



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

by Mrs J A Vyse DipTP Dip PBM MRTPI

an Inspector appointed by the Secretary of State

Date: 7 July 2021

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

APPEAL MADE BY

A C GOATHAM AND SONS

AGAINST

MEDWAY COUNCIL

Inquiry opened on 15 February 2021

Pump Lane, Rainham, Gillingham ME8 7TJ

File Ref(s): APP/A2280/W/20/3259868

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- 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 Medway Council for a partial award of costs against A C Goatham and Sons.
- The Inquiry was in connection with an appeal against the refusal of planning permission for redevelopment of land off Pump Lane to include residential development comprising up to 1,250 residential units, a local centre (with final uses to be determined at a later stage) a village green, a two form entry primary school, a 60 bed extra care facility, an 80 bed care home and associated access (vehicular, pedestrian, cycle).

Summary of Recommendation: That the application for a partial award of costs be granted in the terms set out below.

Documents handed up to the Inquiry (Inquiry Documents) are listed at Annex B below and are prefixed with ID. Core Documents, listed at Annex C, are prefixed with CD. Both sets of Documents can be accessed via the electronic Inquiry library <https://rapleys.com/lower-rainham-appeal/>

1. The Submissions for Medway Council¹

Introduction

- 1.1 This application is procedural in nature, based upon the Appellant's unreasonable behaviour of proposing multiple, substantive additional off-site highways mitigation part-way through the Inquiry, which necessitated a lengthy adjournment. That behaviour directly caused the Council to incur unnecessary and wasted costs in the appeal process.
- 1.2 In general terms, they cover the additional costs incurred in assessing, and responding to the additional highways mitigation, the wasted costs of earlier MAM assessments which were effectively superseded, and the additional costs of the adjourned Inquiry.

Relevant Factual Background

- 1.3 As is confirmed in the Addendum Highways Statement of Common Ground (AHSoCG)² the Transport Assessment (TA)³ submitted with the planning application in June 2019 proposed three separate instances of off-site highway mitigation (the original mitigation). That comprised:
 - widening of Lower Rainham Road at the roundabout with Yokosuka Way and Gads Hill (Dwg No 20230-10A);
 - an additional lane on the A2 eastbound at the signalised junction with Bloors Lane and PlayFootball (Dwg No 20230-09A); and
 - signalisation of Pump Lane under the railway (drawing 20230-05A).

¹ ID47

² ID42

³ CD5.25

- 1.4 The applicant relied on the introduction of these off-site mitigation works to contend that the potential impact of the development proposals on the local highway network would be "sufficiently alleviated."⁴
- 1.5 The original mitigation constituted the entirety of the off-site highway mitigation works proposed by the Appellant throughout both the application and appeal processes until additional mitigation was proposed mid-way through the Inquiry.⁵ The Council assessed the impact of the scheme on the local highway network, taking account of the original mitigation. In particular, as is again agreed within the AHSocG,⁶ the Council took account of the original mitigation in every iteration of their Medway Aimsum Modelling (MAM) assessments of the scheme, namely:
- Lower Rainham Site Sensitivity Tests (December 2019)⁷
 - Pump Lane and Lower Rainham Transport Impact Appraisal (Impact Appraisal) (October 2020)⁸
 - Impact Appraisal Addendum (December 2020)⁹
 - Impact Appraisal Addendum 2 (January 2021)¹⁰
- 1.6 In addition, the Council's evidence to the Inquiry (specifically the proofs of evidence of Messrs Jarvis and Rand,¹¹ as well as the rebuttal proof of Mr Jarvis¹²) proceeded on the basis that the original mitigation was exhaustive of the off-site highways mitigation proposed by the Appellant, and it was the Appellant's case that this level of mitigation was considered adequate to sufficiently mitigate the impacts of the proposal (a contention with which the Council has always fundamentally disagreed).
- 1.7 The same is true of the Appellant's own evidence. In his original proof, Mr Tucker specifically relied on the original mitigation,¹³ and went as far as to state that "[t]he scheme is demonstrably sufficient. Indeed, it will exceed what is required in so far as it will clearly give rise to net improvement."¹⁴
- 1.8 However, on the afternoon of 23 February 2021, in the second week of the Inquiry and the day before the highways evidence was due to begin, the Appellant submitted to the Inquiry a document entitled 'A2 Junction Review.'¹⁵ As Mr Tucker accepted in cross-examination, this document was submitted without any forewarning to the Council.

⁴ See Planning Statement [CD5.11], para 6.80 and the TA (CD5.25) paragraphs 1.5, 6.2.4, 6.2.14-15

⁵ No further off-site highways mitigation works were proposed in Technical Notes 1-4 (CDs 6.2, 6.7, 6.11 and 12.6 respectively) or elsewhere.

⁶ ID42 paragraph 1.3

⁷ CD12.10

⁸ CD12.1

⁹ CD12.3

¹⁰ CD12.2

¹¹ CD10.9 and CD10.10 respectively

¹² CD10.16

¹³ Appendix ST5 set out the Off-site Junction Mitigation proposed, which included drawings 20230-09A and 20230-10A. It is assumed that drawing 20230-05A was omitted from ST5 in error.

¹⁴ Mr Tucker PoE (CD10.4) paragraph 6.7.5

¹⁵ ID39

1.9 Notwithstanding the title, the document in fact (as is agreed in the AHSoCG)¹⁶ proposed additional off-site mitigation works, namely:

- mitigation work at Bowaters Roundabout - configuration of the Toucan crossing east of the roundabout and additional lane capacity as shown on drawing 20230-17;
- mitigation work at Will Adams Roundabout - Lane markings & additional lane capacity as shown on drawing 20230-18.

1.10 Once it became apparent that the Appellant was seeking to propose additional off-site mitigation works which had not previously been the subject of MAM assessment, the Council confirmed that there were two potential ways forward: either to withdraw the A2 Junction Review and proposed additional off-site mitigation (and proceed on the basis of the original mitigation, which had been subject to assessment) or alternatively, that an adjournment would be required to enable the Council to assess the impact of the additional off-site mitigation works.¹⁷

1.11 After taking instructions, Counsel for the Appellant confirmed that his client wished to rely on the additional off-site mitigation works.¹⁸ The Inspector accepted the Council's submission that this meant an adjournment was necessary, and that this would necessitate hearing all of the highways evidence at the resumed Inquiry at a date to be arranged.¹⁹

1.12 As is recorded in the AHSoCG, the additional off-site mitigation works proposed by the Appellant developed yet further following the adjournment:

- Firstly, at a meeting between the highways experts on 24 February 2021, further mitigation was proposed by the Appellant in the form of revised signal timings for Bowaters Roundabout;²⁰
- Secondly, in an email from Mr Tucker (the Appellant's highways witness) dated 28 February 2020,²¹ there were the following proposals (referred to hereafter as the 'additional mitigation':²²
 - i) revised proposals for the mitigation work at Bowaters Roundabout and Will Adams Roundabout;²³
 - ii) signal timings for Otterham Quay Lane/A2/Meresborough Road (in addition to Bowaters Roundabout as discussed on the 24th); and
 - iii) Lower Rainham Road/Yokosuka Way roundabout – a revision to the appellant's original proposed mitigation works at the Lower Rainham Road/Yokosuka Way roundabout (drawing 20230-10A).²⁴

¹⁶ ID42 paragraphs 1.4 and 2.1

¹⁷ Rightly rejecting the Appellant's suggestion that the additional mitigation issue could be 'hived off'. See Day 6 YouTube video at 5:55:00-5:59:15

¹⁸ See Day 6 YouTube video at 5:01:00 – 5:05:40. See also 5:37:00-5:46:50

¹⁹ See Day 6 YouTube video at 5:48:00-5:51:0

²⁰ ID42 paragraph 2.2. For Bowaters Roundabout drawing 20230-17B replaced drawing 20230-17 attached to the A2 Junction Review. For Will Adams Roundabout drawing 20230-18B replaced drawing 20230-18 attached to the A2 Junction Review

²¹ ID42 Appendix B

²² ID42 paragraphs 2.3-2.5

²³ Notwithstanding that this additional mitigation had only been first proposed less than a week earlier

²⁴ For the reasons set out in Mr Jarvis Addendum proof (ID52), the Council was not aware that this further amendment was being proposed until after the Impact Appraisal Addendum 3 was produced (ID34a). Nevertheless,

- 1.13 During the adjournment, the Council assessed the impact of the scheme taking account of the additional mitigation (together with the original mitigation to the extent that it was not amended) and updated its case to reflect the amended proposal. It did so by producing further MAM scenarios for both the 2037 and 2028 assessment years (as was agreed with the Appellant)²⁵ which resulted in four further scenarios having to be modelled;²⁶ producing a third Addendum to the Impact Assessment to report the outputs of that modelling (together with the detailed appendices);²⁷ producing microsimulation videos; and drafting further proofs of evidence from Mr Jarvis and Mr Rand.²⁸
- 1.14 The resumed Inquiry (sitting from 19-23 April, with closing submissions on 28 April) assessed the impact of the proposal on the local highway network, taking account of the additional mitigation. The focus of the evidence, from both sides has been on the residual cumulative impacts of the scheme on the road network with the additional mitigation in place.

Submissions

Unreasonable Behaviour

- 1.15 The planning appeal process is not designed to allow a scheme to be evolved.²⁹ The evolution of this scheme has had a number of dimensions.³⁰ However, the one which the Council contends is particularly unreasonable – and which has led it to incur unnecessary and wasted costs – is the evolution of the additional off-site highway mitigation proposed.
- 1.16 During the entirety of the application and appeal processes, until the afternoon prior to the highways evidence was due to be given, the Appellant sought to rely on the original mitigation only. Throughout this 19-month period these were the only off-site mitigation works being offered by the Appellant.
- 1.17 It was the Appellant's case throughout this period that the original mitigation was sufficient to make the scheme acceptable in terms of its impact on the local highway network. Indeed, in a proof submitted only three weeks prior to the opening of the inquiry, its highway witness was contending that the original mitigation was demonstrably sufficient.
- 1.18 The Council, acting entirely reasonably, assessed the proposal that was before it (in four separate MAM assessments) and responded to the case that was being advanced by the Appellant (both when refusing permission, and in its evidence to the inquiry).
- 1.19 It was undoubtedly unreasonable of the Appellant to introduce additional offsite mitigation works - and seek to rely on the additional mitigation – for the first

the Council has modelled the effects of the amended mitigation, and the results were provided in Mr Jarvis Addendum proof.

²⁵ ID42 paragraph 3.6

²⁶ ID42 paragraph 3.6 – scenarios 2A, 3A, 5A and 6A

²⁷ ID34a

²⁸ ID35 and ID52 respectively

²⁹ See PINS Procedural Guide (March 2021), para M.2.1 which states: "M.2.1 If an appeal is made the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people's views were sought."

³⁰ Including, but not limited to, the introduction of new detailed access plans from Pump Lane at the appeal stage; and the amendment of the building height parameters plan mid-way through the Inquiry, after the landscape and heritage evidence had been heard.

time in the middle of the Inquiry. That unreasonableness was only exacerbated by the fact that it was produced at the very last minute, and without forewarning.

1.20 This was not simply a case of introducing fresh and substantial evidence at a late stage necessitating an adjournment – which in itself, would have been unreasonable. It was a case of introducing fresh and substantial new highways mitigation at the very latest stage necessitating an adjournment.

1.21 It would be no answer to this charge to contend (as the Appellant might) that the additional mitigation was only proposed in response to the Council's written evidence, and proffered only in the event that the Inspector considered it necessary:

- First, and most importantly, the onus lies on the applicant (at application stage) and Appellant (at Appeal stage) to set out clearly, precisely and in a timely manner, the development proposal which it advances, including any necessary mitigation, and its case in respect of that proposal.
- Second, the additional mitigation relates to junctions (Will Adams, Bowater, Yokosuka Way/Lower Rainham Road roundabouts and Otterham Quay Lane/A2/Meresborough Road) and on corridors (A2 and A289) about which the Council has repeatedly, and throughout the application/appeal process, raised significant concerns.
- Third, notwithstanding its distinct limitations, the Appellant's own modelling, when based on the original mitigation, indicated that there would be considerable issues to at least some of the junctions for which it now proposes the additional mitigation.³¹ Mr Tucker accepted in cross-examination that at least part of the rationale for the additional mitigation proposed was due to the issues identified with certain junctions in his own modelling.³²

Unnecessary Costs

1.22 The very late introduction of the additional mitigation, and the adjournment which it necessitated, has directly caused the Council to incur unnecessary and wasted expense in the appeal process. This includes the following:

- (1) The costs of producing Impact Appraisal Addendum (December 2020)³³ and Impact Appraisal Addendum 2 (January 2021).³⁴ These were produced by the Council in an attempt to narrow down the issues between the parties (in particular the differences in relation to trip generation). They were based on the original mitigation proposed, and therefore, as a result of the additional mitigation, have in effect been superseded by Addendum 3.³⁵ It is telling that no time was spent examining them at the Inquiry. This was a significant wasted expense.

³¹ See Mr Rand Proof, paragraphs 4.19-4.29

³² This was consistent with his explanation in the A2 Junction review note, particularly in relation to the mitigation proposed at Will Adams roundabout

³³ CD12.3

³⁴ CD12.2

³⁵ ID34a

- (2) The costs of modelling the additional mitigation, extra scenarios and producing Addendum 3. Had the additional mitigation been proposed by the Appellant during the application process – or indeed any time in the 12 months after the Decision Notice was issued – it would have been taken account of in the October 2020 Impact Appraisal.³⁶ It is the very late introduction of the additional mitigation which has required Addendum 3 to be produced. This was unnecessary expense.
- (3) The costs incurred during the adjournment. Further meetings and conferences between highway experts, council officers and counsel have been necessary during the adjournment to consider the additional mitigation and the outcomes of the further modelling. These additional meetings and conferences would not have been required had the additional mitigation been proposed in a timely manner.
- (4) Additional proofs. The costs of two further proofs of evidence (Mr Rand and Mr Jarvis) which would not have otherwise been necessary.
- (5) The costs of the resumed Inquiry. The Council has had to instruct and pay for counsel, its highway witnesses (and their supporting teams) and its planning witness, to attend a further 5 or 6 days of Inquiry sitting days. This is a considerable extra cost over and above the costs which had been incurred for the original Inquiry dates.
- (6) The costs of this costs application. Which would not have been necessary had the additional mitigation not been proposed, or had it been proposed in a timely manner.

Conclusion

1.23 One of the purposes of the costs regime is to encourage all participants in the appeal process to behave in a reasonable way and follow good practice.³⁷ Where the impact on the local highway network is one of the main issues between the parties, it was wholly unreasonable and antithetical to good practice for the Appellant to have to introduced a substantive change to the highway mitigation proposed at the very last minute. This necessitated an adjournment of the Inquiry and caused the Council to incur substantial unnecessary and wasted costs.

2. The Response by the Appellant³⁸

2.1 There is no proper basis to make the partial award when the background to the coming forward of the Appellant's further transportation mitigations, is understood.

2.2 The Appellant has made every effort to engage proactively and openly with the Council on all highway matters from inception, and especially with regard to its Medway Aimsum Modelling (MAM). Regrettably this was not reciprocated. The detail of discussions, and attempted discussions, is set out in Mr Tucker's proof.³⁹

³⁶ CD12.1

³⁷ PPG paragraph: 028 Reference ID: 16-028-20140306

³⁸ ID49 as added to orally at the Inquiry with reference to paragraphs 209-213 of the Appellant's closing submissions (see paragraphs 6.191-6.195 of the main Report)

³⁹ CD 10.4 Section 2

- 2.3 Following submission of a scoping report in November 2018, with the exception of a single 'draft response' from the Council received in August 2019 (which happened only to speak to traffic generation issues) no detailed feedback was provided on the transport evidence base already before it. Various meetings were subsequently held, initiated by the Appellant, through which the Appellant proactively scoped future common ground, leading ultimately to the submission of further Technical Notes in October 2019.⁴⁰ Regrettably, no positive response was then received from the Council on these documents, despite these explicitly and directly responding to all queries then raised by the Council.
- 2.4 In December 2019, the Appellant received a brief PowerPoint presentation of the headline outputs of the MAM,⁴¹ although no adequate explanation was given as to what was included within the MAM modelling. Indeed, Mr Jarvis (in cross-examination) was unable to confirm the relevance of the sensitivity tests, which is symptomatic of the wider inability (or unwillingness) of the Council to explain the inputs and outputs of the MAM. The December outputs⁴² incorporated, at the time, the correct mitigation, but not the correct access strategy. As a consequence, the resultant outputs of the MAM 2 modelling remained uncertain on their face (and unreliable) from the Appellant's perspective. That was an entirely reasonable, if not inevitable, reaction. This error was in fact not corrected until the Transport Impact Appraisal Addendum (2037 Results) was received by the Appellant on 4 January 2021.⁴³
- 2.5 The Appellant then undertook, in agreement with the Council, further modelling based on the MAM-derived traffic flows. These were reported in Technical Note 3 dated March 2020 (TN3).⁴⁴ No response has ever been received on these.
- 2.6 The Appellant then raised significant concerns about the validity of the MAM generally, including both inputs and outputs, leading to formal requests for further information on the modelling (on 7 and 23 July 2020). A response was not received to these points until 14 December 2020, following the Inquiry case management conference. That response was partial only and despite further requests⁴⁵ disclosure has never been made of the full detail of the MAM outputs, including how it was optimising individual junctions, and no explanation of specific junction operation and causality of any queue has been forthcoming, so that the specific issues of impact (if any) may be properly understood from a MAM perspective.
- 2.7 Aside from the MAM, the Appellant's letter dated 23 December 2020 requested confirmation from the Council that it agreed with the modelling paragraphs adopted in the DTA individual junction assessments. The first ever comments received on this came through Mr Rand's first proof of evidence.⁴⁶
- 2.8 It has been communicated to the Council, clearly and throughout, that the MAM modelling outputs were considered unreliable, and that MAM inputs were not agreed. All references made to the Appellant considering impacts, as described

⁴⁰ CDs 6.2 and 6.7

⁴¹ CD12.10

⁴² CD12.10

⁴³ CD 12.3 Transport Impact Appraisal Addendum 2 (2028 results)

⁴⁴ CD6.11

⁴⁵ latterly on 28 February 2021 - email from DTA to the Council (Appendix to ID42)

⁴⁶ CD10.9

in the Transport Assessment, derive from the Council's own conclusions arising from the Appellant's own modelling (in the complete absence of any clarity on the appropriateness of the MAM modelling). The Appellant's position has been consistent throughout.

2.9 The additional modelling had in fact arisen as a direct consequence of new

information coming forward from the Council,⁴⁷ whereupon further detail of local model validation was provided. In turn, this evidence reasonably gave the Appellant room to address its concerns regarding model outputs, unrelated to baseline validation, and which disclosed inaccuracies within the model run itself, and in terms of junction modelling. The very first time that the Appellant was provided with any visual outputs of any queuing data from the MAM, was in Mr Jarvis's PoE.⁴⁸ This was responded to in headline terms in Mr Tucker's rebuttal.⁴⁹

2.10 However, it was not until the validation issue was adequately clarified by the Council, belatedly, that it reasonably became apparent to the Appellant that further mitigation might be worth considering, based on solely on the MAM outputs. This mitigation was sensibly advanced at the Inquiry, in order to best assist the Inspector in order to more fully understand the differences of the outputs, in the expectation of narrowing issues at Inquiry. This was therefore a responsible way forward. Mr Tucker's letter of 28 February 2021⁵⁰ sought to further aid this process by requesting a comparison of model outputs for the Inspector's benefit, but this has not been forthcoming from the Council.

2.11 The approach adopted by the Appellant leading up to the adjournment could, and would, have been avoided had the Council been adequately transparent, and at a sufficiently early stage, regarding the way the MAM was 'generating' the queuing it suggests might occur. However, this was not so and this approach is yet to be adequately explained.

2.12 The mitigation proposal is substantial. It could not reasonably have been conceived at the time of the application. At that stage, all that the Appellant had been provided with was a very headline, inadequate, PowerPoint presentation.⁵¹ Technical Note 3⁵² had been prepared by the Appellant on an approach that had been agreed with the Council. At the meeting on 22 January 2020, the Council undertook to respond on that assessment. No response has ever been received by the Appellant. This is in fact representative of the approach taken by the Council throughout the application, which has regrettably meant that helpful (and reasonable) discussion, on all issues relating to the application, has been made far more difficult, indeed, if not impossible, by the Council's election not to engage, or at least engage fully and promptly.

2.13 The additional time taken up at Inquiry has been two days only. Originally, transportation matters had been programmed for three days, as a broad 'guesstimate' (with the possibility of four days). In the result, transportation did occupy four days, reasonably. This was the most likely window for the

⁴⁷ see section 2 of Mr Jarvis' rebuttal (CD10.16)

⁴⁸ Mr Jarvis PoE figure 3 and 4: pages 35-36 (CD10.10)

⁴⁹ Mr Tucker rebuttal paragraph 6.4 page 10

⁵⁰ ID 42 Appendix B

⁵¹ CD12.10

⁵² CD6.11

transportation session in any event, even had the original Inquiry timetable been proceeded upon.

3 Council's Counter Response⁵³

3.10 The Council does not accept that the Appellant's account⁵⁴ of the liaison

between the parties about the highway modelling is accurate. An overview of the correspondence between the Council and the Appellant's highway consultants (DTA) is set out in Appendix I to the proof of Mr Rand.⁵⁵ It is noticeable that this account was not challenged by the Appellant in cross-examination. By way of example only:

- It is not correct that the Appellant was only provided with the December 2019 outputs/PowerPoint⁵⁶ prior to determination of the application. Shortly after that presentation was provided, DTA requested specific information concerning the MAM inputs, which was provided to them on 19 December 2019.⁵⁷
- It is not correct to suggest that no response was received in respect of TN3. TN3 was discussed within a meeting on 22 January 2020, with further responses being provided by email in February 2020.⁵⁸

3.11 In any event, the accusations that the Council failed to adequately liaise with the Appellant are entirely irrelevant to the issue at hand. Even if they were accurate (which they are not) this provides absolutely no justification for the Appellant's decision to propose substantial⁵⁹ additional off-site mitigation mid-Inquiry, let alone the day before the highway evidence was due to be heard.

3.12 Third, the suggestion that the additional mitigation was only proposed as a response to MAM's identification of queuing and, in particular to Figures 3 and 4 in the proof of Mr Jarvis⁶⁰ should be rejected. It is demonstrably false for the following reasons:

- (a) The Appellant's central case is that the MAM outputs are not accurate. It is therefore wholly inconsistent for the Appellant to suggest at the same time that the catalyst for the additional mitigation was the outputs of the MAM;
- (b) Mr Jarvis' Figures 3 and 4 illustrate queuing on the A2, yet the additional mitigation includes proposed amendments to the Lower Rainham Road/Yokosuka Way roundabout. Therefore, the suggestion that these figures were the catalyst for the additional mitigation is a *non-sequitur*. Further, even on the Appellant's case, there is no explanation as to why the additional mitigation was proposed some four weeks after Mr Jarvis' proof was served;

⁵³ ID53

⁵⁴ Made in the costs response, as well as the Appellant's closing submissions at paragraphs 209-213 of ID51

⁵⁵ CD10.9 pages 230-236

⁵⁶ CD12.10

⁵⁷ Mr Rand Appendix I page 232

⁵⁸ *ibid* pages 232-234

⁵⁹ As the Appellant accepts is the case, see paragraph 2.12 above

⁶⁰ CD10.10

(c) As Mr Rand explained in his proof,⁶¹ the Appellant's own modelling in TN4 of January 2021⁶² highlighted that a number of the junctions which became the subject of the mitigation were operating at, or over, capacity. Thus, even on its own case, at this stage the Appellant knew – or at least ought to have known – that additional mitigation was required.

3.13 The suggestion that little, if any, by way of unnecessary or wasted costs were incurred as a result of the additional mitigation being proposed at a very late stage is simply wrong. The additional mitigation did not simply result in extra Inquiry sitting days, it also led to the substantial wasted and unnecessary costs outlined in paragraph 1.22 above.

4. Inspector's Conclusions

4.1 The Planning Practice Guidance advises that, irrespective of the outcome of an appeal, 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.

4.2 Appellants are required to behave reasonably in relation to procedural matters on the appeal, for example by complying with the requirements and deadlines of the appeals process. As set out in the Planning Practice Guidance, an example of unreasonable behaviour by an appellant giving rise to an award of costs is introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.⁶³

4.3 It is suggested that the evidence of the Council that led to the further substantial mitigation measures being submitted was not known by the Appellant until receipt of the evidence of Mr Jarvis, in particular his Figures 3 and 4. Even were that the case, that evidence was submitted on 25 January 2021, three weeks before the Inquiry opened, some four weeks before the highways evidence was due to start being heard. There was no mention in Mr Tucker's subsequent rebuttal statement that any revised mitigation was being considered in response to that. I recognise that in responding to section 2 of Mr Tucker's proof, Mr Jarvis' rebuttal (also referred to) included additional validation data. However, the Appellant was in receipt of that a week before the Inquiry opened, some three weeks before the highways evidence was due to begin. Moreover, whilst the additional mitigation was ostensibly in response to Mr Tucker only then becoming aware of potential blocking back issues on the A2, as pointed out by the Council, the Appellant's own evidence to the Inquiry appears to recognise that as a potential issue, suggesting that mitigation may have been required.⁶⁴

4.4 At no stage before the programmed date for examining the highways evidence had the submission of any substantial additional mitigation measures been foreshadowed by the Appellant. Whatever difficulties the Appellant may have had in dealing with the Council's highway officers over preceding months, there is no doubt in my mind that submitting significant new highways evidence so late in

⁶¹ Mr Rand proof paragraphs 4.19-4.24

⁶² CD12.6

⁶³ Paragraph: 052 Reference ID: 16-052-20140306

⁶⁴ Mr Rand PoE especially paragraph 4.21 (CD10.9)

the proceedings, on the day before the highways evidence was programmed to begin, was unreasonable behaviour.

- 4.5 The Appellant made it clear that it wished to rely on those additional measures. That required the MAM to be re-run with that mitigation, necessitating a lengthy adjournment.
- 4.6 As a direct consequence of the Appellant's behaviour, the Inquiry did not sit as planned on 24 and 25 February. In order to make best use of the programmed Inquiry time, we resumed on 1 March and sat for three days to deal with planning conditions and the planning obligation (but excluding any highways related matters) and we also heard the evidence of the respective planning witnesses. I brought forward the planned date of the site visit and carried that out on 4 March. The Inquiry resumed very briefly on 5 March (20 minutes) to deal mainly with the revised Building Heights Parameter Plan that had been submitted by the Appellant and corresponding notes,⁶⁵ after which I adjourned the Inquiry for six weeks, being the minimum time necessary for the Council to run the model and for the relevant reports to be generated. The respective witnesses also needed to time to interrogate the results and provide addendum proofs dealing with that. The Inquiry resumed on 19 April.
- 4.7 Highways evidence was heard on 19-22 April. On 23 April we sat for just one hour and 20 minutes to deal mainly with additional documents that the Appellant wished to rely on relating to affordable housing delivery⁶⁶ and the weight to be afforded to Local Plan policy T1.⁶⁷
- 4.8 The highways evidence was originally scheduled over three days (23-25 February). Once we resumed in April, the highways evidence took four full days. The Inquiry was originally programmed to sit for a total of 13 days.⁶⁸ Putting to one side the two very short days mentioned above which did not discuss matters relating to the later highways evidence, the Inquiry sat for 14 days. Additional expense would have been incurred by the Council in relation to that extra day (not the 5-6 days referred to in the application) expense that would not have been incurred were it not for the appellant's unreasonable behaviour. The consequence of the Appellant's behaviour in this regard is on all fours with the example given in the Planning Guidance as behaviour that may give rise to an award.
- 4.9 In preparing its evidence for the Inquiry, and in discussion with the Appellant, the Council had modelled additional scenarios over above those originally modelled, based on what is referred to by the Council above as the 'original mitigation' measures. Those reports, comprising the Pump Lane and Lower Rainham Transport Impact Appraisal Addendum 2028 results (December 2020)⁶⁹ and Addendum 2 2037 (January 2021),⁷⁰ informed the highways evidence that was prepared for the Inquiry. The new report that was produced over the adjournment, Addendum 3 (Additional A2 mitigations results)⁷¹ effectively

⁶⁵ ID29 and ID30

⁶⁶ ID45

⁶⁷ ID45

⁶⁸ 15-18 February, 22-25 February, 1-4 March and 12 March

⁶⁹ CD12.3

⁷⁰ CD12.2

⁷¹ ID34a

negated the work involved in those two earlier reports and much of the evidence based on them. I consider that the Council incurred wasted expense in this regard

- 4.10 Clearly, the costs of modelling the additional mitigation and producing Addendum 3 will have involved the Council in expense. However, those costs would have been incurred in any event had the measures now relied on been proposed at the time. That the model was run late on in the proceedings does not alter the necessary expense incurred. I find no wasted expense in this regard.
- 4.11 Unsurprisingly, additional meetings and conferences between highway experts, council officers and counsel were necessary during the adjournment, in order to consider the additional mitigation and the outcomes of the further modelling. That led in turn to the production of further proofs from the Council's highway witnesses.⁷² Those additional meetings and conferences, and addendum proofs would not have been required had the additional mitigation been proposed in a timely manner. I consider that the Council incurred unnecessary expense in these regards.
- 4.12 The Planning Practice Guidance confirms that a full award of appeal costs means the party's whole costs for the statutory process, including the expense of making the costs application.⁷³ I see no reason why the same principle should not apply to a successful application for a partial award since, if the unreasonable behaviour had not resulted in unnecessary costs, then an application would not have been necessary. Since I have found that the Council incurred unnecessary or wasted costs in relation to all but one of the component parts of the application, I consider that this aspect of the application should also succeed.

5. Recommendation

- 5.1 I recommend that the application for a partial award of costs be granted, but that it be limited to those costs incurred in producing the Pump Lane and Lower Rainham Transport Impact Appraisal Addendum 2028 results (December 2020)⁷⁴ and Addendum 2 2037 (January 2021), the costs incurred during the adjournment, including the production of further proofs of evidence from Messrs Rand and Jarvis, the costs incurred in the additional sitting day and the costs of making the costs application.

Jennifer A Vyse
INSPECTOR

⁷² ID35 (Addendum proof of Mr Rand) and ID52 (Addendum proof Mr Jarvis)

⁷³ Paragraph: 040 Reference ID: 16-040-20140306

⁷⁴ CD12.3