

**APPEAL BY FAIRFAX ACQUISITIONS LTD AND
THE NORRIS FAMILY**

**LAND EAST OF ANSTY WAY, CUCKFIELD BYPASS, CUCKFIELD
WEST WUSSEX R17 5AG**

PINS REF: 6002030

RESPONSE TO THE APPELLANTS' APPLICATION FOR COSTS

Introduction

1. The Council resists the Appellants' application for an award of costs. For the reasons set out below, the Council has not acted unreasonably, nor has the Appellant incurred unnecessary costs as a result of the Council's conduct.
2. References "ACA_x" below are to paragraphs in the Appellants' Costs Application.

Relevant Guidance

3. ACA2 quotes from para 16-049 of the PPG, which sets out examples of conduct which may be unreasonable. However, that guidance sits within the wider framework of:
 - a. para 16-028 of the PPG , which states that (emphasis added):

"Parties in planning appeals and other planning proceedings normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. 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.”

- b. Para 16-030, which states that (emphasis added):

“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”

4. In addition, in the context of what amounts to “unreasonable” behaviour:

- a. Para 16-031 notes that the word “unreasonable” is used in its ordinary meaning.

It goes on to note that:

“The Inspector has discretion when deciding an award, enabling extenuating circumstances to be taken into account.”

- b. Para 16-050 states that

“Where local planning authorities have exercised their duty to determine planning applications in a reasonable manner, they should not be liable for an award of costs.”

5. Para 16-032 states that:

“An application for costs will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. This could be the expense of the entire appeal or other proceeding or only for part of the process.”

The Council's Decision and its Understanding of Para 11(d)(i)

6. ACA5-7 quote from the Officer's Report ("OR")¹, the Minutes of the Committee meeting² and the Decision Notice³. The Council draws attention to the following:

- a. It is clear that members disagreed with the officer's recommendation. In the circumstances, limited weight can be placed on what officers did and did not advise as an insight into members' thinking. In particular, officers provided no advice on the application of *Monkhill* because they were of the view that there was no conflict with para 189, with the result that para 11(d)(i) was not – in their view – engaged.⁴ However, the OR did set out the full balancing exercise in relation to 11(d)(ii)⁵. It also made it clear that the final question for members was whether there were material considerations of sufficient weight to justify approval of the scheme, notwithstanding the conflict with the development plan.⁶ Members were, therefore, fully aware of the benefits of the appeal scheme and of the need to weigh these in the balance. Any suggestion that they did not take them into account would be legally unsustainable.
- b. The Decision Notice expressly records members' view that this was a case where para 11(d)(i) of the NPPF applied. In those circumstances, it was not necessary for them to go on and consider para 11(d)(ii).⁷ However, if in their view the harm to the NL on its own outweighed the benefits, it is self-evident that this conclusion would not have been altered by considering this harm together with all the other harms under para 11(d)(ii). In this regard, it will be noted that - notwithstanding the fact that they were not reflected in fn7 policies which were relevant under para 11(d)(i) - the Decision Notice also expressly identified harm to the rural character and distinctiveness of the area, the loss of trees, and the impact of the proposal on the perceived coalescence of Ansty and Cuckfield. The extent to which these issues were important considerations in

¹ CD3.1

² CD3.4

³ CD3.3

⁴ See CD3.2 - update on para 1.22 of the OR

⁵ CD3.1 paras 13.6-13.32

⁶ CD3.1 para 13.38

⁷ See proposition 9 at para 39 of Holgate J's judgment at first instance in *Monkhill* [2019] EWHC 1993, copy attached

members' minds can be seen from the Minutes.⁸ Not only would these have been relevant to 11(d)(ii) (had members needed to go on and address that issue) but they were also relevant to the members consideration of s.38(6) and the question whether para 11(d) justified a decision which was otherwise than in accordance with the development plan. That balancing exercise was specifically referenced at the end of the reason for refusal.

- c. The Council's position in relation to 11(d)(i) and 11(d)(ii) was confirmed in its Statement of Case,⁹ para 9.10 of which stated (emphasis added):

“In the light of the above, while the Council acknowledges the potential benefits of the scheme (provision of new housing, including affordable housing, specialist housing (residential care units and self-custom build plots), the provision of a primary school, sports facilities, local centre and health hub, public open space etc.) it will contend that these are outweighed by the impact on the setting of the HWNL in isolation, and /or that impact taken together with the resulting landscape impacts and coalescence between the settlement of Ansty and Cuckfield.”

- d. Para 9.10 is also the basis on which the Council opened its case at this Inquiry: see para 25 of its Opening Statement¹⁰ (emphasis added):

“(a) Under para 11(d)(i), the presumption in favour of granting permission is not triggered if the application of fn7 policies provides a “strong reason for refusal”. Para 189 of the NPPF relates to National Landscapes and therefore falls within fn7. For the reasons we have outlined above, there would be clear conflict with the last sentence of para 189 which, in the Council's submission, is not outweighed by the benefits and so provides a “strong reason.

(b) Under para 11(d)(ii), the presumption is not triggered if the adverse effects significantly and demonstrably outweigh the benefits. In the

⁸ CD3.4

⁹ CD15.2

¹⁰ ID02

present case, whilst accepting that they are not freestanding reasons, the adverse effects (which here need to be added to the harm to the NL) include the harm to the character and appearance of the countryside, the loss of trees, the less-than substantial harm to heritage assets. In addition, even if prematurity is not found to be a reason for refusal in its own right, the grant of permission would subvert the importance of the plan-led system at a time when a new and up-to-date plan is within sight, contrary to para 15 of the NPPF. In the Council's submission, those factors do "clearly and demonstrably outweigh the benefits"

- e. Para 26 of the Council's Opening Statement also set out the basis on which the Council understood Ms Jarvis' evidence was being presented, namely that (emphasis added):

"In particular, as Ms Jarvis explains, whether the issue is addressed under para 11(d)(i) or 11(d)(ii), while the Council recognises that significant weight should be given to the contribution which the appeal scheme would make to housing generally, and to affordable housing, C2 care accommodation and self-build plots in particular, it is equally important to remember that the only reason why para 11(d) is "in play" is because there is currently a shortfall in the 5YHLS."

- 7. Taken together, the Decision Notice, Para 9.10 of the Statement of Case and paras 25 and 26 of the Council's Opening Statement:

- a. reflected a full and proper understanding of *Monkhill*, in as much as the need to weigh harms against the conflict with policy is recognised in relation to both para 11(d)(i) (harm to the NL in isolation) and 11(d)(ii) (all harms, cumulatively);
- b. made it clear that the Council also relied on para 11(d)(ii). The Appellants cannot (and do not) contend that they were taken by surprise when para 11(d)(ii) was raised in Ms Jarvis' evidence, or that it was inappropriate for her to advance this argument.

Response to the Application for Costs

(i) *The Council has not acted unreasonably*

8. ACA15(i) asserts that “the Council’s approach to adducing a ‘strong’ reason for refusal under para 11(d)(i) is flatly contrary to *Monkhill*” and therefore falls within the category “acting contrary to, or not following, well-established case-law”. This point is reiterated at ACA16, which asserts that “the Council’s refusal that gave rise to this appeal was predicated on the wrong test (i.e. para 11(d)(i) rather than 11(d)(ii)”. However, this is simply wrong. As noted above, and as demonstrated by its Statement of Case and Opening Statement, the Council correctly understood para 11(d)(i), as explained in *Monkhill*. Whether or not the Secretary of state agrees with the Council’s conclusion on 11(d)(i), that conclusion was not based on an approach which was contrary to the case-law.

9. The question whether Ms Jarvis’ failure to fully understand 11(d)(i) gives rise to unreasonable conduct under a different head of para 16-049 of the PPG is a separate issue, which is addressed below. However, the fact that the Council’s decision was properly taken is important, given the guidance in para 16-050 that:

“Where local planning authorities have exercised their duty to determine planning applications in a reasonable manner, they should not be liable for an award of costs.”

10. ACA15(ii) contends that the Council has relied upon “vague, generalised or inaccurate assertions about a proposals impact”. However:

- a. There is nothing vague about either the Decision Notice or the Council’s Statement of Case. Both documents were very clear and precise about the nature and extent of the different harms alleged.
- b. It is clear that the Appellant does not agree with Mr Peacock’s evidence, but the respects in which that evidence is said to be “vague” and “internally inconsistent” are not explained. For the reasons set out in the Council’s Closing

Statement¹¹ (but not repeated here), the contention that either Mr Peacock's evidence or Ms Jarvis' reliance on it was "inaccurate" is disputed, but even if the Secretary of State were to disagree with some or all of their conclusions, that does not make either their evidence or the Council's conduct unreasonable. In particular, Ms Jarvis' position that even a lesser degree of harm to the HWNL could still found a "strong reason for refusal" is entirely reasonable, given the "great weight" which national policy requires decision-makers to give to the protection of the landscape and scenic beauty of NLs.

11. ACA15(iii) contends "that harm to the NL, and the supposedly 'strong' reason to refuse that it comprises, has been the heart of the Council's case", but that the Council has failed to produce evidence to substantiate that reason. However:

- a. While harm to the NL has undoubtedly been a core concern for the Council, it has not been the only concern. As noted above, the reason for refusal also explicitly alleges harm to the character and appearance of the countryside, and harm by reason of coalescence. The only reason why the Inquiry has not spent more time on the first of these is because it is agreed that the harm would be significant and adverse, but that does not lessen the importance of the issue.
- b. The Council has acknowledged¹² that, because Ms Jarvis misunderstood para 11(d)(i) and failed to weigh the harm against the benefits, no reliance could be placed on her evidence as to whether there was a "strong reason for refusal". However:
 - i. As noted above, this was not the basis on which the Council itself had approached the issue.
 - ii. Whether or not Ms Jarvis' evidence on the para 11(d)(i) balance could be relied upon, there was clear evidence before the Inquiry – both from the Council and the Rule 6 Party – that there was harm to the HWNL which needed to be weighed in that balance, and on the basis of which

¹¹ ID34

¹² ID34 para 42(e)

it could reasonably be concluded that the harm outweighed the benefits. This is material which the Secretary of State needs to weigh in the balance in any event, irrespective of the evidence presented by any one witness to the Inquiry. In this regard, the Council stands by and repeats its submissions at para 42 of its Closing Statement.¹³

- c. The Inspector will recall the circumstances in which Ms Jarvis was called to give evidence, and in particular the fact that she stepped in at very short notice to replace Mr Martin Dale, who resigned from the Council due to personal family circumstances (which the Council understands to involve the health of his wife) less than a week before his evidence was due to be exchanged. This left the Council in an extremely difficult position, for reasons entirely outside its control. Rather than asking for the Inquiry to be adjourned (with all the attendant additional costs and inconvenience which that would have caused), the Council took immediate action to identify a replacement for Mr Dale. It was fortunate to find Ms Jarvis, and remains grateful to her for her willingness to take the case on at such a late stage. It is unfortunate that it was not until Ms Jarvis gave evidence¹⁴ that it became apparent that her approach to para 11(d)(i) was not consistent with that which the Council itself had taken, but this was not apparent from her proof and (given the very limited time which she had had to prepare her evidence) cannot possibly be considered “unreasonable”. Alternatively, if there is anything in the “unreasonable” here, it is explained by the extenuating circumstances of the case, and should be considered in that light under para 16-031.

12. In the circumstances, the Council has not behaved unreasonably.

¹³ ID34

¹⁴ As ACA 14 recognises, Ms Jarvis understanding of para 11(d)(i) only became apparent for the first time in cross-examination.

(ii) The Appellant has not incurred unnecessary of additional costs

13. As ACA18 makes clear, the Appellant's contention that it has incurred unnecessary or wasted expense is predicated on the argument that para 11(d)(i) was the only reason for refusal, and that if members had understood the implications of *Monkhill* they would have granted permission, with the result that this appeal would not have been necessary. There is no basis for that assumption:

- a. As noted above, members did not misunderstand para 11(d)(i). The Decision Notice, the Council's Statement of Case and Opening Statement all demonstrate a correct and lawful approach to that test. The suggestion (at ACA19(i)) that Ms Jarvis' approach "permeated the Council's position" is therefore simply wrong. This Inquiry would have been necessary in any event, because members would still have refused on the basis of para 11(d)(i).
- b. As also noted above, it is clear from the references in the Decision Notice to harms which were not relevant under 11(d)(i) that members had very real concerns about matters which would have been relevant under para 11(d)(ii), had members needed to go on and consider that issue.
- c. In any event, para 11(d) of the NPPF was not determinative: whatever para 11(d) may have indicated, it was, ultimately, still just an "other material consideration", at the end of which members were required to return to the s.38(6) test. It is clear from the Decision Notice that they did this, and were satisfied that material considerations (which included all of the benefits relied upon by the Appellants, and the fact that the Council could not demonstrate a 5YHLS) did not outweigh the conflict with the development plan.

14. In these circumstances, it is clear that para 11(d)(i) was not the only reason for refusal. In the Council's submission, given the members' overall conclusion on the s.38(6) planning balance it is obvious that, had they needed to address the matter under para 11(d)(ii), they would have concluded that the harms clearly and demonstrably outweighed the benefits. If there was any doubt about this on the face of the Decision Notice, the Council's position was clarified at the earliest possible opportunity in its Statement of Case. However, even if that is not accepted, it does not matter: ultimately.

permission was refused by reference to the overall s.38(6) planning balance and the outcome would therefore have been the same.

15. Critically, while the Appellants disagree with the Council's conclusions in relation to 11(d)(ii) and the overall planning balance, they do not suggest unreasonableness in relation to this part of the Council's case. The reasons for that are obvious:

- a. The Council has plainly called evidence to deal with these matters;
- b. Whatever criticisms can be made of Ms Jarvis' approach to 11(d)(i), that mistake did not permeate her understanding of 11(d)(ii) or the s.38(6) balance, where she clearly took all relevant considerations (harms and benefits) into account.

16. It follows that this appeal, and the costs which the Appellant has incurred, would have been inevitable in any event.

17. There is no merit in the suggestion at ACA20 that there should be a partial award in relation to the cost of responding to the Council's case on NL impacts, because:

- a. The decision notice clearly alleges harm to the HWNL. That harm would have been relevant under both para 11(d)(i) and 11(d)(ii) and the Appellant would have needed to call evidence in relation to it in any event;
- b. Whether or not it was raised by the Council, the impact of the development on the HWNL was also of concern to the Rule 6 Party. In the same way that the Appellants called Mr Stevens as a witness to address the Rule 6 Party's case on sustainability, they would still have needed to call Mrs Brockhurst to address the Rule 6 Party's case on landscape. Indeed, the Appellants have produced lengthy proofs of evidence from numerous other witnesses in relation to issues which were not even in dispute. It cannot seriously be suggested that they would not have done the same in respect of landscape.
- c. The Council's conduct has consequently not resulted in any additional or unnecessary costs in this respect.

Conclusions

18. For the above reasons, the Appellant's application for costs is not justified. It should be dismissed.

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