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# **Costs Report to the Secretary of State for Communities and Local Government**

**by Martin Whitehead LLB BSc(Hons) CEng MICE**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Date: 31 August 2017**

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**Town and Country Planning Act 1990**

**Tewkesbury Borough Council**

**Appeals by**

**Robert Hitchins Limited**

**Application made by Highways England**

Inquiry opened on 20 June 2017

Land at Twigworth and Land at Innsworth, Gloucester, Gloucestershire

File Ref(s): APP/G1630/W/16/3154464 and APP/G1630/W/16/3164033

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**Appeal A Ref: APP/G1630/W/16/3154464**  
**Land at Twigworth, Gloucester, Gloucestershire**

**Appeal B Ref: APP/G1630/W/16/3164033**

**Land at Innsworth, Innsworth Lane, Gloucester, Gloucestershire GL3 1DU**

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Highways England for a full or partial award of costs against Robert Hitchins Limited.
- The Inquiry was in connection with an appeal against the refusal of outline planning permission for a mixed use development comprising demolition of existing buildings; up to 725 dwellings and a local centre of 0.33 ha (A1, A2, A3, A4, A5, D1, D2 uses); primary school, open space, landscaping, parking and supporting infrastructure and utilities; and the creation of a new vehicular access from the A38 Tewkesbury Road (Appeal A) and against the failure of Tewkesbury Borough Council to issue a notice of its decision within the prescribed period on an application for outline planning permission for a mixed use development comprising demolition of existing buildings; up to 1,300 dwellings and 8.31 hectares of land for employment generating uses comprising a neighbourhood centre of 4.23 ha (A1, A2, A3, A4, A5, D1, D2, B1), office park of 1.31 ha (B1) and business park of 2.77 ha (B1 and B8 uses): primary school, open space, landscaping, parking and supporting infrastructure and utilities; and the creation of new vehicular accesses from the A40 Gloucester Northern Bypass, Innsworth Lane and Frogfurlong Lane (Appeal B).

**Summary of Recommendation: That the application for a full or partial award of costs be refused.**

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**Preamble**

1. The application is made based on the guidance given in the National Planning Practice Guidance (NPPG). References to Documents are those listed in Appendix B to the separate Report on the Appeals.

**The Submissions for Highways England (HE)<sup>1</sup>**

2. The submission is for a full, or alternatively a partial, costs order to include the costs of making the application for costs. The appellant has acted unreasonably by not complying with guidance; not producing adequate information on time or at all; delaying the production of necessary information; producing many different schemes at a late stage; producing in its evidence for the Inquiry a scheme and modelling which HE had told it is flawed; not withdrawing unacceptable Option 1 before 23 June 2017; changing its case repeatedly and at the last minute; and taking advantage of HE's expert in his attempts to overcome the shortcomings of the appellant's proposals.
3. It was unreasonable for the appellant to proceed with applications and then appeal on both proposals when Longford Roundabout had not been assessed properly, or at all, and no mitigation measures for its acknowledged capacity problems had been identified, contrary to the 'guide to working with HE on Planning Matters'<sup>2</sup>. The appellant finally produced an acceptable mitigation scheme on 13 June 2017, one week before the Inquiry opened, but the computerised modelling and testing was incomplete and HE had not been given

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<sup>1</sup> Document N35

<sup>2</sup> Document N35 Appendix 2: The Strategic Road Network – Planning for the Future – A guide to working with Highways England on Planning Matters (September 2015)

- an adequate opportunity to consider it. Even after finally being able to deal with it on 23 June 2017, following considerable extra work and costs incurred by HE, the necessary Environmental Impact Assessment, Road Safety Audit and approval of Departures from Design Standards have not been carried out or obtained.
4. It was well known by 2015 that Longford Roundabout was over capacity and that substantial mitigation would be needed. It was incumbent on the appellant to wait before applying or appealing until it had complied with the obligations in HE's guide<sup>3</sup>. The appeals were made when the appellant had not provided any assessment of the impact on Longford Roundabout or any proposed mitigation scheme and when its new modelling using an S-Paramics model had not been finalised. HE had shown that the appellant was wrong in its claim after the S-Paramics model had been finalised that the success of the Growth Deal bid, which included a high level untested Longford Roundabout proposal, dated 2007, negated the need for assessment and agreement. This was an attempt by the appellant to try to avoid or delay dealing with how the otherwise severe impact on Longford Roundabout could be mitigated.
  5. On 29 March 2017 the appellant suggested that a loosely worded Grampian condition would be appropriate<sup>4</sup>. The judgment referred to by the appellant holds in summary that a Grampian condition should not be imposed where there is 'no prospect at all' of it being fulfilled, but there is no obligation to grant permission with a Grampian condition even if there is some prospect of the condition being granted. It is a matter for the discretion of the decision maker. Had a Grampian condition been accepted, it would have created uncertainty as to whether the appeal proposals could or would be able to come forward and would have removed consideration of the important issue at a public inquiry. Ultimately the appellant has produced an acceptable scheme, tying the Grampian condition to that scheme (Option 2).
  6. Between 13 April 2017 and 13 June 2017, the appellant produced 4 different schemes, each requiring considerable response and work by HE, including wasted costs. On the last day before the deadline accepted at the Pre-Inquiry Meeting (PIM) the appellant sent 'first issue forecasting report' models to HE which were found to be deficient. On 27 April 2017, the appellant issued its 'second issue forecasting report' to HE which included a new signalised roundabout scheme for Longford Roundabout (Option 1). In its main proof of evidence the appellant relied on this scheme which had been tested and found to be inadequate by HE. It was not until the appellant's rebuttal evidence on 13 June 2017 that Option 2 was introduced and that Option was assessed by HE as being an acceptable mitigation scheme by 23 June 2017, requiring considerable new work from HE.
  7. The above work should have been done and properly tested by the appellant in a considered manner rather than at the last minute. HE has had to produce Statements of Case, proofs, rebuttals and appendices, attend a PIM, write numerous letters and hold conferences with Counsel and others. HE's guide<sup>5</sup> urges developers not to leave everything to the last minute and to deal with

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<sup>3</sup> Document N35 Appendix 2

<sup>4</sup> Based on Document N35 Appendix 3: the Judgment in FCC Environment v Secretary of State for Communities and Local Government QBD (Admin) 23 June 2014 [2014] EWHC 2035

<sup>5</sup> Document N35 Appendix 2

matters properly at an early stage to avoid having to incur the costs and inconvenience of expensive public inquiries.

8. HE's expert, Mr Lear, has been open and helpful, providing information both by telephone and email to find a reasonable solution. Prior to the opening of the Inquiry on 20 June Mr Lear was informed by the appellant's advocate, Mr Crean, that unless HE 'did a deal' he intended to 'fight' HE by deploying inter alia a supplementary witness statement from Mr Finlayson, the appellant's expert witness, containing various comments and/or communications by Mr Lear to the appellant's consultant, PFA, over the previous week. This was completely unnecessary, rude and unreasonable behaviour which is relevant to costs.
9. On 22 June, Mr Crean refused to withdraw Option 1 despite requests from HE and Gloucestershire County Council (GCC) as the Local Highway Authority and in the light of Mr Lear's rebuttal evidence, which he did not challenge, that Option 1 was an unsuitable mitigation scheme. As a result, HE had to be prepared for the presentation of evidence and cross examination on this until 23 June.

### **The Response for Robert Hitchins Limited (appellant)**

10. The facts do not make out that the appellant has behaved unreasonably and, even if the appellant is found to have acted unreasonably, the costs incurred by HE in attendance at the Inquiry was caused by its failure to understand the law and policy regarding Grampian conditions and not the appellant's conduct.
11. The failure by HE and GCC, who together own the Central Severn Vale (CSV) SATURN Model, to maintain an up-to date model has delayed progress on the Joint Core Strategy (JCS) and put the appellant to considerable additional expense. The S-Paramics Traffic Model developed by the appellant has been the subject of a Validation Report which has set out how it was calibrated in accordance with the Design Manual for Roads and Bridges. The appellant has sought to address the differences of opinion between HE and the appellant. Should HE have had its way, the applications would not have been submitted and there would have been an obvious delay to the start on site and the delivery of housing.
12. HE twice attempted to have the Inquiry adjourned and these attempts were rejected by the Planning Inspectorate. The need to improve Longford Roundabout has been known for a considerable time, having been identified as a location to be improved at the time of an appeal in 2008 regarding development on 'Land at Longford' whereby a financial contribution of £750,000 was made. In July 2011, HE (then known as the Highways Agency) put forward proposals for a partially signalised roundabout which was taken forward as the 'pinchpoint' scheme in 2014. This scheme was not implemented and a reduced scale scheme was installed instead.
13. With regard to the Growth Deal bid, its purpose was to bring forward the strategic allocation known as 'Land at Innsworth' and it comprised the following three elements: a new junction onto the A40; a link to the site from the new junction; and capacity improvements at Longford Roundabout. HE supported the bid and its successful outcome is a means to improve HE's network so that, in line with its obligations under the Licence, it can support national and local economic growth and regeneration.

14. In 2009, in respect of the same site as the appeal site at Innsworth, HE was content to lift its objection to the imposition of a Grampian condition requiring a detailed design scheme for the proposed access directly from the A40 to be submitted to and approved in writing by the Local Planning Authority (LPA). At this time the form of the access had not been agreed. Also, there was a complementary planning obligation towards off-site highway improvements without the detailed design of the scheme being agreed because it was for the highway authorities to improve its networks.
15. The appellant decided not to challenge the criticism of the Option 1 scheme for Longford Roundabout because there was a difference of opinion regarding the operation of the traffic signals and not because it was wrong. HE has accepted the appellant's Option 2 scheme as being a solution.

### **Conclusions**

16. The NPPG 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.
17. All parties are expected to behave reasonably to support an efficient and timely process by providing all the required evidence and meeting timetables. In this respect, the appellant has produced the required information to support its outline planning applications in line with the timetable set at the PIM, albeit that HE found the information to be deficient. Whilst HE has not accepted the Option 1 proposal for the Longford Roundabout, the appellant has tried to support that option and has not acted unreasonably by continuing to promote it whilst attempting to find another solution.
18. The LPA has based one of its reasons for refusal in Appeal A and one of its putative reasons for refusal in Appeal B on advice given by HE as a statutory consultee. Therefore, as the LPA has relied on this advice, HE is expected to cooperate in defending the position of the LPA at appeal and at the Inquiry with regard to these matters. In this respect, HE has requested Rule 6 status and, as such, has had to substantiate its advice with the production of Statements of Case, proofs, rebuttals and appendices, where it has considered it to be necessary. I do not consider that the appellant acted unreasonably in supporting its position at Inquiry.
19. The appellant's stance that the objections could be overcome by the use of Grampian conditions was not accepted by HE until later on in the Inquiry when it agreed that an acceptable scheme for Longford Roundabout (Option 2) could be provided. In my opinion the appellant has not acted unreasonably in pursuing this stance, particularly as the appellant has claimed that HE was content to impose a Grampian condition for an access from the A40 for a proposal in 2009 on the same Innsworth site. I do not have any substantive evidence to show that the appellant has been anything other than cooperative with HE in its attempts to find an acceptable solution to Longford Roundabout junction. This has included providing a new S-Paramics model for the traffic flows on the network and modelling the junction using ARCADY, all of which would have taken time.
20. Whilst the work to find an acceptable solution to Longford Roundabout has resulted in HE having to spend a significant amount of time on examining

different options suggested by the appellant, I do not see this as wasted time and expense, as it has been necessary to ensure that the appeal proposals would not have a severe residual cumulative transport related impact on the strategic road network. There is nothing before me to show that the appellant has failed to comply with the requirements and deadlines set in the appeals process. The significant level of correspondence between the appellant and HE and the level of evidence submitted to the Inquiry indicate to me that the appellant has provided the relevant information to support its case.

21. Although Option 2 was introduced at a relatively late stage, it was able to be dealt with during the course of the Inquiry without the need for the Inquiry to be adjourned for this reason. Prior to the Inquiry a Statement of Common Ground had been agreed between the appellant and HE and this assisted with the efficient running of the Inquiry. It was on the fourth day of the Inquiry that agreement had been reached as to the acceptability of Option 2 for Longford Roundabout, which meant that HE did not need to call its witness or attend the remainder of the Inquiry. As such, I am satisfied that there was sufficient cooperation between the appellant and HE to ensure a timely and efficient outcome and that the work involved by HE was necessary to achieve this.
22. I have insufficient substantive evidence to support HE's claims that the appellant's advocate had put undue pressure on HE's witness. The appellant is entitled to provide evidence to support its case at Inquiry, even if it is ultimately found to be unsuccessful. In the case of the current appeals, I have found in favour of the appellant and therefore I am satisfied that the evidence that the appellant has provided in relation to these appeals has been relevant and necessary.
23. For the reasons given above, I have found that the appellant has not been unreasonable in its production of evidence, timeliness and cooperation with HE in relation to the reason for refusal and putative reason for refusal based on the effects of the appeal proposals on the operation of the A40 trunk road. I therefore conclude that unreasonable behaviour resulting in unnecessary expense has not been demonstrated and that a full or partial award of costs is not justified.

### **Recommendation**

24. I RECOMMEND that the application for a full or partial award of costs be refused.

*M J Whitehead*

INSPECTOR