**PINS REF: APP/D2320/W/22/3295556**

**RE-OPENED APPEAL BY MINISTRY OF JUSTICE**

**LAND ADJACENT TO HMP GARTH AND HMP WYMOTT, LEYLAND**

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**COSTS SUBMISSIONS ON BEHALF OF COUNCIL**

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1. The Council seek a partial award of costs - in relation to the A581/Ulnes Walton Lane Junction ('the Junction') issue - against the Appellant on the basis that their behaviour at this appeal has been unreasonable.

2. As set out in the Planning Policy Guidance on 'Appeals' ('PPG') at paragraph 031 the:

> *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.*
>
> *Unreasonable behaviour in the context of an application for an award of costs may be either:*
>
> - *procedural – relating to the process; or*
> - *substantive – relating to the issues arising from the merits of the appeal.*

3. It is also a requirement that any unreasonable behaviour has led directly to the Council incurring unnecessary or wasted expense in the appeal process. As set out by the PPG at paragraph 32:

> *Costs may include, for example, the time spent by appellants and their representatives, or by local authority staff, in preparing for an appeal and attending the appeal event, including the use of consultants to provide detailed technical advice, and expert and other witnesses.*

4. In this case the Council submit that the Appellant has been substantively and procedurally unreasonable which has caused the Council to incur significant costs in addressing the Junction.

5. In relation to substantive unreasonableness para 53 of the PPG sets out that

> *"An appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding.'*

6. The Council would submit that the Appellant was substantively unreasonable in putting forward the 2023 Design given it had no real prospect of safely mitigating the impacts at the Junction.

7. It is not the purpose of this Submission to repeat submissions made by the Council and UWAG as to the substance of case, but it will briefly explain why it can be said that the 2023 Design had no reasonable prospect of being suitable.

8. As set out by Mr Riley in XiC there were four fundamental flaws with the 2023 Design. To focus on one particular element – which was addressed in the 2024 Design – the 2023 Design was accepted to breach the applicable minimum DMRB standards for visibility at the Junction. This was a safety concern raised in the independent RSAs.

9. It is important to bear in mind that this was not a slight reduction in visibility. DMRB requires 35m of visibility and the 2023 Design provided between 16.6 to 17.8m – i.e half of the required minimum standard.

10. Also, these were not 'preferences' of the DMRB – they were accepted to be 'shall' requirements which would require express consent from LCC for a departure from standard to allow for the 2023 Design to be delivered at all. It is telling that there was no clear and express evidence from LCC that they would grant that consent. Given the unchallenged severe safety implications set out by Mr Riley, the Decisionmakers can conclude such consent would not be granted.

11. The safety implications are plain, but rather than use the wording of Mr Riley in XiC, instead we can use the view of the independent VIA RSA (a similar view was shared by Hydrock) the Appellant commissioned who highlighted the issue:

*Emerging side road vehicles collide with A581 traffic due to restricted visibility (4.1);*

*A581 westbound traffic collides with emerging side road vehicles (4.2)*[1]

12. The clear unacceptability of the 2023 Design was highlighted by the fact that none of Mr Riley's detailed criticism and conclusions (effectively that the 2023 Design was fundamentally unsafe and unsuitable) were challenged in XX.

13. In XiC Mr Yeates only mentioned the 2023 Design once – in response to a more general question about the 'evolution' of the 2024 Design. The 2023 Design was all but abandoned by the Appellant at the inquiry hearings because it was substantively unreasonable. But it wasn't formally abandoned by the Appellant – and this brings us onto the procedural unreasonableness (although it is accepted there is crossover).

14. In relation to procedural unreasonableness para 52 of the PPG gives examples such as:

- *resistance to, or lack of co-operation with the other party or parties in providing information,…*
- *delay in providing information or other failure to adhere to deadlines*
- *introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen*

15. A brief chronology will help illustrate the unreasonable procedural behaviour of the Appellant:

**19 Jan 2023**: Decision Letter highlighting issues with the Junction requiring mitigation.

**February 2023**: RSAs provided internally to the Appellant raising the fundamental safety issues with the 2023 Design, with VIA RSA recommending[2]:

*It is recommended that the visibility is improved by acquisition of a portion of the adjacent land, to allow the highway boundary to be set back. Should this not be possible, a redesigned layout may be required,*

[1] Via RSA, M3, Appendix D, pdf page 27
[2] M3a, Appendix D, Para 4.2, pdf 29

*or failing that, an alternative method of junction control may need to be explored.*

**1 March 23**: Appellant provides 2023 Design as Additional Evidence (M3).

**8 March 23**: Council's Experts – within 7-day period – raise initial concerns with 2023 Design (N2).

**17 March 2023**: Appellant responds maintaining 2023 Design (M5).

**August 2023**: Mr Yeates Proof for Appellant – promotes 2023 Design (M6).

**19 September 2023**: Re-Opened Inquiry due to open – adjourned due to Inspector unavailability.

**November 2023**: Mr Yeates Rebuttal Proof for Appellant – promotes 2023 Design (M9).

**February 2024**: Mr Yeates 'Addendum' Proof – introduces 2024 Design for first time.

**March 2024**: Mr Riley's Rebuttal Proof (after permission granted by the Inspector) addressing the 2024 Design.

**25 March 2024**: Inquiry Re-opened

16. A few stark points emerge from the above timetable.

17. The first is that from the Appellant being told by an independent RSA that the 2023 Design was unsafe and that they should buy adjoining land to improve visibility (in Feb 2023), it took them a year to tell the other parties they had done so and produce the 2024 Design.

18. In particular, a question must be asked – given the Appellant had 7 months before they submitted proofs – what efforts were made to acquire the land before this point, and why the parties were not made aware of it until a month before the inquiry. Especially as it seems to be the case – given the date on the 2024 Design plan at Appendix A of M10a (pdf 4) – that the final scheme (with the newly acquired land site boundaries) was drawn up on 24 October 2023[3]

[3] See P5 Revision 'PROPOSED SITE BOUNDARIES ADJUSTED' dated 24 October 2023.

19. The second is that, while the Appellant cannot be blamed for the Inquiry not sitting in September, if the Inquiry had gone ahead, it would have been based on a design which the Appellant would go onto not either challenge the criticisms or support the merits of in evidence over the last two weeks. It illustrates the lateness of the volte face in the Appellant's case.

20. The third is then linked to what the Appellant did not do in February 2024. The Appellant did not abandon the 2023 Design. Instead, Mr Yeates re-iterated at 6.2.1 of M10:

> *The Appellant invites the Inspector to consider the alternative scheme, and the additional evidence submitted in this Proof. It should be noted that the Appellant is committed to deliver <u>either</u> the original scheme (see DWG: GARTH_ATK_HGN_A581_DR_D_0005_P3 in Appendix G, p.370) or the alternative scheme (see DWG: GARTH_ATK_HGN_A581_DR_D_0016_P6 in Appendix A) as <u>both</u> accord with design standards.*
>
> <u>Emphasis Added</u>

21. This is despite the fact, as Mr Yeates accepted in XX, that the 2024 Design would be preferable to the 2023 Design and there was no world in which the 2024 Design would be unacceptable but the 2023 Design acceptable. This is why – to use the terminology of Mr Barber – by February 2024 the 2023 Design was 'dead in the water'. But while a reasonable Appellant would abandon it, this Appellant maintained that both Designs would be justified.

22. Such an approach has led to the Council to incur unnecessary and wasted expense.

23. The first element of this is the cost spent by the Council's expert in producing written evidence to address the 2023 Design (and such evidence being reviewed by Counsel). This includes the original Technical Note (N2) and Mr Riley's proof (N3) – which contain preliminary, and then detailed evidence as to why the 2023 Design was unacceptable. This cost arose out of the substantively unreasonable behaviour in putting forward the 2023 Design which had no reasonable prospect of success.

24. The next element is the cost spend by the Council in addressing the 2024 Design – especially to produce the Rebuttal Proof at short notice (and such evidence being reviewed by Counsel). This arises from the procedural unreasonableness of the

Appellant failing to provide information (or give advanced notice) that there was going to be a significant shift in their case a month before the Inquiry was to re-open.

25. The third element is the cost incurred through the need to use of inquiry time addressing the 2023 Design – this includes Mr Riley's lengthy and detailed XiC on the matter, and time in Opening and Closing submissions. This could have been entirely avoided if, despite their previous unreasonableness, the Appellant had formally abandoned the 2023 Design once they published and relied upon the 2024 Design. It was clearly entirely academic and unreasonable to maintain that both were justified – and the failure to do so necessitated the other parties to formally address it (and then not be challenged by the Appellant).

26. While it would not have entirely negated the costs award sought, it would have saved inquiry time and the cost incurred to the Council in addressing the 2023 Design. The failure to do so was both substantially and procedurally unreasonable.

27. Therefore, the Appellant has been substantially and procedurally unreasonable in the way in which they have sought to address the Decisionmakers concern on the Junction. This was particularly through the unreasonable reliance on a clearly unacceptable 2023 Design and the last-minute revelation of the 2024 Design – which despite clearly rendering the 2023 Design academic was formally maintained by the Appellant.

28. This substantive and procedurally unreasonable behaviour led the Council to incur unnecessary cost in addressing the 2023 Design and then additionally addressing the 2024 Design, and on this basis the Council respectfully seek an award of the partial costs in relation to the Junction.

**PIERS RILEY-SMITH**

**KINGS CHAMBERS**

26 April 2024