



Costs Decision

Inquiry Held on 21 June - 6 July 2022

Site visit made on 5 July 2022

by Richard McCoy BSc MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 9 August 2022

Costs application in relation to Appeal Ref: APP/C1570/W/22/3291524 Land at Warish Hall Farm, Smiths Green, Takeley

- 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 Weston Homes PLC for a partial award of costs against Uttlesford District Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for "Mixed use development including: revised access to/from Parsonage Road between Weston Group Business Centre and Innovation Centre buildings leading to; light industrial/flexible employment units (c.3568sqm) including health care medical facility/flexible employment building (Use Class E); 126 dwellings on Bulls Field, south of Prior's Wood; 26 dwellings west of and with access from Smiths Green Lane; 38 dwellings on land north of Jacks Lane, east of Smiths Green Lane including associated landscaping, woodland extension, public open space, pedestrian and cycle routes".
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Decision

1. The application for a partial award of costs is refused in respect of the Council failing to produce evidence to support Refusal Reason 3 but is allowed in respect of the Council introducing evidence on ecology contrary to what had been agreed in the Statement of Common Ground, in the terms set out below in the Costs Order.

The submissions for Weston Homes PLC

2. The application is for a partial award of costs in respect costs incurred in responding to Reason for Refusal 3 (RfR3). It is argued that RfR3 never provided any proper basis for refusal of permission, the Council failed to produce evidence to substantiate RfR3, RfR3 itself, and such evidence as has been advanced by the Council, is vague, generalised, unsupported by any objective analysis and inaccurate in the assertions made as to the appeal scheme's impact, and the Council refused planning permission on a planning ground, capable as the Statement of Common Ground (SoCG) makes clear, of being dealt with by conditions.
3. While RfR3 does not specifically refer to ecology, the only policy cited in that reason is Policy ENV8 which is an ecology policy that applies to "development that may adversely affect" ancient woodland. The policy is focussed on "landscape elements" and is headed "Other Landscape Elements of Importance to Nature Conservation". Moreover, the Council in its Statement of Case

- clearly intimated that it would be pursuing a case based on ecological impacts (paras 6.14 – 6.16).
4. The raising of ecological issues as part of RfR3 was unjustified as there was no evidence before Members to justify this. The SoCG states at paragraph 6.28 that, “No objection to any of the technical design of the Appeal scheme was raised during the course of the application, as a result of any impact on trees or biodiversity” and at paragraph 6.30 “There are no statutory consultees who have objected to the proposal having regard to any adverse impact on ecology or the ASNW.”
 5. There no objection from Natural England or the County Council’s Place Services Ecologists and Green Infrastructure Officer. Members seem to have instead blindly followed the objection from the Woodland Trust despite all of the evidence to the contrary. The Woodland Trust’s main issue being that a buffer zone of 50m from the woodland edge to the development be implemented “to avoid root damage and to allow for the effect of pollution from the development”. That view has no support from national nor local policy nor from the Standing Advice.
 6. The Council neither called nor produced to the Inquiry any ecological evidence from any expert. In her proof Ms Bakker stated “although ecology is not explicitly stated as a reason for refusal, I consider that there are ecological impacts which have not been effectively mitigated which contribute to the cumulative indirect effects of the development on Prior’s Wood”. She then proceeded to put forward evidence on ecology that she was not clearly qualified to give. In the Round Table session, she accepted she had no such expertise but said she often spoke to such experts. That does not qualify her to give this evidence. However, having advanced this case the points made had to be rebutted.
 7. Moreover, in cross-examination Mr Dawes accepted that the Council was not advancing any case on adverse impacts on ecology. Indeed, he accepted, as he had to, that the applicant’s evidence demonstrated positive impacts on ecology. Given this concession it is difficult to fathom Ms Bakker’s evidence. It therefore must be the case that in relation to RfR the Council have failed to produce evidence to support RfR3.
 8. The Council on 11 May 2022 indicated that it would not be calling an arboriculture witness despite having led the applicant to believe this would be the case, for example, at the Case Management Conference (CMC), leaving this matter to be addressed by Ms Bakker. Thus, the only evidence on which the Council relied to support RfR3 is (i) the “arboricultural evidence,” which was appended to its Ms Bakker’s proof and (ii) her own (non-expert) commentary on these matters. In relation to (i) the applicant has already raised several serious procedural complaints relating to the unreasonableness of producing late evidence. This “evidence” is deficient in a number of ways. It was late and seeks to go behind what has been agreed by the Council in the SoCG.
 9. Furthermore, it contains several errors, no doubt because of its author being instructed, for no apparent good reason, at the fifty-ninth minute of the eleventh hour. To conclude, its author was not called. This evidence could thus only ever have been given very limited weight. So, the only conclusion must thus be that of Mr Hyett’s: the applicant has put forward sufficient mitigation and RfR3 lacks any merit.

10. The Council's "arboricultural evidence" deals only with the fact that the road/cycleway lies within the 15m buffer in the standing advice. There are two issues with this. Firstly, non-compliance with the standing advice is not the same as a breach of local or national policy on ancient woodland. Secondly, RfR3 was not confined to the road/cycleway. It refers also "*to siting of a large - scale housing development adjacent to its boundary.*" That matter is not dealt with at all in the Council's "arboricultural evidence". The only point pursued by the Council on this has been a landscape issue based on impact on the setting of Priors Wood. But that is a matter under RfR1. RfR3 is focussed on trees and ecology and no case at all has been advanced on impacts from the housing being located where it is. It is accepted that all the housing lies outside the 15m buffer.
11. It is difficult to see how the criticism that the appeal scheme does not provide sufficient mitigation in terms of its impact upon Prior's Wood can bear any scrutiny. Prior to the consideration of the application at Planning Committee, officers were fully content with the proposed mitigation put forward and did not seek to obtain more. At the CMC the Council indicated that there was potential to provide additional mitigation and to remove this objection. However, the Council has not provided any further information as to what such additional mitigation may be.
12. In so far as Mr Dawes and Ms Bakker address arboricultural matters in their proofs they are not qualified to do so. Mr Dawes in cross-examination accepted that when he wrote his proof, he had not seen the Council's "arboricultural evidence" and hence had no evidential basis for his contentions on this subject. Members when refusing permission were, he accepted, in the same position. Crucially, in the SoCG (paragraph 6.31) the Council agreed in terms that "no trees within the ANSW are to be removed or impacted on directly as a result of the proposed route through the buffer".
13. The weakness of the Council's position on RfR3 is illustrated by two further matters. Firstly, Mr Dawes did not include Policy ENV8, the only Development Plan policy cited as being breached in RfR3, as being one of the four key policies justifying refusal. Secondly, the Council agreed in the SoCG that the only footnote 7 policies (of paragraph 11d of the National Planning Policy Framework) in play were in relation to heritage. It is accepted by all parties that footnote 7 refers to "irreplaceable habitats" and that this includes ancient woodland. The Council though do not contend that any impact on ancient woodland, the subject matter of its RfR3, could constitute a "clear reason for refusal". That is, as noted above, in and of itself a telling concession in relation to the strength (or rather lack thereof) of RfR3.
14. Finally, it is agreed in the SoCG that "*mitigation of impact on the woodland includes the draft woodland management plan and can be secured via conditions or planning obligation*", and that "*the woodland enlargement by approximately 10% and measures to secure its longer term management are a benefit to the proposal.*"
15. For these reasons, it is contended that the Council acted unreasonably, putting the applicant to unnecessary expense, by necessitating the need to produce proofs of evidence and rebuttals from Mr Hyett and Mr Hadfield and call them to give evidence at the Inquiry in this regard, in addition to time spent by other

witnesses and the Counsel team dealing with RfR3 by way of preparation for and at the inquiry. A partial award of costs is justified.

The response by Uttlesford District Council

16. RfR3 encapsulates members' concern that the proposed development breached Natural England and the Forestry Commission's standing advice on making planning decisions where there is ancient woodland on or near the proposed development site. That is clear from the wording of the reason for refusal itself, "In particular, the location and layout of the principal roadway serving the residential and commercial development does not provide a sufficient buffer afforded to Prior's Wood, to address the potential detrimental impacts associated with the siting of a large-scale housing development adjacent to its boundary."
17. Policy ENV8 is correctly cited as the policy which is engaged where development "may adversely affect...Larger semi natural or ancient woodlands". The alternative would have been to refer to Policy ENV7, the only other policy which refers to ancient woodland but which is concerned with "likely" effects on local areas of nature conservation significance. Nothing in the language of RfR3 indicates that it is founded on ecological as opposed to arboricultural concerns.
18. Similarly, although the section of the Council's Statement of Case which deals with RfR3 is headed "Impact on Ecology", the text which follows provides the detail of the Council's case under that heading and reiterates that the concern relates to the lack of a sufficient buffer, in breach of the Standing Advice. No wider ecological concerns are raised.
19. Although it is not part of the development plan or national policy or guidance, the Standing Advice is issued by two statutory consultees – Natural England and the Forestry Commission. It is clear from the applicant's own evidence that they recognised and accepted the importance, where possible, of adhering to the Standing Advice. In the circumstances, the Council was fully entitled to give the Standing Advice due weight, and to require clear reasons given for any departure from it.
20. The breach of the Standing Advice is a simple matter of fact. In x-exam, Mr Hyett agreed that there is no provision in the Standing Advice for the buffer zone to be reduced simply because there are no roots within it, and that the access road through the "pinchpoint" breached the guidance. Of itself, that breach is a material planning consideration which should be taken into account in determining this Appeal.
21. The Council has provided evidence to support its case that there is potential harm to the ancient woodland as a result of compromising the buffer zone, from expert arboriculturalist Graeme Drummond, whose views are supported by the Woodland Trust. In cross-examination Mr Hyett accepted that the incursion of the access road and the cycle-path into the 15m minimum buffer was contrary to the guidance. While Mr Hyett argued that the proposed landscaping treatment of the Linear Park is consistent with the Standing Advice, for the reasons advanced by Ms Bakker it clearly is not.
22. Mr Hyett's argument is contingent upon the edge of the woodland being measured from the trunk of the trees. However, the contention that this was

- the proper measuring point first appeared in Mr Hyett's proof of evidence. Prior to that, the Arboricultural Impact Assessment had suggested it should be taken from the outer edge of the ditch which the Council contends is correct. Even if it is not, members cannot be criticised for proceeding on that basis at a time when this is what the applicant was suggesting. This is important, because if the measurement is taken from the outer edge of the ditch, then it will bring part of the above ground built form of the appeal scheme into the buffer.
23. Mr Hyett's argument is also contingent upon his view that the buffer need not be more than 15m. However, the Standing Advice clearly states that this is a minimum, and that a larger buffer may be required if either the surrounding area is less densely wooded or it is close to residential areas. Both those factors exist at the Appeal Site. Mr Hyett's suggestion that a wider buffer was not required because there were no roots within the 15m buffer ignores the fact that neither of these reasons for seeking a wider buffer has anything to do with the presence or absence of roots.
24. In the circumstances, through the report of Mr Drummond and its cross-examination of Mr Hyett, the Council has plainly evidenced the basis for the complaints set out in RfR3, namely, that the appeal scheme fails to provide a sufficient buffer to the Ancient Woodland, and that the applicant has not explained why it is necessary for the road and cycle way to be located within the buffer zone, or for the development to be so close.
25. In terms of applicant's points in respect of ecology, Policy ENV8 is not an ecology policy and the Council did not "clearly intimate" in its statement of case that it would be pursuing a case based on ecological impacts. No ecological issues were raised by members as part of RfR3. The fact that there was no objection from Natural England is irrelevant to the validity of RfR3. As made clear in its consultation response, NE "will only provide bespoke advice on ancient woodland/veteran trees where they form part of a SSSI or in exceptional circumstances" In all other cases, decision-makers are to take into account the Standing Advice.
26. Further, while no objection was maintained on this basis, Place Services Ecology did raise a concern regarding the foot/cycle path within the 15m buffer in their first consultation response which was never expressly withdrawn. As for ECC's Green Infrastructure team, they may not have objected to the granting of permission on Green Infrastructure grounds, but they did say that "To safeguard the woodland, it would be necessary for the public to be excluded from Priors Wood" and that it "should not be treated as part of the open space provision serving the proposed development". They did not comment further on the potential impacts of the development on the ancient woodland. In the circumstances, there was nothing to preclude members from taking into account the concerns expressed by the Woodland Trust which went further than simply insisting upon a 50m buffer.
27. There was no requirement for the Council to call nor produce ecological evidence in circumstances where it was not pursuing an ecological reason for refusal. This is expressly recognised in the cited passage from Ms Bakker's proof: "although ecology is not explicitly stated as a reason for refusal". Ms Bakker readily admitted that she was not qualified to give expert evidence on ecology matters. A passing reference to such matters in her proof – as part of her consideration of Priors Wood as an important landscape feature – did not

- justify a rebuttal proof from an expert ecologist. The points regarding the weight to be given to Ms Bakker's non-expert views on such matters could be made in closing submissions without the need for evidence on the point.
28. Mr Dawes' response in cross-examination is entirely consistent with the fact that the Council has not sought to advance any case of adverse impacts on ecology as part of RfR3
 29. The Council was clear at the CMC that it was still determining its final list of witnesses and it is therefore denied that it led the Appellant to believe that it would be calling an arboricultural witness or ecologist. The procedural complaints which the applicant raises in relation to Mr Drummond's evidence go, if anything, to the weight to be afforded to that evidence.
 30. As set out above, there is no dispute that the Standing Advice is guidance as opposed to policy. Nonetheless, it is guidance issued by statutory consultees whose expertise should carry great weight in the decision-making process. Breach of it is, therefore, a material consideration in the determination of this appeal.
 31. The Council's evidence focusses on the roadway/cycleway being within the buffer zone as that is the most blatant breach of the Standing Advice. RfR3 does not allege that the housing will be situated in the buffer zone, it simply notes that the buffer zone recommended by the Standing Advice is designed to avoid the potential detrimental impacts associated with having large-scale housing development so close to ancient woodland. There was therefore no need for the Council's evidence to address this issue.
 32. The criticism that the appeal scheme does not provide sufficient mitigation was wholly substantiated by Mr Hyett's concession in cross-examination that his use of the term "mitigation" in section 8 of his proof was an error because, in his view, there was no impact on the trees to mitigate against. In any event, a number of the "mitigation" measures relied upon by the applicant – for example the Woodland Management Plan and Woodland Extension – are considered in the Standing Advice to be compensation measures instead.
 33. Mr Dawes and members of the Council's planning committee may not be qualified arboricultural experts but they are nonetheless required to reach planning judgments on schemes that have the potential to have arboricultural impacts. In doing so, they are fully entitled to rely on the expert views of others, namely, the views of the Woodland Trust and the Standing Advice, and (in the case of the appeal) the views and evidence of Ms Bakker and Mr Drummond.
 34. The fact that it is agreed that no trees will be removed or impacted upon directly as a result of the proposed route through the buffer is irrelevant. RfR3 does not refer to the removal of trees nor to direct impacts upon them.
 35. Policy ENV8 is not one of the key policies justifying refusal, because RfR3 is primarily concerned with the breach of the Standing Advice. It also has within it a balancing exercise which requires any impact on the ancient woodland to be weighed against the need for the development. Nonetheless, as the policy which protects ancient woodland, it is still cited as one of the relevant policies for determining the application.

36. The fact that the potential harm to the ancient woodland is not considered to provide a "clear reason for refusal" in footnote 7, NPPF terms, does not prevent it from providing a reason for refusal. Where a planning authority refuses planning permission for several reasons, each one of those does not have to be capable of justifying the refusal of permission on its own. The reasons for refusal have to be considered collectively as matters weighing in the overall planning balance.
37. With regard to demonstrating how unreasonable behaviour has led to unnecessary or wasted expense the Council would point out that:
- a) In its Position Statement filed ahead of the CMC, the applicant had already taken the view that it would "almost certainly" call Mr Hadfield and was "highly likely" to call Mr Hyett. The applicant never suggested that the calling of such evidence was dependent on whether the Council would be calling equivalent witnesses.
 - b) Despite being informed on 11th May that the Council was not going to be calling an arboricultural witness and that RfR3 was going to be addressed by Ms Bakker, the applicant proceeded to file evidence from Mr Hadfield and Mr Hyett; to file rebuttal proofs from both of them; and to call both of them to give formal evidence to the inquiry.
 - c) Significant parts of Mr Hadfield's evidence were concerned with matters (such as Biodiversity Net Gain) which were not only not in issue, but had been agreed as part of the Statement of Common Ground. There was simply no need for this, and there is no justification for asking the Council to meet the costs of preparing this evidence.
 - d) Other parts of Mr Hadfield's evidence were concerned with the impact of the appeal scheme on the Protected Lane, and the likely re-scoring of this if the appeal scheme were to proceed. This is a matter which was relevant to RfR1 and RfR2. It therefore appears that the Appellant would have sought to call Mr Hadfield in any event, i.e. the costs of calling him as a live witness are not a consequence of RfR3. Further (and as with point (c) above) since the costs application is limited to RfR3, there is no justification for requiring the Council to pay costs associated with the preparation of evidence relating to other reasons.
 - e) There is significant overlap between Mr Hadfield and Mr Hyett's evidence insofar as it relates to the impacts on Prior's Wood and breach of the Standing Advice. This is particularly evident in the rebuttal proofs.
 - f) Significant proportions of Mr Hadfield and Mr Hyett's evidence were concerned with responding to matters raised by the Rule 6 Party and (in the case of Mr Hadfield) the Woodland Trust. Mr Hadfield also spent significant time responding to questions from members of the public. Again, this indicates that the applicant was likely to have called Mr Hyett and/or Mr Hadfield in any event.
 - g) The applicant's choice to provide two rebuttal proofs – which are generally discouraged by PINS – in relation to matters which it alleges that the Council has provided no credible evidence on is nonsensical. If, as the applicant contends, there was no credible evidence, it did not need two rebuttals to demonstrate this.

38. In the circumstances, the applicant has not demonstrated that it has incurred any additional costs as a result of the Council's conduct. Even if this is not accepted, there is no basis for requiring the Council to pay the costs associated with the production of proofs and/or rebuttals or the calling of witnesses to deal with matters which were not in dispute with the Council, or were responding to third parties, or were unnecessary duplication.

Reasons

39. The Planning Practice Guidance (PPG) advises that parties in planning appeals normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.
40. I note that while the Council's Statement of Case did refer to impact on Ecology, the explanation given is in relation to the buffer afforded to Prior's Wood and this is reflected in the wording of RfR3. The reference in RfR3 to LP Policy ENV8 in my view reinforces the fact that this was not an ecological concern but rather a concern regarding the potential detrimental impacts of siting development in close proximity to Prior's Wood. This policy deals with the protection of ancient woodland and was relevant to the refusal reason. Arboricultural concerns were before the Inquiry and identified as a main issue at the CMC. Each party prepared its case in terms of witnesses and evidence in that knowledge.
41. The arboricultural evidence from the Woodland Trust and on the behalf of the Council, from Graeme Drummond of Open Spaces Landscape and Arboricultural Consultants Ltd, was before the Inquiry. Each covered the potential indirect effect on ancient trees within Prior's Wood in line with the Standing Advice. The Woodland Trust produced its evidence in a letter dated, 6 May 2022 wherein the effects of the proposal on Prior's Wood, including the buffer zone, were discussed. It is likely that the applicant's arboricultural witness would have been engaged in responding to this along with the evidence of Mr Drummond on the Council's behalf.
42. These were matters that were before the Inquiry under RFR3. This informed the evidence in respect of RfR3 and a significant portion of Inquiry time was taken up in evidence regarding the proximity of a housing development to ancient woodland in the light of the Standing Advice, and not on matters of ecology, as a result of RFR3. In my judgement, it did not contradict what was set out in the SoCG as no direct effect on trees was alleged, regarding removal or root impact, and the indirect effects went beyond air quality. Indirect effects also formed part of the Rule 6 party's case which the applicant's ecology and arboricultural experts responded to. Notwithstanding the conditions agreed in the SoCG, indirect effects in terms of construction and operational effects were matters to be explored under the Standing Advice and would inform whether or not further conditions were likely to be necessary and effective.
43. While matters concerning Prior's Wood as a component of the landscape were discussed in the main under RfR1, and I do not share the Council's specific concerns regarding the principal roadway and cycleway in relation to the buffer zone, as set out in the accompanying appeal Decision, I consider the Council did not exercise its judgement unreasonably in respect of the ancient

woodland. RfR3 goes to the concerns surrounding the effect on the ancient woodland in terms of the Standing Advice and not matters of ecology, and the Council in its evidence gave clear reasons as to why it considered the proposal would have a detrimental impact on Prior's Wood in the light of the full extent of the Standing Advice. In which case, I do not consider the Council acted unreasonably thereby putting the applicant to unnecessary expense by not withdrawing RfR3.

44. At the time of the CMC the Council was still determining its final list of witnesses and on 20 April 2022 indicated that an ecology witness had been confirmed and that an arboricultural witness may be instructed. This was updated on 11 May 2022 when the Council made it known that it would not call such experts and would rely on Ms Bakker's evidence which included Mr Drummond's tree evidence.
45. However, I agree with the applicant that Ms Bakker did go beyond her field of expertise by touching on ecology in her proof and attempting to make this part of the Council's case in respect of RfR3. While this was a short foray, it was nevertheless a matter which the applicant felt needed to be addressed. This is borne out by the fact that it was referred to by Ms Bakker on behalf of the Council at the Landscape Character and Appearance Round Table Session. Ms Bakker did admit she was not an expert in this field and the applicant's advocate referred to this regarding the weight to be given to this evidence.
46. Nevertheless, the Council did act unreasonably and put the applicant to unnecessary expense, but only in respect of the applicant's Ecology witness responding directly to Ms Bakker's Proof of Evidence where it briefly refers to matters of ecology. Against this background, I consider that unreasonable behaviour resulting in unnecessary expense as described in the Appeals section of the PPG has been demonstrated and a partial award of costs is justified.

Costs Order

47. 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 Uttlesford District Council shall pay to Weston Homes PLC, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in preparing for the appeal and attending the appeal event in respect of responding to the ecology evidence set out in the Proof of Evidence of Ms Bakker.
48. The applicant is now invited to submit to Uttlesford 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Court Costs Office is enclosed.

Richard McCoy

INSPECTOR