



Appeal Decision

Inquiry Held on 17-19 & 25-27 May 2021

Site visit made on 28 May 2021

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th September 2021

Appeal Ref: APP/J1860/W/21/3267054

Land off Claphill Lane, Rushwick

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
 - The appeal is made by Lioncourt Strategic Land against Malvern Hills District Council.
 - The application Ref 19/01378/OUT, is dated 9 September 2019.
 - The development proposed is residential development of up to 120 homes (Use Class C3), access, public open space, landscaping, car parking, surface water attenuation and associated infrastructure (all matters reserved except access).
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Decision

1. The appeal is allowed and planning permission is granted for residential development of up to 120 homes (Use Class C3), access, public open space, landscaping, car parking, surface water attenuation and associated infrastructure (all matters reserved except access) at Land off Claphill Lane, Rushwick in accordance with the terms of the application, Ref 19/01378/OUT, dated 9 September 2019, subject to the conditions in the attached Annex.

Application for Costs

2. At the Inquiry an application for costs was made by Lioncourt Strategic Land against Malvern Hills District Council. This application is the subject of a separate Decision.

Procedural Matters

3. The appeal relates to an outline planning application with all matters reserved for future consideration other than access. The matters of appearance, landscaping, layout and scale would therefore be for future consideration were the appeal allowed. However, the Appellant has submitted an illustrative masterplan, together with a development parameters plan, to show how the site could be developed. I have determined the appeal on that basis.
4. The submitted site location plan (ref. 6253_OPA2B) and red line boundary plan (ref. 6253_OPA1B) supersede those originally submitted with the planning application, omitting the existing sub-station on the site. Given that this has resulted in only a minor change to those plans that does not substantively alter the proposals and would be unlikely to prejudice anyone, it is appropriate to accept those plans for consideration.

5. Since the Inquiry, the revised National Planning Policy Framework (the Framework) has come into force. The Appellant has commented that much of the substance of the Framework which is material to this appeal has not changed and that in the main the changes would be more relevant to any future reserved matters. The Council has not raised any comments in relation to this matter. I too am satisfied that the revised version has not materially altered the consideration of those issues pertaining to this appeal. For clarity, any references to the Framework within this decision relate to the revised version including, where applicable, different paragraph and footnote references to the previous version.
6. Also since the Inquiry, a South Worcestershire Five Year Housing Land Supply Report (the SWFYHLS report) has been published for consideration by the three Councils concerned of Worcester City, Wychavon District and Malvern Hills District. This concludes that on a joint basis the three Councils can demonstrate 5.76 years' worth of deliverable housing sites. Whilst this has not been formally published, pending its reporting to the relevant Committees of those Councils, and acknowledging that there is no certainty that it will remain unaltered or be endorsed by all of the Councils, the circumstances are such that it is in an advanced position towards such publication and is therefore a material consideration. I have therefore accepted the submission of that document and taken it into consideration. I acknowledge that its findings have not been tested at this appeal. However, there has been no need to go back to the parties for any further comments on the implications of this document as, for the reasons set out below, there has been no change to the outcome in terms of my decision.
7. The Council and Appellant no longer remain in dispute in respect of the Council's putative reasons for refusal 4 (safe and suitable access and sustainable travel choices) and 6 (effects on infrastructure and provision for affordable housing), subject to completion of a section 106 agreement including various planning obligations, and appropriate planning conditions. Whilst this is reflected in the smaller number of main issues below, I have nevertheless taken into consideration the concerns of local residents on these matters.

Main Issues

8. The main issues are:
 - i) the effect of the proposed development in terms of the Council's development strategy, concerning the location of the site outside of the development boundary of Rushwick and in a Significant Gap;
 - ii) the effect of the proposed development on landscape character;
 - iii) the effect of the proposed development on Best and Most Versatile agricultural land (BMVAL);
 - iv) the Council's housing requirement and whether it can demonstrate a five year supply of deliverable housing sites (5 year HLS).

Reasons

Location outside of development boundary and Significant Gap

9. Policy SWDP 2A of the South Worcestershire Development Plan (the SWDP), sets out amongst other things, the principle to safeguard and (wherever possible) enhance the open countryside. Policy SWDP 2C of the SWDP goes on to require that in the open countryside, development will be strictly controlled, limiting it to certain types of development, none of which would apply to that proposed. As such, in respect of the location of the proposed development outside of the development boundary, it would conflict with those relevant elements of policy SWDP 2.
10. Policy SWDP 2D of the SWDP then goes on to state that development proposals should ensure the retention of the open character of the Significant Gaps. As set out in that policy's reasoned justification, the purpose of maintaining these gaps, which serve as a buffer or visual break between rural settlements and adjacent urban areas or protect the character and setting of settlements, is to provide additional protection to open land that may be subject to development pressures. The designation helps to maintain a clear separation between smaller settlements and urban areas in order to retain their individual identity.
11. In terms of the purpose of providing a buffer or visual break, this is also in the context of other new development on the eastern side of the A4440 being built close to that road albeit that there would remain an area of open space at its southern end. Nevertheless, the proposed development would still be distinctly separated from that development by the wide A4440 corridor with the road also set within a cutting with wide verges and mature vegetation either side. Locally, it is not easy to see from one side of the A4440 to the other outside of the confines of the intervening vegetation screen either side of the road in terms of appreciating the width of that buffer. The proposals would also include a strengthening of that existing tree belt alongside the A4440 with a green corridor on the east side of the site. As such, it is likely that the proposed houses would be generally well screened from vantage points to the east of the A4440. Where they may be visible, it is likely that this would only be glimpses of rooftops, such that they would not be prominent features.
12. Therefore, whilst the distance between the developed edge of Worcester and Rushwick respectively would be significantly reduced at this point, the nature of that break in between would be likely to preserve the individual identity of both settlements. In this regard, it is also already the case that development on the edge of Worcester south of the railway line and on the edge of Rushwick along Bransford Road and again south of the railway line, is located in fairly close proximity to each other. Although the proposed development would extend that closer relationship further north, it would therefore not be an alien feature in this respect. That existing relationship between the closest development of the two respective settlements, with the tree lined A4440 in between, also serves to highlight how the A4440 corridor provides a distinct break between the two, as would be the case with the introduction of the proposed development.
13. With regard to the purpose relating to character and setting of settlements, the site is currently clearly countryside land. However, as referred to above, it is physically confined by the A4440 to the east and visually by its associated

- mature tree screen. Furthermore, although the road itself is not clearly visible from the site and eastern edge of Rushwick, the traffic noise from that road, which I witnessed at my site visit, albeit acknowledging that to be a snapshot, is clearly audible from the site and the public footpath to the north of the site. The road's presence, whilst not clearly visible is therefore audibly obvious.
14. There would nevertheless be inevitable encroachment upon what is an open countryside setting to the village on that eastern side. The proposed development would also be close to the A4440. However, it would not result in any direct connection by road or significant visual association with the A4440, or the edge of Worcester on the other side, due to the A4440 being set within a cutting and the mature intervening vegetation. Furthermore, there would remain a significant area of open space, albeit not agricultural land, at the northern end of the site together with a smaller area at the southern end.
 15. Also, whilst elements of the existing edge of Rushwick on that eastern side are currently separated from the site by trees and other vegetation, houses on the eastern side of Callows Orchard in particular are a prominent feature on that edge. They are clearly visible from the site and to varying degrees from the footpaths on and to the north of the site. The existing settlement is therefore not consistently confined by vegetation.
 16. The northern approach to the village along Claphill Lane has existing houses on the western side of the road set well back. Nevertheless, even if not within the defined settlement boundary, they are clearly seen in the context of the approach to and edge of the village, announced by the village sign and speed restriction sign north of them and the northern site boundary, and are not highly scattered. At the point where they briefly become houses either side of the road in the vicinity of the settlement boundary, these also reflect that low key character, being set back from the road to different degrees with varying amounts of intervening vegetation screening or softening.
 17. The proposed houses opposite those referred to above on the northern approach would be closer to the road and more prominent, thereby intensifying that currently low-key approach to the village. However, it would not be completely unexpected in the context of that existing presence of houses on the western side of the road. Furthermore, the proposals include retention of the vast majority of existing boundary vegetation on the site. As such, any retained roadside vegetation, whilst unlikely to offer significant degrees of screening or softening of the proposed houses at that northern end of the site, would nevertheless at least be likely to retain that existing soft edge to the road on the approach to the village, thereby lessening to a degree the effect of the hard additions of the new houses.
 18. For the above reasons, I conclude on this issue that, as well as the conflict with those relevant elements of policy SWDP 2 in respect of the location of the proposed development outside of the development boundary; having regard to policy SWDP 2D of the SWDP, on the issue of the effect on the Significant Gap, the proposed development would clearly and significantly infringe upon the existing Significant Gap on that north-eastern side of Rushwick. However, for the above reasons, the extent to which it would harmfully affect the purposes of the Significant Gap would be limited. I will consider these issues further, along with any other material considerations, in the planning balance.

Landscape character

19. Policy SWDP 2F of the SWDP requires development proposals to be, amongst other things, of appropriate scale and type with regard to the size of the settlement, local landscape character and location. Policy SWDP 25 goes on to require development proposals to, amongst other things, demonstrate that they are appropriate to, and integrate with, the character of the landscape setting. Furthermore, the site falls within the Principal Timbered Farmlands Landscape Character Type, as defined in the Worcestershire County Council Landscape Character Assessment Supplementary Guidance, and is typical of this in terms of its rolling nature and small to medium scale fields that are well defined by boundary trees and hedgerows. In considering this issue I have also had regard to the Landscape and Visual Impact Assessments submitted by both the Appellant and Council.
20. The proposed development would generally relate well to the existing edge of the village in terms of its proximity and access links. However, the proposed built form element in particular would inevitably result in a fundamental change to the intrinsic character of the site from that relating to open countryside to an urban form, extending the village to its north-east. The proposal would also significantly remove that sense of openness to the setting of that eastern side of the village, notwithstanding the intended areas of open space to the north and south of the site.
21. However, the effect on landscape character would be a localised one as the proposals would be generally well contained by the edge of the existing village, the maturely planted A4440 corridor to the east and that relating to the A4103 a fairly short distance to the north, together with trees lining Claphill Lane on the approach to the site from the north. Furthermore, proposals to include new planting on the site, although not detailed at this outline stage but which could be secured through conditions and the reserved matters, would be likely, particularly once matured, to provide some degree of softening effect albeit in an urban context.
22. As referred to above in respect of the Significant Gap, the proposed development would inevitably be clearly visible in close proximity from the exiting Public Right of Way (PROW) on the site. There would also be clear views of a large part of the proposed development from the footpath to the north of the site. It would therefore be clearly seen as an expansion of the village into that adjacent countryside. However, that would also be in the context of the existing degree of containment of the site and, depending on the particular view point, the degree to which existing houses in Callows Orchard, and to some extent those properties backing onto the site along Bransford Road, are already visually exposed close to the site boundary. Furthermore, existing and, over time, any new tree planting on the site, would again be likely to provide varying degrees of softening.
23. From the footpath running towards the north-west corner of the site on the opposite side of Claphill Lane and from Claphill Lane itself along the northern approach to the village, much of the proposed built form would be likely to be significantly screened or softened by existing intervening trees and hedgerow. The small number of proposed houses at the northern end of the site adjacent to Claphill Lane, would be increasingly visible from that footpath when walking towards the site. However, they would be seen in the context of the existing

houses on the western side of the road opposite. In respect of the effect on landscape character of those same proposed houses at the northern end as seen from Claphill Lane itself, my findings on this are the same as already set out above in my consideration of the effect on the Significant Gap; as is the case in respect of the limited degree of visibility of the proposals as a whole from the eastern side of the A4440.

24. In relation to Bransford Road to the south of the site, whilst the proposed development and the clear loss of open countryside would be clearly visible, it would only be to a limited extent through gaps between buildings and as such unlikely to significantly change the character of that part of the village, albeit that the outlook from the rear of those properties backing onto the site would alter. Nevertheless, from those peripheral vantage points to the south and from other properties surrounding the site, from where the changed nature of the landscape would be viewed, the proposed development would be seen in the context of the existing contained nature of the site referred to previously.
25. I have also had regard to the effect of the proposed development on the sense of place and distinctiveness of the village, having regard to wider views towards the distant elevated ground of the Malvern Hills and the Cotswolds. To varying extents those views from vantage points on the PROW on the site and that to the north are already disrupted to varying extents by intervening buildings and/or vegetation. The proposed development, again to varying extents would add to that disruption. However, particularly given that existing degree of disruption, combined with the significant distance of those elevated areas from the village, this is unlikely to be to an extent that would harmfully reduce the sense of place and local distinctiveness of the village.
26. For the above reasons, I conclude on this issue that the proposed development, despite some mitigating factors, would cause some localised harm to landscape character. As such, it would be contrary to policy SWDP25 of the SWDP. However, again for the above reasons, the extent of that harm would be limited in terms of the wider landscape. I will consider this issue further, along with any other material considerations, in the planning balance.

Best and Most Versatile agricultural land

27. Policy SWDP 13A of the SWDP requires development to make the most effective and sustainable use of land, focussing on, amongst other things, making only exceptional use of the BMVAL. Policy SWDP 13H goes on to state that windfall development proposals which would result in the loss of more than two hectares of BMVAL will be required to demonstrate that the proposed development cannot be reasonably accommodated on non-BMVAL; and the benefits of the development significantly outweigh the loss of BMVAL.
28. I have also taken account of the Framework which states in paragraph 174, in respect of this issue, that planning policies and decisions should contribute to and enhance the natural and local environment by recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of, amongst other things, the BMVAL. Whilst paragraph 174 does not explicitly refer to the need to demonstrate that development cannot be accommodated on non-BMVAL as set out in policy SWDP 13H, that SWDP policy is nevertheless consistent with the principles of paragraph 174.

29. The proposed development would encroach upon more than two hectares of BMVAL, most of which is Grade 3A ('Good') with only a small amount of Grade 2 ('Very Good'). Furthermore, it has not been clearly demonstrated that there are no other sites that are non-BMVAL and could reasonably accommodate the proposed development. As such the proposed development would be contrary to policy SWDP 13H, albeit that it would primarily relate to land at the lower end of the BMVAL ranking.
30. Notwithstanding the above policy conflict, it is not disputed that there is good quality farmland in the area generally. In this respect the submitted 'Agricultural Land classification map (1960s indicative survey)' shows indicatively a wide area beyond the edge of Worcester on that side including Rushwick, that is mainly Grade 3 but also with significant areas of Grade 2, including to the south and west of Rushwick. Furthermore, the 'Agricultural land quality mapping' also submitted by the Council shows large parts of that area, including around Rushwick, where there is a relatively high percentage of likelihood that the land concerned is BMVAL. I will consider this issue further, along with any other material considerations, in the planning balance.

Housing requirement and supply

31. Paragraph 74 of the Framework (was paragraph 73 in the previous version, the wording of which remains unaltered) requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need (LHN) where those policies are more than five years old. In the latter scenario, footnote 39 (was 37 in the previous version) of the Framework states that to be the case unless these strategic policies have been reviewed and found not to require updating. In this case, no review has occurred that has found those strategic policies not to require updating.
32. Notwithstanding the conclusions of the recently submitted SWFYHLS report, at the Inquiry the dispute between the Council and Appellant remained as to whether, for the purposes of this appeal, the housing requirement set out in policy SWDP 3 of the SWDP or the LHN using the standard method (SM) set out in national planning guidance, should form the basis against which the assessment as to whether a 5 year HLS exists is undertaken. This is also in the context of the introduction of the SM into the Framework being designed to support the Government's objective of significantly boosting the supply of homes.
33. Furthermore, the PPG¹ in paragraph 005 sets out that housing requirement figures identified in adopted strategic housing policies should be used for calculating the 5 year HLS figure where: the plan was adopted in the last 5 years, or; the strategic housing policies have been reviewed within the last 5 years and found not to need updating. It goes on to say that in other circumstances the 5 year HLS will be measured against the area's LHN calculated using the SM. Whilst this is guidance, it is consistent with and reinforces paragraph 74 of the Framework in this respect. There is no reference to a scenario whereby the most recent annual update figures based on the housing requirement in the strategic housing policies can still be used where the 5 years has expired; or that SM should not be used in isolation relating to

¹ Reference ID: 68-005-20190722

- one Council because of the potential need for a re-distribution of the housing requirement on a plan-wide basis as part of any future plan-making process where there are other Council areas involved.
34. Paragraph 004 of that same section of the PPG relates to demonstrating a 5 year HLS, noting the non-closed list of documents upon which the Council can rely upon; and circumstances whereby it can be confirmed, which do not apply in this case. That paragraph relates to the 5 year HLS, not what housing requirement figure should be used and, unless confirmed, does not preclude re-consideration of 5 year HLS for any particular planning application or appeal scheme.
 35. The SWDP was adopted in February 2016 and so became more than five years old from February of this year, prior to the date of this decision and indeed the opening date of the Inquiry. There is no directive in the Framework to carry out a land supply calculation more than once a year, but neither does it preclude an update sooner than a year after the last one. Upon the five years expiring the Council did not take up the option to conduct an update at that point based on its LHN using the SM. This was an option demonstrated to have been available to East Cambridgeshire District Council² and referred to in a subsequent appeal decision³; albeit acknowledging that the use of the SM in that case resulted in the Council concerned being able to demonstrate a 5 year HLS, where there had not been at the time of determination of the planning application, and without any consideration in that appeal of whether this was a requirement of paragraph 74 or not.
 36. For the above reasons, the LHN using the SM should be used at the point of determining the appeal. This was also the finding of my colleague in respect of another appeal relating to land south of Bransford Road, Rushwick⁴ and for the above reasons I have no basis to consider differently to that clear position.
 37. The Council highlights the current intent for the reviewed SWDP to also be a joint plan and that SM will be applied on that plan-wide basis, not just Malvern Hills District Council in isolation, as is the case with the SWFYHLS report. The Council also highlights that the review will address the matter of distribution of housing requirement amongst the Councils concerned due to the cross-boundary complexities. However, that is a matter for the plan making process, through the review, and not for this decision-making process notwithstanding my consideration of the SWFYHLS report.
 38. The ongoing SWDP review also attracts limited weight due to the relatively early stage in its preparation. As such, for the purposes of my consideration of this appeal, I do not have the benefit of any new housing requirement figures that are adopted or close to adoption from that review process, with no associated agreement as to any re-distribution of housing need. On that basis, notwithstanding the conclusions of the SWFYHLS report, I would have no substantive basis to consider it inappropriate to take into consideration that change in the Council's housing requirement figure resulting from the application of the SM without any re-distribution.

² East Cambridgeshire District Council Five Year Land Supply Report 1 April 2019 to 31 March 2024

³ Appeal decision Ref. APP/V0510/W/20/3245787 dated 20 July 2020 at 58 Swaffham Road, Burwell

⁴ Appeal decision Ref. APP/J1860/W/19/3242098 dated 6 April 2021

39. On the basis of my findings above relating to housing requirement, where I have not factored in the 5.76 HLS set out in the SWFYHLS report which I shall address further in the planning balance, it is not disputed by the parties that in those circumstances the Council cannot demonstrate a 5 year HLS. I have no basis to find otherwise.
40. Based on the figures submitted and agreed by the Council and Appellant at the time of the Inquiry, to cover the range of scenarios surrounding the disputed aspects of calculating the extent of housing supply in years, albeit with the caveat that the Council does not agree to the use of the SM, they range from 3.42 years (following adjustment in the Statement of Common Ground) to 4.16 years. That difference arises due to the dispute between the Council and Appellant over whether or not oversupply should be taken into account, whether a lapse rate of 5% or 7.5% should be applied, and the deliverability of housing on a small number of sites within the 5 year period. I have had regard to the relevant evidence on these points, however even were I to consider the supply to be 4.16 years, this would still be clearly less than the 5 year requirement. Furthermore, the difference of 0.74 years is not so large as to cause me to apply significantly different weight to any figures within that range. As such I have not dealt with the above three matters of dispute in any further detail. As previously referred to, I will though consider the implications of the SWFYHLS report in the planning balance.

Other matters

41. In respect of highway safety and additional traffic generated by the proposed development, a transport assessment has been submitted which concludes that the proposed development would have a negligible effect on the operation of the local highway network and that safe and suitable access is achievable. Appropriate junction layout and visibility splays at the proposed vehicular site access would also be provided and could be secured by condition. In respect of pedestrian safety, improvements to local footways/public rights of way and provision of dropped kerbs at key road crossing points in the village relating to people movement to and from the proposed development, could be secured through an appropriate condition and a planning obligation. Furthermore, the Highway Authority does not have any outstanding concerns in these respects, subject to appropriate conditions and planning obligation and I have received no substantive evidence to cause me to disagree.
42. Furthermore, in terms of provision for walking routes used currently by local residents, existing PROWs would be retained on and in the vicinity of the site, and proposed paths and open space on the site would be publicly accessible.
43. Various ecological surveys have been undertaken in respect of the site's biodiversity value. Notwithstanding the loss of BMVAL referred to above, the proposals seek to retain and enhance much of the current biodiversity value on the site with scope for ecological enhancements through the management of the vegetation and green space. The protection of the biodiversity interests of the site and surrounding area could also be secured through appropriate conditions as referred to below.
44. Any potential noise and disturbance during the construction of the proposed development could be mitigated through appropriate conditions relating to construction times and management. I have no substantive basis to consider

- that the proposed development, once designed in detail and completed, would generate levels of noise that would be unexpected for a residential area.
45. In terms of concerns about site drainage and flooding in the vicinity, any effects of the proposed development in this regard could be mitigated through appropriate conditions to secure the necessary measures.
46. Regarding concerns about insufficient services/infrastructure in the village to support the proposals, the effect of the proposed development in this regard could be appropriately mitigated through the package of planning obligations referred to below together with appropriate conditions. The planning obligations would also include provision for sustainable travel to destinations further afield than Rushwick.
47. In terms of the outlook from existing residential properties in the close vicinity of the site, the proposed development would inevitably introduce a change to that current open countryside nature of the site as referred to above. However, notwithstanding the effect on the significant gap and landscape character, again as referred to above, I have no substantive basis to consider that the proposed development could not be designed at the reserved matters stage to avoid unacceptable loss of outlook from and privacy and light to existing residential properties.

Planning obligations and conditions

48. A draft Planning Obligation has been submitted making provision for the following:
- A minimum of 40% of the dwellings shall be affordable housing (75% social rented; 25% intermediate housing units), in accordance with policy SWDP 15 of the SWDP of the Local Plan, and the Council's Affordable Housing Supplementary Planning Document (SPD). The tenure split is different from the starting point of 80% social rented and 20% intermediate as set out in the SPD. However, in this case 25% intermediate would be required in order to enable at least 10% of 120 homes to be available for affordable home ownership as required by the Framework.
 - Appropriate financial contributions towards off-site formal sports provision and its future maintenance, in accordance with policy SWDP 39 of the SWDP and the Developer Contributions SPD. This relates to the promotion of achieving active, healthy and integrated communities.
 - Appropriate highways related financial contributions towards: (i) improvements to public rights of way; (ii) scholars transport services; and (iii) passenger transport, in accordance with policies SWDP 4 and SWDP 7 of the SWDP for all three, with the addition of SWDP 21 for (i) and (iii). This relates to: (i) encouraging sustainable travel by providing convenient walking/cycling routes to and from the site; (ii) enabling sustainable travel from the site to and from secondary schools; and (iii) enabling sustainable travel to services and employment destinations further afield than Rushwick.
 - Appropriate financial contribution towards local early years education provision, in accordance with paragraph 95 of the Framework which states, amongst other things, that *'It is important that a sufficient choice*

of school places is available to meet the needs of existing and new communities. Local planning authorities should take a proactive, positive and collaborative approach to meeting this requirement, and to development that will widen choice in education'. This relates to the need to make adequate provision at Rushwick Pre-School.

- Provision of appropriate on site public open space in accordance with policy SWDP 39 of the SWDP. This again relates to the promotion of achieving active, healthy and integrated communities.
49. I have also had regard to the obligation relating to the financial contribution entitled 'National Health Service Contribution' (the NHS contribution). This would comprise a financial contribution towards the provision or improvement of medical services to serve the village of Rushwick where this is directly attributable to the proposed development, as requested by the Worcestershire Acute Hospitals NHS Trust (the Trust). I have had regard to evidence provided by the Trust, including other appeal decisions referred to, which relates to a funding gap created as a result of each potential patient from the proposed development, arising from the Government's funding formula for this element of the NHS. Notwithstanding those other decisions, I have determined this appeal on its own merits, based on all of the evidence before me.
50. Both the Appellant and Council consider that such a contribution would not meet the tests set out in paragraph 57 of the Framework and Regulation 122(2) of the Community Infrastructure Regulations 2010 (as amended) (the CIL Regulations). Amongst other things, the Council is not satisfied that it has been sufficiently demonstrated that it would not be open to the Department of Health, NHS and Clinical Commissioning Groups to make a fairly accurate forecast of the number of dwellings likely to be completed or occupied in the coming year, based on information that could be obtained from the Council, including any windfall allowance, and to adjust the formula accordingly. The Council also highlights that the Trust is obliged to treat all of those people presenting for treatment regardless of whether a contribution is sought or not, bringing into question the link between the request for a contribution and the proposed development.
51. Additionally, it was stated by the Trust that there is a threshold of 15 dwellings for any particular development above which it would seek a contribution. However, it was conceded by the Trust that this is an arbitrary figure having not been through public consultation. There is therefore no clear basis for that threshold, or therefore at which point there is a clear justification for seeking the contribution, and there is no agreement on this for the purposes of setting development plan policy on this matter. This would be contrary to guidance in the PPG⁵ which states, amongst other things, that policies for planning obligations should be set out in plans and examined in public and that policy requirements should be clear so that they can be accurately accounted for in the price paid for land. It also highlights that local communities should be involved in the setting of policies for contributions expected from development.
52. Furthermore, the Trust states that the contribution would be used directly to provide additional services to meet patient demand; including spending on the cost of medical, nursing and other health professional staff, which may be incurred at a premium rate, and also meeting increases in other direct costs

⁵ Paragraph 004 Reference ID: 23b-004-20190901; Planning Obligations Section of the PPG

associated with healthcare delivery such as diagnostic examinations, consumables and equipment. However, unlike another appeal decision referred to by the Trust, relating to Land to the South of White Rock, Paignton⁶, it is unclear as to whether any specific infrastructure has been identified as needing funding from the contribution concerned as a result of the proposed development. That Paignton decision also related to a different Trust where, despite some similarities, the circumstances and evidence were not exactly the same.

53. For the above reasons, in the particular circumstances of this case, I consider there to be no clear justification for the NHS contribution concerned in respect of the proposed development. It fails to meet the tests set out in Reg 122(2) of the CIL Regulations, particularly in terms of not being necessary to make the development acceptable in planning terms and not being directly related to the development. I have therefore not taken that planning obligation into consideration and have afforded it no weight in determining the appeal.
54. The Council has submitted a statement of compliance of the planning obligations with Regulation 122 of the CIL Regulations. Based on that evidence, and relevant development plan policies and SPDs, I am satisfied that the provisions, other than in relation to the NHS contribution, would meet the tests set out in paragraph 57 of the Framework and Regulation 122(2) of the CIL Regulations. Furthermore, in respect of the proposed provision for affordable housing, this would represent a benefit of the development, weighing in its favour.
55. The submitted s106 agreement containing the obligations remains in draft form due to the recent passing of one of the landowners. In this respect, I have had regard to advice in the PPG and agree with the Council and Appellant that these circumstances are exceptional, whereby it would be appropriate to secure the completion of a signed and executed legal agreement/undertaking with the use of a planning condition.
56. The Council has submitted 31 suggested conditions were I minded to allow the appeal. These are generally agreed by the Appellant. I have considered these in the light of advice in the PPG and have, in the interests of clarity and precision, amended some of the wording. I have referred to the condition numbers, cross referenced to the attached annex, in brackets for clarity purposes.
57. The standard conditions (1 and 2) would be necessary to ensure the submission of details relating to the reserved matters. For certainty, a condition requiring the development to be carried out in accordance with the approved plans would also be necessary (3).
58. In the interests of the living conditions of neighbouring residential occupiers during the construction phase, conditions would be necessary to secure: the submission and implementation of a Construction Management Plan, also in the interests of highway safety (4); and appropriate time periods for clearance and construction work and deliveries (25). Again during the construction phase, in order to protect the biodiversity interests of the site and surrounding area, a condition requiring the submission and implementation of a Construction Environmental Management Plan for Biodiversity (5) would also be necessary.

⁶ Appeal decision Ref. APP/X1165/W/20/3245011

- To ensure that the construction of the proposed development provides appropriate opportunities for local employment and training, a condition would be necessary to secure the submission and implementation of an Employment, Skills and Local Procurement Strategy (8).
59. In order to protect the living conditions of prospective residents of the proposed development, in particular relating to external noise, a condition would be necessary to secure the submission and implementation of a noise survey/report relating to the proposed residential properties (6). Also, to ensure prospective residents have appropriate provision for children's play space, a condition would be necessary to secure details and the implementation of a Local Area of Play on the site (29).
60. In the interests of the archaeological integrity of the site, a condition would be necessary to secure the submission and implementation of a programme of archaeological work, including a Written Scheme of Investigation (7).
61. To provide for a sustainable development having regard to the natural environment, a condition would be necessary to ensure the provision of 40% green infrastructure on the site (9).
62. In the interests of the character and appearance of the site and surrounding area, conditions would be necessary to secure the following: existing and proposed levels details with the reserved matters (10); also with the reserved matters, specific provisions relating to the landscaping details (11); tree/hedge protection measures during the construction phase (24).
63. In the interests of highway safety, conditions would be necessary to secure: various local footway and road crossing point improvements, also in the interests of encouraging sustainable transport through walking (12); appropriate visibility splays at the proposed vehicular site access (13); the submission and implementation of engineering details relating to the construction of the proposed site access (14). Also to encourage sustainable transport, conditions would be necessary to secure: the implementation of appropriate cycle parking for each proposed dwelling (15); the provision of a residential welcome pack promoting sustainable forms of access to the development (16); in relation to reduction of pollution, measures to enable provision for electric vehicle charging at each dwelling (17).
64. Also in relation to environmental sustainability, conditions would be necessary to secure: details and implementation of renewable and/or low carbon energy generation measures (18); the submission of a Water Management Statement (23).
65. To ensure the proposal incorporates satisfactory telecommunication facilities a condition would be necessary to secure details and implementation of measures to facilitate superfast broadband or alternative solutions (19).
66. In the interests of providing adequate drainage of the site, and to prevent the exacerbation of any flood risk, conditions would be necessary to secure: details and implementation of foul and surface water drainage (20); a SuDs management plan (21); in relation to site drainage, an exceedance flow routing plan for flows above the 1 in 100 plus 40% event (22).
67. Further conditions to protect the biodiversity interests of the site and surrounding area would be necessary, requiring the submission and

implementation of an Ecological Design Strategy (26), a Landscape and Ecological Management Plan (27); and a lighting design strategy for biodiversity (28).

68. To ensure that the proposed residential development meets the Council's housing needs, a condition would be necessary to ensure an appropriate mix of dwelling sizes in terms of numbers of bedrooms (30).
69. To ensure the necessary provision for affordable housing and required infrastructure to serve the proposed development, as referred to above in respect of the submitted draft planning obligation, a condition would be necessary in the exceptional circumstances, as also referred to above, to require the completion of a signed and executed legal agreement/undertaking (31).

Planning balance

70. I have found that the proposed development would conflict with those relevant elements of policy SWDP 2 of the SWDP which resist the principle of development of the nature proposed outside of the development boundary. Having regard to policy SWDP 2D of the SWDP, concerning the effect on the Significant Gap, I have found that the proposed development would clearly and significantly infringe upon the existing Significant Gap on that north-eastern side of Rushwick. However, for the reasons set out, the extent to which it would harmfully affect the purposes of the Significant Gap would be limited, thereby reducing the weight afforded to the infringement.
71. Furthermore, I have found that the proposed development, despite some mitigating factors, would cause some localised harm to landscape character. The weight afforded to general harm to landscape character is however again reduced due to the limited extent of that harm in terms of the wider landscape.
72. I have also found that the proposed development would encroach upon more than two hectares of BMVAL land and that it has not been clearly demonstrated that there are no other sites that are non-BMVAL and could reasonably accommodate the proposed development. However, there are factors which indicate that the degree of harm in this respect would be limited. In particular, that the proposed loss would primarily relate to land at the lower end of the BMVAL ranking; and that whilst the proposals would result in a loss of approximately 7.2 hectares of BMVAL, this would be relatively small in the context of the large areas of remaining BMVAL land in the wider area, including those that have a relatively high likelihood of being BMVAL.
73. I shall address later, the effects of the HLS set out in the recently submitted SWFYHLS report. Notwithstanding that, I have otherwise found that the Council is not able to demonstrate a 5 year HLS. As such, in that scenario, in relation to paragraph 11(d) of the Framework those policies which are most important for determining the application would be out-of-date, thereby engaging the tilted balance in paragraph 11(d)(ii) of the Framework.
74. I have had regard to the Council's submission that the 740 dwelling shortfall at 2020 in the Malvern Hills Wider Worcester Area is more than compensated for by the 3,244 delivered in excess of the cumulative requirement elsewhere in the plan area; reflected by the Housing Delivery Test figure of 157%. However, having regard to paragraphs 74 and 11(d) of the Framework and the PPG, this

does not alter the situation relating to this appeal resulting in my finding, in the above scenario, that the Council cannot demonstrate a 5 year HLS.

75. Having regard to the Government's objective of significantly boosting the supply of homes, the proposed development would have the benefit of contributing up to 120 dwellings towards the supply of housing in the District. Of those dwellings, the proposed minimum of 40% contribution to the local supply of affordable housing would be an added benefit, particularly due to the numbers involved and the clear need for such housing in the District. Such combined benefits attract very significant weight, particularly in the scenario, without factoring in the SWFYHLS report, whereby the Council is not able to demonstrate a 5 year HLS. There would also be likely significant employment benefits resulting from the construction phase of the proposed development, albeit on a temporary basis for the duration of that phase.
76. Additionally, the proposed development would include significant areas of public open space, would result in improvements to local footways and road crossing points and contribute towards sustainable travel to destinations further afield than Rushwick. Whilst these would, fundamentally, be making appropriate provision for residents of the proposed development, the wider community would also have the benefit of those provisions. I have therefore afforded moderate weight to such benefits.
77. In respect of the intended delivery of measures to enhance the biodiversity of the site, as this would largely represent mitigation for the effects of the proposed development, and without clarity in respect of the level of provision of biodiversity net gain, I have afforded this limited weight.
78. Notwithstanding the above findings in relation to the main issues, I have found there to be no other matters that would cause unacceptable harm, subject to appropriate conditions and planning obligations where applicable.
79. Taking all of the above into account other than in respect of the SWFYHLS report factor, in applying paragraph 11(d)(ii) of the Framework, the extent to which there would be adverse impacts of granting planning permission relating to the first three main issues would not significantly and demonstrably outweigh the above benefits of the proposed development, when assessed against the policies in the Framework taken as a whole.
80. Furthermore, even were I to factor in the exceeding of the 5 year HLS set out in the SWFYHLS report, albeit untested through this appeal, it would only be 0.76 years more than a 5 year HLS. Although the tilted balance would be disengaged in such circumstances, the degree to which the proposed development would boost the supply of homes and needed affordable housing, along with those other benefits referred to above, would therefore still outweigh, and significantly so in relation to the issue concerning BMVAL, the adverse impacts of granting planning permission relating to the first three main issues, when taking all my findings into account.

Conclusion

81. For the above reasons, I conclude that the appeal should be allowed.

Andrew Dawe

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Leanne Buckley-Thomson, Barrister No5 Chambers Instructed by the Council

She called:

Les Greenwood BA(Hons) DipTP MRTPI

Principal Planning Officer,
Wychavon and Malvern Hills
District Councils

Tim Roberts BA(Hons) MRTPI

Tim Roberts Planning

Also appearing for the Council in the landscape matters round table discussion:

Nick Harman BA(Hons) DipLA CMLI

Associate Landscape Architect,
Pegasus Group

Also appearing for the Council in the s106 obligations round table discussion:

Duncan Rudge

Head of Planning Services at
the Council

Rosalind Andrews

Solicitor acting on behalf of the
Council

FOR THE APPELLANT:

Satnam Choongh, Barrister No5 Chambers

Instructed by the Appellant

He called:

Jason Tait BA(Hons) Dip TP MRTPI

Director, Planning Prospects

Cameron Austin-Fell MRTPI

Planning Director, RPS

Also appearing for the Appellant in the landscape matters round table discussion:

Paul Lishman MLPM MSc CMLI

Director, LDA Design

INTERESTED PERSONS:

Leenamari Aantaa-Collier

Partner, The Wilkes Partnership
LLP, Representing
Worcestershire Acute Hospitals
NHS Trust

Jane Ball

Worcestershire Acute Hospitals
NHS Trust

INQUIRY DOCUMENTS:

1. Under cover of email from Jason Tait dated 17 May 2021, copies of: Suffolk Coastal District Council v Hopkins Homes Ltd and another Judgement; and closing submissions of Appellant and Malvern Hills District Council for Custom Land Limited appeal, Land South of Bransford Road, Rushwick, Ref APP/J1860/W/3242098.
2. Copy of LDA Design Green Infrastructure Statement, March 2021.
3. Copy of Approved Judgement dated 2 November 2016: Shropshire Council v Secretary of State for Communities and Local Government, BDW Trading Limited Trading as David Wilson Homes (Mercia) v Magnus Charles Mowat, Martin John Mowat - submitted 17 May 2021.
4. Note submitted 18 May 2021 on behalf of the Council regarding request for s106 funding by the Worcestershire Acute Hospitals NHS Trust.
5. Note on behalf of Worcestershire Acute Hospitals NHS Trust in response to the note from Malvern Hills District Council regarding s106 financial contribution towards mitigating the impact on the Trust's services; and copy of appeal decision Ref APP/X1165/W/20/3245011, Land to the south of White Rock, adjacent to Brixham Road.
6. Revised draft s106 agreement submitted 19 May 2021 incorporating NHS obligation.
7. Copy of the Heritage Consultation Response from the Council Archaeology and Planning Advisor, relating to the planning application stage.
8. Response to the Appellant's costs application on behalf of the Council, 20 May 2021.
9. Revised version of the Council's CIL Compliance Statement (version 2: 24 May 2021); updated draft conditions (24 May 2021); and revised draft s106 Agreement; submitted by the Council 24 May 2021.
10. Updated schedule of 5 year housing land supply sites in dispute, submitted by the Council 24 May 2021.
11. Malvern Hills District Housing Land Supply Update Note, 25 May 2021.
12. Revised draft s106 agreement submitted 25 May 2021 addressing a typographical error in above previous version.

13. Submissions made on behalf of the Appellant in the matter of proposed NHS Trust section 106 contributions, 24 May 2021, under cover of email from Jason Tait dated 26 May 2021.
14. Costs application on behalf of the Appellant: reply to the Council's response, 26 May 2021.
15. Email dated 26 May 2021 from Leenamari Aantaa-Collier in response to above submissions made by Appellant dated 24 May 2021.
16. Copy of Response to the Submissions of Lioncourt Strategic Land Ltd, 18 May 2021, in the matter of (1) University Hospitals Coventry and Warwickshire NHS Trust (2) The South Warwickshire NHS Foundation Trust and Warwick District Council and an application for residential planning permission by Lioncourt Strategic Land Ltd on land at Kings Hill, Warwickshire.
17. Closing submissions on behalf of the Council.
18. Closing submissions on behalf of the Appellant.
19. Under cover of email from Jason Tait dated 27 May 2021 – copy of email dated 7 April 2021 sent to the Planning Inspectorate by the Council concerning the issuing of another appeal decision Ref APP/J1860/W/3242098, Land South of Bransford Road, Rushwick, with that decision attached.

ANNEX – Conditions

1. Applications for the approval of all reserved matters shall be made to the Local Planning Authority before the expiration of three years from the date of this permission. The development hereby permitted shall be begun before the expiration of two years from the date of approval of the last of the reserved matters to be approved.
2. Approval of the details of the appearance, landscaping, layout and scale (hereinafter called "the reserved matters") shall be obtained from the Local Planning Authority in writing before any development is commenced. The development shall be carried out in accordance with approved reserved matter details.
3. The development hereby approved shall be carried out in accordance with the following plans: Planning Redline Site Boundary 6253_OPA1B; Site Location Plan 6253_OPA2B and Access Plan 527-0002-001 Rev A.
4. No development shall begin until a Construction Management Plan (CMP) has been submitted to and approved in writing by the Local Planning Authority. The CMP shall include the following details:-
 - a) measures to minimise the impacts arising from construction and the traffic associated with the construction of the development, including a scheme for vehicle wheel cleaning and other measures to ensure that vehicles leaving the site do not deposit mud or other detritus on the public highway;
 - b) details of site operative parking areas, material storage areas and the location of site operative facilities, including construction compound;
 - c) a management strategy and proposals for the minimisation of construction waste; and
 - d) details of any temporary construction accesses if required and their reinstatement.

The measures set out in the approved CMP shall be carried out and complied with in full during the construction of the development hereby approved. Site operatives' parking, material storage and the positioning of operatives' facilities shall only take place on the site in locations approved in writing by the Local Planning Authority.

5. No development shall take place (including ground works and vegetation clearance) until a Construction Environmental Management Plan for Biodiversity (CEMP: Biodiversity) has been submitted to and approved in writing by the local planning authority. The CEMP: Biodiversity shall be based on mitigation measures outlined in Table 8 of the Ecological Impact Assessment report produced by BSG Ecology dated September 2019 and

informed by any updated surveys as appropriate and shall include the following:

- a) Risk assessment of potentially damaging construction activities;
- b) Identification of "biodiversity protection zones";
- c) Practical measures (both physical measures and sensitive working practices) to avoid or reduce impacts during construction (may be provided as a set of method statements);
- d) The location and timing of sensitive works to avoid harm to biodiversity features;
- e) The times during construction when specialist ecologists need to be present on site to oversee works;
- f) Responsible persons and lines of communication;
- g) The role and responsibilities on site of an ecological clerk of works or similarly competent person;
- h) Use of protective fences, exclusion barriers and warning signs.

The approved CEMP: Biodiversity shall be adhered to and implemented throughout the construction period strictly in accordance with the approved details.

6. As part of the submission of any reserved matters details for layout, a noise survey/report in relation to the proposed residential properties shall be submitted to the Local Planning Authority. The survey shall include periods for daytime as 0700-2300 hours and night-time as 2300-0700 hours and identify appropriate noise mitigation measures if required. All residential units shall be designed so as to achieve the noise criteria based on current figures by the World Health Authority Community Noise Guideline Values/BS8233 conditions given below:

- Internal noise levels within the dwellings should not exceed those set out in the standard BS8233:2014 (Sound Insulation and Noise Reduction for Buildings);
- Garden areas should not exceed the upper limit recommended within BS8233:2014 being 50dB(A).

The development shall not commence until the noise survey/report has been approved in writing by the Local Planning Authority. The approved noise mitigation details shall be implemented prior to occupation of any of the dwellings requiring noise mitigation and shall be maintained as agreed thereafter.

7. No development shall take place until a programme of archaeological work, including a Written Scheme of Investigation, has been submitted to and approved by the Local Planning Authority in writing. The scheme shall include an assessment of significance and research questions; and:-

- a) The programme and methodology of site investigation and recording;
- b) The programme for post investigation assessment;
- c) Provision to be made for analysis of the site investigation and recording;
- d) Provision to be made for publication and dissemination of the analysis and records of the site investigation;
- e) Provision to be made for archive deposition of the analysis and records of the site investigation; and
- f) Nomination of a competent person or persons/organisation to undertake the works set out within the Written Scheme of Investigation.

The development shall not be occupied until the site investigation and post investigation assessment has been completed in accordance with the programme set out in the approved Written Scheme of Investigation and the provision made for analysis, publication and dissemination of results and archive deposition has been secured.

8. Prior to the commencement of the development (excluding site clearance) an Employment, Skills and Local Procurement Strategy shall be submitted to and approved in writing by the Local Planning Authority. This strategy shall set out measures to provide local employment, skills and procurement during the construction phase of the development. The development shall be carried out in accordance with the details so approved.

Within 24 months of any dwelling being first occupied, a Statement of Conformity shall be submitted to the Local Planning Authority, setting out how the approved measures have been implemented and shall include a review of the local employment outcomes arising from the approved Strategy.

9. Reserved Matters pursuant to Condition 2 shall ensure that the development includes a minimum level of provision of 40% green infrastructure on site.
10. Details of the levels of the existing site, proposed finished levels or contours and the precise floor slab levels of the approved dwellings, relative to a fixed datum point outside of the boundary of the site, shall be submitted for approval as part of the reserved matters pursuant to condition 2.
11. The details of "landscaping" to be submitted in accordance with condition 2 shall make specific provision for the following:-

- a) details of any trees and hedgerows to be retained;

- b) schedule of proposed planting (indicating species, sizes at time of planting and numbers/densities of plants);
- c) written specification outlining cultivation and other operations associated with plant establishment;
- d) details of boundary treatments;
- e) hard surfacing specification and materials; and
- f) a schedule of maintenance for a minimum period of five years from first planting.

The approved landscaping scheme shall be carried out concurrently with the development and be completed within one calendar year of the substantial completion of the last dwelling to be constructed.

If within a period of 5 years from the date of the planting of any tree planted pursuant to this condition that tree, or any tree planted in replacement for it, is removed, uprooted or destroyed or dies, or becomes, in the opinion of the Local Planning Authority, seriously damaged or defective, another tree of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written approval to any variation.

12. The Development hereby approved shall not be occupied until the highway works as shown on drawing 527.0002.004 have been constructed and completed in accordance with the details shown on that drawing and Public Right of Way (PROW) 514(B) has been upgraded for a length 65m from the point where PROW 514 (B) intersects with PROWs 516(C) and 515(B) in accordance with details that have first been submitted to and approved in writing by the Local Planning Authority. The works to PROW 514(B) shall include surfacing and lighting, and provision for tie-in with PROWs 515(B) and 516(C).
13. Before any other works hereby approved are commenced, visibility splays shall be provided from a point 0.6m above ground level at the centre of the access to the application site and 2.4 metres back from the nearside edge of the adjoining carriageway (measured perpendicularly) for a distance of 58 metres north and 58 metres south along the nearside edge of the adjoining carriageway. Nothing shall be planted, erected and/or allowed to grow on the triangular area of land so formed which would obstruct the visibility described above.
14. Prior to commencement of development, engineering details relating to the construction of the site access works shown on drawing 527.002.001 Rev A shall be submitted to and approved in writing by the Local Planning Authority. The site access shall be constructed in accordance with the approved details prior to the occupation of any dwelling.

15. Reserved Matters pursuant to Condition 2 shall include details of provision for the secure parking of cycles within the curtilage of each dwelling, to comply with the County Council's adopted Streetscape Design Guide (2018). The cycle parking for each dwelling shall be provided in accordance with the approved details prior to first occupation and shall thereafter be retained for the parking of cycles only.
16. The development hereby approved shall not be occupied until a residential welcome pack promoting sustainable forms of access to the development has been submitted to and approved in writing by the Local Planning Authority. The welcome pack shall be provided to each resident at the point of first occupation.
17. Appropriate cabling and an outside electrical socket shall be supplied for each dwelling adjacent to a car parking space to enable ease of installation of an electric vehicle charging point before each dwelling is occupied. The charging points shall comply with BS7671 or such other standard as may be agreed in writing with the Local Planning Authority. The socket shall comply with BS1363 or such other standard as may be agreed in writing with the Local Planning Authority and be provided with a locking weatherproof cover if located externally to the building.
18. Prior to the occupation of any dwelling, details of renewable and/or low carbon energy generation measures shall be submitted to and approved in writing by the Local Planning Authority. The measures shall contribute to at least 10% of the predicted energy requirements of the development. The details to be submitted shall include:-
- the overall predicted energy requirements of the approved development;
 - the predicted energy generation from the proposed renewable/low carbon energy measures; and
 - an implementation timetable for the proposed measures.
- The development shall be carried out in accordance with the approved details and implementation timetable.
19. Prior to the occupation of any dwelling, details of connections to facilitate superfast broadband facilities or alternative solutions to serve the dwellings hereby approved shall be submitted to and approved in writing by the Local Planning Authority. The submitted details shall include an implementation programme. The facilities shall be provided in accordance with the approved details and implementation programme.

20. Notwithstanding the submitted Drainage Strategy, no development shall commence until detailed design drawings for the disposal of foul and surface water flows, informed by infiltration testing in accordance with BRE Digest 365, have been submitted to and approved in writing by the Local Planning Authority. Thereafter the development shall be carried out in accordance with the approved details.
21. No works in connection with site drainage shall commence until a SuDS management plan including details on future management responsibilities, along with maintenance schedules for all SuDS features and associated pipework has been submitted to and approved in writing by the Local Planning Authority. This plan shall detail the strategy that will be followed to facilitate the optimal functionality and performance of the SuDS scheme throughout its lifetime. The approved SuDS management plan shall be implemented in full in accordance with the agreed terms and conditions and shall be managed and maintained in accordance with the approved maintenance plan thereafter.
22. No works in connection with site drainage shall take place until an exceedance flow routing plan for flows above the 1 in 100+40% event has been submitted to and approved in writing by the Local Planning Authority. The proposed scheme shall identify exceedance flow routes through the development based on proposed topography with flows being directed to highways and areas of POS. Flow routes through gardens and other areas in private ownership will not be permitted. The approved details shall be implemented in full prior to the first occupation of the development.
23. Prior to the occupation of any dwelling, a Water Management Statement setting out water efficiency measures and demonstrating that the daily non-recycled water use per person will not exceed 110 litres per day, shall be submitted to, and approved in writing by, the Local Planning Authority. The measures shall be implemented in accordance with the approved details before occupation of the respective dwelling and retained thereafter.
24. Temporary fencing for the protection of all retained trees/hedges on site and any trees outside the site whose Root Protection Areas fall within the site shall be erected in accordance with BS 5837:2012 (Trees in Relation to Design, Demolition and Construction) before development of any type commences, including site clearance, materials delivery, vehicular movement and erection of site huts. Any alternative fencing type or position not strictly in accordance with BS 5837:2012 shall be agreed in writing by the Local Planning Authority prior to the commencement of development. This protective fencing shall remain in place until the completion of development or unless otherwise agreed in writing with the

local planning authority. Nothing shall be stored or placed, nor shall any ground levels be altered, within the fenced areas without the previous written consent of the local planning authority. There shall be no burning of any material within 10 metres of the extent of the canopy of any retained tree/hedge.

25. Clearance, construction work and deliveries to and from the site in connection with the development hereby approved shall only take place between the hours of 08.00 and 18.00hrs Monday to Friday and 08.00 and 13.00hrs on a Saturday. There shall be no clearance, construction work or deliveries to and from the site on Sundays or Bank Holidays.
26. No development shall take place until an Ecological Design Strategy (EDS) addressing compensation, enhancement and restoration has been submitted to and approved in writing by the local planning authority. The EDS shall be based on the Impact Assessment report produced by BSG Ecology dated September 2019 and informed by any updated surveys as appropriate, and shall include the following:
- a) Purpose and conservation objectives for the proposed works;
 - b) Review of site potential and constraints;
 - c) Detailed design(s) and/or working method(s) to achieve stated objectives;
 - d) Extent and location/area of proposed works on appropriate scale maps and plans;
 - e) Type and source of materials to be used where appropriate, e.g. native species of local provenance;
 - f) Timetable for implementation demonstrating that works are aligned with the proposed phasing of development;
 - g) Persons responsible for implementing the works;
 - h) Details of initial aftercare;
 - i) Details for disposal of any wastes arising from works.

The EDS shall be implemented in accordance with the approved details and all features shall be retained in that manner thereafter.

27. A Landscape and Ecological Management Plan (LEMP) shall be submitted to, and be approved in writing by, the Local Planning Authority prior to the commencement of the development. The content of the LEMP shall be based on recommendations of the Impact Assessment report produced by BSG Ecology dated September 2019 and informed by any updated surveys as appropriate, and shall include the following:
- a) Description and evaluation of features to be managed;
 - b) Ecological trends and constraints on site that might influence management;

- c) Aims and objectives of management;
- d) Appropriate management options for achieving aims and objectives;
- e) Prescriptions for management actions;
- f) Preparation of a work schedule (including an annual work plan capable of being rolled forward over a five-year period);
- g) Details of the body or organisation responsible for implementation of the plan;
- h) Ongoing monitoring and remedial measures.

The LEMP shall also include details of the legal and funding mechanism(s) by which the long-term implementation of the plan will be secured by the developer with the management body(ies) responsible for its delivery. The plan shall also set out (where the results from monitoring show that conservation aims and objectives of the LEMP are not being met) how contingencies and/or remedial action will be identified, agreed and implemented so that the development still delivers the fully functioning biodiversity objectives of the originally approved scheme. The approved plan shall be implemented in accordance with the approved details.

28. Prior to the occupation of any dwelling, a "lighting design strategy for biodiversity" for the site shall be submitted to and approved in writing by the local planning authority. The strategy shall:

- a) identify those areas/features on site that are particularly sensitive for nocturnal wildlife and that are likely to cause disturbance in or around their breeding sites and resting places or along important routes used to access key areas of their territory, for example, for foraging; and
- b) show how and where external lighting will be installed (through the provision of appropriate lighting contour plans and technical specifications) so that it can be clearly demonstrated that areas to be lit will not disturb or prevent the above species using their territory or having access to their breeding sites and resting places.

All external lighting shall be installed in accordance with the specifications and locations set out in the strategy, and these shall be maintained thereafter in accordance with the strategy. Under no circumstances shall any other external lighting be installed without prior consent from the local planning authority.

29. Prior to the occupation of any dwelling, details of a Local Area of Play (LAP), including its siting, signage and guard rails, together with a timetable for its implementation, shall be submitted to and approved in writing by the Local Planning Authority. The approved LAP facility shall be completed in accordance with the approved details and timetable.

30. A minimum of 35% of the total number of market homes proposed shall have a mixture of 1 and/or 2 bedrooms, a minimum of 35% of the total number of market homes proposed shall have 3 bedrooms and a maximum of 30% of the open market homes proposed shall have 4 or 4+ bedrooms. This shall be required unless there is a demonstrable need for an alternative housing mix at the time of the reserved matters application.
31. No part of the development hereby permitted shall commence until a legal agreement in the same terms as the draft agreement entitled 'DRAFT SECTION 106 AGREEMENT – AGREED VERSION DATED 21.05.2021', file reference HCR/MAL52-421, has been completed and executed or a completed Unilateral Undertaking containing the same terms and binding all legal estates and interests comprised in the planning application site has been submitted to and approved in writing by the local planning authority.



Costs Decision

Inquiry Held on 17-19 & 25-27 May 2021

Site visit made on 28 May 2021

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th September 2021

Costs application in relation to Appeal Ref: APP/J1860/W/21/3267054 Land off Claphill Lane, Rushwick

- 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 Lioncourt Strategic Land for a full award of costs against Malvern Hills District Council.
 - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for outline planning permission for residential development of up to 120 homes (Use Class C3), access, public open space, landscaping, car parking, surface water attenuation and associated infrastructure (all matters reserved except access).
-

Decision

1. The application for an award of costs is allowed in the terms set out below.

Procedural Matters

2. The costs application was submitted in writing. I have taken into account the Government's Planning Practice Guidance (PPG) in reaching my decision.
3. As referred to in my appeal decision, since the Inquiry, the revised National Planning Policy Framework (the Framework) has come into force. The Appellant has commented that much of the substance of the Framework which is material to the appeal has not changed and that in the main the changes would be more relevant to any future reserved matters. The Council has not raised any comments in relation to this matter. I too am satisfied that the revised version has not materially altered the consideration of those issues pertaining to the appeal. For clarity, any references to the Framework within my reasoning section relate to the revised version, including where applicable, different paragraph and footnote references to the previous version, the wording of those relevant parts of the Framework having remained unchanged. In the sections containing the submissions of the parties, I have left the paragraph references relating to the previous version of the Framework unchanged but have inserted the new references where applicable in brackets.
4. As also referred to in my appeal decision and since the Inquiry, a South Worcestershire Five Year Housing Land Supply Report (the SWFYHLS report) has been published for consideration by the three Councils concerned of Worcester City, Wychavon District and Malvern Hills District. This concludes that on a joint basis the three Councils can demonstrate 5.76 years' worth of

deliverable housing sites. Whilst this has not been formally published, pending its reporting to the relevant Committees of those Councils, and acknowledging that there is no certainty that it will remain unaltered or be endorsed by all of the Councils, the circumstances are such that it is in an advanced position towards such publication. In my appeal decision I have therefore treated it as a material consideration and have also made reference to it below.

The submissions for Lioncourt Strategic Land

5. The Appellant believes the Council has acted unreasonably in the case of this appeal, such to the extent that the Appellant has wasted expense and a full award of costs is being sought or at the very least a partial award of costs in respect of matters and evidence needed to be prepared and presented in respect of housing land supply matters. This is having regard to Guidance within the Planning Practice Guidance (PPG) on this matter and on the summary basis that:
- The matter of housing land supply position of the Council is important to the determination of the appeal;
 - It was a matter which was a principal focus of the evidence which the Council and Appellant's in that case submitted at a recent appeal in the District in Rushwick, concerning an appeal by Custom Land appeal (APP/J1860/W/19/3242098) a decision which was issued on the 6 April 2021;
 - In that appeal the Inspector concluded that the Council could not demonstrate a 5 year housing land supply (HLS);
 - That decision was issued before exchange of evidence in respect of this appeal;
 - The Council in its acknowledgement of the appeal decision in their email to the Planning Inspectorate dated 7 April 2021, stated that the "decision has significant implications for the Council's position and arguments for the Claphill Lane case, particularly in regard to housing land supply and policy status." The Council asked for extensions of time to complete the Statement of Common Ground (SOCG) and to prepare an updated main Planning SOCG;
 - The Appellant wrote to the Council on a number of occasions seeking clarification of their position, even with the offer to re-submit an application to the Council;
 - The Council advised on the 8th April at 17.56 that "it has been decided that our position on 5 year HLS for this Inquiry will be much the same as for the Bransford Road Inquiry";
 - The Council's submitted evidence in respect of housing land supply which by comparison to the Custom Land appeal is essentially the same, with the same re-rehearsed arguments by the same Witness;
 - The Council's Planning Witness confirms in his evidence that "The Council does not agree with the conclusion in the Bransford Road decision that the Standard Method should apply now, and is reasonably entitled to say that again";

- An example in the PPG of a behaviour of a Local Planning Authority (LPA) which may lead to an award of costs is when a LPA continue in “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”. This is particularly apt in this case given the position on housing land supply is of some considerable significance to the approach to determination of the application and the planning balance;
 - The Council has sought to repeat an argument in direct conflict with the findings of an Inspector in a very recent appeal decision, knowingly doing so and with some suggested entitlement to do so even when admitting that the Custom Land appeal had “significant implications for the Council’s position”;
 - The Council has not changed or even revisited its Statement of Case, nor has it formally advised Planning Committee of the Custom Land decision and sought any new or updated position of “the Council” in the context of the significance of the Custom Land decision;
 - The Council’s evidence pays lip service to the decision and fails to properly and genuinely grapple with the implication of a lack of housing land supply, its implications for the decision making process, and most importantly a genuinely proper and considered re-approach to the planning balance in this case, more have attempted to demean its importance.
6. The Appellant believes that they have wasted expense in having to present HLS evidence in this case, and given the implications of such an absence of a HLS to the approach to decision taking and the planning balance, believe that the council has not properly re-assessed the planning balance as they should have done in the context of the Custom Land appeal, either with the Council Members or in its evidence, such that the appeal may not have been necessary at all.

The response by Malvern Hills District Council

Full Award versus Partial Award

7. The Appellant’s costs application is made on the basis of alleged unreasonable behaviour in respect of the Council’s 5 year HLS case. The Appellant claims that they have been caused wasted expense due to the need to prepare and present evidence in respect of HLS matters. A full, or at least partial, award of costs is sought. Further, the application asserts that *“given the implications of such an absence of a HLS to the approach to decision taking and the planning balance”* they *“believe that the council has not properly re-assessed the planning balance as it should have done in the context of the Custom Land appeal, either with the Council Members or in their evidence, such that the appeal may not have been necessary at all”*.
8. As to that, it is noted that the Appellant does not put its position particularly strongly in stating that it *“may not have been necessary”*. And that is perhaps unsurprising. Mr. Greenwood clearly does consider the Custom Land appeal (also known as the ‘Bransford Road appeal decision’) in his written evidence [paragraphs 3.2-3.3] as does Mr. Roberts [paragraphs 1.10; 2.13-2.19]. It has been explained why the Council has maintained its position and that was

elaborated upon by Mr. Greenwood in oral evidence. He was clear that discussions had been had with officers, the Chairman of the Planning Committee, ward council members and leaders as to the appeal decision and that support had been given to proceed as the Council has. There was no procedural need to report the appeal decision back to the Committee for a decision in this regard. No doubt it will also be further explained by Mr. Roberts. It cannot be properly suggested that it has not been factored into Mr. Greenwood's planning balance, given he is aware of and refers to said decision, and in any event, he is clear in his evidence, both oral and written, that even if there is no 5 year HLS he considers that the harm arising from the development would significantly and demonstrably outweigh any benefits. That is a view the Appellant does not agree with, but that does not make it an unreasonable one. It is not unusual that an Inspector finds, in the circumstances of a case, that even in the absence of a 5 year HLS an appeal should be dismissed. The Appellant's costs application is not put any higher, nor advanced in any more detail, as to why the Mr. Greenwood's position is unreasonable insofar as considering the tilted balance to fall in favour of dismissing the appeal, rather than simply a different exercise of planning judgement to theirs; and it was not put to Mr. Greenwood that this was so.

9. Accordingly, as a starting point, the Council asserts that even if the Inspector were of the view that the Council's 5 year HLS case has been unreasonable, he should not find that this renders the entirety of the Council's case so. Realistically the most the Appellant could achieve is a partial award of costs.

Wasted Expense on that basis

10. Putting aside for a moment the merit in the Appellant's case insofar as the reasonableness or otherwise of the Council's 5 year HLS case, it is appropriate to emphasise the remit of the wasted costs sought on the basis of such a potential partial award.
11. Should the Inspector agree with the Council that it has not acted unreasonably in advancing an alternative position that even without a 5 year HLS the appeal should be dismissed – and he does not need to agree with the Council's case to conclude that it was not unreasonable - a public inquiry was still required. As was the instruction of all of the other experts and counsel. This is a matter of the extent of preparation and sitting time rather than that there should have been none at all.
12. Wasted costs could only then extend to the preparation and presentation of their 5 year HLS evidence – which is what the application appears to seek notwithstanding the 'add on' comment as to the potential for the inquiry not being required. Breaking this down this means:
 - 11.1 As to preparation:
 - The preparation of Mr. Austin-Fell's evidence by him;
 - Very limited time for Mr. Tait to address such evidence in his Proof of Evidence, given he simply relies upon and regurgitates what Mr. Austin-Fell says;
 - More limited counsel preparation time than might otherwise be so given the sites evidence is to be heard by way of roundtable

with more limited time spent on formal Examination in Chief and Cross Examination;

11.2 As to presentation:

- A maximum of 2 days of inquiry time is scheduled to be spent on 5 year HLS evidence;
- It is unlikely that the full extent of scheduled time will be used;
- Given his reliance on Mr. Austin-Fell's evidence, barely any time was spent by Mr. Tait presenting evidence at inquiry on 5 year HLS.

13. Furthermore, even the extent to which the alleged wasted expense of preparing and presenting evidence on 5 year HLS is recoverable should be questioned. The Appellant is quick to draw attention to the Custom Land Appeal and criticises the Council for re-running its case there. However, in that case the Appellant did not take up time disputing sites. That was in this Appellant's gift here too. The Appellant has added to its workload when it could simply have run the same argument the Appellant did at Bransford Road. That would have taken considerably less time and expense than requiring a detailed consideration, and back and forth negotiations, as to individual sites.

14. Accordingly, any wasted costs, if the Council is found to have acted unreasonably, should be focused entirely on the time the Appellant has spent addressing the argument the Council ran at the Custom Land Appeal only and not any new issues dealt with in the context of this case for the first time.

Unreasonable behaviour

15. With all that said, the Council does not accept that it has acted unreasonably in running the arguments it has here with regard to the proper way in which 5 year HLS should be calculated – based on the sub-area not district-wide, and based on the most recent 2020 Annual Monitoring Report (AMR) which was produced at a time when the South Worcestershire Development Plan was under 5 years old rather than the Standard Method (SM).

16. It is correct that those are arguments which were raised in the Custom Land appeal (APP/J1860/W/19/3242098) and it is also correct that the Inspector there concluded that the Council could not demonstrate a 5 year HLS. Whilst the interpretation of planning policy is a matter of law, that Inspector was exercising planning judgement in coming to their decision. Their decision is not one of a court and not binding in the same way that a legal precedent may be. It is a material consideration and it is within this Inspector's gift to take a different view.

17. As to whether he should, the Inspector is referred to the written evidence of Mr. Roberts which is not rehearsed in this document; specifically paragraphs 2.1 to 2.19, and 4.3 to 4.16. Further, by the time the Inspector comes to consider the Appellant's costs application the Inspector will have the Council's closing submissions, which he is also asked to take into account, and he will also have heard Mr. Roberts' oral evidence.

18. Though Mr. Choongh made comments during cross-examination of Mr. Greenwood that he would have made a costs application against the

Council were he acting in the Custom Land appeal, the Appellant's costs application is not brought on the basis of the merit or otherwise of the arguments the Council runs regarding the appropriate interpretation of the National Planning Policy Framework (the Framework) and PPG as to the calculation of 5 year HLS. It is that those arguments have been run before an Inspector recently that is said to be in issue. Allied to that, any costs incurred before the Bransford Road decision should not be payable as there is no argument made in the Appellant's costs claim that the Council's 5 year HLS position was unreasonable before that decision was issued.

19. The Appellant relies in their application on the PPG, citing an example of behaviour of an LPA which may lead to an award of costs as when a LPA continues in "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". The 5 year HLS argument is not in and of itself an objection to a scheme or elements of it, it is more overarching than that. Further, this is not the same scheme as the Bransford Road case, so the PPG reference is analogous at best. There is nothing in the PPG that specifically addresses this situation. As Mr. Greenwood noted, it is not uncommon for one Inspector to decide a matter based on an interpretation of policy and then another Inspector to take a different view.
20. The Council has actively cooperated with the Appellant throughout the course of the appeal process to reduce the matters at issue and therefore the overall costs.

CONCLUSION

21. For all of the reasons set out above, the only just outcome would be for the Appellant's costs application to fail. It does not satisfy the required test and should not have been made.

Reply by Lioncourt Strategic Land to the Council's response

22. We do not respond to that part of the Council's response which seeks to quantify how much time and expense has been taken up with addressing the issue of 5 year HLS. It is not necessary at this stage to quantify the wasted expense; all the appellant has to do is to show that the unreasonable behaviour in question has led it to incur work and expense that would not otherwise have been necessary. There is and can be no doubt that that test is satisfied. Quantification is a step in the process that follows on from the costs award in principle.
23. Neither is it correct or fair to criticise the Appellant for calling evidence on individual sites. Where a council claims to have a 5 year HLS the appellant is entitled to call evidence to prove that it does not have a 5 year HLS, and to show the extent of the shortfall. As the Council's own evidence states, the weight to be attached to the shortfall depends in part on the extent of the shortfall. It will be recalled that Mr Greenwood described the shortfall as 'minor'. The Appellant is entitled to challenge that by seeking to show that not all of the sites factored into the Council's land supply are deliverable, and that even on its own approach to the requirement the supply is lower than that claimed.

24. The mainstay of the Council's defence to the costs application appears to be that the Bransford Road appeal inspector was exercising planning judgment in deciding that the Council could not demonstrate a 5 year HLS. That is simply wrong. As Mr Roberts accepted, his position rests squarely on a particular interpretation of Framework paragraph 73 (now para. 74 in the new version of the Framework). The interpretation of planning policy is a matter of law. As he also accepted, there is only one correct interpretation of the paragraph 73 – in a case where footnote 37 (now 39 in the new version of the Framework) does not apply (and no one contends that it does apply), paragraph 73 either requires application of the SM as soon as the plan is 5 years old or it only requires application of the SM once the LPA has updated its AMR. The Council put its legal interpretation of paragraph 73 to the inspector at the Bransford Road inquiry, and did so with the assistance of experienced planning counsel. Having heard legal submissions from both sides, that inspector summarily dismissed the Council's argument (it got the short shrift it deserved). It is clearly unreasonable for an authority to simply ignore that ruling and run the same point again.
25. What the Council is in effect doing is asking the inspector to disagree with that earlier inspector, without putting forward any new additional legal arguments or pointing to any material change in circumstances. Such would of course be very difficult to do given only a very limited passage of time since the recent Bransford Road decision. That is unreasonable behaviour – the earlier ruling may not be legally binding, but the Secretary of State's (SoS) inspectors cannot simply make wholly inconsistent rulings on the law within a matter of weeks without giving any reasons. Hence the guidance in the costs circular that it is unreasonable for parties to ignore what the SoS has said about an issue in an earlier appeal in the absence of a material change of circumstances.
26. Even leaving aside the egregious behaviour of running the same point again, the fact is that the Council's argument on the SM simply does not reach the threshold of respectability – which is another example of unreasonable behaviour. It is not an argument that any reasonable inspector could possibly accept. It involves asking an inspector to ignore clear government policy that where a plan is more than five years old and found to require updating, housing requirements must be calculated using the SM. It would have been a materially different policy had the SoS wanted to say that the housing requirement set out in adopted policies should continue to be used until LPAs update their AMR, whenever that might be.
27. The full award of costs is justified on the basis that this LPA has simply not genuinely accepted the Bransford Road Inspector's ruling on 5 year HLS and has not genuinely carried out the planning balance exercise applying the tilted balance. It made the decision to reject this application and fight the appeal on the basis that it had a 5 year HLS and this application is contrary to the plan. When it was told by a planning inspector that it did not have a 5 year HLS it should have reported that decision to full planning committee, accepted that it did not have a 5 year HLS and then carried out the planning balance exercise in fresh report to committee and put it before the members. The Officers reporting and advice to Members in their planning balancing must surely have been different if they did so and Members too would have had to at least reconsider their own planning balancing. Had it properly done so the likelihood is that this inquiry could have been avoided altogether.

Reasons

28. The PPG advises that, irrespective of the outcome of the appeal, costs may only 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.
29. In this case the Appellant refers to another appeal decision, relating to a different scheme and site within the District, at land south of Bransford Road, Rushwick¹. That decision was issued on 6 April 2021 and therefore in advance of this Inquiry and the submission of proofs of evidence (PoEs). The Council therefore had the opportunity to consider the implications of that decision in relation to this appeal in producing its PoEs and presenting evidence at the Inquiry.
30. An example of unreasonable behaviour which may result in an award of costs is where the local planning authority persists in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable. Although that other decision was not for the same proposal and that the issue concerning housing requirement and supply is not to do with the scheme itself, examples of unreasonable behaviour set out in the PPG are not exhaustive. Furthermore, the matter of housing requirement was a common consideration for both the Bransford Road appeal and this one, relating to the same District, regardless of that other appeal being dismissed.
31. My colleague in the Bransford Road appeal dealt clearly with the matter of housing requirement in relation to paragraph 74 of the Framework, in light of the SWDP having become more than five years old, finding that the 5 year HLS should be based on local housing need (LHN) using the standard method (SM) rather than that set out in the adopted SWDP. That was a clear finding, and although not legally binding, there has been no material change in circumstances since that decision relating to this issue. This is emphasised by my decision where, having considered the evidence submitted in this case, I have come to the same clear finding as my colleague, demonstrating the clarity of the position as set out in the Framework and PPG.
32. I note that the implications of the Bransford Road appeal for the current appeal have been the subject of discussions with Council officers, the Chairman of the Planning Committee, ward council members and leaders, and that support had been given to proceed with an unchanged position on the matter of housing requirement. However, for the above reasons, the Council had no substantive basis to persist with its different approach leading up to and at this Inquiry following that other decision.
33. The finding on housing requirement was important in terms of triggering the tilted balance under paragraph 11(d)ii of the Framework, notwithstanding the implications of the subsequent submission of the SWFYHLS report. However, notwithstanding my decision, it was reasonable for the Council to have pursued its position at the Inquiry in respect of the first three main issues. This is on the basis that, even with a finding of no 5 year HLS, the Council still considered that the adverse impacts of granting permission would significantly and

¹ Appeal Decision Ref. APP/J1860/W/19/3242098

demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole, which is a matter of planning judgement.

34. Furthermore, the matters concerning the deliverability of a small number of housing developments in relation to the HLS figure were considered in the context of the Appellant's position on housing requirement and so would reasonably have been dealt with at the Inquiry even if the Council had conceded in respect of the use of the SM. It is also the case that this costs application has come about as a result of the Bransford Road appeal decision and I consider that it would be unreasonable for the Council to be liable for any costs incurred by the Appellant on this matter prior to that decision.
35. For the above reasons, relating solely to the evidence concerning housing requirement, again notwithstanding the findings of the SWFYHLS report, I therefore find that the Council behaved unreasonably in continuing to defend its position at appeal, since the Bransford Road decision, that the 5 year HLS should be based on housing requirement in the SWDP rather than LHN using the SM; and that, therefore, the applicant's costs in pursuing that element of the appeal were unnecessarily incurred and wasted. For this reason, a partial award of costs is justified.

Costs Order

36. 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 Malvern Hills District Council shall pay to Lioncourt Strategic Land, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred since the Bransford Road appeal decision in respect of the issue of whether the 5 year HLS should be based on housing requirement in the SWDP or LHN using the SM, as referred to above; such costs to be assessed in the Senior Courts Costs Office if not agreed.
37. Lioncourt Strategic Land is now invited to submit to Malvern Hills 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.

Andrew Dawe

INSPECTOR