Ministry of Housing, Communities & Local Government

David Seaton
Managing Director
PCL Planning
13a-15a Old Park Avenue
Exeter
Devon
EX1 3WD

Our ref: APP/P1133/W/18/3205558

3 June 2020

Dear Sir,

LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 AND 320
APPEAL BY ANTHONY, STEVEN & JILL REW
LAND AT WOLBOROUGH BARTON, COACH ROAD, NEWTON ABBOT, TQ12 1EJ
APPLICATION REF: 17/01542/MAJ

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying his decision on the appeal as listed above.

2. This letter deals with your client's applications for:

    i. a full or partial award of costs against the Council; and

    ii. a partial award of costs against the Torbay and South Devon NHS Trust

    The application as submitted and responses by the Council and by the Torbay and South Devon NHS Trust 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

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Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.

4. For the application for full or partial costs against the Council, the Inspector's conclusions are stated at CR28–39. She recommended that your client's application for a full or partial award of costs be refused.

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 her report and accepts her recommendation. Accordingly, he has decided that a full or partial award of costs against the Council, on grounds of 'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.

6. For the application for partial costs against the Torbay and South Devon NHS Trust, the Inspector's conclusions are stated at CR72-77. She recommended that your client's application for a partial award of costs be refused.

7. 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 her report and accepts her recommendation. Accordingly, he has decided that a partial award of costs against the Torbay and South Devon NHS Trust, on grounds of 'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.

8. These decisions on your applications for awards 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.

9. Copies of this letter have been sent to the Council and the Torbay and South Devon NHS Trust.

Yours faithfully,

Andrew Lynch

Andrew Lynch
Authorised by the Secretary of State to sign in that behalf

The Planning Inspectorate

Costs Reports to the Secretary of State for Housing, Communities and Local Government

by Frances Mahoney MRTPI IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Date 2 April 2020

TOWN & COUNTRY PLANNING ACT 1990

LOCAL GOVERNMENT ACT 1972

TEIGNBRIDGE DISTRICT COUNCIL

APPEAL BY ANTHONY, STEVEN & JILL REW

Inquiry commenced on 26 March 2019

Land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ

File Ref: APP/P1133/W/18/3205558

Cost application A
File Ref: APP/P1133/W/18/3205558
Land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ

- 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 Anthony, Steven & Jill Rew for a full/partial award of costs against Teignbridge District Council.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for:

  Outline proposal for mixed use development comprising circa 1210 dwellings (C3), a primary school (D1), up to 12650 sq m of employment floorspace (B1), two care homes (C2) providing up to 5,500 sq m of floorspace, up to 1250 sq m of community facilities (D1), a local centre (A1/A3/A4/A5) providing up to 1250 sq m of floorspace, open space (including play areas, allotments, MUGA) and associated infrastructure (Means of Access to be determined only); and

  Full proposal for a change of use of existing agricultural buildings to hotel (C1), restaurant (A3) and bar/drinking establishment (A4) uses, involving erection of new build structures, construction of an access road and parking, plus other associated conversion and minor works.

Summary of Recommendation:
The application for both a full and a partial award of costs be refused.

Cost application B
File Ref: APP/P1133/W/18/3205558
Land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ

- 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 the Abbotskerswell Parish Council & Wolborough Residents' Association for a full award of costs against Anthony, Steven & Jill Rew.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for:

  Outline proposal for mixed use development comprising circa 1210 dwellings (C3), a primary school (D1), up to 12650 sq m of employment floorspace (B1), two care homes (C2) providing up to 5,500 sq m of floorspace, up to 1250 sq m of community facilities (D1), a local centre (A1/A3/A4/A5) providing up to 1250 sq m of floorspace, open space (including play areas, allotments, MUGA) and associated infrastructure (Means of Access to be determined only); and

  Full proposal for a change of use of existing agricultural buildings to hotel (C1), restaurant (A3) and bar/drinking establishment (A4) uses, involving erection of new build structures, construction of an access road and parking, plus other associated conversion and minor works.

Summary of Recommendation:
The application for a full award of costs be refused.

Cost application C
File Ref: APP/P1133/W/18/3205558
Land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ

- 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 Anthony, Steven & Jill Rew for a partial award of costs against Torbay and South Devon NHS Trust.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for:

  Outline proposal for mixed use development comprising circa 1210 dwellings (C3), a primary school (D1), up to 12650 sq m of employment floorspace (B1), two care homes (C2) providing up to 5,500 sq m of floorspace, up to 1250 sq m of community facilities (D1), a local centre (A1/A3/A4/A5) providing up to 1250 sq m of floorspace, open space (including play areas, allotments, MUGA) and associated infrastructure (Means of Access to be determined only); and

  Full proposal for a change of use of existing agricultural buildings to hotel (C1), restaurant (A3) and bar/drinking establishment (A4) uses, involving erection of new build structures, construction of an access road and parking, plus other associated conversion and minor works.

Summary of Recommendation:
The application for a partial award of costs be refused.

Cost application D
File Ref: APP/P1133/W/18/3205558
Land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ

- 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 Torbay and South Devon NHS Trust for a partial award of costs against Anthony, Steven & Jill Rew.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for:

  Outline proposal for mixed use development comprising circa 1210 dwellings (C3), a primary school (D1), up to 12650 sq m of employment floorspace (B1), two care homes (C2) providing up to 5,500 sq m of floorspace, up to 1250 sq m of community facilities (D1), a local centre (A1/A3/A4/A5) providing up to 1250 sq m of floorspace, open space (including play areas, allotments, MUGA) and associated infrastructure (Means of Access to be determined only); and

  Full proposal for a change of use of existing agricultural buildings to hotel (C1), restaurant (A3) and bar/drinking establishment (A4) uses, involving erection of new build structures, construction of an access road and parking, plus other associated conversion and minor works.

Summary of Recommendation:
The application for a partial award of costs be refused.

Cost application A

The submissions for the appellants[1]

1. The appellants seek both a full award of costs[2] against the Council[3] and in the alternative a partial award in relation to the defence of amongst other matters, heritage, highway impact, and air quality.

2. Firstly, the Council failed to determine the application within the required time limit. Planning Practice Guidance (PPG) sets out at 16-048[4] that:

   If it is clear that the local planning authority will fail to determine an application within the time limits, it should give the applicant a proper explanation. In any appeal against non-determination, the local planning authority should explain their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period.

3. The Council has not provided any proper explanation for not reaching a decision within the relevant time limit nor did they provide putative reasons for refusal. Its statement of case repeated various comments made by statutory consultees and others, without providing clarity as to what it was the Council itself was saying were tenable reasons for refusal as opposed to matters for conditions/obligations.

4. Secondly, the Council's withholding of planning permission falls within the first example of LPA substantive unreasonableness in PPG para. 16-049: *preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations*.

5. The Council's Statement of Case gave the impression that it may take a broader range of points against the appeal, including heritage and the absence of a Local Planning Authority led development framework plan for the NA3 allocation (albeit the opaqueness of the Statement of Case meant that the nature of the Council's case on these points was unclear). When proofs were exchanged Ms Taylor's[5] proof added the further contention that there would, after 300 dwellings, be a 'severe' impact on highway capacity in the absence of a link road (Council officers having recommended a 500 dwelling trigger for the link road in relation to the duplicate application, which the appellants did not and do not contest), as well as making associated points on air quality.

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[1] Inquiry Doc 44.

[2] If a full award of costs is not made, a partial award of costs is sought in the alternative in relation to the matters set out at paras 5-6 of this Report.

[3] Minus any costs awarded against the Torbay and South Devon NHS Trusts for its procedurally unreasonable conduct during the appeal.

[4] PPG Appeals – Advice on planning appeals and the award of costs.

[5] Senior Transport Planner Devon County Council.

6. The appellants had to produce evidence to deal with all these points: contained in Mr Seaton's main proof and the appended reports on design/master planning (including how heritage was taken into account) and air quality, and Mr Lacey's rebuttal. Time was taken up at the Inquiry too on these points, eg in cross-examination of Ms Taylor.

7. During the Inquiry the Council's case retreated to the Greater Horseshoe Bat (GHB)/Special Area of Conversation (SAC) issue. Mr Perry accepted in cross-examination that save in relation to this issue, the appeal scheme on an allocated site is in accordance with the development plan.

8. The Council's case on the GHB/SAC issue is substantively unreasonable. The appellants rely on their closing submissions[6] in this regard and highlights in particular the following:

    a. It was unreasonable for the Council to have failed to appreciate that the critical question for Habitats Directive/Regulations compliance is that posed at paragraph 33 of the appellants' closing submissions, namely: having regard to the safeguards that can be imposed by way of planning conditions and the ability of the Council to scrutinise the details of the development at the reserved matters stage (to which Regulation 70(3) of the Habitats Regulations expressly says regard must be had), can the Secretary of State be satisfied beyond reasonable scientific doubt that the appeal scheme would not harm the ability of GHBs to continue to travel between the component parts of the SAC "*at low levels"* in a "*broadly dispersed*" manner (descriptions with which the Council's witness Mrs Mason agreed) across the wider landscape within which the appeal site lies?

    b. In answering this question, it was unreasonable of the Council to insist, at this outline stage, on the provision and/or assessment of details which have been entirely legitimately left until the reserved matters stage[7]. In cross-examination she said that she wanted to know now, at this outline stage, *the details of how adverse effects can be ruled out at the reserved matters stage*. That is simply not a requirement of the Habitats Directive or Regulations. It would require the submission of a full planning application in all but name, rendering the concept of outline planning permission of no practical purpose. It is also inexplicably inconsistent with the Council's failure to exercise its power under Article 5(2) of the Town and Country Planning (Development Management Procedure) Order 2015 which allows a Council if so presented with an outline application to require the submission of further details before the application is determined.

[6] Inquiry Doc 55.

[7] See for example paras 6.16-6.16 and 7.4 of Mrs Mason's proof, which require an assessment of collision impacts and severance impacts, and mitigation thereof, in relation to the internal roads of the development; para 7.5 which requires mapping and assessment of lighting within the site, the location and details of which is inextricably linked to the final layout; and the details referred to at paras 7.6(a)-(k) which also all relate to matters left over for subsequent approval by the Council (as she accepted in cross-examination).

c. As for the Council's allegation that further bat surveys need to be undertaken before permission can be granted due to the passage of time since the original surveys, it is important to bear in mind at the outset that this issue has only arisen because of the delay caused by the Council refusing to determine the application. At the time when the application was before the Council, the surveys were up to date. Therefore, this issue cannot excuse the Council's non-determination of the original planning application, now the subject of this appeal.

d. The Council's evidence and submissions fail to grasp that, given (i) the agreed certainty that the bats use the site as part of a wider landscape through which they travel between the component parts of the SAC in a manner that is *widely dispersed* and *at low levels* and (ii) the ability of the Council at the reserved matters stage to ensure that the final form of the development will enable this function to continue, is what matters, not the precise number of bats using the site on any particular survey day(s) or the precise part(s) of the site that they used on those day(s).

e. It is no justification for the Council to say that it was relying on Natural England (NE), since NE had at the Local Plan Examination not had any issue with the principle of the development (and the outline application here is again only concerned with the principle of the development). The Council's witness Mrs Mason did not know, and had not sought to find out, what had prompted NE to change its stance. If the Council didn't know why NE had changed its stance, that change of stance cannot have provided a reasonable basis for the Council to withhold permission. NE's position was untested at the Inquiry and was also misconceived for the same reasons as the Council's position was.

Response for the Council[8]

9. The Council does not accept that its conduct amounts to unreasonable behaviour and, in any event, its actions have not caused the appellants to incur any unnecessary expense.

10. The Costs Application is put on three grounds:

a. it is contended that the Council has failed to provide any explanation (or proper explanation) for its non-determination of the appeal application;
b. that the Council was substantively unreasonable in not granting planning permission; and
c. that if a full award is not justified then a partial award is justified in relation to non-GHB matters.

11. The PPG[9] sets out that *an application for costs will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted*

[8] Inquiry Doc 45.
[9] PPG Appeals – Advice on planning appeals and the award of costs.

expense[10]. This reflects the need for both conditions to be satisfied in order for an award of costs to be justified[11]. The Costs Application heavily focuses on the first condition and, in so far as it addresses the second condition at all, proceeds on the premise that not only will the substantive appeal inevitably succeed but that no other outcome could be reasonably contemplated by the decision maker.

12. If, as the Council has maintained in its Closing Submissions[12], the substantive appeal is dismissed because the appellants have failed to provide sufficient information to enable a grant of permission to satisfy the Habitats Directive and the Habitats Regulations, it will be that failure which has resulted in the appellants incurring all of the costs of the appeal to no good effect, and the essential basis for the Costs Application will fall away. However, even if the Council's case is not accepted, it by no means follows that the Council has acted unreasonably in putting it forward. At all stages the Council has acted with the benefit of professional advice when dealing with the appeal proposal and it was entirely reasonable for the Council to put forward a case based on that advice.

a. Explanation for non-determination

13. The appellants have quoted from part of ID16-048-20140306 but have not quoted the most relevant part:

> *If an appeal in such cases [ie non-determination cases] is allowed, the local planning authority may be at risk of an award of costs, if the Inspector or Secretary of State concludes that there were no substantive reasons to justify delaying the determination and better communication would have enabled the appeal to be avoided altogether.*

14. In the present case, the principal parties have a fundamental disagreement about the proper operation of the Habitats Directive and the Habitats Regulations, having regard to the scope of the contentious outline planning permission element of the hybrid appeal application. This disagreement, based on the advice of the respective parties' ecological advisers and legal advisers, is rehearsed in full detail in the respective Closing Submissions of the principal parties[13]. The Council maintains its position, that the grant of planning permission (even recognising the subsequent controls at the reserved matters stage) is not a legally permissible or Habitats Directive/Regulations-compliant option. If the Secretary of State agrees with the Council there is no question of the appeal being *allowed*, and the case will not fall within the ambit of the advice at ID16-048-20140306 at all.

15. However, even if the Secretary of State ultimately concludes that a planning permission can be lawfully granted, it cannot be said that the Council's contrary case (which is, of course, fully supported in this regard by Natural England as the Government's statutory advisor on Habitats Directive/Regulations matters), does not set out or provide *substantive reasons* to justify delaying the determination

[10] ID16-032-20140306.
[11] ID16-030-20140306.
[12] Inquiry Doc 52.
[13] Inquiry Docs 52, 53 and 55.

until the provision of the required information which the Council contends is needed to show that the appeal proposal will not have an adverse effect on the integrity of the South Hams SAC. The Council has fully articulated those reasons, both by reference to the relevant case law and by reference to the specific facts concerning the appeal site and the relationships between the GHBs using the site and the South Hams SAC. Whether or not those reasons are ultimately accepted by the Secretary of State, it cannot be argued that they provide *no substantive reasons* to explain the Council's stance. Thus, even in this scenario, there is no basis for an award of costs.

16. With specific reference to the Council's provision of an explanation of the reasons for the non-determination, this is set out in section 3 of the Proof of Ian Perry, which rehearses the application history, including the changes made to the appeal proposals during the course of its consideration by the Council, the views expressed by consultees, and the extent to which the Council sought to resolve outstanding issues through consideration of a duplicate application. Whilst officers were prepared to support that application, it was made clear that even this could only be on the basis of the provision of further information in relation to GHBs (both survey data and an adequate GHB mitigation plan informed by such survey data). In other words, the Council has never taken the view that a planning permission could be granted on the state of knowledge about the effects of the proposals on the SAC up until the close of the Inquiry.

17. However, even if the view were to be taken that, instead of seeking to resolve issues by requesting further information (either on the appeal application or on the duplicate application), the Council should have proceeded to determine the appeal application, it remains the case that, based on the professional advice received by the Council from its ecological and legal advisers, the appropriate course in any such determination would have been to refuse planning permission. That would have meant that, if the appellants had wished to challenge the Council's position, an appeal would have been inevitable. Better communication between the parties would not have avoided the appeal because of the fundamental disagreement between the parties on the substantive GHB/SAC issue. It is therefore not possible to conclude that the Council's non-determination, even if thought to be unreasonable in the circumstances (which the Council does not accept), has been causative of any unnecessary expense.

b. Substantive unreasonableness

18. It is not tenable for the appellants to argue that the Council's position is one of substantive unreasonableness. As set out in the Council's Closing Submissions, the appellants accept that the proposal needs to satisfy the tests in the Habitats Directive and the Habitats Regulations in order to be granted planning permission, and that if the proposal cannot satisfy those tests it cannot comply with Policy NA3(n) of the adopted Local Plan, or be in accordance with the development plan, or be consistent with national policy (para 177 of the National Planning Policy Framework (the Framework)).

19. Without repeating its Closing Submissions, the Council does not accept that it has misunderstood the key questions that need to be considered. Rather, it is the appellants who have wrongly elided (i) the principle of development established (without the benefit of any site surveys) by the allocation of the NA3 site at the

plan-making stage, but expressly conditional upon and subject to the subsequent provision of an appropriate bespoke GHB mitigation plan (which would need to be informed by adequate site surveys) prior to any grant of permission, in order to satisfy Policy NA3(n), with (ii) the principle of development in relation to the quantum of 1210 dwellings (and associated development) on the particular application site that would be established by any grant of planning permission as sought in the present appeal. Despite the appellants' repeated endeavours to treat the two positions as the same, it is abundantly clear that they are different and require different levels of evidence in order to satisfactorily discharge the requirements of the Habitats Directive and the Habitats Regulations. This is reinforced by the terms of Policy NA3(n) which expressly requires more at the planning permission stage than was needed to support the Local Plan allocation.

20. The Council's approach does not render the concept of an outline planning permission and reserved matters *otiose*, as claimed by the appellants. It simply means that, in the context of a case where the Habitats Directive and the Habitats Regulations are undoubtedly engaged, and Policy NA3(n) is very explicit about its requirement for a bespoke GHB mitigation plan prior to any grant of planning permission, an applicant/appellant has to provide more specificity on matters that are germane to how the development would impact on GHBs than in a bare outline case. That is neither surprising (given the rigours of the HRA tests) nor inconsistent with Regulation 70(3) of the Habitats Regulations.

21. It is noted that the Costs Application (para 8 c[14]) tacitly concedes that the available GHB survey data is no longer up-to-date, but then seeks to blame the Council for this state of affairs. This is, of course, a complete red herring. The obligations of the Habitats Directive and the Habitats Regulations are required to be satisfied in the light of the actual circumstances of the case. If there is inadequate survey evidence to allow those obligations to be met, it does not matter whether that is due to the applicant's default or due to another party. In any event, the Council does not accept that its non-determination can be regarded as *wrong-doing*, and furthermore it is quite clear from Regulation 63(2) of the Habitats Regulations that it is for the applicant/appellant to provide the necessary information to the competent authority to enable an appropriate assessment to be undertaken. It is also abundantly clear that since 2017 both the Council and Natural England have consistently advised the appellants of the need to provide further and up-to-date survey data. The fact that the appellants have chosen not to do so cannot be laid at the Council's door.

22. However, even if the Secretary of State is ultimately satisfied that he has sufficient information to grant planning permission, it cannot be said to be *substantively unreasonable* for the Council to have taken a contrary view. Its position was supported by its expert ecological advice, by the advice of Natural England, and by its legal advisers, having regard to the relevant regulatory provisions and the applicable European and domestic case law. For the Council to act on that professional advice cannot be said to be unreasonable.

23. It is quite clear that the claim in the Costs application for a full award of costs is misconceived. There has been no unreasonable behaviour by the Council and in

[14] Inquiry Doc 44.

any event, given the regulatory requirements imposed by the Habitats Directive and the Habitats Regulations, its actions have not caused any unnecessary expense to be incurred by the appellants. The appellants have incurred expense because they chose to appeal but without providing the information needed to allow an appropriate assessment to be properly undertaken by the competent authority.

24. *Partial Award* - This application would seem to relate to the non-GHB elements of the case. The Council does not accept that its conduct of its case in relation to heritage, highways, or master-planning was unreasonable. In relation to heritage, the Council had justified concerns about the adequacy of the heritage assessment undertaken by the appellants, and commissioned its own heritage assessment, and in the light of that latter assessment was able to conclude that heritage matters could be adequately addressed by the proposed conditions. All of this is explained in the Proof of Ian Perry and the supporting appendices provided by Maureen Pearce. No Inquiry time was taken on heritage matters by the Council (obviously there was a separate heritage case raised by Historic England that the appellants had to deal with in any event).

25. In relation to highways, it will be recalled that, after the submission of the main proofs (in line with the Inquiry timetable) the appellants submitted (via rebuttal evidence on 20 March 2019) new traffic data and junction capacity assessments, and it was only in the light of this new evidence that Devon County Council, as highway authority, was able to revise its position on the timing of the provision of the link road. It cannot be unreasonable for a party's position to change in the light of the receipt of new technical information. The revised position was explained by Ms Taylor in her evidence, together with the reasons for it. The Council, and its highways witness, reacted promptly to the receipt of the new information and there was no unreasonable behaviour.

26. In relation to master-planning, this had been the subject of lengthy discussions and negotiations during the application process, with iterations of a masterplan evolving during the consideration of the application. Given the requirements of Policy NA3(a) and the importance of the document to the proposed development, it was not unreasonable for the Council to give close scrutiny to its contents, and to the processes that led to its production. The Council also undertook its own master-planning exercise, as explained in paras 6.6 to 6.16 of the Proof of Ian Perry, seeking to pro-actively test sustainable options for overall delivery of the allocated site. In the event, the Council was satisfied that the final iteration of the appellants' masterplan was sufficiently close to its aspirations for the site that further matters could be left as reserved matters. This was a reasonable stance to take. It will also be noted that no time was spent at the Inquiry on this matter.

27. The Council does not therefore accept that any partial award of costs is warranted.

Conclusions- The appellant's Costs application against the Council[15]

28. The Planning Practice Guidance states that irrespective of the outcome of an appeal, costs may only 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 associated appeal process. The same guidance makes it clear that it is necessary for local planning authorities, when failing to determine an application for planning permission, to give the applicant a proper explanation, and further in any appeal against non-determination, the local planning authority should explain their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period. If they have failed to do so they are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal. Failing to produce evidence to substantiate a reason for refusal on appeal, or making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis, are cited as examples[16].

29. The appellants' claim centres on the following grounds:

- whether the Council has provided a proper explanation for not reaching a decision, and
- reasons why permission would not have been granted (putative reasons for refusal).

30. The reason for the non-determination of the planning application stem from the fundamental disagreement between the parties of the proper operation of the Habitats Directive and the Habitats Regulations. This disagreement was based on expert advice on both sides. This dispute was maintained going forward into the Inquiry and was examined over the course of the consideration of evidence leading to the Competent Authority[17] making his decision.

31. Such disputes are not uncommon and when, what at face value appear to be intransigent positions are maintained, so progress forward becomes stifled. In such circumstances applicants often feel they have no alternative but to move onto the next stage of the process, that being an appeal. However, those entrenched positions were on both sides in this case and it was by means of the process of evidential examination at the Inquiry that a decision could be reached.

32. The Council has made it clear that the principle of development is not a matter of dispute between the Council and the appellants[18]. It is also accepted that the appeal site forms the largest part of the mixed-use allocation NA3 in the adopted Teignbridge Local Plan (2014)[19].

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[15] Inquiry Doc 44, 45 – the Costs claim solely relates to the Outline part of this hybrid appeal proposal.
[16] Paragraph: 049 Reference ID: 16-049-20140306
[17] In this case the SofS.
[18] Inquiry Doc 8 para 1.
[19] Both the Council and Devon County Council supported the allocation at the LP stage.

33. The Council's Statement of Case[20] refers to reasons for non-determination centred on the Link Road delivery in the context of timing and creation of a sustainable transport network, the impact on the GHBs in the context of whether there was sufficient information to make that assessment under the Habitat Regulations, heritage impacts, whether the promoted Masterplan fulfils the requirements of LP Policy NA3, and finally, in the then absence of a mechanism for delivery whether the proposal would deliver the obligations required in order to make the development acceptable (S106 agreement). The Council's Statement of Case makes it quite clear the reasons why permission would not have been granted and the Proof of Mr Perry picks up the same themes at section 3.

34. Following the submission of the parties' Statements of Case, through mutual negotiations those disputed matters were narrowed, and various Statements of Common Ground produced which re-focused the Council's case to a reduced number of issues between the parties. At the opening of the Inquiry the Council made it clear what their concerns were as expressed in their Opening[21]. Through the examination of evidence, as the Inquiry progressed, the submission of an acceptable and completed S106 agreement, and the final submission of survey work in relation to GHBs, submitted by the Council after the close of the Inquiry, some matters in dispute were dealt with.

35. In these circumstances the Council did not prevent or delay development which should clearly be permitted. As already indicated the proposal was in step with the LP NA3 allocation, but the Council were entitled to find that at the time of consideration of the proposal, insufficient evidence had been submitted to enable them, as the then Competent Authority, to make a determination as to whether the proposal would have an adverse effect on the integrity of the South Hams SAC.

36. The appellants highlight the Council's initial promoted position on heritage matters, as expressed in the Council's Statement of Case, which indicates some concern in relation to the level of detail within the application being insufficient to determine the level of harm to the range of heritage assets affected by the proposal, more particularly by the means of access. The Council also aligns itself to some extent with the considerations of Historic England. However, by the time the parties had reached the Inquiry room, the Council was no longer associating itself with any opposition on heritage grounds, considering these matters could be resolved through conditions and at reserved matters stage.

37. It could be said that the movement of the Council from promoting a heritage concern, to disassociating itself from the Historic England position, could be considered tentatively unreasonable. However, in this appeal special regard to the desirability of preserving listed buildings or their settings or any features of special architectural or historic interest which they possess, and special attention being paid to the desirability of preserving or enhancing the character or appearance of conservation areas, had to be considered due to the statutory duty

[20] Submitted Oct 2018 – on appeal file-green folder.
[21] Inquiry Doc 8.

placed upon the decision-maker[22]. Therefore, the heritage case presented by the appellants to answer the case of Historic England and initially the Council was required to be examined in any case to enable the decision-maker[23] to come to a view in this regard. Therefore, the appellants were not put to any wasted expense in this regard.

38. Both highway and air quality matters were similarly initially raised by the Council. Air quality was a major concern for the Rule 6 party and evidence was heard in this regard. Therefore, the appellant had to offer a defence on this ground in any event. Similarly, highways matters were pursued by both the Rule 6 party and third parties and were aired by means of a round table discussion. The position of the County Council did shift during the examination of the evidence in relation to the provision of the bus service and to some extent the timing for the delivery of the Link Road. This was as a result of a mutual examination of the evidence and an acceptance and realisation of an opposing position. I do not consider this to be unreasonable behaviour, more the outcome of skilful examination of evidence in the Inquiry setting leading to the resolution of disputed issues.

39. For all of the above reasons I conclude that the Council has not behaved in such a manner as to substantiate a finding of unreasonable behaviour which has directly caused another party to incur unnecessary or wasted expense in the appeal process sufficient to justify either a full or a partial award of costs.

Cost application B

Submissions of the Abbotskerswell Parish Council & Wolborough Residents' Association[24]

40. Abbotskerswell Parish Council and Wolborough Residents' Association (Rule 6 Party) were granted Rule 6 status on 19 February 2019. They have participated in the appeal throughout and have incurred significant costs in employing professional legal and expert advice in doing so.

41. They have maintained the position throughout the appeal and expressed the point clearly in Closing submissions[25] that the appellants have provided insufficient environmental information for the appeal to be determined. The Rule 6 Party also made submissions that the significant adverse effects of the proposal on for instance air quality, biodiversity, heritage and other environmental effects were such that planning permission should be refused in any event; there was an overriding concern that there was a fundamental lack of information being provided by the appellants. The failure to provide either sufficient and/or adequate information is such that if the Secretary of State were to grant permission on the evidence presented, that decision would inevitably be unlawful

[22] Section 16(2), 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.
[23] Secretary of State.
[24] Inquiry Doc 46.
[25] Inquiry Doc 53.

by, amongst other things, a breach of the EIA Directive 2011/92/EU, the EIA Regulations 2011 and the Habitats Regulations 2017.

42. The Rule 6 Party has made it clear to the appellants throughout the Inquiry that the information provided is insufficient and inadequate. This included:

    1) Their letter to the Inspectorate of 26.2.19, copied to the appellants;
    2) A further letter on 18.3.19 again expressing concern that there was too much critical information that had not been made available;
    3) In their Opening submissions[26] highlighting in yet more detail where there was an absence of information; and
    4) In their response to the publication of the ES Addendum (April 2019) and Revised NTS (April 2019).

43. On each occasion, the Rule 6 Party suggested that the appeal should be withdrawn or adjourned until satisfactory information would be provided. They considered that the appellants' agreement to submit further information on the ES in March 2019 may address the critical concerns. However, the information provided was superficial in nature, at best.

44. Moreover, the appellants were reminded of the need to provide relevant information in the Inspectorate's letter to them of 21.12.18 which noted: … *court cases which have stressed the need for all the relevant environmental information in an ES to be comprehensive and easily accessible*.

45. The Rule 6 Party recognise the normal costs rules in relation to Inquiry costs. However, they submit that the appellants' persistent failure to acknowledge and address the significant lack of environmental information provided in the Appeal is not only contrary to their obligations under the EIA Directive it is unreasonable and has put the Rule 6 Party to considerable unnecessary expense. Most, if not all the costs incurred by the Rule 6 Party could have been avoided had the appellants acknowledged, as early as 21.12.18, that they were not in fact providing the information that was lawfully required in legislation and which has been underlined as necessary by the Courts.

46. In the light of the above, and having regard to the closing submissions of Rule 6 Party[27], which highlights in detail the lack of information, the Rule 6 Party invite the Secretary of State to make a full costs award in their favour such that the appellants pay the costs arising out of and incidental to this appeal.

Response by the appellants[28]

47. The Rule 6 Party's application is wholly misconceived. It does not identify any substantive or procedural unreasonableness by the appellants in the conduct of

[26] Inquiry Doc 9.
[27] Inquiry Doc 53.
[28] Inquiry Doc 47.

its appeal or at the Inquiry. It is founded on alleged shortcomings in the appellants' Environmental Statement and Addenda, and the costs that the Rule 6 Party says it has incurred in pointing out those alleged shortcomings. However, there is nothing unusual about a third party pointing out alleged shortcomings in an Environmental Statement. That is inherent in the process of consultation under the EIA Regulations. See R (Blewett) v. Derbyshire County Council [2004] Env. L.R. 29 per Sullivan. at paragraph 41 (emphasis added):

The Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an EIA application' (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in R v North Yorkshire County Council ex parte Brown [2000] 1 A.C. 397 at page 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations…, but they are likely to be few and far between.

48. As is clear from the above paragraph, even if (which is strongly denied) there is any merit in the Rule 6 Party's criticisms of the Environmental Statement and Addenda, the fact that shortcomings have been identified in the Environmental Statement is illustrative not of something having gone wrong in the EIA process, but of the process operating as it is intended to operate.

49. For the reasons given in the appellants' closings[29], the Rule 6 Party's criticisms are without merit; and there is no clear and convincing explanation of how any alleged unreasonableness has caused the Rule 6 Party undue expense. As noted in the appellants' closing submissions, the EIA process is not an obstacle course - even if the Planning Inspectorate had agreed before the Inquiry with the Rule 6 Party that the current Environmental Statement and Addenda were inadequate, this was always remediable and could never ultimately have prevented the appeal and Inquiry proceeding. Therefore, the suggestion in the Rule 6 Party's Costs application that their entire Inquiry costs would have been avoided is manifestly incorrect.

Conclusions- The Rule 6 Party's Costs application against the appellants[30]

50. The Planning Practice Guidance[31] states that irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved

[29] Inquiry Doc 55.
[30] Inquiry Doc 46, 47 – the Costs claim solely relates to the Outline part of this hybrid appeal proposal.
[31] Planning Practice Guidance: Appeals – ID:16.

unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the associated appeal process. The same guidance makes it clear that it is necessary for parties to follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case. If they have failed to do so they are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal or the procedure of the appeal. Failing to produce evidence to substantiate a reason for refusal on appeal, or making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis, are cited as examples[32].

51. The Rule 6 Party are seeking a full award of Costs from the appellants, taking the position that the appellants have provided insufficient environmental information for the appeal to be determined. This is in particular respect of a need, in their view, to submit further information on the Environmental Statement which should be comprehensive and easily accessible.

52. The consultation process under the EIA Regulations does allow for clarification, omissions and the need to submit further detail to be highlighted. This, in my view, is a fundamental part of the securing of a body of evidence which can appropriately inform a decision-maker.

53. In my experience it is not uncommon for Environmental Statements to be less than perfect. Through the consultation process they do, however, start conversations between interested parties such as Natural England, which inform further evidential submissions. Perfection is something we can all strive for but sometimes, taking a common-sense approach, being good enough is what is realistic.

54. In this case other than the impact on the GHBs (SAC) only the Rule 6 Party made any allegations of deficiency in the generality of the environmental assessments submitted and subsequently supplemented[33]. The Council and other statutory consultees were able to come to reasoned conclusions on the environmental effects of the appeal proposal[34].

55. The Rule 6 Party were right to highlight any concerns they might have with the Environmental Statement. They chose to continue to pursue their concerns that the Environmental Statement was deficient through the appeal process, which is their right. They also made submissions upon and offered evidence in other matters such as the prematurity of the development, impact on local services and resources, air quality, biodiversity and heritage.

56. To avoid the delay of development identified within an adopted Local Plan which has already been tested through a Local Plan Examination and subjected to a raft of environmental testing at that stage, the body of environmental evidence should be considered in the round, including the Environmental Statement and Addenda. In the case of this appeal this includes the evidence submitted both

[32] Paragraph: 049 Reference ID: 16-049-20140306
[33] At the appeal stage.
[34] Save for the impact upon the GHBs (SAC).

before, at and after the Inquiry. It is the totality of this environmental evidence which will be considered by the decision-maker to evaluate the proposal in this context and move forward to a decision, taking into account the relevant Directives and Regulations. However, it is for the decision-maker to decide whether the quality and extent of the Environmental Statement and other informative material is good enough to allow for an appropriately informed decision. This matter will be resolved by the Secretary of State.

57. The associated Appeal Report reaches a recommendation that there is sufficient environmental information for the appeal to be determined. Whether this is accepted by the decision-maker is another matter, but whilst a perceived deficiency in information was identified by the Rule 6 Party, which they felt compelled to pursue through the appeal process, the appellants were continuing to work with the Council and other statutory consultees to expand on the environmental evidential base information. The Council also contributed to this through their own evidence, including the up to date GHB survey. From the questioning of some Inquiry witnesses it was clear that some of the extended submitted appeal evidence was not familiar to them.

58. I do not consider that the appellants did not respond when the possible deficiencies in the submitted environmental information was raised. Supplementary information/evidence was submitted. The issue of whether the environmental information was sufficient to test the proposal against the Habitats Directive and the Habitats Regulations, in order to be granted planning permission, was a narrowing point before, during and after the Inquiry. I am satisfied the proposal would have ended up in the Inquiry room in any event due to the dispute between experts on the impact on the GHBs alluded to in Costs application A above. The Rule 6 Party continued their opposition, in the main, to the totality of the environmental information, even in the face of relevant additional information/evidence.

59. Therefore, for all of the above reasons I conclude that the appellants have not behaved in such a manner as to substantiate a finding of unreasonable behaviour which has directly caused another party to incur unnecessary or wasted expense in the appeal process sufficient to justify a full award of costs.

Cost application C

Submissions of the appellants[35]

60. The National Health Service Financial Trust (NHSFT) is not a statutory consultee, nor is it a Rule 6 Party.

61. PPG 16-056 provides:

Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules, may be liable to an award of costs if they behave unreasonably…

[35] Inquiry Doc 48.

It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an appeal has been withdrawn without good reason or where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct.

62. In accordance with this guidance, this costs application is directed at the procedural unreasonableness of the NHSFT.

63. Despite being a substantial body and being professionally represented by solicitors and counsel, and despite its request for a contribution being a seven-figure sum, the NHSFT's first participation in this application/appeal came without warning only days before the Inquiry started, well after the time limits for comments on the application and appeal had expired. No satisfactory explanation has been provided.

64. The way the NHSFT's case was then presented was highly irregular and unsatisfactory. At the March session of the Inquiry oral evidence was given by Mr Grute and representations were made by counsel, but relevant documentation was not provided (such as the governing contractual arrangements or the legislative framework under which the NHSFT operated). The appellants responded during the adjournment between the March and June sessions of the Inquiry, as it was plainly entitled to do, both in accordance with the general principle that the appellants have the last word, and in light of the belated nature of the NHSFT's objection and Mr Grute's evidence. Amongst other things, that response pointed out that the NHSFT's evidence and representations had not presented an accurate and complete picture of its obligations and its relationship with other NHS bodies. Despite the principle that the appellants have the last word at inquiries, the NHSFT then produced in response – provided to the appellants at 16:12 the day before the Inquiry resumed in June – 20 pages of further material including a 'Witness Statement' from a new witness, Mr Cooper, and further representations apparently drafted by counsel and/or solicitors. There was then a session in the order of half a day on the final day of the Inquiry where once again the Trust sought to elaborate its position and for which the appellant needed to have Mr Lock QC in attendance.

65. Had the NHSFT made representations within the relevant time limits, or even after the time limits, but in a single comprehensive fashion in good time prior to the Inquiry, rather than advance its case in this belated and piecemeal fashion, this lengthy, time consuming and costly exchange could have been avoided. The matter could, in that situation, have been dealt with as part of the ordinary S106 session, based upon the written material. Instead, the appellants have been put to the unnecessary and considerable expense of two standalone Inquiry sessions on this point as well as having to consider (with the advice of its professional team, at cost) and respond to the drip-feed of material that came from the NHSFT. The NHSFT has manipulated the inquiry process to obtain most, if not all, of the benefit of Rule 6 party status – in terms of inquiry time, representation and submissions by counsel, provision of a 'Witness Statement' i.e. a proof of evidence, calling witnesses through counsel – but with none of the

responsibilities, including in particular in relation to the timing of its representations and evidence. That was procedurally unreasonable.

66. The appellants therefore seeks their costs of the two standalone sessions on the contribution sought by the NHSFT as well as the professional costs associated with considering and responding to the NHSFT's written material.

Response of NHSFT[36]

67. The complaint of unreasonable behaviour appears to be that the appellants had insufficient opportunity to understand the NHSFT's case before its appearance at the Inquiry in March and, consequently, it had to request further documents and participate in a second Inquiry session to deal with the S106 request. It says that it has incurred wasted expense in the form of responding to the material it requested, providing the advice of David Lock QC and two standalone sessions at the Inquiry.

68. It is denied that the NHSFT has behaved unreasonably and, in any event, the appellant has not incurred any wasted expense.

69. As set out in the witness statement of Leenamari Aantaa-Collier, solicitor for the NHSFT, the NHSFT provided written material (with full appendices) to the Inquiry. This written material is in a similar form to that which has been provided to previous inquiries. It was submitted to the Planning Inspectorate and served on the appellants on 20 February 2019, over a month before the NHSFT appeared at the Inquiry on 28 March 2019. Accordingly, there was ample time for the appellants to digest it and request any further documents they wished from the NHSFT in light of it. Instead, what appears to have happened is that the appellants did not really get to grips with it until after the NHSFT appeared at the Inquiry and the appellants said they were not in a position to respond, they would do so through their Planning Witness, the NHSFT therefore needed to return when the appellants' case was being presented, and they also asked for additional documents from the NHSFT.

70. The appellants' 'reactive' stance was entirely down to it not having prepared sufficiently for the March session; rather than due to any unreasonable behaviour on the part of the NHSFT. Indeed, the documents were provided a day after they were requested. Then the appellants submitted, without warning, a lengthy opinion from leading counsel (rather than dealing with the matter through its Planning Witness, as had been said in the March session). It was only fair that the NHSFT had the right to respond to that and it did so as promptly as possible.

[36] Inquiry Doc 49.

71. In any event, it is not clear what wasted expense has been incurred by the appellants. It is completely unrealistic to suggest that the NHSFT contribution (being so actively disputed) could be dealt with in the normal S106 session on the papers without counsel for the NHSFT and witness attendance. Given the scrutiny being applied to the contribution, it was inevitable there would have to be Inquiry time taken up with oral submissions. Furthermore, the appellants would have wanted to put in David Lock QC' s opinion irrespective of timing and would have requested the NHS contract etc. and needed to respond to that. Therefore, the appellants did not incur any wasted expense due to anything done by the NHS Trust in any event.

Conclusions - The appellants' Costs application against the NHSFT[37]

72. The Planning Practice Guidance sets out[38] that *it is not anticipated that awards of costs will be made in favour of, or against, other interested parties[39], other than in exceptional circumstances*. The appellants are seeking a partial award of costs against the NHSFT in respect of the Inquiry sessions dealing with this matter along with the associated professional fees for considering and responding to the NHSFT written material.

73. The NHSFT is not a statutory consultee nor did they have Rule 6 party status. They were however an interested party. They were included in the Inquiry process on that basis. Whilst presentation by counsel for interested parties outside of the designation of Rule 6 Parties, is unusual at Inquiry, it is at the discretion of the Inspector. Some latitude was afforded to the NHSFT in respect of the presentation of their case, as well as the cross questioning of their evidence and that of the appellants in this regard. This was on the basis that this was the most efficient and appropriate way to examine the case of the NHSFT, allowing the appellants to explore and challenge that case, and for the Inspector to fully understand and question the opposing cases in this regard. That examination of evidence took up about half a day of Inquiry time. It was not prolonged and the questioning of all parties was pertinent and focused. It was also dealt with as a discrete session under the umbrella of the S106 obligations. It was a useful and necessary part of the examination of the evidence in relation to the impact of the appeal proposal. This matter was always going to take up Inquiry time there being a fundamental difference in approach between the parties. In the interest of fairness and transparency this matter needed to be aired within the Inquiry room.

74. The NHSFT became involved in the appeal process in February 2012?, about a month before the Inquiry opened. This may have been somewhat

[37] Inquiry Doc 48 & 49.
[38] At ID: 16-056-20161210.
[39] Other than the Rule 6 Party.

eleventh hour, but I consider this was in the main due to the confusion within the hierarchy of the NHS as to who and where the responsibility lies for exploring and pursuing such funding streams in a measured and logical way[40]. The NHSFT should not be penalised for their late awakening to the appeal process already moving into the station.

75. I do agree with the appellants that it was unfortunate that the NHSFT's additional evidence was not submitted until close to the resumption of the Inquiry in June. However, the appellants were aware of the essence of the NHSFT case. The matter was also not dealt with until the final throws of the Inquiry and this did give several days for very experienced advocates to examine evidence and prepare questions. The appellants' witness in this matter was also a very experienced QC who, in participating in the Inquiry session, appeared well prepared and there was no suggestion the appellants were disadvantaged by the squeeze on preparation time.

76. There is no evidence that the NHSFT manipulated the Inquiry process to obtain a status akin to a Rule 6 party. Their status was given at the discretion of the Inspector to facilitate the workings of the Inquiry and assist in obtaining the information required to appropriately advise the Secretary of State. These are not exceptional circumstances.

77. Therefore, for all of the above reasons I conclude that there are no procedural grounds relating to the behaviour of the NHSFT which have directly caused the appellants to incur unnecessary or wasted expense in the appeal process sufficient to justify a partial award of costs.

Cost application D

Submission of the NHSFT[41]

78. The Torbay and South Devon NHSFT makes an application for a partial award of costs against the appellants. The basis for the application is as follows.

79. The NHSFT is an interested party who has taken part in the appeal process and thus has standing to apply for an award of costs[42].

80. The Planning Practice Guidance states that: *It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal*[43]. This application does not relate to the merits of the appeal, but rather the way in which the appellants chose to argue its case in relation to the NHSFT's S106 contribution request.

[40] Confirmed through Inspector's questions.
[41] Inquiry Docs 50 & 32.
[42] PPG 029 Ref ID: 16-029-20140306.
[43] PPG para 056 Ref ID: 16-056-20161210.

81. The appellants have behaved unreasonably in submitting the advice of David Lock QC dated 1 June 2019. That behaviour has resulted in unnecessary expense to the NHSFT who have had to respond and correct that advice through the production of its Response and the Witness Statement of Paul Cooper, Finance Director of the Trust[44] on 10 June 2019.

82. The Advice is unreasonable because it misunderstands and misrepresents the relevant facts and law. The extent of the errors of law and inaccuracies is such that 'exceptional circumstances' are made out.

83. It is unclear from the Advice what instructions Mr Lock was given by Mr Rew or what documents he was provided with, but it is apparent throughout the Advice that there are fundamental misunderstandings of the law and facts. There is no expert evidence provided to support the many paragraphs which purport to explain the complex system of NHS funding. A number of assumptions are made and the law applied does not accurately reflect the position.

84. One clear indicator that Mr Lock is not properly cognisant of the NHSFT request is apparent from the first paragraph of the Advice where he states that he is asked to advise Mr Anthony Rew *concerning a request which has been made by Torbay and South Devon NHS Foundation Trust to a planning inspector that a condition should be imposed in any planning consent*. There is no request for a condition to be imposed. The NHSFT requests a financial contribution under S106 of the Town and Country Planning Act 1990. Mr Lock goes on to apply the law relating to planning conditions in Newbury (see eg summary of advice in paragraph 2). This is simply wrong.

85. His statement that: *the requests made by NHSFT for funding linked to a proposed planning consent does not appear to me to have any proper basis within planning law* ignores the fact that contributions for hospital running costs have regularly been made by the Secretary of State and the Secretary of State has agreed in the context of High Court proceedings as well as on appeal that such contributions meet the CIL tests in principle. Mr Lock does not refer (perhaps because he was under the misunderstanding that he was advising on a condition) to the House of Lords decision in Tesco Stores or, in fact, to S106 itself at all. Mr Lock appears to combine references to the tests for the imposition of conditions (in Newbury) with Regulation 122 of the CIL Regulations, which has nothing whatsoever to do with conditions. This betrays a fundamental misunderstanding of the relevant law, which the NHSFT has been obliged to correct.

86. In respect of Mr Lock's portrayal of the NHS funding regime, there is no expert evidence to support his statements and assumptions. Throughout the advice there are numerous factual matters and assumptions which the Trust has been obliged to correct through the evidence of Paul Cooper. This costs application does not set out each and every one which can be found in the witness statement of Paul Cooper and the Trust's response. However, by way of example, Mr Lock assumes that the financial contribution will be used to reduce deficit rather than

[44] Inquiry Doc 32.

go towards running costs, where there is in fact no current deficit at all. He speculates that the funding shortfall only arises because of the type of contractual arrangement the Trust has chosen, which is not the case.

87. He furthermore does not appear to have any regard to the previous Inspector's decisions where contributions have been awarded to another NHS Trust and sought in any way to distinguish them. He does not appear to have been aware of the appellant's own evidence, for example that the development will increase population by 2,805 people and seems to be unaware that the calculation takes into consideration an activity rate derived from LSOA (which estimates a percentage of use of services).

88. All of these sorts of matters are not simply differences of opinion which go to the merits of the case, but unreasonable behaviour in failing to ensure that the instructions given to leading counsel, the information available to him and his particular expertise are accurate and relevant to the appeal. They have necessitated substantial work on the part of the Trust to correct them to ensure that the Inspector is not seriously mislead.

89. For these reasons, the Trusts seeks its costs associated with the production of its written response to that Advice and the witness statement of Paul Cooper.

Response of the appellants[45]

90. The Trust is not a statutory consultee, nor is it a Rule 6 Party.

91. PPG 16-056 provides the *Interested parties who choose to be recognised as Rule 6 parties under the inquiry procedure rules, may be liable to an award of costs if they behave unreasonably… It is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds, for example where an appeal has been withdrawn without good reason or where an unnecessary adjournment of a hearing or inquiry is caused by unreasonable conduct.*

92. Therefore, in order for the NHSFT to obtain an award of costs it must demonstrate exceptional circumstances and procedural unreasonableness by the appellants (as opposed to criticising the substance of the appellants' case against the NHSFT).

93. The NHSFT's costs application does not come close to demonstrating exceptional circumstances. It is based upon the NHSFT's view that the critique of its position by Mr Lock QC[46] was misplaced. Mere disagreement with another party's position, no matter how strongly held, does not comprise exceptional circumstances.

[45] Inquiry Docs 51 & 28.
[46] Inquiry Doc 28.

94. Further, whilst being dressed up as a claim of procedural unreasonableness, the NHSFT costs application is patently directed at the substance of the appellant's case against the NHSFT, and in particular the substance of Mr Lock QC's analysis.

95. Either of these points is of itself fatal to the NHSFT's costs application.

96. Further, it was plainly procedurally reasonable for the appellants to seek to respond to the belated and unforeshadowed evidence and submissions of the NHSFT provided only days before the Inquiry and then elaborated orally at the March session of the Inquiry. Mr Lock's advice was that response. Procedurally, it could not have been provided any earlier and its provision between the March and June sessions of the Inquiry was in keeping with the timetable set by the Inspector at the end of the March session.

97. For the reasons set out in Annex 1 of the Appellants' closing submissions[47], Mr Lock QC's critique of the Trust's case for the contribution was well founded.

98. In any event, it must be remembered that the application for costs is against, and thus the unreasonable conduct must be attributable to, the appellants. It was plainly reasonable for the appellants to rely on the advice of leading counsel (Mr Lock QC). To the extent that the NHSFT's costs application seeks to make inferences about the instructions given to Mr Lock QC, that is a wholly inappropriate and unlawful attempt to violate legal privilege.

99. For the reasons set out in Annex 1 of the Appellants' closing submissions and the appellant's cost application against the NHSFT[48], the proper analysis of the chronology relating to the dispute between the NHSFT and the appellant is that the party guilty of procedural unreasonableness is, unquestionably, the NHSFT.

100. For any or all the above reasons the NHSFT's application for costs should be refused.

101. Finally, the appellants have received the NHSFT's Response to the appellant's Costs Application. The NHSFT's Response is accompanied by a further Witness Statement (a new evidential Inquiry Document). It is wholly inappropriate for the Trust to seek to introduce a new Witness Statement at this extraordinarily late stage of the proceedings.

102. Further, the content of both the NHSFT's Response and the Witness Statement is factually inaccurate. As explained in the letter from Clarke Willmott to the Planning Inspectorate dated 24 May 2019, despite having promised to provide a copy of the *contract* within a week of 28 March 2019, the NHSFT did not provide a copy until 23 May 2019 (and then, only after several prompts and the provision of documents other than the contract). Clarke Willmott's letter of 24 May 2019 was copied to the NHSFT. The chronology set out in that letter has never been challenged by the NHSFT.

[47] Inquiry Doc 55.
[48] Inquiry Doc 48.

103. The only document requested on 28 March and provided on 29 March was the NHS Improvement publication. This was requested by Clarke Willmott for general information (not as an Inquiry document). The NHS Improvement publication was not introduced by the NHSFT as an Inquiry document until 12 June 2019.

104. The NHSFT has had little or no regard to the Inquiry Procedure rules throughout this appeal. The NHSFT's Costs Response and Witness Statement is a further example.

Conclusions - The NHSFT's Costs application against the appellants[49]

105. The NHSFT are seeking a partial award of costs claiming exceptional circumstances[50] on the basis of the way in which the appellants chose to argue their case in respect of the NHSFT requested S106 contribution. The NHSFT allege the appellants behaved unreasonably in submitting the advice of David Lock QC with which they diametrically disagreed, and they then had to respond through the statement of Paul Cooper, Finance Director of the Trust.

106. It is for the particular party to decide how they present their case and respond to opposing evidence. Their instructions to the expert witnesses they chose to call is a matter for that party. The context in which Mr Lock was called as a witness was made plain to the Inquiry and his experience and qualifications were submitted[51].

107. The focus and relevance of Mr Lock's evidence was a matter for the appellants who presented him as their expert witness. The NHSFT may not have agreed with Mr Lock but they did have the opportunity to provide explanatory and correcting evidence (in their view) via Mr Cooper's submission and as part of the relevant Inquiry session. As in all examinations of appeal evidence, whether through Inquiries or other recognised means, the decision-maker must come to a judgement based upon everything that has been written, read, seen and heard. The submission, answering of evidence and offering alternative perspectives, interpretations and contradictory evidence is the normal churn of the Inquiry and disagreement the reason why we all gather in the Inquiry room to work.

108. A disagreement over the instruction, content, focus and quality of the advice given by a party to the Inquiry cannot be considered exceptional circumstances. This is not unreasonable behaviour on the part of the appellants, but just part of the workings of the Inquiry.

109. Therefore, for all of the above reasons I conclude that there are no procedural grounds[52] relating to the behaviour of the appellants which have directly caused the NHSFT to incur unnecessary or wasted expense in the appeal process sufficient to justify a partial award of costs.

[49] Inquiry Doc 50 & 51.
[50] PPG para 056 Ref ID: 16-056-20161210.
[51] Inquiry Doc 57.
[52] Related to the way in which the appellants chose to argue their case.

Recommendations

The appellants Costs application against the Council

110. I recommend that no award of costs is made.

The Rule 6 Party Costs application against the appellants

111. I recommend that no award of costs is made.

The appellants Costs application against the NHSFT

112. I recommend that no award of costs is made.

The NHSFT Cost application against the appellants

113. I recommend that no award of costs is made.

Frances Mahoney

Inspector