Inquiry time.

#### *Overall Point*

23. If the Council had reasonably scoped its putative reasons for refusal and thereafter conducted itself reasonably the appeal could have been resolved in a 1-day hearing. A partial award of costs reflecting c. 80% of the appellant's costs or an award reflecting these specific matters is therefore requested.

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<sup>2</sup> Core Document K.11

## **The response by Wealden District Council**

### *Instruction of Counsel for the Appellant*

24. The Council properly raised its concerns with respect to Mr Boyle KC acting as Counsel for the appellant, with Landmark Chambers, by letter, giving them the opportunity to comment. It was Mr Boyle KC who decided to return his instructions. Had the appellant, Landmark Chambers, or Mr Boyle KC disagreed with the Council's concerns then they could have continued to act for the appellant and have the matter determined in a forum outside of the Inquiry. The Council did not force the appellant's hand on this point and their concerns were based upon the proper application of the Bar Handbook.

### *Locational Sustainability Objection*

25. There is no such statement in the 2009 Secretary of State Decision<sup>3</sup> that locational sustainability was not a sufficient reason to refuse planning permission. Rather sustainability was part of the reason why permission was refused.

26. The R6 party also called evidence on the locational sustainability of the appeal site. Therefore, even if the Council had not pursued this putative reason for refusal the appellant would have had to address the issue in any event.

### *Unreasonable Objection to the Admission of Drawing No 5330/021 Rev P*

27. The Council's objection to the admission of this plan was based upon the expert advice of the HA regarding deliverability of the new access. It was perfectly proper to raise this and the matter went to the issue of prejudice as it concerned impacts to third party land. Once the Inspector made her Ruling the Council accepted it and moved on.

28. Even if the Council's approach was unreasonable, the appellant had fair warning of the Council's position and no additional costs would have been incurred above those reasonably necessary for attendance at the Inquiry.

### *Ancient Woodland Objection*

29. This ground continues to promote the appellant's misapprehension that NE gave comprehensive advice on this issue. The Council's witness on ancient woodland took account of all available evidence before him when writing his evidence. The reality is that a consultation response will always be less detailed than evidence given at an Inquiry. The Council attempted to agree a SOCG with the appellant, but the appellant latterly decided that the document would not be useful.

## **Reasons**

30. As set out in the PPG costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

### *Instruction of Counsel for the Appellant*

31. The Council were at liberty to raise this issue with the appellant outside of the Inquiry process and the appellant was similarly at liberty to act accordingly on

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<sup>3</sup> Core Document K.11

it. It was a matter between the parties concerned and could have been determined in a forum outside of the Inquiry if so needed. I therefore find no unreasonable behaviour in this regard.

*Locational Sustainability Objection*

32. Whilst my decision found in favour of the appellant on this point, as also demonstrated therein, matters such as planning policy and material considerations have moved on since the 2009 Secretary of State Decision<sup>4</sup>. I therefore find no unreasonable behaviour on the part of the Council in pursuing this reason for refusal.

*Unreasonable Objection to the Admission of Drawing No 5330/021 Rev P*

33. The Council were entitled to object to the late submission of Drawing No 5330/021 Rev P. Objecting, would not, of itself, amount to unreasonable behaviour as they were entitled to give their view. The Council were also entitled to raise concerns over validity and deliverability, and these were dealt with accordingly. I therefore find no unreasonable behaviour in this regard.

*Ancient Woodland Objection*

34. It will be seen from my decision that I find that the Council did have good reason to not rely entirely on the consultation comments from NE on the application. The Council's case may have evolved somewhat during proceedings but not to an unreasonable level as it was necessary to fully explore all of the matters at play in the Inquiry.

35. The Council made efforts to discuss a SOCG on Ancient Woodland. In any event I do not consider that this, of itself, would have materially reduced Inquiry time given the differences between the main parties on this matter.

*Overall Point*

36. Other matters were raised by the R6 party, including highway safety, locational sustainability, drainage and flood risk, and, as the Inspector, I also raised the matter of heritage. Therefore, it would not have been possible to deal with the Inquiry as a 1-day hearing even if the Council had withdrawn its ancient woodland and locational sustainability objections.

*Conclusion*

37. I find that unreasonable behaviour on the part of the Council resulting in unnecessary or wasted expense to the appellant has not been demonstrated. The appellant's application for a partial award of costs is therefore not justified.

**Costs Application 1**

38. The application for a full award of costs is refused.

**Costs Application 2**

39. The application for a partial award of costs is refused.

*Hayley Butcher* INSPECTOR

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<sup>4</sup> Core Document K.11