LAND EAST OF ANSTY

Appellant's Costs Application

Introduction

1. This is the Appellant's full substantive costs application against the Mid Sussex District Council on account of its unreasonable approach to national policy, and in particular to §11(d)(i) of the National Planning Policy Framework ("**NPPF**").

Relevant guidance

2. The PPG on appeals gives the following non-exhaustive examples of substantive unreasonable behaviour by LPAs at §049:

> **What type of behaviour may give rise to a substantive award against a local planning authority?**
>
> Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include:
>
> - preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
> - failure to produce evidence to substantiate each reason for refusal on appeal
> - vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
> - refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead
> - acting contrary to, or not following, well-established case law
> - persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable
> - not determining similar cases in a consistent manner

Policy framework

3. The policies in the NPPF relevant to this application are:

The presumption in favour of sustainable development

> 11. Plans and decisions should apply a presumption in favour of sustainable development.

[…]

For **decision-taking** this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[8], granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance[7] provides a strong reason for refusing the development proposed; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole, having particular regard to key policies for directing development to sustainable locations, making effective use of land, securing well-designed places and providing affordable homes, individually or in combination[9].

[7] The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 194) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, a National Landscape, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 75); and areas at risk of flooding or coastal change.

[…]

189. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and National Landscapes which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks

and the Broads[66]. The scale and extent of development within all these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

Legal framework

4. In *Monkhill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 74, the Court of Appeal confirmed that:

   (i) The first part of (what is now) §189 is *capable* of founding a clear reason (now "*strong*" reason) to refuse permission under §11(d)(i) NPPF, so as to preclude the operation of the "tilted" balance at §11(d)(ii).

   (ii) Whether it does in fact preclude §11(d)(ii) depends on the balance of that harm against the scheme's benefits, and "*the exercise of planning judgment in the circumstances of the individual case*": see paragraphs 29, 30 and 34 of the judgment of the Senior President of Tribunals in *Monkhill*.

The Council's decision to refuse permission

5. The Council's officers advised members that there was no "strong" reason to refuse permission under §11(d)(i) NPPF:

> "while the site is located within the setting of the High Weald Area of Outstanding Natural Beauty (also known as National Landscapes) it is not located within it. Given this and having consideration of the assessment of the impact the proposed development would have on the setting of the HWAONB set out in subsequent paragraphs 12.85-12.105 of the report and clarified as moderate by your Planning Officer it is not considered that there is a strong reason for refusal. As such it is not considered para 11(d)(i) is engaged. Therefore para 11(d)(ii) is considered relevant in the determination of this application."

6. Members disagreed. The Council refused the application on the basis of §11(d)(i), NB the terms of its resolution:

> "urbanizing impact on the High Weald Area of Outstanding Natural Beauty and therefore para [1]89 of the NPPF is not complied with and **the tilted balance is not engaged**"[1]

7. The decision notice reflected that resolution:

> "it is not considered that the presumption in favour of sustainable development is engaged because having regard to the identified harm to the High Weald National Landscape para 11(d)(i) applies"[2]

8. NB then, the Council's decision to refuse permission, that has given rise to the need to run this appeal in the first place:

   (i) Was based on the premise that there is a "*strong reason for refusal*" such that §11(d)(ii) is not engaged;

   (ii) Did not seek to engage with §11(d)(ii); and

   (iii) Said nothing, at that time, about e.g. "prematurity" re the emerging local plan.

The Council's position at this inquiry

(i) Extent of harm to the NL

9. Ms Jarvis, the Council's planning witness, relied in her planning balance exercise on Mr Peacock, its landscape architect, insofar as the nature and extent of impacts on the NL were concerned. She had interpreted that evidence as being that:

[1] CD3.4.

[2] CD3.3.

(i) The scheme had failed to "*minimise*" its impacts on the NL under §189 NPPF;[3] and

(ii) There would be "*moderate*" impacts to the NL.[4]

10. But she was wrong.

11. In fact, as Mr Peacock confirmed in cross-examination:

(i) The appeal scheme has indeed "*minimised*" its impacts on the NL under §189 NPPF; and also

(ii) The "*moderate*" impacts Mr Peacock had identified in his proof at §3.56 do not relate to the NL, but to the appeal site as part of the NL's "*context*"; and in fact

(iii) Mr Peacock had not expressly evaluated the extent of any harm to the NL itself.

12. Notwithstanding that, in her oral evidence, Ms Jarvis said that she still thought there would be "*limited*", "*residual*" harm to the NL. That is, of course, not what Mr Peacock said.

(ii) Approach to §11(d)(i) NPPF

13. In her proof of evidence, Ms Jarvis does not explain *why* the extent of NL harm is thought by the Council (against the advice of its officers) to comprise a "*strong reason*" to refuse permission under §11(d)(i).

14. She addressed this issue, for the first time, under cross-examination when she confirmed that her approach on the Council's behalf was to:

[3] Jarvis PoE, §3.16.1.

[4] Jarvis PoE, §3.14.

(i) Adduce (incorrectly and without evidence from her own witness) evidence of limited, residual harm;

(ii) Attribute great weight to that harm, applying §189 NPPF; and then

(iii) Conclude that there is a "strong reason" for refusal and §11(d)(ii) NPPF is precluded – *without* doing any balance of benefits against that NL harm.

The Council's unreasonable behaviour

15. The Council's approach to this appeal has been unreasonable. In particular, to take some of the examples from the PPG:

(i) "*acting contrary to, or not following, well-established case law*": the Council's approach to adducing a "*strong*" reason for refusal under §11(d)(i) is flatly contradictory to the requirements of *Monkhill*. In particular, the Council was wrong to assume that *any* harm – even limited and residual harm – comprises a "*strong*" reason to refuse without any reference to a balance against the scheme's benefits. To be clear, it is common ground between all three advocates that the Jarvis approach is wrong in law and contrary to *Monkill*. That is not disputed.

(ii) "*vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis*": as above, the Council's witnesses have adopted vague, internally inconsistent and (in the end) inaccurate positions on the extent of NL harm that was said to found the "*strong reason*" in the first place.

(iii) "*failure to produce evidence to substantiate each reason for refusal on appeal*": harm to the NL, and the supposedly "*strong*" reason to refuse that it comprises, has been the heart of the

Council's case from the start. It has fundamentally failed to prove the core contention of its case.

16. Fundamentally, and in consequence of the above, the Council's refusal that gave rise to this appeal was predicated on the wrong test (i.e. §11(d)(i) rather than §11(d)(ii) NPPF). And its analysis of §11(d)(i) at this appeal was wrong in law.

17. The Appellant emphasises that this application is not founded merely on disagreement with the Council's planning judgment. We do disagree, and that will be a matter for closing submissions. However, the unreasonable conduct which is subject to this application consists in the Council's adoption and maintenance of an erroneous approach to §11(d)(i): namely, treating limited or residual NL harm as automatically precluding the tilted balance, without undertaking the evaluative exercise required by *Monkhill* and without evidentially establishing that the harm to the National Landscape itself was of such weight as to amount to a strong reason for refusal. That was not a reasonable exercise of planning judgment; it was a failure to apply the correct decision-making framework.

Why that unreasonable conduct has directly caused the Appellant to incur unnecessary or wasted expense in the appeal process

18. The supposedly "*strong*" reason for refusal associated with NL harm was:

    (i) Core to the committee's decision to overturn its officers' recommendation, and in particular;

    (ii) The only reason for avoiding the relevant decision-making test in this case, i.e. the balance at §11(d)(ii).

(iii) NB again, there was at that stage no objection on prematurity. And none of the other objections (e.g. coalescence, heritage etc.) were or are said to engage §11(d)(i).

(iv) We do not know what members would have decided on this case if they had (as officers did) applied the correct balance, i.e. the balance at §11(d)(ii) NPPF.

19. This appeal was made necessary in the first place only because members reached a view on §11(d)(i) NPPF that:

(i) Has permeated the Council's position at this inquiry, until the cross-examination of its planning witness Ms Jarvis at any rate; but

(ii) Was wrong, not only on the evidence given by its own witness Mr Peacock on the extent of that harm, but wrong *in law*.

(iii) Was not (as the Council's case became only later during the appeal) caveated with an alternative hypothetical §11(d)(ii) balance.

(iv) In particular, because there was no prematurity objection at that stage, there is no way of knowing had members addressed the correct test what they would have decided.

20. Further, and in any event, if the Inspector and Secretary of State do not accept that the fundamental error above justifies a full award of costs, there should be a partial award to cover the extent of wasted costs addressing the Council's case on NL impacts and the allegedly "*strong*" reason to refuse permission.

Conclusions

21. That comprises substantively unreasonable behaviour. It goes to the heart of the Council's planning balance exercise on which it has founded its resistance to this appeal. Had the Council approached the above issues correctly, there is a real prospect that this inquiry would not have been required, or would have been considerably shorter.

22. In consequence, the Appellant seeks a full substantive award of its costs.

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19th JUNE 2026