

**Herefordshire Council**

# **COMMENTS ON APPELLANTS COSTS CLAIM**

**TOWN AND COUNTRY PLANNING ACT 1990**

**APPEAL UNDER SECTION 78**

**By**

**Mr Philip Staddon, on behalf of Hereford Diocesan Board of Finance against the decision of the County of Herefordshire District Council - Non determination for PENDING S106 AGREEMENT - Outline planning application for a development of up to 18 dwellings (6 affordable homes), associated open space, landscaping and infrastructure, including access road and surface water balancing pond at Open space land Millstream Gardens, Eardisley, Herefordshire, HR3 6NR.**

<b>Grid Reference:</b>	<b>331310, 249428</b>
<b>Planning Inspectorate Reference:</b>	<b>W/20/3262388</b>
<b>Local Planning Authority Reference:</b>	<b>193762</b>
<b>Date of Comments:</b>	<b>7 April 2021</b>

## **1. Background**

As with every person, sector and organisation, the impact of Covid 19 has had a significant functional and human impact on the LPA. The Council as a whole has been at the forefront and frontline of the national Covid response and this has included members of the Planning Department being redeployed to deal with the national emergency and service the community.

Despite closure of Council premises, redeployment of staff, and staff directly affected by the pandemic in health terms, the LPA has retained an open planning service. It is however inevitable its capacity and ability to function has been compromised and reduced and this has led in this instance regrettably, to the proposal before the Inspectorate not being determined.

Whilst the LPA fully appreciates the appellants' frustration with the delays they have incurred, this has been exasperated by the inability to agree Heads of Terms and the appellants resistance to paying the sought contributions towards the NHS, given the current national crisis with the overall performance of the LPA being quite remarkable as the figures for the period April 2020 to February 2021 attached as Annex 1 demonstrate. This has been achieved through the hard work of the department and its commitment to collaborative working with applicants.

The appellants by appealing against non determination have only added to their delays as it is well documented that the Inspectorate has also had to adapt to the national crisis whilst also trying to function and provide a national planning service (with resources far greater than a rural LPA).

Whilst this might not satisfy the appellants, costs should not be used against the LPA for endeavouring to keep the service open and functioning well despite the circumstances it finds itself in. The Inspectorates own records will show, that this is an isolated non determination appeal against a major planning application submitted to the Authority, in adverse times. Further, if the appellant were awarded costs, it only takes taxpayers money away from service provision overall during a time when local authorities are already stretched.

## **2. Appellants Grounds of Appeal**

The appellants set out where and how costs might be awarded within their claim however Government advice on Costs and appeal conduct does not set out the costs award system should be used as a device to negotiate with an LPA to set aside reasonable and development related planning obligation contributions.

On 12 March 2021 the appellants emailed the LPA (**Annex 1**) as follows –

*My client has asked me to contact you to request that the Council considers not contesting the appeal, and simply agrees to a sensible set of Planning conditions, and our Unilateral s.106, which will be signed in the course of the appeal. If the Council were prepared to adopt that position, the appellant would be willing to withdraw its costs claim, and allow the appeal to reach a natural conclusion. Our*

*costs are already quite significant, and include legal costs associated with drafting and redrafting the s.106, and will increase as the appeal progresses further.*

Further to the above, the appellants responded on 18 March 2021 to the requested NHS contribution (**Annex 2**) –

*With regard to the hospital contribution, I really do not see how you can draw parallels between this small planned development in Eardisley and a massive mixed-use urban extension at Ledbury. If your Council wishes to contest the non-determination appeal on this ground, it is entitled to do so. We will defer to the Inspector and make clear that if he / she considers such a contribution is justified in this case, we will amend our unilateral accordingly. However, our costs claim will remain.*

*The offer remains open to you until 5.00pm tomorrow. If the Council agrees not to contest our appeal and confirms so in writing, we will withdraw our costs claim. Our cost may well exceed the amount you are seeking.*

It would appear from the above response from the appellant that they are using the threat of costs and the costs procedure, which they emphasise as *significant* to negotiate the reduction in section 106 obligations with the LPA.

The situation and behaviour outlined above is considered by the Council to be unacceptable and unreasonable, and the Inspector is requested to directly comment on the use of the costs award system as a negotiating tool within their Report.

Further to the matter of the NHS contribution, the Council received a decision on 15 March 2021 with regards to an appeal that was recovered for determination by the Secretary of State in respect of land north of Viaduct, adjacent to Orchard Business Park, Ledbury (P171532/O). The Inspector recommended that the appeal be allowed, and planning permission be granted subject to conditions. The SoS agreed with the Inspector's conclusions and agreed with her recommendation.

The appeal considered in particular whether the Wye Valley Trust NHS Trust contribution was compliant with the regulations. Paragraph 15.13 – 15.14 of the Inspectors decision states *'The Wye Valley NHS Trust seeks a contribution towards Hereford Hospital. It submitted details of the additional interventions required based on the projected population of the proposed development. The contribution sought would assist with the providing capacity for the Trust to maintain service delivery during the first year of occupation of each unit of the accommodation on/in the development. This is necessary since the Trust will not receive the full funding required to meet the additional healthcare demand due to the baseline rules on emergency funding and there is no mechanism for the Trust to recover these costs retrospectively in subsequent years.*

*I am satisfied that the contribution is necessary to make the development acceptable in planning terms. In the absence of the contribution there would be inadequate healthcare services available to support the population increase arising from the development and it would adversely impact on the delivery of healthcare not only for*

*the development but for others in the Trust's area. The contribution is directly related to the development and is fair and reasonable in terms of scale and kind.'*

Paragraph 15.26 – 15.27 concludes '*If the Secretary of State is minded granting planning permission for the development I am satisfied that the financial contributions requested are necessary to render the proposal acceptable in planning terms and they are directly related to the development. Having regard to the costings set out in the justification statement I am also satisfied that they are fairly and reasonably related in scale and kind to the development proposed.*

*Overall, I conclude that the obligations in the s106 agreement meet the tests in CIL regulation 122 and the same policy tests in the Framework and I would recommend that they be taken into account in assessing the application'.*

The SoS concludes at paragraph 34 of his report, attached as **Annex 4**, that he agrees with the Inspectors conclusion that the obligation complies with Regulation 122 of the CIL Regulations and the tests at paragraph 56 of the Framework.

The NHS Trust made representation to the appellants during the planning application process, requesting a contribution of £11,999.61 towards Hereford Hospital.

Further to the above, the appellants contest and refuse to agree section 106 contributions for healthcare despite the Secretary of State confirming such contributions are acceptable and appropriate which has further delayed matters. As such the appellants contest a Secretary of State decision they are fully aware of and it is contended costs should not be awarded for any additional expense they incur altering the non policy compliant submitted Unilateral Undertaking.

On the Appeal being submitted on 2 November 2020 the LPA was thereafter unable to progress matters and it has taken until March 2021 for the Appeal to receive a start date. That and all future delays are not the LPA's responsibility, and given we have complied with Inspectorate deadlines, have not caused or delayed the appeal process.

As evidenced from **Annex 5** and email 18 March 2021 the LPA has been proactive and engaged with the appellants to try and resolve outstanding matters. Further to that the LPA has accepted a number of points raised and withdrawn requests for certain contributions. This is set out in detail within the Council's Statement of Case.

### **3. Further Comments**

The Inspector's attention is drawn to the fact the appellants' agreed an extension of time in July 2020, predominantly on the basis to reach an agreed position/completion of the section 106 agreement. The offer and acceptance of this demonstrates both parties were working towards a positive outcome. The appeal was subsequently submitted whilst discussion continued on the negotiation of the section 106 agreement.

The Inspector will note the appellant has provided limited details to support why the proposals are acceptable in planning terms or when assessed against either the Local Plan or NPPF and refused offers from the LPA to draft a Statement of Common

Ground. As evidenced from the emails provided the appellants approach would appear to be aggressive and adversarial with attempts made to encourage the LPA to not pursue planning obligations for the NHS on the basis that appellants will not pursue costs.

The appellant claims the NHS contributions are unreasonable and not evidenced. They also claim these contribution requirements were presented in January 2020 to them *without any prior engagement and, included some quite extraordinary and completely 'out of the blue' monetary requests*. However this is not true and with the example of the NHS contributions which are those which are disputed by the appellants, these were set out in a formal response from the Herefordshire Clinical Commissioning Group consultation response dated 30 October 2019 (**Annex 6**), which like all other responses, was published and available on the Council's website.

The appellant seeks its legal costs in converting the S.106 undertaking to a Unilateral Undertaking however this is wholly unreasonable. Whether as a Council determination or now at appeal, it is the Council's position that a s106 agreement or unilateral undertaking would be required. A permission cannot be issued without completion of such a legal agreement unless the Inspector concludes no planning obligations are required, however the appellant has demonstrated it expects such a document to be agreed and completed as evidenced by their own submission. This is therefore a cost the appellant would normally and should, bear and is not the result of unreasonable behaviour by the LPA.

Further to the above matter of principle, as it is the appellant who challenges and contests the Draft Heads of Terms and given the LPA, regardless of the Inspector's decision, has robustly and reasonably defended its position there is no unreasonable behaviour and as such no basis to claim or award costs.

Further to all of the above, it would also be paradoxical if the Inspectorate were to award costs against the LPA under the current climate when it itself is suffering significant, albeit understandable, performance issues.

#### **4. Conclusions**

On the basis of –

- The potential misuse of the Costs system
- Incorrect assertions by the appellant
- Recognition of the working environment during the pandemic

The Inspector is respectfully requested to **DISMISS** this costs claim.

#### **Annexes:**

1. Email from appellants agent 12 March 2021
2. Email from appellants agent 18 March 2021
3. Appeal Decision reference APP/W1850/W/20/3244410
4. Email to appellants agent 18 March 2021
5. NHS Wye Valley Trust comments