

TRAINING NOTES SECTION 12

March 2016

AWARDS OF COSTS IN RIGHTS OF WAY (ROW) CASES**Introduction**

- 12.1 This note provides guidance on awards of costs for the various types of Rights of Way (ROW) Orders submitted to the Planning Inspectorate for determination. Full guidance on awards of costs, with particular emphasis on planning casework, can be found in Planning Practice Guidance (<http://planningguidance.planningportal.gov.uk/blog/guidance/appeals/>) and section 9 of Defra Circular 1/09 (version 2 October 2009) , with which this more tailored note should be read.

What are Costs Awards?

- 12.2 A costs award is an order, enforceable in the Courts, that one person or party in planning-related proceedings pays to another the costs, in full or in part, that they have incurred during the process. Awards can be made by:
- An Inspector
 - The Secretary of State or
 - The Welsh Minister.
- 12.3 Costs awards are a refund of professional fees or other money spent unnecessarily – for example, in fighting or defending an appeal or objecting to an order. They will be for the expense "necessarily and reasonably incurred" in relation to the proceedings. That excludes compensation for lost profits or other perceived loss or damage for hurt feelings.
- 12.4 The events which gives rise to the award may well arise from the handling of matters beforehand – that is, prior to the making of the Order – but the award itself relates only to the costs of the proceedings. That excludes the costs of the application for a ROW Order to be made.

What does a Costs Award give the Receiving Person or Party?

- 12.5 A costs award states the broad extent of the expense the person or party can recover from the party against whom the award is made. The award

can be a full or partial award. The Inspector or Secretary of State making the award does not determine the amount.

- 12.6 The amount is a matter for the parties to settle by negotiation or, failing that where a lot of money is at stake, by applying to the High Court for a detailed assessment. This is a separate, judicial, process in which neither the Inspector nor Secretary of State/Welsh Minister has any involvement or responsibility.

No Definition of, or Regulations for, Costs Awards

- 12.7 The term costs award is not defined in either primary or secondary legislation (regulations). A costs award is made by means of a formal "costs order". There are no regulations governing the process for making costs orders and applying for them. These matters are entirely set out in published policy.

The Local Government Act (LGA) 1972

- 12.8 The primary legislation underpinning the present costs regime is contained in section 250(5) of the LGA 1972. This states:

"The Minister causing an inquiry to be held under this section may make orders as to the costs of the parties at the inquiry and as to the parties by whom such costs are to be paid..."

and every such order may be made a Rule of the High Court on the application of any party named in the Order."

Powers

- 12.9 The first part or limb of section 250(5) gives the "Minister" or Secretary of State discretionary power to make a costs order. The second refers to the separate process by which a party affected by the costs order can have it made a civil debt and pursued through the Courts, if necessary.
- 12.10 The mechanism for considering whether or not to award costs is through a costs application. The term "costs application", like "costs award" is not defined in either primary or secondary legislation (regulations). It is a matter set out in published policy.
- 12.11 Inspectors can also initiate an award of costs. Whilst PINS Note 35/2013r2 states that '*The power to initiate costs only applies to casework under the 1990 Planning Acts i.e. The Town and Country Planning Act 1990, The Planning (Listed Building and Conservation Areas) Act 1990 and Planning (Hazardous Substances) Act 1990 and does not apply to NSIP casework under the 2008 Act or casework undertaken by PINS on behalf of other Government departments – e.g. Defra, Dft etc.*', Defra have taken the view that Inspectors **can** initiate an award of costs in rights of way cases. They can do so if there is unreasonable behaviour by a party and it caused unnecessary waste and expense, whether or not any applications have been made by any party (this does **not** include Schedule 14 appeals or directions).

Application of s.250(5) to Types of Casework

- 12.12 Taken on its own, section 250(5) LGA applies only where an inquiry has been held / opened.
- 12.13 Section 250(5) is applied by planning and other legislation, including most recently the Countryside and Rights of Way Act 2000, to different types of casework. It is applied to rights of way hearing and inquiries as follows to enable an award of costs to be considered:
- to hearings and inquiries held under the Wildlife and Countryside Act 1981, by paragraph 10A of Schedule 15, inserted by paragraph 11(8) of Schedule 5 to the 2000 Act;
 - to hearings and inquiries held under Schedule 6 to the Highways Act 1980, by paragraph 2B inserted by paragraph 23(8) of the 2000 Act; and
 - to hearings and inquiries held into Orders made by local authorities under Part X of the Town and Country Planning Act 1990, by sections 320(2) and 322, and Schedule 6 to, the Town and Country Planning Act 1990.

Advice on these provisions and the handling of costs applications at hearings on the same basis as at inquiries is in ROW Note 20/2004.

- 12.14 If the written representations procedure is followed, anyone making representations cannot be required to pay some or all of another party's costs. There is no power.

Separate Costs Jurisdiction

- 12.15 The jurisdiction to award costs is separate from that to determine the appeal/Order.
- 12.16 There is no specific provision for challenging a costs decision in the High Court. Judicial review is available.

Policy

- 12.17 The key principles for costs awards are set out in Planning Practice Guidance
- 12.18 Specific guidance on costs applications and awards in ROW cases is in Defra Circular 1/09 (version2, October 2009) (Section 9) (WO Circular 5/93 paragraphs 11 to 16 of Annex A) and Circular 8/93.

Why are there Costs Awards?

- 12.19 Published guidance makes clear that the parties – in the case of a ROW Order, the Order Making Authority (OMA), objectors and supporters and any other interested person or organisation wishing to taking part in the proceedings – are normally expected to meet their own expenses.

Costs awards are not intended to put people off taking part. They are there to encourage a sense of discipline.

- 12.20 Costs awards underpin and reinforce the framework of rules and regulations and policy governing the conduct of appeals and other proceedings.

What is the basis for costs awards?

- 12.21 Generally speaking, costs are not awarded on the basis of "loser pays", as is the case in Court litigation. The exception is a certain type of Order, which is analogous to a compulsory purchase order in terms of its effect on a statutory objector (see below under "Analogous Orders").
- 12.22 Otherwise, costs can be awarded only where, on specific application (see also paragraph 12.11), it is decided that one of the parties has behaved unreasonably and caused the party seeking an award of costs unnecessary or wasted expense..

Who may apply and against whomand when?

- 12.23 The OMA and objectors/supporters can apply against each other. They should do so **at** the hearing or inquiry **to** the Inspector. They would need to support their case with clearly stated grounds.

What costs can and cannot be awarded?

- 12.24 Costs **can** be awarded for unnecessary or wasted expense incurred in the process. These would be the costs of:
- making an objection and preparing to pursue, or rebut, an objection at a hearing or inquiry
 - attending, or
 - being represented at a hearing or inquiry.
- 12.25 Costs **cannot** be awarded for expenses that are:
- not directly related to the Order itself
 - incurred before the Order was made.

Applications for a Full or Partial Award of Costs

- 12.26 A flow chart is at Annex 12.1.

Full awards

- An application for a full award of costs relates to the whole proceedings.
- It applies to professional fees or salary-based time and expense incurred, starting with the OMA's publication of the Order and ending with the decision on the Order.

- If the party is unrepresented, the costs awarded will be the out of pocket expenses of objecting and attending the inquiry (e.g. travel and taking time off work).
- An application for a full award can be refused, allowed, or allowed in part. For example, a partial instead of a full award might be allowed because the application succeeds only in respect of one of two related Orders, or one aspect of an Order but not every.

Partial awards

- An application for a partial award must clearly identify the "part" in respect of which costs are sought.
- An application for a partial award may relate to one of several Orders (in a joint case) or one ground of objection.
- A partial award could also be time-related - that is, limited to part of the Order process or period.
- An application only for a partial award can never result in a full award.

Justifying an award

12.27 For an award to be **justified** there has to be :

- an application **made at the hearing or inquiry**;
- **unreasonable behaviour** as related to the criteria in the PPG and Circulars 1/09 (WO circular 5/93); and
- **unnecessary** or wasted¹ **expense**.

12.28 These conditions **all need to be met**. There may be cases when unreasonable behaviour occurs, but there is no unnecessary or wasted expense as a result. To conclude that there is unnecessary or wasted expense, the expense only has to be identifiable or quantifiable in terms of the claimant's involvement in the proceedings. To be quantifiable expense does not have to be significant. It would be open to complaint or legal challenge to refuse an award on the basis that, while unnecessary expense was incurred, it was "insignificant". The actual amount of expense is not a matter for the Inspector to decide.

Unreasonable behaviour

¹ There is no definition in the Costs Circular of "wasted" as distinct from "unnecessary" expense, so the terms should be interpreted in their ordinary sense. In ROW cases an example of "wasted" expense would be a technically defective Order which is found to be incapable of confirmation, irrespective of the substantive evidence. However, an Order once submitted has to be determined, either confirmed or not confirmed (with or without modifications). There is no clear analogy with a withdrawn appeal. An objection is unlikely to be withdrawn, but even then there may be other similar objections to the order which need to be addressed at the hearing or inquiry.

- 12.29 Unreasonable behaviour relates to the criteria in the Guidance and Circular. The word "unreasonable" is used in its *ordinary meaning*. Unreasonableness can relate to:
- **procedural matters** or
 - **failure to substantiate a case** to a degree which is unreasonable.
- 12.30 If the allegation cannot be matched to the published criteria then it is very doubtful if an award is justifiable.
- 12.31 In ROW cases further guidance on costs awards is given in section 8 of the PINS booklet "Guidance for procedures on considering objections to Definitive Map and Public Path Orders in England". This information should be taken into account, along with that given in PINS procedure correspondence with the OMA, objectors and other interested parties, in assessing:
- what is fairly expected of all who take part in rights of way hearings/inquiries;
 - whether or not, in the light of this, they have acted unreasonably; and
 - whether as a result they have caused identifiable unnecessary expense to the applying party.

Examples of unreasonable behaviour in ROW cases

- 12.32 See paragraphs 9.2 and 9.3 of Circular 1/09 (paragraphs 12 and 13 of Annex A to Welsh Office Circular 5/93). A party might be ordered to pay all of another's costs if the hearing or inquiry could reasonably have been avoided, were it not for their conduct. For example, the OMA might be ordered to pay objectors' costs if the Inspector finds a basic defect in the Order and so decides not to confirm it, with the result that the objectors have incurred unnecessary or wasted expense going to the hearing/inquiry.
- 12.33 An objector may make an objection which is later found to be irrelevant to the decision on the Order. If the Inspectorate has given objectors the chance to change or withdraw an irrelevant objection and they have not done so, they may be treated as having acted 'unreasonably' by taking the irrelevant objection to the hearing/inquiry. If they are found to have acted unreasonably, unnecessary expense will need to have directly resulted and the expense will need to be identified to justify an award of costs.
- 12.34 Whether or not an objection to an Order is irrelevant will depend on the type of Order and the circumstances of the case.

The Role of the Inspector

- 12.35 The Inspector's role is to hear applications for costs in ROW cases and make a decision on behalf of the Secretary of State or the Welsh Minister; in respect of recovered cases the Inspector makes a

recommendation. Other situations where the Inspector reports on the application for costs are identified below at paragraphs 12.69 to 12.74.

- 12.36 At **Annex 12.2** is a summary note on the basics of hearing and reporting on costs applications.
- 12.37 Where the Inspector is reporting on a costs application, the decision on the order should state: *"The application for an award of costs which was made at the hearing/inquiry will be the subject of a further letter."*
- 12.38 Where the Inspector is deciding a costs application, the decision on the Order should state: *"The application for an award of costs which was made at the hearing/inquiry is the subject of a separate decision."* The aim should be to issue the costs decision at the same time as the Order decision.
- 12.39 Whether reporting or deciding, the Inspector is concerned only with the principle of whether or not costs should be awarded, **not** the amount of costs. He/she will need to know how and when unnecessary or wasted expense was incurred as a result of alleged unreasonable behaviour; and to be satisfied that the expense is quantifiable, without going into the detailed figures. **The basis on which quantifiable unnecessary or wasted expense has been claimed and accepted should be clear from the Inspector's conclusions if it is proposed to award costs.**

At the ROW hearing/inquiry

Providing opportunity to hear applications for costs

- 12.40 It is important to hear any application for costs on grounds of unreasonable behaviour **before** closing the hearing/inquiry. If anyone claims they have not had opportunity to apply to the Inspector and writes in afterwards, the Secretary of State or Welsh Minister (**not** the Inspector) will need to consider the claim as a late application. Only if the claimant can show "good reason" for not applying at the hearing/inquiry, will a late application be entertained.
- 12.41 The Inspector should **not** give any impression that a late application will be treated favourably or deal with any written application received after the hearing/inquiry.
- 12.42 Inspectors must not announce at the hearing or inquiry that they are considering making an award of costs as this may be perceived as pre-determination of the order.
- 12.43 The Inspector's opening announcement should therefore include something along the lines:

For inquiries:

"While I am not inviting applications for costs may I remind you that if anyone sees grounds to apply for costs they should do so before I close the inquiry. Any application for costs should be made at the end of the inquiry separately from the evidence on the merits of the Order."

Additionally, I have the power to initiate awards of costs, whether or not any applications have been made by any of the parties, and if I did this it would follow a written process with the relevant party after the order decision is issued."

For hearings:

"While I am not inviting applications for costs may I remind you that if anyone sees grounds to apply for costs they should do so before we finish our discussions in this room and before we go on our site visit. Any application for costs should be made at the end of our discussions separately from the evidence on the merits of the Order. Additionally, I have the power to initiate awards of costs, whether or not any applications have been made by any of the parties, and if I did this it would follow a written process with the relevant party after the order decision is issued."

12.44 If one of the parties seeks to make an application for costs during the hearing/inquiry, best practice is:

- Say you will hear such applications after hearing the cases for, and against, the Order and immediately before closing the inquiry or finishing the hearing discussions and going on to the site visit.
- If anyone uses the word "unreasonable", that may be a signal to pick up. It would be worth asking whether they intend to make a costs application later, clarifying that there will be opportunity to do so.
- At the end of the hearing/inquiry, ask whether there is any other matter any one wishes to raise. This might be phrased simply as follows:

"That concludes the evidential side of the hearing/inquiry, ladies and gentlemen. Are there any other matters anyone wishes to raise before I (either) make arrangements for the site visit (or) close the hearing/inquiry?"

12.45 If there is no response, continue along the lines:

"Since there is no application for costs I will now make arrangements for the site inspection".

Hearing applications for costs

12.46 The Inspector should hear any costs application(s) and the response(s) of the party (parties) against whom the application(s) is (are) made. The applicant has right of final reply. Occasionally a costs application may prompt a counter-application by the responding party. This should be heard in the same way. If a party is unwilling to apply at the hearing/inquiry and says they would prefer to do so in writing after the inquiry, they should be warned that this is not procedurally correct; they should not be given the impression that any such application might be treated favourably.

12.47 It may be sensible to take a break of, say, 10 minutes while the application(s) or response is prepared. If necessary remind the party that they will need to have studied the Planning Practice Guidance , the

relevant part of Defra Circular 1/09 (WO Circular 5/93 in Wales) and section 8 of the Inspectorate's ROW guide (see para 12.31 above). It is good practice to take a spare copy of these documents to the inquiry and be ready to hand them out if necessary. They are all on the Inspectorate's website.

- 12.48 The applicant for costs should identify the alleged unreasonable behaviour and the nature and extent (not the financial sum) of the unnecessary expense which they have incurred as a result. If the applicant for costs is represented by a separate voluntary organisation, as distinct from a professional agent who can be assumed to be invoicing their client for work done, ensure you are clear and you properly record who precisely is the party applying for costs and what expense they claim to have incurred. To be eligible, the expense has to have been incurred by the claiming party, not a representative.
- 12.49 The Inspector should record the essence of the submissions in his/her costs report or decision.
- 12.50 Interested persons, other than statutory objectors/supporters, who attend the inquiry, with or without having given prior notice, can in principle apply for an award of costs on the grounds of unreasonable behaviour resulting in unnecessary or wasted expense. But they could well find it difficult to substantiate an application. They would qualify for an award of costs (or have costs awarded against them) only in exceptional circumstances, normally relating to procedural matters.

Reporting applications for costs to the Secretary of State/Welsh Minister

- 12.51 On completing the proceedings, the Inspector should report any costs application and the response in the style of **Annex 12.3**. Any adjournment, including any break to deal with a costs application, should be recorded in the costs report. It may be important to record the precise facts of a party's participation – when they gave evidence, and for how long – particularly if the inquiry extends beyond a single day.
- 12.52 If an application for costs is being made on behalf of several objectors, it will be important to clarify and record their name(s) so that there is no doubt from the report who precisely made the application. Any doubt could cause delay in referring back a report for clarification when the Secretary of State deals with it.
- 12.53 In the case of an application for a partial award, what is sought and the basis on which it is sought should be clearly stated.
- 12.54 The flow chart at **Annex 12.4** shows the decision-making process. The costs application should be reported and determined solely on the basis of the grounds on which it is made. It would not be appropriate to introduce some new matter on the basis of which the Inspector might consider the applicant might merit an award of costs.
- 12.55 The costs report should be submitted concurrently with the hearing/inquiry decision or report on the merits of the Order. Each

should refer to the other. One copy of the signed costs report should be placed in the plan folder on the left-hand side of the file. The top right-hand front corner of the file should be marked "Costs" in bold capital letters. Please remember to e-mail a copy of your costs report to the ROW Team.

Deciding costs applications

- 12.56 On completing the proceedings, the Inspector should write a costs decision, recording the parties' submissions, conclusions, formal decision with (if appropriate, a costs order) in the style of **Annex 12.5** to this note.
- 12.57 The general advice in paragraphs 12.51 to 12.55 above applies to decision-making together with the obvious point that the decision rests with the Inspector not the Secretary of State/Welsh Minister.
- 12.58 The application should be assessed against the published guidance on costs. It is best practice to refer specifically to relevant paragraphs of the guidance - dealing with each allegation of unreasonable behaviour and then going on to consider whether there has also been unnecessary or wasted expense. This helps the reasoning process, thereby improving the quality of decisions and reducing the risk of a High Court challenge.
- 12.59 If the basis for an award cannot be linked to one of the published criteria, an award is probably not justifiable, although it should be borne in mind that
- the examples of unreasonable behaviour in Defra Circular 1/09 paragraphs 9.3 (Circular 5/93 in Wales, Annex A, paragraphs 11 to 13), are not stated to be exhaustive; and
 - the correct test - the bottom line – is always whether or not the party has acted unreasonably (in the ordinary sense of the word), in all the particular circumstances of the case. This test was stated in *R v SSE, Ex Parte Chichester DC* (1993 JPEL B21).
- 12.60 While applications should be determined on the basis of the submissions made, all material on the case file can be relevant to the decision on costs, whether or not it needs to be cited in the reasoning. For example, a file note of a phone call from an objector to the ROW Section may indicate intention or doubt about something, which later becomes significant. In some cases it may be necessary to refer to what is evident from the file records. A common sense approach is needed.
- 12.61 While a file note at procedure stage is usually a record of some discussion or action and may not have been copied to the parties, the information contained may be relevant in terms of validating, or conflicting with, what is claimed in a party's costs representations. That applies whether or not the party specifically refers to the discussion or action taken. So the file evidence needs to be borne in mind in judging whether the party concerned has acted unreasonably. If in doubt in a particular case, Costs Branch may be able to advise.

- 12.62 The conclusions should lead to the formal decision. The decision must be consistent with, and be fully supported by, the conclusions. Both must also be consistent in all respects with the reasoning in the Order decision. For example, it would appear illogical to make a full award of costs against the OMA if the Order is being confirmed, with or without modifications.
- 12.63 An application for a full award of costs can result in a partial (rather than full) award if the conclusions support such an outcome. However, an application for a partial award, if successful, can only result in a partial award. It cannot result in a full award. See flow chart at **Annex 12.1**.
- 12.64 Avoid the word "*guilty*" when finding against a party. A costs application is not a matter before a Court of law.

Costs decision document

- 12.65 The aim is to issue the costs decision at the same time as the Order decision. Alternative templates (award and refusal) are at **Annex 12.5**.

Costs order

- 12.66 Where an award is made the "Costs Order" should follow the standard format. Where a partial award is made, the terms of the award should be clearly defined; also the full details of all orders (where more than one) dealt with at the (joint) hearing/inquiry.
- 12.67 When making a partial award of costs, it is important to define precisely what is being awarded: see "**Applications for a Full or Partial Award of Costs**", above. If the award is time-related, for example, as a result of an adjournment of the hearing/inquiry or unnecessarily extended duration, state what additional time was spent as a result.

Despatch of costs decision

- 12.68 When an Inspector's costs decision is issued, the Rights of Way Section will send a standard enclosure letter to the parties to the decision. The content will depend on whether the decision is to award or refuse costs. If an award, the letter will also include a link to the PPG (paragraph 44) which provides guidance on how an amount is settled where an award is made. The standard letter will also explain that there is no statutory provision for a challenge to a decision on an application for an award of costs. The procedure is to make an application for judicial review and this must be done promptly.

Situations requiring a costs report to Secretary of State/Welsh Minister

A. *Successive Hearings/Inquiries*

- 12.69 Because ROW cases can give rise to more than one hearing/inquiry where the Inspector is proposing to modify the Order, it is important to remember that each hearing/inquiry can give rise to a discrete costs application(s), possibly involving the same parties acting in different ways (for example, initially supporting the Order but later objecting to

proposed modifications). Where it is clear that modifications need to be advertised which may give rise to objections and a continuation of the Order process, the Inspector should complete a costs report and attach it to the file for action at the end of the process by Costs Branch or the Welsh casework team.

B. Costs applications against anyone not present at the hearing/inquiry

- 12.70 An objector who has been given the opportunity to be heard, confirms they wish to be heard, but then fails to turn up or be represented without first telling the Inspectorate would appear to have acted unreasonably, and risks having to pay at least part of the OMA's hearing/inquiry costs. To avoid an award against them, they would need to explain satisfactorily why their conduct was not unreasonable. In such cases a costs report should be submitted to the Secretary of State and Costs Branch will obtain the absent party's response before deciding the costs application.
- 12.71 The Secretary of State may decide it is necessary to hold a hearing/inquiry in any event to hear the evidence for and against the Order and reach a decision. In these circumstances, objectors who have not asked to be heard and have not been consulted about the arrangements for the hearing/inquiry, will not necessarily be expected to attend or be represented there. On being notified they should let the Inspectorate know if they cannot or do not want to go to the hearing/inquiry. But choosing not to take part in the hearing/inquiry in these circumstances will not risk being treated as 'unreasonable behaviour'.
- 12.72 If a party against whom costs are claimed is not present or represented at the hearing/inquiry, the Inspector's costs report should:
- include the submissions made in support of the application;
 - note that the responding party was absent;
 - omit any conclusions, recording only tentative comments; and
 - replace the recommendation paragraph with the words: '*Since the submissions are not complete I make no recommendation*'.

C. Incomplete costs report in a case involving more than one hearing or inquiry

- 12.73 Problems or misunderstandings between the parties can result from delay in deciding a reported costs application which is incomplete and requires a procedural exchange of correspondence before the costs decision can be made, but the Order then goes to a further hearing/inquiry. In ROW cases, which can be very protracted, the Inspector should arrange (through the office) for the case file to be sent to Costs Branch or the Welsh casework team immediately after the particular hearing/inquiry so that copies of relevant papers can be made.
- 12.74 This should facilitate the earliest possible exchange of representations while the matter is still fresh in the parties' minds. The file would then be

returned to the Inspector to complete the Order process, following which the decision on the costs application would then be issued By the Costs Branch after the release of the file.

D Any other unusual or novel transferred case where the Inspector might consider, after consultation with GM/Sub-Group Leader/Costs Branch, that a costs report is more appropriate.

E. Recovered or non-transferred Order – costs report with main report to Government Office decision branch

General points on costs reports

12.75 The term "costs application" is not mentioned in legislation. It is purely an administrative device or way of triggering the jurisdiction to make, or not make, a costs order to/against the parties in the proceedings. So a costs application does not first have to be "recovered" for a report to be made to the Secretary of State in a transferred case where the Inspector would normally determine the costs application.

F Situation where unusually a written response is received after the Hearing or Inquiry

12.76 The response to a costs application should be heard at the hearing/inquiry – if necessary after a short adjournment to enable the responding party to prepare their case. But, as noted above, problems can arise if the party is not present. If for any reason a written response is received after the hearing/inquiry before a costs report is prepared, it would not be appropriate to go on to complete the costs report without first giving the applicant for costs a final right of reply. It may be possible to arrange for the office (ROW section) to process an exchange of correspondence so that the costs report can then be completed and signed by the Inspector. In cases of particular difficulty it is best to seek advice from the office.

12.77 If a written response is received after an incomplete costs report is prepared, the action above is needed unless the Order decision is imminent and not going to be delayed by a further inquiry. Any written response not recorded in the signed costs report should be flagged up on the file for the Secretary of State's/NAW's attention. It may even happen that the written response contains a counter-application for costs. If so that will need to be considered by the Secretary of State/Welsh Minister as a late application (see 12.81 below).

Claims against The Planning Inspectorate

12.78 Occasionally, someone may seek to claim costs against the Inspectorate, as part of a complaint about the handling of a particular case. The Inspectorate is Crown-exempt and any claim for reimbursement of expenses is treated as an application for an "ex gratia" payment. All such cases are dealt with administratively within the Inspectorate. Anyone who indicates at the hearing/inquiry that they intend making such a claim should be invited to submit it, in writing, to Pins Customer

QualityRoom 4D, Hawk Wing, Temple Quay House, 2 The Square,
Temple Quay, Bristol, BS1 6PN, quoting the case reference number.

- 12.79 The Inspector should not hear any such claim, nor express any opinion as to its validity or possible success. Subsequently, the Inspector's view may be sought by the Inspectorate before deciding whether an "ex gratia" payment is justified.
- 12.80 In Welsh Assembly Government cases anyone wishing to make such a claim should be invited to submit it, in writing, to Room 1-004, Cathays Park, Cardiff, CF10 3NQ.

Inspector's initiation of costs

- 12.81 Inspectors may initiate an award of costs against a party who they judge to have behaved unreasonably resulting in unnecessary expense and the other party has not made an application for costs. The Inspector can start this process once the order decision has been despatched. The process involves an exchange of comments between the parties and will be dealt with by Rights of Way Procedure Team. When submitting an order decision for despatch, the Inspector should also submit a draft letter setting out which party he/she wishes to initiate the award of costs against and why. This will be flagged on the file so that it is picked up by the procedure team after the decision has been despatched.

Late applications

- 12.82 The Secretary of State/Welsh Minister will only accept an application for costs after the hearing or inquiry has closed if the applicant can show "good reason" for not applying earlier. Late applications in writing should be sent to the Planning Inspectorate's Costs Branch, addressed to 3F Hawk Wing, Temple Quay House, 2 The Square, Temple Quay, Bristol, BS1 6PN, quoting the case reference number. Or, in the case of Wales, to Room 1-004, Cathays Park, Cardiff, CF10 3NQ.
- 12.83 If a late application is accepted, the Inspectorate will tell the applicant and the other people involved and arrange for both sides to make written representations before the Secretary of State (or Welsh Minister) makes a decision.

Analogous Orders

- 12.84 Generally speaking, the only ground on which an application can be made for an award of costs at a ROW hearing or inquiry is that of unreasonable behaviour, as discussed above. However, there is a particular kind of Order that comes up occasionally and raises further complications in terms of costs awards. So it is important to be aware of it.
- 12.85 A creation Order made under Section 26 of the Highways Act 1980 is considered to be similar (or analogous) to a compulsory purchase order (CPO) in that, if confirmed, the Order takes away the landowner's rights to, or interest in, the land. The landowner then has a right to compensation under the Act.

- 12.86 This kind of Order, where there is a statutory right to compensation, is called "analogous". Relevant guidance is in Defra Circular 1/09 (Welsh circular 5/93 at Annex A, paragraphs 14 and 15). Extinguishment and diversion Orders made under sections 118 and 119 of the Act may also be analogous depending on the circumstances of the case.
- 12.87 What this means is that if a person with an interest in land over which a path is to be created, diverted or closed objects at a hearing or inquiry and succeeds as a statutory objector, that person's costs will be payable by the authority (unless the authority can show exceptional reasons). An award of costs for an analogous Order does not, in itself, imply that the authority has behaved unreasonably.
- 12.88 The objector will not know, of course, whether they have been successful until they see the decision on the Order. For that reason, paragraph 9.7 of section 9 of ROW s Circular 1/09 advises that the party need not apply for costs at the hearing or inquiry. The Inspectorate will write to the party concerned and process the award on behalf of the Secretary of State without having to involve the Inspector.
- 12.89 At this type of hearing/inquiry Inspectors need not make the kind of announcement about costs discussed in paragraph 12.43 above. (In the case of a joint hearing/inquiry with a non-analogous Order it will be difficult to exclude an analogous Order from general announcements about costs.)
- 12.90 The rare occasion may arise where a party at an analogous Order hearing or inquiry seeks an award of costs against another party on grounds of unreasonable behaviour (which in practice is likely to relate to procedural matters, for example where the hearing or inquiry had to be adjourned or was unnecessarily prolonged). Generally speaking, Inspectors do not need to concern themselves with hearing an application for costs on this ground, as Annex 6 to the Costs Circular (paragraph 3) advises that an application for costs on grounds of unreasonable behaviour should be made to the Secretary of State *"immediately after the hearing or inquiry"*.
- 12.91 However, to ensure that parties have effective access at a hearing or inquiry, Inspectors should not refuse to hear any costs application any party insists on making on whatever basis. If you hear a costs application, provide opportunity for the other party to respond; and hear any response. Report the application and the other party's response, together with your conclusions and recommendation, to the Secretary of State. This advice is consistent with the approach in the Inspector's Training Manual on Human Rights.