



Ministry of Housing,
Communities &
Local Government

3 December 2024

Our ref: APP/D2320/W/22/3295556

Emma Curtis
Ulnes Walton Action Group

By email only

Dear Madam

**LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 AND 320
APPEAL MADE BY THE MINISTRY OF JUSTICE
AT LAND ADJACENT TO HMP GARTH AND HMP WYMOTT, LEYLAND,
LANCASHIRE
APPLICATION REF: 21/01028/OUTMAJ**

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying her decision on the appeal as listed above.
2. This letter deals with your application for a partial award of costs against the developer. The application as submitted and the developer's response are recorded in the Inspector's Costs Report, a copy of which is enclosed.
3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.
4. The Inspector's conclusions are stated at CR33-40. He recommended that your application for a partial award of costs be refused.

Emma Hopkins, Decision Officer
Planning Casework Unit
Ministry of Housing Communities & Local Government
3rd Floor, Fry Building
2 Marsham Street
London SW1P 4DF

Email: PCC@communities.gov.uk

5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in his report and accepts his recommendation. Accordingly, she has decided that a partial award of costs against the developer, on grounds of 'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.
6. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
7. A copy of this letter has been sent to the developer.

Yours faithfully,

Emma Hopkins
Decision officer

This decision was made by Matthew Pennycook MP, Minister of State for Housing and Planning on behalf of the Secretary of State, and signed on his behalf



Costs Report to the Secretary of State

by Tom Gilbert-Wooldridge BA (Hons) MTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Date 16 September 2024

Town and Country Planning Act 1990

Chorley Borough Council

Appeal by the Ministry of Justice

Costs Report

(Ulnes Walton Action Group against the Ministry of Justice)

Dates of Re-opened Inquiry: 25-27 March, 23-24 and 26 April 2024

Land adjacent to HMP Garth and HMP Wymott, Leyland, Lancashire

File Ref: APP/D2320/W/22/3295556

File Ref: APP/D2320/W/22/3295556

Land adjacent to HMP Garth and HMP Wymott, Leyland, Lancashire

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Ulnes Walton Action Group for a partial award of costs against the Ministry of Justice.
- The inquiry was in connection with an appeal against the refusal of planning permission for a hybrid planning application seeking outline planning permission (with all matters reserved except for means of access, parking and landscaping) for a new prison (up to 74,531.71 sqm GEA) (Class C2A) within a secure perimeter fence following demolition of existing buildings and structures and together with associated engineering works; outline planning permission for a replacement boiler house (with all matters reserved except for access); and full planning permission for a replacement bowling green and club house (Class F2(c) .

Summary of Recommendation: That the application for an award of costs be refused.

Background Matters

1. UWAG's costs application was made in writing on the final day of the reopened Inquiry (26 April 2024). The Ministry of Justice (MoJ) provided a written response on 1 May 2024. UWAG provided final comments on 10 May 2024. The submissions for UWAG and the response by the MoJ are set out below.

The Submissions for Ulnes Walton Action Group (UWAG)¹

Introduction

2. UWAG's application for costs against the appellant (Ministry of Justice) is in respect of the work undertaken by its highways expert, Mr Graham Eves, concerning the development of the 2023 Ulnes Walton Lane/A581 roundabout scheme (the 2023 design). UWAG makes this application on two related grounds.
3. Substantively, on its merits, the appellant had no reasonable prospect of succeeding in its appeal in respect of the 2023 design, given that:
 - (a) The fundamental deficiencies as regards visibility were identified in independent audits as early as February 2023.
 - (b) There is no evidence before the Inquiry indicating that the substantial departures required would be agreed by the Local Highway Authority (LHA) in respect of the 2023 design.
 - (c) The fundamental deficiencies are essentially acknowledged by the appellant's decision to advance a completely new design about a year later.
 - (d) In any event, the appellant has essentially failed to make good its case in response to the myriad criticisms levelled at the 2023 design.

¹ Taken from Core Document Q17

4. In combination, the above amounts to substantively unreasonable behaviour. UWAG should not have had to instruct Mr Eves to produce a proof of evidence and prepare based on the 2023 design for the re-opened inquiry (which was then delayed); or to prepare again on the basis of the 2024 design. The appellant's unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense.
5. Further or alternatively, procedurally, UWAG should not have had to instruct Mr Eves to prepare for the inquiry on the basis of two alternative schemes, because the appellant must have known well in advance of the proofs deadline in March 2024 that:
 - (a) It had a revised scheme (the 2024 design) at an advanced stage of preparation.
 - (b) That revised scheme had been subject to a Road Safety Audit (RSA).
 - (c) That revised scheme was, on its own case, in every respect better than the 2023 design, and therefore there was no further utility in the 2023 design.
6. On that basis it was unreasonable not to have informed UWAG in good time ahead of the proofs deadline that it had promulgated and designed a new scheme which was (on its case) better than the 2023 design in every material respect; and it was (and remains) unreasonable to insist that the 2023 design is a viable alternative to be considered.
7. Instead of informing UWAG of its new scheme in good time, the appellant said nothing at all, and simply served its addendum proof on the deadline, and by doing so announced the new revised design. It also (via the same updated proof) maintained that the 2023 design was a viable and safe 'alternative' which it wished to promote at the inquiry.
8. That necessitated UWAG to instruct Mr Eves, at short notice, to produce a rebuttal critiquing (insofar as he was able in the time permitted) the revised design; as well as to continue to prepare for the inquiry, but now on the basis of two 'alternative' designs for the junction. It should not have had to do so. Because the proof of Mr Yeates did not acknowledge that the existence of the 2024 design rendered the safety/suitability of the 2023 design moot and instead insisted that it remained a viable and safe alternative scheme, UWAG was thus required to instruct Mr Eves to prepare for the inquiry on the basis that both designs were 'live' and required addressing.
9. In any event, it has become clear that in all but words, the appellant accepts that consideration of the 2023 design has been rendered moot by the emergence of the 2024 design, which it says is preferable in every material respect.

The law/guidance

10. The Planning Practice Guidance (PPG) provides at paragraphs 027 and 029 that an Inspector may make an award of costs in full or in part, for and against interested parties. PPG paragraph 028 explains that aim of the costs regime is, inter alia, 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. The definition of unreasonable is taken from PPG paragraph 031.

11. PPG paragraph 032 sets out that costs may include, for example, the use of consultants to provide detailed technical advice and expert witnesses. PPG paragraph 052 provide a non-exhaustive list of the types of behaviour that which give rise to a procedural award against an appellant including resistance to or lack of cooperation with the other parties in providing information; a delay in providing information; and the introduction of fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not have otherwise arisen.
12. This application, for a partial award of costs, is therefore within the terms of what an Inspector can order, subject to the relevant grounds being made out.

Facts

13. This appeal first came before the Inspector in July 2022 following which, in October 2022, the Inspector recommended (albeit at that stage not published) that the appeal be refused for reasons including those of highway safety (see paragraph 13.35 of the Inspector's Report (IR)).
14. Part of that rationale concerned the junction of the A581 / Ulmes Walton Lane about which the Inspector said this: "Nevertheless, while the LHA has no objection to the proposed mitigation works...it has not been demonstrated that the works would resolve capacity issues or that the financial contribution would be sufficient..." (IR paragraph 13.32). This view was maintained by the SoS in the minded to grant decision letter (DL) which was published, together with the IR, in January 2023 (DL paragraphs 15-17).
15. Therefore, at the time of the DL, a key outstanding issue in the appeal was the highway safety implications of the scheme in so far as it concerned the Ulmes Walton Lane / A581 junction. As part of the DL, the SoS gave the appellant an opportunity for a re-opened inquiry into the issue of highway safety.
16. As part of the re-opened inquiry, in early 2023, the appellant crafted a new scheme to seek to mitigate the adverse highways impact to the junction (the 2023 design). The 2023 design sought to provide a raised speed table, speed cushions along the A581, three new lighting columns on the Ulmes Walton Lane approach, relocated speed limit signs along the lane to extend the existing 30mph zone, a reduced inscribed central diameter and dragon's teeth on all approaches.
17. The 2023 design was subject to two RSAs, carried out by Hydrock and by VIA in February 2023. Hydrock opined that, in respect of the 2023 design there was still a "lack of available road space" which "could increase the risk of collisions at the new mini roundabout" and recommended that "an alternative junction solution such as a sheltered right lane is provided at this location." VIA identified a series of issues with the junction, including that the "restricted visibility" meant that "drivers attempting to enter the mini roundabout from Ulmes Walton Lane with insufficient visibility are likely to be involved in collisions with previously unseen main road traffic. This may result in injury to vehicle occupants or riders." They recommended the acquisition of further land to improve visibility, or an alternative junction design.

18. Therefore, as of 21 February 2023, a little over a month from publication of the DL, the appellant knew that there were serious safety problems with the 2023 design. Neither RSA considered that the 2023 design was “good to go”. On the contrary, one advised the acquisition of land to expand the proposal or an alternative design; and the other advised an alternative design.
19. In March 2023, evidence was filed by Mr Yeates, the appellant’s highways expert. He disputed both Hydrock’s and VIA’s identification of the relevant problems or the suggested recommendations (and appended in CD M3a design responses which set out the basis for these disputes) and maintained that the 2023 design offered suitable mitigation (CD M3 at paragraph 5.8.3).
20. In (or just before) August 2023, UWAG instructed Mr Graham Eves, a highways expert, to review the 2023 design, with a view to preparing an addendum proof of evidence for the re-opened inquiry, then scheduled to begin on 19 September 2023. That proof (CD O22) was submitted on 22 August 2023 in line with case management directions. It contains a critique of the 2023 design.
21. On or before 20 September 2023, unbeknownst to UWAG, the appellant obtained drawings of a new scheme (the 2024 design). The design was based on the appellant having secured (or securing) control of more land around the junction with a view to addressing visibility issues, as well as a larger roundabout (CD M10a Appendix A). Additionally, a swept path analysis of the 2024 design was obtained on the same date (CD M10a Appendix F).
22. At the latest, by September 2023, the appellant had taken steps to secure more land, commissioned and received designs for the 2024 design and undertaken some analysis of its ability to overcome concerns around its 2023 design which had been raised by the RSAs some six months earlier. On 16 October 2023, an ecology survey site walkover was completed of the site (CD M10a Appendix N). On 25 October 2023, further drawings of the 2024 design were obtained by the appellant (CD M10a Appendix B and Appendix C). By 5 January 2024, a RSA had been undertaken for the 2024 design (CD M10a Appendix M).
23. Throughout this period the appellant said nothing publicly about its revised scheme. It did not inform or warn the parties that it was coming or communicate to the Inspector that an amendment to the procedural timetable may be required.
24. At least five months after the appellant had developed the 2024 design, its existence was revealed in the evidence of Mr Yeates dated February 2024 (CD M10 paragraph 1.2.4). Despite having produced the 2024 design, the appellant still maintained that the 2023 design was suitable (CD M10 paragraph 6.2.1). This was despite the fact that it is entirely apparent that the 2024 design is a direct response to some of the fundamental and unacceptable defects identified by independent auditors at the time that the 2023 design was commissioned in early 2023.
25. Mr Eves then filed a further rebuttal proof of evidence addressing the 2024 design in February 2024 (CD O74).
26. The hearing of the re-opened inquiry commenced on 25 March 2024. During the cross-examination of Mr Riley (the Council’s highways expert) and Mr Eves, the appellant’s counsel did not ask any questions concerning the 2023 design,

despite it being attacked in detail in the evidence submitted by both UWAG and the Council. The critiques of the 2023 design contained in the evidence of Messrs Riley and Eves thus went entirely unchallenged.

27. In cross-examination of Mr Yeates by UWAG's Counsel, Mr. Yeates admitted that there was "no world in which the 2023 design would be preferred to the 2024 design" and did not demur at Mr. Barber's characterisation of that as meaning the 2023 design was moot or, as he put it, "dead in the water".

Unreasonable behaviour

28. Substantively, in the 2023 design, the appellant has put forward (and maintained) proposed mitigation which has no reasonable prospect of being found to be safe and suitable in its location.
29. Fundamental defects were identified early in the design process back in early 2023. Although the appellant initially rejected both the identified problem and the RSA recommendation to purchase additional land to improve visibility, the subsequent decision to implement that recommendation through the 2024 design is a tacit acknowledgement that the 2023 design is unacceptably and irredeemably sub-standard.
30. There was no reasonable prospect of the 2023 design being found to be safe and suitable, and it is only by happenstance that there was not an entire public Inquiry from 19 September 2023 on that design alone. This amounted to unreasonable conduct, as did the appellant's continued reliance on the 2023 design until today.
31. Procedurally, the PPG is clear that the following may be deemed unreasonable conduct: lack of co-operation with other parties in providing information and/or delay in providing information.
32. Simply put, the appellant unreasonably failed to co-operate with UWAG (or the Council), because it failed to disclose the existence of the 2024 design when it reasonably knew it would be running an alternative to the 2023 design (moreover, on its own case, an improved scheme which would render the 2023 design moot). Alternatively, if not an unreasonable failure to co-operate, it was an unreasonable delay.
33. The evidence demonstrates that: the appellant knew by 21 February 2023, following the RSA of the 2023 design, that the 2023 scheme suffered from multiple safety concerns, and, by no later than September 2023, that it had an alternative to the 2023 design which was (on its own case) better in every material respect. Yet, the 2024 design was not disclosed for five months thereafter. It was not even mentioned. The appellant ought reasonably to have notified UWAG of its intention to change the scheme in March 2023 when it knew it was unworkable or, giving it the benefit of the doubt, at least in September 2023 when it became apparent there was a (potentially arguably) viable alternative. This is particularly so given that there was a deadline for further evidence scheduled for February 2024.
34. Had the appellant disclosed its position on the 2024 design by (say) September 2023, UWAG could have instructed Mr Eves to consider that design and produce a proof of evidence in good time for the deadline in February 2024. Instead it was forced to respond in very short time, and by way of a rebuttal.

35. Further, notwithstanding the obvious flaws of the 2023 design, the appellant asserted in Mr Yeates' February 2024 evidence that it was pursuing the 2024 design as an alternative to the 2023 design i.e. that both should be considered, but then entirely failed without explanation to advance a positive case on the 2023 design during the re-opened Inquiry. The appellant has not pursued the merits of the 2023 design (because it considers that the 2024 design is preferable in every respect). Again, no notice was given of the appellant's intention not to pursue the 2023 design during the re-opened Inquiry.
36. All this amounts to unreasonable conduct. No explanation whatsoever has been offered for the extreme delay in disclosing its position. In this respect UWAG notes the appellant's evidence that the land acquisition deal has reached exchange of contracts but has not completed yet. No dates were given, but the appellant self-evidently had sufficient confidence in the acquisition of land that it worked up the 2024 design (as set out above) from at least September 2023.

Wasted or unnecessary costs

37. Substantively, the appellant's pursuit of the 2023 design has directly caused UWAG unnecessary and/or wasted expenditure in producing evidence and preparing for an Inquiry in the summer of 2023 on the basis of the 2023 design alone; and in continuing to place reliance on the 2023 design, UWAG's highways consultant has had to needlessly continue to prepare in relation to a proposed mitigation which had no chance of being granted planning permission.
38. Procedurally, the appellant's failure to co-operate and/or its delay in revealing the existence of the 2024 design and/or failure to properly pursue the 2023 design during the re-opened inquiry has caused unnecessary and/or wasted expenditure for UWAG in two ways:
- (a) Firstly, had the appellant informed UWAG in a timely way that it had a revised scheme for the mini roundabout at the junction, and which it would say was better in every material respect than the 2023 design, UWAG and Mr Eves could have produced a proof addressing the 2024 design in good time for the deadline in February 2024, and prepared for the Inquiry on that basis, rather than having to produce his response by way of a rebuttal, in short order following receipt of the appellant's evidence, alongside preparing to address the 2023 design dealt with by his initial proof.
 - (b) Secondly, Mr Eves has been required to spend additional (and unnecessary) time preparing for his attendance at the re-opened Inquiry, in dealing with the 2023 design. In effect, he had to prepare to give evidence and be cross-examined on two designs. It has taken him longer to prepare to give evidence on two schemes than on one. The obvious reality is that the 2023 design has been abandoned. His detailed critique of it was not challenged at all in cross-examination and Mr Yeates agreed that there was no world in which the 2023 design was superior or preferable to the 2024 design. Dealing with the (many and compelling) criticisms of the 2023 design have, frankly, been a waste of time. Therefore, the additional costs of the time spent preparing to advance the criticisms of the 2023 design were unnecessary.

39. In light of the above, UWAG invites the Inspector to find that the appellant behaved unreasonably in withholding details of the 2024 design until February 2024 and that this led to UWAG incurring unnecessary fees in respect of Mr Eves involvement.

Conclusion

40. The Inspector has a discretion to make a partial award of costs in UWAG's favour in respect of the unnecessary additional costs of Mr Eves' work in respect of the 2023 design, from such time as it ought to have been reasonably obvious to the appellant that such work was unnecessary in light of its revised design (which moment is no later than September 2023).

41. The appellant behaved unreasonably in:

- (a) promoting and continuing to promote the 2023 design when it had no reasonable prospect of succeeding on appeal; and in the alternative
- (b) not disclosing its intended production of the 2024 design in September 2023 when it self-evidently knew about it and its superiority as compared to the 2023 design;
- (c) delaying the provision of information about the 2024 design until February 2024 despite knowing about it in September 2023; and
- (d) not conceding the logical inevitability that the question of whether the 2023 design was moot (and asserting the contrary) until cross examination of Mr Yeates.

42. That unreasonable behaviour caused UWAG to incur additional unnecessary costs in respect of the work of Mr Eves. A partial award of costs in those terms is therefore justified.

The Response by the Ministry of Justice (the appellant)²

Introduction

43. It is regrettable that UWAG failed to adhere to PPG paragraph 035 that as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. The contents of the costs application could clearly have been made in writing prior to or during the Inquiry which would have enabled the appellant to respond during the Inquiry.

44. The costs application argues that the appellant behaved unreasonably in putting forward the 2023 design given it has no real prospect of being found safe and suitable. It also argues that the appellant failed to give notice of the 2024 design earlier and behaved unreasonably in abandoning the 2023 design. The application claims this resulted in unnecessary or wasted expense in producing written evidence in August 2023 addressing the 2023 design; producing written evidence in March 2024 addressing the 2024 design; and preparing for and addressing the 2023 design at the Inquiry. The appellant wholly rejects the contentions put forward by UWAG.

² Taken from CD Q18

The appellant has not behaved substantially unreasonably

45. A wealth of detailed expert evidence has been put forward which demonstrates that the 2023 design would safely mitigate the junction impacts. This can be found in particular at Core Documents M3 (section 5) and M9 (section 8). To summarise:

- (a) The Inspector and SoS both originally found that without a design for the mini roundabout and traffic modelling to demonstrate the effect, it could not be demonstrated that the proposed works would resolve junction capacity issues
- (b) A mini roundabout has always been the preferred mitigation solution by the LHA and the appellant's closing submissions detail the safety and capacity benefits of a mini roundabout in principle at this location.
- (c) The appellant considered the Inspector and SoS's concerns and produced the 2023 design as a preliminary junction design together with modelling evidence. The 2023 design (and indeed the 2024 design) are only necessarily preliminary designs at this stage, as the highways measures will be subject to detailed design through the section 278 process and the associated RSAs at each appropriate design stage.
- (d) The 2023 design included a raised table, speed cushions on the A581, three new lighting columns on the Ulmes Walton Lane approach, reduced speed limit signs, a reduced inscribed central diameter, and dragon's teeth on all approach arms.
- (e) The junction analysis shows that the 2023 design would mitigate the effects of the development and would provide a betterment compared to the existing junction layout without development traffic. UWAG has not produced any junction analysis to dispute this. As Mr Yeates explained at the Inquiry, capacity has an important link to safety in reducing risk of driver frustration.
- (f) Detailed swept path analysis was undertaken for all vehicles on the 2023 design together with an analysis of the PIA data in this location.
- (g) DMRB visibility standards are not requirements for non-trunk roads such as the A581 and Ulmes Walton Lane and therefore a departure from guidance is not technically necessary. Nevertheless, Mr Yeates addressed the design departure process in relation to visibility and the issues raised in the RSAs including a written designer's response.
- (h) Mr Yeates also addressed these issues in evidence at the Inquiry and explained that the departures are safe and acceptable given the proposed traffic calming to reduce speeds on the junction approaches and the capacity improvements compared to the existing junction. He also explained that meeting standards does not automatically mean a junction design is safe or not. A holistic judgment is required to be made taking into account all the circumstances. He relied on previous appeal decisions which consider similar departures and visibility issues.
- (i) Mr Yeates gave evidence of several mini roundabouts in Lancashire which have substandard visibility and which have a low level of recorded

accidents, which shows there is not a direct correlation between a design departure and a poor highway safety record. He also explained that providing additional visibility can sometimes increase risk of accidents as it encourages speeding.

- (j) Throughout developing the 2023 design, the appellant has consulted with the LHA who reviewed the design and concluded it would suitably and safely address the junction capacity issues with development. In particular, the LHA acknowledged the designer's response to the RSAs and the detailed design work which will follow with the S278 process.

46. On that basis, it is clearly not right to say that the 2023 design has no reasonable prospect of being found safe and suitable. The acceptability of both designs is a matter of expert judgment upon which reasonable professionals may differ in their opinions. Mr Yeates, Mr Riley and Mr Eves have all disagreed with each other to varying extents, but mere disagreement does not mean another expert's view is unreasonable. On this issue of expert judgment, the appellant has reasonably put forward detailed evidence why the 2023 design is safe and suitable and not acted substantively unreasonably in putting forward the 2023 design.

The appellant has not behaved procedurally unreasonably

47. The first allegation is that the appellant failed to give notice of the 2024 design earlier than February 2024. There is no merit in this argument. The original commencement date for the reopened Inquiry was 19 September 2023. In the evidence for this date, the appellant was only putting forward the 2023 design. For the reasons summarised above, the appellant's position was (and still is) that the 2023 design is a safe and suitable mitigation solution at this junction. The appellant had decided there was insufficient time available to purchase the additional land prior to the start of the reopened Inquiry in September 2023 and so no alternative design was being pursued and no drawings had been drawn up. Therefore, there was nothing to disclose prior to September 2023.
48. On 6 September 2023, the parties were notified that the Inquiry would be postponed and then informed later on that the new commencement date was 25 March 2024. The Inspector set a timetable stating that updated highways proofs could be submitted 4 weeks before the Inquiry reopened (26 February 2024) provided it focused only on material changes arising since existing proofs were produced. Allowance was also made for rebuttals to any updated evidence.
49. Given the extra time available, the appellant only then decided that it might be possible to pursue the option of buying additional land and putting forward an alternative design. A drawing using additional land was drawn up on 19 September 2023 to progress thinking, and negotiations advanced with landowners. Complications in relation to complex land ownerships prolonged negotiations meaning that contracts were only exchanged on 26 February 2024.
50. In accordance with the timetable, the appellant issued the updated highways proof on 26 February 2024. This detailed that a material change had arisen, namely the ability to purchase additional land, and that the 2024 design was being put forward as an alternative. The 2024 design is not dramatically different to the 2023 design. It did not represent a significant change to the appellant's case and the new evidence was accepted by the Inspector. An adjournment was

not necessary to deal with this updated evidence. UWAG was given an extension for rebuttal evidence and was able to submit rebuttal evidence in ample time before the Inquiry reopened on 25 March 2024.

51. The appellant could not have reasonably disclosed the 2024 design any earlier than 26 February 2024 given that contracts were only exchanged on that same day, otherwise this would have prejudiced ongoing commercial negotiations. The evidence submitted on the 2024 design was in accordance with the Inquiry timetable for updated evidence. Accordingly, the appellant did not act with any unreasonable delay and disclosed the 2024 design as soon as it was reasonably able to, within the timetable, with ample time for rebuttals, and no adjournment was necessary.
52. The second allegation is that the appellant behaved procedurally unreasonably in abandoning the 2023 design. UWAG are factually mistaken to allege that the appellant abandoned the 2023 design during the reopened Inquiry. The appellant's case at the Inquiry naturally placed more focus on the 2024 design because it is the preferred design out of the two alternatives. Nevertheless, Mr Yeates maintained his professional judgement that both designs are acceptable preliminary highways designs and compliant with national and local policy. The same position was made clear in the appellant's closing submissions. Neither design is finalised at this stage with further detailed work to take place during the S278 process with the LHA and the condition discharge process. UWAG are also disingenuous in suggesting that Mr Yeates accepted the 2023 scheme was dead in the water. It was said more as a statement than a question at cross-examination and it was rejected by Mr Yeates who maintained his expert opinion that the 2023 design is acceptable and policy compliant.

There were no unnecessary or wasted costs

53. The first element of costs claimed is producing written evidence to address the 2023 design. For the reasons set out above, on this matter of expert judgment, it is clearly not right to say that the 2023 design has no reasonable prospect of being found safe and suitable and there is no substantive unreasonable behaviour here. In the lead up to the original commencement date of 18 September 2023, there was no suggestion from UWAG that they viewed the 2023 design to represent unreasonable behaviour. This is an argument that is only opportunistically being pursued now. For the reasons set out above, it was reasonable for the appellant to maintain both designs. Thus, the costs of producing written evidence on the 2023 design was not caused by unreasonable behaviour.
54. The second element of costs claimed are the costs spent producing rebuttal proofs to the 2024 design in March 2024. For the reasons set out above, the appellant did not behave procedurally unreasonably in this regard and both parties had ample time to provide rebuttal evidence. Thus, these costs were not caused by any unreasonable behaviour. Moreover, even if this behaviour was procedurally unreasonable, the costs of responding to the 2024 design would have arisen in any event. PPG paragraph 052 states that costs can only be claimed for work that would not otherwise have arisen. Even if the appellant had notified the other parties of the 2024 design earlier, the parties would have still incurred costs in providing written evidence in response.

55. The third element of costs claimed are the costs incurred in Inquiry time on the 2023 design or the costs incurred in preparing to deal with the 2023 design. For the reasons set out above, throughout the written evidence, live evidence and closing submissions, the appellant has maintained that both designs are acceptable, with the 2024 design being preferred. There is nothing unreasonable in this approach and thus no wasted costs were caused. In addition, there is a large overlap in the work and time spent addressing the two designs given their similarities. Therefore, even if any wasted costs are found, then the costs only attributable to the 2023 will be very limited.

Conclusion

56. In conclusion, the costs application is neither well founded nor justified. The appellant has not behaved substantively or procedurally unreasonably, and this has not resulted in any wasted or unnecessary costs.

The Final Submissions for UWAG³

Introduction

57. The appellant's complaint that UWAG has fallen foul of the good practice guidance in the PPG goes nowhere. First, circumstances did not allow for a costs application before the Inquiry. The appellant presented its case on the basis that both designs adhered to the standards. It was only at the conclusion of Mr Yeates' evidence on the penultimate day of the reopened Inquiry that the appellant had wholly abandoned the 2023 design. Second, it is daring to impugn UWAG for not adhering to guidance in circumstances where the appellant's evidence continued to trickle through to the Inquiry even though the other main parties' cases had concluded. Third, nothing precluded the approach by UWAG in the making of its application which was in the circumstances entirely reasonable. Fourth, there is no prejudice or unfairness as the appellant was given the time it required to respond in writing and has done so.

The appellant has behaved substantially unreasonably

58. The claim for costs rests on the proposition that the 2023 design was doomed to fail and should never have been promoted as mitigation for the junction. If that proposition is not good, UWAG accepts that its claim for costs cannot succeed, but it firmly maintains that proposition. The 2023 design is self-evidently unsafe. In the context of the appellant bringing a further change to fix or address the holes in its original case, including the lack of any safe scheme for mitigation at this junction, it had no prospect of succeeding.

59. There was no reasonable prospect of the 2023 design being found safe and suitable mitigation in the location provided. This is borne out by the appellant's own RSAs and the appellant's subsequent conduct (taking extensive steps and presumably significant additional expense to effectively abandon the 2023 design and advance the 2024 design). Self-evidently, the appellant lost confidence that there was any realistic prospect of the 2023 design standing up to scrutiny. This was confirmed in the reopened Inquiry when the appellant did not challenge by cross-examination or other means any of the criticisms with the 2023 design.

³ Taken from CD Q19

60. The summary of the appellant's evidence does not support the conclusion that the 2023 design would safely mitigate the junction impacts. Rather, each subparagraph at (a) to (j) underlines and reiterates the shortcomings:
- (a) Reiterating the previous finding of the Inspector and SoS does not address whether the 2023 design amounts to safe and suitable mitigation to address a recognised significant highway issue.
 - (b) The LHA's position is and always has been next to useless in assisting the Inspector in reaching an overall view in this case, for the reasons set out in paragraphs 22-27 of UWAG's closings.
 - (c) The Stage 1 RSAs for the 2023 design each raised fundamental issues with that design which could be kicked further down the road. The Hydrock RSA identified the lack of available road space could increase the risk of collisions and that an alternative junction solution should be provided. The VIA RSA identified that visibility issues gave rise to collisions in two locations such that additional land was needed or a redesigned layout or alternative method of junction control. The only appropriate response was a fundamental design change, which the appellant has eventually sought to do.
 - (d) Merely stating what the 2023 design is does not address the range of safety concerns maintained by the parties throughout the Inquiry.
 - (e) Whilst being a necessary prerequisite of any design at the location, addressing the capacity issue does not address concerns as to the safety and suitability of the proposed mitigation.
 - (f) The detailed swept path analysis, addressed in detail by Mr Riley, demonstrated the fundamental shortcomings in relation to overrunning and shows why the 2023 design was so intrinsically flawed.
 - (g) Irrespective of what the DMRB has to say on visibility standards, it was common ground that substantial design departure would be required and such a design would have been wholly inappropriate, hence the 2024 design.
 - (h) Mr Yeates' oral evidence on the 2023 design effectively only confirmed rather than relieved the concerns about the unsafe and unsuitable nature of the 2023 design. UWAG maintains that the only realistic judgment available in relation to the 2023 design is that it needed to be substantially altered in order to be rendered acceptable in highway safety terms and per the RSA recommendation. In those circumstances, the appellant has sought to amend and improve its proposed mitigation although UWAG maintain that the 2024 design remains unacceptable.
 - (i) The evidence on other mini roundabouts in a different context with different existing conditions and without the substantial increase in HGV traffic as proposed here goes nowhere to addressing whether the 2023 design is safe or suitable. Where Mr Yeates spoke about additional visibility during the Inquiry, he was plainly addressing circumstances where there was excess visibility, which offer no support for the 2023 design.

- (j) Consultation with the LHA is a prerequisite of the planning process and that such consultation was carried out says nothing of whether there is a real prospect of the 2023 design being found safe and suitable.

61. The evidence relied upon in the appellant's costs response fails to substantiate the submission that 'it is clearly not right to say that the 2023 design has no reasonable prospect of being found safe and suitable'. Rather, it raises a number of straw men without addressing the elephant in the room. Mr Yeates' evidence erroneously maintained that the 2023 design should be considered because it accorded with design standards when it patently did not. This was in circumstances where the appellant accepted that the 2024 design was better than the 2023 design in every respect and did not seek to advance any meaningful case for the 2023 design throughout the reopened Inquiry.
62. This is not a case of mere disagreement between experts. UWAG says that Mr Yeates' insistence that the 2023 design was safe was unreasonable and not within the range of reasonable disagreements between experts. He maintained in his addendum evidence (Core Document M10) that both designs accorded with the standards when that was not the case, even on the appellant's own evidence. It was unreasonable for the appellant to continue to advance the 2023 design at that stage, in light of its obvious shortcomings and in light of the 2024 design.

The appellant has behaved procedurally unreasonably

63. UWAG and the Council have complained that the appellant kept news of its 2024 design to itself until the last possible moment, and even when it did reveal it, did not withdraw reliance on the unsafe 2023 design. The suggestion that the appellant could not have reasonably disclosed the 2024 design any earlier than 26 February 2024 is plainly inaccurate in circumstances where detailed plans were drawn up as early as September 2023. Leaving it to the very last moment and relying on the provision for rebuttals is characteristic of unreasonable delay and resulted in UWAG inevitably being required to prepare a rebuttal when more proactive case management could have avoided that additional work by seeking to amend the timetable for further evidence. The appellant did not disclose the 2024 design as soon as it was able to.
64. The appellant overstates or mischaracterises any difference between the Council and UWAG's position as to the appellant's approach to the 2023 design at the Inquiry. As set out in UWAG's costs application and closing submissions, the 2023 design had been rendered moot and all but abandoned. This is not simply a matter of emphasis. The complaint by UWAG and the Council is a shared one. The appellant brought into this Inquiry a design it should have left behind some time ago, given its deficiencies, and thereby obliged the parties to address it. Mr Yeates' evidence was not just that the 2023 design was compliant with policy but also with standards. This was a demonstrably unsustainable position to take.

Unreasonable behaviour has resulted in wasted or unnecessary costs

65. The 2023 design had no reasonable prospect of being found safe and suitable in the manner presented. This was reflected in the Stage 1 RSAs which both suggest a fundamental redesign and implicitly by the appellant in seeking to subsequently adopt one of the recommendations, so fundamental was the identified issue in the VIA 2023 RSA. It was unnecessary for UWAG to have to instruct its highway witness to address that design in preparation for the

reopened Inquiry. It should have been abandoned. The quantum of that wasted expense is for another forum.

Conclusion

66. UWAG's application for costs is well-founded and justified. The appellant has behaved substantively and procedurally unreasonably, resulting in wasted and unnecessary costs.

Conclusions

67. The Planning Practice Guidance 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. UWAG has submitted that the appellant behaved unreasonably on both substantive and procedural grounds.
68. Dealing with the substantive grounds first, UWAG contends that the appellant maintained the 2023 design which had no reasonable prospect of being found to be safe and suitable in its location. It will be seen from my supplementary report at paragraph 13.37 that I have identified serious problems and uncertain effects with the 2023 design to the extent that it would have an unacceptable impact on highway safety. Nevertheless, the 2023 design was put forward by the appellant as the solution to address my concerns and the concerns of the SoS. It was subject to review and consultation and was not rejected out of hand as an option, although the appellant came to prefer the 2024 design. Ultimately it was a matter of expert and planning judgment. Therefore, the appellant did not behave unreasonably by persisting with the 2023 design.
69. Regarding the procedural grounds, it is true that the appellant knew in February 2023 that the RSAs had identified safety concerns with the 2023 design. Nevertheless, there is no evidence to indicate that the appellant was seeking to acquire additional land around the junction any earlier than September 2023 or was undertaking work leading to the 2024 design any earlier than that month. It is unfortunate that the appellant felt unable to share this information, even confidentially, with the other main parties until February 2024. However, I recognise that there may have been commercial sensitivities involved with any land negotiations and purchases. There was also an allowance for updated proofs of evidence to be received a month before the Inquiry was due to reopen in March 2024.
70. Had the reopened Inquiry gone ahead in September 2023 as originally planned, the 2024 design may not have ever been considered. Given the concerns I have identified with the 2023 design, this may have exacerbated the appellant's position regarding highway safety. However, through no fault of the main parties, the Inquiry was delayed in September 2023. As noted above, an opportunity was then afforded for updated proofs to address any material changes that may have arisen since the proofs were first drafted. Therefore, while regrettable, the later disclosure of the 2024 design did not represent unreasonable behaviour procedurally.
71. UWAG contends another procedural ground that the appellant abandoned the 2023 design during the Inquiry without proper notice. This was based on the line of questioning under the cross-examination of Mr Yeates that the 2023 design

was 'dead in the water'. However, even if Mr Yeates accepted that proposition, it was only once his evidence had been tested by the parties. Mr Yeates' position beforehand was that both designs were acceptable, and the purpose of an Inquiry is to challenge such positions. I have already found that there are no substantive grounds of unreasonable behaviour in terms of maintaining the 2023 design, so this position was not procedurally unreasonable either.

72. UWAG incurred additional expenses in the appeal process through the assessment of the 2023 and the 2024 designs, both before the Inquiry reopened and during sessions with relevant witnesses. However, given no unreasonable behaviour on substantive grounds has been demonstrated, these expenses were not unnecessary or wasted in terms of the substance of any additional work.
73. It was regrettable that UWAG's witness did not have more notice of the 2024 design, but the evidence was admissible as part of the updated proofs stage, and UWAG was afforded more time to provide rebuttal evidence. Therefore, the lack of unreasonable behaviour on procedural grounds means that the above expenses were not unnecessary or wasted in terms of any timings.
74. Overall, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Therefore, an award of costs is not justified.

Recommendation

75. It is recommended that the application for an award of costs be refused.

Tom Gilbert-Wooldridge

INSPECTOR