THE PLANNING ACT 2008

BC080001

APPLICATION BY LONDON RESORT COMPANY HOLDINGS FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR THE LONDON RESORT ("APPLICATION")

APPLICATION FOR COSTS
ON BEHALF OF MERLIN ENTERTAINMENTS GROUP

Introduction

1. This application is for a full award of costs resulting from the London Resort Company Holdings' ("**Applicant**") withdrawal of the Application on 28 March 2022 and its unreasonable behaviour during the conduct of proceedings.

Relevant Guidance

2. The Department for Communities and Local Government Guidance Note "Award of Costs: examinations of applications for development consent orders" July 2013 ("**Guidance**") sets out the approach to the award of costs in the event of withdrawal of an application for a development consent order.

3. Paragraph 2 of Part A of the Guidance states that:

   "The guidance applies to any "interested party" as defined in Section 102 of the Planning Act 2008. This includes any "affected person" as defined in Section 59 of the Act. It also applies to any "additional affected person" and any "additional interested party" as defined in Regulation 2 of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 and any other person who at the discretion of the Examining Authority takes part in an examination"

   This includes Merlin Entertainments Group ("**MEG**") who have made a relevant representation to the Examining Authority in response to the Application.

4. Paragraph 11 of Part B of the Guidance states that:

   "Costs will normally be awarded where the following conditions are met:

   - *The aggrieved party has made a timely application for an award (see paragraph 32 of Part B of the Guidance which states that this should be within 28 days of the date of the notification of the withdrawal of the application for development consent where the application is withdrawn following the preliminary meeting or for any other reason the examination is curtailed or cancelled) (emphasis added);*

- *The party against whom the award is sought has acted unreasonably; and*

- *The unreasonable behaviour has caused the party applying for the award of costs to incur unnecessary or wasted expenses during the examination – either the whole of the expense because it should not have been necessary for the matter to be examined and/or determined, or part of the expense because of the manner in which the party behaved during the examination"*

5. Paragraph 12 of Part B of the Guidance states that *"for costs purposes, the examination is treated as starting at the beginning of the Preliminary Meeting held under Section 88 of the Planning Act 2008" (emphasis added).*

6. Paragraph 15 and 16 of Part B of the Guidance states that *"a full award of costs means an award of the whole of the costs of a party in relation to its involvement in the examination process. It includes all reasonable preparatory work and costs in relation to its involvement including the costs of making the application for the award of costs" (emphasis added).*

7. The Guidance also provides examples of unreasonable behaviour, for example:

    - *Non-compliance with procedural requirements or failure by a party to substantiate a relevant part of their case;*
    - *Introducing fresh or substantial evidence at a late stage, necessitating the preparation and submission by any other party or parties of additional submissions or evidence that would not have been required if the fresh or substantial additional evidence had been submitted on time.*
    - *Withdrawing the development consent application after the preliminary meeting or by action or omission the examination is curtailed or cancelled in whole or in part (emphasis added).*
    - *An application for development consent is proposed that is clearly contrary to or flies in the face of a relevant designated national policy statement and no, or very limited, other relevant and important issues are advanced with inadequate supporting evidence.*

8. Further, the Guidance states that in order to minimise the risks of a costs award, an applicant should undertake careful and ongoing case management, maintain constructive, co-operative dialogue between the parties at all stages, maintain good records and an audit trail of negotiation, dialogue and information exchanges between the parties and review actively the content of submissions and evidence responding promptly to changing circumstances.

9. The Guidance does differentiate slightly between parties who are objecting on the grounds of compulsory acquisition.

Application

10. There are two points to consider in this case in making an award on costs:

    - Does the Guidance allow for the Examining Authority to award costs to MEG (particularly as it is not objecting as an interested party in the context of compulsory acquisition) and can an award be made in the pre-examination stage; and

    - Has the Applicant acted unreasonably.

11. On the first question, we would respectfully submit that the answer has to be yes. The Guidance clearly states at Paragraph 2 of Part A that the Guidance applies to any other person who takes part in an examination, notwithstanding whether they are participating as a party with an interest

in land to be acquired.

12. Further and whilst it may be suggested that the Guidance only applies to costs incurred once the examination has commenced and the trigger for this being the beginning of the Preliminary Meeting, this is not actually what the Guidance says.

13. Paragraph 12 of Part B of the Guidance does say that for the purposes of costs, the examination is treated as starting at the beginning of the Preliminary Meeting, however the Guidance also clearly allows discretion to the Examining Authority to make awards outside of this period, for example Paragraph 15 and 16 of Part B of the Guidance, which states that *"a full award of costs means an award of the whole of the costs of a party in relation to its involvement in the examination process. It includes all reasonable preparatory work and costs in relation to its involvement including the costs of making the application for the award of costs" (emphasis added).* Additionally, Paragraph 11 of Part B states that *"costs may be awarded [for unreasonable conduct] where the application is withdrawn following the preliminary meeting or for any other reason the examination is curtailed or cancelled" (emphasis added).* The examination was cancelled by virtue of the Applicant's withdrawal prior to the Preliminary Meeting and MEG submits that the underlined part of Paragraph 11 is intended to widen the circumstances in which costs are recoverable to exactly these circumstances. The letter of Paragraph 11 cannot legitimately be read so as to confine costs awards to withdrawals which follow the close of the Preliminary Meeting, as this would be inequitable to any party who participated in pre-examination stages openly and in good faith.

14. By way of contrast, costs were awarded to interested parties in the Atlantic Array decision (EN010015), the application for which was withdrawn 10 days prior to the Preliminary Meeting. In this case, the withdrawal of the application came after the relevant representation period had closed and the notification of the Preliminary Meeting had been received. The decision itself stating that:

    "The process for the examination of a DCO for an NSIP is therefore wider than the statutory period of the examination starting with the PM. To take too narrow a reading of the guidance on costs would place affected persons at a financial risk with no guarantee of recompense whilst simultaneously encouraging them to engage formally and potentially risk their own costs. That would be inconsistent with other areas of the planning process and incompatible with the Human Rights Act"

15. Although the Atlantic Array decision concerns circumstances where an interested party is objecting to the principle of compulsory acquisition of land and in this case, MEG was not objecting to the Application as an interested party, the Applicant's conduct of the Application has been particularly troubling and in this case should create an exception to the rule that parties be required to meet their own costs.

16. If the Examining Authority found in the alternative, MEG asserts that the Preliminary Meeting was technically opened on Tuesday 29 March 2022 in order to inform the parties that the Application had been withdrawn, meaning that for the purposes of Paragraph 12 of Part B of the Guidance, the examination had commenced and thus preparatory time is recoverable in circumstances where the Applicant had behaved unreasonably, pursuant to Paragraph 16 of Part B of the Guidance.

17. On the second question, we would again respectfully submit that the Applicant has behaved in an unreasonable manner and this has led to the compounding of costs incurred by interested parties and those parties with valid relevant representations.

18. For context, the Application was submitted to the Examining Authority on 4 January 2021 and was accepted for examination on 28 January 2021. As early as 11 March 2021, the Applicant was

notified by Natural England that the Swanscombe Peninsula (comprising almost the entirety of the land within the proposed order limits of the Application) was to be subject to designation as a Site of Special Scientific Interest ("**SSSI**"). Despite the notification, the Applicant did not revisit the environmental statement to take into account the existence of the SSSI status or the potential for designation. This would have proved fatal to the Application in its submitted form, as the SSSI was then designated on 10 November 2021. On designation, the Applicant undertook a review of the Application with a view to updating its submissions in consultation with statutory consultees and affected persons. Between 10 November 2021 and 1 February 2022, the Applicant undertook tokenistic engagement with statutory consultees and in the case of many affected persons, none at all. This led to affected persons and other parties participating in the examination to make representations on the designation of the SSSI and the impacts to the Application and other deficiencies in the Applicant's approach to the examination. By 21 January 2022, (over 10 weeks after the designation of the SSSI), the Applicant had not published a single updated document or demonstrated any tangible progress, instead just providing a list of new and proposed updated documents with no accompanying detail and a schedule of consultation to be undertaken. The Applicant eventually did submit updated documents on 17 March 2022 but these were incomplete and did not address key economic issues raised in MEG's relevant representations, despite promises from the Applicant that such evidence would be forthcoming. The consequence of this was continuous, disruptive and expensive delay which continued to cause significant market uncertainty.

19. Section 55(3)(f) of the Planning Act 2008 states that for an application be to accepted, it must be *"of a standard that the Secretary of State considers satisfactory*". This, in conjunction with established practice, requires the Applicant to review changing circumstances and engage with the statutory process of examination in a proportionate and reasonable manner to mitigate the impact to other affected persons. Further, DCLG Guidance (Planning Act 2008: Guidance on the pre-application process – March 2015) is also clear that the Secretary of State's judgment in deciding whether to accept an application for examination will be based on a number of aspects including *"the overall quality of the application in terms of the ability of the Examining Authority to be able to examine it within the maximum 6 month statutory time period"* and *"the level of detail and definition of the project and the resulting quality of the information contained in the application as a whole*". The Applicant itself stated in its letter to the Examining Authority dated 10 January 2022 that:

    "We too are mindful of the intent of the DCLG Examination Guidance that accepted applications should normally be ready for early Examination; we would note that [at] the time of submission, the Inspectorate were aware that elements of the submission would follow acceptance and that their absence may indicate that the application would not be ready for examination"

20. The Applicant's own admission that it submitted the Application prematurely undermines its assertion that the issues with the Application can be attributable to COVID-19 and the SSSI designation alone. The Application was not ready for submission and the Applicant demonstrated an inability (or an unwillingness) to adapt to changing circumstances, which were in our view insurmountable. The moment that the Applicant was advised such (either through its own legal team or the representations received in January 2022) the Applicant should have withdrawn the Application. Arguably, this should have been the advice the Applicant was receiving on designation of the SSSI in 2021.

21. Further, the funding arrangements for the development to be delivered under the Application were never fully substantiated, which was undermined continuously through the inability of the Applicant to pay its previous legal advisers (resulting in ongoing litigation), the failure to provide any evidence to substantiate its market demand assessment and the haemorrhaging of key sponsorship deals (widely reported and in the public domain). As one of the leading leisure operators, MEG asserts that it is neither reasonable nor proportionate to have continued with the Application in circumstances where the funding for the development was in such clear doubt.

22. Since 1 February 2022, MEG has incurred approximately £19,833 plus VAT in legal and professional fees, spent reviewing updated information and evidence submitted by the applicant, preparing for the Preliminary Meeting, responding to procedural decisions, preparing a costs application and correspondence generally with the Examining Authority.

Summary

23. MEG asks the Examining Authority to make a full award of costs against the Applicant to cover preparatory time for the Preliminary Meeting and preparing this costs application.

DLA PIPER UK LLP
21 April 2022