Consultation on Revised Circular on Costs Awards in Appeals and other Planning Proceedings

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December 2008
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Introduction

1. This consultation seeks views on a revised planning circular on the award of costs in certain types of cases and builds on proposals set out in the Government's consultation paper *Improving the appeals system – making it proportionate, efficient and customer focused*. http://www.communities.gov.uk/archived/publications/planningandbuilding/improvingappealconsultation

2. In England, the number of planning appeals has dramatically risen in recent years from around 14,000 in 1997 – 1998 to over 22, 000 in 2007-08. The existing system is not equipped to handle such large appeal numbers efficiently, leading to delays in decision making. Whilst appeal numbers may fall in the light of economic circumstance, we need to take the opportunity to improve the system for the long term. In recognition of this, the Government consulted last year on a number of measures to improve the handling of appeals in the consultation paper, "Improving the appeals system – making it proportionate, efficient and customer focused". This consultation proposed changes to the procedures for dealing with appeals and also proposed an update to the Costs Circular in the light of legislative and procedural changes that were likely to be brought forward.

3. These changes are being introduced through amendments to the various Planning Acts 1990 by the Planning Act 2008 and various amendments to secondary legislation which will come into force on 6 April 2009.

Background

4. The current policy on the award of costs is contained in DOE Circular 8/93 *Award of Costs incurred in planning and other (including compulsory purchase order) proceedings*. This policy is well established, has generally worked well and has remained largely unchanged since its introduction.

5. The current Circular sets three tests to be met if costs are to be awarded:

   - that the application is made at the appropriate time
   - that the party against whom the application for an award is made has behaved unreasonably and
   - that unreasonable behaviour has resulted in unnecessary or wasted expense being incurred in the appeal proceedings

6. The policy on the award of costs has proved a useful discipline in encouraging parties to behave reasonably both prior to and during the course of appeals and the Government does not plan to change these fundamental principles on which the costs regime is based.

7. However, the Government's policy on the award of costs does need to reflect and respond to the changing context of the planning system and must be considered alongside wider changes to the appeals process.

The proposal

8. In the consultation outlined above the Government proposed to update the Costs Circular to reflect new legislation, clarify more accurately the extent of full awards and re-affirm examples of unreasonable behaviour. The Government also signalled it was considering allowing fixed penalties to be imposed where a party has behaved poorly or abused the appeal process, including in instances where parties abuse the new processes for evidence submission and/or submit late evidence. Finally, the consultation outlined that the Government would consider extending the costs regime to written representation planning appeals, since at present costs can only be sought in hearing and inquiry cases in planning appeal cases.

Response to consultation

9. The proposal to update the Costs Circular was well supported, with 83 per cent of all respondents indicating that they either strongly agreed or agreed with the proposal. By group, the most support was from business respondents, with 92 per cent indicating that they agreed with the proposal. Government bodies (central, local and NDPBs) also indicated a high level of support, with 80 per cent agreeing with the proposal. Support from public respondents was more muted, although 50 per cent of these respondents were in agreement with the proposal and 17 per cent were neutral. The most common response was that it should be made clear through guidance and codification when costs awards were appropriate. However, it was also suggested that any changes to the costs regime should retain a degree of flexibility, as not all circumstances could be predicted or mitigated.

10. More recently, in order to inform the drafting of the circular which is the subject of consultation, the Planning Inspectorate circulated a questionnaire to a number of planning agents (small businesses) who submit appeals on behalf of clients, representatives from a number of planning authorities and other stakeholder organisations, seeking views on the costs regime and the need for

change. Some respondents subsequently attended a workshop to discuss their responses. The questionnaire responses provided some useful messages which have been reflected in this circular – in particular, support for the extension of costs awards to written appeals and clearer examples of unreasonable behaviour to discourage spurious claims and encourage proper use of the costs regime where justified.

Actions proposed

11. The consultation responses summarised above confirmed for the Government the strength of opinion that the Costs Circular is in need of updating. The Government has given further thought to the idea of introducing fixed penalties into the costs system and has decided not to proceed with this measure. Such a system would be too bureaucratic and costly to administer so that the potential benefits of the system would be outweighed by the costs.

12. The Government will extend the ability to apply for costs to appeals dealt with by written representations. This measure is particularly important in the light of the amendments to the 1990 Acts made by the Planning Act 2008 which will allow the Planning Inspectorate to determine the method by which appeals are dealt with.

13. Under the current regime, appellants and local planning authorities have the opportunity to insist upon a right to be heard orally, thus ensuring that their appeal will be dealt with through a hearing or inquiry. One of the factors that might influence this choice is that costs can be applied for in such cases. In the Government's view it would be unfair for the Inspectorate to determine an appeal route which prevented parties from applying for costs where they might be justified in doing so. This is why we intend to extend the ability to apply for costs to cases dealt with through written representations. This will be achieved through commencing powers which already exist in legislation. The attached draft circular explains the effect of this commitment.

14. The draft circular also makes clear that parties will be liable for an award of costs at all stages of the process, even where they withdraw an appeal due to be dealt with by hearing or inquiry before the date for the hearing or inquiry has been set. Again, this will be achieved by fully commencing existing legislative powers and the circular highlights this change.

15. Further explanation and justification for this change is provided in the Impact Assessment attached at annex B.

Key Changes

16. As discussed above, the attached revised draft circular doesn't change the fundamental principles on which the costs system is based and much of the revision has been to update the text in line with legislative changes that have already taken place and to define more clearly examples of unreasonable behaviour. The key changes from Circular 8/93 are to:

    - reflect the fact that the Government will be fully commencing powers in the Town and Country Planning Act 1990 (sections 322 and 322A) to enable costs to be awarded in appeals dealt with by written representations
    - reflect the introduction of new section 319A Town and Country Planning Act 1990, 88D of the Listed Building Act and 21A of the Hazardous Substances Act, which have been inserted by section 196 of the Planning Act 2008 and allow costs to be awarded in cases where the Planning Inspectorate determines the appeal method
    - explain how the above legislative changes create a level playing field for all types of appeal, so that costs can be sought even where appeals have been withdrawn before a date for a hearing or inquiry has been set. This change also gives effect to the policy intentions outlined in the consultation paper *Improving the appeals system – making it proportionate, efficient and customer focused*, encouraging parties to behave responsibly in submitting appeals
    - provide clearer examples of what might be considered unreasonable behaviour and also outline best practice to avoid costs awards

Next steps

17. The Government is working on a package of measures which will be introduced with effect from April 2009. In summary, the key changes are set out below.

The Planning Act 2008

- the Planning Inspectorate will be able to determine the appeal process (written representations, hearing or inquiry)
- a power to enable the Planning Inspectorate to correct minor, non-material errors in decision notices eg incorrect house numbers, without recourse to the parties

Secondary legislation

- introduction of the Householder Appeal Service which will deliver decisions in quicker timescales
- a reduction in the time limit in which householders can appeal against planning decisions from six months to three months
- procedural changes to improve the operation of the appeals system (removal of comments at nine weeks stage in hearing and inquiries, requirement for statements of common ground to be submitted by week six of inquiries)
- fully commence powers in the Town and Country Planning Act 1990 (sections 322 and 322A) to enable costs to be awarded in appeals dealt with by written representations

We intend to introduce the new costs circular at the same time as these proposals.

Appeal Fees

18. The Government has also outlined its intention to introduce an appeal fee to offset part of the cost of running the service to those who may stand to benefit from the decision. A power to make regulations to set fees for appeals is contained in section 200 of the Planning Act 2008. However, we will be consulting further on a draft scale of fees prior to introducing an appeal fee. The attached draft circular on costs does not reflect the fact that the Government intends to introduce appeal fees and the treatment of an appeal fee in terms of any application for costs will be the subject of the forthcoming consultation on appeal fees.

Killian-Pretty Recommendation to clarify the status of statutory consultees in the costs regime

19. The Killian-Pretty Review of the planning application process *Planning Applications: A faster and more responsive system* was published in November 2008[1]. The review made a number of recommendations to make the planning application process swifter, more efficient and more effective for all users.

1 Available to view at http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/reformplanningsystem/killianprettyreview/

20. One of the recommendations relating to the role of statutory consultees in the planning process, urges Government to clarify the circumstances in which an award of costs might be made against a statutory consultee where they have acted unreasonably and consider strengthening the provisions to make it easier to award costs against statutory consultees. We have not had time to consider the implications of this recommendation and the attached draft does not therefore take account of this recommendation.

21. The attached circular does however, make it clear that:

    - where a local planning authority has refused consent in accordance with a direction issued by a statutory consultee, the consultee will be treated as a principal party and may be liable for costs
    - third parties, including statutory consultees, who are entitled to appear at the inquiry will be expected to behave appropriately
    - technical or expert witnesses from an organisation that is a statutory consultee who only appear at the inquiry in support of the local planning authority's case will not be regarded as a separate party in their own right and will not therefore be liable to an award of costs
    - normally, to be treated as a separate party, the statutory consultee would need to be separately represented at the event
    - any allegations of unreasonable behaviour directed at a statutory consultee, should be drawn to their attention at an early stage before the event so that there is time to prepare and co-ordinate a response
    - if an award of costs is made against a planning authority but the authority considers the statutory consultee should bear responsibility, the resolution of any difference of view will be a matter for the two parties

Scope of consultation

22. The Government has already consulted on the proposal to extend costs awards to written representation cases and on the policy intentions contained in this circular – that the appeal process should not be abused neither should appeals be submitted frivolously. We would, however, welcome feedback on the way in which these changes have been explained in the attached guidance. We would particularly welcome feedback on the examples of unreasonable behaviour which are discussed in the attached draft circular. In line with earlier consultation responses, the attached circular makes clear that the examples outlined 'may' give rise to costs awards – each case will continue to be considered on its own merits.

Questions

1. Does the attached draft provide greater clarity on when it might be appropriate to seek an award of costs?
2. If not, how could it be improved?
3. Do you have any other comments? (where you have detailed comments it would be useful to indicate the part and paragraph numbers to which you are referring)
4. Do you think the assessment of the impacts of the new guidance set out in the Partial Impact Assessment at Annex B is realistic?
5. Do you have information about costs awards, or time taken in submitting or defending costs applications, which could help us complete the Impact Assessment?

Consultation Responses

23. The period of public consultation will last for approximately 10 weeks and responses should be submitted to arrive by 20 February 2008. The consultation period for this document is shorter than the standard 12 weeks for formal written consultation exercises, because the key changes which are explained in this document have previously been consulted upon and the policy decided. The scope of the consultation is limited to the way in which the messages have been implemented in the draft document.

Comments should be sent to:
Theresa Donohue
Department for Communities and Local Government
Eland House Zone 1/J10
Bressenden Place
London
SW1E 0RS

Or by email to: **costresponses@communities.gsi.gov.uk**

A summary of responses to this consultation will be published by and will available on the Department's website at:
www.communities.gsi.gov.uk.

Paper copies will be available on request.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

Circular xx/09
(Communities and Local Government)

Date

COSTS AWARDS IN APPEALS AND OTHER PLANNING PROCEEDINGS

INTRODUCTION

1. The annex to this Circular provides updated guidance on the award of costs in England in proceedings under the Planning Acts[2]. It complements legislative amendments[3] designed to improve the efficiency and effectiveness of the planning appeals system. The costs awards regime seeks to increase the discipline of parties when taking action within the planning system, through financial consequences for those parties[4] who have behaved unreasonably[5] and have caused unnecessary or wasted expense in the process. A party may be ordered to meet the costs of another party, wholly or in part, on specific application by the aggrieved party.

2. Part 1 of the annex sets out the general principles for awards of costs and updates the procedures for making applications.

3. Part 2 focuses on the most common types of case eligible for costs awards, with examples to illustrate circumstances in which a party is most likely to be at risk of an award of costs against them.

4. Part 3 records the continued application of the general policy on the award of appeal costs to called-in planning applications, and also to non-planning casework which is subject to any separate guidance from the relevant responsible Department.

5. Part 4 discusses the position of third parties including statutory consultees.

6. Part 5 provides updated guidance in relation to compulsory purchase orders and so-called analogous orders, consistent with the Planning and Compulsory Purchase Act 2004 and associated subordinate legislation.

[2] For the purposes of this Circular the Planning Acts (as amended) are the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990, and the Planning and Compulsory Purchase Act 2004.

[3] Summarised in Part F of the Annex

[4] The term "party" or "parties" is defined in paragraph A15 of Part A of the Annex.

[5] As summarised in A22 & A23

7. Part 6 of the annex records the legislation underpinning costs awards in planning-related proceedings. An illustrative list of case types for which costs awards are available is published on the Inspectorate's website[6]. It is intended that this should be regularly updated.

8. While the content of this Circular has no statutory status, and is guidance only, it represents current national policy on the awarding of costs and will be fully taken into account by the Secretary of State and Inspectors where costs are at issue in planning and planning-related proceedings.

SCOPE OF CIRCULAR

9. The guidance in this Circular will apply to all appeals under the Planning Acts in England, which are made on or after the date of this Circular; and to called-in planning applications and other referred applications under the Planning Acts where proceedings are initiated on or after the date of this Circular. It will also apply by analogy to proceedings under non-planning legislation initiated on or after that date, which previously relied upon DOE Circular 8/93 as a general statement of principles for the award of costs. This Circular does not apply to proceedings arising from the role of the Infrastructure Planning Commission (IPC) and examinations into applications for orders granting development consent under Part 6 of the Planning Act 2008.

EXPLANATORY GUIDE FOR APPELLANTS

10. An updated explanatory guide (*Costs Awards in Planning Appeals – A Guide for Appellants*) is obtainable from:

    The Planning Inspectorate
    Customer Services Team
    Temple Quay House
    2 The Square
    Temple Quay
    BRISTOL BS1 6PN

    Telephone 0117 372 6372.

    It is also accessible via the Inspectorate's website[7].

CANCELLATIONS

11. DOE Circular 8/93 *Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*; paragraphs 46, 48 and 49 of Part 1 of the Memorandum to ODPM Circular 06/2004 *Compulsory Purchase and The Crichel Down Rules* are cancelled. [Add any cancellations of other Circular references as appropriate]

[6] www.planning-inspectorate.gov.uk [add full reference of web page]

[7] See footnote 4

Annex

PART A – GENERAL PRINCIPLES AND PROCEDURES

Introduction

A1. The appeal process, administered by the Planning Inspectorate, is an integral part of the planning system. It provides for the resolution of disputes arising from decisions taken at the local level and ensures that decisions about the use and development of land are consistent with up to date national, regional and local planning policies. The Inspectorate has limited resources for this purpose and it is in the interests of all those involved that they are used efficiently and effectively.

A2. Planning applications may be refused or appeals made for insufficiently good reason or parties may behave in ways that cause delay or frustrate the efficient resolution of outstanding matters. The costs regime should support a well-functioning system and encourage proper use of the right of appeal.

A3. The costs regime is aimed at ensuring as far as possible that:

- all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice, whether in terms of timeliness or in quality of case
- appeals are not entered into lightly or as a first resort without prior consideration to making a revised application which meets reasonable local objections
- planning authorities and applicants enter into constructive pre-application discussions to resolve or narrow areas of disagreement
- at the appeal stage statements of common ground are timely
- planning authorities properly exercise their development control responsibilities, rely only on reasons for refusal which stand up to scrutiny and do not add to development costs through avoidable delay or refusal without good reason
- unsuccessful applicants exercise their right of appeal responsibly
- costs applications are not routinely made when they have little prospect of success and merely add to the costs of administering the appeal system
- all those involved in the appeal process who feel justified in complaining about others' behaviour use the guidance in this Circular effectively, by only pursuing substantiated applications for costs in a robust but realistic way

Changes introduced by the Planning Act 2008 and secondary legislation impacting on the costs regime

A4. Relevant legislative changes are recorded in Part F of this annex. In particular, new section 319A[8] of the Town and Country Planning Act 1990, "Determination of procedure for certain proceedings", enables the Planning Inspectorate, acting on behalf of the relevant Secretary of State, to determine the most appropriate appeal procedure. Consistent with that change, and to ensure a "level playing field" for costs purposes, the Government has decided to extend the costs regime to all written representations appeals under the Planning Acts, including the new category of householder appeals[9] identified for discrete treatment under the new Householder Appeals Service. The opportunity to apply for an award of costs, and therefore the risk of an award, now applies to all appeals and proceedings under the Planning Acts, irrespective of the appeal procedure adopted.

A5. However, the principle of extending the costs regime to all written appeals under the Planning Acts should not be seen as a "green light" to costs applications on spurious grounds. Parties should be robust in applying for costs where they feel fully justified in doing so, but the reverse also applies. Costs do not necessarily follow the appeal outcome. Spurious or unsubstantiated costs applications will be dismissed by the briefest possible decisions in the interests of economy.

A6. The combined effect of the legislative changes noted in Part F of the Annex is considered to be that withdrawal of an appeal ***at any stage in the process*** will risk an award of costs irrespective of case type and procedure. Enforcement notice, lawful development certificate and some other specialist appeals[10] are no longer distinguishable and all appeals under the Planning Acts carry the same risk of an award of costs, irrespective of procedure.

General principles

A7. In planning appeals, and other proceedings to which this guidance applies by analogy, **the parties involved normally meet their own expenses**.

[8] Inserted by section 196 of the Planning Act 2008

[9] "householder appeals" to be defined in Regulations.

[10] Listed building enforcement notice appeals under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990; tree replacement notice appeals under section 208 of the Town and Country planning Act 1990; and appeals under section 25 of the Planning (Hazardous Substances) Act 1990 and Regulations against hazardous substances contravention notices.

A8. Most appeals do *not* result in a costs application, let alone a costs award. Statistics are published on the Planning Inspectorate's website[11]. In recent years, on average, costs applications have been made in about 20 per cent of hearing cases, 25 per cent of inquiry cases and 4 per cent of written cases[12]. Awards have been made in about 40 per cent of these cases overall.

A9. A costs award, where justified, is an order which can be enforced in the Courts and states that one party shall pay to another party the costs, in full or part, which have been incurred during the process by which the Secretary of State's or Inspector's decision is reached. The costs order states the broad extent of the expense the party can recover from the party against whom the award is made. It does not determine the actual amount. Settling the amount is covered in paragraph A21 below.

A10. The appeal decision *will not be affected in any way* by the fact that an application for costs has been made. The two matters are entirely separate.

Conditions for an award

A11. An award of costs does not necessarily follow the outcome of the appeal, as in litigation in the Courts. This is a well-established principle of the costs regime and remains so. An unsuccessful appellant is not expected to reimburse the planning authority for the costs incurred in defending the appeal. Equally, the costs of a successful appellant are not borne by the planning authority as a matter of course.

A12. Costs will normally be awarded where the following conditions have been met:

- a party has made a timely application for an award of costs
- the party against whom the award is sought has acted unreasonably[13] ***and***
- the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process[14] – either the *whole of the expense* because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector, or *part of the expense* because of the manner in which a party has behaved in the process

A13. Different conditions apply to compulsory purchase and so-called analogous orders. These are dealt with in Part 5 of the annex.

[11] See footnote 4.

[12] These written cases have concerned the appeal types itemised in paragraph A6 and footnote 9.

[13] Decisions are taken on the "balance of probability", with the onus on the applicant for costs to show that the tests of unreasonable behaviour and unnecessary or wasted expense have been met in the particular circumstances of the case.

[14] The appeal process is regarded for costs purposes as starting from the submission of the appeal and ending on the date when the appeal is concluded, normally by its determination or withdrawal.

Who can apply for costs or who can have costs awarded against them

A14. Principal and third parties may apply for costs or have costs awarded against them.

A15. In this Circular, the term "principal party" normally refers to the local planning authority (or other relevant responsible authority) and the appellant. *All* other interested parties are defined, for the purposes of this guidance, as third parties, subject to the following exception.

A16. Where the Mayor of London or any other statutory consultee[15] exercises a power to direct a planning authority to refuse planning permission, this third party will be treated as a principal party for the purposes of this guidance.

A17. Further guidance on awards of costs either in favour of or against third parties, including situations where they will be treated as principal parties, is in Part D.

Full awards

A18. A full award of costs relates to the applicant's whole costs of the statutory process, including the submission of the appeal statement and supporting documentation. It also includes the expense of making the costs application in respect of the appeal process, whether in writing or at a hearing or inquiry. Where the process concerns a called-in planning application, the eligible costs will start from the date of the notification by the relevant Government Office of the decision to call-in the application. In other non-appeal cases the eligible costs will start from the date of the notification or statutory publication of, for example, the relevant order, following which the applicant for costs has begun to incur costs in the ensuing statutory process. An application for a full award may be allowed in full, refused or allowed in part.

Partial awards

A19. Some cases do not justify a full award of costs – for example, where the appeal is one of several joint appeals, or where the application for costs only relates to one ground of refusal, or only relates to the attendance of particular witnesses. In these circumstances, a partial award may be made. The partial award may also be limited to a part of the appeal process. Where an unnecessary adjournment is caused by the unreasonable conduct of one of the parties, the award of costs would be limited to the expense caused by the adjournment, for example the abortive costs of attending the event on the day of the adjournment.

[15] See Part D of the Annex

A20. A partial award may be made where an application for a full award is being allowed in part or where a partial award is applied for in specific terms. An application for a partial award[16] may be allowed in the terms of the application, refused, or allowed in part (that is, a *smaller* partial award is made).

Settling the amount where an award is made

A21. Where a costs award or "costs order" is made, the party awarded should first submit details of their costs to the other party, with a view to reaching agreement on the amount. If they are unable to agree, the party awarded costs can refer the matter to a Costs Officer of the Supreme Court Costs Office for a detailed assessment of the amount. When an award of costs is made the parties will be sent a guidance note on the separate procedure for detailed assessment by the Court[17].

Meaning of "unreasonable"

A22. The word unreasonable is used in its ordinary meaning as established by the Courts in *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774.[18] Further explanation of what is likely to be regarded as unreasonable behaviour is set out in Part B of the annex. The most common examples concern non-compliance with procedural requirements.

A23. Whether behaviour is regarded as unreasonable or not will take account of the appellant's evident experience and whether or not they are professionally represented. Lay persons cannot reasonably be expected to be familiar with the full extent of planning guidance and procedures, although they will be expected to read and take note of standard informative material sent to them by the Planning Inspectorate and relevant facts drawn to their attention by the planning authority. In a hearing or inquiry case, where a party has indicated an intention to apply for costs and the reasons for so doing, their case will be strengthened especially if the opposing party has not responded positively to the relevant facts or matters to which they have been referred.

Unnecessary or wasted expense

A24. An applicant for costs will need to demonstrate clearly how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. This should be identifiable or capable of being quantified in some tangible way. Expense may be unnecessary or wasted because the entire appeal could have been avoided or because time and effort was expended on one part of a case that subsequently turned out to have been abortive.

[16] The expense of making an application for a partial award of costs is recoverable where the application is allowed. Where the application is for a full award and the application is allowed in part, or an application for a partial award is allowed in part, a proportion of the expense of making the application will be recoverable accordingly.

[17] Under the Civil Procedure Rules, Part 47

[18] More recently, the case of *R (on the application of Hann) v SSETR and Sedgemoor District Council 2001* EWHC Admin 930 confirmed the principle set down in *R v SSE, ex parte Chichester District Council 1993* 2 PLR 1 DCI and *Blythe Valley Borough Council v SSE 1988* that "unreasonable" for the purposes of an award of costs means unreasonable in the ordinary sense of the word, not in the "Wednesbury" sense.

A25. The power to award costs[19] enables a party to be awarded the costs necessarily and reasonably incurred in the appeal process, although these costs may relate to what happened[20] before the appeal was lodged. Accordingly, costs incurred that are unrelated to the appeal itself are not eligible. The costs of the appeal will typically – for an appellant – be the costs of employing an agent to submit the appeal and represent them throughout the process. Similarly planning authorities will incur recoverable costs in resisting appeals and defending their stance.

A26. Awards cannot extend to compensation for indirect losses, such as those which may result from delay in obtaining planning permission via the appeal process.

A27. As a decision to award costs will define the broad extent of the award (full or partial), **but not the *amount*** of unnecessary or wasted expense payable, no details of actual expenditure are required when making a costs application.

Suggestions for good practice – minimising the risk of a costs award

A28. While the costs regime is a necessary disciplining tool, an award of costs is plainly not a satisfactory outcome in terms of the overall use of resources. Good behaviour includes careful and on-going case management. Parties can minimise the likelihood of costs being awarded against them by following the good practice listed below:

- there should be constructive co-operation and dialogue between the parties at all stages
- parties should respond promptly to changing circumstances and provide a clear explanation of a revised stance or position, with nothing coming as a complete surprise and
- parties should be willing to accept the possibility that a view taken in the past can no longer be supported and act accordingly at the earliest opportunity

Procedures: Applications for Costs

Hearing or inquiry cases

A29. **The principle of early disclosure of evidence should apply equally to any intention to seek an award of costs.** The term "application for costs" has no statutory basis. It reflects well-established practice and is the process by which decisions are made on whether or not to award costs, where sought. Applications should be made in writing unless the decision to apply for costs is triggered by what has happened at the event, in which case the application may be made orally.

[19] Section 250(5) of the Local Government Act 1972 gives the Secretary of State the power to award costs in inquiries and is the basis for powers to award costs in hearing and written reps by virtue of Section 322 of the Town and Country Planning Act 1990

[20] Which is claimed to demonstrate unreasonable behaviour

A30. In hearing or inquiry cases any applications for costs should be made ***before the hearing or inquiry is closed by the Inspector.*** While providing adequate opportunity the Inspector will not explicitly invite an application for costs, which is entirely a matter for the party concerned. If, prior to the hearing or inquiry, and having regard to the advice in this Circular, a party clearly sees grounds for an award of costs and intends to apply they should:

- provide a written statement of their grounds in advance and
- disclose this to the other party so that the intention is clear and open

A31. Written submissions disclosed in advance, via the Inspectorate's case officer, will save valuable time in hearing submissions on costs and assist the decision process. As a minimum a written skeleton argument[21] setting out concerns with reference to the relevant guidance in this Circular should be provided as soon as possible. At the hearing or inquiry the party applying for costs will be given the opportunity to expand on their submission in the light of events that have taken place. The other party will be given an opportunity to respond before the applicant has the "final say".

A32. There is no good reason why costs applications should rely on using surprise as a tactic. If the grounds for a costs application are not, as a matter of courtesy, disclosed as far in advance as is reasonably practicable this will be taken into account in deciding whether or not to make an award, or whether the award should be full or partial.

A33. The Inspector will normally decide the costs application in conjunction with the appeal. Where the Secretary of State is deciding the appeal any application will be reported[22] by the Inspector with a recommendation.

Written appeals

A34. Any application for costs in respect of a live written appeal should be made in writing to the Inspectorate's case officer at the earliest possible stage in the process and in any event before the decision is notified to the principal parties.

Householder appeals

A35. Procedures for "householder appeals" [23] [will be] set out in [Regulations]. It should normally be clear from the outset whether there is any realistic basis for a costs application by the appellant. In these cases the appellant will be expected to make any application for costs at the same time as the appeal, supported by a full statement of why an award is considered justified. The

[21] A form which may be used on a purely voluntary basis to apply for costs in writing is included in the Explanatory Guide, referred to in paragraph 10 of the Circular introduction. Use of the form is ***not*** a requirement.

[22] For the Secretary of State's separate decision.

[23] The term "householder appeal" is defined in Regulation X of the Y Regulations

appellant will need to demonstrate that the planning authority's decision was unreasonably made on the basis of the information available to the authority at the time. Given the reduced timescales and minimal procedural requirements for these appeals, *the possibility of unreasonable behaviour during the process* is minimised.

A36. In the case of planning authorities, any application for costs will be expected to be made within 14 days of the "start date" notified by the Inspectorate. This takes into account that within 5 days of the start date, the authority should have submitted its questionnaire with any supporting documents.

A37. If a timely application is made, the Inspectorate will invite the other party to comment and exchange comments within a set timescale.

Tree preservation order appeals

A38. Similar considerations apply to any costs applications in respect of written appeals[24] against decisions of planning authorities relating to applications for consent to carry out work to trees protected by tree preservation orders (TPOs). The procedures for these cases are set out in Communities and Local Government's publication *Tree Preservation Orders – A Guide to the Law and Good Practice.*

Other written appeals

A39. In cases where appeal statements are submitted and exchanged, the grounds for any costs application should normally be clear by the time of the completed exchanges at the latest[25], if not when the party's statement of case is submitted[26]. An exception might be the subsequent failure of a party to attend an arranged accompanied site visit. In that situation any costs application should be made immediately after the site visit. If a timely application is made, the Inspectorate will invite the other party to comment and exchange comments within a set timescale.

Decisions on applications for costs in written appeals

A40. In householder and TPO cases, the decision on any application for costs is likely to be issued after the Inspector's appeal decision to ensure that utmost priority is given to the appeal outcome within the programming of "fast track" work in the Inspectorate. In other written cases, where longer timescales will apply, it is more likely that the costs decision will be issued at the same time as the appeal decision.

Withdrawal of appeal or enforcement notice or any other basis for the

[24] These appeals are subject to the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Amendment) (England) Regulations 2008 (SI 2008, No.595) and the Town and Country Planning (Trees)(Amendment)(England) Regulations 2008 (SI 2008, No.2260)

[25] Due 9 weeks after the appeal start date

[26] Due 6 weeks after the appeal start date

proceedings/events cancelled or closed/no appeal decision

A41. In these circumstances an application for costs should be made in writing *immediately to the Inspectorate's Costs and Decisions Team*[27]. If some delay is unavoidable, the application should be made **no later than four weeks** after receiving confirmation from the Inspectorate (or, in the case of any third parties, from the planning authority) that the hearing, inquiry or site visit has been cancelled[28] and no further action is being taken on the withdrawn appeal/closed proceedings.

A42. If the application is timely and accepted for consideration, the decision on whether the abortive or wasted costs were due to unreasonable behaviour will be taken by a decision officer[29] following an exchange of the parties' written submissions. The decision will address the stated justification for an award of costs, with reference to the guidance in this Circular and all the case circumstances.

Late applications for costs

A43. Late applications for costs are handled by the Inspectorate's Costs and Decisions Team. In this Circular late applications are defined as those made:

- after the hearing or inquiry is closed
- later than four weeks after receiving notification of the withdrawal, at any stage, of the appeal or enforcement notice or other planning matter the subject of proceedings, irrespective of procedure
- after the end of the period of 14 days beginning with the start date, in the case of householder appeals or
- after the Inspectorate's deadline for final comments at nine weeks or after the site visit[30] in any other written appeal

Anyone making a late application for an award of costs will need to show good reason for not having applied sooner. A "good reason" will ***not*** be, simply, that the appellant has won their appeal and therefore wishes to recover their costs.

A44. If a late application for costs is entertained, it will normally be determined by a decision officer. The decision will be taken on the basis of the appeal papers and an exchange of written submissions, and normally without seeking any advice from the Inspector who held the hearing or inquiry.

[27] Contact details are in the Explanatory Guide referred to in paragraph 10 of the Introduction

[28] Or in the case of a hearing or inquiry closed, if the withdrawal occurs at the event

[29] Acting on behalf of the Secretary of State under delegation

[30] Unless the claim concerns conduct relating to the site visit itself in which case it should be made immediately afterwards.

A45. In the interests of economy, the parties involved should be as concise as reasonably possible in their submissions, and observe the time-limits set for their exchange.

PART B – AWARDS OF COSTS FOR UNREASONABLE BEHAVIOUR IN PLANNING AND PLANNING RELATED APPEALS

B1. Behaviour which is alleged to be unreasonable in the context of an application for an award of costs may be of a procedural or substantive nature. "Procedural" relates to the process; "substantive" relates to the issues arising on the appeal. Applications for costs on the basis of the withdrawal of an appeal (or enforcement notice) and late cancellation of an event are discussed in more detail in paragraphs B39 to B56.

Procedural awards – general

B2. All appeals are open to costs awards for failure to comply with the relevant statutory requirements, as set out in Regulations. Detailed advice on these requirements is set out in [currently DETR Circular 05/2000 and 02/2002]. Non-compliance with any rule or regulation, for example, the late submission of statements, will be regarded as unreasonable unless there is evidence of "extraordinary circumstances" which satisfactorily explain the failure to comply.

B3. Discussion of, and agreement on, outstanding issues between the principal parties is likely to reduce the risk of a confrontational attitude developing. It may also reduce the risk of a successful costs application and minimise the overall costs of the process to all concerned, including the costs of administering the appeal system. Costs applications are less likely to be justified where parties take responsibility for their behaviour and act reasonably.

B4. The following are examples of unreasonable behaviour which may result in an award of costs to either principal party:

- late submission of statements or proofs of evidence outside the prescribed timetable. This may result in unnecessary delay and extra hearing or inquiry time, due to the need for an adjournment. Or it may result in extra expense of preparation time – for example, from having to work late in the evening before or during the event with consequent higher charges for urgent work undertaken
- failure to produce statements or proofs of evidence, or required information in support of an enforcement notice appeal or ground of appeal, resulting in work being undertaken that turns out to have been fruitless
- resistance to or lack of co-operation with the other party in providing information, discussing the appeal or in responding to a planning contravention notice, thereby extending the duration of the appeal and associated expense
- introducing fresh and substantial evidence at a late stage necessitating an adjournment

- prolonging the proceedings by introducing a new ground of appeal or issue or reason for refusal
- not completing a timely statement of common ground or not agreeing factual matters common to witnesses of both principal parties, resulting in more time being taken at an inquiry than would otherwise have been the case
- late withdrawal of any reason for refusal, or ground of appeal, or reason for issuing an enforcement notice, resulting in wasted preparatory work and/or the attendance of a witness or representative person who proves not to have been required
- failing to provide relevant information within statutory time limits, resulting in an enforcement notice being quashed without the issues on appeal being determined
- failing to attend or be represented at an arranged hearing or inquiry
- failing to attend an accompanied site visit arranged by the Planning Inspectorate, so that the other party's expense of attending is wasted and
- withdrawing the appeal or enforcement notice so that the whole proceedings are abandoned and no decision on the appeal can be issued

In the case of the appellant, failure to provide the necessary documentation in support of an appeal may, in some cases, simply result in the appeal not being validated and actioned by the Inspectorate, at no expense to the planning authority.

The planning authority's handling of the planning application or enforcement notice prior to the appeal

B5. Planning authorities have statutory responsibility for handling a wide range of planning applications and investigating alleged breaches of planning control. Serious allegations of misconduct which suggest maladministration by the planning authority should appropriately be made to the Local Ombudsman, where the complainant does not have a remedy via a statutory right of appeal.

B6. The purpose of the costs application process is ***not*** to resolve by investigation every allegation of unreasonable behaviour. Rather it is to decide whether or not an award of costs is justified on the available evidence in a particular case.

B7. The procedures adopted by a planning authority for determining planning applications are generally a matter for the authority within the context of local government accountability. The process followed by the planning authority may be open to criticism in a particular case; but cause and effect need to be addressed in deciding an application for costs. Nonetheless, allegations of mishandling of the planning application or pre-application discussions or a previous application may be indicators of unreasonable behaviour by the planning authority.

B8. If it is clear that the planning authority will fail to determine an application within the time limits because of the complexity of the case, the applicant should be given a proper explanation. This should include information about any statutory consultations and an indication of when a decision is likely to be given. In any appeal against non-determination, the authority should explain the reasons for not reaching a decision within the relevant time limit, including any agreed extension of time. In such cases the decisive issue is likely to be whether or not the planning authority can produce evidence on appeal to substantiate each of its reasons given as to[31] why the authority would have refused planning permission, had the application been determined within the relevant period. However, if an appeal in such cases is allowed, the planning authority may be at risk of an award of costs if it is concluded that a greater level of communication with the applicant would have enabled the appeal to be avoided altogether.

B9. With regard to enforcement action, planning authorities must carry out adequate prior investigation consistent with national policy and guidance.[32] They are at risk of an award of costs if it is concluded that an appeal could probably have been avoided by more diligent investigation.

Substantive awards

Awards against appellants – unreasonable pursuit of appeal

B10. The right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award of costs being made against them if, on the basis of the available evidence, the appeal or ground of appeal plainly had no reasonable prospect of succeeding. This may occur when:

- the proposal is clearly contrary to or flies in the face of national planning policy and no, or very limited, other material considerations are advanced with inadequate supporting evidence
- development is proposed which is obviously not in accordance with the statutory development plan and no, or very limited, other material considerations are advanced with inadequate supporting evidence to justify determining otherwise
- the appeal follows a recent appeal decision in respect of the same, or very similar, development on the same, or substantially the same, site where the Secretary of State or Inspector has decided that the proposal is unacceptable and circumstances have not materially changed in the intervening period
- the appellant is seeking planning permission for inappropriate development in the Green Belt. In this situation it will not be sufficient for the appellant to rely on a genuine belief that there are very special circumstances to justify overriding the Green Belt presumption stated in PPG 2 on *Green Belts.* It is for the appellant to

[31] These resolved or putative reasons should be clear from the appeal documentation

[32] In PPG 18 on *Enforcing Planning Control* and DOE Circular 10/97 on *Enforcing Planning Control: Legislative Provisions and Procedural Requirements; also the Good Practice Guide for Local Planning Authorities on Enforcing Planning Control (DETR 1997).*

show why permission should be granted by demonstrating what the very special circumstances are or

- the appellant has refused to enter into or provide a planning obligation or fails to provide an obligation in appropriate terms, which the Secretary of State or Inspector considers is necessary to make the proposed development acceptable[33]

Awards against planning authorities – unreasonable refusal/failure to determine planning applications and unreasonable defence of appeals

B11. Planning authorities are at risk of an award of costs against them if they prevent or delay development which should clearly be permitted having regard to the development plan, national policy statements and any other material considerations. General guidance to authorities on propriety and the handling of planning applications is at paragraphs 27 and 28 of *The Planning System: General Principles (ODPM, 2005).*

B12 Authorities will be expected to produce evidence to show clearly why the development cannot be permitted. The planning authority's decision notice should be carefully framed and should set out in full the reasons for refusal. Reasons should be complete, precise, specific and relevant to the application. Planning authorities will be expected to produce evidence at appeal stage to substantiate each reason for refusal with reference to the development plan and all other material considerations including any relevant judicial authority. If they cannot do so, they risk a costs award against them for any unsubstantiated reason for refusal. This continues to be the ground on which costs are most commonly applied for and awarded against a planning authority. The key test will be whether evidence is produced on appeal which provides a respectable basis for the authority's stance, in the light of *R v SSE ex parte North Norfolk DC 1994 [2 PLR 78]*.

B13. If one reason for refusal is not properly supported, but substantial[34] evidence has been produced in support of the others, a partial award may be made, against the authority. If the authority relies on a sole reason for refusal which is not substantiated that is likely to result in a full award of costs.

B14. Planning appeals often involve matters of judgement concerning the character and appearance of a local area or the living conditions of adjoining occupiers of property. Where the outcome of an appeal turns on an assessment of such issues it is unlikely that costs will be awarded if realistic and specific evidence is provided about the consequences of the proposed development. On the other hand vague, generalised or inaccurate assertions about a proposal's impact are more likely to result in a costs award.

[33] ODPM Circular 05/2005 *Planning Obligations*, paragraph B57.

[34] In the sense of being respectable or not inconsiderable. Substantial evidence does not necessarily need to be lengthy to meet this test.

B15. Guidance on design is set out at paragraphs 33 to 38 of PPS 1 *Delivering Sustainable Development.* Planning authorities should ensure that their design evidence in appeals demonstrates a clear understanding of context. The evidence should explain the way in which a proposal would fail to promote or reinforce local distinctiveness. Where planning authorities rely on adopted supplementary guidance on design or relevant and up to date policies containing design criteria, an award of costs is unlikely to be made on the ground of an unreasonable planning objection.

B16. Planning authorities are not bound to accept the recommendations of their officers. However, if officers' professional or technical advice is not followed, authorities will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects. If they fail to do so, costs may be awarded against the authority.

B17. While planning authorities are expected to consider the views of local residents when determining a planning application, the extent of local opposition is not, in itself, a reasonable ground for resisting development. To carry significant weight, opposition should be founded on valid planning reasons which are supported by substantial evidence. Planning authorities should therefore make their own objective appraisal and ensure that valid planning reasons are stated and substantial evidence provided.

B18. Planning authorities will be at risk of an award of costs for unsubstantiated objections where they include valid reasons for refusal but rely almost exclusively on local opposition from third parties, through representations and attendance at an inquiry or hearing, to support the decision.

B19. Similarly, planning authorities are expected to give thorough consideration to relevant advice or representations from statutory consultees such as the Environment Agency or English Heritage, or from a County Council as highway authority, before determining a planning application. While it is the primary responsibility of planning authorities to either accept or reject that advice, they should clearly understand the basis for doing so and should provide, where necessary, a clear and rational explanation of the position taken. Exceptionally, if the planning authority is specifically directed[35] to refuse, or restrict the grant of, planning permission or to impose condition(s) on any permission it may grant, the responsibility for defending that issue on appeal and potential liability in the event of a costs application will fall to the directing body.

[35] Examples of directions and their implications for costs applications are given in Part D.

B20. In general, however, planning authorities will be expected to produce, or co-ordinate the provision of, evidence in support of advice on which they are relying on appeal and be prepared to defend any costs application. They should therefore discuss their case with the consultee at an early stage and clarify whether or not the consultee intends to support the authority by providing a statement or technical witness, as appropriate. What matters in any subsequent costs application is whether or not the authority can show good reason for accepting, or rejecting, the consultee's advice.

B21. Whenever appropriate, planning authorities will be expected to show that they have considered the possibility of imposing relevant planning conditions to allow development to proceed. They should consider any conditions proposed to them before refusing permission. A planning authority refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs where it is concluded on appeal that suitable conditions would enable the proposed development to go ahead.

B22. Authorities may wish to consider using an informative note attached to the decision notice on an application to convey outstanding planning concerns, rather than using an additional reason (or reasons) for refusal, where it seems likely that further information or possibly a planning obligation could resolve them and make the proposal acceptable to the planning authority.

B23. If a matter is capable in principle of being overcome by a condition or an obligation, authorities may run the risk of a partial award of costs in any subsequent appeal in respect of a revised application if this is not made clear at the outset, thus compelling the appellant to carry out work to address a reason for refusal which could probably have been overcome by other means.

B24. Minerals Planning Guidance (MPG) 8 and MPG 14 give advice on the statutory provisions and procedures with regard to applications for determination of operating, restoration and aftercare conditions respectively for interim development order ("IDO") permissions and old mineral planning permissions. The advice in MPG14 relates to provisions for both initial and periodic reviews (that is, determinations) of conditions. A mineral planning authority will be expected to show good reason, on appeal, for determining conditions which differ from those set out in the application. Failure to do so is likely to be regarded as unreasonable.

B25. The following are examples of circumstances which may lead to an award of costs against a planning authority:

- ignoring relevant national policy – for example, the advice in PPG 8 on *Telecommunications* concerning health risks arising from a mobile phone base station

- where a proposal is contrary to the development plan but the relevant policy has been superseded by national policy which advocates an entirely different approach. In those circumstances costs may be awarded if national policy has been blatantly disregarded by the planning authority. An example might be ignoring national advice in paragraph 52 of PPG 13 *Transport* on the use of maximum parking standards for individual developments
- acting contrary to, or not following, well-established case law
- persisting in objections to a scheme, or part of a scheme, which has already been granted planning permission or which the Secretary of State or an Inspector has previously indicated to be acceptable
- not determining like cases in a like manner – for example, imposing a spurious additional reason for refusal on a similar scheme to one previously considered by the planning authority where circumstances since the minor amendment have not materially changed
- or failing to grant a further planning permission for a scheme the subject of an extant or recently expired permission where there has been no material change in circumstances
- refusing to approve reserved matters when the objections relate to issues that should already have been considered at the outline stage
- imposing a condition that is not necessary, precise, enforceable, relevant to planning, relevant to the development permitted or reasonable and thereby does not comply with the advice in DOE Circular 11/95 on *The Use of Conditions in Planning Permissions*
- requiring that the appellant enter into or complete a planning obligation which does not accord with the tests in ODPM Circular 05/2005 on *Planning Obligations*
- not imposing conditions on a grant of planning permission where conditions could effectively have overcome the objection identified – for example, in relation to highway matters. The risk of a full award will be much greater if the conditions relate to a sole reason for refusal. Conversely a partial award is indicated if other substantiated objections to the proposal remain and
- refusing to enter into pre-application negotiations or to provide reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether or the issues to be considered being narrowed thus reducing the costs associated with the appeal

Awards against appellants – unreasonable appeals against enforcement notices or refusal to grant a lawful development certificate

B26. The appellant's right of appeal to protect their interest in land has to be balanced against the expectation that all parties to appeals should act responsibly and not cause others to incur unnecessary or wasted expense in the process. In enforcement and lawful development certificate appeals the onus of proof regarding decisive matters of fact is on the person appealing. Guidance is in DOE Circular 10/97.

B27. Where it has been made plain by a recent appeal decision relating to the same, or very similar, development on the same, or substantially the same, site that development should not be allowed, persisting with an appeal against an enforcement notice on ground (a) in section 174(2) of the 1990 Act (as amended) runs the clear risk of an award of the planning authority's costs of dealing with that issue.

Awards against planning authorities – unreasonable enforcement action/defence of appeals

B28. Costs are awarded in enforcement appeal cases on much the same basis as for planning appeals. Enforcement action is within the planning authority's discretion, and there is a right of appeal to the Secretary of State. However, the availability of costs awards is not intended to inhibit effective enforcement action, when it is clearly essential in the public interest.

B29. When using their discretionary enforcement powers, planning authorities are expected to exercise care to ensure that their decision to issue an enforcement notice takes full account of relevant judicial authority, national policy guidance in PPG 18, DOE Circular 10/97, the Good Practice Guide for Local Planning Authorities on Enforcing Planning Control (DETR 1997), and appeal decisions.

B30. Paragraphs 5 to 22 of PPG 18 will be relevant to deciding whether the planning authority behaved reasonably in exercising its discretion to take enforcement action. Authorities should be able to show, on appeal, that they had reasonable grounds for concluding that the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest; and it was expedient to issue the enforcement notice in the particular case.

B31. Planning authorities are likely to be at risk of an award of costs if they feel compelled to withdraw an enforcement notice after an appeal has been made. In such a case, it may be concluded that, by withdrawing the notice, the authority effectively conceded that it was not expedient to have issued it at the outset. An example is where the notice has been so incorrectly drafted, or is so technically defective, that, in the authority's view, it could not be corrected or

varied by the Secretary of State, on appeal, in accordance with section 176 (1) of the Town and Country Planning Act 1990. In these circumstances an award is likely to be made for the expense of the appeal unnecessarily incurred up to the date of withdrawal.

B32. The same principle applies if such a defective notice is not withdrawn, but is subsequently quashed on appeal for similar reasons, after expense has been incurred over a greater period.

B33. A serious misunderstanding of clearly established principles of law is likely to be considered unreasonable. However, that will not necessarily be the case where the authority relies on a legal interpretation which is not, in the event, supported by the reasons for an appeal decision.

B34. Planning authorities may decide to use their discretion to waive or relax any requirement of an enforcement notice under section 173A (1)(b) of the Town and Country Planning Act 1990. If they do so after an appeal has been made – for example, in the light of subsequent discussion with the appellant – authorities will *not* be at risk of a partial award of the appellant's costs of pursuing grounds (f) and (g) in section 174 (2) of the 1990 Act, if those grounds apply.

B35. It is entirely optional whether the planning authority decides to serve a planning contravention notice (requiring the provision of relevant information) before taking any enforcement action. A reasonably taken decision in favour of enforcement action should not put the authority at risk of an award of appeal costs, irrespective of whether or not a planning contravention notice has previously been served. However, in any particular case it will be necessary to consider whether the planning authority had reasonable grounds for concluding that there had been a breach of control; and the adequacy of the authority's stated reasons why enforcement action was considered expedient in the particular circumstances[36].

B36. In accordance with PPG 18, it will generally be considered unreasonable for a planning authority to issue an enforcement notice solely to remedy the absence of a valid planning permission, if it is concluded, on appeal, that there is no significant planning objection to the breach of control alleged in the enforcement notice. Accordingly, planning authorities issuing a notice in these circumstances will remain at risk of an award of the appellant's costs of pursuing an appeal. For example, an unconditional grant of planning permission on the "deemed application" might be regarded as an indication that the alleged breach of control was so trivial or technical as not to justify enforcement action.

[36] As required by Regulation 4 of The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, S.I. 2002 No. 2682.

B37 Where appropriate, the planning authority's stated reasons for withdrawing the enforcement notice during the course of an appeal will be examined in order to assess whether any material change of circumstances has occurred since the date of issue – for example, the availability of new information or the willingness of the appellant to apply for a conditional planning permission – and whether the enforcement notice was withdrawn promptly.

B38. If no good reason can be shown for any protracted delay between the decision to withdraw and the actual withdrawal of the notice, a partial award of costs may be made in respect of costs incurred during that period.

Awards arising from a party's withdrawal

Awards where appellant or planning authority withdraws – appeal not decided/ events cancelled or closed/partial withdrawal of case

B39. An appeal should be made only as a last resort. However, in recent years around 9 per cent of all appeals have been withdrawn, with a much higher proportion of those being where an inquiry or hearing has been requested, resulting in wasted administrative effort by all concerned including the Planning Inspectorate. Modified procedures for handling appeals, explained in Communities and Local Government Circular XX [replacement for Circular 05/2000] and supported by appeals procedural guidance available on the Planning Inspectorate's website[37], should encourage appellants to be ready when they appeal and help to avoid the kind of inefficiencies that have arisen in the recent past – whether from unnecessary requests for oral hearings, case creep[38] or tactical delays around the fixing of inquiry or hearing dates and the linking of appeals.

B40. The combined effect of the legislative changes recorded in Part F of the Annex is to create a level playing field where:

- awards of costs are generally available in principle irrespective of appeal procedure and
- the risk of an award of costs for withdrawal starts as soon as an appeal has been made irrespective of procedure and there is no "risk-free window" of opportunity to withdraw with impunity

Below are examples of the circumstances where withdrawal may lead to an award of costs.

[37] www.planning-inspectorate.gov.uk [add full reference to link]

[38] The practice of using the appeal process to progress alternatives to a scheme which should have been submitted as a new planning application to the local authority.

Withdrawal of an appeal resulting in wasted expense

B41. Generally speaking, an appellant who withdraws their appeal at any time risks an award of costs against them. If the appeal is withdrawn without any material change in the planning authority's case, or any other material change in circumstances, relevant to the planning issues arising on the appeal, an award of costs is likely to be made against the appellant if the claiming party can show that they have incurred quantifiable wasted expense as a result. The claiming party might be the planning authority or an interested third party.

B42. An example of a material change in circumstances would be a new and significant shift in the evidence base in support of a development proposal, which was not available to the appellant and before the planning authority when it made its decision on the application, or declined to determine the application. Withdrawal for commercial, not planning, reasons concerned with the choice of a particular site will run a risk of an award of costs.

B43. An appellant's desire to use the appeal process to progress amendments or alternatives to a scheme to overcome identified objections, which should have been submitted as a new planning application to the local planning authority, will ***not*** be regarded as a material change of circumstances relevant to the issues arising on the appeal.

B44. When an appeal is registered and the starting date set, the Inspectorate's practice is to forewarn appellants in correspondence that if they subsequently decide to withdraw their appeal at any stage they run the risk of a successful application for costs.

B45. In cases where the Inspectorate agrees to postpone a hearing, inquiry or site visit to a later date with the agreement of both parties, postponement would not carry a risk of an award of costs. In enforcement cases a mutually acceptable compromise from ongoing discussions may lead to the prompt withdrawal of an enforcement notice, thus avoiding further costs in the proceedings.

Withdrawal of an appeal too late for inquiry or hearing to be cancelled

B46. When an appeal is being dealt with by a hearing or inquiry, the Inspectorate's practice is to forewarn appellants that they should notify the case officer of any withdrawal soon enough for the event to be cancelled and the planning authority contacted and the cancellation publicised locally. If the appellant fails to notify the Inspectorate at the earliest opportunity with the result that

- the hearing or inquiry is opened or
- the planning authority, and any other parties, are present at the venue in anticipation that it will open

The appellant will run the risk of an award, against them, of the **preparation *and* attendance costs** of the planning authority, and of any other parties who have notified the appellant of their intention to be present. For an award *not* to be made in any particular case, the appellant will need to show good reason for the late withdrawal.

Failure to pursue an appeal or to attend a hearing or inquiry

B47. Warning the planning authority that the appeal may, or will, be withdrawn is not the same as actually withdrawing the appeal. Until the Inspectorate has received formal notice in writing of withdrawal, by email or faxed or posted letter, the appeal is still "live" and the planning authority and any other parties must assume that they will need to attend any arranged event.

B48. Where a hearing or inquiry has not been cancelled, the appellant or planning authority will be at clear risk of an award of costs for failing to attend or be represented at the arranged event. They will need to show, in any particular case, that there is good reason for not making an award. This applies irrespective of whether or not the party asked for a hearing/inquiry in the first place.

B49. In these circumstances, an award is likely to be made in respect of preparation work and attendance costs of the claiming party.

Withdrawal of planning authority's enforcement notice or reason(s) for refusal of planning permission

B50 If the planning authority withdraws the enforcement notice (or the basis for its case in general) *at any time* after an appeal is made, an award of costs may be made against the planning authority, if it is concluded that the appellant was unreasonably put to wasted expense. "Wasted expense" would be net of any re-usable expense, if appropriate, where a remaining linked appeal proceeds to decision.

B51. Notwithstanding the risk of a costs award, planning authorities should be prepared to review their case promptly following an appeal against refusal of planning permission (or non-determination) or an application to remove or vary one or more conditions as part of sensible on-going case management. The authority can minimise the risk of an award of costs in an appeal, or the extent of any award of costs, by:

- notifying the Inspectorate's case officer and the appellant *immediately* if it concludes, on re-examining its case, that any of the authority's reasons for refusal, or conditions for an approval, cannot, in the circumstances, be supported by substantial evidence and
- the authority confirms that it will not be contesting the appeal in those respects

Even in circumstances where the planning authority is found to have behaved unreasonably, acting in accordance with the guidance outlined above minimises unnecessary work and therefore expense being incurred by the appellant. However, a partial award of costs may be justified for time spent by the appellant in preparing to contest such reasons or conditions *before* being notified of the planning authority's change of stance.

B52. The withdrawal of one or more, but not all, of the planning authority's reasons for refusal will not remove all the planning objections to be resolved by an appeal. The planning authority will be at risk of at least a partial award of costs in favour of the appellant for wasted costs of preparing to rebut the particular objection or objections up to the time of withdrawal, unless circumstances have materially changed in the meantime so justifying the change of stance. Similar considerations apply to the appellant's withdrawal of a ground/ grounds of appeal – for example, one or more of the legal grounds[39] in an enforcement notice appeal – resulting in partially wasted costs to the planning authority where the appeal otherwise proceeds to a decision on a remaining ground or grounds.

B53. Where the planning authority is relying on expert advice from a statutory consultee, the responsibility for liaising over supporting evidence is with the planning authority, although the consultee should assume responsibility for the content. Should the stated position of a statutory consultee appear to change following the submission of the appeal, the planning authority will minimise the risk of an award of costs by clarifying and withdrawing the relevant reason for refusal at the earliest possible stage. Where in this scenario the authority chooses to maintain the reason for refusal, it will be held responsible for providing evidence to substantiate the maintained position.

B54. If the planning authority concedes on a further identical application, invited or not, the authority runs a clear risk of a full award of costs for an abortive appeal which is withdrawn in such circumstances.

B55. In this scenario it is possible that an appeal may not be withdrawn because not all the planning issues have been resolved to the appellant's satisfaction. Examples are where the appellant is dissatisfied with a conditional grant of planning permission, or with a resolution by the authority to grant permission subject to a section 106 agreement[40]. In these circumstances, an award of costs may be made in favour of the appellant if the planning authority fails to provide sufficient evidence on appeal to support the imposition of the particular condition(s) or the requirement for a planning obligation if the authority's

[39] Grounds (b), (c), (d), and (e) in section 174(2) of the 1990 Act (as amended)

[40] Section 106 of the 1990 Act (as amended).

stance is inconsistent with national policy guidance on the use of conditions and planning obligations. The decision on any costs application will take full account of the particular circumstances.

B56. If the planning authority's withdrawal of one or more reasons for refusal removes the operational need for a hearing or inquiry, but the appeal continues by written representations, a partial award of costs may be made against the planning authority, limited to any "wasted" extra costs incurred by other parties in preparation for the hearing or inquiry. Any such award would be without prejudice to considering any other application for costs on the grounds of unreasonable behaviour mentioned elsewhere in this guidance. Similar considerations apply to an appellant's withdrawal of one or more grounds appeal.

PART C: CALLED-IN PLANNING APPLICATIONS AND NON-PLANNING CASEWORK

C1. The general policy set out in Part A of the annex applies to non-planning casework[41] which is subject to any separate guidance from the relevant responsible Department.

C2. In the case of planning applications referred to the Secretary of State under section 77 of the Town and Country Planning Act 1990[42], the decision by the Secretary of State to call in an application for his/her own determination places the parties in subsequent inquiry proceedings in a different position from that in a planning appeal. In call in proceedings the participation of the parties is primarily to assist the Secretary of State in the process of reaching his/her decision on the planning issues identified in his/her statement under Rule 6 of the relevant Inquiries Procedure Rules.

C3. The decision to call in an application for the Secretary of State's determination is a matter open to direct complaint and may be contested in the Courts, by application for judicial review. The decision to call in an application is not a relevant consideration in determining an application for the award of costs to one party and against another.

C4. Unlike the situation in a planning appeal, the planning authority is not defending its formal decision to refuse planning permission, or its failure to determine the application within the prescribed period. The applicant has a right to apply for planning permission. In these circumstances, it is *not* envisaged that a party may 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, risks a partial award of costs for unreasonable behaviour in a called-in case.

C5. In the case of a called-in planning application, the eligible costs will start from the date of the notification by the relevant Government Office of the decision to call in the application. In other non-appeal cases the eligible costs will start from the date of the notification or statutory publication of, for example, the relevant order, following which the applicant for costs has begun to incur costs in the ensuing statutory process.

[41] For example, public rights of way orders and environment appeals, relating to the responsibilities of the Secretary of State for Environment, Food and Rural Affairs.

[42] Also, listed building consent applications referred under section 12 of the Planning (Listed Buildings and Conservation Areas) Act 1990; conservation area consent applications referred under section 74(2)(a) of that Act; and hazardous substances applications referred under section 20 of the Planning (Hazardous Substances) Act 1990 and Regulations.

PART D: COSTS AND THIRD PARTIES, INCLUDING STATUTORY CONSULTEES

General policy

D1. As stated in paragraph A15, the term "principal party" normally refers to the relevant planning authority (or other relevant responsible authority) and the appellant. *All* other interested parties[43], are defined, for the purposes of this guidance, as third parties with the exception in paragraphs D9 and D10 below.

D2. In the case of hearings, separate Rules apply, but similar considerations relate to the procedural conduct of the parties. In written cases it is not envisaged that conduct affecting third parties will arise. An exceptional example might be an abortive site visit, where a third party has specifically requested that the Inspector view the appeal site from their property.

D3. The general principle is that all parties normally meet their own expenses. Nothing in this guidance is intended to deter third parties such as local residents from becoming involved in an appeal if they have views they wish to express and have taken into account. However, if third parties choose to participate in the appeal process, and to incur expense in preparatory work for an inquiry (or hearing), in which they intend to appear – for example, in support of the planning authority's refusal of planning permission – they do so on their own initiative.

D4. The policy in this part of the Annex distinguishes between:

- third parties in general, such as local residents who may or may not have written to the planning authority and who attend an appeal inquiry or hearing (paragraph 5 below) or make representations in a written appeal and
- third parties who are "entitled to appear at an inquiry"[44] as discussed in paragraph 6 below

D5. Awards to or against third parties in general will be made only in exceptional circumstances – such as non-compliance with procedural requirements by one of the principal parties, causing unnecessary or wasted expense to third parties. They will not have costs awarded to, or against, them where unreasonable behaviour by one of the principal parties relates to the substance of the case (that is, the appeal, or the refusal of permission or refusal reason(s), is considered unreasonable).

[43] including statutory consultees, whether or not they are "entitled to appear at an inquiry" under the appropriate Inquiries Procedure Rules,

[44] Under Rule 11 of the appropriate Inquiries Procedure Rules – for example, the person has registered their interest as a Rule 6 party or they are a "statutory party" as defined in the Rules

D6. Third parties who are "entitled to appear at an inquiry" will be expected to behave appropriately – for example, complying with the normal procedural requirements concerning the timely submission of statements of case. They will be at risk of an award of costs against them for any unreasonable conduct by them relating to procedural matters at the inquiry, which causes unnecessary or wasted expense to other parties. They may also have costs awarded to them in the circumstances of another party's procedural misconduct at the inquiry. An example would be an unnecessary adjournment.

D7. In the case of statutory consultees, a consultee providing only a technical or expert witness in support of the planning authority's case at the inquiry (or hearing) will not be regarded as a separate party in their own right liable to an award of costs. In that situation, the planning authority will be treated as the party expected to defend any appropriate costs application made. Normally, to be treated as a separate party the consultee will need to be separately represented at the event. Accordingly, any allegations of unreasonable behaviour directed at a statutory consultee, as distinct from the planning authority, should, in fairness, be drawn to their attention at an early stage before the event, so that there is adequate time to prepare and co-ordinate a response which avoids disproportionate work in handling a costs application.

D8. If an award of costs is made against the planning authority but the authority considers the statutory consultee should bear responsibility, the resolution of any difference of view will be a matter for the two parties.

D9. In the case of the Mayor of London section 322B of the Town and Country Planning Act 1990[45] deals with costs situations that apply only in London where a planning authority has refused a planning application in compliance with a direction from the Mayor. Relevant policy guidance is in GOL Circular 1/2000, at paragraphs 6.16 to 6.20 and Annex 3 to that Circular. Accordingly, the Mayor should be treated as a principal party where an appeal arises from such a direction which is determined by the Secretary of State or an Inspector; and the Mayor may be liable to pay costs in circumstances described in that Circular.

D10. Similar considerations apply, by analogy, to any other statutory consultee exercising a similar power of direction – for example, the Highways Agency.

Cancellation of an inquiry or hearing

D11. Unreasonable conduct may cause the cancellation of an inquiry (or hearing), for example, as a result of unreasonable withdrawal of the appeal. Or an appellant may withdraw the appeal too late for the inquiry or hearing to be cancelled or fail to attend an inquiry or hearing (see paragraphs B39 to B56 above). In these circumstances, third parties may be awarded costs in their favour, if they can prove that they have incurred wasted expense as a result.

[45] Inserted by section 345 of the Greater London Authority Act 1999

D12. For an award of costs to be entertained, third parties will need to demonstrate that they had forewarned the appellant and the planning authority of their intention to appear at an inquiry (or hearing), before incurring expense in preparatory work. In the case of inquiries they can do this by seeking Rule 6[46] status from the Inspectorate at an early stage.

D13. Even where an inquiry or hearing has to be cancelled, an award of costs in favour of a third party is unlikely to be made in circumstances where ongoing discussions between the appellant and the planning authority have resulted in a mutually acceptable solution to the planning issues on which the appeal turns, and neither principal party has applied for an award of costs against the other.

D14. In any costs application relating to a cancelled inquiry (or hearing), third parties will be expected to demonstrate that:

(1) before incurring any expense which is ultimately "wasted", they enquired of the planning authority about any discussions between the principal parties which would have forewarned them that the arranged inquiry (or hearing) might not proceed on the date first notified and

(2) the party against whom costs are sought has behaved unreasonably in causing the cancellation of the inquiry (or hearing)

[46] Or Rule 8 in the Town and Country Planning (Enforcement) (Inquiries) Procedure Rules

PART E – COSTS IN RESPECT OF COMPULSORY PURCHASE AND ANALOGOUS[47] ORDERS

General principles

E1. There continues to be a distinction between cases where appellants take the initiative, such as in applying for planning permission or undertaking development allegedly without planning permission, and cases where objectors are defending their rights, or protecting their interests, which are the subject of a compulsory purchase order. Such objectors are defined in terms of "remaining objectors"[48]. If a remaining objector to such an order is successful, an award of costs will be made in his or her favour unless there are exceptional reasons for not doing so. The award will be made against the authority which made the order: it does *not*, of itself, imply unreasonable behaviour by the authority[49].

E2. This guidance applies where there are separate acquiring (or order making) and confirming authorities[50] – that is, where the acquiring authority is not a Minister. It has been updated in the light of the amendments made to compulsory purchase legislation by Part 8 of the Planning and Compulsory Purchase Act 2004.

E3. Separate guidance specific to awards of costs in connection with public inquiries or hearings held into applications for orders made under section 6 of the Transport and Works Act 1992 is contained in Circular No. 3/94 (Department of Transport).

E4. In cases to which this guidance applies awards of costs may also be made where the written representations procedure is used. The Acquisition of Land Act 1981 (as amended) provides that the confirming authority "may make orders as to the costs of the parties [to the procedure] ….and as to which party must pay the costs"[51].

E5. In the light of the provisions inserted by the 2004 Act, the policy criteria for costs awards have been updated. To enable an award to be made on the grounds of a successful objection the following conditions normally have to be met:

[47] Orders of a kind which are considered analogous to a compulsory purchase order for costs purposes; examples are given in the Appendix.

[48] "Remaining objector" means a person who has made a remaining objection within the meaning of section 13A of, or paragraph 4A(1) of Schedule 1 to, the Acquisition of Land Act 1981 – that is, a qualifying person who has made a relevant objection which has been neither disregarded nor withdrawn.

[49] This guidance does ***not*** apply to applications for costs in relation to trunk road and motorway schemes and orders published by the Secretary of State for Transport.

[50] Section 7(1) of the Acquisition of Land Act 1981 provides that "confirming authority", in relation to compulsory purchase, means, where the acquiring authority is not a Minister, the Minister having power to authorise the acquiring authority to purchase the land compulsorily.

[51] Section 13B of the Acquisition of Land Act 1981, as substituted by section 100(6) of the 2004 Act.

- the claimant is a remaining objector who either:
  - attended (or was represented at) an inquiry (or, if applicable, a hearing[52]) at which his or her objection was heard or
  - submitted a written representation which was considered as part of the written procedure **and**
- the claimant has had his or her remaining objection sustained by the confirming authority's refusal to confirm the order, or by its decision to exclude from the order the whole or part of his or her property

E6. Exceptionally, an order is not confirmed for technical reasons or because the acquiring authority subsequently decides not to proceed with compulsory purchase and asks for the order to be treated as withdrawn. In such circumstances, provided all the criteria in paragraph E5 above are met, a claimant who has incurred expense in objecting to the order and pursuing that objection will be regarded as a successful objector for the purposes of this circular. The objector will be treated in the same way as if their success were due to their representations.

E7. An application for costs on the ground of having successfully opposed the order cannot sensibly be made at the inquiry or hearing, or during the written representations procedure, as the decision whether or not to confirm the order will not have been issued. When notifying successful objectors of the decision on the order under the appropriate Rules[53] or Regulations[54], the confirming authority will tell them that they may be entitled to claim inquiry, hearing or written representations procedure costs and invite them to submit an application for an award of costs on the basis of successful objection.

E8. There are some circumstances in which an award of costs may be made to an unsuccessful objector or to an order-making authority because of unreasonable behaviour by the other party, although this would appear most unlikely where the written procedure is followed.

E9. In practice such an award is likely to relate to procedural matters, such as failing to submit grounds of objection or serve a statement of case, resulting in unnecessary expense – for example, because the inquiry has to be adjourned or is unnecessarily prolonged.

[52] Objections to compulsory purchase orders are not dealt with by informal hearings for practical reasons, but a hearing might be used, for example, in the case of an analogous order under section 97 or 98 of the Town and Country Planning Act 1990, revoking or modifying a planning permission.

[53] The Compulsory Purchase (Inquiries Procedure) Rules 2007 (SI 2007 No. 3617); or in the case of analogous orders the relevant rules where applicable.

[54] Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004 (SI 2004 No. 2594); or in the case of analogous orders the relevant regulations where applicable.

E10. In these limited cases an application for costs (on grounds of unreasonable behaviour) should be made to the Inspector at the inquiry (or hearing), or in writing if appropriate. The Inspector will then report to the confirming authority with his or her conclusions and recommendation.

E11. An award of costs cannot be made both on grounds of success and unreasonable behaviour in such cases; but an award to a successful objector may be reduced if they have acted unreasonably and caused unnecessary expense in the proceedings – as, for example, where their conduct leads to an adjournment which ought not to have been necessary.

E12. The policy in Part D of this Memorandum on third parties will apply to any allegations of unreasonable behaviour by or against a person who is not a remaining objector to the order but wishes to attend the proceedings.

Partly successful objectors

E13. Where a remaining objector is partly successful in opposing a compulsory purchase order, the confirming authority will normally make a partial award of costs. Such cases arise, for example, where the authority, in confirming an order, excludes part of the objector's land.

Analogous orders and proposals

E14. The confirming authority normally awards costs to successful objectors to orders and proposals which he or she regards as analogous to compulsory purchase orders. In general an order or proposal will 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. Some examples of orders and proposals which are considered to be analogous to compulsory purchase orders, or *may* be in certain cases (depending on the particular circumstances of an objector's interest in the land), are set out in the Appendix below, although the list is not intended to be exhaustive.

Plural objections

E15. Sometimes joint inquiries (or hearings) are held into two or more proposals, only one of which is a compulsory purchase (or analogous) order, for example an application for planning permission and an order for the compulsory acquisition of land included in the application. Where a remaining objector, who also makes representations about a related application, appears at such inquiries (or hearings) and is successful in objecting to the compulsory purchase order, the objector will be entitled to an award in respect of the compulsory purchase or analogous order only. An objector is not, however, precluded from applying for the costs relating to the other matter on the grounds that the authority has acted unreasonably.

Appendix to Part E

ORDERS ANALOGOUS TO COMPULSORY PURCHASE ORDERS

(1) orders under sections 97 and 98 of the Town and Country Planning Act 1990, revoking or modifying a planning permission

(2) orders under sections 23 and 24 of the Planning (Listed Buildings and Conservation Areas) Act 1990, revoking or modifying listed building consent

(3) orders under section 220 of the Town and Country Planning Act 1990 and Control of Advertisements Regulations[55], revoking or modifying a grant of advertisement consent

(4) orders under sections 102 and 103 of, and Schedule 9 to, the Town and Country Planning Act 1990 –

- (a) requiring discontinuance of a use of land (including the winning and working of minerals), or imposing conditions on the continuance of a use of land or
- (b) requiring the removal or alteration of buildings or works or
- (c) requiring the removal or alteration of plant or machinery used for winning or working of minerals or
- (d) prohibiting the resumption of winning or working of minerals or
- (e) requiring steps to be taken for the protection of the environment, after suspension of winning and working of minerals

(5) orders under sections 14 and 15 of the Planning (Hazardous Substances) Act 1990, revoking or modifying a hazardous substances consent, or refusal of an application under section 17 (1) of the Act for continuation of a consent, on change of control of land

(6) a petition under section 125 of the Local Government Act 1972, as substituted by section 43 of the Housing and Planning Act 1986, relating to compulsory acquisition of land on behalf of parish or community Councils

[55] The Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (SI 2007 No. 783).

PART F – LEGISLATION UNDERPINNING COSTS AWARDS IN PLANNING-RELATED PROCEEDINGS

Powers to award costs

F1. Section 250 (5) of the Local Government Act 1972 enables the Secretary of State to 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". This power is applied to various planning proceedings by sections 320, 322, 322A of, and Schedule 6 to, the Town and Country Planning Act 1990; by section 89 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and by section 37 of the Planning (Hazardous Substances) Act 1990.

F2. For hearings and written representations cases, section 322 of the Town and Country Planning Act 1990 has been fully commenced[56], with the result that costs awards are available for all proceedings under the Planning Acts, begun on or after the appointed day,[57] irrespective of procedural method.

F3. Section 322 enables costs to be awarded against any party in proceedings which do not give rise to a local inquiry. This may include where it has been determined that the matter will be determined following a hearing or inquiry, but the arrangements have not yet been made for that hearing or inquiry. [Once fully commenced], it will also apply to cases which are to be determined on the basis of written representations. Section 322(1A)[58] applies this power to any case which falls with section 319A of the Planning Act 2008,[which provides that the Secretary of State may determine the appeal method.]

F4. Section 322A of the Town and Country Planning Act 1990 enables costs to be awarded against any party in proceedings under the Planning Acts where arrangements are made for a local inquiry or hearing to be held and the inquiry or hearing does not take place. The Secretary of State will exercise this power where any party's unreasonable behaviour directly results in the cancellation of a hearing or inquiry which has been arranged, so that expense incurred by any of the other parties is wasted[59].

[56] By SI […./2009], an order under the Planning (Consequential Provisions) Act 1990, setting an appointed day for all appeal methods. It has also brought paragraph 6(5) of Schedule 6 fully into force for written representations as well as hearings cases. As a consequence the amendments made by Schedule 4 to the Planning (Consequential Provisions) Act 1990, which "temporarily omitted" section 322 have ceased to have effect.

[57] [record date]

[58] Inserted by Schedule 10 to the [2008 Act]

[59] See B39 onwards

F5. These provisions, in combination, are interpreted as enabling an award of costs to be made irrespective of planning case type and procedure, including in the event of a withdrawal at any stage in the appeal process. The consequence is that enforcement notice, lawful development certificate and some other specialist appeals[60] are no longer distinguishable and all appeals under the planning Acts carry the same risk of an award of costs, irrespective of procedure and the timing of any withdrawal.

[60] to which the provisions in Schedule 4 to the Planning (Consequential Provisions) Act 1990 previously applied

Annex B

Partial Impact Assessment

Summary: Intervention & Options		
Department /Agency: **Communities & Local Government**	**Title:** **Impact Assessment of new guidance on the award of costs in planning and other proceedings**	
Stage: Consultation	**Version:** 1.1	**Date:** 27/11/2008
Related Publications:		

Available to view or download at:
http://www.communities.gov.uk

Contact for enquiries: Katie Jones **Telephone:** 020-7944-6530

What is the problem under consideration? Why is government intervention necessary?
The Planning Act 2008 contains a power to allow the Planning Inspectorate to determine the method by which appeals will be dealt with (inquiries, hearings or written representations). At present an application for costs can be made if one party in an appeal believes the other has behaved unreasonably and has caused them unnecessary expense. However, this only applies to appeals dealt with by inquiries and hearings. Therefore, government intervention is needed to make the planning appeals process equal regardless of which method of appeal is chosen. Additionally, parties sometimes abuse the appeal system by submitting appeals as a negotiating tactic with the local planning authority and then withdrawing them with impunity from costs. Government intervention is needed to deter parties from abusing the appeal system in this way.

What are the policy objectives and the intended effects?
The policy objective is to ensure that all parties to a planning appeal have the opportunity to apply for an award of costs, where justified, regardless of the method by which their appeal is being determined (written representations, hearings or inquiries). The Government also wishes to strengthen the disciplining nature of the costs regime to ensure that parties behave reasonably both prior to and during the appeal process and do not submit frivolous appeals and then withdraw them before the hearing or inquiry takes place.

What policy options have been considered? Please justify any preferred option.
The Government did consider whether introducing fixed penalties for unreasonable behaviour might encourage parties to behave more reasonably but concluded that the benefits of such a system, would be outweighed by the costs and work necessary to adminster such a system.

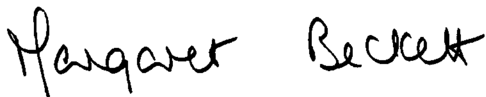
The Government sees no feasible alternative option other than to commence powers to extend the costs regime to appeals dealt with by written representations in order to create a fair and level playing field for all parties.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?
Numbers of applications for costs and the decisions made are monitored and reported on an annual basis by the Planning Inspectorate, and will continue to be in order to establish the effects of the changes introduced by the circular. The annual data collected will be monitored after two years to establish the effects of the policy.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:



Date: 3/12/2008

Summary: Analysis & Evidence

Policy Option: **Description:**

COSTS			
ANNUAL COSTS		Description and scale of **key monetised costs** by 'main affected groups' No transition costs are expected as the preferred option is an extension of an existing regime and therefore parties involved in planning appeals are already familiar with the process. There will be costs to the Planning Inspectorate of deciding increased numbers of costs applications caused by extending regime to written representations.	
One-off (Transition)	**Yrs**		
£0			
Average Annual Cost (excluding one-off)			
£263,000		**(10 year) Total Cost** (PV)	**£2,100,000**

Other **key non-monetised costs** by 'main affected groups'

An increase in costs applications may lead to an increase in awards. More parties who behave unreasonably may be liable for costs. This cost will be a transfer to the party affected by the unreasonable behaviour.

Increased costs to local planning authorities, appellants, and third parties of preparing and defending costs applications.

BENEFITS			
ANNUAL BENEFITS		Description and scale of **key monetised benefits** by 'main affected groups'. It has not been possible to monetise the benefits at this stage.	
One-off	**Yrs**		
£0			
Average Annual Benefit (excluding one-off)			
£0		**Total Benefit** (PV)	**£0**

Other **key non-monetised benefits** by 'main affected groups'.

The costs regime will be more equitable. The increased deterrent effect of the regime will reduce delays in the appeal system, and reduce unnecessary time spent on preparing for appeals which are subsequently withdrawn. If an increased number of cost awards are made, there will be greater transfers to the party which has been affected by unreasonable behaviour.

Key Assumptions/Sensitivities/Risks We have assumed that as the majority of planning appeals are made via written representation, the extension of the costs regime to written representations may mean an increase in the number of cost applications made.

Price Base Year 2008	**Time Period Years** 10	**Net Benefit Range** (NPV) **£0**	**NET BENEFIT** (NPV Best estimate) **–£2,100,000**

What is the geographic coverage of the policy/option?				England	
On what date will the policy be implemented?				6 April 2009	
Which organisation(s) will enforce the policy?				Planning Inspectorate	
What is the total annual cost of enforcement for these organisations?				£0	
Does enforcement comply with Hampton principles?				Yes/No	
Will implementation go beyond minimum EU requirements?				Yes/No	
What is the value of the proposed offsetting measure per year?				£0	
What is the value of changes in greenhouse gas emissions?				£0	
Will the proposal have a significant impact on competition?				Yes/No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large	
Are any of these organisations exempt?	No	No	N/A	N/A	

Impact on Admin Burdens Baseline (2005 Prices)		(Increase – Decrease)
Increase of £	Decrease of £	**Net Impact £**

Key:	**Annual costs and benefits: Constant Prices**	**(Net) Present Value**

Evidence Base (for summary sheets)

Title of proposal

Revision of the Circular on award of costs in planning and other related proceedings.

Objective

To improve the equity and disciplining nature of the costs regime in planning and other associated appeals.

Background

The current policy on the award of costs is contained in Circular 8/93 "Award of Costs incurred in planning and other (including compulsory purchase order) proceedings"[61]. This policy is well established and has generally worked well.

The policy set out in Circular 8/93 is relevant to a number of different types of appeal, called-in or referred applications and orders of various kinds, both under the Planning Acts and non-planning legislation.

The current Circular sets three tests to be met if costs are to be awarded:

- that the application is made at the appropriate time
- that the party against whom the application for an award is made has behaved unreasonably and
- that unreasonable behaviour has resulted in unnecessary or wasted expense being incurred in the appeal proceedings

The threat of facing a potential award of costs encourages all parties to an appeal to act reasonably in the planning process both prior to and during appeal. Examples of unreasonable behaviour might include, on the part of the appellant, introducing new grounds of appeal, or new issues late in the process; whilst for a local planning authority, failure to provide evidence on planning grounds to substantiate reasons for refusing planning permission would constitute unreasonable behaviour. Further examples of unreasonable behaviour are laid out in Circular 8/93.

The way the relevant legislative powers have been commenced means that for the majority of cases that the Planning Inspectorate deals with (ie planning appeals) the Secretary of State can only award costs in those appeals dealt with by hearing or inquiry. This does not currently disadvantage parties since they have the right to have their appeal heard orally, thus allowing them to seek an award of costs, where they believe it is justified. The ability to apply for costs may be an influencing factor in parties exercising their right to be heard orally even where the complexity of their appeal case doesn't necessarily warrant this.

[61] http://www.planning-inspectorate.gov.uk/pins/appeals/costs/circular08_19930329.htm

The existing legislative powers also allow parties to withdraw an appeal being dealt with by hearing or inquiry before a date has been set for the event without being liable to an award of costs.

Costs applications are made during the course of an appeal and are generally decided by the Inspector who determines the appeal. Awards may be full or partial based on the nature of the application ie whether the appellant is arguing that the matter should never have had to go to appeal in the first place, thus justifying a full award of costs, or whether some aspect or element of a party's behaviour prior to appeal or during the appeal had caused unnecessary expense eg if the appellant has failed to turn up to a hearing or inquiry thus causing other parties to incur unnecessary or wasted expense on that day.

Government Intervention

The costs circular is in need of updating to take account of various legislative changes that have taken place since 1993 when it was first introduced.

By virtue of powers within the Planning Act 2008[62], the Secretary of State can determine the method by which appeals will be dealt with ie written representations, hearings or inquiries. This is to ensure that appeal procedures relate to the complexity of the case and that time and resource are not wasted unnecessarily. However, in adopting this proposal, the government also recognises that if a case was selected for the written representations procedure, but the parties to the appeal wanted to apply for costs, then under the current legislative and policy framework, they would be prevented from doing so. The government views this situation as unfair to the parties to the appeal.

As outlined below, the government has previously consulted upon a number of changes to the appeals process to improve the effectiveness and efficiency of the appeal system in the consultation document *Improving the appeals system – making it proportionate, efficient and customer focused*[63].

Many of the changes were proposed to underpin the view that submitting an appeal should be a last resort for an applicant and should not be entered into lightly. Parties are encouraged to continue negotiations with a local planning authority to overcome concerns about development proposals rather than immediately resorting to the appeal process. At present appellants can submit appeals to be dealt with by hearing and inquiry and withdraw their appeal at any point before a date for the hearing or inquiry has been set with immunity from any costs award. The appellant can use this as a negotiating tactic with the local planning authority. The withdrawal of appeals at any stage causes all parties abortive work and can delay those genuine appeals that do proceed to hearing or inquiry as they have to wait their turn in the queue.

[62] Section 196 of the Planning Act 2008 inserts section 319A into the Town and Country Planning Act 1990, 88D into the Planning (Listed Building and Conservation Areas) Act 1990 and 21A into the Planning (Hazardous Substances) Act 1990

[63] http://www.communities.gov.uk/archived/publications/planningandbuilding/improvingappealconsultation

The Government is seeking to reduce the number of vexatious and frivolous appeals in order to make the appeals process more efficient and revisions to the costs circular are required to reinforce this aim and reflect the other legislative changes that the Government will be bringing forward via secondary legislation and revised guidance on appeal procedures.

Since planning appeals comprise the bulk of the casework to which these changes will apply, the analysis in this impact assessment is based on appeals under section 78 of the Town and Country Planning Act 1990, commonly known as planning appeals.

Consultation

Within Government

The consultation document and accompanying impact assessment have been prepared by Communities and Local Government and the Planning Inspectorate. Discussions with Government Departments with an interest have informed the drafting of the circular.

Outside Government

The Government has already consulted on the principle of updating the costs circular and of extending the costs regime to appeals dealt with by written representations. The proposal to update the Costs Circular was on the whole supported, with 83 per cent of all respondents indicating that they either strongly agreed or agreed with the proposal. The guidance in the attached draft circular has also been informed by discussions with key stakeholders such as agents that regularly submit appeals and local planning authorities.

Alongside the written consultation exercise on a number of proposals to improve the appeals system which took place between May and August 2007, the Department undertook meetings and workshops with a range of stakeholders, including small businesses, to inform the consultation response. In Spring 2008, the Planning Inspectorate circulated a questionnaire on costs to a number of local planning authorities, planning agents and other stakeholder organisations and held workshops to follow up the questionnaire responses, which have informed the drafting of the attached circular.

Although earlier consultation has taken place on updating the circular and extending costs to written representations cases, the way in which the policy would be expressed was not consulted upon. The consultation on a revised draft circular allows consultees the opportunity to respond to the policy and guidance on the costs regime.

Options

A) Do nothing

The costs regime would continue to apply in its current form ie as set out in Circular 8/93. This would mean that appellants whose case was dealt with by written representations as a result of the Inspectorate choosing that procedure would not be able to seek an award of costs where they considered this justified in principle. It would also mean that appellants who withdraw their appeal before a date for a hearing or inquiry is set could continue to do so with immunity from costs awards.

B) Commence legislative powers to enable the award of costs in written representation cases and update costs policy so that costs awards can be sought when an appeal is withdrawn regardless of the timing.

The costs regime will be extended to written representation cases to allow parties to seek an award of costs where they believe the behaviour of another party has been unreasonable and has caused them unnecessary expense.

The Government believes that whilst the opportunity for parties to exhibit unreasonable behaviour which causes unnecessary expense is more limited in cases dealt with by written representations, it does nonetheless exist and in principle parties should be able to seek an award of costs and should not be prevented from doing so by the particular method that their appeal is being dealt with.

The full commencement of costs provisions in the Town and Country Planning Act 1990, the insertion of new section 319 A into the Town and Country Planning Act 1990 (allowing the Inspectorate to determine the appeal method) and the consequential changes to the powers to award costs[64] needs to be reflected in the revised cost circular. The attached circular therefore creates a level playing field for costs for all methods of procedure (written representations, hearings or inquiries) so that if an appeal is withdrawn at any stage of the process, parties may be liable for costs awards.

Costs and benefits

Sectors and groups affected

- public sector (local authorities, the Planning Inspectorate and Government Offices, Government Departments)
- appellants (including business, voluntary sectors, charities and the public)
- third parties (including business, voluntary sectors, charities and the public)

[64] As set out in Schedule 10 of the Planning Act 2008.

Option A: Do nothing

Benefits

- familiarity with current regime. The costs regime is well established and parties that administer the regime and those parties that use it regularly would not need to learn a new set of procedures
- the resources required to determine costs applications would remain fairly constant

Costs

- there would be no additional monetary costs with this option but doing nothing would lead to an unfair system since parties could be prevented from seeking costs if their method was to be determined via written representations
- where parties withdraw an appeal before a date has been set, costs may be incurred by the other party in terms of time and resources spent preparing an appeal. These parties will be unable to make an application for costs.

Option B: Extend costs to written representations and allow costs award to be sought where appeals have been withdrawn, regardless of the timing of the withdrawal.

It has not been possible at this stage to fully monetise the benefits and costs of this option and, as part of the consultation we would like to ask consultees to consider the following questions:

- is there any evidence we should be considering on the level of cost awards made?
- do you have any relevant evidence on the time taken in submitting or defending costs applications in either householder or non-householder applications?

Benefits

Due to the nature of the benefits arising from adopting Option B, they cannot be easily monetised. The key benefits are identified below, but no quantification has been possible. Most of the benefits are likely to come from the greater equity which the extension of the cost regime brings. If the costs regime was not reformed, parties to an appeal which was decided by written representations would be unable to seek any compensation if they were faced with unreasonable behaviour which had cost them time and effort.

Extending the costs regime to cover written representations enables the Government to commence the powers in the Planning Act allowing the Planning Inspectorate to choose the appeal procedure. A previous impact assessment accompanying the Planning Bill[65] found that allowing the Planning Inspectorate to determine the appeal method would lead to net benefits of £34,930,000.

[65] http://www.communities.gov.uk/publications/planningandbuilding/planningbill

Greater Equity

This option introduces a more equitable system in which parties to an appeal could make an application for costs regardless of the method by which their appeal was being dealt with, in recognition of the fact that unreasonable behaviour can still lead to unnecessary expense in written representations cases. Consequently, this may result in increased confidence in the system since it will appear 'fairer' to all parties.

The Scottish planning appeals system allows for costs awards in written representation cases. Looking at the proportion of those cases where costs applications are made gives us an indication of the number of cases in England where a party might face unreasonable behaviour and be unable to claim recompense if the costs regime were not extended. On average, over the three years 2004/05 to 2006/07, 8.4 per cent of Scottish written representations cases made applications for costs. Applying this figure to the total number of written representation cases in England in 2007/08 gives 1524 cases where parties might claim for costs. The benefits of greater equity would therefore apply to this estimated number of cases.

Although it is not possible to monetise these benefits directly, it is possible to say something about the benefits that would need to derive from the change in the regime in order to outweigh the estimated costs. Assuming 1524 annual cases make an application for costs under the new regime, there would be 15240 cases over 10 years which would benefit from being able to claim costs.

Dividing the present value of costs over 10 years by this number of cases gives us approximately £140. This is the benefit that would need to accrue to each party by being able to claim costs when facing unreasonable behaviour.

Costs Awards

The extension of cost awards to written representations is likely to result in an increase in the number of costs awards due to the large number of appeals dealt with by this method. More parties who face unreasonable behaviour may be recompensed for the extra time and resource this behaviour causes them to expend. Where costs awards are made, this represents a transfer from the party behaving unreasonably to the party applying for costs. As the Planning Inspectorate does not currently collect information on whether cost awards are full or partial, or have a role in determining the level of the award, it is not possible to estimate the likely size of the increased transfer.

Reduction in appeals submitted and then withdrawn

By extending liability for cost awards to all parties bringing an appeal, regardless of whether they later withdraw that appeal, this option will provide a greater incentive for appellants to behave reasonably and not submit appeals as a negotiating tactic. This may have the effect of reducing the number of frivolous appeals, which is likely to reduce delays for genuine appeals, as well as reducing the time and resources spent by the other

party in preparing for appeals which do not go ahead. This change also brings parity with enforcement and lawful development certificate appeals where parties are at risk of costs where an appeal is withdrawn at any stage.

It is not possible to monetise these benefits, as it is not currently known how many appeals are withdrawn before the appeal date is set and how many of those might be held liable for costs. However, the following table gives some indication of the numbers of appeals which are withdrawn up to three months after being submitted.

Table 1: Average number of appeals withdrawn in the first three months (2005/06 – 2007/08)

Time from start of appeal	Inquiries	Hearings	Written Reps
1-4 weeks	6	9	44
5-8 weeks	28	50	119
9 -12 weeks	47	61	144

It is important to stress that these figures are illustrative and it is not possible to know how many of these appeals may have been used as a negotiating tactic and would be deterred under the new regime.

Costs

One-off (transitional) costs

One-off or transitional costs are not anticipated. This is because the changes outlined in this option are essentially an extension of an existing regime. Of the three parties affected, local planning authorities, appellants and third parties, it would be expected that local planning authorities are already familiar with the costs regime, and will not have to undertake any costly learning associated with the extension of the regime. Appellants and third parties will fall into two categories – those who lodge an appeal and seek costs awards themselves, and those who use an agent to act on their behalf. Those who lodge an appeal themselves may have learning costs associated with either option as they may be altogether unfamiliar with the appeal process and the costs regime in either its existing or new form. Where an agent acts as an intermediary, it is to be expected that the agents will already be familiar with the costs regime, and its extension to written representations should not have any effect.

Increased numbers of costs applications

Since the majority of appeals are dealt with by the written representations procedure, extending the costs regime to written representations cases is likely to result in an increase in the number of costs applications made, thus resulting in more work for those determining the applications.

Similarly, allowing applications for costs in those cases dealt with by hearing or inquiry, where the appeal is withdrawn before the date has been set, may result in a further increase of costs applications. We anticipate this to be very low because the Planning Inspectorate is introducing new date fixing procedures to ensure that dates for hearings and inquiries are fixed earlier in the process than is currently the case. This will mean that parties have little chance to incur unnecessary expense within this timeframe.

The exception to this general rule is for those cases where a bespoke timetable for the appeal will apply. In those cases, a date for the inquiry may not be fixed in the early stages of the appeal and there may be more opportunity to either behave unreasonably/incur additional cost.

The costs will vary depending on the assumptions made about how the cases are likely to be decided. The Planning Inspectorate is looking at a pilot scheme for dealing with the extra cases arising from the change. This will involve a mixture of a specialist office-based team and appeal inspectors making decisions about cases. The type of application will determine who will deal with it. It is expected that householder applications will be determined by the office-based team whilst non-householder applications will be decided by appeal inspectors.

Each year the Secretary of State recovers a number of planning appeals for her own determination. This means that a Planning Inspector will prepare a report for the Secretary of State and where there has been a costs application, the Inspector will also prepare a costs report upon which the Secretary of State will base her decision. This process is also true for call-in cases.

The norm is for call-ins and recovered appeals to be dealt with by inquiry. We don't therefore consider that extending the costs regime to cases dealt with by written representations will place any additional burden on colleagues in Communities and Local Government central.

Assumptions made in calculating the costs of increased applications:

- the expected number of extra cases has been estimated by looking at the Scottish experience of the costs regime which currently applies to written representations. It was felt that looking at the current levels of costs awards in hearings and inquiries in England was not an appropriate indicator of the number of written representation cases which might attract cost applications. This is because in those cases dealt with by hearing or inquiry often the main reasons for seeking an award of costs are cancelled hearing and inquiry dates, or adjournment of proceedings, whereas there is more limited opportunity to incur unnecessary expense as a result of unreasonable behaviour in cases dealt with by written representations. In Scotland, 8.4 per cent of written representations

cases attracted costs applications averaged over three years (04/05 – 06/07)[66]. In 2007/08 the Planning Inspectorate dealt with 18,142 written representations planning appeals. On the basis that 8.4 per cent of the total 18,142, including withdrawn appeals, might attract costs applications this would result in an additional 1524 costs applications being submitted and assessed by the Planning Inspectorate

- at this time no estimate has been made of the increase in costs applications due to extending the regime to appeals which are withdrawn. This is because these numbers are expected to be very small because the Planning Inspectorate is introducing new date fixing procedures to ensure that dates for hearings and inquiries are fixed earlier in the process than is currently the case. The average number of hearing and inquiry appeals that have been withdrawn annually (2005/06 – 2007/08) in the first four weeks after submission is just 7.5
- the analysis of costs is based on appeals under s.78 of the Planning Act (known as planning appeals) since they comprise the vast majority of written representations cases to which the new ability to apply for costs will apply
- subject to the Inspectorate being able to determine the method by which appeals are dealt with, the number dealt with by written representations might increase in future years as procedures are selected which are appropriate to the complexity of the case. However, for the purposes of this exercise it is not possible to predict either future appeal numbers or the method by which they will be dealt with. The analysis is therefore based on the current numbers of written representations cases
- average salary details for the appropriate staff grades, including full superannuation costs, have been provided by PINS and are shown in the table below

Table 2: PINS estimated staff costs (based on 2008 salaries)

Grade	Average annual cost
AO	£23,204
EO	£30,147
HEO	£41,285
Inspector	£50,146

[66] Performance data from the Scottish Government

- on average 35 per cent of written representations appeals are householder applications, and 65 per cent are non-householder applications. Applying these rates to the estimated 1524 additional costs applications gives the number expected to be decided by the admin team, and by the Inspectors. Assuming Inspectors have 174.5 available working days annually, this means 2.8 additional Inspectors will be needed to meet the extra demand. The admin team would need to be made up of 0.6 AOs, 0.4 EOs and 1.3 HEOs. Salary costs have been based on these estimates
- accommodation costs for the additional staff have been estimated using the Government Office Tariff for 2007-08 assuming a 'flexible' desking ratio of 8:10 workstations to members of staff working

Taking the assumptions above into account gives the annual costs shown in Table 2.

Table 3: Annual costs of dealing with increased number of cases (2008 prices)	
Breakdown of staff	**Annual cost**
Admin team costs	£98,000
Inspector costs	£165,000
TOTAL	**£263,000**

It is possible that there may be some resource transfers between those dealing with cost awards for oral hearing and inquiries, and the new cases arising from extending the regime to written representations. Currently, parties who believe they have a case for claiming costs may be choosing to have their appeal heard in an oral hearing, and these cases may in future be decided by written representation. There may be some substitution of cases where costs awards are made from oral hearing or inquiry to written representations, and therefore the estimated number of **additional** cases may be too high. For this reason, the costs estimated here should be regarded as an upper limit.

Costs Awards

The increase in costs applications when the regime is extended to written representations is likely to lead to a greater number of decisions to award costs. In Scotland, around a quarter of the cost applications in written representations cases result in costs being awarded. Applying this proportion to the estimated increase in applications in England suggests that in around 380 cases, costs will be awarded. More parties who behave unreasonably will therefore have to bear these costs. However, this represents a transfer to the other party and will not have an effect on the net benefits.

At present, the Inspectorate does not collect information on whether any costs award is full or partial. Neither does the Inspectorate have a role in determining the level of the award, since this is generally agreed privately between the relevant parties. Where agreement cannot be reached, the Supreme Court Costs Office can decide on the amount on specific application.

Although the attached draft circular does not propose to alter this situation, in order to inform the final impact assessment we would appreciate information from consultees on the range of costs that they have been awarded or had awarded against them in costs cases. Currently it is not possible to put a monetary value on the possible increase in transfers which may take place.

Costs to local planning authorities and appellants in submitting/defending costs applications

The costs to authorities and appellants of submitting and defending costs applications will depend on the complexity of the case. For a minor written representations case the time and effort spent on this is likely to be fairly minimal. These cases will often be householder appeals. In the non-householder case the length is more likely to vary depending on the complexity of the case but is not expected to be substantially greater. At this time we have not attempted to quantify the costs incurred by authorities and appellants. We will consider any evidence provided by consultees which enables us to do this.

Enforcement, sanctions

The purpose of the costs regime is to provide a disciplining tool to encourage parties to behave reasonably both prior to and during the appeal process. Unreasonable behaviour which causes other parties to incur unnecessary expenditure could result in cost applications be submitted and costs awarded against them.

Monitoring

The Planning Inspectorate routinely monitors the numbers of and decisions made on the costs regime. Since the proposal is to extend the ability to apply for an award of costs to cases dealt with by written representation cases, this monitoring regime will be extended to all additional costs cases.

SPECIFIC IMPACT TESTS

Competition Assessment

We have undertaken the competition screening assessment and concluded that the proposed changes in option B will have no impact on competition. The changes to the cost regime act as an incentive to act reasonably both prior to and during the appeal process. They will not limit the number or range of suppliers (ie businesses that submit planning applications who subsequently could go to appeal), indirectly limit the number or range of supplier, limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

Small firms impact test

Consultation with small business

When the proposal to update the costs circular and extend costs to written representation cases was consulted upon, 36 of the respondents to the consultation were classified as businesses although we don't hold information on whether they would consider themselves a small business.

The proposal to update the Costs Circular was on the whole supported, with 83 per cent (162) of all respondents indicating that they either strongly agree or agree with the proposal. By group, the most support was from business respondents, with 92 per cent (33) indicating that they agreed with the proposal. Government bodies also indicated a high level of support, with 80 per cent (82) agreeing with the proposal. The least support came from the public respondents, although 50 per cent (3) of these respondents were in agreement with the proposal and 17 per cent (1) was neutral.

The Government response did not provide a percentage breakdown on those in support of extending the costs regime to written representations cases, but we have revisited responses and assessed a sample of responses from planning consultancies, all of which indicated support for extending the costs regime to written representations appeals.

Alongside the written consultation exercise, the Department ran workshops with local planning authorities, developers and small businesses to explain and gain views on various proposals in the White Paper including the reforms to the appeals process.

More recently, in order to inform the drafting of the circular which is being consulted upon, the Planning Inspectorate circulated a questionnaire to a number of planning agents which submitted appeals on behalf of clients and invited them, and representatives from a number of planning authorities, to attend a workshop to discuss their responses and their expectations from the revised circular. Although the response rate was low, the questionnaire responses provided some useful messages which have been taken on board in this circular – in particular, support for the extension of costs award to written appeals and clearer examples of unreasonable behaviour to discourage spurious claims and encourage proper use of the costs regime where justified.

Impact

The extension of the costs regime to written representations cases could have an impact on small businesses and their customers since they may put in planning applications for their own business, or on behalf of clients eg householders who are developing their houses. Work undertaken for the then Office of the Deputy Prime Minister by MORI[67] indicates that 78 per cent of householder applications are submitted by an agent acting on behalf of the householder.

[67] *Householder Development Consents Review – Survey of Applicants and Neighbours*

However, any impact will only be likely if parties to an appeal behave unreasonably. We do not propose to exempt any party, including small businesses, from a liability to costs since they will only have costs awarded against them if they have behaved unreasonably.

In cases where a small business is acting on behalf of a householder, it will be the householder who is considered the appellant and the small business will be acting under instruction from the householder. The liability for costs would fall to the appellant as the relevant party against whom an award of costs is made. Where the householder believes the small business was at fault eg through the provision of poor advice, it will be for the householder and the planning agent to decide between them who should pay the necessary costs.

Legal aid

Appellants cannot seek legal aid to fund appeals; therefore there is no impact on legal aid.

Sustainable development

There is no foreseeable impact on the sustainable development agenda.

Other environment

There are no foreseeable environmental consequences as a result of the proposed changes.

Carbon assessment

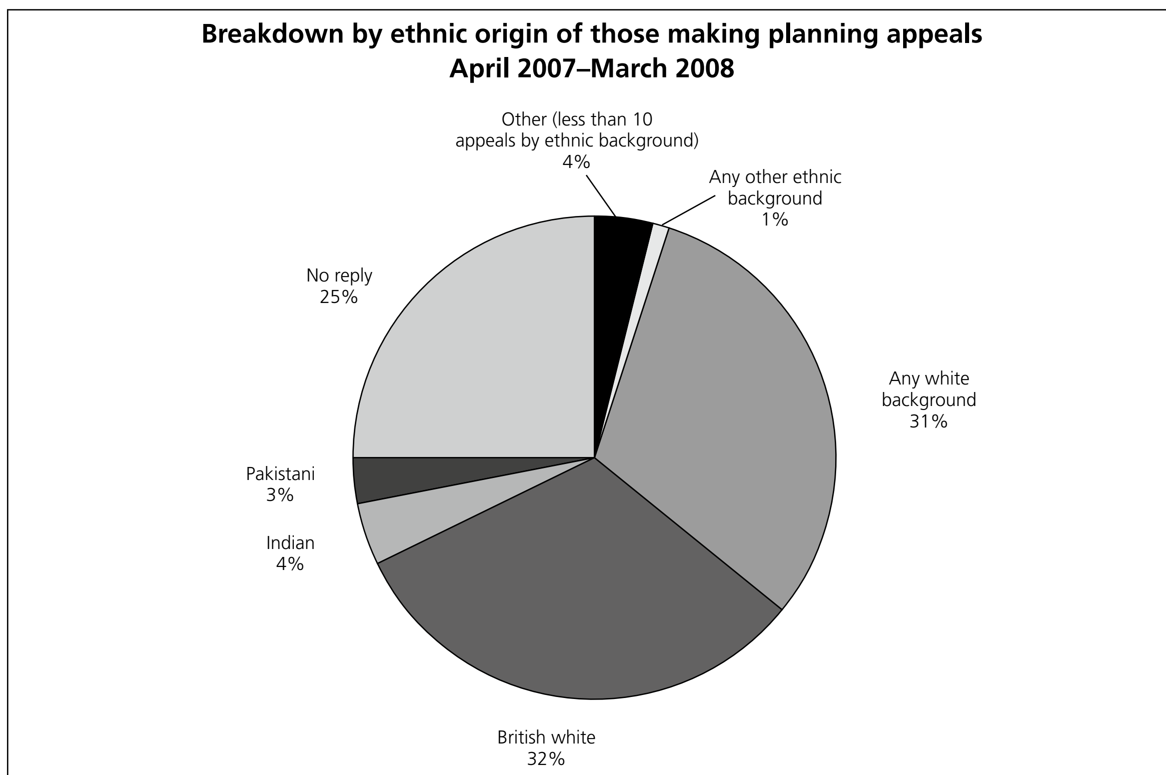
There is no foreseeable impact on carbon.

Health impact assessment

There is no foreseeable impact on health.

Race equality assessment

The pie chart below summarises the ethnic monitoring data provided by the Planning Inspectorate and shows the breakdown of the different ethnic origins of those making planning appeals. A quarter gave no reply to the question on ethnic background. Nearly a third of appellants classified themselves as British white, and nearly another third as of any white background. Other ethnic backgrounds were less represented amongst appellants. Where there were less than 10 appellants by ethnic background (eg Vietnamese, black Caribbean and white) these have been grouped together and in total this category accounts for four per cent of appellants. In the chart below, "any other ethnic background" is a separate category chosen by appellants.



Specific Impacts

The ethnic monitoring data shown above does not indicate the number of appeals submitted by Gypsies and Irish Travellers, both of which are recognised ethnic minorities, although there is the opportunity to declare this information on the ethnic monitoring questionnaire. Anecdotal evidence suggests that this group might be over-represented in the appeals process due to the fact a greater proportion of planning applications submitted by Gypsies and Travellers are refused and are subsequently appealed against.

We have considered whether the extension of the costs system to written representations would adversely impact on Gypsies and Travellers. However, we do not believe that this proposal will adversely affect Gypsies and Travellers because, by virtue of the nature of the issues involved in appeal cases on Gypsy and Traveller sites the appeals tend to be dealt with by hearing or inquiry. For example, the indicative criteria that the Planning Inspectorate use to advise on the most appropriate appeal method acknowledge that Gypsy and Traveller cases are unsuitable for written representations. The criteria that the Inspectorate will use when they start using their power to determine the appeal method[68], also acknowledge that written representations won't be suitable for Gypsy and Traveller cases. This is because they often involve complex issues which need to be explored through oral questioning, often involve legal representation and/or appellants are represented by an advocate. As a result, in the vast majority of cases Gypsies and Irish Travellers will already be eligible to apply for costs or be at risk of costs being awarded against them and the proposed changes to the process will not alter this position.

68 Draft criteria published in the consultation paper 'Improving the Appeal Process in the Planning System – Making it proportionate, customer focused, efficient and well resourced', available at www.communities.gov.uk

Disability equality

There is no foreseeable impact.

Gender equality

There is no foreseeable impact.

Human rights

There is no foreseeable impact.

Rural proofing

There is no foreseeable impact.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annex C

The consultation criteria

The Government has adopted a code of practice on consultations. The criteria below apply to all UK national public consultations on the basis of a document in electronic or printed form. They will often be relevant to other sorts of consultation.

Though they have no legal force, and cannot prevail over statutory or other mandatory external requirements (eg under European Community Law), they should otherwise generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure.

1. **Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.**
2. **Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.**
3. **Ensure that your consultation is clear, concise and widely accessible.**
4. **Give feedback regarding the responses received and how the consultation process influenced the policy.**
5. **Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.**
6. **Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.**

The full consultation code may be viewed at
www.cabinet-office.gov.uk/regulation/Consultation/Introduction.htm

Are you satisfied that this consultation has followed these criteria? If not, or you have any other observations about ways of improving the consultation process please contact

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