



## Costs Decisions

Inquiry held on 9 August 2022

Site visit made on 10 August 2022

**by O S Woodward BA(Hons.) MA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 11<sup>th</sup> October 2022**

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### **Costs application A - in relation to Appeal Ref:**

**APP/G1630/W/22/3295270**

#### **Land off Brook Lane, Twigworth**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Robert Hitchins Limited for a full award of costs against Tewksbury Borough Council.
  - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for residential development (up to 160 dwellings), associated works, including demolition, infrastructure, open space and landscaping with vehicular access from the A38.
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### **Costs application B - in relation to Appeal Ref:**

**APP/G1630/W/22/3295270**

#### **Land off Brook Lane, Twigworth**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Tewksbury Borough Council for a partial award of costs against Robert Hitchins Limited.
  - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for residential development (up to 160 dwellings), associated works, including demolition, infrastructure, open space and landscaping with vehicular access from the A38.
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### **Costs application C - in relation to Appeal Ref:**

**APP/G1630/W/22/3295270**

#### **Land off Brook Lane, Twigworth**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Gloucestershire County Council for a partial award of costs against Robert Hitchins Limited.
  - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for residential development (up to 160 dwellings), associated works, including demolition, infrastructure, open space and landscaping with vehicular access from the A38.
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## **DECISIONS**

1. Application A – The application for an award of costs is allowed in the terms set out below.
2. Application B – The application for an award of costs is partially allowed in the terms set out below.
3. Application C – The application for an award of costs is partially allowed in the terms set out below.

## **BACKGROUND**

4. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably, and thereby caused the party applying for costs to incur unnecessary expense in the appeal process. The PPG also advises that the behaviour of parties during the time of the planning application can be taken into account in deciding whether unreasonable behaviour has occurred, although the costs themselves can only be awarded in relation to unnecessary or wasted expense at the appeal.
5. The below is a timeline of key events in the application and appeal process. This helps inform my reasoning in my Decisions:
  - Appeal application submitted, 16 July 2021;
  - January Planning Committee, 18 January 2022 - deferred for further information on affordable housing mix and education contributions;
  - February Planning Committee, 15 February 2022 – deferred for further information on affordable housing mix, an up-to-date traffic assessment, further work on drainage, and to request a meeting on-site between the applicant and residents;
  - Appeal lodged, 21 March 2022;
  - Appellant Statement of Case (SoC), 21 March 2022 – matters in dispute could involve highways, drainage, education contributions, affordable housing mix, and housing land supply;
  - April Planning Committee, 19 April 2022 – minded to refuse in line with officer recommendation, the reasons being the education contribution, affordable housing mix, and infrastructure contributions;
  - Duplicate application submitted (Ref 22/00523/OUT), 21 April 2022 - including a Unilateral Undertaking securing contributions towards infrastructure, affordable housing, and sets out that a further planning obligation will be entered into with regards to education contributions;
  - The Council's SoC, 30 May 2022 – matters in dispute could involve education contributions, affordable housing mix, and infrastructure contributions;
  - Gloucestershire County Council (GCC) SoC, 6 June 2022 – matters in dispute could involve education contributions;

- First Case Management Conference (CMC), 9 June 2022 – matters in dispute were agreed to be education contributions, affordable housing mix, and infrastructure contributions. However, the Council confirmed that all of these matters were now acceptable in the duplicate application. Agreed a revised timetable for the appeal to take into account the duplicate application, which was being taken to the 21 June 2022 Planning Committee: 19 July 2022 – exchange of Proofs of Evidence (PoE); and, 9 to 12 August 2022 – inquiry dates;
- June Planning Committee, 21 June 2022 – the duplicate application was deferred in the absence of an engrossed s106 in relation to education contributions;
- Second CMC, 22 June 2022 - revised deadline for the PoE was agreed for 26 July 2022. Agreed that the inquiry would be uncontested. Appellant agreed to remove the alternative contributions and blue pencil clauses from the planning obligations, apart from the one small point regarding the education contributions. GCC highlighted that although only the drawdown issue remains on education contributions, this was important to GCC;
- Affordable Housing Unilateral Undertaking (UU), 22 June 2022 – resolved affordable housing mix;
- Public Open Space UU, 22 June 2022;
- Education, Libraries and Highways UU, 22 June 2022 – resolved infrastructure contributions issues;
- Primary School Transport s106, 24 June 2022 – resolved education contribution issues;
- Duplicate application withdrawn, 18 July 2022 - due to window closing on overlapping judicial review periods;
- Third CMC, 20 July 2022 – all issues agreed;
- The Council/appellant Statement of Common Ground (SoCG), 26 July 2022 – no matters in dispute;
- GCC/appellant SoCG 26 July 2022 – no matters in dispute; and,
- Appellant PoE, 26 July 2022 – in relation to interested parties, acknowledges no dispute with either the Council or GCC.

## **APPLICATION A**

### **The submissions for Robert Hitchins Limited (RHL)**

6. An application for full costs for unreasonable behaviour was made in writing. The written submission provides full details of the claim but, in summary, the grounds for the claim is that the Council failed to determine the applications within the statutory period and that the Council's planning committee was unreasonable in deferring the decision on the application at the January and February 2022 planning committees, and on the duplicate application at the June 2022 planning committee.
7. The claim also highlighted the timings of the potential judicial review period following any determination of the application and the importance of any

appeal inquiry that fell within that period taking place. The applicant had reason to believe any decision might have been vulnerable to judicial review because of inaccuracies in the reports to committees attributing housing contributions from the appeal proposal to Tewkesbury's housing needs, rather than to Gloucester City Council, as it should have done.

### **The response by Tewksbury Borough Council**

8. This was provided orally at the Inquiry. The Council stated that the planning committee were the decision maker and are at liberty to disagree with officer's recommendations. The January 2022 committee were reasonable to defer because the affordable housing mix and the education contribution had not been agreed at the stage. The February 2022 committee were reasonable to defer to seek further evidence regarding highways and drainage.
9. Housing land supply and the attribution of the proposed housing was never a contested feature of the applications. The concerns regarding this element of the report were only raised at appeal.

### **Reasons**

10. It is within the rights of the planning committee to make a different decision to the officer recommendation. However, the decisions of the committee must be reasonable.
11. The decision to defer the planning application at the January 2022 committee, and not to delegate the decision to officers, was reasonable because the remaining discussions regarding the education contributions were potentially detailed, important, and could have resulted in significant changes to the value of the contribution.
12. However, the decision to defer the application at the February 2022 committee was unreasonable. No substantiated reasons for requiring further evidence were given with regard to the drainage and highways issues. Requiring a meeting between residents and the applicant is not a material planning consideration. None of these issues were taken forward by the Council in contesting the appeal, as shown in its SoC. There was also no reason why these issues could not have been raised at the January 2022 committee.
13. The decision to defer the duplicate application at the June 2022 committee was also unreasonable. The only reason was that the submitted s106 planning obligation and Unilateral Undertakings had not been signed. The content of the legal agreements was not in dispute. This could easily have been delegated to officers, and indeed this procedure is commonplace at planning committees.
14. The Council has, therefore, demonstrated unreasonable behaviour. If the application had been approved at the February 2022 committee then the appeal would not have been made. If the duplicate application had been approved at the June 2022 committee then the appeal could have been withdrawn at that point. The unreasonable behaviour has, therefore, resulted in unnecessary and wasted expense by RHL. This covers the entire period of the appeal, because the appeal was only necessitated by the February 2022 committee decision.

## **Costs Order**

15. 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 Tewksbury Borough Council shall pay to Robert Hitchins Limited, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
16. The applicant is now invited to submit to Tewksbury Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

## **APPLICATION B**

### **The submissions for Tewksbury Borough Council**

17. The Council has made an application for partial costs against RHL, based on unreasonable behaviour. The partial claim relates to the preparation of the Council's SoC, preparation and appearance at the second and third CMCs, and preparation and appearance at the Inquiry.
18. The written submission provides full details of the claim but, in summary, the legal agreements were not submitted until late in the process in June 2022, even though they were submitted in relation to the duplicate application earlier. On 18 March 2022, RHL confirmed it would not be contesting the appeal on the basis of education contributions or affordable housing mix, in an email to the Council. However, RHL did not formalise this through correspondence to the Inspectorate or with an updated Statement of Case. RHL did not confirm until the first CMC on 9 June 2022 that it would not be contesting these two matters. RHL also refused to adjourn the appeal pending the Council's decision on the duplicate application.
19. Because of the above, the Council needed to prepare a full case with regard to the three putative reasons for refusal, as set out in the April 2022 planning committee. This led to abortive work. The Council also needed to attend the second and third CMCs, which were necessitated in part by RHL not adjourning the appeal. The second CMC was also necessitated by RHL not providing the relevant legal agreements in support of the duplicate application at the June 2022 planning committee.
20. At the Inquiry, the Council verbally added to its claim, highlighting that RHL's legal agreements were only submitted to the Inspectorate one day before the 9 June 2022 CMC, after the Council had written its SoC.

### **The response by RHL**

21. RHL provided a verbal response at the Inquiry. RHL stated that the claim related to the duplicate application, not the application related to the appeal. They made various points in relation to the alleged unreasonableness of the deferral of the appeal application at the February 2022 planning committee. RHL stated that the duplicate application was submitted in an effort to avoid the appeal progressing but that it ended up not working because the duplicate was deferred from the June 2022 committee. Because of this, the appeal needed to proceed because of the threat of a judicial review period even if a decision had been made on the duplicate at a later committee.

22. RHL stated that they agreed very quickly not to contest the affordable housing mix and education contributions issues at the appeal. They also highlighted that the Third CMC was called for an arranged by the Inspectorate, not by RHL.

### **Reasons**

23. RHL's SoC for the appeal indicated it would be contesting the education contributions and affordable housing mix issues, in addition to highways, drainage and housing land supply. RHL submitted an email to the Council at the same time confirming it would not, in fact, contest the education contributions and affordable housing mix issues. However, this was not presented to the Inspectorate. The formal SoC was not revised. The Council had no other option than to proceed on the basis that the applicant would contest the appeal on the basis of all the matters raised in the SoC. This was later confirmed in the Council's three putative reasons for refusal, as agreed at the April 2022 planning committee.
24. RHL did not withdraw its position regarding education contributions and affordable housing mix until the legal agreements were submitted in June 2022. The duplicate application offered what the Council, and GCC, were requesting in those regards. However, it is not uncommon for an applicant to submit an application to a Council at the same time as contesting an appeal on the basis of a different approach to certain matters. The Council therefore had no option other than to proceed on the assumption that the applicant would, or at least could, contest the appeal, up until the point the legal agreements were submitted and confirmation was provided that these would not be contested issues at the First CMC. The approach of the Council's planning committee is irrelevant to the above points.
25. Also, although RHLs approach to protect its position in relation to judicial review periods is reasonable, it did not request for an adjournment to the appeal process, so that the appeal could remain 'live' but would not need to be contested until after the duplicate application and its judicial review period had been resolved. That the Third CMC was arranged by the Inspectorate is irrelevant – it was only necessary to arrange the CMC to respond to the evolving situation regarding the forthcoming Inquiry, which would not have been necessary had the Inquiry been placed in abeyance. RHL has therefore demonstrated unreasonable behaviour leading to unnecessary or unwasted expense at appeal.
26. However, I do not view preparation and attendance at the Inquiry itself to be an unreasonable use of the Council's time and resources. By that stage, the Council knew that the Inquiry would be uncontested. It was the RHL's right at that stage to require the Inquiry to be held because the duplicate application had been withdrawn. Importantly, the duplicate application was withdrawn on reasonable grounds, given the previous decisions made by the planning committee.

### **Costs Order**

27. 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 Robert Hitchins Limited shall pay to Tewksbury Borough Council, the costs of the appeal proceedings described in the heading of this decision, limited to



those costs incurred in dealing with the appeal up until the First CMC, but not the CMC itself; and, preparation for and attendance at the Second and Third CMCs; such costs to be assessed in the Senior Courts Costs Office if not agreed.

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

## **APPLICATION C**

### **The submissions for Gloucestershire County Council**

29. The written submission provides full details of the claim but, in summary, GCC has made a claim for a partial award of costs in relation to the professional fees of Elizabeth Fitzgerald and Andrew Fraser-Urquhart KC, based on unreasonable behaviour by RHL.
30. There are two aspects to the claim. The first relates to the education contributions. RHL only agreed to pay the full amount required by GCC when the s106 planning obligation was submitted on 24 June 2022. There were no changes of fact or policy that led to the change by RHL. Up until that point, GCC was obliged to prepare for the appeal on the basis that the education contributions would be a contested issue. GCC also highlight that RHL has previously contested the same point at two other inquiries, Coombe Hill and Oakley Farm.
31. The second aspect relates to the duplicate application and the complications to the Inquiry timetabling, which necessitated three CMCs, all of which required the attendance of Elizabeth Fitzgerald and Andrew Fraser-Urquhart KC. If the education contributions matters had been resolved, then attendance would only have been required from a GCC solicitor alone.
32. At the Inquiry, GCC verbally added to their claim. It highlighted that RHL's SoC made it clear that education contributions were a contested issue, including stating that an education contributions specialist witness, Neil Tiley, would be called. GCC also highlighted that it is not unusual for an appellant to submit a duplicate application offering full payment of a contribution and to simultaneously contest that point at an appeal. GCC needed to be alive to this. GCC highlighted that the education contribution was only reduced due to a calculation based on pupil yield from the proposal, not methodology, which was the reason given for RHL's contention with the education contributions in the SoC.

### **The response by Robert Hitchins Limited**

33. RHL highlighted that the payment for the education contribution reduced from a GCC request of £1 million to £878,000. It is also important to note that GCC subsequently accepted RHL's position on drawdown, which is also an important part of why agreement was reached on the education contributions payment. At the point the new figure was agreed, there was no reason why GCC could not take a step back from the process.
34. RHL said at the First CMC that there would be nothing for GCC to challenge. RHL explained at the Second and Third CMCs the rationale for the duplicate application, and its relationship not just to matters of principle but also judicial

review periods. The Coombe Hill and Oakley Farm appeals were for several million pounds worth of education contributions and needed to be contested in a manner that was not necessary for the appeal scheme.

### **Reasons**

35. Up until the s106 planning obligation (the s106) was submitted on 24 June 2022, there remained dispute regarding the education contribution. This was made clear in RHL's SoC, at the First CMC, and even in the final draft s106 that was discussed at the Second CMC which, at the time, included blue pencil clauses in relation to the contribution. The duplicate application was accompanied, at the time it reached the June Planning Committee, by a s106 planning obligation that offered the payments that GCC requested. However, GCC was entitled to continue to prepare for the appeal on the basis that this issue was still being contested in relation to the appeal scheme, until confirmation came otherwise from RHL on submission of the appeal s106 on 24 June 2022. It is important that there was no change in policy or fact to influence the change in approach by RHL to this issue. RHL has therefore demonstrated unreasonable behaviour leading to unnecessary or unwasted expense at appeal.
36. From 24 June 2022 onwards, though, it was clear that the education contributions were no longer a contested issue for the appeal. From that date, the approach of RHL to this issue for the appeal was reasonable and it was for GCC to judge what resources it required in relation to the ongoing appeal process.
37. The duplicate application did not directly influence any of the matters above. It led to an elongated appeal timetable but this was largely a result of the deferral from the June 2022 Planning Committee, which would have been difficult for RHL to predict. The duplicate had the potential, if it had not been deferred from the committee, to negate the need for the appeal to progress to an inquiry. The duplicate application did result in a protracted inquiry timetable. Submitting the duplicate application was a reasonable approach by RHL.

### **Costs Order**

38. 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 Robert Hitchins Limited shall pay to Gloucestershire County Council, the costs of the appeal proceedings described in the heading of this decision: limited to those costs incurred in dealing with the appeal up until the submission of the s106 Planning Obligation on 24 June 2022; such costs to be assessed in the Senior Courts Costs Office if not agreed.
39. The applicant is now invited to submit to Gloucestershire County Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*O S Woodward*  
INSPECTOR