Aylesham Centre.

Appellant's Application for Costs

Introduction

1. This is an application for a partial award of costs based on:

    a. The unreasonable new allegation that the Council had a 7.21 year housing land supply, the complete failure to call any credible evidence at the inquiry in support of that allegation and the significant additional time and cost for the Appellant in refuting the unreasonable allegation.

    b. The introduction and maintenance of an inadequate quantum of affordable housing reason for refusal contrary to the clear advice of officers having regard to expert advice received by the Council.

    c. The introduction and maintenance of a harm to vitality and viability reason for refusal contrary to the advice of officers based on a mechanistic analysis of loss of retail area.

2. The aim of the costs regime set out in the PPG is to:

    a. 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;

    b. 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,

    c. discourage unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections.

3. Costs may be awarded where: a) a party has behaved unreasonably; and b) the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

4. Examples of the type of procedural and substantive behaviour that may give rise to an award of costs against a local planning authority are given in the PPG (see the PPG on Appeals at paragraphs 047 and 049). This includes in particular:

    a. vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis;

    b. introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen;

c. prolonging the proceedings by introducing a new reason for refusal;

d. the failure to produce evidence to substantiate each reason for refusal on appeal; and,

e. vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.

5. The Secretary of State has also recently endorsed[1] the following in relation planning committee members overturning the professional advice of its officers:

> "*Turning to the substantive grounds, it is a fundamental principle of local decision-making that a planning committee is not bound to follow the advice of its officers. Nonetheless,* ***there is an expectation that where this occurs it should show reasonable planning grounds for taking a contrary decision and produce sound, substantive and defensible evidence on appeal to support the decision in all respects****. Similarly, whilst the views of local residents and local organisations must be taken into account, the extent of local opposition is not in itself a reasonable ground for resisting development.* ***To carry weight, opposition should be founded on valid planning reasons and supported by substantial evidence****.*"

Procedure

6. Before addressing the substance of the costs claim, it is necessary to address the procedural arguments made by Mr Turney KC to the Inspector, following closing submissions.

7. The Inspector has the statutory power to make an order for costs.[2]

8. The PPG on Appeals (paragraph 035) provides that such costs applications must be made to the Inspector before the inquiry is closed. That is exactly what the Appellant is doing in accordance with this requirement, and in accordance with the direction by the Inspector.

9. Mr Turney KC's reference to this being a late application for costs and there needing to be good reasons for having made the application late (see final paragraph of paragraph 035 of the PPG) is not applicable here. This reference in the PPG applies to late applications for costs, made after the inquiry has closed.

10. This costs application is being made before the inquiry has closed, and it is not a late application for costs.

11. In any event, the Inspector has determined and ruled that the costs application can and should be made and has set a fair timetable for the process to be followed.

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[1] See the Secretary of State's letter dated 22 September 2025 granting at award of costs, fully agreeing with the reasoning of the Inspector at CR34-CR53, in the Brighton Gasworks appeal (APP/Q1445/W/24/3353409).

[2] Section 320 of the Town and Country Planning Act 1990.

The five-year housing land supply ("5YHLS") Saga

12. In this case involving housing, the issue of the existence or otherwise of a 5 year housing land supply at the date of the determination was clearly a material consideration of some importance.

13. This is particularly so bearing in mind the Government's stated aim to significantly boost the supply of housing during the lifetime of the Parliament.

14. Local planning authorities have a duty at inquiries such as this to assist the decision maker by accurately stating their 5YHLS position (PPG Housing Supply Para 004 and 007).

15. This is a case where the local planning authority failed to take that duty seriously and indeed sought (without evidence or choosing to call the appropriate witness) to inflate unreasonably its alleged 5YHLS.

16. The appeal was due to be heard in October 2025. The Council had not stated a position on a 5YHLS since 2021.

17. That previous position was plainly out of date and in its report to committee (CD 3.1) the authority clearly applies the presumption or tilted balance test (see paragraph 57, CD3.1, dated 15th July 2025).

18. The Council's argument in Closing that the issue of 5YHLS and the tilted balance is a new point 'dreamt up' by the Appellant is incorrect and entirely unjustified.[3] Officers had always proceeded on the basis that the tilted balance was engaged. It was only in the evidence produced for the appeal that the Council reneged on this position, resulting in the Appellant having to spend significant time dealing with this new point.

19. In its Rule 6 statement (28th July 2025 para 4.13) CD 8.2) the Council asserted, for the first time in the context of this application and appeal, a 5YHLS and relied on the obviously out of date 2021 Assessment. That document is out of date both on its face and having regard to the "perfect storm" of non-delivery.

20. The Appellant, in Mr Alston's proof of evidence, noted that the Council has not demonstrated a 5YHLS either in an AMR or in any appeal cases and is unable therefore to say whether there is a 5YHLS demonstrated.

21. The Council, in Mr Ibbot's proof of evidence, then alleged a new and remarkable 7.21 years supply and further alleged that as a result the weight to be given to housing can only be moderate (see para 9.25 Mr Ibbot's proof).

22. There was no evidence in support of this new allegation. Mr Ibbot only produced an unevidenced and unparticularised table that the 7.21 years supply existed, without reference to the sites which made up that alleged land supply (see table MI2), in conflict with the Council's duty under the PPG.

[3] See paragraph 100 of the Council's closing.

23. Both these allegations (of a 7.21 supply and moderate only weight to housing in Southwark and London at the present time) are clearly incorrect and unreasonable. They are unsupported by evidence.

24. Mr Ibbot had been given the information by officers who were not to appear at the inquiry and he was not in a position to independently verify them. He had not independently verified them as he fairly accepted. He was aware of the overwhelming likelihood that the borough would not meet its 2024/5 Housing Delivery Target. But that was not mentioned in his proof, nor in relation to the achievement of an alleged 7.21YHLS.

25. As a direct result of these claims of a 7.21 years supply the Appellant reasonably sought the release of the sites relied upon and began its own assessment of the HLS position having regard to the advice in the NPPF – an assessment which involved a consideration of each and every site now relied upon. The Appellant had to repeatedly chase the Council to provide the list of sites, which was eventually only disclosed on 8 October 2025 (see Mr Alston's rebuttal, paragraph 2.32).

26. The site-by-site assessment was an extensive undertaking by the Appellant. The site-by-site assessment resulted in a housing land supply of no more than 3.9 years. Mr Alston (appendix E). That evidence was presented by way of a signed rebuttal to the new assertion of a 7.21 years supply. It was open to cross examination.

27. Two working days before the commencement of the inquiry and without notice and outside of the Inquiry Procedure rules, the Council served an anonymous and unsigned schedule which purported now to show a housing land supply of 5.04 years (CD 8.13.2). This late claim of 5.04 years supply was still clearly incorrect and resulted in more time and money being spent reviewing the revised schedule.

28. Mr Ibbot said that it had been prepared by housing officers and represented their position and he was unable to speak to it beyond that. Officers were not going to be giving evidence on the schedule. Their "evidence" to this extent could not be challenged.

29. Mr Ibbot agreed that he had been told by officers that all of the "Berkeley Sites" had been removed and accepted that they had not in fact done this. He could not say why but agreed that removing the site dealt with in Mr Alston's Appendix D was appropriate and by itself meant that there was no 5YHLS.

30. He could also give no reason why the Canada Water site remained in the land supply when the evidence before the inquiry was that it was NOT proceeding and had stalled and was unfundable. Further, he could not deal with any of the sites with no formal planning permission which had nonetheless been included en bloc.

31. That is the Council's evidence it chose to provide to this inquiry on 5YHLS.

32. Further evidence on such matters should now not be entertained.

33. For the reasons set out in the Appellant's own evidence and in the Appellant's Closing, we now know that the Berkeley and Canada Water sites and other sites all remained in the Council's claim of 5.04 years supply, and that on anyone's evidence at the inquiry (including Mr Ibbot's acceptance) there was and is not a 5YHLS.

34. The introduction and then rapid withdrawal of the 7.21 HLS assertion was unreasonable having regard to the evidence.

35. The failure to call any evidence during the inquiry in support of the allegation from those asserting a 5YHLS was unreasonable also and the maintenance of the allegation of a 5YHLS in the face of the evidence as to the Berkeley and Canada Water sites and an entire category of sites without planning permission but with a resolution to grant where there is a positive duty on the local planning authority to provide further evidence of delivery in relation to those sites, is also unreasonable.

36. Quite remarkably, particularly given Mr Ibbot's acceptance in cross-examination that even just removing the Berkeley sites meant that the Council could not demonstrate a 5YHLS, the Council has continued to maintain in Closing (see paragraph 103 of the Council's Closing) that it can demonstrate a 5YHLS.

37. The Council's additional argument (see paragraph 103 of the Council's Closing) that the Inspector does not need to reach a conclusion on this issue is even more bizarre – given that this was an issue first placed into evidence by the Council itself.

38. None of Council's evidence on this issue stood up to scrutiny and fell well, well short of being robust evidence demonstrating of a 5YHLS as required by the PPG (para 007 Housing Supply and Delivery).

39. All of this led to the need, as mentioned above, for the Appellant to instigate its own investigation of the relevant sites as to which there was no (and could be no) meaningful challenge from Mr Ibbott or Mr Turney KC.

40. The costs of such investigation and presentation were occasioned by the Council's unreasonable conduct in relation to the alleged demonstration of a 5YHLS. It was the Council who introduced this new issue, and who unreasonably and incorrectly alleged a 7.21 YHLS and then a 5.04 YHLS.

41. This amounts to procedural and substantive unreasonable behaviour by the Council. It produced fresh and substantial evidence at a late stage necessitating extra expense for preparatory work, prolonged proceedings by introducing a new issue, and failed to provide evidence to substantiate this point (PPG on Appeals, paragraphs 047 and 049).

42. An order for the costs incurred by the Appellant is dealing with this issue should be made against the Council.

The insufficient affordable housing despite acceptance that reasonable maximum provision reason.

43. Where a Committee fails to follow the advice of its officers, there is an expectation that it should show reasonable planning grounds for taking a contrary decision and produce sound substantive and defensible evidence to support its decision in all respects (see the Brighton Gas works Inspector's Report, endorsed by the Secretary of State, referenced above).

44. In this case, the Council (and the Rule 6 party) indicated that the Inspector should give lesser weight to the assessment of the reasonable maximum provision of affordable housing (which was agreed to be up to date relevant and undertaken in a robust and transparent way by both parties' expert teams). But neither Rule 6 Party nor the Council explained how else the appropriate level of affordable housing ought properly to be calculated.

45. What was the appropriate level of affordable housing to be sought by the planning system and when, the Inspector is entitled and required to ask? There will be no rational or coherent answer to this question.

46. This led to a wholly incoherent freestanding reason for refusal which should never have been formulated or relied upon.

47. Such an approach if followed would result in decisions which were wholly relativistic and based apparently on the unknown and irrelevant individual circumstances of individual developers.

48. Officers directed members clearly and unambiguously on this matter.[4]

49. Without any expert or technical evidence on this matter members unreasonably overturned the relevant advice and failed to meet their duty to produce sound substantive and defensible evidence to support the new reason for refusal.

50. The costs of addressing this reason for refusal were incurred as a result of the unreasonable refusal on this ground, and members were warned of the risk of costs on this issue.[5]

51. In the premises, the Council adopted an unreasonable and incoherent approach which should never have framed a reason for refusal and then (and as a result) failed to produce evidence to substantiate that reason.

52. This substantive unreasonable behaviour included preventing development for this reason contrary to the application of the development plan policies and national policy, prolonging proceedings by introducing this new reason for refusal, failing to produce evidence to substantiate this issue, and making vague,

[4] See, for example, points 1.244 and 1.248 at internal numbered pages 51 and 52 of the transcript of the Committee meeting (in Mr Alton's appendices at CD 8.07-1).
[5] As above.

generalised and inaccurate assertions unsupported by any objective analysis (PPG on Appeals, paragraphs 047 and 049).

53. There were no valid planning reasons or sound, substantive and defensible evidence to justify this additional reason for refusal added by members contrary to officer's advice (see Brighton Gasworks costs decision).

Mechanistically relying upon the small loss of retail floorspace to found a reason for refusal

54. Officers, and the Inspector in his Main Issues, correctly indicate that the issue for the planning system is the vitality and viability of the Town Centre.

55. It is not the mechanistic assessment of whether there is in fact a small reduction in "old" A3 retail uses. Yet this quantitative reduction of retail floorspace was the sole reason given by members in the third reason for refusal for why there was allegedly harm to the town centre. This is so despite members having no evidence whatsoever of any harm that this would cause to the vitality and viability of the town centre.

56. The reshuffling of the Use Classes Order to provide more flexibility for town centre uses sought to ensure that it was the function of the town centre that was important and not necessarily the boxes into which such functions were placed. This approach was encouraged by officers, in both the agreed Brief (CD 7.17, electronic page 11) (which formed part of an extensive pre-application process) and in the officers' report (CD 3.1, paragraphs 82-85 and 126).

57. In this case, members were told that the proposal enhanced the vitality and viability of the present Aylesham Centre and that therefore the simple arithmetic loss of floorspace should not be a reason for refusal (CD 3.1 paragraphs 85 and 126).

58. Elected members however could not resist opportunistically aiming at the "loss" simply because the allocation uses the term "must" in relation to replacement of retail floorspace.

59. When considering the use of the word "must" in the allocation regard should be given to the development plan when read as a whole and the underlying objective behind the retail floorspace requirement (just as officers did). It is unreasonable to concentrate solely on one provision of one policy and simply and slavishly adhere to its provision irrespective of the impact of a proposal overall on vitality and viability.

60. In this case officers were clear and gave detailed reasons that "*the proposed development would result in a loss of retail floorspace compared to that which currently exists on the site and would also include workspace and drinking establishments which do not form part of the site allocation but are uses supported by policies about development in town centres. For the reasons outlined in detail above officers consider that the land uses proposed and*

quantum of floorspace are in compliance with the development plan when read as a whole" (see paragraph 126 of CD 3.1).

61. In contradistinction, elected members' fixation with the precise retail quantitative figure of retail floorspace is unreasonable.

62. In cross-examination, Mr Ibbot, when taken to the relevant parts of the officers' report (paragraphs 82-85 of CD 3.1), readily agreed with officers that whilst there would be an arithmetic reduction of retail floorspace – the introduction in its place of workspace and drinking establishment spaces would be positive additions to the town centre. This disclosed the unreasonableness of this objection by members in the first place.

63. Yet, flying in the face of Mr Ibbot's own views, the Council has continued to maintain in Closing that the mechanistic reduction of retail floorspace continues to justify a reason to refuse permission.

64. The Appellant in dealing with this allegation had to engage in costs in order to overcome the objection, including the production of town centre health checks and other analysis (see Mr Alston's proof at section 10 and appendices B and C).

65. This substantive unreasonable behaviour included preventing development for this reason contrary to the application of the development and national policy, prolonging proceedings by introducing this new reason for refusal, failing to produce evidence to substantiate this issue, and making vague, generalised and inaccurate assertions unsupported by any objective analysis (PPG on Appeals, paragraphs 047 and 049).

66. There were no valid planning reasons or sound, substantive and defensible evidence to justify this additional reason for refusal added by members contrary to officer's advice (see Brighton Gasworks costs decision).

Overall

67. The unwarranted addition of the two additional reasons for refusal, in relation to development on a brownfield allocated site, followed a very significant period of pre-application engagement between the Appellant and Council officers, including the agreement with officers of the Design Brief.

68. On both of these elected member driven reasons for refusal, the comments recorded in the transcript are instructive:[6]

> "1.298 Councillor Vambi: So my understanding is officers have put forward this reason for refusal because it gives us the best chance of success, and my colleagues here are suggesting that we need to factor in all of the other considerations that we've heard from the objectors because not only are they strong but thinking about precedent, they might—you know, thinking about future opportunities where a new planning application is put forward. We

[6] Points 1.298 and 1.299 on internal numbered page 61 of the Committee transcript (see Mr Alston's appendices at CD 8.07-1).

want them to not only address this, we would want them to address other things. I guess my only response— my only response to that would be if this argument put forward is the difference between being successful versus putting forward an alternative argument that adds in additional considerations, wouldn't we in hindsight say we would have wished to have put forward this argument which gives us the best chance of success over option B, which is this argument and other arguments too, because we're thinking long-term, etc.? But what does that mean if we lose the appeal anyway because we've made a different argument?

1.299 Officer: I think what we're saying is that officers are saying that the strongest grounds they think for us refusing is what they set out there. The question then becomes, does adding other reasons weaken that case, or does it give us something else that's preferable? I tend to view that as long as we are not making any reasons that officers don't feel they can defend, then I don't see how it weakens the case. I think for me the advantage of it is—and I think other people have said this as well, but I'll repeat it just so that you understand where my head is—if the planning inspector looked at all of this and agreed that refusal of this was right but on fairly narrow grounds because we'd only put one reason, is there a risk that the applicant or somebody else, if Barkley walked away, came back with a different application which addressed this in terms of the heritage impact but otherwise we were unhappy with, given there would then be a precedent that said, well, the only reason for refusal is this, does that put us at risk of getting a development there that we're not happy with? So, sorry, I did say please not having interruptions—it's quite nice to be applauded, but actually we do need to get on and complete the meeting."

69. This discloses a mindset based on finding a way to frustrate the development as opposed to determining the planning merits of the application.

70. However these additional reasons are viewed, they were unreasonably added contrary to officers' advice and were not supported by sound substantive evidence to justify setting aside officers' analysis.

71. The unreasonable behaviour of the Council in relation to the 5YHLS saga speaks for itself.

72. This unreasonable behaviour by the Council has greatly added to the costs of the appeal, and it needs to be marked by an award of costs. This is particularly important given the Government's drive to make as much use as possible of brownfield land to deliver 1.5 million new homes, in the context of the worst housing crisis in living memory.

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Anjoli Foster

18 November 2025