



# The Planning Inspectorate

Costs & Decisions Team

Temple Quay House  
2 The Square  
Bristol, BS1 6PN

Direct Line: 0303 444 5601  
Customer Services: 0303 444 5000

---

Charles Felgate  
Geldards LLP  
4 Capital Quarter  
Tyndall Street  
Cardiff  
CF10 4BZ

Your Ref: CF1.ELR.113081.2

Our Ref: APP/A2470/W/22/3310265

Date: 13 February 2024

---

Dear Sir

**LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)  
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 & 322  
LAND AT THE LOOKOUT, WEST OF MAIN ROAD (B640), BARLEYTHORPE/OAKHAM,  
RUTLAND, LE15 7FZ  
APPEAL BY DE MERKE ESTATES: APPLICATION FOR COSTS**

1. I am directed by the Secretary of State for Levelling up, Housing and Communities to refer to the Planning Inspectorate's letter of 5 July 2023 confirming the withdrawal of the above appeal. It was against the failure of Rutland County Council to decide, within the appropriate period, a planning application (ref: 2022/0796/MAO – validated on 19 July 2022) for outline planning permission (with all matters reserved except for means of access from main road) for residential development, with landscaping and public open space, associated drainage infrastructure and access works, and safeguarded land for community uses, on land described above.

2. With apology for the delay, this letter deals with your costs application, on behalf of Oakham Action, a Rule 6<sup>1</sup> party in the appeal proceedings, for a full award of costs against the appellants, as made in correspondence of 17 July and 11 August 2023. The appellants' legal representatives, Town Legal LLP, replied on 2 August 2023. The costs representations have been carefully considered.

## Summary of decision

3. The costs application succeeds to the extent that a partial award of costs is being made against the appellants. The formal decision and costs order are set out in paragraphs 17 and 18 below.

## Basis for determining the costs application

4. Planning Practice Guidance (PPG) advises that costs may be awarded against a party which has behaved unreasonably and thereby caused the party applying for costs to incur

---

<sup>1</sup> Oakham Action were granted Rule 6(6) status in the appeal proceedings by the Planning Inspectorate on 7 December 2022

unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the guidance in the PPG (as published on the Gov.uk website under "Appeals"), the appeal papers, the written costs correspondence and all the relevant circumstances.

## Reasons for the decision

5. All the available evidence has been carefully considered. The decisive issue is whether or not the appellants acted unreasonably, causing Oakham Action, to incur wasted expense in the appeal proceedings, by withdrawing the appeal when they did. The guidance in paragraphs 052 to 056 of the PPG is considered particularly relevant. Paragraph 056 explains that an award of costs may be made in favour of an interested party on procedural grounds, for example where an appeal has been withdrawn without good reason. In this case Oakham Action were an interested party who were entitled to appear at an inquiry, having been granted Rule 6 status, and would therefore have carried out work in connection with the appeal in accordance with the programme set by the Planning Inspectorate.

## Conclusions

6. Paragraph 054 of the PPG warns that, if an 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, appellants are at risk of an award of costs against them if there are no other exceptional circumstances and the claiming party can show that they have incurred quantifiable wasted expense as a result. The Secretary of State has to decide whether the appellants had good reason for the withdrawal due to a material change in circumstances relevant to the planning issues arising on the appeal, or whether there are any other exceptional circumstances.

7. The view is taken that an appeal should be made as a last resort. It is considered that, having exercised the statutory right of appeal and requested the inquiry procedure, the onus was on the appellants to proceed with the appeal to a determination. In this case, the appeal was withdrawn almost 8 months after its submission. The appellants' decision to withdraw the appeal when they did needed to be weighed against the risk of an award of costs against them. This risk was brought to their attention, via their agents, in the Planning Inspectorate's procedural letter of 14 November 2022 which included the advice that "withdrawal at any stage in the proceedings, without good reason, may result in a successful application for costs." The Secretary of State takes the view that the appellants would, or should, have been aware that by withdrawing the appeal when they did Oakham Action, as an interested Rule 6 party, would have incurred wasted costs in the abortive appeal.

8. The appellants' email of withdrawal dated 4 July 2023 gave no reason for the withdrawal of the appeal. In their subsequent costs rebuttal letter of 2 August 2023 the appellants have highlighted that their decision to withdraw came as a result of:

- a) the need for an environmental statement;
- b) uncertainty as to whether the appeal would be determined by the Inspector or the Secretary of State;
- c) housing land supply; and
- d) the draft local plan.

It was argued that these material changes that were outside of the appellants control justified the appellants reconsidering their position and withdrawing their appeal when they did.

9. As to cited reason for withdrawal (a) above, it is considered most unfortunate that the timing of the Secretary of State's Screening Direction of 16 February 2023 caused the postponement of the original inquiry date of 28 February 2023. However, it would appear from the costs correspondence that the appellants were content to continue with the appeal notwithstanding the fact that an Environmental Statement (ES) would be required. In this regard, it is noted that the appellants correspondence of 10 March and 24 April 2023 confirmed their intention to prepare and submit an ES statement. In particular, the appellants' email of 24 April 2023 provided a time estimate of between 2-3 months for the submission of the ES. The view is taken that given the contents of that email it could be reasonably expected that the appellants would wish to pursue their appeal to a re-scheduled inquiry on the basis that an ES would be forthcoming. The Planning Inspectorate subsequently confirmed that the inquiry had been re-scheduled to start on 7 November 2023. The Secretary of State considers that a period of over 6 months between the appellants email of 24 April 2023 and the start of the inquiry on 7 November 2023 was more than sufficient time for the appellants to prepare and submit an ES and for the publicity and consultation requirements to be completed.

10. It is noted that the appellants contend that at the time of the withdrawal of the appeal they had not received sufficient information from the Department of Levelling Up, Housing and Communities (DLUHC) regarding the scope of the work required to enable them to complete the ES process before the re-scheduled inquiry date of 7 November 2023. However, this claim is not borne out by the available evidence. While the appellants did contact DLUHC on 20 February 2023 asking various questions about the scope of the works required, DLUHC responded to those questions on 4 April 2023. The appellants email of acknowledgement dated 24 April 2023 provided an estimate of some 2-3 months for the submission of the ES but gave no indication that the appellants required any additional/further information from DLUHC to allow them to prepare the ES within this timeframe. Nor has the Secretary of State seen or been provided with any separate correspondence from the appellants to show that they had sought and were awaiting information from DLUHC at the time of the withdrawal of the appeal. Furthermore, if the appellants needed additional time to complete the ES process, they could have taken the precautionary step of contacting the Planning Inspectorate to explain the situation. And if necessary, they could have sought a further postponement of the inquiry date as an alternative to withdrawing the appeal. There is no evidence that any such contact or request was made.

11. With regard to cited reason (b) above, it is accepted that at the time of the withdrawal of the appeal the parties were still awaiting a decision by the Secretary of State as to whether the appeal would be recovered or not. However, it is not clearly understood, nor has it been satisfactorily explained why the identity of the decision-maker should have prevented the appellants from continuing with the appeal to a determination. The planning and policy issues to be considered in the appeal would have been the same if it were to be decided by either the Inspector or the Secretary of State. In the event the appellants withdrew the appeal before the identity of the decision-maker was confirmed. The view is taken that this was a personal decision and is not considered to constitute "good reason" for withdrawal.

12. Dealing with cited reason for withdrawal (c) above, the appellants have referred to the publication, in May 2023, of the Council's updated 5-year housing land supply (HLS). They say that this showed a "marked change" in the Council's annual HLS. The Secretary of State accepts that the Council's 5-year HLS would have been an important consideration in the appeal. It is noted that that when the planning application was submitted the Council did not have a 5-year HLS. However, that position appeared to have changed after the appeal was submitted. The Council first put the parties on notice that they would be able to demonstrate a 5-year HLS at the Case Management Conference (CMC) held by the appointed Inspector on 11 January 2023. Subsequently, on 8 February 2023, the Council

published details of the update which indicated that they could demonstrate that they did have a sufficient supply of deliverable sites to meet the 5-year HLS and the parties were notified of this. It is not unusual for a Council to update their housing land supply position during the course of the appeal. The view is taken that the Council's 5-year HLS was therefore not a new issue in the consideration of the appeal. The appellants have not provided the Secretary of State with any details about the latest update of the HLS made by the Council in May 2023. Nor have they explained, in clear and precise terms, what the "marked change" was from the Council's previous position in February 2023 that caused them to reconsider their position on the merits of their appeal such that the appeal needed to be withdrawn. As such, the appellants have failed to demonstrate that the latest update of the Council's HLS in May 2023 represented a material change in circumstances within the scope of the costs policy guidance.

13. With regard to cited reason for withdrawal (d), the appellants argue that the Council's confirmation at a meeting held on 3 July 2023 that they would publish a further Regulation 18 "preferred options" draft of their local plan in autumn 2023 just ahead of the opening of the rescheduled inquiry represented new information that justified the withdrawal of the appeal. It appears that the appellants were under the impression that although this timeline had been in prospect for some time, they were unsure whether it would be affected by the recent change in the administration of Rutland County Council. However, while there might have been a change in the Council's administration, the Secretary of State considers that there could be no guarantee that this would necessarily affect the date of publication of the draft local plan and the view is taken that the appellants relied on this prospect at their own risk. In the event, the meeting on 3 July 2023 merely sought to confirm that the timeline for the publication of the Council's draft local plan in autumn 2023 remained unchanged as previously predicted. This does not therefore amount to an unexpected or unforeseen circumstance justifying the withdrawal of the appeal. Furthermore, the appellants have not explained in any detail why the impending publication of the Council's draft local plan impacted on their ability to continue with the appeal to a decision. The appellants have not argued that the draft plan would have significantly changed the policy environment such that success on appeal would have been called into doubt.

14. The Secretary of State takes the view that the reasons given for the withdrawal of the appeal do not amount to a material change in the planning authority's case or any other material change of circumstances that was relevant to the substantive planning issues arising on it, within the terms stated in paragraph 054 of the PPG. On all the evidence available, the Secretary of State concludes that the appellants have not shown that there was "good reason" for withdrawing the appeal when they did and he is not satisfied that there are any exceptional or mitigating circumstances for withholding an award in this case. It is acknowledged that, by withdrawing the appeal when they did, the appellants saved all parties the costs of attending the re-scheduled inquiry. However, taking into account all the circumstances outlined above, he concludes that the appellants acted unreasonably within the scope of paragraph 054 of the PPG, which caused Oakham Action to incur wasted expense in the abortive appeal process. Exceptionally, and in accordance with the guidance in paragraph 056 of the PPG concerning awards to or against "interested third parties", the Secretary of State therefore concludes that an award of costs should be made.

15. As to the extent of the award, the view is taken that the Inspectorate's procedural letter of 14 November 2022 gave sufficient warning to the appellants, via their agents, that withdrawal of an appeal without good reason could result in an award of costs against them. The view is therefore taken that the appellants had adequate opportunity from that date to consider the position in relation to the risk of costs in the event of the withdrawal of the appeal. It is therefore considered that a partial award of costs from 21 November 2022 (inclusive) is justified. This allows a nominal period for the appellants to fully consider the standard warning on costs.

16. The Secretary of State's power to award costs is interpreted as enabling him to award to a party the costs necessarily and reasonably incurred in relation to the proceedings before him. He does not determine the amount payable. That will be for the parties to resolve by agreement on the evidence of expense actually incurred or failing that, in the context of an application to the Senior Courts Costs Office for detailed assessment.

## **FORMAL DECISION**

17. For these reasons it is concluded that a partial award of costs against the appellants, on grounds of "unreasonable" behaviour resulting in unnecessary or wasted expense, is justified in the particular circumstances.

## **COSTS ORDER**

18. Accordingly, the Secretary of State for Levelling Up, Housing and Communities in exercise of his powers under section 250(5) of the Local Government Act 1972, and sections 78 and 322 of the Town and Country Planning Act 1990, and all other powers enabling him in that behalf, **HEREBY ORDERS** that De Merke Estates shall pay to Oakham Action their costs of the appeal proceedings before the Secretary of State, limited to those costs incurred from 21 November 2022 (inclusive); such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned an appeal more particularly described in paragraph 1 of this letter.

19. You are now invited to submit to the appellants' representatives, Town Legal LLP, details of those costs with a view to reaching agreement on the amount. A copy of this decision letter has been sent to them.

Yours faithfully

*S Parsons*

STEVE PARSONS  
Authorised by the Secretary of State  
to sign in that behalf