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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 Robert Hitchins Limited**

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 Robert Hitchins Limited for a full or partial award of costs against Tewkesbury Borough Council.
- 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 Robert Hitchins Limited (appellant)<sup>1</sup>**

2. This application for a full award of costs relating to both appeals is made because there is a strong public interest in encouraging council's to apply a disciplined approach to the determination of planning applications, which includes the need to assess them on the basis of a sound knowledge of the law and not to advance or maintain inconsistent propositions. Alternatively, the application is made for a partial award of costs unnecessarily incurred owing to:
  - i. The failure of Tewkesbury Borough Council (the Council) to understand the law regarding Grampian conditions; and/or
  - ii. the Council's failure to understand the scope and utility of reserved matters; and/or
  - iii. the logical inconsistency between the case advanced at the Inquiry and the case presented to the Joint Core Strategy (JCS) Inspector at the Examination in Public (EiP) due to be held in July 2017; and/or
  - iv. the Council's failure to understand the consequences for the appeals in agreeing Very Special Circumstances (VSC) exist to allow the development

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<sup>1</sup> Documents N45 and N61

under paragraph 88 of the National Planning Policy Framework (Framework) and, through that, the operation of the Framework.

3. The Council has been unreasonable for the substantive failures with particular reference to:
  - i. Inhibiting, preventing or delaying development which should reasonably have been allowed;
  - ii. refusing planning permission on a planning ground capable of being dealt with by conditions; and
  - iii. failing to understand well established principles of law.

### **The Response for Tewkesbury Borough Council<sup>2</sup>**

4. With respect to Grampian conditions, the Council declined to accept the appellant's note<sup>3</sup> but responded with its own correct interpretation of the law<sup>4</sup>. The caselaw presented by Highways England (HE)<sup>5</sup> supports the Council's interpretation of the law on Grampian conditions. The appellant appears to have submitted to the Inquiry that the Council's case on Grampian conditions is different from that which it has set out, being that the imposition of Grampian conditions is a matter for the discretion of the decision maker. The Council did not adduce evidence of 'no prospects' in the appeals because it had not been presented with any Grampian conditions to consider. It has not said that a 'reasonable prospects' test must be applied as a matter of law, as alleged by the appellant. The appellant has wasted time and expense by setting up a false argument and purporting to defeat it and by misinterpreting the law.
5. In terms of the submission by the appellant of NPPG, the Council objected to not having a supply of hard copies in advance of the point being made and not the introduction of a '*new document not previously referred to*'. All that the appellant's claim for costs amounts to is that the Council has argued different points to it at the Inquiry. This is not unreasonable as it is the nature of an inquiry.
6. With regard to the law on reserved matters, it is set out clearly, specifically in the form of the Crystal Property case<sup>6</sup>. It is the appellant who has failed to understand the law.
7. Turning to the grounds based on the case presented to the Inspector for the EiP of the JCS, there is no 'logical inconsistency' with the case that the Council has advanced at the Inquiry, unless the Inquiry finds that there is no purpose or function to an outline planning permission.
8. The grounds based on the Council's approach to Green Belt and the VSC test is substantially an issue of law. If it is not acceded to, it does not automatically result in a costs award. It is not inherently unreasonable to have a different

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<sup>2</sup> Documents N47 paragraphs 28 to 32 and N60

<sup>3</sup> Document H14

<sup>4</sup> Document H15

<sup>5</sup> Documents N3a and N3b

<sup>6</sup> Document N46: Crystal Properties (London) Ltd v Secretary of State for Communities and Local Government and London Borough of Hackney Council [2016] EWCA Civ 1265

interpretation of law and policy. The number of times that the correct approach to the planning balance and paragraph 14 of the Framework has been to the Courts recently is a testament to the fact that it is not a straightforward area of law.

9. The Council has believed that it is not appropriate to maintain a reason for refusal on Green Belt grounds when the Green Belt was proposed to be de-allocated. It cannot possibly have been envisaged that the Council was thereby conceding that the harmful impacts that it identified were entirely outweighed in the overall planning balance.

## **Conclusions**

10. 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.
11. The Council has given 15 reasons for refusing Appeal A and, although the Council failed to give notice of its decision on Appeal B within the prescribed period, it has since given 13 reasons why it would have refused planning permission. It has agreed Statements of Common Ground in which it concedes on a number of matters and indicates that it will not contest many of these reasons or putative reasons for refusal, narrowing down the issues before the Inquiry. As such, it has acted reasonably in reducing the time spent in the preparation of evidence and the submission of evidence at the Inquiry.
12. The remaining reasons/putative reasons for refusal are based on the inadequacy of the information provided with the outline applications, which has since been supplemented by the appellant, and the details provided on the indicative masterplans and parameter plans. The appellant has been required to provide an Addendum Environmental Statement and HE only agreed that a Grampian condition would be appropriate following its acceptance during the course of the Inquiry of a proposed scheme for Longford Roundabout that had been submitted a relatively short time before the Inquiry opened. As such, the appellant has needed to provide significant additional information at appeal to demonstrate to me that the appeal proposals would be acceptable. Therefore, although I have ultimately accepted that the outstanding matters would be able to be addressed by planning conditions and/or planning obligations, I am satisfied that the Council has not inhibited, prevented or delayed development which should reasonably have been allowed.
13. During the Inquiry, planning conditions were discussed with the Council, appellant and highway authorities following the appellant's submission of additional information. However, it is only as a result of this additional information that I have accepted that the outstanding issues would be able to be addressed by planning conditions. Therefore, I am not convinced that the outline planning applications would have been able to have been granted without the additional information being provided, and in particular the scheme for Longford Roundabout (Option 2) that HE finally accepted following its assessment. I find that there is nothing before me to show that the Council acted unreasonably in refusing outline planning permission on grounds that at the time of the applications would have been able to have been dealt with by conditions, based on the information submitted.

14. In terms of the principles of law, the Council appears to me to have applied the correct test for the imposition of Grampian conditions, even if it did not refer to the NPPG, as it has considered it to be a planning judgment after establishing whether or not there are 'no prospects at all'. There is nothing before me to show that the Council applied a 'reasonable prospects' test in considering that the matters would not be able to be dealt with by Grampian conditions. Furthermore, nothing has been provided to show that the appellant suggested any Grampian conditions in its submissions accompanying the outline planning applications.
15. The Council has referred to the Crystal Property case with regard to its interpretation of 'reserved matters'. Whilst the information that it has required to satisfy itself on matters that have been reserved has been more than that required by the most recent legislation<sup>7</sup>, especially as it did not appear to me to request any additional information at the time of the applications, I do not consider that the Council has acted unreasonably in refusing or indicating refusal based on its concerns about the parameter and indicative masterplans. It is important that the Council is satisfied that an acceptable design would be able to be produced within the parameters that have been set by these plans. In this respect, the Council has provided evidence to support its concerns about the amount of land required to allow for flooding and the indicative designs shown on the masterplans.
16. Although the Council has supported the inclusion of the appeal sites within its allocations in its submission of the emerging Joint Core Strategy to the EiP, this does not of itself indicate the Council's support for the approval of the appeal applications. The Council has given reasons/putative reasons for refusal that are based on the level of information and the details that have been provided with the applications that could potentially be overcome but, in the opinion of the Council, had not been overcome in the information that had been submitted with the applications. Whilst I have not agreed with the Council's stance on all these matters, I have found that it has been necessary for the appellant to have submitted additional information to enable me to recommend approval subject to appropriate conditions.
17. The Council's position with regard to the existence of VSC to allow development in the Green Belt in accordance with paragraph 88 of the Framework appears to me to have been misguided. It has given a Green Belt reason/putative reason for refusal in both of the appeal applications. In agreeing not to pursue this in the Statements of Common Ground, I am satisfied that it has not conceded that the applications should have been granted, as it has contested other issues at the Inquiry. Furthermore, I have insufficient evidence to show that this matter has resulted in the appellant incurring any unnecessary or wasted expense.
18. For the reasons given above, I have found that the Council has not been unreasonable in its refusal or indicative refusal of planning permission and has not inhibited, prevented or delayed development in either of the appeals that should reasonably have been allowed. I therefore conclude that unreasonable

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<sup>7</sup> The Town and Country Planning (Development Management Procedure) (England) Order 2015

behaviour resulting in unnecessary expense has not been demonstrated and that a full or partial award of costs is not justified.

**Recommendation**

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

*M J Whitehead*

INSPECTOR