

# LAND ADJACENT TO HMP GARTH AND WYMOTT

## MINISTRY OF JUSTICE

### REOPENED INQUIRY

#### APPELLANT'S COSTS RESPONSE

##### Introduction

1. This is the response by the Ministry of Justice (“the MoJ”) to the costs applications by Chorley Borough Council (“the Council”) and the Ulnes Walton Action Group (“UWAG”). Both the Council and UWAG first confirmed to the Inspector and the MoJ that they would be making costs applications on 24 April 2024 (the penultimate day of the inquiry) and then only issued their written costs applications for the first time on 26 April 2024 (the final day of the inquiry). It is regrettable that both the Council and UWAG failed to adhere to the good practice guidance in the Planning Practice Guidance (“the PPG”)<sup>1</sup> that “*as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry.*” The contents of both applications could clearly have been written prior to the inquiry, or even during the inquiry itself, which would have enabled the MoJ to respond during the inquiry, but unfortunately that process has not been followed.
2. Under the PPG, an award of costs can only be made where: i) a party has behaved unreasonably; and ii) the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.<sup>2</sup>
3. Both costs applications mainly raise the same arguments<sup>3</sup> and therefore can be addressed in this single costs response. In summary, the Council and UWAG’s costs applications contain the following arguments:
  - a) In relation to unreasonable behaviour, both parties contend that:

---

<sup>1</sup> PPG on Appeals, paragraph 035.

<sup>2</sup> PPG on Appeals, paragraphs 030.

<sup>3</sup> To the extent that there are differences between the two costs applications, that will be highlighted in this costs response.

- i) The MoJ behaved substantively unreasonably in putting forward the 2023 design given it has no real prospect of being found safe and suitable.<sup>4</sup>
    - ii) The MoJ behaved procedurally unreasonably in failing to give notice of the 2024 design earlier, and behaved procedurally unreasonably in either abandoning or not abandoning the 2023 design.<sup>5</sup>
  - b) The Council and UWAG then claim that this resulted in the following unnecessary or wasted expense:
    - i) The cost of producing written evidence in August 2023 addressing the 2023 design.<sup>6</sup>
    - ii) The cost of producing written evidence in March 2024 addressing the 2024 design.<sup>7</sup>
    - iii) The cost of preparing for and addressing the 2023 design at the inquiry.<sup>8</sup>
4. The MoJ wholly rejects the contentions put forward by the Council and UWAG, for the reasons set out below.

**The MoJ has not behaved substantively unreasonably**

5. The PPG states that an appellant is at risk of an award of costs based on substantive unreasonable behaviour where a ground of appeal has “*no reasonable prospect of succeeding*”.<sup>9</sup> The test of “*no reasonable prospect*” is a very high test to meet. The allegation by the Council and UWAG that the 2023 design has “*no real prospect*” of being found safe and suitable is unfounded.
6. The MoJ has put forward a wealth of detailed expert evidence, which the MoJ continues to stand by, which demonstrate that the 2023 design would safely mitigate the impacts at the junction. This can be found in particular at section 5 of Document M3 and section 8

---

<sup>4</sup> See paragraphs 6-13 of the Council’s costs application and paragraphs 40-42 of UWAG’s costs application.

<sup>5</sup> There is a difference between the two costs applications here. At paragraph 21 of the Council’s costs application it is alleged that the MoJ behaved unreasonably in **not abandoning** the 2023 design. Whereas in paragraph 47 of UWAG’s costs application it is alleged that the MoJ behaved unreasonably in failing to give notice that it **would be abandoning** the 2023 design during the inquiry.

<sup>6</sup> Paragraph 23 of the Council’s costs application and paragraph 51 of UWAG’s costs application.

<sup>7</sup> Paragraph 24 of the Council’s costs application and paragraph 52a of UWAG’s costs application.

<sup>8</sup> Paragraph 25-26 of the Council’s costs application and paragraph 52b of UWAG’s costs application.

<sup>9</sup> PPG on Appeals, paragraph 053.

of M9. This evidence should be read in full and is not repeated here, but by way of summary:

- a) The Inspector and Secretary of State both originally found that without a design for the mini roundabout and traffic modelling to demonstrate the effects, it could not be demonstrated that the proposed works would resolve capacity issues at the A581/Ulnes Walton Lane junction.
- b) Notably a mini roundabout has always been the preferred mitigation solution by Lancashire County Council (“LCC”) as highway authority, and the MoJ’s closing submissions sets out in detail the safety and capacity benefits of a mini roundabout in principle at this location.
- c) The MoJ carefully considered the Inspector and Secretary of State’s concerns, and in response the MoJ produced the 2023 design as a preliminary highways design for the junction, together with modelling evidence. The 2023 design (and indeed the 2024 design) are only necessarily preliminary highways designs at this stage, as the highway measures will be subject to detailed design through the section 278 process and the associated Road Safety Audits (“RSAs”) at each appropriate stage of the design.
- d) The 2023 design includes a raised table, speed cushions along the A581, three new lighting columns on the Ulnes Walton Lane approach, relocated speed limit signs, a reduced inscribed central diameter and dragons teeth on all approach arms.
- e) The junction analysis shows that the 2023 design would mitigate the effects of the development, and also would provide a betterment compared to the existing junction layout without development traffic. Neither the Council nor UWAG have produced any junction analysis to dispute this. As Mr Yeates explained at the inquiry, capacity has an important link to safety in reducing risk of driver frustration.
- f) Detailed swept path analysis was undertaken for all vehicles on the 2023 design, together with an analysis of the Personal Injury Accident data in this location.
- g) In relation to visibility, Mr Yeates explained that the DMRB visibility standards are not ‘requirements’ for non-trunk roads, such as the A581 and Ulnes Walton Lane,

and therefore a ‘departure’ from guidance is not technically necessary.<sup>10</sup> Nevertheless, he addressed the ‘design departure’ process in relation to visibility and the issues raised in the RSAs, which were also responded to in a written designer’s response.<sup>11</sup>

- h) Mr Yeates also addressed these issues in live evidence at the inquiry. He explained that the ‘departures’ are safe and acceptable given the proposed traffic calming to reduce speeds on the approach to the junction and the improvements in capacity compared to the existing junction. Mr Yeates also explained that whether or not standards are met does not automatically mean a junction design is safe or not. Rather a holistic judgment is required to be made, taking into account all the circumstances. In this regard, he relied on previous appeal decisions where inspectors and the Secretary of State have considered similar departures and visibility issues.<sup>12</sup>
- i) Mr Yeates also gave evidence of a number of mini roundabouts within Lancashire which have ‘substandard’ visibility and which have a low level of recorded accidents, which shows that there is not a direct correlation between a design ‘departure’ and a poor highway safety record. He also spoke to this evidence at the inquiry, explaining that providing additional visibility can sometimes increase risk of accidents as it encourages speeding.
- j) Throughout developing the 2023 design the MoJ has consulted with LCC. LCC reviewed the 2023 design and concluded that the design would suitably and safely address the capacity issues at the junction with development. In particular, LCC acknowledged the designer’s response to the RSAs and the follow up detailed design work which will follow as part of the section 278 process.<sup>13</sup>

7. On this basis, it is clearly not right to say that the 2023 design has “*no reasonable prospect*” of being found safe and suitable. The acceptability of the 2023 design (and the 2024 design) is a matter of expert judgment, upon which reasonable professionals may of course differ in their opinions. Mr Yeates, Mr Riley and Mr Eves have all disagreed with each other to varying extents during this inquiry on matters of expert judgment, but mere

---

<sup>10</sup> See section 4.5 of M6.

<sup>11</sup> See M3a.

<sup>12</sup> See Appendix D of M7.

<sup>13</sup> See page 5 of M3a.

disagreement between experts does not mean another expert's view is "*unreasonable*". On this issue of expert judgment, for the reasons set out above, Mr Yeates and the MoJ have reasonably put forward detailed evidence as to why the 2023 design is safe and suitable and have obviously not acted substantively unreasonably in putting forward the 2023 design.

**The MoJ has not behaved procedurally unreasonably**

8. There are two parts to this allegation. The first is an allegation that the MoJ behaved procedurally unreasonably in failing to give notice of the 2024 design earlier than February 2024. There is no merit in this argument. The original commencement date for the reopened inquiry was due to be 19 September 2023. In evidence for the original dates of the inquiry, the MoJ was **only** putting forward the 2023 design.<sup>14</sup> For the reasons summarised above, the MoJ's position was (and still is) that the 2023 design is a safe and suitable mitigation solution at the junction. The MoJ had decided there was not the time available to purchase the additional land prior to the start of the original dates of the inquiry, and so no alternative design was being pursued and no drawings for an alternative mini roundabout design had been drawn up. Therefore, there was nothing to disclose as to any alternative design prior to September 2023.
9. Then on 6 September 2023, the parties were notified by PINS that the inquiry would be adjourned. PINS later informed the parties that the new date for the inquiry was fixed to commence on 25 March 2024. PINS laid down a timetable stating that updated highways proof could be submitted 4 weeks before the inquiry reopened (i.e. 26 February 2024) provided it focus only on material changes arisen since existing proofs were produced; with allowance also being made for rebuttals to any updated evidence. Given the extra time available, the MoJ only then decided that it might be possible to pursue the option of buying additional land and putting forward an alternative mini roundabout design. A drawing of a mini roundabout using additional land was drawn up on 19 September 2023 to progress thinking, and negotiations advanced with landowners. Complications in relation to complex land ownerships prolonged purchase negotiations, meaning that contracts were only exchanged on 26 February 2024. In accordance with the timetable, the MoJ issued the updated highways proof on time on 26 February 2024, which detailed that a material change of circumstances had arisen, namely that the MoJ had been able to purchase additional land, and that the 2024 design was now being put forward as an

---

<sup>14</sup> See M3 and M6, plus appendices.

alternative.<sup>15</sup> The 2024 design is not dramatically different to the 2023 design. This did not represent a significant change to the MoJ's case and the new evidence was accepted by the Inspector. Further, an adjournment was not necessary to deal with this updated evidence, and both the Council and UWAG were given an extension for rebuttal evidence and were able to submit rebuttal evidence in ample time before the inquiry began on 25 March 2023.

10. The MoJ could not have reasonably disclosed the 2024 design any earlier than 26 February 2024, given that contracts were only exchanged on that same day, otherwise this would have prejudiced ongoing commercial negotiations. Moreover, the evidence submitted on the 2024 design was in accordance with the inquiry timetable for updated evidence where material changes had arisen since existing proofs were produced. Accordingly, the MoJ did not act with any unreasonable delay and disclosed the 2024 design as soon as it was reasonably able to, within the inquiry timetable, and the Council and UWAG were able to issue rebuttal evidence in ample time and no adjournment was necessary.
11. The second allegation made is that the MoJ behaved procedurally unreasonably in either abandoning or not abandoning the 2023 design. There is a difference between the positions of the Council and UWAG in this respect. The Council state that "*The Appellant did not abandon the 2023 Design*" and that "*while a reasonable Appellant would abandon it, this Appellant maintained that both Designs would be justified*"<sup>16</sup> and the Council allege that this was procedurally unreasonable. In contrast, UWAG state that "*no notice was given of the MoJ's intention not to pursue the 2023 design during the re-opened inquiry*" and they complain this was procedurally unreasonable. It follows that the Council complain that the MoJ behaved unreasonably in not abandoning the 2023 design, whereas UWAG claim that the MoJ behaved unreasonably in abandoning the 2023 design.
12. Starting with UWAG's submissions first. UWAG are factually mistaken to allege that the MoJ abandoned the 2023 design during the re-opened inquiry. The MoJ's case at the inquiry naturally placed more focus on the 2024 design because it is, as Mr Yeates characterised it, the preferred design out of the two alternatives. Nevertheless, throughout Mr Yeates' written and live evidence at the inquiry he firmly maintained his professional judgment that both the 2023 and 2024 design are acceptable preliminary highways designs and compliant with national and local policy; and the same position

---

<sup>15</sup> See M10, plus appendices.

<sup>16</sup> See paragraphs 21 and 25 of the Council's costs application.

was made clear in the MoJ's closing submissions. It is worth remembering that necessarily neither the 2023 and 2024 roundabout designs are finalised at this stage, and that further detailed design on a mini roundabout scheme will take place during the section 278 process with LCC (with the Council also engaging through the condition discharge process). UWAG's submissions are also disingenuous in suggesting that Mr Yeates accepted the 2023 scheme was "*dead in the water*".<sup>17</sup> This rather theatrical phrase was said by Mr Barber as more of a statement during cross-examination of Mr Yeates (rather than a question, which it should have been) and it was rejected by Mr Yeates who has strongly maintained his expert professional opinion throughout that the 2023 design is acceptable and policy compliant.

13. The Council's position in their costs application, that the MoJ have maintained that both the 2023 and 2024 designs are acceptable, is factually correct. However, the Council's argument that this was an unreasonable position to take is clearly mistaken. As set out above, the MoJ has provided detailed evidence as to why the 2023 design is acceptable. The 2024 design is the preferable alternative, but that does not place an obligation on the MoJ to withdraw all the previous evidence going to the acceptable 2023 design, which is already evidence that is before the Inspector. There is nothing unreasonable or unusual in presenting two acceptable design alternatives before the Inspector, and there has been no procedurally unreasonable behaviour by the MoJ.

#### **There were no unnecessary or wasted costs**

14. Finally, the Council and UWAG claim three elements of costs incurred. None of these costs directly arose out of any unreasonable behaviour by the MoJ and/or were costs which would have arisen in any event.
15. The first element of costs claimed is the cost of producing written evidence to address the 2023 design, which the parties claim was caused by the MoJ behaving substantively unreasonably in putting forward the 2023 design.<sup>18</sup> For the reasons set out above, on this matter of expert judgment, it is clearly not right to say that the 2023 design has "*no reasonable prospect*" of being found safe and suitable, and there is no substantive unreasonable behaviour here. Tellingly, in the lead up to the original commencement date of the inquiry on 19 September 2023 (prior to the adjournment) there was no suggestion whatsoever from the Council or UWAG's legal team or witnesses that they viewed the

---

<sup>17</sup> Paragraph 38 of UWAG's costs application.

<sup>18</sup> Paragraph 23 of the Council's costs application and paragraph 51 of UWAG's costs application.

2023 design to amount to unreasonable behaviour. This is an argument that is only opportunistically being pursued now. For the reasons set out above, it was also reasonable for the MoJ to continue to maintain the 2023 design, together with the alternative 2024 design. For this reason, the costs of producing written evidence to respond to the 2023 design were not caused by any unreasonable behaviour.

16. The second element of costs claimed by the parties are the costs spent producing the rebuttal proofs to the 2024 design “*at short notice*”<sup>19</sup> or “*in short order*”<sup>20</sup> in March 2024, which the parties claim was caused by the MoJ behaving procedurally unreasonably in failing to give notice of the 2024 design earlier than February 2024. For the reasons set out above, the MoJ did not behave procedurally unreasonably in this regard, and both the Council and UWAG had ample time to provide rebuttal evidence in March 2024 in advance of the re-opened inquiry. For this reason, these costs were not caused by any unreasonable behaviour.

17. Moreover, even if this behaviour was procedurally unreasonable (which is strongly denied) the costs of responding to the 2024 design would have arisen in any event. The PPG states that costs can only be claimed for work “*that would not otherwise have arisen*”.<sup>21</sup> Even if the MoJ had notified the other parties of the 2024 design earlier, the parties would have still incurred costs in providing written evidence in response. UWAG complain that if they had known earlier then Mr Eves “*could have produced a Proof of Evidence addressing the 2024 design in good time for the deadline in February 2024*”.<sup>22</sup> This exactly discloses the flaw in the argument – whether the written evidence responding to the 2024 design was produced in February 2024 or March 2024, exactly the same costs would have been incurred either way.

18. The third element of costs claimed are the costs incurred in inquiry time spent on the 2023 design<sup>23</sup> or the costs incurred in preparing to deal with the 2023 design.<sup>24</sup> It is claimed that these costs were caused by the MoJ behaving unreasonably in either abandoning or not abandoning the 2023 design. For the reasons set out above, throughout the written evidence, live evidence and closing submissions, the MoJ has maintained that both the 2023 and 2024 alternative designs are acceptable, with the 2024

---

<sup>19</sup> Paragraph 24 of the Council’s costs application.

<sup>20</sup> Paragraph 52a of UWAG’s costs application.

<sup>21</sup> PPG on Appeals, paragraph 052, fourth bullet point.

<sup>22</sup> Paragraph 52a of UWAG’s costs application.

<sup>23</sup> Paragraph 25-26 of the Council’s costs application.

<sup>24</sup> Paragraph 52b of UWAG’s costs application.

design being the preferred option. As set out above, there is nothing unreasonable in this approach, and thus no wasted costs were caused as a result of any unreasonable behaviour.

19. In addition, there is a large overlap in the work and time spent addressing the 2023 design, with the work and time spent addressing the 2024 design, given the similarities between the two designs. This was illustrated by Mr Riley's examination in chief, where he spent a long time discussing the 2023 design and because of this was then able to address the 2024 design very quickly. Therefore, even if any wasted costs are found under this item (which is strongly denied), then the costs *only* attributable to the 2023 design will be very limited indeed.

### **Conclusion**

20. In conclusion, neither of the costs applications are well founded or justified. The MoJ has not behaved substantively or procedurally unreasonably, and this has not resulted in any wasted or unnecessary costs.

**Jenny Wigley KC**

**Anjoli Foster**

**Landmark Chambers**

**1 May 2024**