The Planning Inspectorate

Appeal Decisions

Hearing held on 16 January 2024

Site visit made on 17 January 2024

by Mike Robins MSc BSc(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2024

Appeal A: Ref: APP/K1128/W/23/3327455
Land at Garden Mill, Derby Road, Kingsbridge, Devon, TQ7 1SA

- 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 planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Blakesley Estates (Kingsbridge) Ltd (now T/A Garden Mill Ltd) against South Hams District Council.
- The application Ref 1803/23/VAR, is dated 7 June 2023.
- The application sought planning permission for an outline application with some matters reserved for a residential development scheme for 32no. dwelling at allocated site K4 without complying with conditions attached to planning permission Ref 28/1560/15/O, under Appeal Ref APP/K1128/W/3156062, and reserved matters Ref 0826/20/ARM, dated 05 June 2017 and 21 December 2020 respectively.
- The conditions in dispute are No 7 of the Outline permission, which states that:
  The development hereby permitted shall be carried out in accordance with the following approved plans: 215/06A, 215/11, 215/08, 215/09, 215/10, 215/29, 215/30, 215/31, 215/28, 215/13, 215/33, 215/12, 215/15, 215/14, 215/32, 215/34, 215/07A, 215/01A, 215/02A, 215/03A, 215/04B, 215/05A, 215/102A, 215/201, 215/17, 215/16, 215/19, 215/18, 215/21, 215/20, 215/22, 215/23, 215/24, 215/25, 215/26A, 215/27, 215/35, 215/101A, 215/103A;
  and No 1 of the Reserved Matters permission, which states that:
  The development hereby permitted shall be carried out in accordance with the application form and the following approved plans/documents received on:
  30th March 2020: 215-35, 215-37, 215-38, 215-39, 215-40, 215-41, 215-42, 215-1024.
  16th November 2020: 215-1021 Rev C, 215-1022 Rev A, 215-1023 Rev A, 215-1025 Rev C.
- The reasons given for the conditions are:
  Condition 1: *In order to ensure compliance with the approved drawings.*
  Condition 7: *A condition specifying the scheme drawings is necessary for certainty.*

Appeal B: Ref: APP/K1128/W/23/3325969
Land at Garden Mill, Derby Road, Kingsbridge, TQ7 1SA

- 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 consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Blakesley Estates (Kingsbridge) Ltd (now T/A Garden Mill Ltd) against South Hams District Council.

- The application Ref 1170/23/ARC, dated 30 March 2023, sought approval of details pursuant to condition No 8 of a planning permission Ref 28/1560/15/O granted on 05 June 2017, under Appeal Ref APP/K1128/W/3156062.
- The development proposed is an outline application with some matters reserved for a residential development scheme for 32no. dwelling at allocated site K4.
- The details for which approval is sought are: details and samples of materials to be used on the external elevations of the dwellings.

Decisions

Appeal A

1. The appeal is dismissed and planning permission for an outline application with some matters reserved for a residential development scheme for 32no. dwelling at allocated site K4 without complying with a condition imposed on a permission is refused.

Appeal B

2. The appeal is dismissed and approval of the reserved matters is refused, namely: details and samples of materials to be used on the external elevations of the dwellings submitted in pursuance of condition 8 attached to planning permission Ref 28/1560/15/O granted on 05 June 2017, under Appeal Ref APP/K1128/W/3156062.

Applications for costs

3. An application for costs was made by South Hams District Council against the appellant. This application is the subject of a separate Decision.

Preliminary Matters

4. Both appeals relate to the same original outline application, which was granted on appeal in 2017[1]. Notwithstanding that the appeals before me were made against a failure to give notice of determination, the Council's position on each of the relevant applications was that the outline permission relied upon was not lawfully implemented and had expired. As a result their position was that they declined to determine either of the applications that have led to the appeals.

5. Although that original permission followed an application by h2land, further development and applications were by Blakesley Estates (Kingsbridge) Ltd, who were the original applicant for both of the proposals before me. Subsequently, it has been confirmed that the developer of the site is now Garden Mill Ltd. Although the applications referred to the site as land at Garden Mill, much of the correspondence refers to it as Locks Hill.

6. Following submission of legal opinion on the validity of the appeals, I set out in a Pre-Hearing Note, that the consideration of the appeals' validity was to be the preliminary assessment, and that the assessment of the planning merits would only take place, were I to find in favour of the appellant's position.

7. A similar application to Appeal A was submitted in August 2021[2]. Although the subsequent appeal was dismissed, the timing of that appeal coincided with applications for a Lawful Development Certificate. The Inspector therefore

[1] APP/K1128/W/16/3156062
[2] APP/K1128/W/21/3296573

confirmed in the decision that no conclusions were to be drawn on the status or validity of the original permission.

8. Subsequent to the original permission, the Council set out a Tree Protection Order, No 1039, made 14 May 2021 (the TPO), covering tree groups to the boundaries of the site, as well as specified trees and a group along the public footpath that bisects the site.

Main Issue(s)

9. As a result of the fundamental disagreement between the parties over the validity of these appeals, I set out the main issues as follows:

    - The status of the planning permission and consequential validity of the appeals.

10. If the appeals are valid then:

    - Whether the proposal would achieve a suitable housing mix and meet locally identified needs;
    - Whether the proposal would provide sufficient levels of affordable housing; and
    - The effect on the character and appearance of the area with regard to the existing and future effects on trees and from the external materials now proposed.

Background and History

11. The site was identified as part of a land allocation (K4) in the South Hams Local Development Framework (LDF) 2016. An outline proposal by h2land for 32 dwellings on the site, initially refused by the Council in 2016, was allowed on appeal, as set out above.

The Original Outline Permission

12. The h2land proposal was allowed with a number of conditions. The matters set out as central to the decision by the Inspector included the setting of Buttville House, the scheme design, provision of affordable housing and the effect on the South Devon Area of Outstanding Natural Beauty (AONB), now referred to as a National Landscape.

13. While finding in favour of the appellant, there were a number of important findings in this decision, including the effect on the listed Buttville House being predicated on the importance of the trees currently on and surrounding the site. The Inspector noted, "*the appellant has made clear their intention to retain and supplement the trees and vegetation at the north-east corner of the site closest to the listed building",* and consequently found that "*With retained and enhanced planting along the site boundaries even in the winter months, from the house and verandas, glimpsed views only would be available…."* Overall, it was found that the proposed development would preserve the setting of the listed building.

14. In their design assessment, the Inspector noted the overall sylvan character of part of the site, and went on to consider the effect on the AONB, finding that

for particular important views into the site, "*the boundary vegetation could be retained and supplemented and its impact thus softened.*"

15. Again, and importantly, the Inspector noted "*The appellant has indicated their intention to retain and supplement boundary vegetation, and retain mature trees at the centre of the site.*" This clearly informed the findings that effects on the AONB would be negligible. Similarly, the retention of trees in the north-east corner were important, in the Inspector's view, on the other consideration of the effect on the living conditions of the occupiers of Buttville House.

16. On any reading of this decision, the retention of trees, both on the boundaries and within the site, was a determinative factor in the conclusions reached by the Inspector, and this is borne out by the proposed conditions. These include not only Condition 4, which specifies tree retention as part of the required landscaping reserved matters, but also Condition 6, which explicitly requires tree protection measures, prior to works on the site. This condition states:

    No site clearance, preparatory work or development shall take place until a scheme for the protection of the retained trees (the tree protection plan) and the appropriate working methods (the arboricultural method statement) in accordance with paragraphs 5.5 and 6.1 of British Standard BS 5837: Trees in relation to design, demolition and construction - Recommendations (or in an equivalent British Standard if replaced) shall have been submitted to and approved in writing by the local planning authority. The scheme for the protection of the retained trees shall be carried out as approved.

    [In this condition "retained tree" means an existing tree which is to be retained in accordance with the approved plans and particulars.]

17. Consequently, in my view, there can be no question that the required provision of tree protection measures was central to the decision.

18. The Landscaping Reserved matters were approved on 21 December 2020, and the details required by the pre-commencement conditions, including Condition 6, were discharged between December 2021 and May 2022. On the basis of the submission of the required details, implementation of this permission should have been by 21 December 2022. The appellant informed the Council by notice, dated 12 May 2022, of their intention to commence development on the 27 May 2022. This permission, subject also of a non-material amendment, forms the basis, or host permission, for the appeals before me.

    Other applications and appeals

19. In addition to the August 2021 appeal, referred to above, the appellant in this case sought confirmation of the status of the original outline permission through two Lawful Development Certificate applications. These were refused in November 2022 and March 2023. Neither were appealed, with the appellant noting that they felt it more efficient to pursue the non-validation of the Section 73 application in order to have the lawfulness of the host permission and the merits of the Section 73 application considered in one appeal.

    Other Proceedings relevant to the site

20. The Council report that they issued a temporary Stop Notice, dated 14 May 2021, in relation to breaches of Conditions 6 and 13, followed by an Enforcement Notice, dated 11 June 2021, and a Stop Notice, dated 14 June

2021. Enforcement action, including through the courts, is reported to be ongoing.

Reasons

21. It is established in case law that breaching a pre-commencement condition can, in certain circumstances, render implementation of that permission unlawful.

22. When considering the site in its present condition, the extensive excavation, land reprofiling and construction of a number of the dwellings to first floor levels would clearly indicate that material operations have begun. However, this must be viewed in light of the timing and nature of the activities that have taken place.

23. There is persuasive evidence that works representing at least preparatory works and site clearance were taking place around May 2021, notwithstanding that the appellant at the Hearing suggested those works comprised trial pits and survey work. I am satisfied, in the face of the photographic[3] and other evidence, that works sufficient to represent commencement of the development began prior to the date notified, the 27 May 2022. The timing of the enforcement notices give further clear indication that there was substantive activity on the site at this time. When considered against Condition 6, in particular, and the requirement for submission of details prior to any preparatory or site clearance works, then a breach has clearly taken place.

24. It is not contested that Devon Tree Services were only engaged around the middle of 2021, and while they produced the Tree Protection Plan (TPP) and the Arboricultural Method Statement (AMS), which were subsequently agreed by the Council, the appellant's argument that tree protection fencing was employed in a robust manner is not supported by the evidence.

25. Firstly, I note the inclusion of photographs in the AMS, reported to be from July 2021. However, these show only a small part of the site and even then, the fencing is not in accordance the submitted TPP. What these do indicate is substantive earthworks have already taken place, and in close proximity to the trees. There is no substantive evidence from the appellant to show fencing either in accordance with the TPP, or even in an alternate form that could be shown to provide the requisite element of protection, being in place prior to the submission or approval of the AMS/TPP. Indeed there is nothing to show the continuous application of fencing to those standards has been employed consistently across the site, even to the time of this appeal's site visit.

26. It is accepted in the appellant's own statements, that fencing was not provided in the upper, southern field, a requirement of the AMS, but instead left until construction was due to start. However, this claim is undermined by both photographic evidence, clearly showing significant working to that area prior to the fencing being in place, the site manager's own statement, that fencing has been installed 'since starting construction', and the arboriculturist accepting that he had to respond to construction beginning in that area, and requiring the fencing to be put up. This is reactive provision and not the pro-active provision as set out in the AMS. While there are photographs in the updated findings of the more recent AMS relating to fencing in the southwestern field, these are not in accordance with the TPP, show only part of the site, are undated and are

[3] The South Hams Society and others

indicative of machinery being used through that area, with some evidence of vegetation loss under the tree canopies. Additionally this report accepts that 'Tree Protection Barriers were not in place in their entirety within the southwest field'. To my mind, this gives insufficient reassurance that fencing measures, in accordance with the approved details were in place at the time of construction works and use of machinery in this area.

27. A number of times in the course of the Hearing, the appellant accepted that fencing may not have been in accordance with the AMS and TPP but that it was robust and in place in the period from October 2022 to December 2022, presumably to link it to the final date for implementation of the permission, 21 December 2022.

28. It is important to note that the TPP expressly states that 'The protection barriers must be in place before any materials, plant or other machinery is b(r)ought (sic) onto the site'.

29. The AMS/TPP required installation of fencing along the northern and eastern boundaries. It is evident now that excavations have meant significant, and acknowledged difficulties in maintaining fencing in such narrow sections against such steep slopes. Unfortunately, this does not equate to the expectations of the TPP. The Council's survey and on-site evidence clearly shows that, whether as part of phased development or not, substantial excavation, reprofiling and the deposit of material has taken place very close to the tree and hedge groups along these boundaries.

30. Furthermore, there is evidence of failure of even the ad hoc tree fencing and AMS procedures in place leading to fundamental breaches of the requirement to retain existing tree and hedge groups. This is acknowledged in the Arboricultural Inspections findings and in the AMS update, dated February 2023. The removal of a section of hedge bank, including some trees, to enable easier access to the upper parts of the site is entirely contrary to the required retention and an indication that staff on site were not operating in accordance with the AMS as approved. That measures were taken to address this breach, the success of which can only be assessed in the long term, does not mitigate the failure here.

31. The TPP clearly shows expectations of 2-metre-high fencing with scaffolding brace supports with notices, with the AMS confirming that this is to ensure prevention of unauthorized activity. Such activity is identified as occurring, in relation to the removal of signage and damage to boundary fences. However, the expected approach, that of the scaffolding bracing, does not appear to have been employed at any stage, and even the suggested use of an alternative triangular set up does not appear to have been employed across the site. It is highly unfortunate that, when responding to a direct question on this matter as to why the approaches approved in the AMS/TPP had not been followed, it was indicated that it was submitted in that form to gain approval. That such approaches were not employed, but nonetheless, alternate, unapproved measures were, measures which have not been comprehensively proven to have been in place at the appropriate time or across the whole site, and which have led to direct impacts and potentially unknown longer term impacts on the retention of trees, is an indication that the requirements of Conditions 6, in terms of the scheme being carried out as approved, has also been breached.

32. The question is whether in breaching either part of Condition 6, or indeed the condition as a whole, the development was not lawfully begun; that is, if in contravention of a condition precedent, the development could not properly be described as commencing.

33. In such circumstances, the commonly accepted approach to considering such matters is that set out as the 'Whitley principle'. Derived from *FG Whitley & sons v SSW and Clyde CC* 1992 JPL 856, *R(oao Hart Aggregates Ltd) v Hartlepool BC* 2005 EWHC 840 Admin and others[4], where a condition, which goes to the heart of the permission, expressly prohibits development before a particular requirement is met is breached, that would be development without planning permission. There are a number of exceptions to this principle, and it is acknowledged that there may be some flexibility on the matter of timings, for example, in relation to the submission and subsequent approval of details.

34. At the Hearing, the appellant accepted in principle the use of the Whitely approach, whose steps I address here, but set out a number of other arguments that I also deal with.

Does the condition prohibit the commencement of development?

35. The wording of Condition 6 is clear, and while I note the appellant's argument that some measure of site clearance, indeed of tree removal, could be carried out by a landowner without planning permission, this permission expressly places the responsibility on the developer to comply in accordance with any works related to the development of that site.

36. Accordingly, the requirement of Condition 6 is to submit details prior to any works of site clearance or other preparatory works, let alone works that may comprise other more extensive operations. It clearly prohibits commencement of development until the TPP and the AMS have been submitted and approved. Conditions 6 is a condition precedent in this regard.

37. The appellant argues that Condition 6 is in two parts, firstly, the submission of details and secondly, the implementation of those approved details, a requirement which, they suggest, is for continuing compliance and which could not take place without breaching the precedent element of the condition itself. I give this argument very little weight. The condition requires the appropriate details to be submitted and approved to ensure retention of the trees and hedges. Were it to be suggested that those details, which in themselves require, for example, tree protection barriers to be in place prior to the construction phase, do not then need to be implemented prior to construction activities starting, including, but not exclusively, activities such as site preparation, earth moving, the importation and storage of materials and the use of heavy machinery, that would undermine the very reasoning for the condition.

38. I accept that compliance with the ongoing supervision and monitoring, or the later options, in terms of the two specialist works requirements set out in the AMS, would be a matter of continuous compliance subsequent to the commencement of development. However, this does not and cannot apply to the installation of tree protection measures; Condition 6 is therefore a condition precedent in this regard also.

[4] Including *Greyfprt Properties Ltd v SSCLG* [2011] EWCA Civ 908

Does the condition go to the heart of the permission?

39. It is noted that, in some cases, there are conditions, which require detailed submission prior to commencement, boundary treatments for example, that have been found to not meet this test. Here, Condition 6 relates to measures to protect the trees and hedges to the boundaries and through the centre of the site. I have set out above the importance placed on this matter, both by the original applicants, but importantly, by the Inspector who allowed the original host permission. This relates to screening effect and the contribution to the character and appearance of the area, both in terms of public perception, but also the AONB and heritage assets.

40. Tree protection measures to retain the existing features are vital to prevent not only the immediate damage or loss of those features, but also to protect from longer term impacts through compaction, root loss or contamination, among other factors.

41. Accordingly, I consider that Condition 6 does go to the heart of the host permission.

Are there any exceptions to the principle.

42. In this case, no exceptions were argued. I have considered whether the substance of the approved details had been complied with at any time prior to approval of the details, or even subsequent to that approval and found that they had not. Accordingly, I have identified no relevant exception from the evidence before me.

Conclusion on the Whitley Principle

43. There is an absence of any convincing evidence that appropriate tree protection measures were in place when substantive preparatory, site clearance or other works began. Furthermore, the evidence before me confirms that the approved measures were not implemented consistently across the site, were at no time shown to be in place in full in accordance with the approval and that direct impacts had been experienced in relation to retained feature. As a matter of fact and degree, I consider Condition 6 to have been breached.

44. As a condition precedent going to the heart to the permission, and in absence of any exceptions to the principle, I must conclude that works carried out prior to 21 December 2022 were not lawful and the host permission lapsed at that point.

Other Matters

45. From their legal opinion on this matter, and the case made at the Hearing, the appellant's arguments are mostly dealt with above. However, for completeness, they argued, but did not take forward at the Hearing, the case that only Condition 1, in relation to landscaping, was the condition precedent, with Condition 6 merely dealing with construction management. While landscaping is an important matter in this case, and in some way contributes to the effect on the setting of Buttville House, the principal concern of the Inspector in allowing the host permission related to the retention of existing landscape features, notably trees and hedgerows. In this, Condition 6 is the relevant condition precedent.

Conclusion

46. As set out above, were my findings to be that the host permission had not been lawfully implemented, then I would not go on to consider the substantive planning merits of the revised scheme as sought under the revision to Conditions 1 and 7 and the approval of details pursuant to Condition 8 of the host planning permission and reserved matters approval.

47. For the reasons given above, and having regard to all other matters raised, I conclude that the appeals should not succeed.

Mike Robins

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Roach MRTPI	Roach Planning and Environmental Ltd – Director
Mr B Naughton	Roach Planning and Environmental Ltd
Mr D Tilney	Stephens Scown LLP – Partner
Mr M Daley	Ihc Design - Director
Mr T Spencer	Garden Mill Ltd
Mr J Freeland	Garden Mill Ltd
Mr S Putt	Devon Tree Services

FOR THE LOCAL PLANNING AUTHORITY:

Mr G Lewis KC	Instructed by D Fairburn, Head of Legal Services
Mr S Stroud MRTPI	Planning Consultant for South Hams District Council
Mr P Baker	Principal Planning Officer – Local Plans South Hams District Council
Mr A Rehaag	Principle Affordable Housing Officer - South Hams District Council
Mr L Marshall	Senior Tree Officer – South Hams District Council
Mr A Wagstaff	South Hams District Council – Site Visit only

INTERESTED PARTIES:

Cllr Martina Edmonds	Kingsbridge Town Council
Mrs J Pearce	Local Resident
Mrs V Mugford	Local Resident
Mrs A Barlow	Local Resident
Mr L Pengelly	Local Resident
Mrs C Cahan	Local Resident

The Planning Inspectorate

Costs Decision

Hearing held on 16 January 2024

Site visit made on 17 January 2024

by Mike Robins MSc BSc(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2024

Costs application in relation to:

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- The details for which approval is sought are: details and samples of materials to be used on the external elevations of the dwellings.

Decision

1. The application for a full award of costs is refused but a partial award of costs is allowed in the terms set out below.

The submissions for South Hams District Council

2. The costs application was initially made in writing, dated 15 January 2024, seeking a partial award of costs. This was subsequently updated orally at the Hearing, where the application was changed to seek a full award.

3. The initial application related to the Council's costs in dealing with the planning merits of Appeals A and B. This application referred to the Planning Practice Guidance (PPG) and paragraphs 30, 31 and 32, and considered that the matter of the validity of the appeal should have been addressed following the Council's own refusal of the applications for a Lawful Development Certificate (LDC). In so doing, the Council argue, parties would have been spared the expense of preparing evidence on the planning merits if the finding was that the host permission had lapsed.

4. At the Hearing, the Council chose to expand their case and argue for a full award. Notwithstanding that, in their written application, they considered it reasonable to seek a decision from an Inspector on whether the host permission had lapsed, that was on the understanding that there was a factual case in seeking to comply before the December 2022 deadline.

5. That, the Council say, is not the appellant's position now and they referenced PPG Paragraph 53, which considers that a party is at risk of costs if an appeal has no reasonable prospect of succeeding. The onus of proof is on the appellant and concessions made at the Hearing show that there was inadequate evidence to support their legal arguments. The Council considered that it was not asserted or substantiated that all of the fencing was in place at any point, and not before the implementation date of December 2022.

6. It would appear, the Council states, that the appellant's case now argued was that parts of the fencing was installed on an ad hoc basis as they considered necessary, with no argument that an alternative alignment approach extended across the whole site. In absence of evidence, this, the Council say, was a quintessential example of wasted costs where a planning permission had lapsed.

The response by Garden Mill Ltd

7. The response was made orally at the Hearing.

8. The original outline application was made 9 years ago. The choice to appeal the s73 application was made for reasons of pragmatism. Garden Mill Ltd

wanted to develop the site having, they say, made a lawful implementation of the host permission. That they had drawn the validity of the appeals into the scheme was for practical reasons, as to have had to deal with 2 separate appeals would take too long.

9. The revised scheme is a well-considered one, with considerable merits over the host permission and would provide a positive housing mix, including 75% 2 and 3 bed units. If refused, what, they ask, will happen to the site.

The final response for South Hams District Council

10. In their response to the appellant's arguments, the Council suggested that it contained no response to the evidential arguments put, and simply to assert the permission had not lapsed is no sort of answer.

11. While it may be open to merge LDC and planning merits appeals, this is not generally how the procedure should work. Parliament identified separate procedures for legal issues precisely because it specifically avoids spending time and costs on planning merits, potentially academically.

12. Consequently, in taking this highly irregular approach, the appellant must accept the consequences. The Council consider that there is hardly a more obvious circumstance for costs, especially where the appellant had not come close to meeting the case required.

Reasons

13. Parties in planning appeals normally meet their own expenses. However, the PPG advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

14. While I note the Council's position regarding the onus on the appellant to prove their case and justify that this was not one where the appeal had no reasonable prospect of success, the appellant presented a legal opinion on the validity of the appeals. This was supported with statements from the site manager and evidence at the Hearing from the author of that opinion and the arboricultural advisor, as well as from the developer.

15. While I may have found that that evidence was insufficient to demonstrate either that Condition 6 was not a condition precedent that went to the heart of the permission, or that it had not been breached, such findings are a judgement based on the matters presented to me. While concessions regarding the provision of fencing were made at the Hearing, this does not mean that no evidence was produced or that the argument necessarily had no reasonable prospect of success. Consequently, on this particular matter, I do not consider the appellant was unreasonable and a full award of costs should not follow.

16. However, in this case, the appellant chose not to appeal either of the LDC refusals, but instead bring an appeal for non-determination in circumstances where the Council's decision was explicitly that they declined to determine because the relevant permission had, in their view, lapsed.

17. While it may have been pragmatic from the appellant's point of view not to have followed the well-established procedure of appealing against an LDC

refusal, it necessitated the Council preparing a response on the planning merits on the understanding that were the issue of validity to fall, those preparation would have been to no purpose.

18. That the appeal was an unusual one is confirmed by my own questions on the initial review of the case[1]. Furthermore, from an early stage the Council were clear that they did not want to have to commit to the preparation of evidence on planning merits were it not to prove necessary, and wished the matter of the status of the permission to be assessed separately[2].

19. The appellant's position on splitting the appeal, or hearing the case on validity separately, was to refute such an approach[3]. Furthermore, I could not agree to the Council's proposal for a preliminary assessment on the validity of the appeals, principally because the appeal was made under s78 of the Town and Country Planning Act 1990 and not against the LDC, and the appellant did not support it. However, in my pre-Hearing note, dated 22 December 2023, I noted that the Council's legal opinion on this matter had merit and that my deliberations, if it was found that the appeal had lapsed, would stop at there.

20. In such circumstances, the risks and consequences of choosing to pursue an appeal where the issue of the validity was to be informed by whether the permission had lapsed or not, were clear. That those consequences could have been avoided can be considered, in part, the reason that appeals under s191 are available under the Act. Consequently, I consider that the appellant was unreasonable in their approach.

21. It is inevitable that, on a finding that the permission had lapsed, all work relating to the planning merits of Appeal A and B would result in unnecessary work and wasted expense.

22. Accordingly, for the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the Council preparation and presentation of evidence in relation to the planning merits of Appeals A and B, and a partial award of costs is therefore warranted.

Costs Order

23. 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 Garden Mill Ltd shall pay to South Hams District Council, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in addressing the planning merits of the appeals; such costs to be assessed in the Senior Courts Costs Office if not agreed.

    The applicant is now invited to submit to Garden Mill Ltd, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Mike Robins

INSPECTOR

[1] Email dated 3 October 2023
[2] Email dated 12 September 2023
[3] Email dated 15 September 2023