Neutral Citation Number: [2020] EWHC 3482 (Admin)

Case No: CO/1461/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2020

Before :

SIR ROSS CRANSTON
Sitting as a High Court judge

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Between :

SWALE BOROUGH COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
(2) SW ATTWOOD AND PARTNERS	

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- -

WILLIAM UPTON QC (instructed by **Sharpe Pritchard**) for the **Claimant**
GEORGE MACKENZIE (instructed by **GLS**) for **Defendant (1)**
PETER VILLAGE QC (instructed by **Winckworth Sherwood**) for **Defendant** (2)

Hearing dates: 8 December 2020

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JUDGMENT

SIR ROSS CRANSTON:

Introduction

1. This is a challenge by the claimant, Swale Borough Council ("the Council"), to a costs order made against it by a planning inspector appointed by the first defendant, the Secretary of State for Housing, Communities and Local Government ("the Secretary of State"). It followed the planning inspector's grant of planning permission to SW Attwood and Partners ("Attwood"), the second defendant, after it successfully appealed the Council's refusal of planning permission.

2. Mrs Justice Lang refused the Council permission to apply for statutory review of the costs decision on the papers. However, at an oral renewal hearing Tim Mould QC, sitting as a Deputy High Court judge, granted the Council permission on two grounds of the application.

Background

3. The background, in brief, is as follows. The Council is the planning authority; Kent County Council ("Kent CC") is the education and highways authority.

4. Attwood had applied to the Council for outline planning permission for a development of up to 700 dwellings and supporting infrastructure in Minster-on-Sea, Isle of Sheppey, Kent. The application was made on 11 June 2018.

5. The Council's planning committee refused the application on 8 August 2019, although the report from the Council's planning officers had recommended approval. Four reasons were given for refusal: (1) the significant and demonstrable harm to the open, undeveloped character and appearance of the

area and a failure to provide sufficient landscape mitigation; (2) the failure to secure a sufficient setting to Parsonage Farmhouse, a grade II listed building; (3) the failure to make provision for affordable housing, including affordable ownership housing, contrary to policies A12 and DM8 of the Swale Borough Local Plan, and paragraphs 61-64 of National Planning Policy Framework ("the NPPF"); and (4) the proposed transport improvements offered to address capacity issues within the local highway network were not sufficient to mitigate the harm caused by the additional traffic arising from the development, contrary to policies A12 and DM6 of the Local Plan and paragraph 109 of the NPPF.

6. Attwood appealed and a planning inspector was appointed. Attwood lodged its statement of case on 27 September 2019. The Council lodged its statement of case two months later, in November, which it revised the following month.

7. There was a case management conference, by telephone, on 6 December 2019. The inspector noted that the main issues for the inquiry would be the effect of the development on the character and appearance of the surrounding area; its effect on the setting of the grade II listed Parsonage Farmhouse; its effect on the provision of affordable housing in the borough, which the Council would review following a meeting of the planning committee on 17 December 2019; and the development's effect on the flow of traffic on the local road network.

8. There followed a number of statements of common ground. The Overarching statement of common ground of the 31 January 2020 had travelled through a number of iterations.

9. The appeal was heard 4-7 February 2020. The focus was on the first and second reasons that the Council had refused permission, character and appearance and

heritage, since by the time of the hearing agreement had been reached over affordable housing and highways. Although it would not accord with the development plan as a whole, the inspector allowed the appeal and granted planning permission, along with the imposition of planning conditions and a section 106 undertaking.

10. At the end of the inquiry, Attwood submitted an engrossed section 106 Unilateral Undertaking dated 7 February 2020, the version agreed with the Council and Kent CC at the inquiry.

11. At the time the inspector issued his decision letter on the appeal, he also handed down a decision on the costs of the appeal. His conclusion was that the Council should bear Attwood's costs of the appeal as regards the issues of (a) affordable housing and (b) highways.

The affordable housing issue

12. The background to the affordable housing issue was a report on the economic viability of the proposal which the Council and Attwood had jointly commissioned from the consultants, Pathfinder. That covered both the proposed development and a scaled-down version. In a report in August 2018 Pathfinder had concluded that the proposed development was only marginally viable and could not provide any affordable housing. The scaled-down version, Pathfinder concluded, was even less viable.

13. In its updated report dated 12 December 2018 Pathfinder again concluded that the proposed development was only marginally viable and could not provide a full package of section 106 contributions.

14. Then in August 2019, as we have seen, affordable housing was the 3rd of the reasons for the Council's refusal of planning permission.

15. On 18 December 2019 the Council's senior planning officer, emailed Attwood to confirm that the planning committee had met the previous day and decided that it would not defend reason 3, affordable housing, and that it would not challenge the viability evidence submitted with the application, in other words the Pathfinder report. However, the email added:

> "If, however, the viability position is to change during the course of the appeal (for example, at the Case Management Conference call your client's barrister referred to a potential challenge to the KCC [Kent CC's] request for secondary school contributions), then the Council would expect this sum of money to be recycled within the s.106 to provide affordable housing…[W]e will be making this point as part of our case."

16. Following the case management conference, on 18 December 2019, Kent CC emailed the planning inspectorate, copying in the parties, referring to its surprise that at the case management conference, for the very first time, it learnt that previously agreed secondary education contributions of £820,000 would be disputed and that no contributions would be provided.

17. There were a number of emails between the Council and Attwood following the 18 December withdrawal. In these Attwood maintained its position that there was not scope for affordable housing.

18. Attwood had commissioned Dr Lee to report on economic viability. In his proof of evidence, available on 7 January 2020, he had concluded that the scheme was not economically viable.

19. Discussions occurred between Attwood and Kent CC, and in a statement of common grounds on 13 January 2020 Atwood agreed with Kent CC that it would make a contribution to secondary education of £678,975.

20. The Council had had Pathfinder review Dr Lee's evidence and on 28 January 2020 called on Attwood to respond to the Pathfinder's analysis that it was wrong.

21. The Overarching statement of common ground of the 31 January 2020 recorded that policy DM8, Affordable Housing, provided at (1) that 0% affordable housing would be sought on the Isle of Sheppey, and at (6) that if evidence demonstrated that economic conditions, or the proposed characteristics of a development or its location, had positively changed the impact of viability of the provision of affordable housing, the Council would seek a proportion of affordable housing closer to the assessed level of need, or higher if development viability was not compromised.

22. The statement then recalled that the Council had not provided any evidence that the scheme was in conflict with the policy and on 17 December 2019 had resolved not to defend this reason for refusal. The statement continued:

> "Following notice from the appellant [Attwood] that they were seeking to challenge the Secondary School contribution sought by Kent County Council, the Council did query whether this would release funding that

> could be made available for affordable housing. However, following the agreed position between K[ent] CC and the appellant on a revised secondary school contribution, and the acceptance of increased costs relating to highways works, the Council is satisfied that there is no surplus to be allocated towards affordable housing."

23. On 5 February 2020 a statement of common ground on viability recorded that the parties agreed that the scheme was viable but could not make any contribution towards affordable housing. The statement contained a new table dealing with appraisal inputs and was signed by Dr Lee and the Council.

The highways issue

24. There were a number of highway issues which the inspector had to resolve. A particular issue in dispute between the Council and Attwood revolved around the Barton Hill Drive / Minster Road roundabout ("the Barton Hill junction") and the Halfway Road / Minster Road / The Crescent signalised junction ("the Halfway Road junction") ("the two junctions").

25. As regards the junctions, Kent CC as the highways authority had written to the Council on 13 September 2018 that the junctions were unable to facilitate the level of development proposed without additional mitigation. A month later, on 12 October 2018, Kent CC reiterated that Attwood was requested to demonstrate an attempt to reduce the congestion at the two junctions.

26. In early 2019, on 12 February, Kent CC wrote to the Council that the measures Attwood had now agreed would provide mitigation for the impact of the development on the two junctions

27. As we have seen the fourth reason for refusing planning permission the Council gave in August 2019 concerned highways issues.

28. The Council had appointed a highways expert, Mr Clive Burbridge, who gave advice and conducted discussions with Attwood's expert, Mr Mike Axon. There was still a disagreement between the two over the issue of the two junctions when on 7 January 2020 the two experts signed a statement of common ground. Entitled "Transport Statement of Agreement and Disagreement" it set out their areas of agreement and disagreement. As regards the areas of disagreement, the document recounted the Council' position that the proposed development would have a severe cumulative residual impact on the operation of the two junctions.

29. There were further discussions between the experts and on 31 January 2020 they agreed a further "Transport Statement of Agreement and Disagreement". Under the heading "Areas of agreement", the Council stated that subject to a Grampian condition limiting occupation to no more than 570 dwellings until such a time as improvements to the Halfway Road junction were implemented according to the Vectos drawing No 195003_GA_001, and the obligations set out within the Unilateral agreement for off-site highway improvement works totalling £60,000, it no longer objected to the development on highway grounds. Accordingly, reasons for refusal 4 was withdrawn.

30. The Overarching Statement of Common Ground of the 31 January 2020 recorded that in refusing the application, the Council had contended that it conflicted with Policy DM6, Managing Transport Demand and Impact, because the improvements to the local highway network agreed with Kent CC were insufficient to reduce the residual cumulative impacts to below "severe", but the

Council's position at the appeal was that, following the offer of further mitigation to offset impacts at the two junctions, there was no conflict with the policy.

31. Accordingly, Attwood's expert, Mr Axon, was called to give oral evidence at the inquiry not on the issue of the two junctions but regarding some outstanding highways and transport issues raised by third parties, as well as questions concerning the evidence and the section 106 undertaking and section 278 (of the Highways Act 1980) agreement. The rest of the highway evidence was taken in written form.

Decision letter on the appeal

32. In his decision letter, the inspector noted that prior to opening the inquiry, the Council advised that it would not be defending its reasons for refusal 3, regarding affordable housing, or 4, regarding its impact on highways, and that its planning committee has resolved to withdraw these reasons for refusal. Consequently, he said, the main issues were the effect of the proposal on the character and appearance of the surrounding area, and its effect on the setting of the grade II listed Parsonage Farmhouse: DL [5].

33. The inspector then went on to consider these two issues, character and appearance and heritage. In both cases he decided against the Council.

34. Under the heading "Other matters", the inspector addressed affordable housing at DL [26].

> "26. The Council has agreed the findings of the latest viability statement prepared by the appellant and has accepted that, taking account of the

> contributions that would be secured in the engrossed Section 106 Unilateral Undertaking (S106 UU) that the appellant has provided, the inclusion of affordable housing would make the proposed development not economically viable. The proposal would accord with [the Council's] Policy DM8, as the appellant has demonstrated that the impact of viability of the provision of affordable housing has not changed from the 0% sought under the Policy."

35. Traffic and transport were addressed at DL [28]-[31]. With respect to the two junctions, the inspector stated that their impacts had been considered by the Council and Kent CC and they had agreed that, with appropriate mitigation secured by planning obligations and conditions, the proposal would be consistent with all local and national transport policies. KCC did not object to the proposal on highway grounds and the Council had withdrawn its objection on these grounds: DL [30]. Based on that he was satisfied that the impact as a result of traffic that would be generated by the proposed development would be made acceptable by the imposition of planning conditions and the obligations to secure appropriate mitigation measures: DL [31].

36. The inspector discussed planning obligations at DL [37]-[50]. At DL [37] he noted that after the close of the inquiry Attwood had submitted an engrossed section106 Unilateral Undertaking dated 7 February 2020, based on that agreed with the Council and KCC at the inquiry, and that he had considered the information given in the Community Infrastructure Levy Regulations 2010 (CIL) compliance statements provided by the Council and KCC in support of the planning obligations.

37. Regarding the two junctions he said:

> "38. The obligations to secure contributions towards highway improvements at the Halfway Road junction and Darlington Drive / Parsonage Chase would be necessary to mitigate any adverse impacts on the local highway network of additional traffic that would be generated by the development. This money would be used to deliver traffic measures on local roads, including The Crescent and Lowfield Road, Darlington Drive and Parsonage Chase, to discourage rat running that could result from additional queuing due to increased traffic generated by the proposal at the Halfway / Minster Road signal junction and the Barton Hill Drive / Minster Road mini roundabout. The amount that would be provided has been calculated by KCC as being that which would deliver the appropriate traffic management measures."

38. With respect to contributions to secondary education, the inspector stated that the obligations to make them were necessary to make the development acceptable in planning terms; directly related to the development, as the future occupants would be likely to use the education facilities that would be provided through the contributions; and would be fairly related in scale and kind to the development: DL[40].

39. There was then discussion of the planning balance (DL [51]-[57]) and planning conditions (DL [58]-[66]). At DL [62] the inspector stated that the conditions to control the level of development occupied until highway measures had been implemented at the M2 Junction 517, Lower Road18 and Halfway traffic signal junction were necessary to prevent severe cumulative impacts on the road

network. The condition governing the Halfway junction, condition19, states: "(19) No more than 570 dwellings shall be occupied until a scheme of highway improvements to the Halfway traffic signal junction, as shown on the Vectos drawing No 195003_GA_001, has been completed."

Decision letter on costs

40. The issue of costs was dealt with on written submissions from both main parties following the conclusion of the inquiry hearing. The inspector issued his costs decision letter on 2 March 2020.

41. Attwood's case was that it should have its costs because of the Council's unreasonable behaviour. With respect to affordable housing, the inspector summarised its case for costs as based on (i) the Council's failure to provide evidence to substantiate each reason for refusal; (ii) the Council not reviewing the case promptly following the lodging of an appeal; and (iii) the fact that the Council had no answer that the policy required 0% affordable housing in this location: CDL [3].

42. The inspector summarised the Council's case as follows at CDL [10]:

> "10. The reason for refusal on affordable housing was not pursued at the Inquiry. The appellant raised the issue of viability in its proof of evidence. At the Case Management Conference (CMC) the Council proposed to deal with affordable housing under the planning topic. The matter that the appeal scheme cannot make any contribution towards affordable housing was already agreed before the Council signed the topic specific SoCG on the third day of the Inquiry. No time was spent on this topic at the Inquiry and

> no time was wasted on it. It was not unreasonable behaviour, and considerable time was saved at the Inquiry in any event."

43. On highways the inspector summarised Attwood's case in terms that the Council's behaviour was unreasonable in refusing permission on a ground capable of being dealt with by conditions or planning obligation; after all, its basis for the withdrawal of the reasons for refusal 4 was that Attwood had agreed to condition 19 and agreed to make a further contribution of £20,000 by way of traffic calming on Darlington Drive / Parsonage Chase: CDL [4].

44. At CDL [11] the inspector said that the Council's response was that it provided expert evidence in support of the highways reason for refusal and justified why the Section 106 contribution and Grampian condition were required. Mitigation was identified, and Attwood agreed the necessary contribution with the Council and Kent CC. As the Council asserted, Attwood had not argued that mitigation was not required. On the Council's case there had been a substantial highways issue to resolve, which was the subject of detailed and substantial evidence.

45. The inspector awarded Attwood its costs. On affordable housing he said:

> "[16] The Council refused planning permission for four reasons. The third reason for refusal on grounds of affordable housing contribution was withdrawn with the Council suggesting that it informed the appellant on 18 December. However, this does not appear to me to have been conclusive as the Council pursued this matter with regard to the s.106 planning obligations contributions. In this respect the appellant's evidence on viability that it provided for the Inquiry could have been avoided, even though the Council claimed that it was related to the level of secondary

education contributions. Therefore, I find that the Council acted unreasonably in refusing planning permission for this reason, which clearly was not supported by the evidence or development plan policies, and failing to produce evidence to substantiate this reason for refusal. As a result, the appellant incurred unnecessary expense in its preparation of evidence on affordable housing and viability for the Inquiry.

46. As regards highways, the inspector reasoned:

> "[17] In terms of the fourth reason for refusal on highways grounds, the Council only withdrew it following a meeting on 27 January 2020. This was based on agreement to a planning condition and a planning obligation to secure mitigation. Kent County Council as the local highway authority, had not supported the reason for refusal and, although it agreed to the mitigation measures, it did not object to the proposal on highway grounds. As such, the Council had gone against the expert advice of its highway authority and its own planning officers, who recommended the grant of planning permission. Although it provided expert evidence to support this reason for refusal, this evidence was not examined at the Inquiry. In my opinion, this ground could have been resolved without the need for the appellant to provide evidence to contest it at the Inquiry and therefore the appellant has incurred unnecessary expense in providing this evidence."

47. At CDL [22] the inspector found that the Council had not prevented or delayed development which should clearly be permitted. However, he considered that unreasonable behaviour resulting in unnecessary expense, as described in the

Planning Policy Guidance, had been demonstrated in respect of the reasons for refusal 3 and 4 on affordable housing and highways.

48. In consequence the inspector ordered the Council to pay to the costs of the appeal proceedings on the Council's third and fourth reasons for refusal, regarding affordable housing and viability and highway and traffic impacts. Those costs were to be assessed if not agreed.

Legal framework on costs

49. Costs do not follow the event in this area. An inspector has a wide statutory discretion to award costs against any party to the appeal: Local Government Act 1972, s. 250(5).

50. For many years the Secretary of State has had a published policy on costs, which in essence has remained constant. In its current form in the Planning Practice Guidance ("PPG"), it begins with the overall aims of the policy, that parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met.

51. The aim of the costs regime, the PPG says, is to: (i) encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case: (ii) encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay; and (iii) discourage

unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections.: para. 028.

52. The PPG continues that costs may be awarded against a party where it has behaved unreasonably, and this unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process: para.030. The word "unreasonable", the PPG explains, is used in its ordinary meaning, as established by the courts in *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774. Unreasonable behaviour may be either procedural, relating to the process; or substantive, relating to the issues arising from the merits of the appeal. An inspector has discretion when deciding an award, enabling extenuating circumstances to be taken into account: para. 031.

53. In explaining what counts as unnecessary or wasted expense, the PPG states: "An application for costs will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense…Costs applications may relate to events before the appeal or other proceeding was brought". para 032. Among the type of behaviour which may give rise to a substantive award of costs against a local planning authority, listed in paragraph 049, are (1) the refusal of planning permission on a planning ground capable of being dealt with by conditions, where it is concluded that suitable conditions would enable the proposed development to go ahead; and (2) not reviewing its case promptly following the lodging of an appeal against refusal of planning permission.

54. In *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774, the case cited in the PPG, Kennedy J held that (i) once the Secretary of State expressed himself to be deciding a case under the policy about costs, if he decided the case other than in accordance with that policy he misdirected himself; and (ii) under the Secretary of State's costs policy, behaviour would be unreasonable if the refusal of planning permission could not be supported by substantial evidence. That was the situation where the Council refused permission to replace a radio mast on the ground that there was danger to health and safety from the microwaves. Kennedy J held that the inspector was entitled to find that even at the inquiry there was a lack of substantial evidence to support that positive assertion, made with at least some knowledge of the weight of the evidence to the opposite effect.

55. In *R v Secretary of State for the Environment, ex parte North Norfolk District Council* [1994] 2 PLR 768, Auld J held that the award of costs against the Council was wrong. The inspector had dismissed the developer's appeal on one ground only, finding that the other reasons for refusal had not been established. He had then awarded the developers their costs of refuting the council's reasons for refusing permission on the other grounds. That, Auld J held, was an improper exercise of discretion.

56. In the course of his judgment Auld J confirmed that "unreasonable" meant unreasonable in the ordinary sense of the word, not unreasonable in a Wednesbury sense. Auld J also explained that the list of potential reasons in the policy why a party might be said to have acted unreasonably was only guidance

as to matters which may be relevant to deciding the matter: As he put it at p. 783:

> "[T]he test is one of unreasonableness, not just whether an authority has produced evidence to substantiate their case on a particular issue. I respectfully adopt the view of Hutchison J in R v Secretary of State for the Environment, ex parte Chichester District Council [1993] 2 PLR 1 DC, that the proper test is that set out in para 5 of the circular, namely has the unreasonable conduct of the authority caused the other party to incur unnecessary expense. This is how he put it at p8 of the report:
>
> > '… I cannot accept that the correct test is whether the authority had produced substantial evidence to support their case. Mr Mole relied heavily on para 7 of the policy statement, contending that it in effect requires that the inspector should examine the evidence and the reasons, treating para 7 as a sort of check list; …'
>
> In my judgment, … the test is that stated in para 5 — had the unreasonable conduct of the authority caused the other party to incur unnecessary expense; and that para 7 is intended to give guidance as to some of the different matters which may be relevant to deciding that issue. Thus, while the question of whether there was or was not substantial evidence to support the authority's objections will usually be a relevant one, it does not embody the legal test for making an order for costs."

57. *Ealing LBC v Secretary of State for the Environment and Brixton Estates* [1993] 2 PLR 12 was a case where it was held that in awarding costs to the developer the inspector had misdirected himself and acted irrationally. There the Council

had granted planning permission, the developer consenting a section 106 agreement. At an outstanding appeal on the application, the developer was successful in persuading the inspector to grant planning permission without the requirement for the section 106 agreement. The inspector then awarded it their costs in relation to the argument on the section 106 agreement on the grounds that it had been unreasonable for the Council to seek one. Popplewell J held that the inspector's decision was flawed (pp. 21-22):

> "The preparation of the section 106 agreement, as the inspector rightly said, was not a matter for him. It was not for the inspector to spend his time considering the section 106 agreement because it was a perfect waste of time. It was unnecessary for his decision. It was unnecessary for the grant of planning permission. In my judgment, he has misdirected himself and arrived at a decision which I have to categorise as irrational in his approach to the question of costs."

58. It seems to me that the authorities establish the following propositions:

(i) the Secretary of State is entitled to adopt a policy about costs and having done so his inspectors must apply it;

(ii) the policy is that costs may be awarded against a party for unreasonable behaviour resulting in unnecessary or wasted expense;

(iii) "unreasonable" means unreasonable in the ordinary sense of the word, not unreasonable in a Wednesbury sense;

(iv) a Council's behaviour may be unreasonable if its refusal of planning permission could not be supported by substantial evidence, but that is not the only test and there may be other relevant factors;

(v) one example is if a developer signs a section 106 agreement; it is accepting that it is reasonable even though the inspector may not be persuaded that it is necessary.

Ground 1: costs relating to affordable housing and viability issue

59. For the Council Mr Upton QC submitted that the inspector was wrong in deciding that the Council's position on affordable housing and viability was unreasonable so that it should pay Attwood's costs on the issue. In particular the inspector's decision was reviewable on mistake of fact and irrationality grounds because he had distorted how the matters arose and were dealt with.

60. What had occurred on 18 December 2019, Mr Upton submitted, was that the Council had withdrawn its reasons for refusal 4 but that a new issue arose over the scheme's contribution to schooling. There was now a pot of money potentially available for affordable housing. Then in early January Dr Lee cast a shadow over the economic viability of the scheme as a whole. The Council was duty bound to explore both issues, which it did. Moreover, the pursuit of affordable housing was in line with national policy and in the circumstances consistent with local policy DM8(6) (outlined earlier in the judgment).

61. Once the position became clear, Mr Upton continued, the Council made clear in the Overarching statement of common ground on the 31 January 2020, and in the 5 February 2020 statement of common ground on viability, that it

accepted that the scheme could not make any contribution towards affordable housing. As a result of the Council's actions, there was no need for the inspector to be troubled by the issue at the inquiry.

62. Yet, submitted Mr Upton, the inspector ignored all this background at CDL[16] of his costs decision, quoted earlier in the judgment, when he focused on the Council's failure to produce evidence to substantiate its reason for refusal, and on what he characterised as its ambiguous statement of 18 December 2019 on the affordable housing issue.

63. While at one level the Council's actions following the 18 December and Dr Lee's evidence on 7 January may seem reasonable, I am unable to conclude that the inspector's findings at CDL [16] were flawed. Those findings were based on the approach of the Council to the affordable housing issue from its refusal of planning permission in August 2019, and not just in the month or so preceding the inquiry held in early February 2020.

64. The inspector was much closer to the position than I am. As I understand it, his reasoning began with the fact that Pathfinder, jointly commissioned with the Attwood, had come to clear conclusions on economic viability and the affordable housing issued, and that Dr Lee's evidence simply reinforced the point that there was no headroom in the scheme for affordable housing. Yet the Council produced nothing to gainsay the point. Then when the Council purported to withdraw the reason for refusal on 18 December 2019, it did so ambiguously, as the inspector said, seeking to keep the door open as regards the secondary school contribution which might be available for affordable housing.

65. Given the Council's refusal to accept the Pathfinder reports which it had jointly commissioned, the ambiguous 18 December withdrawal, and the failure of the Council to engage with Attwood's point about the absence of headroom in the scheme for affordable housing in the correspondence following 18 December, one can understand the inspector's conclusion that Attwood had incurred additional expense, especially when the Council stated in the 18 December email that it would make the recycling argument as part of its case. The Council's acceptance that affordable housing was not on the cards came too late for Attwood to avoid expense.

66. The Council's reference in CDL [16] to the Council' position not being supported by evidence reflects the example in the PPG and what Auld J said in *R v Secretary of State for the Environment ex parte North Norfolk District Council* [1994] 2 PLR 768, both referred to earlier, about a planning authority needing to have an evidential and respectable basis for a ground for the refusal of permission. Moreover, as the inspector also noted at CDL [16], the Council's development plan policy provided that, generally speaking, no affordable housing contributions would be sought in respect of development in this location. The Council has not surmounted the high bar for review of the inspector's decision on this point.

Ground 2: costs award in relation to highways and traffic impacts

67. For the Council Mr Upton contended that the Inspector erred in law in his decision to award the costs incurred in dealing with the appeal on the Council's reasons for refusal 4 regarding highway and traffic impacts. Attwood accepted that the basis for the withdrawal of the highways reason for refusal was that it

agreed to condition 19 and agreed to make a further contribution of £20,000 by way of traffic calming on Darlington Drive / Parsonage Chase. That basis for the withdrawal, Mr Upton underlined, was because of the force of the evidence of the Council's expert, Mr Burbridge. The Council had been right on the point and won the argument, and it was perverse to order the Council to pay for Attwood's traffic expert.

68. Indeed, added Mr Upton, the inspector accepted at DL [64] that the traffic works at, inter alia, Halfway junction were necessary to prevent severe cumulative impacts on the road network. Yet at CDL [17] the inspector focused on the views of Kent CC and the Council's own officers. Although it may be persuasive, a local planning authority is not obliged to accept the advice of other authorities, and it is still for it to decide the issue. Importantly, Mr Upton submitted, the inspector had ignored a material fact, the impact of Mr Burbridge's views on the ultimate outcome.

69. In my view this is one of those cases where a different inspector may have reached a different conclusion. However, I cannot conceive that Mr Upton has surmounted the high hurdle necessary to establish that this inspector's decision was flawed. The case which Mr Village QC put to the inspector was that the Council had not raised what became condition 19, or the further contribution to traffic calming in Darlington Drive/Parsonage Chase, until immediately before the exchange of evidence on 6 January 2020, too late to avoid the preparation of Attwood's highways evidence. When these were raised as a way forward, Attwood agreed and it was an example of the Council's failure to review the

case promptly following the lodging of the appeal, one of the examples the PPG gives as indicating unreasonable behaviour (at para. 049, referred to earlier).

70. Nor do I consider that Mr Upton has established that the inspector neglected a material consideration. CDL [17] is not as explicit as it possibly could have been, but it is clear that the inspector was well aware of the Council's arguments on the matter, as is evident from CDL [11], outlined earlier in the judgment. It is horn book law that an inspector's decision letter must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced: *South Buckinghamshire DC v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953, [36], per Lord Brown.

71. In any event Mr Village was making the point that at the time of refusal, not when the hearing was imminent, the Council should have grappled with the issue of how mitigation could be effected. The inspector was closest to the case and his view, as stated in the last sentence of CDL [17], was that this ground for refusal could have been resolved without the need for Attwood to provide evidence to contest it. That the inspector had to scrutinise condition 19 is beside the point. His approach reflects what is said about the failure to resolve matters through planning conditions at paragraph 049 of the PPG, referred to earlier in the judgment. There is no reviewable error in the inspector's conclusion.

Conclusion

72. For the reasons given the Council's application is refused.