



## Costs Decision

Inquiry held on 3, 4, 16 and 17 May, 29 and 30 June, 5, 7, and 13 July 2023.

Site visit made on 17 May 2023.

**by Joanna Gilbert MA (Hons) MTP MRTPI**

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

**Decision date: 19 July 2023**

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### **Costs application in relation to Appeal Ref: APP/N1920/W/23/3314268 Land at Little Bushey Lane, Bushey.**

- 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 Redrow Homes Limited for a partial award of costs against Hertsmere 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 310 units) with access from Little Bushey Lane, and land reserved for primary school, community facilities and mobility hub (Class E) along with car parking, drainage and earthworks to facilitate drainage, open space and all ancillary and enabling works. (Outline Application with Appearance, Landscaping, Layout and Scale Reserved).
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### **Decision**

1. The application for a partial award of costs is allowed in the terms set out below.

### **Reasons**

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) 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. The applicant, Redrow Homes Limited, has applied for costs on a procedural basis regarding the issue of sequential flood risk assessment.
3. The PPG<sup>1</sup> confirms that local planning authorities are required to behave reasonably in relation to procedural matters at the appeal, for example by complying with the requirements and deadlines of the process. Examples of unreasonable behaviour which may result in an award of costs include lack of co-operation with the other party; delay in providing information or failure to adhere to deadlines; not agreeing a statement of common ground in a timely manner or not agreeing factual matters common to witnesses of both principal parties; and 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 reason for refusal.
4. The applicant and landowner engaged with Hertsmere Borough Council (the Council) over a number of years to progress the site as an allocation for

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<sup>1</sup> Paragraph 16-047-20140306: What type of behaviour may give rise to a procedural award against a local planning authority?

- housing and other uses within the Draft Hertsmere Local Plan (DHLP). The DHLP was set aside on 27 April 2022.
5. On 14 June 2022, the planning application was submitted, with a Flood Risk Assessment (June 2022)(FRA). The application was validated on 20 June 2022 with a statutory decision date of 19 September 2022. The Council carried out its duties in consulting statutory consultees Hertfordshire County Council as the Lead Local Flood Authority (LLFA) and the Environment Agency (EA) on 29 June 2022. The EA confirmed it had no objection on 14 July 2022. The LLFA's first consultation response was provided on 9 November 2022 (the first response).
  6. I note that the Council engaged with the applicant on the application up to mid December 2022. On 18 November 2022, an extension of time was agreed until 2 December 2022. The applicant submitted an appeal on 6 January 2023. While this came as a surprise to the Council, it was the choice of the applicant to do so, despite outstanding objections from the LLFA and National Highways. At that point, no mention had been made of the sequential test (ST) for flood risk.
  7. On 18 January 2023, the Council requested that the Inquiry be delayed by at least a week from 3 May 2023, due to local elections, venue capacity, and resourcing. The Inquiry timetable had been set having had regard to the Harris Lane, Shenley Inquiry<sup>2</sup> and to another Inquiry elsewhere in which the applicant's team were involved. It was made clear that interested parties would be given scope to speak after the elections, and two Councillors chose to do so. I appreciate that the Council faces resourcing challenges, as do many local authorities, but this does not alter the need to move forward with decision-making in a timely manner.
  8. A further LLFA response was provided on 1 February 2023 (the second response). A meeting was held between the applicant and the LLFA on 22 February 2023. The Council held its Planning Committee on 23 February 2023 to establish putative reasons for refusal, which did not mention the ST. The Council's Statement of Case was submitted on 24 February 2023. On 1 March 2023, the applicant submitted amended plans to address drainage. An updated FRA (March 2023) was subsequently provided. Further consultation took place on amended plans between 16 March and 6 April 2023.
  9. On 22 March 2023, the LLFA wrote to the Council (the third response). This represents the first specific reference to the ST and states that the Council "should consider if this site has sufficiently investigated the ST for development in this location." The applicant received this on 23 March 2023. The main Statement of Common Ground (SOCG)(24 March 2023) did not refer to the ST.
  10. On 5 April 2023, proofs of evidence were submitted. Ms Waters' proof for the LLFA refers at 3.1.4 to it being her opinion that "the information submitted to support this application has not demonstrated that this development is appropriate or necessary in this flood risk location. From a review of the submitted information no evidence has been submitted that the ST has been carried out in relation to all sources of flooding although this evidence would be for the Local Planning Authority to review and determine its acceptability."
  11. Ms O'Brien's proof for the Council confirms at paragraph 3.33 that the "objection from the LLFA also recommends that the Council consider whether

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<sup>2</sup> The Inquiry for appeal APP/N1920/W/22/3311193 was held on 18 – 21, 24, 25 and 27 April 2023.

there has been sufficient investigation of the ST for development at this location. They consider that, as the site is at medium to high risk of surface water flooding, a site-specific ST would be required to assess this.” At paragraph 3.34, she adopts the LLFA’s conclusions.

12. On 12 April 2023, the applicant wrote to express concern about the lack of clarity of the Council’s and the LLFA’s approach and to advise that it was wholly unacceptable that the Council’s first mention of this was within the exchange of evidence coupled with the LLFA’s first mention of this in their third response.
13. On 19 April 2023, the Council confirmed by letter that the LLFA’s first and second responses both refer to Policy SADM14 of the Hertsmere Local Plan: Site Allocations and Development Management Policies Plan (SADM), adopted in November 2016 and that this policy refers to the ST. This letter further refers to the FRA (June 2022 and March 2023) highlighting the need for the ST but stating that “it falls outside the scope” of the FRA. The LLFA therefore interpreted the FRA as accepting the need for an ST.
14. The site is at risk from fluvial, surface water, and reservoir flooding. The National Planning Policy Framework (the Framework) was published in July 2021. Paragraph 162 of the Framework asserts that the aim of the ST is to steer new development to areas with the lowest risk of flooding from any source. It states that development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.
15. As the 2021 Framework was in place at the time of submission, the applicant, the Council, and the LLFA should all have been aware that the ST was necessary by June 2022. Furthermore, the August 2022 changes to the PPG in respect of flood risk occurred after submission and should also have triggered discussion between the parties and the completion of an ST then.
16. It was posited at the inquiry by Ms Waters and Ms O’Brien that the applicant should have known about the need for an ST because Policy SADM14 covers the ST. The applicant should indeed have known. It is disappointing and unsatisfactory that the applicant’s specialist consultants did not address this.
17. While Policy SADM14 deals with the ST, the Council did not understand that the LLFA was taking its position on the ST until after the production of the Council’s Statement of Case. The Council was bound to take the LLFA’s third response into account<sup>3</sup>. However, having a significant workload does not absolve the LLFA from its responsibility to express in a clear and timely manner that something as vital as an ST is required. While the LLFA has specialist resources, the Council’s professional planning officers should also have been aware of the potential need for an ST. Where people’s safety is at risk, it is not acceptable to assume that the need for an ST being implied will result in an ST being carried out. The lateness of the LLFA’s third response raising the ST placed the Council in an invidious position during the Inquiry process, but both the LLFA and the Council should have acted earlier.
18. Given the extent of flood risk and the national and local policy situation, this necessitated the ST being carried out. Although the Inquiry’s sitting days were

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<sup>3</sup> R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities [1986] 1 All ER 164.

- no greater in number than originally anticipated, the timing of the LLFA's introduction of concerns about the ST prolonged proceedings by introducing in effect a new reason for refusal. This was far from satisfactory.
19. Notwithstanding the unacceptable timing, what had been done by this point in April 2023 could not be undone. The appeal process should not be used to evolve a scheme, but it would have been procedurally unfair of me to seek to reach a decision when the ST was raised only during the appeal process.
  20. On 20 April 2023, I allowed the applicant the opportunity to provide a ST by no later than 22 May 2023. The Council and the LLFA were given until 12 June 2023 to provide their response to that ST. A case management conference (CMC) was held on 25 April 2023 to clarify available sitting days. This occurred after I had suggested that the flood risk and planning evidence might be heard in October 2023. No requests to extend either the May or June deadlines were made before, at or after the CMC. The parties met their respective deadlines.
  21. It has been suggested that the ST has a number of shortcomings. Indeed, the Council considers that if the applicant had carried out the ST appropriately, taking proper account of whether a site is at lower flood risk and what the variation of flood risk is within that site, this would have reduced Ms Waters' workload in rebutting the ST. This may well have been the case, as Ms Waters' work on the quantitative assessment of flood risk was more thorough than that provided by the applicant. However, the challenges faced by the Council and LLFA in undertaking work on their ST rebuttal were not communicated to me between 22 May and 12 June 2023.
  22. The applicant should have agreed the ST methodology with the Council and the LLFA, including the area of search. Given the time which elapsed between LLFA consultation responses, I have some sympathy with the applicant's position. However, this could have been timetabled into the ST process.
  23. On receipt of the Council's and LLFA's evidence on 12 June 2023, the covering email confirmed that this evidence was prepared collaboratively by Ms O'Brien, Mr Ross and Mr Wilson. Ms O'Brien confirmed that she adopted Ms Waters' conclusions. At this point, the Council proposed a round table discussion on ST. It was also confirmed that the Council would seek to progress an ST SOCG.
  24. The Council's evidence included Appendix A to Ms O'Brien's ST Rebuttal, which Mr Ross had prepared (the original Appendix A). It included 10 sites which were described as potentially sequentially preferable, possibly sequentially preferable, or could be sequentially preferable in terms of both flooding and being reasonably available. In contrast, Ms Waters' Rebuttal referred to approximately 17 sites which were more sequentially preferable in terms of flood risk, while paragraph 4.2 of Ms O'Brien's ST Rebuttal referred to 9 sites.
  25. On 14 June 2023, I confirmed that, notwithstanding the Council's preference for round table discussion, the policy principle and the parameters of the ST should be dealt with by cross-examination and the sites by round table discussion. I requested an agreed ST SOCG by 21 June 2023 with a Scott schedule of all the Hertsmere sites which the Council considered sequentially preferable with the areas of common and uncommon ground.
  26. The Council's first comments on the draft ST SOCG were received by the applicant on the evening of 20 June 2023. The applicant questioned its

contents in respect of the disputed sites which did not match the evidence of Ms O'Brien's ST Rebuttal at paragraph 4.2. The applicant confirmed that it had been working on the basis of 9 sites being in dispute.

27. On the afternoon of 21 June 2023, the applicant received an amended draft ST SOCG from the Council. This did not include feedback from Ms Waters, but confirmed that the Council had updated the list of 17 sequentially preferable sites. This superseded paragraph 4.2 of Ms O'Brien's ST Rebuttal and some of the commentary in the original Appendix A.
28. Given conflicting evidence, it was unclear what case the Council was advancing at this late stage in proceedings. The applicant confirmed on 21 June 2023 that it would be unable to complete the ST SOCG and that they may ask for my agreement to allow the applicant's advocate to cross-examine Mr Ross and Ms O'Brien. The Council confirmed receipt of the applicant's email and stated its intention to respond on 22 June 2023.
29. Concerned by the lack of clarity from the Council and aware of limited remaining time for the parties to prepare, I issued a further direction on 22 June 2023 that all remaining evidence would be heard by cross-examination, with the Council's and LLFA's witnesses Ms Waters, Mr Ross and Ms O'Brien followed by Ms Featherston and Mrs Ventham for the applicant.
30. Later on 22 June 2023, Mr Ross submitted a second Appendix A with 15 sites which he considered sequentially preferable. On 23 June 2023, the applicant highlighted discrepancies in the second Appendix A. On the same day, the Council provided a third Appendix A with 14 sites which Mr Ross considered sequentially preferable.
31. The ST SOCG was agreed on 28 June 2023. This indicated disagreement on 14 sites, as for Mr Ross' third Appendix A. Evidence was heard from Ms Waters and Mr Ross on 29 June 2023, Ms O'Brien on 30 June 2023, Ms Featherston and Mr Ross on 5 July 2023, and Mrs Ventham on 7 July 2023.
32. The number of disputed sites fluctuated during the Inquiry. The Council has questioned the applicant's reference to Mr Ross' work being riddled with errors and internal inconsistencies. Prior to and during the hearing of his evidence on 29 June 2023, this did unfortunately appear to be the case. This was exacerbated by poor communication and teamwork on the part of Ms Waters, Mr Ross and Ms O'Brien. While it is understandable that team members will have differing availability within a given period of time due to prior commitments, it appears that Mr Ross did not see Ms Waters' work prior to producing his original Appendix A. As a result, sequentially preferable sites for the Council's and LLFA's witnesses did not match. It appears that Mr Ross' evidence changed only because he had finally read Ms Waters' flood risk evidence. This was unacceptable.
33. It became apparent at the Inquiry that the applicant's advocate and I were not reading from the same original Appendix A as Mr Ross. Changes were made to Mr Ross' original Appendix A by Ms O'Brien in respect of flood risk immediately prior to the submission of documents on 12 June 2023. Ms O'Brien failed to discuss or communicate this to Mr Ross before or after submission and compounded the issue as she was then on leave until 20 June 2023. Ms O'Brien's manipulation of Mr Ross' evidence may have been without ill-intent and thought to the consequent effect, but it detrimentally affected Mr Ross'



- ability to provide his own professional opinion to the Inquiry. It also meant that Mr Ross and the applicant's advocate appeared to be talking at cross purposes during cross-examination and resulted in Mr Ross being subjected to considerably more questioning by the applicant's advocate than had been envisaged.
34. Much was made of the short timescales for producing and responding to the ST. If concern had been raised at the right time and it had been clearly evidenced by the lack of availability of personnel, this may have constituted reason to delay the latter part of the Inquiry until Autumn 2023.
  35. During cross-examination of Ms Featherston on 5 July 2023, the Council's advocate sought to introduce a dispute on a site which Mr Ross had previously agreed was not sequentially preferable. In order to clarify this, Mr Ross was recalled to the Inquiry and again gave evidence that the site in question was not disputed as it was not sequentially preferable.
  36. I find that it was necessary for the applicant to undertake the ST, albeit that this was during the appeal process. While this is extremely unfortunate, it did not lead to wasted expense. Notwithstanding this, the events which followed the submission of the Council's ST evidence are of significant concern.
  37. Given the differences in the ST evidence provided by the Council's and LLFA's witnesses on 12 June 2023, the consequent changes to Mr Ross' and Ms O'Brien's evidence, and the Council's advocate's introduction of a previously undisputed site, this involved the Council introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work on the part of the applicant that would not otherwise have arisen, had the Council been organised and effective in its work in the first place.
  38. Not only did the applicant have to read and understand the Council's evolving position, and produce emails in response, but the applicant's team had to undertake preparation on additional disputed sites, and respond to these changes during the Inquiry. The Council failed to co-operate with the applicant to progress and agree the ST SOCG in a timely manner and this affected the applicant's ability to prepare for the Inquiry. This was both unreasonable and resulted in unnecessary or wasted expense in the appeal process.
  39. The costs regime looks to support a well-functioning appeal system. It aims to ensure that all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice, whether in terms of timeliness, behaviour, or quality of case. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of work undertaken by the applicant following the issue of the Council's ST evidence on 12 June 2023 and a partial award of costs is therefore warranted in respect of work undertaken by the applicant after 12 June 2023 in respect of the ST evidence only.

### **Costs Order**

40. 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 Hertsmere Borough Council shall pay to Redrow Homes Limited, the costs of the appeal proceedings described in the heading of this decision limited to

those costs incurred in relation to work undertaken by the applicant following the issue of the Council's ST evidence on 12 June 2023 in respect of ST evidence only; such costs to be assessed in the Senior Courts Costs Office if not agreed.

41. The applicant is now invited to submit to Hertsmere 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.

*Joanna Gilbert*

INSPECTOR