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## Costs Decision

Hearing held on 25 September 2023

Site visit made on 26 September 2023

**by K Savage BA(Hons) MPlan MRTPI**

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

**Decision date: 09 November 2023**

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**Costs application in relation to Appeal Ref: APP/J1860/W/23/3323076  
Land at OS 8223 5896, off Oakleigh Heath, Hallow, nr Worcester  
Easting: 382273 Northing: 258944**

- 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 Andrew Browne (Hamelin Partnerships Limited) for a full award of costs against Malvern Hills District Council.
  - The appeal was against the refusal of planning permission for construction of 40 affordable dwellings including a mix of one, two, three and four bedroom properties and the construction of a new internal road, parking, SUDS infrastructure, and green infrastructure (including public open space).
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### Decision

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

### Reasons

2. 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.
3. The appellant contends that it prepared considerable technical evidence to address the Council's five reasons for refusal, but the Council failed to substantively address this in a Statement of Case that was just three pages long. It adds that the Council failed to revise its case following its belated acceptance that it could not demonstrate a five year supply of deliverable housing sites, particularly in respect of the weight to be afforded to any conflict with SWDP Policies 2 and 16 in the overall planning balance. It is further argued that the Council withdrew the substance of its third reason for refusal relating to density and urbanising impact and offered no cogent argument beyond the 'inevitable' harm of building on greenfield land. The appellant also points out that Reasons 4 and 5 were resolved by the time of the hearing, but that both could and should have been resolved during the application process and should not have formed reasons for refusal.
4. The Council in response states that its acceptance of the housing land supply position established in the *Kempsey* appeal was presumed to have removed the first reason for refusal, even if it did not state this explicitly. It adds that Reasons 4 and 5 required ongoing negotiation which would otherwise have been necessary as part of the application process. With respect to Reason 2, the Council argues that whether the proposal met with SWDP Policy 16, and

what weight should be afforded to it in light of the Council's housing land supply position, was a matter of judgement for the decision maker. Similarly, the Council states that the assessment of landscape impact is a subjective consideration requiring the Inspector to exercise their planning judgement.

5. The Council has acknowledged that it effectively withdrew Reason for Refusal 1 following the *Kempsey* decision, but only did so after the appellant had provided the appeal decision, and only made it clear it had done so in its costs response on 21 September, some five weeks after the decision. Prior to this, the appellant's evidence identified several appeals dating to 2021 where the Council was found not to have a five year housing land supply, all predating the *Kempsey* decision. The Council was, or should have been, aware of these appeal decisions. In particular, it accepted its supply was less than five years at appeal in March 2023<sup>1</sup>, prior to it submitting its statement of case in July 2023, and its continued pursuit of the appeal on the basis it could demonstrate a sufficient supply was contrary to the evidence. Moreover, once it did accept its supply was less than five years, the Council failed to offer any substantive evidence, in writing or at the hearing, as to the effect of this on its overall case, particularly the implications a lack of a five year housing land supply has for application of Paragraph 11 of the National Planning Policy Framework. The District Council's actions, up to the point it made clear it had withdrawn its first reason for refusal on 21 September 2023, constitute unreasonable behaviour.
6. With respect to Reason 2, I accept that whether there is a local affordable housing need is a matter of planning judgement, but it is incumbent on the District Council to review their case upon receipt of an appeal. The District Council did not offer any substantive evidence to rebut the appellant's detailed technical evidence of affordable housing need. It was left largely to Hallow Parish Council to advance a case against the appellant at the hearing. Moreover, following its acceptance of the *Kempsey* decision, the District Council failed to review its case or provide any substantive argument as to the implications of its housing land supply position in terms of the weight to be applied to Policy SWDP 2 and SWDP 16 in the overall planning balance. I find that the District Council's failure to address these matters was unreasonable.
7. The District Council's third reason for refusal referred clearly to 'density' and 'urbanising impact' but within the Statement of Common Ground it had conceded that density, design and massing were all acceptable. The District Council also offered no argument beyond the intrinsic change from open field to developed site, and it offered no detailed rebuttal to the appellant's further evidence on landscape impact at the hearing. In this respect, I find that the District Council failed to substantiate its reason for refusal, partially withdrawing it but continuing to argue a vague 'in principle' harm unsupported by evidence to counter that advanced by the appellant. This amounts to unreasonable behaviour.
8. For clarity, I find no unreasonable behaviour with respect to the parts of the third reason for refusal relating to neighbours' living conditions, as this was a valid objection which required the appellant to submit revised plans to overcome.
9. In respect of Reason 4, highways matters were subsequently resolved prior to the hearing and did not require the appellant to dedicate time or personnel at

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<sup>1</sup> Areley Common - APP/J1860/W/22/3309338 and APP/R1845/W/22/3309343

the event. The failure to agree these matters earlier is unfortunate, but given the objection from the local highway authority, the District Council was justified in refusing permission on this basis. Whilst I note the appellant's frustrations with a lack of correspondence from the District Council during the application, the evidence is not clear that such matters would have been resolved prior to a decision being made, such that an appeal could have been avoided. Given the District Council's subsequent efforts to reach agreement on this matter prior to the hearing, I do not find unreasonable behaviour in respect of this reason for refusal.

10. Similarly, the final reason for refusal relating to a lack of a Section 106 agreement is typical where a proposal is being otherwise refused and the time and expense of preparing a legal agreement would be in vain. Ultimately, it was necessary for the main parties to work together, either at application or appeal stage, to produce a completed legal agreement. The District Council has engaged with the appellant during the appeal process to enable a completed agreement to be before me at the hearing but given the appellant's disputing of certain contributions up to and at the hearing, it is not certain that these matters could have been fully addressed before the District Council issued its decision, and it is clear from my decision that these were matters requiring adjudication at appeal. Therefore, I do not find unreasonable behaviour in respect of this reason for refusal.

11. For these reasons, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the first, second and part of the third reason for refusal and a partial award of costs is therefore warranted.

### **Costs Order**

12. 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 Andrew Browne (Hamelin Partnerships Limited), the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in contesting the first and second reasons for refusal, and the third reason for refusal in so far as it relates to matters of character and appearance and landscape impact; such costs to be assessed in the Senior Courts Costs Office if not agreed.

13. 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.

*K Savage*

INSPECTOR