APPEAL REF: APP/D2320/W/3295556
APPLICATION REF: 21/01028/OUTMAJ
APPEAL BY THE MINISTRY OF JUSTICE
LAND ADJACENT TO HMP GARTH AND HMP WYMOTT

COSTS REPLY

Ulnes Walton Action Group – Rule 6 party

Introduction

1. This submission sets out UWAG's reply to the MOJ's costs response. Matters not addressed should not be taken to be accepted or agreed, and UWAG refers to its costs application and its closing submissions which establish its position in greater detail.

2. The MOJ's complaint (§1) that UWAG has fallen foul of the good practice guidance set out in the PPG goes nowhere. First, circumstances did not allow for an application for costs before the inquiry. The Appellant expressly prepared to present its case on the basis that both the 2023 design and the 2024 design adhered to standards. It was only at the conclusion of Mr Yeates' evidence (i.e., on the penultimate day of the reopened inquiry) that it became crystal clear that, in effect, the MOJ had wholly abandoned the 2023 design. Second, it is somewhat daring to seek to impugn UWAG for not adhering to good practice guidance in circumstances where the Appellant's evidence continued to trickle through to the inquiry even after the other main parties' case had concluded. Third, in any event, nothing precludes the approach adopted by UWAG in the making of its costs application, which was, in the circumstances, entirely reasonable (and the MoJ response does not suggest any consequence should flow from its observations). Fourth, there is no prejudice or unfairness: the MoJ was given the time it requested to respond in writing and has done so.

The MOJ has behaved substantively unreasonably

3. The claim for costs rests on the proposition that the 2023 design was doomed to fail and should never have been promoted as a serious answer to the need to mitigate that

junction. If that proposition is not good, UWAG accepts that its claim for costs cannot succeed; but for the reasons set out in its application, it firmly maintains that proposition. The 2023 design is self-evidently unsafe. In the specific context of the Appellant being given a further chance to 'fix' or address the holes exposed in its original case – including the lack of any safe scheme for mitigating the A581/Ulnes Walton Lane junction - it had no prospect whatsoever of succeeding.

4. The Appellant says (§5) that showing that the 2023 Design had no reasonable prospect of succeeding is a "*very high test to meet*", albeit asserted without authority. The PPG says no such thing. In any event, however the test might be described, it was met: in all reality there *was* no reasonable prospect of the 2023 design being found safe and suitable mitigation in the location provided. Without rehearsing the contents of UWAG's original costs application, this is plainly borne out by (i) the Appellant's own road safety audits and (ii) the Appellant's subsequent conduct (i.e., taking extensive steps and presumably significant additional expense to effectively abandon the 2023 design and advance the 2024 design). Self-evidently, they simply lost any confidence that there was any realistic prospect of the original design standing up to any real scrutiny. This was confirmed in the subsequent re-opened inquiry, when the Appellant did not challenge by cross-examination or other means *any* of the myriad criticisms of the 2023 design.

5. The summary of the Appellant's evidence (summarised at §6) does not support the conclusion that the 2023 design would safely mitigate the impacts of the junction. Rather, each sub-paragraph serves to underline and reiterate the shortcomings in the case for the 2023 design:

    a. Reiterating the previous finding of the SoS and the Inspector (at §6(a)) does not address whether the 2023 design amounts to safe and suitable mitigation to address a recognised significant highway issue.

    b. The LHA's position is (and always has been) next to useless in assisting the Inspector in reaching an overall view in this case, for the reasons set out in ¶22-27 of UWAG's closings: cf. §6(b).

c. The Stage 1 RSAs produced in relation to the 2023 each raised fundamental issues with that design which could not be kicked further down the road: cf. §6(c). The Hydrock RSA (M3a, p.9) identified that a "*lack of available road space could increase the risk of collisions at the new mini roundabout*" and recommended that "*an alternative junction solution… is provided at this location*" (M3a, p. 17). VIA's 2023 RSA (M3a, p.22) identified that visibility issues giving rise to collisions in two locations (problems 4.1 and 4.2), such that it was recommended visibility be improved by acquisition of a portion of the adjacent land, or if not possible, a redesigned layout or alternative method of junction control (M3a, p.27 and p.29). In reality, the only appropriate response to those issues was to fundamentally change the design, which the MOJ has (eventually) sought to do (in line with the VIA recommendations).

d. Merely stating what the 2023 design is does not address the range of safety concerns maintained by the main parties throughout the inquiry and into closings: cf. §6(d).

e. Whilst being a necessary prerequisite of any design at the location, addressing the capacity issue (if it does indeed do so) does not address concerns as to the *safety and suitability* of the proposed mitigation: cf. §6(e).

f. In relation to §6(f), the detailed swept path analysis carried out in relation to the 2023 design – addressed in detail in the evidence of Mr Riley – in fact serve to demonstrate the fundamental shortcomings arising in relation to overrunning – and demonstrate why the 2023 design was so intrinsically flawed in context.

g. Irrespective of what the DMRB has to say on visibility standards, it was common ground that the substantial design departure would be required at this location, and in reality such a design departure would have been wholly inappropriate (hence the 2024 design): cf. §6(g).

h. Mr Yeates' oral evidence on the 2023 design effectively only confirmed – rather than relieved – the overwhelming concerns about the fundamentally unsafe and unsuitable nature of the 2023 design. UWAG maintains that the only realistic

judgment available in relation to the 2023 design is that it needed to be substantially altered in order to be rendered acceptable in highway safety terms: cf. §6(h), and per the RSA recommendation. In those circumstances, and tellingly, the Appellant has sought to amend and improve its proposed scheme of mitigation (although of course UWAG maintain that the 2024 design remains unacceptable).

i. Mr Yeates' evidence on other mini-roundabouts in different contexts with different existing conditions and without the substantial increase in HGV traffic as proposed under the present appeal scheme goes nowhere to addressing whether the 2023 design is safe or suitable in this location. When he spoke about additional visibility during the inquiry, he was plainly addressing circumstances where there was excess visibility – obviously those concerns offer no support for the 2023 design. See UWAG's closings at ¶54-56: this is "a classic straw man".

j. Again, in relation to §6(j), consultation with LHA is simply a prerequisite of the planning process and that such consultation was carried out says nothing of whether there is a real prospect of the 2023 design being found safe and suitable. Once again, we refer to our closing submissions on the role that the LHA has to play in the decision-making process here.

6. All in all, the evidence relied upon as set out in the Appellant's costs responses at §6(a)-(j) fails to substantiate the submission at §7 that "*it is clearly not right to say that the 2023 design has "no reasonable prospect" of being found safe and suitable*".

7. Rather, it raises a number of straw men without addressing the elephant in the room: Mr Yeates' evidence erroneously maintained that the 2023 design should be considered because it "accorded with" design standards, when it patently did not (see M10, §6.2.1), in circumstances where the Appellant had such a crisis in confidence that it accepted that the 2024 design was better than the 2023 design in every respect, and did not seek to advance any meaningful case for the 2023 design throughout the course of the re-opened inquiry.

8. This is not a case of mere disagreement between experts: cf §7. UWAG says that Mr Yeates' insistence that the 2023 design was safe was unreasonable, and not within the range of reasonable disagreements between experts. He maintained in his addendum evidence (M10) that both the 2023 design and the 2024 design accorded with standards, when that was patently and demonstrably not the case, even on the Appellant's own evidence. It was unreasonable for the Appellant to continue to advance the 2023 design at that stage – in light of the obvious shortcomings of that design, and in light of the 2024 design.

The MOJ has behaved procedurally unreasonably

9. Both UWAG and the Council complain that the MoJ kept news of its 2024 Design to itself until the last possible moment, and even when it did reveal it, did not (as it should have done for the reasons given) withdraw reliance on the unsafe 2023 Design.

10. As for the suggestion that the MoJ could not have reasonably disclosed the 2024 design any earlier than26 February 2024 (at §10), that is plainly inaccurate in circumstances where detailed plans were drawn up at least as early as September 2023: see UWAG's costs application. In any event, leaving it until the very last moment and relying on provision for rebuttals is characteristic of unreasonable delay and resulted in UWAG inevitably being required to prepare a rebuttal when more proactive case management could have avoided that additional work by seeking to amend the timetable for further evidence. It is plain that the MOJ did *not* disclose the 2024 design as soon as it was able to.

11. Further, the MOJ overstates (or mischaracterises) any difference between the Council and UWAG's position as to the MOJ's approach to the 2023 design in the re-opened inquiry. As set out in our costs application at para. 54(b)(iv), the 2023 scheme had been rendered moot; in our closings, we said the 2023 design appears to have been "*all but abandoned*" (¶25(ii)), and in the circumstances, it would have made sense for the MOJ to formally abandon it at the earliest possible opportunity (¶57). This is not simply a matter of emphasis. In reality, the complaint by UWAG and the Council is a shared one: that the MOJ has brought into this inquiry a scheme which it should have left behind some time ago, given its inherent deficiencies, and thereby obliged the parties

to address it. Relatedly, Mr Yeates' evidence (M10, §6.2.1) was not just that the 2023 design was compliant with *policy*, but also with *standards*, and as UWAG explored in cross-examination, this was a demonstrably unsustainable position to take: cf. §12.

Unreasonable behaviour has resulted in wasted or unnecessary cost

12. In terms of unnecessary or wasted costs, the 2023 design had no reasonable prospect of being found safe and suitable in the manner presented (cf. §15). This was reflected in the Stage 1 RSAs which both suggest a fundamental redesign (and implicitly by the MOJ in seeking to subsequently adopt one of the recommendations, so fundamental was the identified issue in the VIA 2023 RSA). It was unnecessary for UWAG to have to instruct its highways witness to address that design in preparation for the resumed inquiry. It should have been abandoned. The *quantum* of that wasted expenditure is for another forum.

Conclusion

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

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