

## Costs: when to apply and how to avoid awards



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## Legislative and Policy framework

Under s.250(5) of the Local Government Act 1972

The Minister causing an inquiry to be held under this section *may make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid, and every such order may be made a rule of the High Court on the application of any party named in the order.*

Paragraph 6(5) of the Town and Country Planning Act 1990 ('TCPA 1990') extends the power under s.250(5) to the 'appointed person' (i.e. an inspector).

Costs can now be awarded in cases involving written representations (s.322 and 322A of TCPA 1990).

Awards of costs, however, should be in accordance with the guidance contained in the [Planning Practice Guidance](#) (a highly material consideration).

## What type of cases can costs be awarded in?

- Nearly all planning proceedings!
  - Planning appeals
  - Enforcement appeals
  - CLEUDS and CLOPUDs
  - Tree preservation orders
  - Listed building enforcement
- The Government has produced a thorough list of illustrative list of case types for which costs awards are available [here](#).

## Who can apply for costs?

## What sort of costs can be awarded?

- Both the Appellant and the Local Planning Authority may apply for costs. In addition, interested parties (including statutory consultees) who have taken part of the process.
- Costs do not depend on the outcome of the appeal.
- Costs can be awarded against a *successful* party.
- Costs can be awarded on a full or, more likely, a partial basis:
  - E.g. costs relate to one ground.
  - E.g. costs relate to one day of the hearing.
  - E.g. costs relate to one witness.

## In outline – When will costs be awarded.

- Parties in planning appeal normally meet their own expenses. Costs do not, as a rule, follow the result.
- However where a party has
  - (1) behaved unreasonably **and**
  - (2) this has **directly** caused another party to incur **unnecessary** or **wasted** expense,
 they **may** be subject to an award of costs.
- Therefore costs can only be awarded costs if both limbs are satisfied and even then the award of costs remains discretionary. Accordingly, extenuating circumstances may be taken into account.

## First Limb – ‘behaved unreasonably’

- Unreasonable is used in its ordinary sense not the sense that lawyers use it when describing *Wednesbury* unreasonableness. (*Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774) and (*Swale Borough Council v Secretary of State for Housing Communities and Local Government & Anor* [2020] EWHC 3482 (Admin) (17 December 2020))
- Unreasonable behaviour may be either
  - Procedural
  - Substantive
- Unreasonable procedural behaviour may include failure to meet deadlines, failure of witness to attend, failure to prepare resulting in an adjournment, failure to attempt to resolve statements of common grounds, withdrawing the application without good reason.
- Unreasonable substantive behaviour includes running points which have no legal basis or substantive points with no evidence.
- Unreasonable behaviour during the whole planning application process will be taken into account. Therefore, unreasonable behaviour during the planning application can be taken into account.

## Examples from the Inspector's Training Manual

- Non-compliance with procedural requirements.
- Failure to substantiate a stated reason for refusal.
- Planning Authorities clearly failing to have regard to government policy or its own adopted policies.
- Appellants pursuing a clear 'no hope' case (e.g. Green belt without advancing very special circumstances)
- Late withdrawal of an appeal, late cancellation of an event or late cancellation of an enforcement notice. It is far better to ask for permission than forgiveness.

## Second limb – directly caused unnecessary or wasted expense

- The unreasonable behaviour must have *directly* caused unnecessary or wasted expense.
- An applicant for costs will need to *clearly demonstrate* how the unreasonable behaviour resulted in unnecessary or wasted expense. This could, for example, include time spent preparing for an appeal or ground which was withdrawn at the very last minute.
- Awards for costs must be for the direct costs, the PPG cites compensation for alleged delay in obtaining planning permission as an example of indirect costs which cannot be recovered.

## How and when should an application for costs be made?

- Written Representations – costs must be made in writing by any party no later than the final comments stage. Where the conduct relates to a site visit, the application should be made within 7 days of the site visits.
- In the case of hearings and inquiries:
  - Must be made before the hearing / inquiry is closed.
  - Ideally, however, applications should be made in writing before the hearing / inquiry.
  - Where the unreasonable conduct relates to behaviour at the hearing, the application should be made to the inspector before the hearing is adjourned.
- Where an application is withdrawn, an application for wasted costs must be made in writing (an application form is available) within 4 weeks of receiving notification.

## Procedure if costs are claimed

- Any written application will be disclosed to the party against whom the application is made, so that they can respond in writing. An applicant for costs, will then have an opportunity to make a final reply in writing.
- For hearing and inquiries, the party against whom the application is made will have an opportunity to reply, either at the event or in writing.
- The inspector makes the final decision. An inspector may award costs *without an application*.
- Where an application is withdrawn, the award of costs is taken by the Planning Inspectorate.

## Appeals and Enforcement

- Appeals by judicial review are very unlikely to be successful given the discretionary nature of a costs award (*R v Secretary of State for the Environment ex. parte London Borough of Ealing* [1999] EWHC Admin 345)
- Once the Planning Inspectorate has made an award for costs, it has no further role and it is for the parties to negotiate the award and agree arrangements for payment.
- Failure to settle an award of costs is enforceable through the Courts: *Maiden London Ltd v Ruddick & Anor* [2018] EWHC 3684 (QB).

## Appeals and Enforcement

- Costs recoverable? *Deutsche Bank AG v Vik* [2020] WL 03086205
- Basis of assessment
  - Standard – reasonable and proportionate
  - Indemnity – reasonable
- Reasonableness – assessed at time incurred.
  - Types of lawyer instructed
  - Reasonable brief fee: *Simpson Motor Sales (London) Ltd v Hendon Corp* [1964] 3 All ER 833
- Proportionality – reasonable relationship to matters such as complexity of litigation, conduct of paying party, importance of the litigation

## Two Final Messages

- It is difficult to have costs awarded either against you or the appellant. Typically, only apply if a party has acted very poorly.
- That said, it is far better to ask for permission than forgiveness.

Thank you for listening

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