

LAND AT PUMP LANE, RAINHAM

APPLICATION FOR COSTS ON BEHALF OF
MEDWAY COUNCIL

Introduction

1. Medway Council (“the Council”) makes an application for a partial award of costs against A C Gotham & Sons (“the Appellant”).
2. The application is procedural in nature. It is based upon the Appellant’s unreasonable behaviour of proposing multiple, substantive additional off-site highways mitigation (which is more fully described below) part-way through the original Inquiry, which necessitated an adjournment of the Inquiry. This behaviour directly caused the Council to incur unnecessary and wasted costs in the appeal process.
3. The broad heads of costs applied for are set out in detail below.¹ In general terms, they cover: the additional costs incurred by the Council 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responding to the additional highways mitigation; the wasted costs of earlier MAM assessments which were effectively superseded; and the additional costs of the adjourned Inquiry.

Policy

4. The Secretary of State’s policy on the award of costs in planning appeals is set out in the Planning Practice Guidance.² The most relevant elements of that guidance to this application can be summarised as follows:

¹ As, the PPG explains, any “costs order states the broad extent of the expense the party can recover from the party against whom the award is made. It does not determine the actual amount.” Paras 027

² Guidance – Appeals – Advice on planning appeals and the award of costs (<https://www.gov.uk/guidance/appeals#the-award-of-costs--general>) , paras 027-054

- (1) 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.³
- (2) Unreasonable behaviour may be either procedural – relating to the process; or substantive - relating to the issues arising from the merits of the appeal.⁴
- (3) The guidance gives a non-exhaustive⁵ list of examples of the type of behaviour which may give rise to a procedural award against an appellant. This includes: *“introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen,”* and *“prolonging the proceedings by introducing a new ... issue”*.
- (4) In terms of timeliness, where the application relates to behaviour at the inquiry the applicant is required to inform the Inspector of the application before the Inquiry is closed.⁶ In this case the Council has adopted best practice by giving the appellant forewarning of the application, and basis for it, as well as providing the written application in time to allow for a written response.

Relevant Factual Background

5. As is confirmed in the Addendum Highways Statement of Common Ground ('AHSOCG'), the Transport Assessment ('TA') [CD5.25] submitted with the planning application in June 2019 proposed three separate instances of off-site highway mitigation. These were as follows (“the original mitigation”):
 - (a) Widening of Lower Rainham Road at the roundabout with Yokosuka Way & Gads Hill – drawing 20230-10A;
 - (b) An additional lane on the A2 (EB) at the signalised junction with Bloors Lane & PlayFootball – drawing 20230-09A;
 - (c) Signalisation of Pump Lane under the railway – drawing 20230-05A.

³ Paragraph: 030 Reference ID: 16-030-20140306

⁴ Paragraph: 031 Reference ID: 16-031-20140306

⁵ The list of examples is expressly stated to be non-exhaustive: Paragraph: 051 Reference ID: 16-051-20140306

⁶ Paragraph: 035 Reference ID: 16-035-20161210

6. The Appellant (then 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”.⁷
7. The original mitigation constituted entirety of the off-site highway mitigation works proposed by the Appellant throughout both the application and appeal processes (until the additional mitigation was proposed mid-way through the Inquiry).⁸ Accordingly, the Council sought to assess the impact of the scheme on the local highway network, taking account of the original mitigation. In particular, as is again agreed within the AHSOCG⁹, the Council took account of the original mitigation in every iteration of their Medway Aimsun Modelling (“MAM”) assessments of the scheme, namely:
 - (1) Lower Rainham Site Sensitivity Tests (December 2019) [CD12.10];
 - (2) Pump Lane and Lower Rainham Transport Impact Appraisal (“Impact Appraisal”) (October 2020) [CD12.1]
 - (3) Impact Appraisal Addendum (December 2020) [CD12.3]
 - (4) Impact Appraisal Addendum 2 (January 2021) [CD12.2]
8. In addition, the Council’s evidence to the Inquiry (specifically the proofs of evidence of Karl Jarvis and James Rand, as well as the Rebuttal Proof of Mr Jarvis) 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).
9. The same is true of the Appellant’s own evidence. In his original proof Mr Tucker specifically relied on the original mitigation¹⁰, and went as far as to state that “[t]he

⁷ See Planning Statement [CD5.11], para 6.80 and TA, paras 1.5, 6.2.4, 6.2.14-15,

⁸ No further off-site highways mitigation works were proposed in Technical Notes 1-4 or elsewhere.

⁹ AHSOCG , Paragraph 1.3

¹⁰ Appendix ST 5 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 ST 5 in error.

scheme of mitigation, as proposed, is demonstrably sufficient. Indeed, it will exceed what is required in so far as it will clearly give rise to net improvement."¹¹

10. However, in the afternoon of 23rd 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". As Mr Tucker accepted in cross-examination, this document was submitted without any forewarning to the Council.
11. Notwithstanding the title, the "A2 Junction Review" document in fact (as is agreed in the AHSOCG¹²) proposed additional off-site mitigation works, namely:
 - (a) Mitigation work at Bowaters Roundabout - configuration of the Toucan crossing east of the roundabout and additional lane capacity as shown on drawing 20230-17;
 - (b) Mitigation work at Will Adams Roundabout - Lane markings & additional lane capacity as shown on drawing 20230-18.
12. Once it became apparent that the Appellant was, at the 11th hour, seeking to propose additional off-site mitigation works (which had not previously been the subject of MAM assessment), the Appellant was specifically put on notice by the Council 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 that an adjournment would be required to enable the Council to assess the impact of the additional off-site mitigation works.¹³ After taking instructions, the counsel for the Appellant confirmed that his client wished to rely on the additional off-site mitigation works¹⁴. 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 adjourned hearing.¹⁵

¹¹ Tucker Proof, para 6.7.5

¹² AHSOCG, Paragraphs 1.4 and 2.1

¹³ See Day 6 YouTube video at 5:01:00 – 5:05:40. See also 5:37:00-5:46.50

¹⁴ See Day 6 YouTube video at 5:48.00-5:51:00

¹⁵ 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

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

- (a) Firstly, at a meeting between the highways experts on 24th February 2021, further mitigation was proposed by the Appellant in the form of revised signal timings for Bowaters Roundabout.¹⁶
- (b) Secondly, in an email from Mr Tucker (the Appellant's highways witness) dated 28th February 2020, there were the following proposals¹⁷
 - (i) revised proposals for the mitigation work at Bowaters Roundabout and Will Adams Roundabout¹⁸
 - (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).¹⁹

(taken together these works are referred to as “the additional mitigation”)

14. 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: (i) producing further MAM scenarios for both the 2037 and 2028 assessment years (as was agreed with the Appellant)²⁰ – this resulted in four further scenarios having to be modelled²¹; (ii) producing a 3rd Addendum to the Impact Assessment to report the

¹⁶ AHSOCG, para 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.

¹⁷ AHSOCG, para 2.3-2.5

¹⁸ Notwithstanding that this additional mitigation had only been first proposed less than a week earlier

¹⁹ For the reasons set out in Mr Jarvis 2nd rebuttal, the Council were not aware that this further amendment was being proposed until after the Impact Appraisal 3rd Addendum was produced. Nevertheless, the Council has modelled the effects of the amended mitigation, and the results were provided in Mr Jarvis 2nd rebuttal.

²⁰ AHSOCG, para 3.6

²¹ AHSOCG, para 3.6 – Scenarios 2A, 3, A, 5A and 6A

outputs of that modelling (together with the detailed appendices); (iii) producing microsimulation videos; and (iv) drafting further proofs of evidence from Mr Jarvis and Mr Rand.

15. The adjourned Inquiry has 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. The adjourned Inquiry has sat from 19th April – 23rd April 2021, with closing submissions to take place on 28th April.

Submissions

Unreasonable behaviour

16. The planning appeal process is not designed to allow a scheme to be evolved.²² Regrettably in this appeal the Appellants have singularly failed to observe that principle. The evolution of this scheme has had a number of dimensions.²³ However, the one which the Council contends is particularly unreasonable – and which has led it to incur unnecessary and wasted costs – is the evolution in the off-site highway mitigation proposed.
17. 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 to ‘alleviate’ the highway impacts of the proposal.
18. 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

²² 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.”

²³ 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.

inquiry, their highway witness was contending that the original mitigation was “demonstrably sufficient”.

19. The Council, acting entirely reasonably, assessed the proposal that was before them (in four separate MAM assessments) and responded to the case that was being advanced by the Appellant (both when refusing permission, and in their evidence to the inquiry).
20. It was undoubtedly unreasonable of the Appellant to introduce additional offsite mitigation works - and seek to rely on the additional mitigation - for the first 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.
21. 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.
22. 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:
 - (1) 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: (a) the development proposal which they advance, including any necessary mitigation; and (b) their case in respect of that proposal.
 - (2) 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) which the Council has repeatedly, and throughout the application/appeal process, raised significant concerns.
 - (3) Thirdly, notwithstanding its distinct limitations, the Appellant’s own modelling, when based on the original mitigation, indicated that there will be considerable issues to at least some of the junctions on which they now propose the additional

mitigation.²⁴ 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.²⁵

Unnecessary Costs

23. 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) [CD12.3] Impact Appraisal Addendum 2 (January 2021) [CD12.2]. 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. It is telling that no time was spent examining them at the Inquiry. This was a significant wasted expense.
- (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 appeal was issued - it would have been taken account of in the Impact Appraisal (October 2020) [CD12.1]. 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 meeting and conferences would not have been required had the additional mitigation been proposed in a timely manner.

²⁴ See Rand Proof, paras 4.19-4.29

²⁵ This was consistent with his explanation in the A2 Junction review note, particularly in relation to the mitigation proposed at Will Adams roundabout

- (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 reconvened hearing – 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 hearings. This is a considerable extra cost over the costs which had been incurred for the original hearing 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

24. If there was ever a case for awarding costs against an appellant, this is it. It plainly meets the criteria for a costs award. 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.²⁶ 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.

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²⁶ PPG, Paragraph: 028 Reference ID: 16-028-20140306