DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT

Communities and Local Government Circular 03/2009
Department for Communities and Local Government
Eland House, Bressenden Place, London SWIE 5DU

6 April 2009

COSTS AWARDS IN APPEALS AND OTHER PLANNING PROCEEDINGS

INTRODUCTION

1. The annex to this circular provides updated guidance on the award of costs in England in proceedings under the Planning Acts[1]. It complements legislative amendments[2] designed to improve the efficiency and effectiveness of the planning appeals system. The costs awards regime seeks to increase the discipline of parties when taking action within the planning system, through financial consequences for those parties[3] who have behaved unreasonably[4] and have caused unnecessary or wasted expense in the process. A party may be ordered to meet the costs of another party, wholly or in part, on specific application by the aggrieved party.

2. Part A of the annex sets out the general principles for awards of costs and updates the procedures for making applications.

3. Part B focuses on the most common types of case eligible for costs awards, with examples to illustrate circumstances in which a party is most likely to be at risk of an award of costs against them.

4. Part C records the continued application of the general policy on the award of appeal costs to called-in planning applications, and also to non-planning casework which is subject to any separate guidance from the relevant responsible Department.

5. Part D discusses the position of third parties including statutory consultees.

[1] For the purposes of this Circular the Planning Acts are the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990, and the Planning and Compulsory Purchase Act 2004 (as amended).

[2] Summarised in Part F of the Annex

[3] The term "party" or "parties" is defined in paragraph A15 of Part A of the Annex.

[4] As summarised in A22 & A23

6. Part E provides updated guidance in relation to compulsory purchase orders and so-called analogous orders, consistent with the Planning and Compulsory Purchase Act 2004 and associated subordinate legislation.

7. Part F of the annex records the legislation underpinning costs awards in planning-related proceedings. An illustrative list of case types for which costs awards are available is published by the Planning Inspectorate[5]. It is intended that this should be regularly updated.

8. While the content of this circular has no statutory status, and is guidance only, it represents current national policy on the awarding of costs and will be fully taken into account by the Secretary of State and Inspectors where costs are at issue in planning and planning-related proceedings.

SCOPE OF CIRCULAR

9. The guidance in this circular will apply to all appeals under the Planning Acts in England, which are made on or after 6 April 2009; and to called-in planning applications and other referred applications under the Planning Acts where proceedings are initiated on or after the 6 April 2009. It will also apply by analogy to proceedings under non-planning legislation initiated on or after that date, which previously relied upon DOE Circular 8/93 as a general statement of principles for the award of costs. This circular does not apply to proceedings arising from the role of the Infrastructure Planning Commission (IPC) and examinations into applications for orders granting development consent under Part 6 of the Planning Act 2008.

EXPLANATORY GUIDE FOR APPELLANTS

10. An updated explanatory guide (*Costs Awards in Planning Appeals – A Guide for Appellants*) is obtainable from:

The Planning Inspectorate
Customer Services Team
Temple Quay House
2 The Square
Temple Quay
BRISTOL BS1 6PN
Telephone 0117 372 6372.

It is also accessible via the Planning Portal[6].

CANCELLATIONS

11. *DOE Circular 8/93 Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*; paragraphs 46, 48 and 49 of Part 1 of the Memorandum to *ODPM Circular 06/2004 Compulsory Purchase and The Crichel Down Rules* are cancelled.

[5] www.planningportal.gov.uk

[6] See footnote 5

ANNEX

Part A – General principles and procedures

Introduction

A1. The appeal process, administered by the Planning Inspectorate, is an integral part of the planning system. It provides for the resolution of disputes arising from decisions taken at the local level and ensures that decisions about the use and development of land are consistent with up to date national, regional and local planning policies. The Inspectorate has limited resources for this purpose and it is in the interests of all those involved that they are used efficiently and effectively.

A2. Planning applications may be refused or appeals made for insufficiently good reason or parties may behave in ways that cause delay or frustrate the efficient resolution of outstanding matters. The costs regime should support a well-functioning system and encourage proper use of the right of appeal.

A3. The costs regime is aimed at ensuring as far as possible 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 or in quality of case
- taking into account the statutory period for making an appeal, appeals are not entered into lightly or as a first resort, without prior consideration to making a revised application which meets reasonable local planning authority objections
- planning authorities and applicants enter into constructive pre-application discussions consistent with PPS 1, paragraph 12
- at the appeal stage, statements of common ground are provided at the appropriate time
- planning authorities properly exercise their development control responsibilities, rely only on reasons for refusal which stand up to scrutiny and do not add to development costs through avoidable delay or refusal without good reason
- unsuccessful applicants exercise their right of appeal responsibly
- costs applications are not routinely made when they have little prospect of success and merely add to the costs of administering the appeal system
- all those involved in the appeal process who feel justified in complaining about others' behaviour use the guidance in this circular effectively, by pursuing substantiated applications for costs in a robust but realistic way

Changes introduced by the Planning Act 2008 and secondary legislation impacting on the costs regime

A4. Relevant legislative changes are recorded in Part F of this annex. In particular, new section 319A[7] of the Town and Country Planning Act 1990, "Determination of procedure for certain proceedings", enables the Planning Inspectorate, acting on behalf of the relevant Secretary of State, to determine the most appropriate appeal procedure. Consistent with that change, and to ensure a "level playing field" for costs purposes, the costs regime has been extended to all appeals dealt with under the written representations procedure. The opportunity to apply for an award of costs, and therefore the risk of an award, now applies to all appeals and proceedings[8] under the Planning Acts, irrespective of the procedure adopted.

A5. However, the principle of extending the costs regime to all written appeals under the Planning Acts should not be seen as a green light to costs applications on spurious grounds. Parties should be robust in applying for costs where they feel fully justified in doing so, but the reverse also applies. Costs do not necessarily follow the appeal outcome. Spurious or unsubstantiated costs applications will be dismissed by the briefest possible decisions in the interests of economy.

A6. In addition, the legislative changes ensure that withdrawal of an appeal at any stage in the process, without good reason, will risk a successful application for costs irrespective of case type and procedure. Where it is advantageous to both principal parties to withdraw an appeal and they agree that it is the best course of action in the particular circumstances, then they may wish to agree that no costs application will be made. Enforcement notice, lawful development certificate and some other specialist appeals[9] are no longer distinguishable and all appeals under the Planning Acts carry the same risk of an award of costs, irrespective of procedure.

General principles

A7. In planning appeals, and other proceedings to which this guidance applies, **the parties involved normally meet their own expenses.**

A8. Most appeals do not result in a costs application, let alone a costs award. Statistics are published by the Planning Inspectorate[10]. In recent years, on average, costs applications have been made in about 20 per cent of hearing cases, 25 per cent of inquiry cases and 4 per cent of written cases[11]. Awards have been made in about 40 per cent of these cases overall.

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[7] Inserted by section 196 of the Planning Act 2008

[8] With the exception of proceedings under section 259 of the Town and Country Planning Act 1990 which are dealt with on the basis of representations in writing

[9] Listed building enforcement notice appeals under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990; tree replacement notice appeals under section 208 of the Town and Country Planning Act 1990; and appeals under section 25 of the Planning (Hazardous Substances) Act 1990 and Regulations against hazardous substances contravention notices.

[10] See footnote 5.

[11] These written cases have concerned the appeal types itemised in paragraph A6 and footnote 9.

A9. A costs award, where justified, is an order which can be enforced in the Courts and states that one party shall pay to another party the costs, in full or part, which have been incurred during the process by which the Secretary of State's or Inspector's decision is reached. The 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. Settling the amount is covered in paragraph A21 below.

A10. The appeal decision will not be affected in any way by the fact that an application for costs has been made. The two matters are entirely separate. There may be more than one application for costs per appeal by different parties on different aspects of the case.

Conditions for an award

A11. An award of costs does not necessarily follow the outcome of the appeal, as in litigation in the Courts. This is a well-established principle of the costs regime and remains so. An unsuccessful appellant is not expected to reimburse the planning authority for the costs incurred in defending the appeal. Equally, the costs of a successful appellant are not borne by the planning authority as a matter of course.

A12. Costs will normally be awarded where the following conditions have been met:

- a party has made a timely application for an award of costs
- the party against whom the award is sought has acted unreasonably and
- the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process[12] – either the whole of the expense because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector, or part of the expense because of the manner in which a party has behaved in the process

A13. Different conditions apply to compulsory purchase and so-called analogous orders. These are dealt with in Part E of the annex.

Who can apply for costs and who can have costs awarded against them

A14. Principal and third parties may apply for costs and may have costs awarded against them.

A15. In this circular, the term "principal party" normally refers to the local planning authority (or other relevant responsible authority) and the appellant. All other interested parties are defined, for the purposes of this guidance, as third parties, subject to the following exception.

[12] The appeal process is regarded for costs purposes as starting from the submission of the appeal and ending on the date when the appeal is concluded, normally by its determination or withdrawal.

A16. Where the Mayor of London or any other statutory consultee[13] exercises a power to direct a planning authority to refuse planning permission, this third party will be treated as a principal party for the purposes of this guidance.

A17. Further guidance on awards of costs either in favour of or against third parties, including situations where they will be treated as principal parties, is in Part D.

Full awards

A18. A full award of costs relates to the applicant's whole costs of the statutory process, including the submission of the appeal statement and supporting documentation. It also includes the expense of making the costs application in respect of the appeal process, whether in writing or at a hearing or inquiry. Where the process concerns a called-in planning application, the time period for which costs may be awarded starts from the date of the notification by the relevant government office of the decision to call-in the application. In other non-appeal cases, the time period starts from the date of the notification or statutory publication of, for example, the relevant order, following which the applicant for costs has begun to incur costs in the ensuing statutory process. An application for a full award may be allowed in full, refused or allowed in part.

Partial awards

A19. Some cases do not justify a full award of costs – for example, where the appeal is one of several joint appeals, or where the application for costs only relates to one ground of refusal, or only relates to the attendance of particular witnesses. In these circumstances, a partial award may be made. The partial award may also be limited to a part of the appeal process. Where an unnecessary adjournment is caused by the unreasonable conduct of one of the parties, the award of costs would be limited to the expense caused by the adjournment, for example, the abortive costs of attending the event on the day of the adjournment.

A20. A partial award may be made where an application for a full award is being allowed in part or where a partial award is applied for in specific terms. An application for a partial award may be allowed in the terms of the application, refused, or allowed in part (that is, a smaller partial award is made). The expense of making an application for a partial award of costs is recoverable where the application is allowed. Where the application is for a full award and the application is allowed in part, or an application for a partial award is allowed in part, a proportion of the expense of making the application will be recoverable accordingly.

Settling the amount where an award is made

A21. Where a costs award or "costs order" is made, the party awarded should first submit details of their costs to the other party, with a view to reaching agreement on the amount. If they are unable to agree, the party awarded costs can refer the matter to a Costs Officer of the Supreme Court Costs Office for a detailed assessment of the amount. When an award of costs is made the parties will be sent a guidance note on the separate procedure for detailed assessment by the Court[14].

[13] See Part D of the Annex

[14] Under the Civil Procedure Rules, Part 47

Meaning of "unreasonable"

A22. The word unreasonable is used in its ordinary meaning as established by the Courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774.[15] Further explanation of what is likely to be regarded as unreasonable behaviour is set out in Part B of the annex. The most common examples concern non-compliance with procedural requirements or failure by the planning authority to substantiate a stated reason for refusal of planning permission.

A23. Where a planning authority applies for an award of costs against an appellant, whether behaviour is regarded as unreasonable or not will take account of the appellant's evident experience and whether or not they are professionally represented. People who are not familiar with the planning system cannot reasonably be expected to be familiar with the full extent of planning guidance and procedures, although they will be expected to read and take note of standard informative material sent to them by the Planning Inspectorate and relevant facts drawn to their attention by the planning authority[16]. Where a party has indicated an intention to apply for costs and has clearly set out the basis for the claim, their case will be strengthened if the opposing party is unable to explain why the relevant facts or matters referred to have not led to a change of stance or position.

Unnecessary or wasted expense

A24. An applicant for costs will need to demonstrate clearly how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense and decisions will be taken on the balance of probability. Expense should be identifiable or capable of being quantified in some tangible way. Expense may be unnecessary or wasted because the entire appeal could have been avoided or because time and effort was expended on one part of a case that subsequently turned out to have been abortive.

A25. The power to award costs[17] enables a party to be awarded the costs **necessarily and reasonably** incurred in the appeal process. However, applications may relate to what happened[18] before the appeal was lodged. Costs incurred that are unrelated to the appeal itself are not eligible. The costs of the appeal will typically – for an appellant – be those of employing an agent to submit the appeal and represent them throughout the process. In addition, costs may include the use of a range of professional expertise to provide detailed technical/legal advice, including representation at a hearing or inquiry where held. Similarly planning authorities will be able to recover costs incurred in resisting appeals and defending their decision or their stance in a "failure to determine" case.

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[15] More recently, the case of R (on the application of Hann) v SSETR and Sedgemoor District Council 2001 EWHC Admin 930 confirmed the principle set down in R v SSE, ex parte Chichester District Council 1993 2 PLR 1 DCI and Blythe Valley Borough Council v SSE 1988 that "unreasonable" for the purposes of an award of costs means unreasonable in the ordinary sense of the word, not in the "Wednesbury" sense.

[16] Planning Aid provides free, independent and professional help, advice and support on planning issues to people and communities who cannot afford to hire a planning consultant. More information can be found on http://www.planningaid.rtpi.org.uk/.

[17] Section 250(5) of the Local Government Act 1972 is the basis for powers to award costs in planning proceedings. See paragraph F1 for further details.

[18] Which is claimed to demonstrate unreasonable behaviour

A26. Awards cannot extend to compensation for indirect losses, such as those which may result from delay in obtaining planning permission via the appeal process.

A27. As a decision to award costs will define the broad extent of the award (full or partial), but not the amount of unnecessary or wasted expense payable, no details of actual expenditure are required when making a costs application. However, the kind of expense or time spent in the matter should be identified in broad terms.

Suggestions for good practice – minimising the risk of a costs award

A28. While the costs regime is a necessary disciplining tool, an award of costs is plainly not a satisfactory outcome in terms of the overall use of resources. Good behaviour includes careful and on-going case management. Parties can minimise the likelihood of costs being awarded against them, or the extent of any award, by following the good practice listed below:

- there should be constructive co-operation and dialogue between the parties at all stages
- parties should maintain good records and an audit trail of negotiation, dialogue and information exchanges between them
- planning authorities should consider using informatives on decision notices and other documents as an aid to improving communication between all parties and promoting reasonable conduct in the planning system
- parties should actively review their cases, respond promptly to changing circumstances and provide a clear explanation of a revised stance or position, with nothing coming as a complete surprise throughout the process, and
- parties should be willing to accept the possibility that a view taken in the past can no longer be supported and act accordingly at the earliest opportunity, even at the risk of an application for costs being made where, for example, an appeal or reason for refusal of planning permission is withdrawn at an early stage (see Awards arising from a party's withdrawal in Part B)

Procedures: Applications for Costs

A29. The term "application for costs" has no statutory basis. It reflects well-established practice and is the process by which decisions are made on whether or not to award costs, where sought.

Hearing or inquiry cases

A30. In hearing or inquiry cases any applications for costs should be made to the Inspector at the event before the Inspector closes and adjourns to the site visit. Adequate opportunity will be provided by the Inspector for an application or applications for costs to be made and where they are made, for parties to respond.

A31. The principle of early disclosure of appeal evidence should apply equally to any intention to seek an award of costs. Costs applications should not therefore rely on using surprise as a tactic. As good practice, advance applications should be made in writing unless the decision to apply for costs is triggered by what has happened at the event, in which case the application may be made orally. Advance applications may be amended as necessary as a result of what happens at the event.

A32. If, prior to the hearing or inquiry, and having regard to the advice in this Circular, a party clearly sees grounds for an award of costs and intends to apply they should:

- provide the Inspectorate's case officer with an advance written statement[19] of their grounds or written skeleton argument and

- disclose this to the other party so that the intention is clear and open

The case officer will then write to the other party and invite a response. This will be copied to the claiming party for any final comment before the hearing or inquiry opens.

A33. A written skeleton argument which is disclosed in advance via the Inspectorate's case officer, and sets out concerns with reference to relevant guidance in this circular can save valuable time in hearing submissions on costs and assist the decision process. At the hearing or inquiry the party applying for costs will be given the opportunity to expand on their submission in the light of events that have taken place. The other party will be given an opportunity to respond before the applicant has the "final say".

A34. The Inspector will normally decide the costs application in conjunction with the appeal. Where the Secretary of State is deciding the appeal any application will be reported[20] by the Inspector with a recommendation.

A35. If the party against whom the costs application is made is not present at the hearing or inquiry, the Inspector appointed to decide the appeal will be unable to decide the costs application fairly without the absent party being given opportunity to respond. In this situation the established practice is for the Inspector to decide the appeal, while reporting the costs application to the Secretary of State with provisional conclusions but no recommendation. The application will then be decided separately[21] after the appeal decision. The person against whom the costs application has been made will be invited to comment and any comments received will be exchanged with the claiming party before the decision on costs is issued.

Written appeals

A36. The conditions for an award of costs, as set out in para A12, apply to all cases dealt with by written representations, including householder and tree preservation order appeals.

[19] A form which may be used to apply for costs in writing is included in the Explanatory Guide, referred to in paragraph 10 of the Circular introduction. Use of the form is not a requirement.

[20] For the Secretary of State's separate decision.

[21] In the Inspectorate's Costs and Decisions Team

Written appeals generally, excluding householder and tree preservation order appeals

A37. The grounds for any costs application should normally be clear by the time of the completed appeal exchanges at the latest[22], if not when the party's statement of case is submitted[23]. An exception might be the subsequent failure of a party to attend an arranged accompanied site visit. In that situation any costs application should be made immediately, but if some delay is unavoidable, no later than within 7 days of the site visit.

A38. If a timely costs application is made, the Inspectorate will invite the other party, against whom the application has been made, to comment within a set timescale. Opportunity will be given for comments to be exchanged and taken into account before the decision on the costs application is issued.

Householder appeals

A39. "Householder appeals"[24] are defined as appeals under section 78(1) in relation to a householder application, except an appeal against the grant of any planning permission, consent, agreement or approval which is granted subject to conditions. It should normally be clear from the outset in householder appeal cases whether there is any realistic basis for a costs application by the appellant. In such circumstances the appellant should make any application for costs at the same time as the appeal, supported by a full statement of why an award is considered justified. The appellant will need to demonstrate that the planning authority's decision was unreasonably made on the basis of the information provided and available to the authority at the time. The fact that planning permission has been refused will not, in itself, be an adequate basis for alleging unreasonable behaviour.

A40. Should the appeal follow the expedited procedures for householder appeals set out in Part 1 of The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (2009/452), the reduced timescales and minimal procedural requirements for these appeals mean that the possibility of unreasonable behaviour during the process is minimised. Therefore, any application for costs is likely to concern the substance of the case and, as stated above, should be made at the same time as the appeal.

A41. If the appeal is agreed to be dealt with under Part 1 of the Regulations, any application for costs should be made within 5 days of the start date notified by the Planning Inspectorate, if it was not made at the same time as the appeal. In the case of planning authorities, any application for costs should be made within 14 days of the start date notified by the Inspectorate. This takes into account that within five days of the start date, the authority should have submitted its questionnaire with any supporting documents.

[22] Due 9 weeks after the appeal start date

[23] Due 6 weeks after the appeal start date

[24] The term "householder appeal" is defined in Regulation 2 of the regulations mentioned in paragraph A40

A42. If a timely costs application is made in a householder appeal which follows the expedited procedures, it will be dealt with separately at the end of the process after the appeal decision has been issued. At that stage the Inspectorate will invite the other party, against whom the costs application has been made, to comment within a set timescale. Opportunity will be given for costs comments to be exchanged and taken into account before the decision on the costs application is issued.

A43. Should the appeal be dealt with under Part 2 of the Regulations and a costs application was not made at the same time as the appeal, then the guidance outlined at A37 and A38 applies.

Tree preservation order appeals

A44. **Tree preservation order (TPO) written appeals**[25] The procedures for tree preservation order (TPO) cases which are dealt with in writing are set out in Communities and Local Government's publication *Tree Preservation Orders – A Guide to the Law and Good Practice*. If the appellant has not opted to have his/her appeal dealt with at a hearing or inquiry, the appeal proceeds on the basis of written representations. In such a case any application for costs should normally be made at the same time as the appeal, supported by a full statement on why an award is considered justified. The appellant will need to show that the LPA's decision was unreasonably made on the information available to them at the time.

Decisions on applications for costs in written appeals

A45. In householder and TPO cases that proceed on the basis of written representations, the decision on any application for costs is likely to be issued after the Inspector's appeal decision to ensure that utmost priority is given to the appeal outcome. In other written cases, where longer timescales will apply, it is more likely that the costs decision will be issued at the same time as the appeal decision.

Withdrawal of appeal or enforcement notice or any other basis for the proceedings/events cancelled or closed/no appeal decision

A46. In these circumstances an application for costs should be made in writing immediately to the Inspectorate's Costs and Decisions Team[26]. If some delay is unavoidable, the application should be made no later than four weeks after receiving confirmation from the Inspectorate (or, in the case of any third parties, from the planning authority) that the hearing, inquiry or site visit has been cancelled[27], or that the appeal or enforcement notice in a written case has been withdrawn, and no further action is being taken on the withdrawn appeal/closed proceedings.

A47. If the application is timely and accepted for consideration, the decision on whether the abortive or wasted costs were due to unreasonable behaviour will be taken by an experienced decision officer[28] in the Costs and Decisions Team following an exchange

[25] These appeals are subject to the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997 (SI 1997, No.420) (as amended) and the Town and Country Planning (Trees) Regulations 1999 (SI 1999, No.1892) (as amended)

[26] Contact details are in the Explanatory Guide referred to in paragraph 10 of the Introduction

[27] Or in the case of a hearing or inquiry that is closed, if the withdrawal occurs at the event

[28] Acting on behalf of the Secretary of State under delegation

of the parties' written submissions. The decision will address the stated justification for an award of costs, with reference to the guidance in this Circular and all the case circumstances.

Late applications for costs

A48. Late applications for costs are handled by the Inspectorate's Costs and Decisions Team. In this Circular late applications are defined as those made:

- after the hearing or inquiry is closed
- later than four weeks after receiving notification of the withdrawal, at any stage, of the appeal or enforcement notice or other planning matter the subject of proceedings, irrespective of procedure
- later than 5 days after the start date notified by the Planning Inspectorate in the case of a householder appeal that proceeds via the expedited procedure, where the costs application is made by the appellant
- after the end of the period of 14 days beginning with the start date, in the case of householder appeals that proceed via the expedited procedure, where the costs application is made by the planning authority
- after the notice of appeal has been given in the case of TPO appeals which proceed on the basis of written representations, where the application is made by the appellant
- after the completed questionnaire has been submitted to the Secretary of State, in the case of TPO appeals which proceed on the basis of written representations, where the costs application is made by the planning authority or
- after the Inspectorate's deadline for final comments at nine weeks or after the site visit[29], in appeals dealt with in writing, other than via the expedited procedure

Anyone making a late application for an award of costs will need to show good reason for not having applied sooner. A "good reason" will not be, simply, that the appellant has won their appeal and therefore wishes to recover their costs.

A49. If a late application for costs is entertained, the decision will be taken on the basis of the appeal papers and an exchange of written submissions, and normally without seeking any advice from the Inspector who held the hearing or inquiry, if one was held. If advice is sought – for example, because there are specific allegations about the party's conduct at the hearing or inquiry which cannot be assessed from the file evidence – the comments of the Inspector will be disclosed to the parties before a final decision is taken.

A50. In the interests of economy, the parties involved should be as concise as reasonably possible in their submissions, and observe the time-limits set for their exchange.

[29] Unless the claim concerns conduct relating to the site visit itself in which case it should be made immediately afterwards and no later than within 7 days of the site visit.

Part B – Awards of costs for unreasonable behaviour in planning and planning related appeals

B1. Behaviour which is alleged to be unreasonable in the context of an application for an award of costs may be of a procedural or substantive nature. "Procedural" relates to the process; "substantive" relates to the issues arising on the appeal. Applications for costs on the basis of the withdrawal of an appeal (or enforcement notice) and late cancellation of an event are discussed in more detail in paragraphs B43 to B61.

Procedural awards – general

B2. All appeals are open to costs awards for failure to comply with the relevant statutory requirements, as set out in Regulations. Detailed advice on these requirements is set out in the relevant national guidance on procedures – for example, the Planning Inspectorate Guidance[30], ODPM Circular 02/2002 on *Enforcement Appeals Procedures,* and ODPM circular 07/2005 on *Planning Inquiries into Major Infrastructure Projects: Procedures*. Non-compliance with any rule or regulation, for example, the late submission of statements, will risk an award of costs on specific application where unreasonable behaviour results in unnecessary expense.

B3. Discussion of, and agreement on, outstanding issues between the principal parties throughout the planning process is likely to reduce the risk of a confrontational attitude developing at appeal stage. It may also reduce the risk of a successful costs application and minimise the overall cost of the process to all concerned, including the cost of administering the appeal system. Costs applications are less likely to be justified where parties take responsibility for their behaviour and act reasonably.

B4. The following are examples of unreasonable behaviour which may result in an award of costs to either principal party:

- late submission of statements or proofs of evidence outside the prescribed timetable. This may result in unnecessary delay and extra hearing or inquiry time, due to the need for an adjournment. Or it may result in extra expense of preparation time – for example, from having to work late in the evening before or during the event with consequent higher charges for urgent work undertaken

- failure to produce statements or proofs of evidence, or required information in support of an enforcement notice appeal or ground of appeal, resulting in work being undertaken that turns out to have been fruitless

- resistance to or lack of co-operation with the other party in providing information, discussing the appeal or in responding to a planning contravention notice, thereby extending the duration of the appeal and associated expense

[30] *Procedural Guidance: Planning Appeals and Called-in Planning Applications,* accessible via www.planningportal.gov.uk

- introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not have arisen if the evidence had been submitted on time

- prolonging the proceedings by introducing a new ground of appeal or issue or reason for refusal

- not completing a timely statement of common ground or not agreeing factual matters common to witnesses of both principal parties, resulting in more time being taken at an inquiry than would otherwise have been the case

- withdrawal of any reason for refusal, or ground of appeal, or reason for issuing an enforcement notice, resulting in wasted preparatory work and/or the attendance of a witness or representative person who proves not to have been required

- failing to provide relevant information within statutory time limits, resulting in an enforcement notice being quashed without the issues on appeal being determined

- failing to attend or be represented at an arranged hearing or inquiry, resulting in wasted or unnecessary expense being incurred by other parties

- failing to attend an accompanied site visit arranged by the Planning Inspectorate, so that the other party's expense of attending is wasted and

- withdrawing the appeal or enforcement notice so that the whole proceedings are abandoned and no decision on the appeal can be issued

B5. **In the case of the appellant,** failure to provide the necessary documentation in support of an appeal may, in some cases, simply result in the appeal not being validated by the Inspectorate, so that no further action is taken on the appeal and the planning authority incurs no expense on it.

B6. **An appellant** who fails to respond to reasonable, timely and clearly stated requests from the planning authority for information or evidence on a major issue at the application stage, including any informative attached to the decision notice, and then agrees to do so at the appeal stage risks an award of costs for expense incurred by the planning authority in dealing with the appeal which could reasonably have been avoided. An example is where the additional information or evidence is so significant as to persuade the authority that one or more stated reasons for refusal should no longer be maintained and their stance should be altered, or should be reversed because they would have granted planning permission, with or without conditions.

The planning authority's handling of the planning application or enforcement notice prior to the appeal

B7. Planning authorities have statutory responsibility for handling a wide range of planning applications and investigating alleged breaches of planning control. Serious allegations of misconduct which suggest maladministration by the planning authority should

appropriately be made to the Local Government Ombudsman, where the authority's own complaints procedures have been exhausted and the complainant does not have a remedy via a statutory right of appeal.

B8. Allegations of mishandling of the planning application or pre-application discussions or a previous application may be indicators of unreasonable behaviour by the planning authority. However, the purpose of the costs application process is not to resolve by investigation every allegation of unreasonable behaviour. Rather it is to decide whether or not an award of costs in respect of the appeal is justified on the available evidence in a particular case.

B9. The procedures adopted by a planning authority for determining planning applications are generally a matter for the authority within the context of local government accountability. The process followed by the planning authority may be open to criticism in a particular case; but cause and effect need to be addressed in deciding an application for costs.

B10. If it is clear that the planning authority will fail to determine an application within the time limits because of the complexity of the case, the applicant should be given a proper explanation and informed of the potential for delay as early as possible. Delay should only arise because of substantive and unforeseen concerns. These may arise, for example, from the consultation on the application, including concerns from statutory consultees. Information about the concerns giving rise to the delay in determining the application should be included in the explanation to the applicant, together with an estimate of when the decision on the application will be made and why the extra time is required. Ideally, an extension of time should be agreed with the applicant.

B11. In any appeal against non-determination, the authority should explain the reasons for not reaching a decision within the relevant time limit, including any agreed extension of time, or within the estimate provided to the applicant of when the application would be determined. In such cases the decisive issues are likely to be whether or not the planning authority can produce evidence on appeal to explain the delay satisfactorily, and why the application could not have been determined favourably within the relevant period. The authority should be able to provide evidence to substantiate each of its reasons[31] why it would have refused planning permission, had the application been determined within the relevant period. Where an appeal against non-determination is allowed, the planning authority may be at risk of an award of costs if it is concluded that there were no substantive reasons to justify delaying the determination and a greater level of communication with the applicant would have enabled the appeal to be avoided altogether.

B12. With regard to enforcement action, planning authorities must carry out adequate prior investigation consistent with national policy and guidance. [32] They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation.

[31] These resolved or putative reasons should be clear from the appeal documentation

[32] In PPG 18 on Enforcing Planning Control and DOE Circular 10/97 on Enforcing Planning Control: Legislative Provisions and Procedural Requirements; also the Good Practice Guide for Local Planning Authorities on Enforcing Planning Control (DETR 1997).

Substantive awards

Awards against appellants – unreasonable pursuit of appeal

B13. The right of appeal should be exercised in a reasonable manner. It should be used as a last resort, with the appellant being ready to proceed with the appeal once it is submitted. An appellant is at risk of an award of costs being made against them if, on the basis of the available evidence[33], the appeal or ground of appeal plainly had no reasonable prospect of succeeding on the basis of the application submitted to the planning authority. This may occur when:

- the proposal is clearly contrary to or flies in the face of national planning policy and no, or very limited, other material considerations are advanced with inadequate supporting evidence [see bullet point below for proposed development in the Green Belt]

- development is proposed which is obviously not in accordance with the statutory development plan and no, or very limited, other material considerations are advanced with inadequate supporting evidence to justify determining otherwise

- the appeal follows a recent appeal decision in respect of the same, or very similar, development on the same, or substantially the same, site where the Secretary of State or Inspector has decided that the proposal is unacceptable and circumstances have not materially changed in the intervening period

- the appellant is seeking planning permission for development in the Green Belt, which would be inappropriate according to PPG2: Green Belts. In this situation it will not be sufficient for the appellant to rely on a genuine belief that there are very special circumstances to justify overriding the Green Belt presumption stated in PPG2. It is for the appellant to show why permission should be granted by demonstrating what the very special circumstances are, and providing evidence to justify an exception to general Green Belt policy

- the appellant has refused to enter into or provide a planning obligation or fails to provide an obligation in appropriate terms, which the Secretary of State or Inspector considers is clearly necessary to make the proposed development acceptable[34]

B14. In accordance with the Planning Inspectorate Guidance[35], the appellant should be confident in the strength of their case without commissioning substantial new evidence which was not made available to the planning authority at the time of their consideration of the planning application. An appellant who acts otherwise will risk an award of costs for unreasonably introducing such evidence if, in dealing with it, the planning authority incurs additional expense in the appeal process which would not have been incurred if the evidence had been made available at application stage.

[33] Including any correspondence from the planning authority drawing the appellant's attention to relevant facts and the possible consequences of persisting in an appeal

[34] ODPM Circular 05/2005 Planning Obligations, paragraph B57.

[35] *Procedural Guidance: Planning Appeals and Called-in Planning Applications*

Awards against planning authorities – unreasonable refusal/failure to determine planning applications and unreasonable defence of appeals

B15. Planning authorities are at risk of an award of costs against them if they prevent or delay development which should clearly be permitted having regard to the development plan, national policy statements and any other material considerations. General guidance to authorities on propriety and the handling of planning applications is at paragraphs 27 and 28 of *The Planning System: General Principles (ODPM, 2005)*.

B16 Authorities will be expected to produce evidence to show clearly why the development cannot be permitted. The planning authority's decision notice should be carefully framed and should set out in full the reasons for refusal. Reasons should be complete, precise, specific and relevant to the application. Planning authorities will be expected to produce evidence at appeal stage to substantiate each reason for refusal with reference to the development plan and all other material considerations including any relevant judicial authority. If they cannot do so, they risk a costs award against them for any unsubstantiated reason for refusal. This continues to be the ground on which costs are most commonly applied for and awarded against a planning authority. The key test will be whether evidence is produced on appeal which provides a respectable basis for the authority's stance, in the light of *R v SSE ex parte North Norfolk DC 1994 [2 PLR 78]*.

B17. If one reason for refusal is not properly supported, but substantial[36] evidence has been produced in support of the others, a partial award may be made against the authority.

B18. Planning appeals often involve matters of judgement concerning the character and appearance of a local area or the living conditions of adjoining occupiers of property. Where the outcome of an appeal turns on an assessment of such issues it is unlikely that costs will be awarded if realistic and specific evidence is provided about the consequences of the proposed development. On the other hand vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis, are more likely to result in a costs award.

B19. Guidance on design is set out at paragraphs 33 to 38 of PPS 1 *Delivering Sustainable Development*. Planning authorities should ensure that their design evidence in appeals demonstrates a clear understanding of context. The evidence should explain the way in which a proposal would fail to promote or reinforce local distinctiveness. Where planning authorities rely on adopted supplementary guidance on design or relevant and up to date policies containing design criteria, an award of costs is unlikely to be made on the ground of an unreasonable planning objection.

B20. Planning authorities are not bound to accept the recommendations of their officers. However, if officers' professional or technical advice is not followed, authorities will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects. If they fail to do so, costs may be awarded against the authority.

[36] In the sense of being respectable or not inconsiderable. Substantial evidence does not necessarily need to be lengthy to meet this test.

B21. While planning authorities are expected to consider the views of local residents when determining a planning application, the extent of local opposition is not, in itself, a reasonable ground for resisting development. To carry significant weight, opposition should be founded on valid planning reasons which are supported by substantial evidence. Planning authorities should therefore make their own objective appraisal and ensure that valid planning reasons are stated and substantial evidence provided.

B22. Planning authorities will be at risk of an award of costs for unsubstantiated objections where they include valid reasons for refusal but rely almost exclusively on local opposition from third parties, through representations and attendance at an inquiry or hearing, to support the decision.

B23. Similarly, planning authorities are expected to give thorough consideration to relevant advice or representations from statutory consultees such as the Environment Agency or English Heritage, or from a county council as highway authority, before determining a planning application. While it is the primary responsibility of planning authorities to either accept or reject that advice, they should clearly understand the basis for doing so and should provide, where necessary, a clear and rational explanation of the position taken. Exceptionally, if the planning authority is specifically directed[37] to refuse or to impose condition(s) on any permission it may grant, the responsibility for defending that issue on appeal and potential liability in the event of a costs application will fall to the directing body.

B24. In general, however, planning authorities will be expected to produce, or coordinate the provision of, evidence in support of advice on which they are relying at appeal and be prepared to defend any costs application. They should therefore discuss their case with the consultee at an early stage and clarify whether or not the consultee intends to support the authority by providing a statement or technical witness, as appropriate. What matters in any subsequent costs application is whether or not the authority can show good reason for accepting, or rejecting, the consultee's advice.

B25. Whenever appropriate, planning authorities will be expected to show that they have considered the possibility of imposing relevant planning conditions to allow development to proceed. They should consider any conditions proposed to them before refusing permission. A planning authority refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs where it is concluded on appeal that suitable conditions would enable the proposed development to go ahead.

B26. Authorities may wish to consider using an informative note attached to the decision notice on an application for proposed development, in addition to stating a reason (or reasons) for refusal, to advise applicants that certain matters are considered to be capable of resolution by the submission of a planning obligation or by a condition. Provided that there are no objections of principle, such notes could also be used to indicate the form that a revised scheme might take in order to be regarded as acceptable.

[37] Examples of directions and their implications for costs applications are given in Part D.

B27. If a matter is capable in principle of being overcome by a condition or an obligation, authorities may run the risk of a partial award of costs in any subsequent appeal in respect of a revised application if this is not made clear at the outset, thus compelling the appellant to carry out work to address a reason for refusal which could probably have been overcome by other means.

B28. Minerals Planning Guidance (MPG) 8 and MPG 14 give advice on the statutory provisions and procedures with regard to applications for determination of operating, restoration and aftercare conditions respectively for interim development order ("IDO") permissions and old mineral planning permissions. The advice in MPG14 relates to provisions for both initial and periodic reviews (that is, determinations) of conditions. A mineral planning authority will be expected to show good reason, on appeal, for determining conditions which differ from those set out in the application. Failure to do so is likely to be regarded as unreasonable.

B29. The following are examples of circumstances which may lead to an award of costs against a planning authority:

- ignoring relevant national policy – for example, the advice in PPG 8 on Telecommunications concerning health risks arising from a mobile phone base station

- where a proposal is contrary to the development plan but the relevant policy has been superseded by national policy which advocates an entirely different approach. In those circumstances costs may be awarded if national policy has been blatantly disregarded by the planning authority. An example might be ignoring national advice in paragraph 52 of PPG 13 Transport on the use of maximum parking standards for individual developments

- acting contrary to, or not following, well-established case law

- persisting in objections to a scheme, or part of a scheme, which has already been granted planning permission or which the Secretary of State or an Inspector has previously indicated to be acceptable

- not determining like cases in a like manner – for example, imposing a spurious additional reason for refusal on a similar scheme to one previously considered by the planning authority where circumstances have not materially changed

- failing to grant a further planning permission for a scheme the subject of an extant or recently expired permission where there has been no material change in circumstances

- refusing to approve reserved matters when the objections relate to issues that should already have been considered at the outline stage

- imposing a condition that is not necessary, precise, enforceable, relevant to planning, relevant to the development permitted or reasonable and thereby does not comply with the advice in DOE Circular 11/95 on The Use of Conditions in Planning Permissions

- requiring the appellant to enter into or complete a planning obligation which does not accord with the tests in ODPM Circular 05/2005 on Planning Obligations

- not imposing conditions on a grant of planning permission where conditions could effectively have overcome the objection identified – for example, in relation to highway matters. The risk of a full award will be much greater if the conditions relate to a sole reason for refusal. Conversely a partial award is indicated if other substantiated objections to the proposal remain

- unreasonably refusing to enter into pre-application negotiations, contrary to paragraph 12 of PPS 1, or to provide reasonably requested information, when a more helpful approach would probably have resulted in the appeal being avoided altogether

Awards against appellants – unreasonable appeals against enforcement notices or refusal to grant a lawful development certificate

B30. The appellant's right of appeal to protect their interest in land has to be balanced against the expectation that all parties to appeals should act responsibly and not cause others to incur unnecessary or wasted expense in the process. In enforcement and lawful development certificate appeals the onus of proof regarding decisive matters of fact is on the person appealing. Guidance is in DOE Circular 10/97.

B31. Where it has been made plain by a recent appeal decision relating to the same, or very similar, development on the same, or substantially the same, site that development should not be allowed, persisting with an appeal against an enforcement notice on ground (a) in section 174(2) of the 1990 Act (as amended) runs the clear risk of an award of the planning authority's costs of dealing with that issue.

Awards against planning authorities – unreasonable enforcement action/defence of appeals

B32. Costs are awarded in enforcement appeal cases on much the same basis as for planning appeals. Enforcement action is within the planning authority's discretion, and there is a right of appeal to the Secretary of State. However, the availability of costs awards is not intended to inhibit effective enforcement action, when it is clearly essential in the public interest.

B33. When using their discretionary enforcement powers, planning authorities are expected to exercise care to ensure that their decision to issue an enforcement notice takes full account of relevant judicial authority, national policy guidance in PPG 18, DOE Circular 10/97, the Good Practice Guide for Local Planning Authorities on Enforcing Planning Control (DETR 1997), and appeal decisions.

B34. Paragraphs 5 to 22 of PPG 18 will be relevant to deciding whether the planning authority behaved reasonably in exercising its discretion to take enforcement action. Authorities should be able to show, on appeal, that they had reasonable grounds for concluding that the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest; and it was expedient to issue the enforcement notice in the particular case.

B35. Planning authorities are likely to be at risk of an award of costs if they feel compelled to withdraw an enforcement notice after an appeal has been made. In such a case, while the risk is minimised by early withdrawal in accordance with sensible case management[38], it may be concluded that, by withdrawing the notice, the authority effectively conceded that it was not expedient to have issued it at the outset. An example is where the notice has been so incorrectly drafted, or is so technically defective, that, in the authority's view, it could not be corrected or varied by the Secretary of State, on appeal, in accordance with section 176 (1) of the Town and Country Planning Act 1990. In these circumstances an award may be made for the expense of the appeal unnecessarily incurred up to the date of withdrawal.

B36. The same principle applies if such a defective notice is not withdrawn, but is subsequently quashed on appeal for similar reasons, after expense has been incurred over a greater period.

B37. A serious misunderstanding of clearly established principles of law is likely to be considered unreasonable. However, that will not necessarily be the case where the authority relies on a legal interpretation which is not, in the event, supported by the reasons for an appeal decision.

B38. Planning authorities may decide to use their discretion to waive or relax any requirement of an enforcement notice under section 173A (1)(b) of the Town and Country Planning Act 1990. If they do so after an appeal has been made – for example, in the light of subsequent discussion with the appellant – authorities will not be at risk of a partial award of the appellant's costs of pursuing grounds (f) and (g) in section 174 (2) of the 1990 Act, if those grounds apply.

B39. It is entirely at the discretion of a local planning authority whether to serve a planning contravention notice (requiring the provision of relevant information) before taking any enforcement action. A reasonably taken decision in favour of enforcement action should not put the authority at risk of an award of appeal costs, irrespective of whether or not a planning contravention notice has previously been served. However, in any particular case it will be necessary to consider whether the planning authority had reasonable grounds for concluding that there had been a breach of control; and the adequacy of the authority's stated reasons why enforcement action was considered expedient in the particular circumstances[39].

B40. In accordance with PPG 18, it will generally be considered unreasonable for a planning authority to issue an enforcement notice solely to remedy the absence of a valid planning permission, if it is concluded, on appeal, that there is no significant planning objection to the breach of control alleged in the enforcement notice. Accordingly, planning authorities issuing a notice in these circumstances will remain at risk of an award of the appellant's costs of pursuing an appeal. For example, an unconditional grant of planning permission on the "deemed application" might be regarded as an indication that the alleged breach of control was so trivial or technical as not to justify enforcement action.

[38] As noted in paragraph A28 on recommended good practice

[39] As required by Regulation 4 of The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, S.I. 2002 No. 2682.

B41. Where appropriate, the planning authority's stated reasons for withdrawing the enforcement notice during the course of an appeal will be examined in order to assess whether any material change of circumstances has occurred since the date of issue – for example, the availability of new information or the willingness of the appellant to apply for a conditional planning permission – and whether the enforcement notice was withdrawn promptly.

B42. If no good reason can be shown for any protracted delay between the decision to withdraw and the actual withdrawal of the notice, a partial award of costs may be made in respect of costs incurred during that period.

Awards arising from a party's withdrawal

Awards where appellant or planning authority withdraws from an appeal – appeal not decided/ events cancelled or closed/partial withdrawal of case

B43. An appeal should be made only as a last resort. However, in recent years around 9 per cent of all appeals have been withdrawn, with a much higher proportion of those being where an inquiry or hearing has been requested, resulting in wasted administrative effort by all concerned. The Planning Inspectorate's Guidance[40] on the changes to the appeal system is intended to encourage appellants to be ready to proceed with an appeal once it is submitted, and not to use the appeal system as a bargaining tactic. The guidance states that the appeal should be about the scheme considered by the local planning authority and not as changed in response to the reasons for refusal of the particular application. Changed schemes should be resubmitted to the authority, although, as stated in the Guidance, the Planning Inspectorate will apply the principles set out in the *Wheatcroft* judgement[41] to the issue of the appropriateness of the Inspector accepting proposed minor amendments when submitted with the appeal.

B44. The combined effect of the legislative changes recorded in Part F of the Annex is to create a level playing field where:

- awards of costs are generally available in principle irrespective of appeal procedure and
- the risk of an award of costs for withdrawal starts as soon as an appeal has been made irrespective of procedure and there is no "risk-free window" of opportunity to withdraw with impunity

Below are examples of the circumstances where withdrawal may lead to an award of costs.

[40] *Procedural Guidance: Planning Appeals and Called-in Planning Applications*, accessible from www.planningportal.gov.uk

[41] *Bernard Wheatcroft Ltd v SSE* [JPL, 1982, P37]. This decision has since been confirmed in *Wessex Regional Health Authority v SSE [1984] and Wadehurst Properties v SSE & Wychavon DC* [1990] and *Breckland DC v SSE and T. Hill* [1992]

Withdrawal of an appeal resulting in wasted expense

B45. Generally speaking, an appellant who withdraws their appeal at any time risks an award of costs against them, although nothing in this guidance is intended to dissuade an appellant from withdrawing an appeal at the earliest possible stage where a prompt review has found it to be unsustainable. Early withdrawal minimises the impact of any award of costs in terms of wasted expense by other parties, as well as by the appellant. It may also influence the decision on whether to make a costs application, which itself involves time and expense, with the aim of recovering wasted expense incurred in the abortive appeal.

B46. If an appeal is withdrawn without any material change in the planning authority's case, or any other material change in circumstances, relevant to the planning issues arising on the appeal, an award of costs is likely to be made against the appellant if there are no other exceptional circumstances and the claiming party can show that they have incurred quantifiable wasted expense as a result. The claiming party might be the planning authority or an interested third party. However, if the appeal is withdrawn as a clear result of an agreement between the principal parties, and neither principal party applies for an award of costs, an award is unlikely to be made in favour of any third party in the proceedings[42].

B47. An example of a material change in circumstances would be a new and significant shift in the evidence base in support of a development proposal, which was not available to the appellant and before the planning authority when it made its decision on the application, or declined to determine the application. In general, withdrawal for commercial, not planning, reasons concerned with the choice of a particular site will run a risk of an award of costs.

B48. In accordance with paragraph B43 above, the use of the appeal process by appellants to progress an alternative scheme will risk an award of costs if that appeal is withdrawn without any material change in the planning authority's case or any other relevant material change of circumstances. Instead, in order to overcome identified objections a new planning application should be submitted to the local planning authority.

B49. When an appeal is registered and the starting date set, the Inspectorate's practice is to forewarn appellants in correspondence that if they subsequently decide to withdraw their appeal at any stage they run the risk of a successful application for costs.

B50. In cases where the Inspectorate agrees to postpone a hearing, inquiry or site visit to a later date with the agreement of both parties, postponement would not carry a risk of an award of costs. In enforcement cases a mutually acceptable compromise from ongoing discussions may lead to the prompt withdrawal of an enforcement notice, thus avoiding further costs in the proceedings.

[42] As also stated in paragraph D14.

Withdrawal of an appeal too late for inquiry or hearing to be cancelled

B51. When an appeal is being dealt with by a hearing or inquiry, the Inspectorate's practice is to forewarn appellants that they should notify the case officer of any withdrawal soon enough for the event to be cancelled and the planning authority contacted and the cancellation publicised locally. If the appellant fails to notify the Inspectorate at the earliest opportunity with the result that

- the hearing or inquiry is opened or
- the planning authority, and any other parties, are present at the venue in anticipation that it will open

the appellant will run the risk of an award, against them, of the preparation and attendance costs of the planning authority, and of any other parties who have notified the appellant of their intention to be present. For an award not to be made in any particular case, the appellant will need to show good reason for the late withdrawal.

Failure to pursue an appeal or to attend a hearing or inquiry

B52. Warning the planning authority that the appeal may, or will, be withdrawn is not the same as actually withdrawing the appeal. Until the Inspectorate has received formal notice in writing of withdrawal, by email or faxed or posted letter, the appeal is still "live" and the planning authority and any other parties must assume that they will need to attend any arranged event.

B53. Where a hearing or inquiry has not been cancelled, the appellant or planning authority will be at clear risk of an award of costs for failing to attend or be represented at the arranged event. They will need to show, in any particular case, that there is good reason for not making an award. This applies irrespective of whether or not the party asked for a hearing/inquiry in the first place.

B54. In these circumstances, an award is likely to be made in respect of preparation work and attendance costs of the claiming party.

Withdrawal of planning authority's enforcement notice or reason(s) for refusal of planning permission

B55. If the planning authority withdraws the enforcement notice (or the basis for its case in general) at any time after an appeal is made, an award of costs may be made against the planning authority, if it is concluded that the appellant was unreasonably put to wasted expense. "Wasted expense" would be net of any re-usable expense, if appropriate, where a remaining linked appeal proceeds to decision.

B56. Notwithstanding the risk of a costs award, planning authorities should be prepared to review their case promptly following an appeal against refusal of planning permission (or non-determination) or an application to remove or vary one or more conditions as part of sensible on-going case management. The authority can minimise the risk of an award of costs in an appeal, or the extent of any award of costs, by:

- notifying the Inspectorate's case officer and the appellant immediately if it concludes, on re-examining its case, that any of the authority's reasons for refusal, or conditions for an approval, cannot, in the circumstances, be supported by substantial evidence and explains the reason for that change and

- the authority confirms that it will not be contesting the appeal in those respects.

Even in circumstances where the planning authority is found to have behaved unreasonably, acting in accordance with the guidance outlined above minimises unnecessary work and therefore expense being incurred by the appellant. However, a partial award of costs may be justified for time spent by the appellant in preparing to contest such reasons or conditions before being notified of the planning authority's change of stance.

B57. The withdrawal of one or more, but not all, of the planning authority's reasons for refusal will not remove all the planning objections to be resolved by an appeal. The planning authority will be at risk of at least a partial award of costs in favour of the appellant for wasted costs of preparing to rebut the particular objection or objections up to the time of withdrawal, unless circumstances have materially changed in the meantime so justifying the change of stance. Similar considerations apply to the appellant's withdrawal of a ground/ grounds of appeal – for example, one or more of the legal grounds[43] in an enforcement notice appeal – resulting in partially wasted costs to the planning authority where the appeal otherwise proceeds to a decision on a remaining ground or grounds.

B58. Where the planning authority is relying on expert advice from a statutory consultee, the responsibility for liaising over supporting evidence is with the planning authority, although the consultee should assume responsibility for the content. Should the stated position of a statutory consultee appear to change following the submission of the appeal, the planning authority will minimise the risk of an award of costs by clarifying and withdrawing the relevant reason for refusal at the earliest possible stage. Where in this scenario the authority chooses to maintain the reason for refusal, it will be held responsible for providing evidence to substantiate the maintained position.

B59. If the planning authority concedes on a further identical application, the authority runs a clear risk of a full award of costs for an abortive appeal which is withdrawn in circumstances where the evidence base is unchanged and the scheme is unamended in any way. An award is unlikely to be made in circumstances where it is shown that the authority invited the appellant at an early stage in the progress of the second application to make minor changes to the proposed development which make it acceptable to the authority, the appellant agrees to this course and such changes are reflected in the scheme which has been granted planning permission.

[43] Grounds (b), (c), (d), and (e) in section 174(2) of the 1990 Act (as amended)

B60. Where an identical application is allowed by a local planning authority, the original appeal may not be withdrawn because not all the planning issues have been resolved to the appellant's satisfaction. Examples are where the appellant is dissatisfied with a conditional grant of planning permission, or with a resolution by the authority to grant permission subject to a section 106 agreement[44]. In these circumstances, an award of costs may be made in favour of the appellant if the planning authority fails to provide sufficient evidence on appeal to support the imposition of the particular condition(s) or the requirement for a planning obligation or if the authority's stance is inconsistent with national policy guidance on the use of conditions and planning obligations. The decision on any costs application will take full account of the particular circumstances.

B61. If the planning authority's withdrawal of one or more reasons for refusal removes the operational need for a hearing or inquiry, but the appeal continues by written representations, a partial award of costs may be made against the planning authority, limited to any "wasted" extra costs incurred by other parties in preparation for the hearing or inquiry. Any such award would be without prejudice to considering any other application for costs on the grounds of unreasonable behaviour mentioned elsewhere in this guidance. Similar considerations apply to an appellant's withdrawal of one or more grounds appeal.

[44] Section 106 of the 1990 Act (as amended).

Part C – Called-in planning applications and non-planning casework

C1. The general policy set out in Part A of the annex applies to non-planning casework[45] which is subject to any separate guidance from the relevant responsible Department.

C2. In the case of planning applications referred to the Secretary of State under section 77 of the Town and Country Planning Act 1990[46], the decision by the Secretary of State to call in an application for his/her own determination places the parties in subsequent inquiry proceedings in a different position from that in a planning appeal. In call in proceedings the participation of the parties is primarily to assist the Secretary of State in the process of reaching his/her decision on the planning issues identified in his/her statement under Rule 6 of the relevant Inquiries Procedure Rules.

C3. The decision to call in an application for the Secretary of State's determination is a matter open to direct complaint and may be contested in the Courts, by application for judicial review. The decision to call in an application is not a relevant consideration in determining an application for the award of costs to one party and against another.

C4. Unlike the situation in a planning appeal, the planning authority is not defending its formal decision to refuse planning permission, or its failure to determine the application within the prescribed period. The applicant has a right to apply for planning permission. In these circumstances, it is not envisaged that a party may be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application, risks a partial award of costs for unreasonable behaviour in a called-in case.

C5. In the case of a called-in planning application, the time period for which costs may be awarded starts from the date of the notification by the relevant Government Office of the decision to call in the application. In other non-appeal cases the time period starts from the date of the notification or statutory publication of, for example, the relevant order, following which the applicant for costs has begun to incur costs in the ensuing statutory process.

[45] For example, public rights of way orders and environment appeals, relating to the responsibilities of the Secretary of State for Environment, Food and Rural Affairs. In the case of public rights of way orders (proceedings under s 259 of the Town and Country Planning Act 1990), the commencement of section 322 has excluded these cases so that costs awards are not available where they are dealt with by the written method (see Part F, paragraph F2).

[46] Also, listed building consent applications referred under section 12 of the Planning (Listed Buildings and Conservation Areas) Act 1990; conservation area consent applications referred under section 74(2)(a) of that Act; and hazardous substances applications referred under section 20 of the Planning (Hazardous Substances) Act 1990 and Regulations.

Part D – Costs and third parties, including statutory consultees

General policy

D1. As stated in paragraph A15, the term "principal party" normally refers to the relevant planning authority (or other relevant responsible authority) and the appellant. All other interested parties[47], are defined, for the purposes of this guidance, as third parties with the exception in paragraphs D9 and D10 below.

D2. In the case of hearings, separate Rules apply, but similar considerations relate to the procedural conduct of the parties. In cases dealt with on the basis of written representations it is not envisaged that conduct affecting third parties will arise. An exceptional example might be an abortive site visit, where a third party has specifically requested that the Inspector view the appeal site from their property and the third party does not attend so that the site visit has to be re-arranged.

D3. The general principle is that all parties normally meet their own expenses. Nothing in this guidance is intended to deter third parties such as local residents from becoming involved in an appeal if they have views they wish to express and have taken into account. However, if third parties choose to participate in the appeal process, and to incur expense in preparatory work for an inquiry (or hearing), in which they intend to appear – for example, in support of the planning authority's refusal of planning permission – they do so on their own initiative.

D4. The policy in this part of the Annex distinguishes between:

- third parties in general, such as local residents who may or may not have written to the planning authority and who attend an appeal inquiry or hearing (paragraph 5 below) or make representations in a written appeal and

- third parties who are "entitled to appear at an inquiry"[48] as discussed in paragraph 6 below

D5. Awards to or against third parties in general will be made only in exceptional circumstances. They will not have costs awarded to, or against, them where unreasonable behaviour by one of the principal parties relates to the substance of the case (that is, the appeal, or the refusal of permission or refusal reason(s), is considered unreasonable).

[47] including statutory consultees, whether or not they are "entitled to appear at an inquiry" under the appropriate Inquiries Procedure Rules

[48] Under Rule 11 of the appropriate Inquiries Procedure Rules – for example, the person has registered their interest as a Rule 6 party or they are a "statutory party" as defined in the Rules

D6. Third parties who are "entitled to appear at an inquiry" will be expected to behave appropriately – for example, complying with the normal procedural requirements concerning the timely submission of statements of case. They will be at risk of an award of costs against them for any unreasonable conduct by them relating to procedural matters at the inquiry, which causes unnecessary or wasted expense to other parties. They may also have costs awarded to them in the circumstances of another party's procedural misconduct at the inquiry. An example would be an unnecessary adjournment which causes unnecessary or wasted expense.

D7. A statutory consultee who is asked by the local planning authority to provide a technical or expert witness at the inquiry or hearing, will not be regarded as a separate party in its own right liable to an award of costs. In that situation, the planning authority will be treated as the party expected to defend any appropriate costs application made. Normally, to be treated as a separate party liable to an award of costs, a statutory consultee will need to be separately represented at the event with its own advocate, in which case the consultee will be regarded as a third party, except in certain circumstances set out in D10 where the consultee will be treated as a principal party for awards of costs purposes. Any allegations of unreasonable behaviour directed at a statutory consultee, as distinct from the planning authority, should be drawn to their attention at an early stage before the event, so that there is adequate time to prepare and co-ordinate a response which avoids disproportionate work in handling a costs application.

D8. If an award of costs is made against the planning authority but the authority considers the statutory consultee should bear responsibility, the resolution of any difference of view will be a matter for the two parties.

D9. In the case of the Mayor of London section 322B of the Town and Country Planning Act 1990[49] deals with costs situations that apply only in London where a planning authority has refused a planning application in compliance with a direction from the Mayor. Relevant policy guidance is in GOL Circular 1/2008, at paragraphs 5.62 to 5.67 and Annex 4 to that Circular. Accordingly, the Mayor should be treated as a principal party where an appeal arises from such a direction which is determined by the Secretary of State or an Inspector; and the Mayor may be liable to pay costs in circumstances described in that Circular.

D10. Similar considerations apply, by analogy, to any other statutory consultee exercising a similar power of direction – for example, the Highways Agency where directly accountable. In practice, however, the Highways Agency has several options when considering whether or not to issue a direction[50]. If the Agency directs that development not be approved indefinitely without detailing the actions to be taken by the developer and/or the planning authority which would enable the direction to be lifted, the planning authority has no alternative but to refuse planning permission. Similarly, where the planning authority is obliged to impose a highway safety condition where directed to do so. In these circumstances the view is taken that the Agency should be responsible for defending the refusal or condition at appeal.

[49] Inserted by section 345 of the Greater London Authority Act 1999

[50] Under Article 14 of the Town and Country Planning (General Development Procedure) Order 1995

D11. More commonly the Highways Agency will issue a "holding direction" that prevents the grant of planning permission for a limited period. This will often be until such time as additional information is received or specific technical issues are resolved. If planning authorities use the holding direction as a basis for proceeding to a decision to refuse planning permission, it is considered that the responsibility for fully substantiating the refusal decision rests with the planning authority. The Agency might be close to reaching agreement with the applicant which would enable the direction to be lifted. In this scenario, therefore, the planning authority may be at risk of an award of costs for an unnecessary appeal if it is concluded that the appeal resulted from a premature and unsubstantiated refusal of planning permission.

Cancellation of an inquiry or hearing

D12. Unreasonable conduct may cause the cancellation of an inquiry (or hearing), for example, where an appeal is withdrawn unreasonably. Or an appellant may withdraw the appeal too late for the inquiry or hearing to be cancelled or fail to attend an inquiry or hearing (see paragraphs B43 to B61 above). In these circumstances, third parties may be awarded costs in their favour, if they can prove that they have incurred wasted expense as a result.

D13. For an award of costs to be entertained, third parties will need to demonstrate that they had forewarned the appellant and the planning authority of their intention to appear at an inquiry (or hearing), before incurring expense in preparatory work. In the case of inquiries they can do this by seeking Rule 6[51] status from the Inspectorate at an early stage.

D14. Even where an inquiry or hearing has to be cancelled, an award of costs in favour of a third party is unlikely to be made in circumstances where ongoing discussions between the appellant and the planning authority have resulted in a mutually acceptable solution to the planning issues on which the appeal turns, and neither principal party has applied for an award of costs against the other.

D15. In any costs application relating to a cancelled inquiry or hearing, third parties will be expected to demonstrate that:

(1) before incurring any expense which is ultimately "wasted", they enquired of the planning authority about any discussions between the principal parties which would have forewarned them that the arranged inquiry or hearing might not proceed on the date first notified and

(2) the party against whom costs are sought has behaved unreasonably in causing the cancellation of the inquiry or hearing.

[51] Or Rule 8 in the Town and Country Planning (Enforcement) (Inquiries) Procedure Rules

Part E – Costs in respect of compulsory purchase and analogous[52] orders

General principles

E1. There continues to be a distinction between cases where appellants take the initiative, such as in applying for planning permission or undertaking development allegedly without planning permission, and cases where objectors are defending their rights, or protecting their interests, which are the subject of a compulsory purchase order. Such objectors are defined in terms of "remaining objectors"[53]. If a remaining objector to such an order is successful, an award of costs will be made in his or her favour unless there are exceptional reasons for not doing so. The award will be made against the authority which made the order: it does not, of itself, imply unreasonable behaviour by the authority[54].

E2. This guidance applies where there are separate acquiring (or order making) and confirming authorities[55] – that is, where the acquiring authority is not a Minister. It has been updated in the light of the amendments made to compulsory purchase legislation by Part 8 of the Planning and Compulsory Purchase Act 2004.

E3. Separate guidance specific to awards of costs in connection with public inquiries or hearings held into applications for orders made under section 6 of the Transport and Works Act 1992 is contained in Circular No. 3/94 (Department of Transport).

E4. In cases to which this guidance applies awards of costs may also be made where the written representations procedure is used. The Acquisition of Land Act 1981 (as amended) provides that the confirming authority "may make orders as to the costs of the parties [to the procedure] ….and as to which party must pay the costs"[56].

E5. In the light of the provisions inserted by the 2004 Act, the policy criteria for costs awards have been updated. To enable an award to be made on the grounds of a successful objection the following conditions normally have to be met:

- the claimant is a remaining objector who either:
  - attended (or was represented at) an inquiry (or, if applicable, a hearing[57]) at which his or her objection was heard or

[52] Orders of a kind which are considered analogous to a compulsory purchase order for costs purposes; examples are given in the Appendix.

[53] "Remaining objector" means a person who has made a remaining objection within the meaning of section 13A of, or paragraph 4A(1) of Schedule 1 to, the Acquisition of Land Act 1981 – that is, a qualifying person who has made a relevant objection which has been neither disregarded nor withdrawn.

[54] This guidance does not apply to applications for costs in relation to trunk road and motorway schemes and orders published by the Secretary of State for Transport.

[55] Section 7(1) of the Acquisition of Land Act 1981 provides that "confirming authority", in relation to compulsory purchase, means, where the acquiring authority is not a Minister, the Minister having power to authorise the acquiring authority to purchase the land compulsorily.

[56] Section 13B of the Acquisition of Land Act 1981, as substituted by section 100(6) of the 2004 Act.

[57] Objections to compulsory purchase orders are not dealt with by informal hearings for practical reasons, but a hearing might be used, for example, in the case of an analogous order under section 97 or 98 of the Town and Country Planning Act 1990, revoking or modifying a planning permission.

– submitted a written representation which was considered as part of the written procedure **and**

- the claimant has had his or her remaining objection sustained by the confirming authority's refusal to confirm the order, or by its decision to exclude from the order the whole or part of his or her property

E6. Exceptionally, an order is not confirmed for technical reasons or because the acquiring authority subsequently decides not to proceed with compulsory purchase and asks for the order to be treated as withdrawn. In such circumstances, provided all the criteria in paragraph E5 above are met, a claimant who has incurred expense in objecting to the order and pursuing that objection will be regarded as a successful objector for the purposes of this circular. The objector will be treated in the same way as if their success were due to their representations.

E7. An application for costs on the ground of having successfully opposed the order cannot sensibly be made at the inquiry or hearing, or during the written representations procedure, as the decision whether or not to confirm the order will not have been issued. When notifying successful objectors of the decision on the order under the appropriate Rules[58] or Regulations[59], the confirming authority will tell them that they may be entitled to claim inquiry, hearing or written representations procedure costs and invite them to submit an application for an award of costs on the basis of successful objection.

E8. There are some circumstances in which an award of costs may be made to an unsuccessful objector or to an order-making authority because of unreasonable behaviour by the other party, although this would appear most unlikely where the written procedure is followed.

E9. In practice such an award is likely to relate to procedural matters, such as failing to submit grounds of objection or serve a statement of case, resulting in unnecessary expense – for example, because the inquiry has to be adjourned or is unnecessarily prolonged.

E10. In these limited cases an application for costs (on grounds of unreasonable behaviour) should be made to the Inspector at the inquiry (or hearing), or in writing if appropriate. The Inspector will then report to the confirming authority with his or her conclusions and recommendation.

E11. An award of costs cannot be made both on grounds of success and unreasonable behaviour in such cases; but an award to a successful objector may be reduced if they have acted unreasonably and caused unnecessary expense in the proceedings – for example, where their conduct leads to an adjournment which ought not to have been necessary.

[58] The Compulsory Purchase (Inquiries Procedure) Rules 2007 (SI 2007 No. 3617); or in the case of analogous orders the relevant rules where applicable.

[59] Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004 (SI 2004 No. 2594); or in the case of analogous orders the relevant regulations where applicable.

E12. The policy in Part D of this Annex on third parties will apply to any allegations of unreasonable behaviour by or against a person who is not a remaining objector to the order but wishes to attend the proceedings.

Partly successful objectors

E13. Where a remaining objector is partly successful in opposing a compulsory purchase order, the confirming authority will normally make a partial award of costs. Such cases arise, for example, where the authority, in confirming an order, excludes part of the objector's land.

Analogous orders and proposals

E14. The confirming authority normally awards costs to successful objectors to orders and proposals which he or she regards as analogous to compulsory purchase orders. In general an order or proposal will be considered to be analogous to a compulsory purchase order if its making or confirmation takes away from the objector some right or interest in land for which the statute gives them a right to compensation. Some examples of orders and proposals which are considered to be analogous to compulsory purchase orders, or may be in certain cases (depending on the particular circumstances of an objector's interest in the land), are set out in the Appendix below, although the list is not intended to be exhaustive.

Plural objections

E15. Sometimes joint inquiries (or hearings) are held into two or more proposals, only one of which is a compulsory purchase (or analogous) order, for example an application for planning permission and an order for the compulsory acquisition of land included in the application. Where a remaining objector, who also makes representations about a related application, appears at such inquiries (or hearings) and is successful in objecting to the compulsory purchase order, the objector will be entitled to an award in respect of the compulsory purchase or analogous order only. An objector is not, however, precluded from applying for the costs relating to the other matter on the grounds that the authority has acted unreasonably.

Appendix to Part E

ORDERS ANALOGOUS TO COMPULSORY PURCHASE ORDERS

(1) orders under sections 97 and 98 of the Town and Country Planning Act 1990, revoking or modifying a planning permission

(2) orders under sections 23 and 24 of the Planning (Listed Buildings and Conservation Areas) Act 1990, revoking or modifying listed building consent

(3) orders under section 220 of the Town and Country Planning Act 1990 and Control of Advertisements Regulations[60], revoking or modifying a grant of advertisement consent

(4) orders under sections 102 and 103 of, and Schedule 9 to, the Town and Country Planning Act 1990 –

  (a) requiring discontinuance of a use of land (including the winning and working of minerals), or imposing conditions on the continuance of a use of land or

  (b) requiring the removal or alteration of buildings or works or

  (c) requiring the removal or alteration of plant or machinery used for winning or working of minerals or

  (d) prohibiting the resumption of winning or working of minerals or

  (e) requiring steps to be taken for the protection of the environment, after suspension of winning and working of minerals

(5) orders under sections 14 and 15 of the Planning (Hazardous Substances) Act 1990, revoking or modifying a hazardous substances consent, or refusal of an application under section 17 (1) of the Act for continuation of a consent, on change of control of land

(6) a petition under section 125 of the Local Government Act 1972, as substituted by section 43 of the Housing and Planning Act 1986, relating to compulsory acquisition of land on behalf of parish or community councils

[60] The Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (SI 2007 No. 783).

Part F – Legislation underpinning costs awards in planning-related proceedings

Powers to award costs

F1. Section 250 (5) of the Local Government Act 1972 enables the Secretary of State to make "orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid". This power is applied to various planning proceedings by sections 320, 322, 322A of, and Schedule 6 to, the Town and Country Planning Act 1990; by section 89 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and by section 37 of the Planning (Hazardous Substances) Act 1990.

F2. Section 322 of the Town and Country Planning Act 1990 has been fully commenced[61], with the result that costs awards are available for all proceedings under the Planning Acts, begun on or after the appointed day,[62] irrespective of procedural method, at inquiry, at a hearing or on the basis of representations in writing.

F3. Section 322 enables costs to be awarded against any party in proceedings which do not give rise to a local inquiry. This may include where it has been decided that the matter will proceed on the basis of a hearing or inquiry, but the arrangements have not yet been made for that hearing or inquiry or where it has been decided that the matter will proceed on the basis of written representations, but the matter is not determined because the appeal or enforcement notice is withdrawn at any stage in the proceedings. Section 322(1A)[63] applies this power to any case which falls within section 319A of the Town and Country Planning Act 1990, which gives the Secretary of State the power to determine the appeal method.

F4. Section 322A of the Town and Country Planning Act 1990 enables costs to be awarded against any party in proceedings under the Planning Acts where arrangements are made for a local inquiry or hearing to be held and the inquiry or hearing does not take place. The Secretary of State will exercise this power where any party's unreasonable behaviour directly results in the cancellation of a hearing or inquiry which has been arranged, so that expense incurred by any of the other parties is wasted[64].

[61] By SI 2009 No. 849, an order under the Planning (Consequential Provisions) Act 1990, setting an appointed day for all appeal methods. It has also brought paragraph 6(5) of Schedule 6 fully into force for written representations as well as hearings cases. As a consequence the amendments made by Schedule 4 to the Planning (Consequential Provisions) Act 1990, which "temporarily omitted" section 322 have ceased to have effect.

[62] 6 April 2009

[63] Inserted by Schedule 10 to the 2008 Act

[64] See B43 onwards

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