
Costs Decisions

Inquiry held on 10-11 October 2022

Site visits made on 11 January and 11 October 2022

by Katie McDonald MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th November 2022

Costs application 1: in relation to Appeal Ref: APP/J1915/W/20/3264831 Land Off Chapel Lane, Little Hadham SG11 2AB

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Timothy Mahoney & Traveller Group for a partial award of costs against East Hertfordshire District Council.
 - The inquiry was in connection with an appeal against a refusal to grant consent, agreement or approval to details required by conditions of a planning permission.
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Costs application 2: in relation to Appeal Ref: APP/J1915/W/20/3264831 Land Off Chapel Lane, Little Hadham SG11 2AB

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by East Hertfordshire District Council for a partial award of costs against Timothy Mahoney & Traveller Group.
 - The inquiry was in connection with an appeal against a refusal to grant consent, agreement or approval to details required by conditions of a planning permission.
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Costs application 3: in relation to Appeal Ref: APP/J1915/W/20/3264831 Land Off Chapel Lane, Little Hadham SG11 2AB

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by the residents of Wellpond/Westland Green (the Rule 6 Party) for a partial award of costs against Timothy Mahoney & Traveller Group.
 - The inquiry was in connection with an appeal against a refusal to grant consent, agreement or approval to details required by conditions of a planning permission.
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DECISIONS

Costs Application 1

1. The application for a partial award of costs is refused.

Costs Applications 2 and 3

2. The applications for partial award of costs are allowed in the terms set out below.

PROCEDURAL MATTERS

3. The costs applications were made in writing after the closure of the inquiry, following a prescribed timetable.

4. The costs applications for both the Council and Rule 6 (R6) party against the appellants party are very similar and I have dealt with them together.

COSTS APPLICATION 1

The submissions for Timothy Mahoney & Traveller Group

5. The Council behaved unreasonably during the appeal process in respect of the refusal to discharge the element of condition 5 relating to lighting, causing the applicant to provide written inquiry evidence and preparation in respect of attendance at the inquiry to address the issue of lighting.
6. During the Case Management Conference (CMC) held on 9 November 2021, the Council confirmed that the objection to the lighting element of the refusal was to be maintained, although the issues could be narrowed and dealt with in writing. The Inspector identified lighting as a 'main issue' in the CMC Summary Note.
7. The applicant produced a statement dealing with the lighting strategy, Statement on Lighting Matters and Summary¹ (December 2021) (SLMS) which set out the information relied upon, which had already been provided at application stage.
8. It is understood that the Council, following review of the proofs of evidence (PoE), confirmed to the Planning Inspectorate (PINS) by email² that the lighting dispute was resolved. The applicant was not copied into this correspondence and continued to prepare the matter on the basis that lighting was still a live issue. Because of this, the Council has acted unreasonably.
9. The Council should have reviewed the material before them at appeal stage and not waited until shortly before the first scheduled listing of the inquiry to confirm the acceptance of the lighting evidence before them. To not have done so is unreasonable behaviour that resulted in the applicant incurring additional and wasted costs in preparing written evidence for inquiry purposes and preparing to present that evidence at inquiry.
10. The Council have acted unreasonably in failing to review the case properly and adequately, and in failing to expeditiously communicate the acceptance of the lighting element of the case to the applicant, which in any event should not have been refused at application stage. The lighting element of the appeal was unreasonably defended, right up until the scheduled first listing, such behaviour being unreasonable resulted in the applicant incurring wasted costs.

The response by East Hertfordshire District Council

11. The Council resists this application in respect of the lighting condition in its entirety. It is regrettable that the application omits material information and serves to misrepresent the position. Far from providing the necessary information at the application stage, the applicant did not provide adequate details in respect of lighting.
12. Indeed, the applicant expressly admitted this in their own statement of case (SoC). Paragraph 5.9 states "*It is acknowledged that the submitted plan*

¹ Submitted with the Proofs of Evidence

² By email dated 12th January 2022 at 16:31

lacked the necessary details on the location of the lighting. This error occurred when compiling the drawing file and is unfortunate error not picked up”.

13. Therefore, the Council did not have the necessary information at the application stage. Since the applicants then appealed, the Council had to proceed on that basis and that was the position at the CMC. There is no basis upon which it can sensibly be said the Council acted unreasonably given the applicant’s own admission that they had failed to provide sufficient details at the application stage.
14. Subsequently, following discussions, the Council sent an email³ to PINS and the applicant’s team agreeing that the lighting matter can be narrowed and recommended that a LUX level map was provided. This was entirely reasonable given that the PoE were to be exchanged on 14 December 2021. The Council’s Environmental Health Officer (EHO) produced a PoE and only once the EHO had reviewed the applicant’s SLMS was the Council in an informed position to decide if the issue should be pursued. Prior to this the necessary detail had not been provided.
15. The Council did not act unreasonably. On the contrary, the applicant failed to provide the requisite detail until proofs were exchanged. As soon as this occurred the Council reviewed the fresh evidence and was satisfied that the condition could be discharged.
16. In the circumstances there was no unreasonable behaviour. The applicants themselves were the architect of their situation. The Council acted as soon as it could once the requisite material details had been provided and saved inquiry time by reviewing the proof and determining that the scheme was adequate in light of the fresh information.
17. This application is wholly misconceived and should be refused.

Final response by Timothy Mahoney & Traveller Group

18. The application does not “omit material information” and does not “misrepresent the position”. The applicant did provide adequate information on the lighting issue such that a withdrawal of the lighting opposition by the Council at the time it was withdrawn was not justifiable, it should have been withdrawn earlier.
19. The Council had adequate information at application stage, but unequivocally had more than adequate information, as contained in the “Lighting Statement” from the point of submission of the appeal. This was self-evidently not reviewed prior to the Council preparing their SoC, and was not reviewed prior to the CMC, and it appears not reviewed prior to the Council preparing its PoE. This resulted in direct wasted expense for the applicant by the Council failing to expeditiously review the case.
20. The Council maintained that a LUX plan was a requirement up until PoE stage, despite the detail already being provided with the SoC (i.e. the revised product details, and the corrected plan submitted with the second conditions application). The Council had the information from the point of submission of the SoC, and simply failed to review their position, withdrawing their opposition at the latest possible stage.

³ On 30 November 2021 at 12:54

21. A simple review of §5.9-5.11 of the applicant's SoC and the appended product specifications, and 2.0 of the SLMS, demonstrates that the same information is provided in the PoE as was provided in the SoC. It was unreasonable not to review that position until after preparation of the Council's EHO PoE, it should have been done as soon as the appeal was lodged and addressed in the Council SoC.
22. The proof relied upon the same information already provided in the appeal submission, it was merely drafted in a form suitable for a PoE. The Council's EHO comment in an email "*...I have reviewed the WS Planning & Architecture Statement of Lighting Matters & Summary dated December 2021. The appellants have submitted a lighting scheme and product details that are, essentially, of a 'domestic' nature i.e. small, unobtrusive wall-mounted spot light fixtures and low-level post lights, both of which are shown to be of reasonably low wattage. Based on the information submitted I am satisfied that the illumination levels and positioning of the lights are unlikely to cause any light nuisance or other form of obtrusive light (sky glow, glare etc)...*". The information reviewed by the EHO was not new information, it was presented in the SoC. The simple fact is that the Council unreasonably failed to review the position in respect of lighting upon receipt of the appeal SoC, unreasonably maintaining an objection in respect of lighting, which was withdrawn at a very late stage, this unreasonable behaviour having caused the applicant to incur wasted costs.
23. The Council did act unreasonably by failing to review the evidence before them as contained in the appeal submission, and failed to advise the applicant of the reversal of their position until after exchange of proofs, and prior to this, maintaining their excessive and disproportionate requirement for a LUX plan (which was demonstrated to be excessive and unnecessary by virtue of the objection subsequently being withdrawn). The withdrawal of the objection should have occurred shortly after submission of the appeal, obviating the need for any further work to be carried out on the issue of lighting.
24. The key issue in this response is that the information provided at PoE stage was not fresh information. The plan was included at Core Document 2.2, dated April 2019 (revised September 2020 for parking). The revised product details (CD2.3 and 2.4) were also previously provided. The Council objection (and LUX plan requirement) was maintained within their own SoC. The Council continued to maintain their requirement for a LUX plan post the CMC, and the applicants proceeded on the basis that the Council were maintaining their objection on this ground, and thus the applicants were unnecessarily required to produce a PoE which set out once again the information previously provided, but did not provide anything material that was additional.
25. The application is not "wholly misconceived", the arguments are properly set out. What the application does portray further is the whole approach of the Council, that being to seek to defeat the lawful development at any cost, even to the extent of seeking to make the development financially unviable. Such behaviour should be neither encouraged nor condoned.
26. The applicants maintain that the application is meritorious, and that a partial award of costs is justified in the terms set out in the application.

Reasons

27. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably **and** thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The purpose of the costs regime includes encouraging Councils to *"properly exercise their development management responsibilities, to rely on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay."*
28. Unreasonable behaviour in the context of an application for an award of costs may be either procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal. Examples of unreasonable behaviour which may result in an award of costs include lack of co-operation with the other party or parties, delay in providing information, failure to produce evidence to substantiate each reason for refusal or not reviewing their case promptly following the lodging of an appeal as part of sensible on-going case management.
29. The applicants' SoC contains one page referring to the lighting matters, and a 2 page appendix document detailing the proposed lighting (including technical details) because the original lighting products were no longer available. It highlights that the submitted site plan with the condition discharge application lacked the necessary details on the location of the lighting. However, it goes onto detail that the proposed lighting would be low level, respectful of the rural area, with 2 post lights on either side of each pitch's access and a wall mounted light on each of the utility buildings.
30. The SLMS, submitted with the PoE, contained more information in relation to the lighting element at dispute. This was mainly in response to the Council's request for a LUX plan, but it also provided the vertical location for the wall lights and a comparative decision made by the Council to support the applicants' case.
31. Aside from the location of the wall lights, the technical information and details for the lights was provided in the SoC. I understand the applicants' frustration on this matter.
32. That said, the Council maintained that it needed a LUX plan until the SLMS was received, which provided a counter argument. The Council only removed their objection at this point, with the email from the Council setting out that *"the appellants have submitted an argument that such a requirement is excessive. In the circumstances, and now informed by the lighting scheme proposed, it is my professional opinion that the scheme will comply with Policy EQ3 Light Pollution."*
33. Therefore, it is clear that it was the SLMS that provided the Council with an alternative line of reasoning, in which it then decided that the details presented were acceptable and the request for a LUX plan was indeed excessive. This behaviour was not unreasonable, and the Council reviewed its case as part of sensible on-going case management.
34. However, the Council's communication only to PINS was uncooperative, and it should have informed the applicant directly of its views. Moreover, the Council did not review its case promptly, and it ought to have informed the applicant

earlier. This is because the SLMS was submitted on 14 December 2021, yet it took until 12 January 2022 for the Council to inform PINS of its acceptance of the lighting scheme. Even taking account for the seasonal break, this was still over 4 weeks and this behaviour was unreasonable.

35. Nevertheless, I am not persuaded that additional work or expense was incurred by the applicant would have undertaken during this time. This is because this matter was to be resolved in writing, as indicated by the appellants' email to PINS⁴, which details that "*we consider that any evidence on this matter can take a written format, and that it is not necessary for this to be explored in any significant depth at the inquiry*". Therefore, even though the applicants claim they were preparing to present evidence at the inquiry, I do not understand why this would be the case, or in what format any evidence would have been given.
36. Therefore, the second stage of the costs regime has not been met. There was no unnecessary or wasted expense caused by the failure to inform the applicants directly of the withdrawal of the Council's objection on lighting matters following the submission of the SLMS. The application for a partial award of costs is not justified.

COSTS APPLICATIONS 2 AND 3

The submissions for East Hertfordshire District Council

37. The Council seeks a partial application for costs against the appellant arising from their unreasonable behaviour which has led to the incurrence of wasted costs in the appeal process.
38. The Council seeks its wasted costs arising from having to prepare evidence in relation to the first 2 schemes submitted with the appeal, V2 and V3 – both of which were abandoned in December 2021. The Council had to address the 2 schemes during the appeal process and as neither were pursued this has led to wasted costs.
39. The Council also seeks its wasted costs arising from the failure of the appellant to attend on the first day of the inquiry.
40. The aim of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case.
41. Far from presenting full and detailed evidence, the appellant has sought to evolve its case during the appeal process. The schemes now before the inquiry bear no resemblance to those which were before the Council and which were the original subject of the appeal. Paragraph 052 of the PPG provides a non-exhaustive list of examples of unreasonable behaviour. Appellants are required to behave reasonably in relation to procedural matters on the appeal. In the present case the appellant falls squarely within the examples provided.
42. The appellant has acted unreasonably by introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that

⁴ Dated 6 December 2021 at 17:14

would not otherwise have arisen and caused wasted expense in relation to the previous work undertaken on the abandoned schemes.

43. The appellant failed to attend or to be represented at the inquiry without any reason – let alone good reason. To this time, no explanation for no member whatever of the appellant's team attending the inquiry on the first day has been provided other than a vague reference to a "miscommunication" referred to by the appellant's counsel on day 2. It appears that no member intended to attend at all and had simply presumptively decided that the appeal should not proceed and unilaterally chosen to absent themselves en-masse based on the fact that their Counsel had informed them that he was unwell.
44. Even after the Inspector chased up the appellant, there was no suggestion that they would attend the inquiry. Following Directions that they do attend, not only did the witnesses attend but the unwell Counsel also managed to attend remotely throughout the day.
45. Failing to attend was unreasonable and led to wasted costs as it meant that no inquiry business could occur on the first day. The Council's entire team was in attendance and wasted costs were incurred in respect of the attendance of Counsel, the expert witnesses, solicitor and case officer.
46. Had they attended, the course of action decided upon in light of the appellant's counsel being unwell would have been capable of being undertaken on the first day and the hearing completed in that manner. Instead, the first day was entirely wasted.
47. It is no answer to say the inquiry was scheduled for 4 days as costs would not have been incurred by the Council for days the inquiry did not need to sit.
48. The Council therefore seeks a partial costs award arising from the unreasonable behaviour leading to wasted costs in respect of:
 - i) Extra work in relation to the new schemes.
 - ii) Wasted expense in relation to the abandoned schemes.
 - iii) Wasted expense in relation to attendance on day 1 by the Council's team.

Other costs

49. The Council also seeks its costs for having to respond to the appellant's "baseless and unreasonable" application, particularly in the light of para 5.9 of the applicant's SoC, and the failure of the applicant's own costs application to refer to this.

The submissions for the residents of Wellpond/Westland Green

Late Evidence

50. The appellants have behaved unreasonably in conducting the appeal. At a very late stage, in December 2021, they introduced a new drainage strategy and highways/access evidence via their PoE. They did not have prior permission from the Inspector to rely on this new evidence but later obtained permission following the inquiry being adjourned in January 2022.
51. This new evidence was substantial. It meant that the appellants' case on drainage and highways/access issues differed significantly from their SoC

dated December 2020 and also from their position in May 2020 when they applied to discharge Conditions 5 and 6 of the planning permission. It also rendered the R6 SoC and proofs of evidence of December 2021 effectively redundant because they addressed out-of-date proposals by the appellants.

52. The appellants' unreasonable behaviour has put the R6 Party to expense. It has meant that the R6 Party's costs of producing its earlier proofs and SoC were wasted; alternatively, the R6 Party has had to incur the cost of producing updated evidence for the inquiry. It has also meant that the R6 Party has incurred additional legal costs associated with Counsel advising on the appellants' new case.
53. These costs would not have been incurred had the appellants not changed their proposals and submitted new evidence.

Failure to attend

54. On 10 October 2022, the R6 Party and Council attended the first day of the 4 day public inquiry. Counsel for the appellant sent an email to PINS, copying in the Planning Consultant for the R6 Party, the evening before indicating that he was too unwell to attend on 10 October 2022 and requesting that the matter be adjourned. Given that the email was sent on Sunday evening, there was no response from either the Inspector or the other parties.
55. The R6 Party does not say that it was unreasonable for Counsel for the appellant to fail to attend yesterday. He said he was too ill to attend and he provided an explanation to that effect. However, what was unreasonable was the fact that nobody from the appellants' team attended.
56. Two explanations have now been offered for the failure to attend. The first, by email, from the appellant's Planning Consultant sought to give an explanation which stated that: *"I was only made aware last night by a phone call from one of our witnesses of the ill health of our Barrister. As such we were not in a position to proceed. The Barrister despite he [sic] serious ill health made the Council and R6 parties aware. I am only the instructing party for the Barrister and I am not an advocate. We could not possibly proceed without our barrister as our clients' position would be seriously prejudiced. I apologise if we have caused a problem by not attending."* The second offered alongside an apology from Counsel for the appellant was that there was a "miscommunication".
57. Neither of these explanations amount to a "good reason". It was, as the Inspector indicated in her Instructions of 10 October 2022, 'discourteous' of the appellants not to attend the first day of the inquiry. In effect, they arrogated to themselves the decision not to proceed with the inquiry at all by voluntarily absenting themselves despite the fact that the Inspector had made no decision to adjourn.
58. The key point here is that the first day of the inquiry was wasted. Witnesses from the Council and the R6 Party were booked and prepared to give evidence. Had the appellant's witnesses attended, the matter could have proceeded in the manner it did on day 2 and the costs of day 2 would not have been incurred.

The response by Timothy Mahoney & Traveller Group

East Hertfordshire District Council

New Schemes/Abandoned Schemes

59. To award partial costs in respect of both applications would result in the Council being awarded costs for all its preparation. These applications can only be put in the alternative as clearly it was necessary for the Council to prepare a case in response to the appeal and it would be inherently unfair and unjust were they to succeed in both applications, resulting in all preparatory costs being paid by the appellant.
60. In any event, the appellant resists the application of both limbs. Neither scheme advanced in December 2021 presented substantial changes to that previously submitted on appeal. The differences do not amount to fresh and substantial changes. It is accepted that they were an evolution of the schemes previously submitted, but not to the extent alleged by the Council.
61. The highways scheme, at its core, did not evolve at all. The changes are minimal, and the vast majority of the Council and R6 evidence in opposition addresses irrelevant matters, not matters specific to the precise wording of the condition, that being visibility splays only. The Council (and R6) should not be awarded their costs of preparing irrelevant evidence, particularly where it was accepted at the inquiry that the real issue was a lack of a line on the plan, and there was no dispute that the required sight lines could be achieved.
62. Further, at the inquiry the Council accepted that a s.278 Agreement was not necessary to discharge the condition, but the Council (and R6) have persistently held the discharge of the condition ransom to a finalised s.278 Agreement.
63. Similarly, the drainage scheme did not evolve substantively; the same investigative data and modelling data was relied upon, thus not requiring additional or revised evidence beyond that already submitted alongside the appellants' SoC.
64. Both schemes presented in December 2021 were developments of the schemes already advanced, and not wholly different. The evidence before the Council at the submission stage required the Council to address the schemes. That was the evidence, it was full, and it was detailed. The schemes had to evolve in response to the continued objection from the R6 and the Council. The PoE needed to respond to the Council and R6 SoC, and both compelled an evolution of the schemes.
65. The approach taken by the appellants has not been unreasonable in respect of either the highways or drainage schemes. The schemes relied upon before the inquiry are minor evolutions of the schemes on application, changes that were necessary as a result of the continuing unreasonable and excessive approach of the Council to discharge the conditions and the intransigence of the Highways Authority.
66. Repeat applications were not an option for the appellant given their limited financial means and the concerted efforts of both the Council and R6 to exhaust the appellants of all available funds, thus making development of the site untenable, the ultimate desire of both the Council and R6. This is said,

considering the respective parties' position on jurisdiction, and the genuine likelihood that any subsequent application would have been refused to be accepted and determined by the Council.

67. The suggestion that either or both of the drainage scheme and highways scheme have evolved in any material or substantive way such as to justify an entirely revised approach is specious.

Failure to attend

68. The appellant's advocate was unwell prior to the inquiry commencing and when it became apparent on 9 October 2022 that he would not be in a position to attend on 10 October 2022, he contacted PINS' case officer directly, copying in the Council and R6, this being the most expeditious way of alerting the teams to the problem.
69. On 10 October 2022, the appellant's advocate was simply not able to attend in any capacity. Following email communication with the case officer, and confirmation on the morning of 10 October 2022 that the message had been passed to the Inspector, the remainder of the appellants' team took the view that they would not be able to proceed with the inquiry in the absence of Counsel, an entirely reasonable decision given the importance of '*equality of arms*' and fairness in a situation where the Council and R6 have behaved wholly unreasonably thus far in putting the appellants to significant expense to resist their zeal to extinguish a lawful planning permission.
70. As a result in a breakdown in communications no one from the appellants' team attended day 1. Given the geographical location of the appellants' team (excluding Counsel), it was regrettably not possible to meet the Inspector's direction that the representatives attend by 11:00, and this was explained in an email from the planning consultant. The appellants' team have apologised, and do so again, for the discourtesy shown to the Inspector.
71. The appellants' team did attend on day 2 of the inquiry, as did the appellants' Counsel (remotely), at considerable cost to his own health and wellbeing. The apparent snipe in the Council costs application is both unprofessional and regrettable.
72. As a consequence of what happened on day 1, the appeal did proceed in a timely and efficient manner, being concluded in one substantive day, rather than the 4 planned. The practical effect of what happened was that instead of incurring 4 days of costs, the parties only incurred 2, a costs saving, and in such circumstances it is difficult to conceive how wasted costs could have been incurred.
73. Additionally, there was simply no need for the Council solicitor and case officer to be in attendance on day 1, given that the lighting and planning evidence was to be taken as read, and no need for both professional witnesses to be in attendance given that a timetable had been established determining upon which days the professional witnesses were required.
74. Ultimately, the anticipated 4 day inquiry completed in 2 days, a benefit of the illness suffered by the appellant's Counsel, who then suffered significant and unfortunate consequences of attending virtually in order to assist the Inspector, the inquiry and the appellant, when in hindsight he should really have not done so. The ultimate outcome was that both the Council and R6

incurred less costs rather than more, and consequently there can be no wasted costs.

The residents of Wellpond/Westland Green

75. The R6 make 3 applications for partial costs on precisely the same basis as the Council. The appellant does not repeat the submissions set out above, but they apply equally to the applications made on behalf of the R6, and it is respectfully requested that all applications be dismissed.
76. The R6 makes the same error as the Council in seeking costs for both the initial and subsequent preparation, which would result in awards covering all preparatory costs incurred. This would be entirely unjust. Further, there can be no doubt that the R6 Highways evidence contained substantial amounts of unnecessary and irrelevant evidence, failing to focus on the precise wording of the highways condition and instead presenting substantial evidence relating to access design. An award of costs covering the entirety of the R6 highways evidence (and that of the Council) would reward both the R6 and Council for the unnecessary preparation of irrelevant evidence intended to compel the appellants to present the ideal scheme rather than a satisfactory scheme.

Conclusion

77. The appellant has already been put to significant unnecessary expense by the actions of the Council and R6 in their efforts to extinguish a lawful planning permission and the Inspector is asked to consider matters in the round and not assist the opposing parties in extinguishing the planning permission by making it financially impossible for the appellants to rely upon the permission.

Final response by East Hertfordshire District Council

Different and abandoned schemes

78. Yet again the appellants' submissions fail to reflect reality or the documented facts. On the last occasion when the appellants' counsel was unable to attend, immediately prior to the appellant seeking an adjournment, the appellant had tabled its new schemes. These schemes were the subject of Directions issued by the Inspector in the week of 10 January 2022. The Inspector expressly refused to allow those schemes to be considered at the inquiry as they were different and the Council and R6 would be prejudiced.
79. The Inspector went on to seek parties' views as to how the appellant would put its case now that the new schemes had been rejected and they were no longer relying on their earlier evidence.
80. This makes it plain that the new suggestion that the changes were "minor" is simply wrong and inconsistent with the submissions made previously by the appellant. Indeed, the appellant went on to seek what they termed "Wheatcroft" amendments – something that is only sought when changes are material. The appellant fails to address any of the above in its reply.
81. The new drainage scheme (v4) was only accepted by the Inspector when the appellant's consultant sought an adjournment due to their Counsel's illness immediately prior to the opening of the inquiry in January 2022.
82. This necessitated new evidence from the Council. The abandoning of the previous work and the new work were squarely the result of unreasonable

behaviour as set out in the Council's costs application. The appeal system is not to be used to evolve a case as appears to be suggested as appropriate by the appellant in their reply. The Council's application is well founded and costs should be awarded in the terms set out in its application.

Failure to attend

83. No reasonable or good reason has been provided to answer why no member of the appellants' team attended the first day of the inquiry. This falls squarely within the scope of unreasonable behaviour pursuant to the PPG. No details of the "miscommunication" or any witness evidence (despite the passage of time and opportunity to do so) of what this was, have been provided for the extremely serious matter of simply not turning up (since the remainder of the team were fit and well as evidenced by their attendance the next day). No other member of the appellants' team has stated that they could not attend. The appellants' team are experienced consultants and it is plain they simply decided not to turn up.
84. The reference to "apparent sniping" in the appellants' reply is not understood. It is a matter of fact that witnesses and Counsel turned up when directions were issued by the Inspector. With respect, it is unattractive for Counsel to now complain about having attended remotely on the second day. This was his own decision to do so and it is noteworthy that no objection whatever was raised to the directions issued by the Inspector as to how the matter would proceed on the second day. Significantly there was no application to adjourn the proceedings. The Inspector did not direct Counsel for the appellant to attend and nor was it expected that he would do so. The change in proceedings was entirely conducive to his not attending as set out by the Inspector in her note.
85. As already noted in its application, it is no answer to say that the proceedings would have lasted 4 days. The Council would not have been liable to pay for days the inquiry did not sit. The Council relies on its costs application.
86. Finally, it is not open to the appellants to try to trim down the attendance of the Council's team in order to try to improve the wasted costs situation arising from its own unreasonable behaviour. It is entirely proper for the Council to have presented its team on the first day and in any event it is a matter for the Council. Their attendance resulted in wasted costs because of the unreasonable behaviour of the appellants in not turning up. Had they turned up there would have not been wasted costs.
87. In conclusion, the Council should be awarded its costs as set out in its application. The appellants have failed to provide any justification for the unreasonable behaviour in respect of both the new and abandoned schemes and the failure to attend the inquiry until directed to do so by the Inspector.

Final response by the residents of Wellpond/Westland Green

Late Evidence

88. In relation to the application for an award of costs as a result of the introduction of late evidence necessitating a response from the R6 Party, the appellants argue that neither scheme advanced in December 2021 presented substantial changes to that previously submitted. However, whether the changes are characterised as substantial or less than substantial misses the

point. The key point is that the proposal under appeal evolved to such an extent that:

- i) The Inspector indicated in her Directions 13 January 2022 that she would not allow the new proposals to be considered at the January 2022 inquiry because their late submission would prejudice the Council and the R6 Party;
- ii) Once the inquiry was adjourned, the appellants themselves referred to the new evidence setting out the proposals as a "Wheatcroft Amendment";
- iii) The appellants when they emailed PINS on 24 January 2022 concerning this 'Wheatcroft Amendment' explicitly stated: "*We would have no objection to the parties preparing rebuttal evidence to that already submitted, and acknowledge this position may incur costs on behalf of the appellant*"; and
- iv) In light of this, the Inspector gave permission for the Council and R6 party to submit rebuttal evidence in her Directions 27 January 2022.

89. As a result of the appellants' Wheatcroft Amendment, the R6 party prepared rebuttal evidence that it would not otherwise have had to provide had the new and late evidence not been submitted. It is no answer for the appellants to say that the revised schemes were necessitated by the Council and R6 Party's SoC, nor is it an answer to say that the highways evidence went beyond that required by Condition 5.
90. The R6 Party was entitled to raise whatever concerns it had with the scheme at the SoC stage. This left the appellant with a choice of:
- i) Accept that the schemes proposed were doomed to fail and withdraw the appeal; or,
 - ii) Revise the schemes, but in the knowledge that they would face a costs application because the R6 party would need to be given an opportunity, as a simple matter of fairness, to respond.
91. The appellants chose the latter approach, but regrettably did not have the courtesy to inform PINS or the parties prior to submission of PoE that they had chosen this approach, and as a result the R6 party was left in a position of having to submit further evidence. The appellants' behaviour was unreasonable as it forced the R6 party to incur costs in relation to 2 sets of evidence.

Failure to Attend

92. The R6 party maintains that the 'breakdown in communications' basis for not attending day one of the inquiry is not a 'good reason' within the scope of the PPG to justify the non-attendance by anyone from the appellants' team. The appellants were professionally represented and the Inspector had made no decision to adjourn the inquiry. The expectation from the appellants should not have been that the matter would be automatically adjourned, particularly bearing in mind the context of this appeal which had already been postponed twice previously.
93. The matter could have proceeded as it did on day one in the manner it did on day two. This would have meant the inquiry would have been kept to a day,

and the R6 party would not have incurred costs associated with Counsel and witnesses for day 2. The appellants' behaviour was therefore unreasonable.

Reasons

94. The purpose of the costs regime includes encouraging all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case. Appellants are required to behave reasonably in relation to procedural matters on the appeal. Examples of unreasonable behaviour which may result in an award of costs against an appellant include:
- i) introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen,
 - ii) failing to attend or to be represented at a site visit, hearing or inquiry without good reason.

Late Evidence

95. As detailed in the Appeal Decision, the first point to note in these costs claims is that this is a condition discharge appeal. It is not a normal planning appeal where evidence is presented to consider if planning permission should be granted. Planning permission has been granted, and the appellants are seeking to discharge the planning conditions associated with that. The Council (and R6) have made it difficult for the appellant to discharge the conditions, in what can only be considered as an attempt to nullify the planning permission by the wording of condition 5.
96. The appellants have presented new versions of evidence throughout the process. This is clearly because they want to seek a positive resolution on the conditions, and are responding to the Council's (and R6's) recurrent objections.
97. However, I accept that the appellants sought to introduce new evidence at a late stage in the appeal process. Indeed, if the inquiry had not been postponed in January 2022, I would not have accepted the submissions as they would have prejudiced the cases of the Council and R6 party, as indicated in the first set of Directions (13 January 2022).
98. Nevertheless, owing to the postponement of the inquiry, the amended documents were accepted and all interested parties were consulted by the appellant. The evidence was fresh and substantial enough to warrant new evidence being prepared by the Council and R6 in the form of Rebuttals. With regard to the PPG, this is plainly unreasonable behaviour.
99. The Drainage PoE was supplemented by a new Drainage Strategy (V4.0) and the Site Access PoE contained plans associated with the s278 agreement that showed an access in a slightly different location to that presented to the Council in the discharge of conditions application. However, the visibility splays remained in the same place.
100. The Drainage Strategy, whilst relying upon the same technical information, proposed a new way of dealing with the surface and foul waters. This necessitated a rebuttal from both applicants, and therefore, the rebuttals to this evidence were additional expenses incurred by the Council and R6.

101. Nevertheless, I do not agree that there were wasted costs from the Council (or R6) in relation to the preparation of evidence on V2 and V3 of the drainage strategies. Firstly, costs cannot be claimed for all preparation of evidence. Secondly, the appellant was continuing to attempt to address the ongoing concerns raised by the Council (and R6) to satisfy condition 5. It was accepted by all parties at the inquiry that a successful drainage strategy should be technically possible for the site and had some positive communication taken place between parties, matters could be resolved.
102. Furthermore, the highways changes were minor. Whilst updates were made to the evidence by the applicants, the rebuttals included objections to matters relating to the site access, deliverability, drainage and gradients. These rebuttal proofs went beyond the condition at dispute, being "*the provision of adequate visibility splays at the site access*". Therefore, it would be disproportionate to award costs for the preparation of the highway rebuttal proofs because they continued to address superfluous matters.
103. Awarding additional legal costs associated with the R6's Counsel advising on the appellants' new case is not proportionate. The case was not new, and the matters were updated and reviewed by the professional witnesses. Any additional costs should have been absorbed in preparation of the evidence.

Failure to Attend

104. The failure to attend the inquiry on the first day by the appellants' party remains unexplained, aside from a 'miscommunication' error. The presumption that the inquiry would be postponed was presumptuous, particularly given the 2 previous postponements and the lateness of the notification. I also did not issue Directions that required attendance by 11:00, simply a response to my email to ascertain the appellants' whereabouts.
105. Moreover, even if the inquiry had been adjourned to a later date, there would still have been a requirement to open the inquiry to discuss procedural matters, such as the rearranged dates. This is normal practice and one which a professional planning consultancy should have been aware of. Therefore, I have been presented with no good reason as to the failure to attend. This behaviour was entirely unreasonable.
106. In terms of unnecessary or wasted expense in the appeal process, the Council and R6's teams were in attendance on the first day and the event could not proceed due to the failure to attend by the appellant's team. The appellants claim that they were not in a position to proceed without their advocate. However, the directions that I issued changed the procedure for hearing evidence from formal evidence to round table sessions, such that their advocate did not need to be in attendance, because '*equality of arms*' and fairness would be maintained by myself leading the questions. This was to enable the inquiry to proceed in light of the earlier postponements.
107. Had all of the appellants' team attended on day one, I could have proceeded, and theoretically concluded matters that day. Yet, this would have been on the basis that **all** witnesses had attended. The programme did not include highways evidence until days 2 and 3, and witnesses on this topic would not have been required to attend on day one. In my experience, witnesses at inquiries do not attend events on the days when they are not required, and

therefore, it is highly likely that the inquiry would have run to 2 days even if part of the appellants' team had attended on the first day.

108. Therefore, I do not consider that there has been wasted expense in relation to attendance from the Council and R6 on day one of the inquiry, and their attendance on day 2 would have been highly likely in any event. Furthermore, the inquiry concluded in less than the 4 programmed days. The application for costs in this regard therefore fails.

Other costs

109. The Council's attempt to claim costs for its response to the appellant's costs application is unjustified. The applicants had a cause to apply, and whilst I do not find that their application is justified, it was not a baseless or unreasonable application.

Conclusion

110. The applications from the Council and R6 against the appellant succeed on the basis relating to extra expense for the preparation of rebuttal proofs in relation to drainage matters only.

CONCLUSION

Costs Application 1

111. The application for a partial award of costs is refused.

Costs Applications 2 and 3

112. The applications for partial award of costs are allowed in the terms set out below.

COSTS ORDER FOR APPLICATIONS 2 AND 3

113. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Timothy Mahoney & Traveller Group shall pay to East Hertfordshire District Council and the residents of Wellpond/Westland Green, the partial costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the preparation of rebuttal proofs in relation to drainage matters only; such costs to be assessed in the Senior Courts Costs Office if not agreed.
114. The applicants are now invited to submit to Timothy Mahoney & Traveller Group details of those costs with a view to reaching agreement as to the amount.

Katie McDonald

INSPECTOR