The Planning Inspectorate

Costs Decisions

Inquiry opened on 16 May and closed on 4 July 2023
Site visits made on 15 and 19 May, and 16 June 2023

by Katie McDonald MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 September 2023

Costs application in relation to Appeal A Ref: APP/W4325/W/22/3313729 Land east of Glenwood Drive, Irby CH63 1JD

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 290 dwellings (Use Class C3), including 30% affordable housing and 10% self-build/custom build properties; delivery of part of the Borough's cycle supergreenway; green infrastructure including sports pitches, play areas and parkland, wildlife habitats and green corridors; and off-site highway, environmental, biodiversity and accessibility enhancements (all matters reserved except for access).

Costs application in relation to Appeal B Ref: APP/W4325/W/22/3313734 Land east of Dale View Close, north of Gills Lane, Pensby

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 92 dwellings (Use Class C3), including 30% affordable housing; delivery of green infrastructure including a new public open space and play area, wildlife habitats and green corridors; and off-site highway, environmental, biodiversity and accessibility enhancements (all matters reserved except for access).

Costs application in relation to Appeal C Ref: APP/W4325/W/22/3313737 Land east of Thorncroft Drive, north of Gills Lane, Pensby

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 15 dwellings (Use Class C3), including 30% affordable housing; delivery of green infrastructure including a green space, wildlife habitats and wetland; and off-site environmental, biodiversity and accessibility enhancements (all matters reserved except for access).

Costs application in relation to Appeal D Ref: APP/W4325/W/22/3313741 Land west of Barnston Road, north of Gills Lane, Barnston, Wirral

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 153 dwellings (Use Class C3), including 30% affordable housing; delivery of green infrastructure including a new public park and play area, wildlife habitats and green corridors; and off-site highway, environmental, biodiversity and accessibility enhancements (all matters reserved except for access).

Costs application in relation to Appeal E Ref: APP/W4325/W/22/3313743
Land at Milner Road and Barnston Road, Heswall

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 120 dwellings (Use Class C3), including 30% affordable housing and 10% self-build/custom build properties; delivery of part of the Borough's cycle supergreenway; green infrastructure including a new public park and play area, community orchard, wildlife habitats and green corridors; and off-site highway, environmental, biodiversity and accessibility enhancements (all matters reserved except for access).

Costs application in relation to Appeal F Ref: APP/W4325/W/22/3313775
Land west of Raby Hall, Raby Hall Road, Raby Mere

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 38 dwellings (Use Class C3), including 30% affordable housing; safeguarded land for the expansion of Autism Together facilities; delivery of green infrastructure including a new pocket park and play area, wildlife habitats and green corridors; and off-site environmental, biodiversity and accessibility enhancements, including an off-road pedestrian and cycle connection between the site and Blakeley Road (all matters reserved except for access).

Costs application in relation to Appeal G Ref: APP/W4325/W/22/3313777
Land east of Raby Hall, Raby Hall Road, Raby Mere

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for a residential development for up to 80 dwellings (Use Class C3), including 30% affordable housing; delivery of green infrastructure including a new open green space and play area, wildlife habitats and green corridors; and off-site environmental, biodiversity and accessibility enhancements (all matters reserved except for access).

Costs application in relation to the SANG Appeal Ref: APP/W4325/W/22/3313726
Land west of Barnston Road, Barnston, Wirral

- 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 applications are made by Wirral Metropolitan Borough Council and Wirral Green Space Alliance for a full award of costs against Leverhulme Estates Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for the creation of a Suitable Alternative Natural Greenspace (SANG) development of 22.6 hectares including boundary works and means for access and parking; biodiversity enhancements to hedgerows, meadows/grasslands, field ponds and woodlands; creation of green infrastructure and footpaths; creation of wildlife habitats; and off-site highway works.

Decisions

1. The applications for an award of partial and full costs are refused.

The submissions for Wirral Metropolitan Borough Council

Application for full award

2. The Council considers that the residential appeals (A-G) had no reasonable prospect of succeeding. The basis of the Council's costs case is that each appeal is a proposal for inappropriate development in the Green Belt (as set out in the development and the emerging Local Plan (eLP)) requiring the appellant to demonstrate very special circumstances (VSC) exist such that the harm by reason of inappropriateness and other harm is clearly outweighed.

3. The appellant's case constituting VSC is weak. They assert that the housing land supply position is 3.45 years (this is disputed such that the Council considers the supply to be 5.49 years), which the Council does not consider to be significant. Furthermore, the appellant's case is predicated on a claim that the eLP is "*fundamentally flawed*" and challenges key aspects of it including the spatial strategy and regeneration proposals. This aspect of the case itself gives rise to the position that the development proposals are premature, in the sense used in paragraph 49 of the National Planning Policy Framework (the Framework).

4. Based on the appellant's own case the appeals have no reasonable prospect of success, but rather should be seen as an unreasonable attempt to usurp the plan led system through use of the appeal process.

Application for a partial award

5. After the exchange of evidence and rebuttal evidence, the appellant withdrew the appeal in relation to the SANG (Appeal H) on 10 May 2023 when the inquiry was scheduled to commence on 16 May 2023. The Council's case was apparent from the Statement of Case and the Ecology Proof of Evidence of Alan Jemmett, Director of Merseyside Ecological Advisory Service (MEAS), the Council's Ecological and Environmental Advisor.

6. The suggestion made by the appellant that the withdrawal was because of late introduction of new information is a transparent ruse to attempt to avoid the prospect of a costs application. The appellant misunderstood the Council's approach to mitigating recreation pressure as set out in the Wirral Interim Approach to Avoid and Mitigate Recreational Pressure (WIA)[1] and also introduced late evidence which should have been made available prior to

[1] Core Document (CD) 04/4

determination. The evidence that was introduced late by the appellant comprises:

i. 7 Stage 2 shadow HRAs for Appeal sites A to G
ii. Stage 2 shadow HRA for the proposed SANG
iii. Non-Breeding Bird Survey Report
iv. SANG Management Report
v. SANG Agricultural Land Classification Report

7. Furthermore, the Council claim that MEAS did not receive a copy of the bat survey report of trees associated with the proposed SANG in the vicinity of the proposed car park.

8. The failure of the appellant to provide the necessary evidence during the determination of the SANG application, despite additional information and evidence being sought by the Council, has resulted in the Council not being able to complete the Stage 2 HRA Appropriate Assessments which are a regulatory requirement. The only "late" information the Council has referred to is the final Visitor Survey report[2] prepared as evidence upon which the final Liverpool City Region and West Lancashire Recreation Mitigation Strategy will be based. Liverpool City Region and West Lancashire Visitor Survey Report 2021-22 (Caals, Liley & Panter, Footprint Ecology, March 2023) was completed and uploaded onto the MEAS website on 28 March 2023. The WIA does not rely on it because it is supported by the previous evidence base, which is referred to in the MEAS and Ecology Proof of Evidence.

9. The late withdrawal was procedurally unreasonable and the SANG appeal was unreasonable in itself, as it was apparent from the Reason for Refusal, the Council's case and evidence.

Conclusion

10. A full award of costs is justified because of the appellant's unreasonable behaviour in pursuing and maintaining the residential appeals in circumstances when such appeals have no realistic prospect of succeeding. An award of costs in respect of the SANG appeal is justified because it also had no realistic prospect of succeeding in light of the Council's evidence and the late withdrawal of the appeal.

The submissions for Wirral Green Space Alliance

11. Wirral Green Space Alliance (WGSA) applies for full costs in relation to the Appeal H. WGSA a local community umbrella group, were exposed to costs for the SANG in relation to site visits, document review and preparation of evidence for the inquiry. Withdrawal at the late stage was unreasonable at a point where the Rule 6 party had assembled all their evidence. An award of costs in respect of the SANG appeal is justified because it also had no realistic prospect of succeeding considering the Council's, MEAS, Wirral Wildlife and WGSA evidence at an early stage.

12. WGSA was liable for consultancy costs from Jackie Copley and Peter Black as they have undertaken site visits, involving travel to the site, and background

[2] CD04/55

research in order for written proofs, responded to information requests and reading proofs of evidence. The team members incurred printing costs and wasted many hours on the SANG.

13. If the housing appeals (A-G) are dismissed, WGSA should be awarded full costs relating to the residential appeals. The appeals ran contrary to relevant policies in the adopted local plan and the Framework. The appellant has readily accepted that the proposals were inappropriate development in the Green Belt and the appeals were always doomed to failure. The Council did not accept the VSC argument. This relates to its very good (99%) performance of the Council in delivering houses against (an inflated) housing requirement and the healthy current 5-year land supply position.

14. There are several other material considerations. The development plan is still relevant in the Framework terms and evidence provided in the Rule 6 planning proof was not contested in cross-examination. Other factors included no community engagement, the Secretary of State letter of 5th December 2022, proposed changes to the Framework and prematurity against eLP. This is seen as an improper and unreasonable attempt to undermine the plan led system through use of the appeal process.

The response by Leverhulme Estates Limited to Wirral Metropolitan Borough Council

Full costs application

15. This application is made on the basis that the appeals had no reasonable prospect of succeeding. To be awarded its costs, it is not sufficient for WBC to demonstrate that the appeals should be dismissed, or even that this was a likely outcome, it must demonstrate that it was unreasonable for the appellant to pursue to the appeals – i.e. that they were bound to fail.

16. The costs application fails to address this fundamental test and should be refused for this reason alone. Planning Practice Guidance (PPG) gives examples of conduct that may fall into this category. The example relied on by the Council is "*development [that] is clearly not in accordance with the development plan*". Putting aside the fact that the Unitary Development Plan (UDP) is plainly out of date, the Council's cost application fails to appreciate that if VSC are demonstrated, then the applications would be in accordance with that plan taken as a whole (and in addition would be supported by paragraph 148 of the Framework).

17. The Council must therefore show that the appellant had no reasonable prospect of demonstrating that VSC exist. The application fails to even begin to demonstrate this, and instead takes the clearly erroneous approach that any reliance on VSC is "unreasonable". As the evidence will show, when judged on the correct basis in accordance with national planning policy, the appellant's VSC case is compelling; it is certainly not unreasonable.

18. As for the reliance on prematurity, again to succeed in its costs application it is not sufficient for the Council to demonstrate that the applications are premature. Rather, it would have to show that it was "unreasonable" to conclude otherwise. This is an impossible hurdle for the Council to surmount, not least because it did not refuse the applications on the grounds of

prematurity. It is fanciful to suggest that it was unreasonable for the appellant to take the same approach that the Council itself adopted when it determined the applications.

19. The reasons why the applications are not in fact premature will be addressed in the evidence. For the purposes of responding to this application, it can simply be noted that (i) it is plainly reasonable to conclude that the eLP is not at an "advanced stage" (paragraph 49(a) of the Framework) when (i) lengthy examination hearings into the plan have only just begun, and key matters (such as the spatial strategy, housing need and viability) have already been postponed to September (ii) that plan is subject to profound objection.

20. It is also plainly reasonable to conclude that granting planning permission for these 788 new homes would not prejudice or predetermine decisions that are "central" to the eLP given (i) the Local Plan seeks to deliver 16,322 units in total and (ii) there is no evidence that those 788 new homes, with all the benefits they would bring with them, could not come forward together with the delivery of the Local Plan supply.

21. For all of these reasons, there is no merit at all in the Council's application for full costs.

Partial costs application

22. The starting point is that costs should only be awarded when an appeal is withdrawn "without good reason". The reason why the SANG appeal was withdrawn is set out in the emails from the appellant to the Council on 28 April 2023 and 10 May 2023. In short:

    i. On 18 April 2023, Natural England (NE) signed a statement of common ground with the Council (SoCG)[3] which stated that payment of the full tariff under the WIA was sufficient to mitigate recreational disturbance on the National Sites Network arising from residential developments permitted prior to the adoption of the Liverpool City Region Recreational Mitigation Strategy.

    ii. On the same day, the appellant received the Proof of Evidence of Alan Jemmett from MEAS. This stated that should the full contribution be made "*then the proposed SANG…is no longer necessary to provide mitigation for alone and in-combination recreation pressure*".

23. This was the first time that NE had formally confirmed its approach in respect of the WIA, and therefore represented a significant change in circumstances. Prior to NE's endorsement in the SOCG, there were significant concerns that the WIA failed to meet the test of certainty under the Habitats Regulations, rendering a bespoke SANG necessary. As recognised by Mr. Jemmett, the SOCG meant that the SANG appeal was "*no longer necessary*". The appellant quickly sought to confirm the position (by email on 28 April 2023) and on 1 May 2023 the Council confirmed that "*the Council has no objection to the withdrawal of the SANG appeal*". There was no indication that this withdrawal would give rise to a costs application, nor any suggestion that the appeal was being withdrawn without good reason. Following this confirmation, the appeal was withdrawn shortly after.

[3] CD01/19.3 Appendix 7

24. None of this background is set out in the Council's costs application. It provides a complete answer to the application. Plainly there was a good reason for withdrawing the SANG appeal: in light of the SOCG, the SANG was now not necessary for the residential schemes to receive a favourable Appropriate Assessment, and maintaining the appeal would simply add increased costs and length to the Inquiry.

25. Finally, it is necessary to briefly respond to the suggestion that the appellant has provided 'late' information in respect of the SANG application (with the inference that this is why the appeal was withdrawn). As set out in the Proof of Evidence of Mr. Dance, the information was provided in response to WBC's reasons for refusal. It could not have been provided before this point, since the first time WBC indicated that it sought additional information was at the point that it refused the application.

26. In any event, the withdrawal had nothing to do with a view on the merits of the SANG as such, but rather to its necessity. With the SOCG and the Council's ecology proof, the SANG was not necessary so was withdrawn, thereby actually saving Inquiry time and the parties' costs.

Conclusion

27. For all of these reasons, WBC's cost applications should be refused – indeed, they should never have been made.

The response by Leverhulme Estates Limited to Wirral Green Space Alliance

Full award

28. The full costs application is contrary to the PPG which makes clear (at paragraph 56) that: "*An award will not be made in favour of…interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal*". WSGA is an interested party for the purpose of the PPG.

29. Therefore, in accordance with guidance, even if there was any merit in the full costs application (which there is not), WGSA is not entitled to an order for costs. This reflects the fact that WGSA came to this Inquiry as a volunteer, and therefore was under no obligation to incur any expense defending appeals which it purportedly considered had no reasonable prospect of success. For this reason alone, the full costs application must be refused.

30. In any event, there is no substantive merit whatsoever in WGSA's application which (i) as with the Council's application simply repeats WGSA's case without explaining why the appellant's position is unreasonable (ii) in doing so, relies on a number of propositions which are clearly contrary to national policy (such as the suggestion that the applications were "*doomed to failure*" simply because they are classed as being inappropriate development – ignoring the fact that paragraph 148 of the Framework permits such development where VSC are demonstrated) and (iii) simply refers to a collection of considerations (e.g. the proposed changes to the Framework) without explaining what relevance (if any) they have to either the appeal or the costs application. Therefore, even on its own terms, WGSA's full costs application discloses no legitimate basis for a costs award.

Partial award

31. The application in respect of the SANG appeal adds nothing to the application made by the Council and should therefore be refused for the reasons set out in the appellant's response to the partial costs application made by the Council.

32. There are 2 further reasons why WGSA's partial costs application should be refused. First, whilst the PPG does envisage that, in principle, costs can be awarded to interested parties on procedural grounds, it also makes clear that this should only occur in "exceptional circumstances" (paragraph 56 of the PPG). There are no exceptional circumstances here, and none is identified by WGSA.

33. Second, to succeed in an application for costs, WGSA must identify not only that unreasonable behaviour has occurred but that, as a result of that behaviour, it has incurred unnecessary or wasted expenses in the appeal process. The only issues raised by WGSA in relation to the SANG application related to its ecological impact. However, none of WGSA's witnesses gave expert ecological evidence. Instead, Ms. Copley's evidence relied on evidence and input provided by Dr Hilary Ash, a retired ecologist. WGSA does not claim that it occurred any expense in relation to that input and therefore it has not incurred any expense. For all these reasons, the partial costs application should also be refused.

Final submissions for Wirral Metropolitan Borough Council

Full Award

34. The primary application seeks a full award of costs on the basis that the residential appeals in respect of Sites A-G have no reasonable prospect of succeeding. The test is that the appellant has pursued an appeal that had no realistic prospect of success and that in maintaining the appeal this has caused the Council to incur unnecessary costs. The Council maintains that this threshold has been clearly met.

35. The appellant in addressing one example given in the PPG concerning development that is "clearly not in accordance with the development plan" clearly confuses two issues; namely, the age of the Plan and whether it is up-to-date in the sense of being in conformity with national policies in the Framework. Whilst the UDP is dated and is pre-Framework (2014) its most important policies for determining the appeal are consistent, and acknowledged to be consistent, with the Framework.

36. The VSC case, such as it is, relies principally upon demonstrating housing need (Market, Affordable and Self Build) and a basket of other "add-on" benefits including contributions to open space and biodiversity net gain. Individually or cumulatively the matters relied upon as VSC justifying a conclusion that they "clearly outweigh" the definitional harm and other harm do not come close to being of sufficient weight to justify a rational basis for entertaining a prospect of success in this case.

37. The high-water mark of the appellant's case on supply is well over 3.5 years in circumstances where there is an identified supply to meet need. The Appellant's case is not that the regeneration sites will fail to deliver housing but that the anticipated rate is generally too optimistic to contribute to the 5YYS.

38. The point made by the Council is all the more powerful in circumstances where the eLP is being tested at Examination contemporaneously with these appeals. Furthermore, the appellant has mischaracterised the "prematurity" issue. The eLP is clearly at an advanced stage and on any view these appeals are diametrically counter to the spatial strategy being advanced in the eLP. The fact that a consortium of landowners and housebuilders maintain that the spatial strategy is flawed and pursue that matter in the Examination hearings serves only to demonstrate that if the appeals on green field and Green Belt land are allowed they would pre-determine the crucial issue at the heart of the eLP that brownfield redevelopment is appropriate, necessary and sufficient to meet need.

39. The number of houses at 788 across several sites is not insignificant but is not the crucial consideration here (even bearing in mind that the Leverhulme Estate have openly admitted it has ambitions for about 10 times greater) because what is crucial is the issue of principle – need for Green Belt land.

40. The Council's case for a full award is entirely justified.

Partial award

41. There was no good reason to pursue the SANG appeal from the outset. There was a perfectly good and fit for purpose mechanism to address the matters concerning the protection of the ecological value and integrity of the protected sites on the Wirral. The Appellant has now belatedly accepted the good sense of embracing the solution that was present throughout. The withdrawal was not precipitated by confirmation by NE.

42. The appellant pursued the case for a SANG to meet the needs generated by their development proposals. The WIA had been tested and found to be sound at Examination and had been deployed previously.

43. At no time did the Council give any indication that a costs application would not be made in respect of this issue. In truth, this application for a partial award is unanswerable.

Final submissions for Wirral Green Space Alliance

44. WGSA had already enquired about the matter of abortive costs arising relating to the SANG, in advance of the Council issuing its cost claim letter. It is a fact that the SANG was deemed unnecessary by MEAS (although not by WGSA) if the full financial contribution to mitigation of recreational pressure was agreed by the appellant, which it has been, but:

    i. this was in the light of MEAS (the Council and our) belief that the Council's proposals for measures to address the harm of increased recreational pressure (away from the Coast) would be better and more appropriately located at Arrowe Park (for several reasons), if deemed necessary at all;

    ii. the particular SANG proposed by the appellant would be ineffective as a SANG because:

        a) the area chosen by the appellant is not popular for walkers using the existing footpaths;

b) the soil is very unsuitable and would require deep 'inversion', which would be difficult to achieve, very costly, and (from experience elsewhere) probably 'doomed to failure' - therefore the lack of certainty would also weigh against;

c) the proposal had not sufficiently been prepared and was undergoing changes;

d) the period before any measurable benefit would accrue would be many years at best and the level of certainty too low;

e) proposals were confused, changing, incomplete and most likely ineffective over public access being restricted at times with (probably ineffective) fencing and gates to give protected birds some preferred conditions at some critical times;

f) construction could not start for an extended but indefinite period owing to the extent of known and protected underground heritage assets over at least 50% of the Site, and possibly more could be discovered. As there had been no proper reference to heritage, nor any surveys undertaken despite both known and suspected heritage assets affecting the site and being legally protected, approval would have been unsafe; and

iii. taking into account that the SANG was entirely an invention of the appellant, not called for by the Council, and purely located to suit their own inappropriate housing schemes in the Green Belt and not where independently best located.

45. WGSA was obliged to commission professional expertise relating to the appeals to respond to the paperwork submitted. The involvement is not 'voluntary' but because of the scale of local opposition (26,000 recorded objections against release of Green Belt land in the eLP and 25,000+ to LE's applications) to 'unnecessary' Green Belt loss, over issues of non-compliance with national and local planning policy. There is unanimous support for the eLP at the constituency MP and across the political spectrum of the Council. All support a regenerative approach. The Government supports the regeneration of Birkenhead, and there are identified development partners.

46. There has not been a need, nor is there a need, for the release of land in the Green Belt as set out in the UDP, which has relevant policies in the Framework terms, and as shown in the eLP, based on its up to date evidence base. Considering the Census 2021, the actual up to date data, there is even more evidence of no housing need to justify approval. Thus, there is no VSC.

47. There is a clear prematurity case here. Particularly considering that this set of applications is part of a much bigger scheme. In addition, the appellant is part of the Developer Consortium, which is promoting Green Belt land. The delay to the eLP examination is leading to a situation where the appeal decisions would significantly compromise it.

48. This case is unique, in many respects, and the unreasonable behaviour has presented additional challenges for the local group. WGSA has been put under considerable undue pressure arising from the actions of the appellant.

Reasons

49. The 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. One of the aims 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.

50. 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 against an appellant include withdrawal of an appeal without good reason. Additionally, an appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding. This may occur when the development is clearly not in accordance with the development plan, and no other material considerations such as national planning policy are advanced that indicate the decision should have been made otherwise.

51. The appellant claims that WGSA would not be entitled to an order for costs because they are an interested party and there would need to be exceptional circumstances. However, they are not an interested party. They are a Rule 6 party under the Inquiry Procedure Rules, and thus are considered as a main party. Therefore, they could be liable to an award of costs if they behave unreasonably, and likewise, may also have an award of costs made to them.

Substantive award for full costs (Appeals A-G)

52. The appeals were pursued by the appellant on the basis that they were inappropriate development, but that there were VSC that clearly outweighed the totality of harm. If I had found that there were VSC, the proposals would have been compliant with the development plan and Framework. The other considerations advanced were not insignificant and have been subject to a great deal of work from the appellant. They required careful consideration and weighting and were clearly material considerations. Therefore, the appeals were not pursued on the grounds that they had no reasonable prospect of succeeding.

53. Moreover, whilst all roads in the appeals lead back to the prematurity issue, this was raised by me prior to the inquiry opening. Neither the Council, nor WGSA, can claim that the appellant behaved unreasonably by pursuing appeals when they were not refused for this reason.

54. Therefore, the appellant did not behave unreasonably for substantive reasons and the application for an award of full costs fails for both the Council and WGSA.

Procedural award for partial costs (SANG Appeal)

55. The WIA has been in the public domain since May 2022 and was based on 'Towards a Liverpool City Region European Sites Recreation Mitigation & Avoidance Strategy – Evidence Report' (July 2021)[4] (LCRMS). The LCRMS

[4] CD 04/41

provides an *opt-in* mechanism, where residential developments of 10 or more units can pay a mitigation tariff per dwelling through a planning obligation to contribute to on and off-site mitigation measures. This is in lieu of developing and implementing their own project-level measures relating to recreational disturbance and demonstrating that these comply with the Habitats Regulations.

56. Other Merseyside authorities are using the LCRMS and charging tariff style payments, agreed with NE, for example Liverpool[5] and Halton[6]. However, Wirral's own arrangement (the WIA) was only published as part of the Regulation 19 Local Plan consultation, and stated that "*the prioritisation of these mitigation measures* ***will be agreed*** *(my emphasis) in consultation with NE and the other local authorities in the Liverpool City Region and West Lancashire Council to ensure the measures align with the emerging LCRMS mitigation measures*". The WIA was not agreed with NE until the SoCG on 19 April 2023, during the first block of Local Plan hearings.

57. The SANG was identified as necessary mitigation for the likely significant effects upon the National Sites Network by the appellant during preparation of the applications in 2020-2021[7]. At this time, there was no other available mitigation available, and it was considered necessary by the appellant to propose mitigation in the form of a SANG.

58. Additionally, the appellant also claims that, even after publication of the draft WIA, they had significant concerns about whether it was suitable. Even as late as preparing the SANG SoC[8], it was considered that the Council's approach for mitigating recreational pressures was fundamentally flawed, because the WIA acknowledged both the need for a SANG and the impossibility of Wirral delivering one[9].

59. Nonetheless, at the application stage, concerns were raised by MEAS[10] on 9 August 2022 that the SANG would not adequately address the potential in-combination effects, because future residents would still visit the coast for recreation. MEAS requested a commuted sum payment would also be necessary for Site Access Management and Monitoring measures (SAMMs).

60. NE's response was similar for Appeals A and G (2 August 2022), which required further assessment of the impacts of recreational disturbance on designated sites along with suitable mitigation measures. NE noted that the mitigation would include provision of the SANG but advised that the suitability would need to be fully assessed. They concluded by detailing that further measures in addition to a SANG may also be required.

61. Wirral Wildlife objected to the efficacy of the SANG, and are part of WGSA. Their concerns were clear from the application stage.

62. However, MEAS welcomed the provision of the SANG and set out minimal concerns about its efficacy in the original consultation response[11], detailing that

[5] CD 04/68
[6] CD 04/69
[7] EiC Simon Handy
[8] CDS01/2
[9] CD04/4 7.6
[10] CD04/70
[11] Dated 18 October 2022

"*the SANG has been designed following Natural England guidelines (Guidelines for Creation of Suitable Alternative Natural Greenspace, August 2021), this is welcomed*." The only area of concern raised related to the extent of access for dogs, although additional information was requested, such as biodiversity metrics and additional ecological enhancements.

63. It is not clear whether these were requested prior to determination as stated in the response. The appellant claims they were not and there is evidence of chaser emails from the appellant[12] prior to the refusal of the SANG. This explains why the appellant submitted additional evidence with the appeal as part of ongoing case management to reduce the reasons for refusal. Moreover, I do not agree that the SANG had no reasonable prospect of succeeding at this stage. Indeed, the LCRMS is an *opt-in* mechanism for tariff payments in lieu of developing and implementing a developer's own project-level measures.

64. The appellant's Ecology Proof of Evidence[13] followed on from the original overarching SoCG[14] and responded to MEAS's comments[15]. It detailed that the SANG, coupled with payment towards SAMMs contributions quoted in the LCRMS, would provide sufficient mitigation to address impacts arising from increased recreational pressure. This was a change in the appellant's approach to the WIA, as they now agreed to pay towards the SAMMs.

65. Notwithstanding, the appellant considered that the only issue in dispute with the Council, at that point, was the level of contribution required towards the SAMMs. The appellant considered that it should only contribute towards the SAMMs since it has provided is own bespoke SANG, whereas the Council sought full payment irrespective of the SANG.

66. Conversely, the Council's Ecology PoE[16] raised numerous concerns about the efficacy of the SANG and included a NE consultation response[17] dated 24 March 2023. This highlighted that the SANG may not be compatible with the aim of allowing dogs off lead. Nevertheless, the PoE concluded that should the appellant agree to pay the full WIA contribution, then the SANG would be no longer necessary as recreational pressure mitigation for Appeals A to G.

67. Within the same PoE, appendix 7[18] contained the SoCG between NE and the Council, which endorsed the WIA as an appropriate response to address recreational pressure. The SoCG also raised concerns that the SANG would not provide effective mitigation for in combination recreation effects arising from Appeals A-G, citing various areas of concerns. These included increased risk of recreational interactions and harm to biodiversity, insufficient ecological evidence and failing to meet NE guidelines for effective functioning SANGs.

68. Whilst WGSA maintained their concerns at the evidence stage, the change to MEAS and NE's opinions with the efficacy of the SANG and the endorsement of the WIA by NE was a significant change in circumstance.

[12] CD01/7.6
[13] CD01/7.2
[14] CD01/2.1 3.15-3.20
[15] CD04/70
[16] CD01/19.2 13.3
[17] CD01/19.3 Appendix 10
[18] CD01/19.3

69. Importantly, it was made clear by the Council that the SANG was not considered necessary if full payment towards the WIA were made. Whilst this option had been available to the appellant the whole time, the WIA was not endorsed by NE until April 2023.

70. Consequently, the appellant promptly reviewed their case, agreed to the WIA tariff style payments, and withdrew the appeal for the SANG. They did this after first consulting with the Council and WGSA. Whilst the withdrawal was late in the day, the appellant's pursuit of the SANG was justified and reasonable given the changing position of consultees and evolving status of mitigation.

71. Whilst the SANG did not address the full recreational impacts of visitors to the coast, at the appeal stage, they agreed to pay the contribution towards the SAMMs. It was only when the efficacy of the SANG was objected to by MEAS, NE and the Council, and the WIA was fully endorsed by NE, that the position changed and the appellant recognised the SANG was no longer necessary.

72. Therefore, the withdrawal of the SANG appeal was for good reasons and actually saved inquiry time and costs. This was not unreasonable behaviour. Thus, the application for partial costs from both the Council and WGSA fails.

Katie McDonald

INSPECTOR