Costs Report to the Secretary of State for Communities and Local Government

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TOWN AND COUNTRY PLANNING ACT 1990

PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990

LOCAL GOVERNMENT ACT 1972

APPEALS BY NORTH OXFORDSHIRE CONSORTIUM LTD

AGAINST THE FAILURE TO DETERMINE

AN APPLICATION FOR OUTLINE PLANNING PERMISSION AND

AGAINST THE REFUSALS OF APPLICATIONS FOR CONSERVATION AREA CONSENTS

BY

CHERWELL DISTRICT COUNCIL

Inquiry held on 30 September, 1-24 October, 16 and 17 December 2008, 12 January and 16 March 2009

Sites at Heyford Park, Camp Road, Upper Heyford, Bicester, OX25 5HD

File Ref(s): APP/C3105/A/08/2080594 and APP/C3105/E/08/2069311 and 23 others

File Refs: APP/C3105/A/08/2080594; APP/C3105/E/08/2069311 and 23 other Conservation Area Consent appeals
Site at Heyford Park, Camp Road, Upper Heyford, Bicester

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 74 and 89 and the Local Government Act 1972, section 250(5).
- The application is made by North Oxfordshire Consortium Ltd for a full or partial award of costs against Cherwell District Council.
- The inquiry was in connection with appeals firstly against the failure of the Council to issue a notice of their decision within the prescribed period on an outline application for planning permission for a new settlement of 1075 dwellings, together with associated works and facilities, including employment uses, community uses, a school, playing fields and other physical and social infrastructure and secondly against the refusal of 24 applications for conservation area consent for demolition.

Summary of Recommendation: No award of costs is made

Procedural Matter

1. The application and response were made at the inquiry on 16 March. Owing to the lateness of the hour and the wish of all to avoid a further lengthy adjournment it was agreed that the Appellant's reply to the Local Planning Authority's response would be made in writing.

The Submissions for the Appellant

2. This Application for Costs is made in accordance with the guidance in Circular 8/93. The general considerations which apply to awards of costs are set out in Annex 1 and paragraph 6 and are as follows:

2.1 An application is made at an appropriate stage of the proceedings;

2.2 One of the parties to the proceedings has behaved unreasonably;

2.3 The unreasonable behaviour has resulted in wasted expenditure. In this case the Appellant contends that the wasted expenditure is the cost of coming to the appeal or alternatively the cost of having at the appeal hearing, to deal with considerations which should never have been raised as Reasons for Refusal.

3. As to whether the general conditions for an award are satisfied the Appellant's position is as follows:

3.1 The application for costs is being made at the appropriate stage of the proceedings;

3.2 The Local Planning Authority has behaved unreasonably: see below;

3.3 Expenditure has been wasted because if the Council had behaved reasonably the appeal would not have been necessary or alternatively if an appeal was necessary the appeal proceedings would not have been anything like so protracted had the authority not pursued unreasonable grounds of refusal and called voluminous evidence in relation to them.

Unreasonable behaviour

4. Circular 8/93 Annex 3 and paragraph 7 points out that a planning authority should not prevent, inhibit or delay development which could reasonably be permitted in the light of the Development Plan so far as it is material to the application and of any other material considerations. Paragraph 8 of the Annex indicates that Reasons for Refusal should be precise, specific, clear and relevant and that the authority will be expected to produce evidence to substantiate each Reason for Refusal by reference to the Development Plan and other material considerations. In addition the Annex makes clear that authorities are at risk of an award of costs if they fail to have regard to relevant Government Policy, the relevant policies of the Development Plan and previous decisions of Inspectors or the Secretary of State. In the circumstances of this case the authority has been guilty of failing to have regard to each of those matters and as a result has fallen into substantial error.

5. In making this Application, the Appellant makes clear that they do so on the basis of the evidence which has been heard at the Inquiry. In particular they rely on the evidence given, particularly in cross examination, by the authority's witnesses and the clear answers which substantiate the unreasonableness of the authority's conduct.

6. A substantial plank of the authority's case against the appeal proposals and something which features in all aspects of its evidence is the Revised Comprehensive Planning Brief (RCPB). The circumstances surrounding the preparation of that document have been rehearsed in evidence and its contents have been appropriately examined. We do not repeat our main submissions in that regard but rely upon them. From the evidence the following is clear:

6.1 That although the authority purports to have prepared the RCPB in a way which respected the requirement to consult, that was far from the reality. The reality is that the authority prepared a RCPB on one basis with one content and subsequently having had representations, completely revised the document introducing new, strict and onerous requirements upon which there was no effective consultation. It is self evident that that is an unreasonable approach. Equally unreasonable is the authority's suggestion that because the Government Office did not object to adoption of the RCPB it must comply with Government Policy. Had the Government Office been aware of the substantial and far reaching changes which were made after they had been consulted it is, we submit, inconceivable that there would not have been an objection.

6.2 As to the content of the RCPB the answers given by the Authority's own Heritage consultant make it clear that the document was not in accordance with national planning policy in Planning Policy Guidance 15 and that the lack of conformity was material in terms of the approach to and treatment of buildings within a Conservation Area. It is, we submit, self evident that the authority was behaving unreasonably and was in pursuit of a long held and entrenched position that sought the removal of unlisted buildings in the Conservation Area whatever might be their contribution to its character or appearance. The description "entrenched position" does not, of course, originate with North Oxfordshire Consortium (NOC) but is a phrase used by the District and County

Councils' own leading members when writing to an occupant on the Flying Field: see Core Document 125[1].

7. It is clear from the Secretary of State's previous decision and the Inspector's report upon which it was founded that the approach taken in the earlier Structure Plan Policy H2 was a site specific Structure Plan approach which, as the Inspector pointed out had in those circumstances, taken into account the general policies of the Structure Plan. It was accordingly inappropriate to rely on those general policies as supporting any refusal. Notwithstanding that clear approach the authority in this instance has relied on the general Structure Plan policies in an attempt to turn this proposal away. As was pointed out in the cross examination of Mr Staley such as approach puts the Structure Plan at war with itself as well as being inconsistent with the approach of the Secretary of State and the Inspector on the last occasion. It was unreasonable in the circumstances to rely on those policies.

8. The Reasons for Refusal also rely upon the adopted Cherwell Local Plan policies. As was clear in the course of evidence those Local Plan policies are policies which seek effectively wholesale removal of unlisted buildings within the designated Conservation Area and represent again an approach by the authority which is more to do with achieving a predetermined position than it is the application of both national and Development Plan policies in current circumstances, i.e. with a Conservation Area designated. It was unreasonable of the authority to rely on the Local Plan policies in all the circumstances. The authority compounds this unreasonableness by not then drawing attention to the one Local Plan policy which was relevant: EMP4: see the evidence of Mr Dobson at paragraph 4.32.

9. The Secretary of State's guidance with regard to design and design and access statements is contained in PPS1 and Circular 1/2006. The guidance is we submit clear and straightforward with regard to the content of Design and Access Statements (DAS) and certainly does not support the approach taken by the authority in this instance. The authority having misapplied and apparently misunderstood the advice presented evidence extending to over 100 pages related to design and access issues and the Design and Access Statement. It was accepted in cross examination that none of those matters were matters which would be appropriate to rely upon to dismiss the appeal. In the circumstances there ought not to have been any Reason for Refusal related to design and access issues or the DAS and it was most certainly unreasonable to produce a proof of evidence extending to over 100 pages and requiring a substantial amount of Inquiry time to be dealt with not least by way of cross examination and then the calling of evidence and rebuttal evidence in order to demonstrate the unreasonableness and inappropriateness of the approach taken.

10. The Reasons for Refusal extend to a consideration of requirements for infrastructure of various kinds. The authority called evidence in support of those matters in an attempt to support, what we submit were its unreasonable requirements. The Secretary of State's advice with regard to these matters is contained in Circular 5/2005 and is explicit in stating that if a Local Planning Authority seeks unreasonable planning obligations in connection with a grant of planning permission it is open to the Applicant to refuse to enter into them and

[1] Inspector's note: this reference is to the phrase at the end of the third paragraph of the letter at appendix 1 to Mr Maltby's Proof of Evidence (Document PSM1)

where an appeal has arisen because of what seems to the Secretary of State to be an unreasonable requirement on the part of the Local Planning Authority and a public local inquiry has been held he will consider sympathetically any application which may be made to him for an award of costs: see paragraphs B56 and 57.

11. In this instance the Authority's requirements included a requirement for an education contribution of some £16m and requirement for a contribution to Primary Care Trust facilities. The education contribution has now been reduced to some £11m, a sum calculated on a basis which the Appellant had always indicated they were willing to consider and the PCT has entirely disappeared. It is no answer for the Local Planning Authority to say that they were relying on the evidence of either the Local Education Authority or the Primary Care Trust in making the requirements. In the circumstances of an appeal and where Reasons for Refusal are being considered the Local Planning Authority is not there simply to be a mouthpiece for the unreasonable requirements of others: see Circular 8/93 Annex 3 paragraph 9. To the extent therefore that the appellants have been put to the trouble of preparing evidence and then having to negotiate with regard to these unreasonable requirements an award of costs is justified.

12. In making this application for costs the Appellant does not seek to repeat their main submissions with regard to the merits of the appeal proposals and the lack of substance in the Reasons for Refusal. Those submissions are taken as read with regard to the application for costs. We do however draw attention to the fact that the appeal was necessitated by an approach with regard to in substance one particular issue, the retention and use of buildings on the Flying Field, but the Authority seems to have regarded it as an opportunity to present evidence on a whole range of other matters. In that connection we draw attention to the fact that:

12.1 There is no dispute about the overall dwelling numbers for the new settlement area;

12.2 There is no dispute about the location of the new settlement area and the appropriateness of the location in the application;

12.3 There is no dispute about the general disposition of uses within the new settlement area and the appropriateness of those uses;

12.4 There is now no dispute about the retention of protected buildings within the new settlement area and their relationship to proposed new development.

13. It is immediately apparent that the substantive issue is the retention and use of buildings on the Flying Field in respect of which the authority clearly has an entrenched position rooted in the earlier Local Plan policies, pursued in the RCPB and taken forward in its refusal of planning permission for these proposals. The only support the Authority has from English Heritage with regard to its approach on the Flying Field is as to the limited issue relating to the extent of the Paragon use and in that respect English Heritage happily acknowledge that there are other material considerations in play that the Secretary of State will wish to have regard to, not the least of which is the substantial importance of Paragon's contribution to the local economy and the employment which is generated by their use of the site. That is precisely the sort of issue which a Local Planning Authority behaving reasonably would have had no difficulty in determining in an appropriate fashion. It is in that connection noteworthy, we submit, that for the first time in its existence, SEEDA have made an appearance at a public inquiry

objecting to a Local Planning Authority position in relation to a refusal of planning permission. It is a startling condemnation of the unreasonableness of the Authority's position and an affirmation of the accuracy of the description of their position as being entrenched.

14. In these circumstances the Appellant seeks an award of costs on the following basis:

14.1 For the costs of having to pursue the appeal proposals to Inquiry. If the Authority had behaved reasonably and not pursued an entrenched position it would never have been necessary for the proceedings to have come to an inquiry because planning permission would have been granted and such issues as there were that needed resolution would have been capable of sensible negotiation.

14.2 In the alternative, the Appellant seeks a partial award of costs related to the authority's unreasonable behaviour in pursuing the reasons for refusal relying on the RCPB, further and alternatively in pursuing the reasons for refusal relating to design and the design and access statement Reasons for Refusal, further and alternatively in pursuing the Reason for Refusal in relation to infrastructure provision all of which have unnecessarily extended the Inquiry proceedings and caused the Appellant to incur expenditure in preparing evidence and rebuttals which would not otherwise have been necessary.

The Response by the Local Planning Authority

15. NOC's application is resisted in the strongest terms.

16. The submissions made by NOC are addressed in the order in which they are made in the application.

17. Their first 4 paragraphs paraphrase extracts from DoE Circular 8/93 and make general allegations about Cherwell District Council's (CDC) conduct at the inquiry which are detailed later in the application. We shall focus on those matters of detail below, but before doing so, the following points arise:

17.1 At paragraph 2.3 above NOC claims that the wasted expenditure incurred is the "cost of coming to appeal or alternatively the cost of having at the Inquiry to deal with considerations that should never have been raised as reasons for refusal". Even if, contrary to the Councils' case, the Secretary of State in due course decides to grant planning permission, it is extraordinary to suggest that NOC should have its costs of "coming to appeal", on the apparent basis that it considers that there has been no need for an Inquiry and permission should simply have been granted without question. For the reasons set out in detail in the Councils' evidence, the Appeal scheme is contrary to Development Plan Policy, (in particular the site specific requirements of SP Policy H2) and is also contrary to the RCPB, which is an adopted SPD. (Moreover, it should be noted at the outset that it is not just the Councils that oppose the scheme and Inquiry time has also been taken up with the objections of EH, OTCH and the EA).

17.2 All of the reasons for refusal were reasonable. In the normal course of events issues narrow, progress is made on some matters by virtue of negotiation and the provision of further information etc, and to some extent that has happened here. It is legitimate and reasonable for CDC to take issue in relation to the remaining areas.

17.3 As to paragraph 3.1 above, after several weeks of evidence in October 2008, the first suggestion that a costs application was being considered was made on 12 January 2009. Whilst no issue is taken that the application has been made at an "appropriate" stage in the proceedings, CDC notes that the details of the claim were only finally revealed on Wednesday afternoon last week[2] - the lengthy gestation period presumably indicative of the struggle to devise the claim.

17.4 NOC claims that the appeal could have been shorter, but does not particularise how (or by how much the proceedings have allegedly been protracted). The "topics" covered at the Inquiry were all relevant to a proper and detailed determination of the Main Appeal and, of course, included Inquiry time spent by EH, OTCH and the EA.

17.5 Aside from the general considerations set out at Annex 1 Para 6 of the Circular, NOC relies on 3 specific paragraphs in Annex 3 (7, 8 and 9), as to which:

17.5.1 There is no basis for the claim (at paragraph 3) that CDC has inappropriately or unreasonably prevented, inhibited or delayed development which could reasonably be permitted in the light of the development plan or of any other material considerations.

17.5.2 Each reason for refusal and the evidence that has been produced to support them, complies with the requirements of Circular 8/93 Annex 3 Para 8. The reasons are complete, precise, specific and relevant to the application and evidence has been produced to substantiate each of them. It is clear from the Report to Committee, the Councils' Statement of Case and the evidence before the Inquiry that CDC plainly has had regard to relevant Government policy, DP policies and previous decisions of Inspectors and the Secretary of State. The Councils have produced evidence which shows clearly why the development should not be permitted. There is absolutely no credible basis to allege that CDC has failed to have regard to any of those matters – it is absolutely plain from the reasons for refusal and the evidence that all those matters have been to the forefront of considerations. There is therefore no reasonable basis to allege CDC has fallen into "substantial error".

17.6 Paragraph 5 explains that their claim is apparently founded on the basis of the evidence heard at the Inquiry and goes on to state "in particular [NOC relies] upon the evidence given, particularly in cross examination." Yet there was nothing unreasonable in the conduct or evidence of any of the Councils' witnesses in cross examination.

18. Paragraph 6.1 sets out the heart of the "justification" of the costs application, namely CDC's reliance on the RCPB. It is claimed that CDC prepared the RCPB in a manner which failed to respect the requirement to consult. In particular, it is alleged that CDC "prepared an RCPB on one basis with one content and subsequently having had representations completely revised the document introducing new, strict and onerous requirements upon which there was no effective consultation". This allegation is both factually wrong and entirely without merit when tested against the requirements of Circular 8/93:

(1) As Circular 8/93 makes clear, a fundamental precondition of a costs award founded on "unreasonable behaviour" is that it has caused the

[2] Inspector's note: 11 March 2009

party seeking costs to incur or waste expenditure unnecessarily, *either* because it should not have been necessary for the matter to be determined by the Secretary of State, *or* because of the "manner in which another party has behaved in the proceedings… " [Annex 1, paragraph 6(3), emphasis added].

CDC respectfully submits that the issue before the Secretary of State in respect of this costs claim is limited to the parties' conduct in the context of these applications and appeals. The adoption of the RCPB (a Supplementary Planning Document), and the consultation process that preceded it, was no part of these appeal proceedings. If NOC had a sustainable complaint about the adoption of the RCPB, the proper approach would have been to seek a timely judicial review of CDC's decision to adopt it. NOC did not do this. Rather, NOC has sought, not only in the Main Appeal, but also in this misconceived costs application, to circumvent the 3 month limitation period on such challenges by attempting to criticize the RCPB some two years after its adoption in March 2007. Such an approach flies in the face of the certainty that a plan-led system is intended to achieve.

(2) Moreover, paragraph 6.1 of the application as above is also factually wrong in suggesting that CDC failed to respect the requirement to consult when it adopted the RCPB. This matter is addressed in the Councils' closing submissions on the Main Appeal at paragraphs 64-67, but in particular it should be noted that:

(i) NOC attended a series of working group meetings on the RCPB prior to its adoption, and so it is not accurate to say that it was excluded from the consultation process.

(ii) Mr Dobson accepted in cross examination (XX) that NOC made "detailed comments" on the draft RCPB and these comments were considered by the Council's Executive Committee at its December 2006 meeting.

(iii) There was no requirement in the version of PPS12 which applied at the time of the adoption of RCPB that local planning authorities undertake more than one round of consultation on supplementary planning guidance (paragraphs 4.42-4.43). That version of PPS12 set out, in a box on p. 47, the 'minimum' required of local planning authorities during the 'SPD Consultation Process'. MD agreed in XX that he was not in a position to argue that CDC had failed to comply with all five of these criteria. Para 4.43 of this version of PPS12 could not be clearer:

> "Once the local planning authority has considered the representations on the draft supplementary planning document and made any changes as a result, they should adopt the document." [emphasis added]

(iv) Moreover, the version of the RCPB finally adopted was not a 'complete revision' of the earlier draft as the costs application alleges. The blue text in the revised draft [CD 42] did indicate modified text, including substantive changes, but much of the blue text is related to reordered text as opposed to text that was

substantively new. NOC claims that "new, strict and onerous requirements" were included in the draft, but no details of these are offered to justify the costs claim.

(v) CDC notes Mr Kingston's view (paragraph 6.1) that it is "inconceivable GOSE would not have objected [to the RCPB] if it had known of the extent of the changes". GOSE was consulted on the Draft RCPB and made a number of points, which CDC considered before producing the final version of the RCPB. (For the avoidance of doubt, in making its comments on the Draft, GOSE did not indicate any need for a further round of consultation.) The fact of the matter is GOSE did not object to the adoption of the RCPB - which is unsurprising since CDC complied with the consultation requirements set out in the then extant PPS12, and then adopted the SPD in accordance with that document. It is also important to note that the current PPS imposes no such requirement and sets out a much less prescriptive approach.

19. Paragraph 6.2 of the application then alleges that the answers given by CDC's heritage consultant "make it clear that the document was not in accordance" with PPG15 and that this "was material in terms of the approach to and treatment of buildings within a Conservation Area", in particular that it sought "the removal of unlisted buildings within the Conservation Area whatever might be their contribution to its character or appearance". Paragraphs 72-75 of the Councils' closing submissions deal with these points fully. Suffice it say here that, insofar as NOC is rehearsing its claim that the RCPB fails to engage with PPG15 and so fails to provide a justification for the demolition sought, the Councils point to paragraph 5.3.3 of the RCPB which gives the justification for the demolition of the NW Hardened Aircraft Shelters (HAS) in a manner consistent with setting out the "substantial benefits" of doing so for environmental enhancement[3]:

> "IN THE SOUTH EAST, BEYOND THE CORE AREA OF HISTORIC SIGNIFICANCE AT THE INTERFACE WITH THE SETTLEMENT, THERE IS A NEED TO CREATE A SATISFACTORY LIVING AND WORKING ENVIRONMENT FOR THE RESIDENTS OF THE NEW SETTLEMENT, TO SECURE ENVIRONMENTAL IMPROVEMENTS WHERE COMPATIBLE WITH THE CHARACTER AND APPEARANCE OF THE CONSERVATION AREA, WHILST RETAINING PROTECTED BUILDINGS, THOSE OF INTERNATIONAL SIGNIFICANCE AND THOSE WHICH HAVE BEEN IDENTIFIED AS NATIONALLY IMPORTANT."

20. Paragraph 5.3.3 also sets out the "substantial benefits" of removing the SE HASs (see paragraph 72(3) of closing submissions). As a result, Ms Barker was able to conclude in re examination that, whilst the RCPB may not present an explicit application of the criteria for demolition in PPG15, its approach was consistent with those criteria and both Ms Barker and Dr Edis gave clear evidence that the RCPB would result in substantial public benefit. This was reinforced by the statutory Consultation Statement for the RCPB at paragraph A7.30 [CD 43].

[3] Para 3.17 of PPG15 states that the Secretary of State would not expect consent to be given for the total or substantial demolition of any building in a conservation area unless one of three criteria is met. One of these is whether redevelopment "would produce substantial benefits for the community which would outweigh the loss resulting from the demolition".

21. Drawing on all of these sources, Ms Barker was able to conclude in evidence in chief (XC) that "it is clear that consideration of the Conservation Area and the importance of the buildings identified on the Site were part and parcel of the consideration in the brief" given that there are "references throughout to preserving and enhancing the character of the Conservation Area". She further referred to paragraphs 4.4.2 and 5.3.1 of the RCPB as clearly grappling with the value of the buildings on the Site and whether their removal would be beneficial.

22. Accordingly, it is plainly wrong for NOC to allege in its costs application that CDC has an "entrenched position" of seeking the removal of buildings in the Conservation Area "whatever *might be their contribution to its character and appearance*". The extracts from the RCPB to which we refer above addressed this question of 'contribution to character and appearance' with reference to specific structures, balancing the benefits and disbenefits of demolition in accordance with the approach of PPG15.

23. Mr Kingston for the Appellant repeats several times the claim that CDC's position is "entrenched", a word used in a letter written by two Councillors, which does not reflect the formal position of either CDC or Oxfordshire County Council (OCC) (see XX of Mr Semple). CDC has a clear view about what it wants to see happen at the Site and rightly so. CDC has spent a long time and a considerable amount of public resources producing, consulting on and adopting the SPD and then assessing the details of this application and preparing evidence for Inquiry. Whilst there are clear differences of opinion between the parties, it cannot credibly be suggested that CDC's position is itself unreasonable and indicative of an 'entrenched' position, particularly when other parties, including OCC as strategic planning authority, English Heritage (EH) and indeed Oxford Trust for Contemporary History (OTCH) (albeit for different reasons) also oppose the grant of planning permission and consider that the appeal should be dismissed.

24. Paragraph 7 alleges that it was "inappropriate" for CDC to rely on general policies other than the site-specific policy H2 in the Structure Plan "in an attempt to turn this proposal away" as this "puts the Structure Plan at war with itself as well as being inconsistent with the approach of the Secretary of State and the Inspector on the last occasion". Again, it is difficult to respond fully to this highly generalised allegation: no attempt is made to list what are considered to be the "general" policies that ought not to have been applied; no specific examples are given of how the Structure Plan is "at war with itself". Nevertheless, CDC recalls the submission made by Mr Dobson in his proof that it was "patently absurd" for CDC to have submitted that the proposal is contrary to policy G1 of the Structure Plan given the site-specific provision made for the Site by policy H2 (MD1, paragraph 6.26). G1 sets out in general terms, amongst other matters, the need to "<u>deliver the level of development required to meet the objectives of the Plan</u> while protecting and enhancing the environment, character and natural resources of the county". Accordingly, and as Mr Dobson ultimately accepted in XX, if the level of development put forward in the proposal goes beyond the parameters of H2, it follows by necessary connection that G1 is also breached. There is a clear relationship between these policies such that to suggest that they are somehow "at war" is, with respect, nonsense.

25. CDC maintains that its duty, as a local planning authority, is to assess a planning application against all relevant policies in the development plan. The fact that the development plan makes specific provision for a particular site does not mean that all other policies in the plan fall away, particularly where, as in the case of

policies G1 and H2 of the Structure Plan, it is perfectly clear that the two are working in tandem with each other.

26. Paragraph 8 likewise suffers from a lack of detail. Unspecified "adopted Cherwell Local Plan policies" are criticized for seeking "effectively wholesale removal of unlisted buildings within the designated conservation area". The suggestion is that the Local Plan is deficient because it does not have built into it consideration of the Conservation Area designation that superseded its adoption. Accordingly, it is alleged, in relying on the Local Plan, CDC was again at this inquiry more concerned with "achieving a predetermined position" than it was with "the application of both national development plan policies in current circumstances, i.e. with a Conservation Area designated".

27. This misrepresents the approach taken by CDC. It was clear from the approach taken by CDC in its report on the main application to Committee, followed up in its Rule 6 statement on the Main Appeal, that its case was founded primarily on the RCPB - a creature of the Structure Plan - the adoption of which post-dated the designation of the Site as a Conservation Area and took full account of it. Indeed, the Conservation Plan upon which the Conservation Area designation was partly based, contemplates the "possible demolition" of the NW and SE HASs as being in an area of only "moderate overall significance" [CD 64, Vol 1, p. 95] (see paragraph 52, CDC's closing submissions). Elsewhere in the Conservation Plan (CP), further justification is provided for the "possible demolition" of the HASs, as detailed in paragraph 53 of the Councils' closing submissions.

28. NOC is therefore wrong, in this part of its application, to suggest that the Conservation Area designation necessarily ruled out the later removal of buildings within it. The Conservation Area Appraisal ("CAA") that put forward the justification for that designation made clear that whilst there "should be a general presumption in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area *unless it can be demonstrated that the removal of a particular building will facilitate enhancement*. Opportunities for enhancement should be identified and there should be desirability for change within section of the site outside the area of national importance" (p. 83). This clear steer from the CAA, which was followed through in the RCPB's proposal to remove the NW and SE HASs, is towards a nuanced approach, striking a balance between conservation objectives and the need to ensure long-term environmental enhancement. It is precisely this approach that has been pursued by CDC. For the NOC to suggest, therefore, that the CDC's approach in this matter has failed to give due regard to the Conservation Area designation, is fanciful.

29. As for the Local Plan itself, there is no Adopted Local Plan policy that seeks removal of buildings on the Site. CDC does rely on two of its conservation policies at the inquiry: C7 and C10, both of which relate to landscape conservation (see reason for refusal 8 which addresses the impact of car storage/ staging). It is clear from CDC's report to Committee, its Rule 6 statement on the Main Appeal and its proofs of evidence that it was putting forward its case primarily on the basis of the RCPB and that policies C7 and C10, both of which seek to control the harmful impact of development on the landscape in highly general terms, were included as the overarching statements of policy applying to all sites. There is nothing "unreasonable" in this two-tier approach of relying principally on the site-specific SP policy and then reinforcing that by reference to a more general, overarching policy elsewhere in the plan, (or indeed by reference to the relevant

non statutory local plan policies). Both the RCPB and the Local Plan are consistent with each other on the need to resist development that causes "demonstrable harm" (C7) to or has a "detrimental effect" (C10) upon the landscape. (The only other reason for refusal that cites Local Plan policies is reason 6, which lists 3 transportation policies.)

30. NOC ends paragraph 8 by criticizing CDC for not drawing attention "to the one Local Plan policy that was relevant": EMP4. As the Councils explained fully in closing submissions at paragraphs 28-30, the supporting text to EMP4 makes clear that this policy is "intended to apply mainly to farm buildings of traditional construction... which are no longer suitable for agricultural use but are worthy of retention" (paragraph 3.5.3). The agricultural context of EMP4 is also plain from other sections in the supporting text: the policy simply does not envisage the reuse of a large number of military buildings because it is addressing an entirely different kind of structure.

31. In any event the claim that CDC has not "drawn attention to the one Local Plan policy relevant (EMP4)" is plain wrong, see Ms Barker's Proof (JB1) at paragraph 10.3.6 p23-24, paragraphs 26.2 – 26.5 p112-113 and her Rebuttal at paragraphs 6.1-6.2 p21-22.

32. It is claimed in paragraph 10 that "there ought never to have been any Reason for Refusal relating to design and access issues or the design and access statement" given that "it was accepted in cross examination that none of those matters were matters which would be appropriate to rely upon to dismiss the appeal". Ms Rand, the Council's design witness said in XX, that the reason for refusal relating to design would not *in and of itself* justify the dismissal of the appeal, but the Council did consider the DAS, and the design process it set out, inadequate in several respects such it cannot be said to have resulted in "high quality design" as required by PPS1 and PPS3. This, it was explained, militated further in favour of refusing the Main Appeal when considered alongside the other inadequacies set out in the reasons for refusal.

33. This approach is entirely consistent with Article 22(1)(c) of the Town and Country Planning (General Development Procedure) Order 1995 which sets out the duty of a planning authority, where planning permission is refused, to "state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision". The requirement is therefore simply to state the "full reasons" for the refusal, and the starting point is that these reasons, taken as a whole, then explain why the local planning authority considered a refusal justified.

34. Given that CDC had clear and justified concerns about the DAS and the design process undertaken, it was entirely proper for these to be explained in a proof of evidence. Furthermore, the Secretary of State expressly asked (see the letter dated 1 April 2008) to be informed inter alia about the extent to which the proposed development would be consistent with Government policies in PPS1 with particular regard to "….whether the design principles adopted in relation to the site and its wider context, including the layout, scale, open space, visual appearance and landscaping, will preserve or enhance the character and appearance of the area, having regard to the advice in paragraphs 33 to 39 of PPS1 [see paragraph (b)] and the extent to which the proposed development is consistent with Government planning for housing policy objectives in PPS3 with

particular regard towards delivering inter alia, "…high quality housing that is well-designed and built to a high standard." [see paragraph (c)(i)].

35. It is claimed that CDC "misapplied" and "apparently misunderstood" the guidance in Circular 01/06 on DAS, but again, NOC leave this as a bare assertion and fail to give examples or further details. In any event, the claim that Ms Rand had 'misunderstood' the Circular sits most uncomfortably with the fact that Ms Walker had no answer in XX to several of the criticisms made by Ms Rand of the DAS and the design process with reference to the Circular. In particular, Ms Walker had to accept that:
    (1) the DAS does not cover the whole site, as is required where an application is for both a change of use and operational development. Ms Walker agreed in XX that, in this regard, the DAS does not comply with Circular 01/06.
    (2) the DAS has no explanation or justification, as sought by the Circular, for why buildings 151 and 315 in the New Settlement Area (NSA) are not proposed to be demolished by NOC in accordance with the RCPB.
    (3) the DAS does not, as is required by the Circular, provide the dimensions of existing buildings that are to be retained;
    (4) the DAS does not attempt to elucidate the 'Principles for Architectural Expression' by reference to the 6 character areas identified earlier in the design process. CDC considers this in breach of the requirement in PPS1 and PPS3 to secure "high quality design".

36. This provides a snapshot of material deficiencies in the DAS and the design process which CDC submits needs to be brought to the attention of the Secretary of State if she is to take all material considerations into account. Against this background, it was not unreasonable for Ms Rand to draw attention to these problems in a proof. The deficiencies identified by CDC have prompted NOC to revise the DAS. However, as the Councils made clear in their closing submissions (see paragraph 130), even the revision produced on 7 January 2009 still contained inconsistencies. On Friday 13 March 2009, CDC received (unannounced) yet another revision to the DAS from NOC. CDC has addressed this latest document in the Councils' closing submissions, but given the number of revisions to the DAS that NOC has felt it necessary to make, it is readily apparent that the DAS has not led or adequately explained the design process, rather the DAS is still trying to catch up. NOC's reasoning on the design aspects of its costs claim looked hollow even prior to the 11th hour arrival of yet another iteration of the DAS, and CDC considers that the claim is wholly without merit.

37. In any event, it is somewhat puzzling that NOC should put so much emphasis on their handling of the design issue at the inquiry when they did not prepare a proof themselves on it. Rather, they proffered only a short written rebuttal by Ms Walker to Ms Rand's proof and so it is factually wrong for the costs application to state that her evidence necessitated "*the calling of evidence* and rebuttal evidence in order to demonstrate the unreasonableness and inappropriateness of the approach taken". Moreover, a "substantial amount of time" was not spent on the issue of design by NOC, as its costs application alleges. In XC, Ms Rand reduced the essence of her proof to 5 key propositions and she took some 45 minutes to give her evidence in chief: this was not at all unusual for a witness at this inquiry; indeed, she spent substantially less time in giving her evidence than the parties' witnesses on planning, conservation and landscape. In the light of the significant concessions made by Ms Walker as to the adequacy of the DAS,

the notion that NOC succeeded in demonstrating the "unreasonableness and inappropriateness" of Ms Rand's approach is also clearly wrong.

38. As to paragraphs 10 and 11 in relation to infrastructure requirements:

38.1 A number of statements were prepared in support of the Council's position which, given the progress of negotiations before the Inquiry was entirely reasonable and indeed was not an approach that NOC claimed was somehow inappropriate or unnecessary at any time before or during the Inquiry.

38.2 In the event, negotiations removed the need to call the witnesses to give oral evidence, so saving Inquiry time. In getting to that position a lot of work went on outside the Inquiry on both sides. The fact that negotiations resulted in some differences in final figures, or indeed some individual aspects not being pursued in the light of the overall negotiation, cannot amount to unreasonable behaviour on the part of CDC.

38.3 In particular, NOC seems to be suggesting that because negotiations reduced the sum sought for education to £11m, CDC has behaved unreasonably. However, intensive negotiations took place with OCC addressing a range of education matters (both in terms of financial contributions and the provision of a school site) which resulted in a reduced sum being agreed. That does not demonstrate any unreasonableness on the part of CDC and indeed the costs application conspicuously fails to particularise its allegation in this respect. Further, CDC respectfully submits that in the absence of any testing of the parties' evidence in the Inquiry, the Inspector and the Secretary of State are simply not in a position to form a view as to the reasonableness of any particular detailed constituent part of those negotiations.

38.4 As to the PCT contribution – a matter which may have occupied 5 minutes of Inquiry time, CDC made it clear that it had received the PCT's requirements, sought details and when none were forthcoming, it did not seek to take the matter further. NOC was sent the PCT's request for a contribution well in advance of the Inquiry, but did not contact CDC at all regarding the matter, which might then have been resolved prior to the Inquiry. It speaks volumes for the flimsiness of this application that NOC has focused on the PCT contribution in a hopeless attempt to make good the infrastructure allegation.

39. Paragraph 13 again suffers from a lack of detail. The complaint appears to be that CDC used one of its concerns, the retention and use of buildings on the Flying Field, as an "opportunity to present evidence on a whole range of other matters". These "other matters" which it is alleged ought not to have troubled CDC are not specified. The application then lists "in that connection" a series of matters that were agreed between the parties. The alleged 'connection' between these "other matters" and the four areas of *common ground* is not clear. If the suggestion is that agreement on these four matters necessarily precludes CDC from taking any issue in relation to the proposals other than the extent of the proposed use of the Flying Field, this is illogical. That there should be agreement on these four matters, for example, does not preclude CDC from raising concerns about, for example, the adequacy of the design process undertaken so far for the design of the dwelling houses. It is the duty of CDC, as the local planning authority, to test the application against the development plan and all relevant guidance.

40. The application then repeats the allegation that CDC has acted pursuant to an "entrenched position" in relation to the RCPB, but CDC has already dealt with this above.

41. It is then alleged that CDC's stance in respect of the Flying Field has only had the support of English Heritage in relation to one "limited issue" of the extent of the Paragon use. However, it is important to note that EH's position on the demolition of the HASs has changed. EH originally objected to the RCPB, but then withdrew that objection by letter dated 8 November 2006 (Dr Barker, App 10) on the basis that having looked "particularly carefully at the arguments now being made in favour of demolition in both the south-east and north-west areas of the site taking into account that the brief has to balance heritage interest with environmental improvement and achieving a satisfactory interface between the settlement and the retained structures", it noted that the justification for all of the proposed demolitions had been re-examined in light of further visual assessment and appraisal work and had incorporated the findings of the Conservation Plan. EH made clear that it was concerned that it was still proposed to demolish the four NW HASs which "clearly make a positive contribution to the special character of the conservation area", but believed that "the consideration of issues that have led your officers to the conclusion that the balance remains in favour of demolition is now more cogently argued in principle and therefore accords with the approach outlined in the [CP]". The letter then concluded: "As stated in our earlier letter, EH supports the overarching vision for the site and recognises that your council has to balance a number of complex issues in order to achieve a lasting future for Upper Heyford. Whilst we regret that the Brief has come down on the side of demolition of 4 nationally significant Cold War Structures, it is our judgement that this will not fundamentally undermine the coherence of the Cold War Landscape. EH believes that these structures could remain and form part of the monumentalised landscape but we are now prepared to withdraw our formal objection to the brief" [emphasis added].

42. CDC recognizes that EH has changed its position again and at this inquiry EH has made it clear that it opposes the demolition of the NW and SE HASs, but it is important to recognize, as EH itself did in its letter dated 8 November 2006, that the focus of EH is necessarily on heritage. As the local planning authority, CDC has to balance a much wider range of issues when assessing the merits of proposed development, including the importance of environmental enhancement. It follows the fact that CDC's position may not be aligned perfectly with that of EH, is no indication of an "unreasonable" approach. It is simply that CDC, upon balancing all relevant issues, wishes to maintain an approach that EH has itself accepted (by withdrawing its objection) at one point in time. It should also be remembered that the demolition of the NW and SE HASs was promoted by NOC itself at one point in time, as is clear from previous versions of the ES. Against this background, it is somewhat bizarre that NOC should be arguing that it is "unreasonable" for CDC to take an approach in relation to the Flying Field that is consistent with NOC's own previous proposals.

43. Further, NOC's claim that CDC's stance in respect of the Flying Field has only had the support of English Heritage in relation to one "limited issue" of the extent of the Paragon use is an interesting characterisation of the car processing element of the appeal proposals. It is certainly true that EH and CDC have differences in relation to the appropriate approach to the future of the Site, but the Paragon use is no small matter and NOC's proposal, which includes large areas used for

car processing on the Flying Field, is not simply or fairly to be described as support for the Council on a "limited issue". The impact of that issue is sufficiently adverse for EH to attend the entire inquiry and submit that the processing would cause serious harm to the character and appearance of the Conservation Area.

44. In conclusion on this issue, NOC prays in aid SEEDA's appearance at the Inquiry. As set out at paragraph 48 of the Councils' closing submissions, the evidence given by the two SEEDA representatives left a lot to be desired. Both expressed concern as to the impact of the RCPB, if implemented, on local employment, but the Inspector will recall from the XX of both SEEDA witnesses, the extent of their diligence, not even troubling to read the detailed and material employment and planning evidence submitted by the parties. This necessarily goes to the weight that can be given to SEEDA's evidence. In particular, NOC's claim that SEEDA's appearance was a "startling condemnation" of CDC's approach, must rely entirely on the simple fact that they attended, ignoring the content and credibility of the evidence given to the Inquiry.

45. Paragraph 14 sets out the details of the award(s) sought. As to the claim for a whole award. CDC submits that it is simply incredible to suggest that there was no need for this matter to come to an Inquiry. The detailed reasons for refusal relied upon by two public authorities set out legitimate and reasonable concerns that clearly show why the appeal proposal is in conflict with relevant policies and guidance. It was a matter for NOC whether it chose to listen to those concerns and negotiate and/or resubmit or to appeal. It is worth noting that in the case of the current appeal, NOC lodged the appeal for non-determination only about 2 weeks after submitting amendments to the proposal (including to the ES) which required consultation and advertising. As to the opportunity for "sensible negotiation" on the details of the appeal scheme, as Ms Barker explains at paragraph 15.8.1 (page 43) of her Proof, the last of the advertisements to be published was the local press notice dated 3 July 2008, requiring comments by 24 July 2008. NOC lodged its appeal for non determination on 11 July 2008. In any event, for the detailed reasons set out above, the application for a whole award of costs is entirely unmeritorious and should be rejected.

46. As to the claim for partial award(s), there appear to be three alleged justifications:

46.1 CDC was unreasonable in pursuing reasons for refusal that rely upon the RCPB. (The only reasons for refusal that do not cite the RCPB are 1 and 7 relating to the sustainable planning framework for the site and the infrastructure requirements.) This issue has been dealt with above. The RCPB is a site-specific adopted SPD, against which and pursuant to SP Policy H2, the scheme falls to be assessed. As set out above, this is not the appropriate forum for an extremely belated attack on a SPD that has been adopted for 2 years.

46.2 Further and alternatively, the reasons that relate to design and the DAS. (None are specified, but presumably the claim relates to reasons 10 and 11.) The design and DAS issue has been addressed above.

46.3 Further and alternatively, the reasons that relate to infrastructure provision (reason 7). As set out above, the infrastructure complaint makes two points, one in relation to the education contribution, the other in relation to the PCT: both points are entirely lacking in merit.

46.4 It is claimed in support of the partial costs application that the matters set out above unnecessarily extended the Inquiry proceedings and caused NOC to incur expenditure in preparing evidence and rebuttals which would not otherwise have been necessary, but again no particulars have been provided as to by how much the Inquiry was extended or as to precisely on what aspects it is alleged expenditure has been incurred unnecessarily.

Conclusion for the CDC

47. For these reasons, CDC strongly resists this application for costs as being entirely without merit. At several points, the application suffers from a lack of detail and factual inaccuracy. There is no reasonable basis whatsoever upon which to seek the relief sought in paragraph 13.

Final comments in Reply for the Appellant

48. NOC's response to the Council's rebuttal of its application for costs is set out below. The length of the response is dictated not by the substance of the submissions made by the District Council but simply by the prolixity of them running as we note to some 17 pages to respond to an application for costs which is said to be totally without foundation and lacking particularity. We propose to respond on a paragraph by paragraph basis in the hope that that will make the responses easier to relate to the Council's submissions[4].

49. Paragraph 17.1: It is not NOC's case that planning permission should simply have been granted without question. It is NOC's case that the consideration of whether or not planning permission should have been granted should have been based upon a consideration of the evident unsoundness of the RCPB as attested to not only by NOC but also by, for example, EH and also upon a proper consideration of what were the relevant Development Plan policies and the applications' response to those relevant policies. The relevant Development Plan policy which determines in substance the acceptability or otherwise of NOC's proposals is H2. The reality of the Council's position is that its case was substantially founded on the RCPB (see further below for confirmation of this) which the evidence makes clear had been adopted on a basis which was flatly contrary to Government guidance in PPG15, a matter recognised by the Council's own heritage consultant. Reference to other parties' appearance at the Inquiry does not allow the Council to escape from the fact that it was for it to determine the application in accordance with the law and all relevant material considerations. The fact that its unreasonable refusal of the application has provided a platform for others to make representations does not allow the Council to escape from its responsibilities. In any event EH's appearance was geared to drawing attention to the PPG15 guidance in seeking to ensure compliance with it. The only other issue which engaged it was the Paragon issue which it readily admitted was one to be balanced against other important policy considerations. The OTCH comments were in effect in pursuit of an entirely different scheme and the EA's position was capable of being resolved on any reasonable basis by condition.

[4] Inspector's note: for ease of reference I have altered these to reflect the paragraph numbers in this compilation document, not those in the Council's original "rebuttal" document

50. Paragraph 17.2: It is not reasonable to refuse planning permission on the basis that you will refuse planning permission, put an appellant to the trouble of going to appeal and then negotiate away the Reasons for Refusal which have prompted the appeal. The Secretary of State's advice is clear. If matters are capable of being negotiated or being dealt with by condition or agreement, they should not form Reasons for Refusal.

51. Paragraph 17.3: There is no basis for a criticism of the timing of the costs application. The costs application was made having ensured that CDC had had the fullest opportunity to present its case and NOC had had the opportunity of listening to its position on all relevant matters including conditions and agreements. As it was the Council's position on conditions and agreements continued to promote an unreasonable stance. In the circumstances CDC have received rather more notice than they might in many circumstances of the application and have received the application in advance of the close of the inquiry in writing. There is no basis for any complaint.

52. Paragraph 17.4: It is not for NOC at this stage to formulate a precisely costed application. If the Secretary of State decides that an award of costs is appropriate the Inspector will have advised in respect of either the whole application or which parts should be the subject of the costs application. When that is done then the items identified can be subject to assessment in terms of the amount of inquiry time and therefore costs that have been wasted as a result of the unreasonable behaviour.

53. Paragraph 17.5: This paragraph is mainly addressed by NOC's main submissions which we do not repeat. However, we note that CDC assert that it is clear from the report to committee, the Council's Statement of Case and evidence before the Inquiry that CDC has had regard to relevant Government policy. That, we respectfully submit, is a typical overstatement of the Council's position. What is plain is that the Council has disregarded relevant Government advice and as a consequence proceeded to adopt and then apply a RCPB which is contrary to Government guidance even on the basis of its own advisor's evidence.

54. Paragraph 17.6: NOC do not complain that the unreasonable conduct was the answers given in cross examination. Rather NOC's point is that the answers given in cross examination support the view that the Council behaved unreasonably. In that respect the matters are fully particularised in the application as relating to the evidence of Dr Edis and also Ms Rand and Ms Barker.

55. Paragraph 18: The substance of this paragraph is addressed in our application for costs. CDC's response is an attempt to avoid the difficulties that arise from it having applied in this case an RCPB that was plainly contrary to Government guidance and which had been adopted in an unfair and inappropriate way. The behaviour of the Council in the proceedings that is complained of is the reliance on guidance of that kind which it is clear from circular 8/93 is unreasonable: see paragraph 10 and 11 of Annex 3 and the reference to planning authorities being at risk of an award of costs if they fail to take into account Government guidance. NOC rely on the conduct of CDC in the handling of the application and its refusal and its persistence at the appeal in relying on the matters referred to in the application. We have in our main submissions dealt with the suggestion that the only basis for challenging the RCPB was by way of Judicial Review a submission which is plainly without foundation. CDC has known of NOC's position well in

advance of the Inquiry and has had an opportunity of reconsidering its inappropriate reliance on the RCPB in the circumstances identified.

56. Paragraph 18(2): There is nothing factually wrong in NOC's application. On the basis of Ms Barker's answers in cross examination CDC failed to effectively consult. NOC has made it clear throughout that its complaint is not that the Council did not go through the motions of a consultation for the time period referred to in the relevant PPS at the time the RCPB was being advanced. NOC did make detailed comments and did make representations at meetings with the Council. The fact is that those representations were ignored, the guidance was completely redrawn, it was not simply that the words were moved around, and when the guidance was redrawn it was redrawn in a way which ignored, as agreed by Dr Edis, PPG15 and which deprived the NOC or indeed others of making representations on the RCPB in its substantially revised form. NOC do not suggest that there is any requirement in the relevant version of PPS12 to consult twice. NOC's position is that there is a requirement to consult effectively when the consultation takes place rather than consulting on a document which has effectively disappeared and been replaced by another document only to have that document adopted without the opportunity of any effective commentary upon it. Sub-paragraph (iv) of paragraph 4(2) of CDC's response is an attempt to rewrite Ms Barker's evidence in cross examination. It is clear from an examination of the documents that this was not simply a case of reordering the text; it was a case, as Ms Barker admitted, of introducing new substantial elements of text and policy with new and onerous requirements. We have noted that CDC have no answer to NOC's comments with regard to GOSE and the failure to consult them on the substantially revised document. It is no answer to say that GOSE did not indicate the need for a further round of consultation when on the evidence GOSE had no idea that CDC were going to so substantially revise the document and introduce requirements which were contrary to well established elements of national policy.

57. Paragraph 19: This is an attempt again to rewrite the evidence at the Inquiry. Dr Edis' answers in cross examination were plain and incontrovertible. He had the fullest opportunity to consider the document and his answers before he gave them. It is not therefore open now to CDC to attempt to rewrite that evidence and ex post facto justify RCPB on the basis that it complied with PPG15. In that connection we note that we are not alone in our view of the RCPB but are substantially supported by the Government's advisors on National Heritage (EH) in their Closing Submissions to the Inquiry and in particular paragraphs 34 and 35 where it is stated that:

57.1 "The RCPB conflicts with the Secretary of State's clear policy on the demolition of buildings which make a positive contribution to the character and appearance of a CA as set out in paragraphs 4.2.7 and 3.16-3.19 of PPG15";

57.2 "It is common ground that all the 11 HAS's make a positive contribution to the character and appearance of the CA";

57.3 "It is common ground that the requirements in the RCPB for the demolition of the north of the NW and SE HAS's was adopted without any proper consideration of the tests set out in paragraphs 3.16-2.19 of PPG15";

57.4 "No analysis has been put forward in evidence by any party to the Inquiry that could be said to come close to addressing the issues set out in paragraphs 3.16-3.19 of PPG15";

57.5 "....that consent should not be given for the demolition of any buildings which make a positive contribution to the character and appearance of a CA without clear and convincing evidence that all reasonable efforts have been made to sustain the existing uses or find viable new uses and their efforts have failed. No such evidence has been provided to the Inquiry…";

57.6 "With regard to paragraph 3.19(iii) of PPG15 it could not realistically be said that the demolition of any of the 11 HAS's could be said to bring with it 'substantial benefits for the community' so as to justify such an exceptional course of action".

58. In addition EH's Closing Submissions at paragraph 35(e) and (f) are unequivocal in noting that it would have been flatly contrary to national policy in PPG15 to have allowed the CA appeals that sought authorisation for the demolition of the NW and SE HAS's and also that it would be flatly contrary to the same paragraphs to site non compliance with the RCPB's requirement as a Reason for Refusal of the appeal scheme. We have noted that EH makes similar comments about the perimeter fence: see its Closing Submissions at paragraphs 46 to 48.

59. Paragraph 21: It is not the role of re-examination to rewrite the witnesses' answers given clearly in cross examination. To the extent that this paragraph draws on answers which attempted to rewrite the answers given in cross examination, it is identifying an illegitimate exercise. NOC relies on Ms Barker's answers in cross examination and likewise those of Dr Edis.

60. Paragraph 22: This paragraph again attempts to adopt an analysis retrospectively which ignores the evidence given at the Inquiry now supported by the submissions of EH. In addition to the extent that it claims some public benefit it is an attempt at introducing the application of the test in circumstances where the Council's own witnesses have indicated that the RCPB does not set up a proper basis for that application but rather proceeds in its own way contrary to PPG15.

61. Paragraph 23: It is correct that NOC has drawn attention to the use of the word "*entrenched"* used by two senior members of both the Council and District Councils. The drawing attention to that word is not to cause any difficulty or embarrassment to the individuals but simply to provide a convenient way of summarising what is clearly the Council's position. Even without the letter referred to it is plain from the Council's approach and its reliance on the non-statutory Local Plan policies UH1 to UH4 that the Council has indeed an entrenched position. That was played out again in every aspect of this Inquiry with the Council even prompting EA to make objections, which we have indicated in the application were without foundation.

62. Paragraph 24: CDC apparently has difficulty in understanding what the general policies referred to in the application are. It is, we submit, absolutely plain that the general policies being referred to are the G Policies of the Structure Plan and those referred to in the Reasons for Refusal and Statement of Case. There is no basis for a reliance on those policies in circumstances where as the Inspector at the earlier Inquiry noted, the relevant Development Plan policy has taken them into account in its formulation.

63. Paragraph 26: The adopted Cherwell Local Plan policies are those identified in the Reasons for Refusal. It is surprising to say the least that CDC should be unaware of which policies are being referred to bearing in mind that they are the ones set out in the Reasons for Refusal, Statement of Case and evidence to which objection is made in the costs application.

64. Paragraph 27: We note the confirmation in the third line of this paragraph that CDC's case was "*founded primarily on the RCPB*". This fully supports NOC's approach in its costs application focusing on the RCPB and the lack of compliance of that document with national guidance and a failure to consult effectively on it before adopting it. The fact that the Conservation Plan may have contemplated the possible demolition of buildings prior to the designation of the Conservation Area is nothing to the point. At the time the RCPB was being formulated and adopted the Conservation Area was there to be seen and taken into account in accordance with national policy.

65. Paragraph 28: To the extent that this paragraph suggests that the Conservation Area Appraisal is capable of modifying national policy it is plainly wrong. The CAA does not modify national policy and it is the national policy that the Council should have had regard to in its drafting of an adoption of the RCPB.

66. Paragraph 29: As to what it is that the Council relied on in refusing planning permission NOC relies on the Reasons for Refusal and Statement of Case and the answers given in cross examination confirming that they had been drafted having regard to the guidance on the preparation of such Reasons for Refusal in the GDPO and in particular Article 22 which requires Reasons for Refusal to be precise, specific and clear and to identify all relevant Development Plan policies. CDC confirmed that it had taken that approach and it does not now lie in its mouth that it had not taken into account those matters which are set out in the Reasons for Refusal and Statement of Case.

67. Paragraphs 30 and 31: NOC relies upon the evidence in respect of Adopted Local Plan Policy EMP4. Its complaint is that the Council did not draw attention to the relevant part of the Policy which applied in the circumstances of this case.

68. Paragraphs 32 to 36: These paragraphs are an attempt to rewrite the evidence of Ms Rand and in particular her answers in cross examination. It was plain that the Council's position at the Inquiry, as it was inevitably going to be, was that the complaints made could not possibly justify a refusal of planning permission. They ought never to have featured as Reasons for Refusal and there ought never to have been so substantial a body of evidence called to support what were "non" reasons for refusal and matters which could have been resolved by sensible negotiation about the form and content of the DAS. Paragraph 20 refers to the CDC having had "*concerns*". Having concerns is a matter which might give rise to some sensible negotiation about the content of the DAS. Concerns are not a basis for Reasons for Refusal which as we have indicated above, pursuant to the GDPO should be clear, precise and specific. Refusing planning permission ought not to proceed on the basis of highlighting matters which the Local Planning Authority believes are capable of being discussed and negotiated. The matters set out at paragraph 35 above in CDC's response are no answer to the point that the Reasons for Refusal simply should not have been there at all. That they should not have been there as Reasons for Refusal is clear from the Council's own evidence and from its approach at the Inquiry. It avails the Council nothing

to rely on Mr West's answers in cross examination in relation to matters which should not have been Reasons for Refusal.

69. Paragraphs 40 to 42: The substance of these paragraphs is addressed in NOC's main submissions and earlier in this response to the costs application. EH's position on the issues which are material to this application is clear from its closing submissions at this Inquiry. That is that the RCPB is not in accordance with PPG15 and that it is not appropriate to rely on it to require demolition of a large number of buildings which make a position contribution to the Conservation Area. If CDC had behaved reasonably it would have consulted on the revisions to the substantially rewritten RCPB and if it had done so it would then have seen just how strongly were the objections to the ignoring of PPG15 advice and how cogent they were and then have taken the opportunity not to proceed in the way that it did. As it was the deficiencies in the brief were clearly drawn to CDC's attention in ample time for them to reconsider their position before forcing the Appellants to come to appeal in order to avoid the application of a document which has ignored a most material element of national policy.

70. Paragraph 43: SEEDA's position is dealt with in our main submissions. It is a testimony to the unbalanced and unreasonable nature of the CDC's approach that SEEDA should have found themselves driven to come to the Inquiry in defence of a substantial employment area and its continued existence.

71. Paragraph 44: It is neither incredible nor inappropriate to suggest that if the Council had properly applied the guidance in the relevant elements of national policy and properly considered the Structure Plan Guidance there would have been no need at all for this proposal to come to Inquiry. It was the Council's dogged determination to see the demolition of as many of the buildings on the flying field as possible which has caused this Inquiry; that overarching point is not to be denied by anything which is contained in the CDC response to the costs application. Such an approach is evident from the non statutory Local Plan (NSLP) through to the RCPB through to the Reasons for Refusal and the Council's evidence. It is an approach which as we have indicated above is contrary to national guidance and not supported by English Heritage. It was plainly unreasonable.

72. Paragraph 45: NOC's position with regard to a partial order of costs is set out in its main submissions which are not repeated here.

Conclusions for the Appellant

73. CDC's response to the costs application has confirmed that the substance of its objections to the appeal application was rooted in the RCPB. The unreasonableness of the approach adopted in the RCPB is evident from the answers in cross examination of Ms Barker and Dr Edis. In essence therefore CDC's response reinforces the appropriateness of NOC's application for costs which it is respectfully submitted should be allowed.

Inspector's Conclusions

74. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

The application for a full award

75. This is made on the grounds that the appeal should not have been necessary because a reasonable Local Planning Authority would have permitted the lead proposal.

76. Neither party makes reference to the fact that none of the applications to the Local Planning Authority for CAC was accompanied by a detailed justification for demolition by the Appellant, as advised in PPG15. Before the inquiry opened the Appellant produced evidence intended to address this (NOC JM1 and JM2 of August 2008). However in the view of English Heritage not all the buildings where demolition was proposed which were considered to make a positive contribution to the Conservation Area had been included and the analysis against the matters set out in PPG15 paragraph 3.16 to 3.19 of other buildings included was considered inadequate. Further work was submitted by the Appellant during the inquiry (NOC JM3 of 10 October 2008) which then satisfied English Heritage that their objections to demolitions could be withdrawn. This work and the inquiry time spent considering it was completely necessary in my view. Aside from the grounds raised in their application, the Appellant's time and costs at the inquiry on that matter would have been necessarily incurred.

77. Other aspects of the proposal would also have necessarily and quite reasonably required evidence to be submitted and heard, including the following: the level of employment proposed relative to the indications in the RCPB and the extent of reuse of buildings particularly those outside the new settlement area and the extent of the area proposed for outdoor car processing relative to the RCPB and indications in the explanatory memorandum to Structure Plan Policy H2. Those matters also indicate that a full award would be unjustified.

78. I now turn to the grounds set out in the Application.

The Local Planning Authority's approach to its RCPB Supplementary Planning Document and Development Plan policy.

79. The Local Planning Authority is claimed to have acted unreasonably in the way it progressed its Revised Comprehensive Planning Brief Supplementary Planning Document to adoption, in the weight given to the SPD in their opposition to the lead proposal and in the selective way it applied Development Plan policies.

80. Much inquiry time was spent by the Appellant in addressing the process whereby the RCPB in its final form was adopted. If the Appellant considered that the processes through which the RCPB progressed towards adoption by the Local Planning Authority were defective, particularly in respect of the scope and nature of changes made post consultation and the absence of a further opportunity to comment on those, then it was open to the Appellant to seek judicial review. As set out in Circular 8/93 and Annex 7 thereto the purpose of the Costs regime is to address unreasonable behaviour relating to "planning proceedings" (and some

other proceedings not relevant here) meaning applications and appeals, not to how supplementary planning policy is arrived at. As accepted by the Local Planning Authority's planning witness the process to the finally adopted SPD may not have amounted to a "rigorous procedure of community involvement" (paragraph 2.42 of the then applicable PPS12 of 2004) but the draft SPD was subject to consultation, changes were made to it and it was then adopted, which generally accords with the minimum requirements set out at paragraph 4.42 – 4.43 of that PPS12.

81. For the purposes of this appeal the Local Planning Authority assessed the proposal against both the Development Plan policies and its RCPB SPD, the need for which is included in Structure Plan policy H2. The latter says that proposals for development at the airbase "must" reflect a revised comprehensive development brief.

82. The RCPB does set out reasons why certain buildings on the Flying Field should be demolished. With regard to national guidance in PPG15, I have concluded on the lead appeal that the reasoning in the RCPB for its approach to demolition lacked the full rigour advised in PPG15 (sections 3.16-3-19 in particular) and that accordingly I would give the SPD less weight than otherwise may have been the case. However it is not unreasonable for the Local Planning Authority to seek to apply an adopted Supplementary Planning Document to which de facto there was no objection from the County Council or Government Office and to which no legal challenge had been made.

83. The RCPB followed on from the Conservation Plan, which was prepared for a Steering Committee comprising the Local Planning Authority, NOC and English Heritage. It envisaged the possible demolition of the NW and SE HASs, which are noted as being away from the main historic core of the airbase. English Heritage as one of its co-sponsors thus accepted its provisions that demolitions of the NW and SE Hardened Aircraft Shelters could be contemplated. The RCPB also followed the Conservation Area Appraisal which clearly states the presumption in favour of retaining buildings making a positive contribution unless it can be shown that removal would facilitate enhancement. The proposals for demolition of these HASs in the RCPB did not thus spring entirely unannounced in the revisions made post consultation to that SPD.

84. The appellant's 2007 lead application (the appeal proposal withdrawn in favour of the current lead appeal) included the demolition of these 11 HASs which were also the subject of the CAC appeals (in their cases against non-determination) that were withdrawn during the inquiry. The Environmental Statement and Application documentation was prepared on that basis and subsequently revised for this lead appeal. At the time of that application the Appellant clearly considered it could accommodate those provisions of the Brief.

85. I do not consider the Local Planning Authority was unreasonable in applying their SPD to this proposal and finding that it did not satisfactorily reflect the adopted RCPB (reason for refusal 2). They substantiated their putative reason for refusal of the application on this ground by reference to the RCPB and the explanation therein for the approach taken to the relevant buildings, in particular the 4 NW and 7 SE Hardened Aircraft Shelters. Those link their demolition to environmental improvements and/or better living and working environments where it would be "compatible with the character and appearance of the Conservation Area". The latter reference and others in the SPD indicate that

some account is taken of conservation interests in the SPD. The Local Planning Authority considered that enhancement would arise from demolition. That their own expert considered the approach to demolition of the HASs in the SPD was inconsistent with PPG15 did not assist their case but heritage issues were one of several interests to be balanced. This principle was accepted by English Heritage in relation to the outdoor car processing proposals.

86. The relationship of the airbase to the surrounding rural landscape and the creating of a pleasant living environment are also valid interests to be addressed as set out in the Structure Plan Policy H2 as well as in the SPD and in a general sense in some adopted Local Plan policies. General principles on these are found in other national policy statements (PPSs 1, 3 and 7) that must be considered as well as PPG15. I have concluded differently to the Local Planning Authority on the benefits to environmental improvements and living conditions that would arise from demolition of the HASs relative to the cost to the character and appearance of the Conservation Area of the loss of these unlisted but nationally significant buildings. That the Appellant, English Heritage and I have reached a different conclusion on the balance of all those interests to that of the Local Planning Authority does not however indicate their unreasonable behaviour – or that they held to an unreasonably "entrenched" position. That the portfolio members for Economic Development of both Councils used that term in relation to local planning policies in a letter to Paragon (appended to PSM1) clearly indicates those councillors' views. It does not however alter the status of the relevant Development Plan or adopted SPD policies.

87. SEEDA's appearance was undoubtedly due to their perception that the Local Planning Authority seemed intent on damaging the contribution to the local economy made by Heyford Park. They did not appear however to have full appreciation of the allowance made in the RCPB for a number of jobs that exceeds numbers employed there under the temporary permissions. I have given weight to their views particularly in relation to potential job losses at the Paragon car processing firm. I do not however consider their decision to make their first appearance at an inquiry in opposition to the elected authorities indicates that the Local Planning Authority acted unreasonably in opposing the lead appeal.

88. The Local Planning Authority's approach to car processing in the RCPB is for a much smaller area than in the lead proposal. The Paragon Statements (PSM1 and PRM1) explain how the company anticipates contracting into the 17ha of the appeal proposal but it does not detail why a smaller area would not be feasible. The use is harmful to the character of the Conservation Area which cannot be mitigated and its harmful impact on appearance cannot wholly be overcome. I do not consider it unreasonable of the Local Planning Authority to consider that the cost to the local economy if the car processing use was lost would be outweighed by the benefits to the character and appearance of the Conservation Area if it was confined to a much smaller area of the site.

89. The "adopted Local Plan" policies to which the Appellant refers regarding "wholesale removal of unlisted buildings" (paragraph 8 above) are in fact those from the non-statutory Local Plan. The adopted plan has no site specific policy. Putative reason for refusal no.5 (and some others) refers to the "UH" policies of the non-statutory plan. It is clear however in the Local Planning Authority proofs and at the inquiry that they relied on the RCPB SPD that post-dates the current Structure Plan Policy H2 rather than the non-statutory Local Plan, which was

prepared in the context of the earlier Structure Plan (where the heritage interest of the site did not feature in the then Policy H2). I do not consider that the Local Planning Authority gave unreasonable weight to the non-statutory policies.

90. It is plain to me that the Local Planning Authority did not refer to their adopted Local Plan policy EMP4 because they considered that this policy addressing employment generating development in the rural areas was intended (as set out in its supporting text) "to apply mainly to farm buildings of traditional construction", not the reuse of large numbers of substantial military buildings, a point acknowledged in evidence in chief by the Appellant's planning witness. Failure to refer to that policy was not unreasonable.

91. The Local Planning Authority case regarding the General policies of the Structure Plan (CD28) in particular general strategy Policy G1 was that the latter came into play when a proposal did not meet the provisions of site specific Policy H2. The latter includes employment opportunities in "necessary supporting infrastructure". The numbers of jobs implied by the lead appeal proposal as calculated by the Appellant materially exceeds that anticipated in the RCPB (and also the higher number in the superseded CPB) and substantially more than those as calculated on behalf of the Local Planning Authority. The Explanatory Memorandum (EM) for Policy H2 (paragraph 7.7) aims for a scale of development "appropriate to the location and surroundings" which are described as a "relatively isolated and unsustainable location". The aim in the RCPB to link the acceptable number of jobs to the likely number of economically active residents of the new settlement seems a reasonable interpretation of what would be necessary to support the new settlement. The EM also envisages reuse of existing buildings being in the technical and residential core area of the base with no mention of buildings on the flying field where very many of the buildings proposed for reuse in the lead appeal are located.

92. Because of the implied numbers of jobs and scale and location of reuse of buildings with associated extra travel to work journeys, I see nothing unreasonable in the Local Planning Authority looking beyond Policy H2 to how the proposal stands against Policy G1. Again I have reached a different conclusion to them on the overall balance of interests, but their references in putative reasons for refusal 1, 4 and 6 to this general policy and the evidence called in support on the wider "sustainability" matters at the inquiry was not unreasonable.

The Local Planning Authority's approach to Design and the Design and Access Statement

93. In this case the Secretary of State "Matters" letter (issued on 1 April 2008 in relation to the withdrawn appeal but retained for this appeal) asks whether high quality design (amongst other PPS1 and PPS3 design issues) would be achieved. It was thus reasonable for the Local Planning Authority to pay close attention to the proposal on those matters before issuing its putative "reasons for refusal" on 8 August 2008. On this outline application (for the New Settlement elements) this evidence was the Environmental Statement, the Parameter Plans and the Design and Access Statement. Those were also the only indication of what would replace buildings proposed for demolition in a Conservation Area, some of which were considered to make a positive contribution and on which the Appellant had not at that time provided a "PPG15 paragraph 3.19 assessment". In those circumstances I would expect no lesser appraisal than the careful and full attention given by the Council's urban design witness.

94. The DAS was subject to revision during the inquiry in part to address some of the shortcomings identified by the Local Planning Authority, especially inconsistencies with other appeal documentation. In the final form of 12 March 2009 it did not wholly meet advice in Circular 1/2006 and did not explain how the different character areas of the relevant existing parts of the Conservation Area would be translated into the architectural principles of the new housing. The Local Planning Authority's analysis did not in my view imply an unreasonable expectation of what a DAS, on such a large site combining operational development and change of use, should address, as set out in Circular 01/2006.

95. In the particular circumstances of the case I have not found the failure to incorporate more fully the change of use proposals within the DAS an undue obstacle because on the Flying Field it was clarified that despite the reference to "provision of all infrastructure", no operational development is in fact proposed except the relatively minor matters to be addressed by "strategies" (car parking, lighting, waste storage etc). I do not consider that it was unreasonable to highlight the very modest attention given to such matters in the DAS.

96. As a result of the Local Planning Authority's analysis, various matters that would need further consideration before reserved matters submissions are made (if permission is granted) have been highlighted. It is to be hoped that a process of Design Review would also be instigated on a project of this scale. Insofar as such is possible at outline stage the Local Planning Authority's analysis has partly served that purpose.

97. That the Local Planning Authority witness in cross examination conceded that design matters alone would not have justified refusal does not indicate to me unreasonable behaviour. It is not unusual for reasons for refusal to include matters that are of lesser significance than others but where they contribute to the conclusion that a proposal is unacceptable.

98. I thus consider it was reasonable for those points to be raised by the Local Planning Authority in both their 11th "reason for refusal" and in their evidence to the inquiry. That evidence needed to be answered by the Appellant and hence unnecessary expense was not incurred.

99. The critical appraisal of the DAS made by the Local Planning Authority was also helpful to me in assessing whether consent could be given for demolitions (including many buildings judged to make a positive contribution to the Conservation Area) without detailed proposals being available for consideration for their replacement. Had that detailed process not been carried out by the Local Planning Authority I may well have needed to ask for more information myself on similar matters and thus the time taken may not have been shortened in any case.

Infrastructure

100. Regarding the package of infrastructure required in support of the development, putative Reason for Refusal 7 was drafted on the basis of the contents of a "Heads of Terms" document, in advance of a fuller draft Unilateral Undertaking being available from the Appellant. Negotiations on the latter continued during but outside the inquiry.

101. Because a large measure of agreement was reached on the relevant topics, the evidence prepared by the two Councils on education and children's services;

sports facilities, open space and play areas; indoor sports, leisure and public art; affordable housing and more general aspects of the Unilateral Undertaking were not called but remain before the inquiry as written submissions. Similarly proofs prepared by the Appellant on education and affordable housing are now to be considered as written submissions.

102. No evidence is before the inquiry from the Appellant regarding Primary Health care. Only "transport" is individually specified in the putative reason for refusal. The Local Planning Authority made no case for a contribution to healthcare being needed at the inquiry. It was entirely reasonably they had sought further details from the Primary Care Trust about their request for funding, but had received none and therefore did not pursue the matter. The Local Planning Authority withdrew its proof in support of a contribution being sought for CCTV and no proof in response to that had been submitted by the Appellant. There is thus nothing before the inquiry to indicate unnecessary expense being incurred on either of these by the Appellant.

103. Negotiations on the sums to be committed for education occurred outside but during the inquiry. NOC's Mr Clyne's written rebuttal evidence (NOC SC3) gives the position shortly before the inquiry opened. I was given some informal progress reports during the inquiry indicating continuing and constructive discussions and then that the two relevant experts had reached agreement on the sums necessary but that there was still some dispute over mechanisms. By the time the signed Unilateral Undertaking was submitted the County Council had indicated (on 16 January 2009 – item 14 in bundle U1) that they were now satisfied on the outstanding matter of the timing of delivery of the school site. Accordingly I was not invited to judge whether excessive sums had been sought. Nothing from the Education proofs remaining before the inquiry as written submissions is referred to in support of this element of the Appellant's claim for costs.

104. The sum of £11m is mentioned in the Application for Costs as a "reduced" contribution. In the Unilateral Undertaking up to £5.53m is committed as a primary school sum, up to £5.53m for secondary education and £240,000 for school transport and temporary places at an existing nearby village school. From NOC's Mr Clyne's written evidence (NOC SC1) it can be seen that on 23 July 2008 the OCC as Local Education Authority had sought sums for education based on: the gross figure of 1075 dwellings not the net increase over existing dwellings of 760; sums for special educational needs based on the net increase but without taking account that there was no identified shortfall of such places in the county; a sum for primary Information Technology that was the same as for secondary education (whereas the Appellant considered that for the former it should be lower) and a sum for demolition of buildings at the village school where existing Heyford Park pupils attend at present which was considered unjustified as the need for a new school was accepted. Mr Hamer for the Councils (OCC AH1) refers to the sum for work at the existing school being for "making good".

105. The Appellant does not refer to the source of £16m being the sum first sought for education by the County Council. That sum is not found in NOC's own evidence from Mr Clyne. A table in Mr Hamer's written submission for the OCC does however give £16.5m as the total sum, the difference mainly being accounted for by a figure of nearly £10.8m for Primary and Early Years education and over £0.5m for Special Needs.

106. Negotiations on these matters occurred entirely outside the inquiry. I am unable to comment on the time spent on them and in the absence of cross examination I am unable to judge whether excessive amounts were being sought or, if the latter was the case at what stage concessions were made.

107. The need for such evidence to be submitted to inquiries on major schemes is not uncommon and neither is the need for negotiations on the sums involved. Mr Clyne's bona fides attest to his representing developers and public authorities on such matters. It appears that the OCC did not pursue certain matters and the outcome of the negotiations meant that by the time the Unilateral Undertaking was signed in January 2009 there was agreement on the sums committed therein.

108. I thus have no reason to support that the Local Planning Authority acted unreasonably in advancing the need for contributions towards education.

109. Turning to the concluding paragraphs of the Appellant's Application, I thus consider that this is not a case where a reasonable Local Planning Authority would have granted permission so that the expense of the inquiry could have been avoided because outstanding matters could have been resolved by negotiation. Neither do I consider that the Local Planning Authority acted unreasonably on the matters of reliance on the RCPB, or in its approach to design and the design and access statement or on seeking contributions towards infrastructure.

110. From all of the above and having regard to matters addressed in the Appendix and Annexes 1,2 and 3 to Circular 8/93, I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 8/93, has not been demonstrated and I therefore conclude that neither a full award nor a partial award of costs is justified.

RECOMMENDATION

111. I recommend that no award of costs is made.

Daphne Mair

INSPECTOR