Costs Awards

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Responsibility of	**Subject Lead for Appeal Procedures**
Version 1.2: Added paragraph 11 in response to the Halton judgement. Version 1.1: Added paragraphs 38 – 41 'Uncertainty as to whether a Costs Application has been made'	

Key legislation and policy

Legislation	• Town & Country Planning Act 1990 Section 322C (Costs: Wales), sections 78, 174, 175(7) and Schedule 6 • Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 39, 89 and Schedule 3
National policy and guidance	• Development Management Manual (DMM) Section 12 Annex: Award of Costs
Judgments	• Manchester CC v SSE and Mercury Communications, 1988 JPEL 774 • Ealing R v SoS for the Environment ex Parte London Borough of Ealing (1999) EWHC 345 • R (on the application of Halton Borough Council) v The Secretary of State for Housing, Communities and Local Government

Key principles

- Parties are normally expected to meet their own expenses.
- The costs regime is aimed at ensuring parties behave in an acceptable way and follow good practice, whether in terms of timeliness or in quality of case.
- A costs award does not affect the appeal decision and vice versa: both are entirely separate. It is possible for costs to be awarded against a 'winning' party'.

When can costs be awarded?

1. Costs will normally be awarded where:

- a timely application has been made;
- a party has behaved unreasonably; and

- the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense.

2. Costs may be awarded in full, or a partial award may be made e.g. where there are a number of reasons for refusal and one is not properly supported.

Power to award costs

3. Section 322C (Costs: Wales) of the Town and Country Planning Act 1990 applies to any application, appeal or reference to the Welsh Ministers under the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 whether it is considered at an inquiry, hearing or on the basis of written representations.

4. Section 322C also applies to certain proceedings under the Highways Act 1980 and the Wildlife and Countryside Act 1981. As such, section 322C applies to proceedings which include, but are not limited to:

- Planning and related appeals
- Enforcement and related appeals
- Called in applications
- Planning applications for Developments of National Significance ("DNS") and associated secondary consents
- Opposed public path extinguishment and diversion orders
- Appeals in connection with consents relating to Sites of Special Scientific Interest
- Appeals against management notices, and
- Opposed orders modifying the definitive map and statement.

Types of cost awards

5. **Procedural** awards may be claimed for unreasonable behaviour occurring during the proceedings e.g. where new evidence was introduced late in the proceedings where this could have been provided earlier, or where a party has disrupted or delayed the process.

6. **Substantive** awards may be claimed where the unreasonable behaviour relates to issues of substance arising from the merits of the appeal e.g. where the appeal had no reasonable prospect of succeeding because it is not in accordance with the development plan and no material consideration are advanced to indicate a decision otherwise.

What is unreasonable behaviour?

7. In **Manchester CC v SSE and Mercury Communications 1988 JPEL 774**, it was established that the word 'unreasonable' has its ordinary meaning for the purposes of a costs award. It can be distinguished from the higher public law tests for the courts namely unreasonable in the Wednesbury sense.

8. **Ealing R v SoS ex Parte London Borough of Ealing (1999) EWHC Admin 345** established that the Inspector would be in the best position to judge whether a party had acted unreasonably, it would only very rarely be proper for this court to intervene and strike down a decision.

9. Where a local planning authority has refused an application that is not in accordance with the development plan and no material considerations indicate that permission should have been granted, there should generally be no grounds for an award of costs against the LPA for unreasonable refusal of an application.

10. LPAs are not bound to adopt the professional advice of its own officers or that received from statutory consultees. However, they are expected to show that they had reasonable planning grounds for taking a decision contrary to such advice and they are expected to produce evidence to support their decision. Where no such evidence is provided it is likely that costs will be awarded.

11. In **R (on the application of Halton Borough Council) v The Secretary of State for Housing, Communities and Local Government,** the Court of Appeal found it was not unreasonable for the Council to withdraw its support for a called in planning application after its expert witness made damaging concessions during cross-examination. The Court held the Secretary of State set the bar too high in suggesting that parties should test their expert evidence to ensure it will withstand cross-examination, as this was not a standard procedural requirement in planning inquiries or civil proceedings more generally.

12. Procedural examples include introducing new grounds of appeal when this could have clearly been provided earlier and providing evidence that is knowingly inaccurate. Examples of substantive unreasonable behaviour includes an appeal that follows the same or a similar decision without any material change in circumstances or where it is clearly not in accordance with the development plan and no other material considerations are advanced. Sections 3.6 and 3.7 of the DMM set out examples of unreasonable behaviour in procedural and substantive cases. It is not necessary to repeat them here.

What is unnecessary / wasted expense?

13. The power to award costs relates to those necessarily and reasonably incurred in the appeal process. Typically, for an appellant this might be the costs of employing an agent to submit the appeal and represent them; for an LPA costs will be typically incurred in resisting the appeal and defending its decision.

14. Costs cannot be claimed for the period during the determination of the application which has led to the appeal. Nonetheless, behaviours and actions at the time of the application can be taken into account in the consideration of whether costs should be awarded.

15. Costs may be claimed in the period before proceedings were commenced but must be directly related to the proceeding e.g. preparation. Awards of costs cannot be made for indirect losses, such as the delay of planning permission.

16. No details of actual expenditure are required but the kind of expense or time should be identified in broad terms, and it should be capable of being quantified.

17. Expense may be wasted because the entire appeal could have been avoided e.g. not following pre-application advice or the advice of Welsh Ministers.

18. Expense may be unnecessary because the time and effort expended on a part of a case should not have had to be pursued.

Other relevant Court decisions

19. **R v SSE, ex Parte North Norfolk DC (12 July 1994)** - In dismissing the appeal on one main ground the Inspector had nevertheless awarded (partial) costs in relation to the Council's refusal of the other two main grounds (density and amenity). But there were no clear and intelligible reasons for the award. The question for the Inspector should have been not just that there was insufficient evidence to substantiate those two grounds but also how it was that the Council had acted unreasonably.

20. **Scrivens v SSCLG [2013] unreported** - In making a partial award of costs to the Council on the basis of (an unreasonably large) quantity of evidence produced by the Appellant, the Inspector should have indicated the proportion of evidence upon which that award was based. In the absence of such an indication the decision had to be quashed.

Timescales for cost applications

21. The procedures for costs applications are not statutory so there is discretion to accept applications outside set time limits. However, this will need to be supported by good reasons for late submission. In all proceedings whether by written rep, hearings, inquiry or combined, costs must be applied for at the earliest opportunity.

22. It is recognised that circumstances may mean that a party seeks an award after evidence has been tested at a hearing or inquiry, or in relation to conduct at a site visit. If an application for costs is made following the closure of proceedings the Welsh Government Planning Directorate will determine the costs application.

Application on substantive grounds

23. Where these are made by the appellant, these should be submitted in writing with the appeal. Representations in response should be made by the LPA or interested parties by the 4-week stage.

24. Where an LPA or third party intends to apply for costs, they must do so in writing within 4 weeks of the starting date of the appeal. The appellant will then be given the opportunity to respond by the 6-week stage.

25. The Inspector can also seek further comments where necessary, usually within 2 weeks of alleged unreasonable behaviour.

26. Where substantive grounds occur during oral proceedings applications must be made prior to close of proceedings.

Applications on procedural grounds

27. These should be made as soon as possible after the alleged unreasonable behaviour has occurred. Comments from respondents should be sought within a period specified by the Inspector (usually 2 weeks).

Writing the costs decision

28. The appeal decision should refer to the costs application, using the standard paragraph in the template.

29. The relevant **costs decision template** should be selected from Dotdocs. The relevant legislation for the more common casework types is set out below.

- **Planning appeals**, the application is made under the Town & Country Planning Act 1990, section 78, Section 322C and Schedule 6.
- **Planning enforcement**, the application is made under the Town and Country Planning Act 1990, sections 174, 175(7), 322C and Schedule 6.
- **Listed Building Consent** the application is made under the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 89 and Schedule 3.
- **Listed Building Enforcement** the application is made under the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 39, 89 and Schedule 3.

30. Costs do not follow the appeal outcome. However, costs decisions should be logically consistent with the appeal decision e.g. it would be illogical to award full costs against an appellant on grounds of an unreasonable appeal, where the appeal is allowed. However, it might be possible to make a partial award for an element of unreasonable behaviour such as causing an adjournment,

31. You are only concerned with the principle of whether costs should be awarded, not the amount. However, where a **partial award** is awarded, or a full award has been sought but partial costs awarded, you must be specific in the Order as to what failing is being awarded against. E.g. 'It is hereby ordered that xx shall pay xx the costs of the appeal proceedings described in the heading of this decision *limited to those costs incurred in respect of the second reason for refusal related to the effect on living conditions*;..'

32. For an award to be made, the **two parts of the test have to be met** i.e. unreasonable behaviour that also results in unnecessary or wasted expense. The costs decision should specifically address, and clearly conclude on, these two questions.

33. If a **late application** has been accepted, the decision should say why.

34. Any **oral submissions** should be summarised as part of the decision so that there is a record of them.

35. In written rep cases, the application and response will already be a matter of record. There is therefore no need to rehearse the cases of the parties before setting out the reasoning.

36. If **both main parties apply for costs** against one another, this can be dealt with in one decision letter but remember to conclude separately on each application and give a separate decision. However, in more complex cases it might be easier to deal with them as separate decisions.

37. If **full and partial awards are sought** as alternatives, deal with these in one decision but distinguish clearly between them.

38. Be clear as to the matters on which costs were expended unnecessarily or wasted. Be sensitive to the losing party – if they have lost the appeal, this will be an added blow.

Uncertainty as to whether a Costs Application has been made

39. Paragraph A4 of Schedule A of the Annex says that an application for costs will contain a statement which clearly explains why the applicant considered unreasonable behaviour has occurred and how this has caused unnecessary or wasted expense taking into account the guidance in the Annex.

40. However, in written representation appeals, there may be occasions where it is not clear whether a costs application has been made e.g., the box in the appeal form is ticked 'yes' but no clear statement is provided, or a very short sentence is written in the box underneath. In such situations, the case officer will go back to the appellant to ask whether it is intended to provide a statement.

41. You should firstly check with the case officer that a statement has been sought. If no statement is provided, it will be reasonable to conclude that the appellant does not wish to purse a costs application. This should be explained in a procedural paragraph e.g.:

> "Although the appeal form indicated that the appellant(s) is/are making an application for costs, there is no statement that clearly explains the basis of any such application. It is therefore reasonable to conclude that the appellant(s) did not intend to pursue the costs application, and I have not considered the matter any further."

42. Sometimes, the 'no' box may be ticked but the appellant has made a vague or unsubstantiated statement alluding to a costs application. In such cases, you should make it clear in a procedural matter that an application has not been made. Where the 'no' box is ticked but a clear statement is provided, it is reasonable to consider that a costs application has been made. However, if the Council has not provided a rebuttal, you should go back to the parties confirming the submission of the costs application, and if necessary give the Council an opportunity to provide a late rebuttal.

The Costs Order (where awarding costs)

43. A costs award, where justified, is an order which can be enforced in the Courts. It states the broad extent of the expense the party can recover from the party against whom the award is made, and it sets out that settling the amount is for subsequent agreement between the parties. In the event of a failure to agree, the successful party can apply to the Senior Courts Costs Office for independent assessment.

Third parties

44. Any party who has taken part in proceedings may have costs awarded to or against them, including third parties and statutory consultees. Generally, costs either in favour or against third parties will only be made in exceptional circumstances e.g. following an adjournment due to unreasonable behaviour. In general, costs will not be awarded to or against third parties where unreasonable behaviour relates to the merits of the case. Costs may also be awarded to the Welsh Ministers where unnecessary expense has been incurred on their part.

Procedural matters

45. If an application for costs arises following the **withdrawal of an appeal**, PEDW will no longer have jurisdiction and the costs application will be dealt with by Welsh Government.

46. A claim for **an award of costs can be withdrawn** providing the application party formally notifies PEDW. However, this does not prevent another party from seeking costs, nor the potential for an Inspector to initiate an award against either party.

Written Representations

47. Whilst the case officer will aim to identify the **costs application material** in a separate costs folder, you will need to satisfy yourself that you have had regard to all the relevant costs material when writing the decision. Sometimes, costs evidence can be bound up in the appellant's or LPA appeal statement and may need to be extracted.

48. Where possible you should **issue the appeal and costs decision together**. However, where there are tight targets it can be acceptable, although not advisable because of the risk of prompting further costs submissions, to issue the appeal decision first so that the target is met.

Hearings / Inquiries

49. It is an expectation that costs applications are made at the earliest opportunity and in writing. However, at the opening of the event you should provide a final opportunity for parties to **apply for costs orally** or in writing prior to the closure of proceedings. In order to avoid a costs application being made on site, ask if there are any applications for costs before closing hearing/inquiry and departing for the site visit. If an oral submission is allowed, the parties against which the application is being made will be given the opportunity to respond orally. It may be necessary to allow the parties a short period of thinking time (10-15 minutes) to prepare an oral response. If both parties make applications these should be heard one after the other. You will need to take full notes of oral submissions. In most cases this will not lead to an adjournment, but it may be necessary in certain instances, in the interests of fairness.

50. In exceptional circumstances, you may allow a written response to an oral submission but in order to avoid a paper chase after the event you should give very clear guidance as to what is required, what will be accepted and by when.

51. If advance written submissions have been received from both sides, check that the submissions have been fully exchanged and that there is nothing to add. If you and both sides have had adequate opportunity to read and understand the written submissions. there is no need for these to be read out as a matter of course.

52. **Application at a site visit** - where an inquiry or hearing is kept open for a site inspection and a party then makes an application, in the interests of fairness you would have to determine if the relevant party could reasonably hear and respond to the application on site. If not, and they require time to consider the application, it may be that an adjournment is required before meeting back at the original venue or somewhere else suitable to properly hear the application and response.

Initiation of costs by Inspectors

53. If you have witnessed clear unreasonable behaviour which has incurred unnecessary or wasted expense, you can initiate an award of costs. This will usually happen after the event or after deadlines for written reps. To avoid a perception of pre-determination all such awards are to be considered by WG who will determine whether such an award should be made. If you are considering doing this you should discuss it with your Inspector Manager.

Re-determinations

54. Appeal and costs decisions are two separate decisions for which (usually) separate challenges must be made if both the decisions are to be quashed and re-determined. If only the appeal decision is successfully challenged, and unless the Court judgment clearly states that the Inspector's costs decision is also being quashed and remitted to the Welsh Ministers for re-determination, **the original costs decision remains extant and cannot be revisited** even if, in the context of re-determining the appeal, it seems odd.

55. However, you can entertain a fresh costs application made solely in connection with the re-determination of the appeal decision (as opposed to the need for the original costs decision to be re-determined following a successful challenge to that costs decision). It is important that any such costs determination does not stray into matters previously addressed in the earlier, and still extant, costs decision. In practice this is likely to relate only to procedural misconduct for the period post the High Court in the re-determination proceedings.

Called-in planning applications

56. A "called-in" planning application places the parties in a different position from that in a planning appeal. The local planning authority is not defending a decision to refuse planning permission, or a failure to determine the application within the prescribed period. In these circumstances, it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision. However, a party's failure to comply with the normal procedural requirements of inquiries, including aborting the process by withdrawing the application without good reason, risks an award of costs for unreasonable behaviour.

Costs in respect of Compulsory Purchase and Analogous Orders

57. Annex 12 section 4 of the DMM contains detailed guidance. Section 322C (Costs: Wales) of the Town and Country Planning Act 1990 applies to any application, appeal or reference to the Welsh Ministers under the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 whether it is considered at an inquiry, hearing or on the basis of written representations. As such, section 322C applies to proceedings which include, but are not limited to Orders to revoke or modify a planning permission, listed building consent, hazardous substances consent, continuation of a hazardous substances consent on change of control of land, and express consent for adverts; and discontinuance of use or alteration or removal of buildings orders.

58. An order or proposal will generally be considered to be analogous to a compulsory purchase order if its making, or confirmation, takes away from the objector some right or interest in land for which the statute gives them a right to compensation.

Charting arrangements

59. You will normally be charted half a day per costs application. For inquiries and hearings where applications are not known about in advance, you should ask for extra reporting time. In written representation cases, charting time will be added as soon as the case officer becomes aware of the costs application. In all cases, if extra reporting time is required you should discuss this with your Inspector Manager and Charting Officer.