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## Costs Decision

Site visit made on 30 October 2017

**by Jonathan Tudor BA (Hons), Solicitor (non-practising)**

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

**Decision date: 04 January 2018**

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**Costs application in relation to Appeal Ref: APP/W1850/W/17/3177891  
Land adjacent to Mill Ditch Cottage, Sellack Boat, Kings Capse,  
Herefordshire HR1 4UB**

- 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 Herefordshire Council for a full award of costs against Mr Richard Brandram-Jones.
  - The appeal was against the refusal of outline planning permission for the erection of a three bedroom cottage, access, turning manoeuvring, car parking and scale.
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### Decision

1. The application for an award of costs is refused.

### Reasons

2. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, 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.<sup>1</sup>
3. Essentially, the Council contends that the appeal had no reasonable prospect of succeeding. The PPG says that applicants '*should give consideration to the merits of the case, and whether there are strong grounds to contest the reasons for refusal of permission, or the conditions attached to a permission, before submitting an appeal. Parties who pursue an appeal unreasonably without sound grounds for appeal may have an award of costs made against them*'.<sup>2</sup>
4. The Council also submits that the appellant, via their agent, has not defended the appeal in an appropriate manner or provided sufficient supporting evidence. Moreover, that inaccurate statements were made, mainly with regard to the then emerging Kings Capse Neighbourhood Development Plan (KCNDP). The Council holds that it was clear that the proposal was not in accordance with the development plan and no other material considerations, such as national planning policy, were advanced which could have justified departure from the development plan.
5. The Council seeks to contrast the quality of the appellant's approach with the precise and articulate nature of its grounds for refusal and Officer's Report. However, in my judgement, refusal reasons 1 and 2 cover much the same

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<sup>1</sup> Paragraph: 030 Reference ID: 16-030-20140306

<sup>2</sup> Paragraph: 001 Reference ID: 16-001-20140306

ground in respect of alleged harm to the countryside, landscape and the Wye Valley Area of Outstanding Natural Beauty (AONB). That duplication is apparent from the Council's Statement of Case (SOC), where paragraphs 5.34-5.37 and 5.41-5.42, in relation to reason for refusal 1, are repeated verbatim in paragraphs 5.61-5.64 and 5.69-5.70, in relation to reason for refusal 2.

6. Reason for refusal 2 also conflates issues concerning the character and appearance of the AONB and countryside with the setting of unlisted heritage assets. Reason for refusal 3 then repeats the issue of the setting of Willow Cottage, one of the said non-designated heritage assets, and combines it with a concern about the amenity or living conditions of existing occupiers of that dwelling. The original Council Officer's Report does not explain in what way amenity or living conditions would be affected. It is left to the Council's subsequent SOC to refer to a concern in relation to overshadowing and loss of natural light.
7. Therefore, although I ultimately dismissed the appeal, concurring with the Council on the majority of the main issues, and I agree that the appellant's case has deficiencies, I do not find the contrast to be quite as stark as that suggested by the Council.
8. I agree that there is limited analysis of policy contained within in the appellant's initial 'Grounds of Appeal'. However, there are references to whether the proposal is in an isolated location, the character and appearance of the AONB, the KCNDP and its then emerging status, the development plan and other planning considerations, such as low-cost accommodation.
9. Those matters are developed in the appellant's subsequent 'Response to the Council's Statement of Case' where, for example, the Council's 'Rural Housing Background Paper'<sup>3</sup> is referred to. That submission also cites the National Planning Policy Framework (the Framework)<sup>4</sup>, the Council's lack of a 5-year Housing Land Supply (HLS) and provides copies of recent appeal decisions in Herefordshire, where the HLS was a relevant factor. Policies RA1 and RA3 of the Herefordshire Local Plan Core Strategy 2011-2031 (CS)<sup>5</sup> are also referenced. Therefore, I do not agree that the appellant's case is devoid of relevant policy and associated content.
10. The Council alleges a misunderstanding, on the part of the appellant, of planning terminology such as 'open countryside' and 'unlisted heritage assets'. However, the application of such definitions is frequently a matter of planning judgement dependent on the particular characteristics of a site and the facts of a case and not necessarily wholly uncontroversial.
11. The Council says that it is well-known that proposals outside settlement boundaries are in the 'open countryside'. However, a settlement boundary for Kings Caple was only defined in the KCNDP, which was emerging at the time of the application and appeal and has only more recently passed a referendum and been 'made'.
12. Moreover, the interpretation of concepts such as 'isolated dwellings in the countryside' in terms of the paragraph 55 of Framework, referred to in paragraph 6.6 of the Council's SOC, evolve and have been affected by recent

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<sup>3</sup> March 2013

<sup>4</sup> Published March 2012

<sup>5</sup> Adopted October 2015



case law, as discussed within the main appeal decision. The appellant made the point that the appeal site was adjacent to existing buildings which was relevant to the interpretation of 'isolated' within the meaning of paragraph 55, which is a material consideration in rural housing applications.

13. The Council suggests that the appellant does not recognise the concept of 'unlisted heritage assets' which it says are referred to in paragraph 135 of the Framework. However, with regard to terminology, paragraph 135 refers to 'non-designated' rather than 'unlisted' heritage assets. Moreover, in paragraph 5.52 of its SOC, amid a discussion of its second reason for refusal, concerning 'unlisted' heritage assets, the Council refers to paragraph 132 of the Framework. However, paragraph 132 is only concerned with 'designated' heritage assets. Paragraph 5.58 of the Council's SOC refers to the 'less than substantial harm' test, but that is contained in paragraph 134 of the Framework and again is only relevant to 'designated' heritage assets. Therefore, it is not directly pertinent to a discussion of 'unlisted' or 'non-designated' heritage assets.
14. Overall therefore, given that context, while there are obviously disagreements between the parties about relevant issues, interpretation, significance and degrees and nature of harm, I do not consider that the manner in which the appellant has presented their case clearly amounts to unreasonable behaviour.
15. The Council has also drawn my attention to a Costs Decision<sup>6</sup> awarded against it, dating from 2016. I note that the Inspector in that appeal considered that the Council's actions in relation to a number of detailed and particular factors amounted to unreasonable behaviour. The Council says *that 'if the local planning authority is required to reasonably be able to defend its refusal reasons (without prejudice to the appeal decision) it stands an appellant should similarly be required to defend its position'*. The requirement for both parties to behave reasonably in the appeal process is well-established and detailed within the PPG. Therefore, I do not see that the Costs Decision cited, and the point made regarding it, adds substantively to the established position.
16. It is significant that the KCNDP was emerging during the course of the original application and the appeal process. During that period, the Examiner's Report was published; the NDP subsequently passed a referendum on 7 September 2017 and was 'made' on 16 October 2017. The Council's lack of a 5-year Housing Land Supply (HLS) added another dimension.
17. The Council at times seems to imply that the position with regard to the weight to be given to the KCNDP has remained clear. However, the extent of the HLS shortfall was not referred to in the original Officer's Report and it contained no reference to the Written Ministerial Statement (WMS) on neighbourhood planning, published on 12 December 2016, perhaps because the KCNDP had yet to pass a referendum or be made. Those aspects were clarified in the Council's SOC but that was during the course of the appeal, which emphasises that the progress made by the KCNDP during that period was relevant to the weight to be assigned to it and its settlement boundary.
18. It seems to me that debate about the weight to be afforded to an emerging neighbourhood plan was not unreasonable given the changing circumstances. Whilst I disagree with a number of the assertions made in relation to the

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<sup>6</sup> APP/W1850/W16/3141786

KCNDP by the appellant's agent, it is not uncommon for polemical language to be employed in an ultimately adversarial process. The fact that the claims made have been successfully refuted by the Council on the basis of the submitted evidence and the apparent lack of any legal challenge to the KCNDP, does not, of itself, mean that the statements or claims can be considered to have been manifestly untrue or inaccurate from the outset, which is a high test.

19. It is suggested by the Council that the conduct of the agent in relation other applications, where the KCNDP has been cited in support, amounts in some way to withholding information or unreasonable behaviour. I do not agree with that judgment. In any event, I have more limited details of those cases, and the germane matter is the conduct of the appellant in relation to the main appeal.
20. Although I ultimately dismissed the appeal, many of the issues referred to in the application for costs and the main appeal are legitimate matters of planning judgement. It is not unreasonable for the appellant to have wished to test the approach adopted by the Council, especially given the lack of a 5-year HLS and the then emerging nature of the KCNDP.
21. I have considered the non-exhaustive lists of the types of behaviour which may give rise to an award of costs detailed in the PPG.<sup>7</sup> The appellant's case could have been clearer and included more precise consideration of relevant policy and additional supporting documentation. However, on balance, in the particular circumstances of this appeal, I am not persuaded that the appellant's conduct amounted to unreasonable behaviour.

### **Conclusion**

22. For the reasons set out above, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Therefore, no award is made.

*Jonathan Tudor*

INSPECTOR

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<sup>7</sup> Paragraph: 052 Reference ID: 16-052-20140306 and Paragraph: 053 Reference ID: 16-053-20140306