



## Costs Decision

Hearing held on 16 January 2024

Site visit made on 17 January 2024

**by Mike Robins MSc BSc(Hons) MRTPI**

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

**Decision date: 03 April 2024**

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### Costs application in relation to:

#### **Appeal A: Ref: APP/K1128/W/23/3327455**

#### **Land at Garden Mill, Derby Road, Kingsbridge, Devon, TQ7 1SA**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by Blakesley Estates (Kingsbridge) Ltd (now T/A Garden Mill Ltd) against South Hams District Council.
  - The application Ref 1803/23/VAR, is dated 7 June 2023.
  - The application sought planning permission for an outline application with some matters reserved for a residential development scheme for 32no. dwelling at allocated site K4 without complying with conditions attached to planning permission Ref 28/1560/15/O, under Appeal Ref APP/K1128/W/3156062, and reserved matters Ref 0826/20/ARM, dated 05 June 2017 and 21 December 2020 respectively.
  - The conditions in dispute are No 7 of the Outline permission, which states that:  
*The development hereby permitted shall be carried out in accordance with the following approved plans: 215/06A, 215/11, 215/08, 215/09, 215/10, 215/29, 215/30, 215/31, 215/28, 215/13, 215/33, 215/12, 215/15, 215/14, 215/32, 215/34, 215/07A, 215/01A, 215/02A, 215/03A, 215/04B, 215/05A, 215/102A, 215/201, 215/17, 215/16, 215/19, 215/18, 215/21, 215/20, 215/22, 215/23, 215/24, 215/25, 215/26A, 215/27, 215/35, 215/101A, 215/103A;*  
and No 1 of the Reserved Matters permission, which states that:  
*The development hereby permitted shall be carried out in accordance with the application form and the following approved plans/documents received on:*  
*30th March 2020: 215-35, 215-37, 215-38, 215-39, 215-40, 215-41, 215-42, 215-1024.*  
*16th November 2020: 215-1021 Rev C, 215-1022 Rev A, 215-1023 Rev A, 215-1025 Rev C.*
  - The reasons given for the conditions are:  
Condition 1: *In order to ensure compliance with the approved drawings.*  
Condition 7: *A condition specifying the scheme drawings is necessary for certainty.*
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#### **Appeal B: Ref: APP/K1128/W/23/3325969**

#### **Land at Garden Mill, Derby Road, Kingsbridge, TQ7 1SA**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by a condition of a planning permission.

- The appeal is made by Blakesley Estates (Kingsbridge) Ltd (now T/A Garden Mill Ltd) against South Hams District Council.
  - The application Ref 1170/23/ARC, dated 30 March 2023, sought approval of details pursuant to condition No 8 of a planning permission Ref 28/1560/15/O granted on 05 June 2017, under Appeal Ref APP/K1128/W/3156062.
  - The development proposed is an outline application with some matters reserved for a residential development scheme for 32no. dwelling at allocated site K4.
  - The details for which approval is sought are: details and samples of materials to be used on the external elevations of the dwellings.
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## **Decision**

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

### **The submissions for South Hams District Council**

2. The costs application was initially made in writing, dated 15 January 2024, seeking a partial award of costs. This was subsequently updated orally at the Hearing, where the application was changed to seek a full award.
3. The initial application related to the Council's costs in dealing with the planning merits of Appeals A and B. This application referred to the Planning Practice Guidance (PPG) and paragraphs 30, 31 and 32, and considered that the matter of the validity of the appeal should have been addressed following the Council's own refusal of the applications for a Lawful Development Certificate (LDC). In so doing, the Council argue, parties would have been spared the expense of preparing evidence on the planning merits if the finding was that the host permission had lapsed.
4. At the Hearing, the Council chose to expand their case and argue for a full award. Notwithstanding that, in their written application, they considered it reasonable to seek a decision from an Inspector on whether the host permission had lapsed, that was on the understanding that there was a factual case in seeking to comply before the December 2022 deadline.
5. That, the Council say, is not the appellant's position now and they referenced PPG Paragraph 53, which considers that a party is at risk of costs if an appeal has no reasonable prospect of succeeding. The onus of proof is on the appellant and concessions made at the Hearing show that there was inadequate evidence to support their legal arguments. The Council considered that it was not asserted or substantiated that all of the fencing was in place at any point, and not before the implementation date of December 2022.
6. It would appear, the Council states, that the appellant's case now argued was that parts of the fencing was installed on an ad hoc basis as they considered necessary, with no argument that an alternative alignment approach extended across the whole site. In absence of evidence, this, the Council say, was a quintessential example of wasted costs where a planning permission had lapsed.

### **The response by Garden Mill Ltd**

7. The response was made orally at the Hearing.
8. The original outline application was made 9 years ago. The choice to appeal the s73 application was made for reasons of pragmatism. Garden Mill Ltd

wanted to develop the site having, they say, made a lawful implementation of the host permission. That they had drawn the validity of the appeals into the scheme was for practical reasons, as to have had to deal with 2 separate appeals would take too long.

9. The revised scheme is a well-considered one, with considerable merits over the host permission and would provide a positive housing mix, including 75% 2 and 3 bed units. If refused, what, they ask, will happen to the site.

### **The final response for South Hams District Council**

10. In their response to the appellant's arguments, the Council suggested that it contained no response to the evidential arguments put, and simply to assert the permission had not lapsed is no sort of answer.
11. While it may be open to merge LDC and planning merits appeals, this is not generally how the procedure should work. Parliament identified separate procedures for legal issues precisely because it specifically avoids spending time and costs on planning merits, potentially academically.
12. Consequently, in taking this highly irregular approach, the appellant must accept the consequences. The Council consider that there is hardly a more obvious circumstance for costs, especially where the appellant had not come close to meeting the case required.

### **Reasons**

13. Parties in planning appeals normally meet their own expenses. However, the 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.
14. While I note the Council's position regarding the onus on the appellant to prove their case and justify that this was not one where the appeal had no reasonable prospect of success, the appellant presented a legal opinion on the validity of the appeals. This was supported with statements from the site manager and evidence at the Hearing from the author of that opinion and the arboricultural advisor, as well as from the developer.
15. While I may have found that that evidence was insufficient to demonstrate either that Condition 6 was not a condition precedent that went to the heart of the permission, or that it had not been breached, such findings are a judgement based on the matters presented to me. While concessions regarding the provision of fencing were made at the Hearing, this does not mean that no evidence was produced or that the argument necessarily had no reasonable prospect of success. Consequently, on this particular matter, I do not consider the appellant was unreasonable and a full award of costs should not follow.
16. However, in this case, the appellant chose not to appeal either of the LDC refusals, but instead bring an appeal for non-determination in circumstances where the Council's decision was explicitly that they declined to determine because the relevant permission had, in their view, lapsed.
17. While it may have been pragmatic from the appellant's point of view not to have followed the well-established procedure of appealing against an LDC

refusal, it necessitated the Council preparing a response on the planning merits on the understanding that were the issue of validity to fall, those preparation would have been to no purpose.

18. That the appeal was an unusual one is confirmed by my own questions on the initial review of the case<sup>1</sup>. Furthermore, from an early stage the Council were clear that they did not want to have to commit to the preparation of evidence on planning merits were it not to prove necessary, and wished the matter of the status of the permission to be assessed separately<sup>2</sup>.
19. The appellant's position on splitting the appeal, or hearing the case on validity separately, was to refute such an approach<sup>3</sup>. Furthermore, I could not agree to the Council's proposal for a preliminary assessment on the validity of the appeals, principally because the appeal was made under s78 of the Town and Country Planning Act 1990 and not against the LDC, and the appellant did not support it. However, in my pre-Hearing note, dated 22 December 2023, I noted that the Council's legal opinion on this matter had merit and that my deliberations, if it was found that the appeal had lapsed, would stop at there.
20. In such circumstances, the risks and consequences of choosing to pursue an appeal where the issue of the validity was to be informed by whether the permission had lapsed or not, were clear. That those consequences could have been avoided can be considered, in part, the reason that appeals under s191 are available under the Act. Consequently, I consider that the appellant was unreasonable in their approach.
21. It is inevitable that, on a finding that the permission had lapsed, all work relating to the planning merits of Appeal A and B would result in unnecessary work and wasted expense.
22. Accordingly, for the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the Council preparation and presentation of evidence in relation to the planning merits of Appeals A and B, and a partial award of costs is therefore warranted.

### **Costs Order**

23. 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 Garden Mill Ltd shall pay to South Hams District Council, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in addressing the planning merits of the appeals; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Garden Mill Ltd, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*Mike Robins*

INSPECTOR

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<sup>1</sup> Email dated 3 October 2023

<sup>2</sup> Email dated 12 September 2023

<sup>3</sup> Email dated 15 September 2023

