



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

by A Mead BSc (Hons) MRTPI MIQ

**an Inspector appointed by the Secretary of State
for Communities and Local Government**

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Date: 19 May 2010

TOWN AND COUNTRY PLANNING ACT 1990

LOCAL GOVERNMENT ACT 1972

APPLICATION FOR AN AWARD OF COSTS

by

HELIOSLOUGH LTD

Inquiry held between 24 November and 18 December 2009

Appeal ref: APP/B1930/A/09/2109433

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Site in and around Former Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Helioslough Ltd for a full or partial award of costs against St Albans City & District Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for a Strategic Rail Freight Interchange

Summary of Recommendation: I recommend that a partial award of costs is made.

The Submissions for Helioslough

1. The conditions for an award are set out in para A12 of Circular 3/2009. The appellant seeks a full, alternatively a partial, award of its costs of this inquiry on the following basis. Advance warning of this application has been given for many months in accordance with the guidance in para A31 of Circular 03/09.

2. The factual material on which this application is based has been explored in evidence and in cross-examination and was covered in closing submissions.

Circular 03/2009

3. The costs regime is aimed at ensuring as far as possible that: a. all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice whether in terms of timeliness or in the quality of case (bullet 1); b. planning authorities enter into constructive pre-application discussions (bullet 3); c. statements of common ground are provided at the appropriate time (bullet 4); and d. planning authorities properly exercise their development control responsibilities, rely only on reasons for refusal which stand up to scrutiny and do not add to development costs through avoidable delay or refusal without good reason (bullet 5).

4. Paragraph A28 recommends the following good practice to minimise the risk of a costs award: there should be constructive co-operation and dialogue between the parties at all stages (bullet 1); parties should actively review their cases, respond promptly to changing circumstances... (bullet 3); and parties should be willing to accept the possibility that a view taken in the past can no longer be supported and act accordingly at the earliest opportunity (bullet 5).

The Unreasonable Test

5. The basic tenet of the Circular is "unreasonable" behaviour. It is for HS to demonstrate unreasonableness and how the unreasonable behaviour has resulted in unnecessary or wasted expense.

6. Para B4 sets out relevant examples of unreasonable behaviour: lack of co-operation – bullet 3; inappropriately introducing reasons for refusal – bullet 5; not agreeing factual common ground in a timely manner – bullet 6; and late withdrawal of reasons for refusal - bullet 7.

7. LPAs are at risk of any award of costs against them if they prevent or delay development which should clearly be permitted having regard to the development plan, NPSs and any other material considerations (B15).

8. Authorities will be expected to produce evidence to show clearly why the development cannot be permitted. The LPA's decision notice should be carefully framed and should set out in full the reasons for refusal. Reasons should be complete, precise, specific and relevant to the application. LPAs will be expected to produce evidence at appeal stage to substantiate each reason for refusal. The key question is whether evidence is produced on appeal which provides a respectable basis for the authority's stance: B16¹.

9. The LPA should identify those matters which could be addressed by conditions or S106 obligations so as to avoid substantive evidence being presented on them (B25 – 27).

10. B29 provides, so far as relevant as follows:

"The following are examples of circumstances which may lead to an award of costs against a planning authority:

Persisting in objections to a scheme, which has already been granted planning permission or which the Secretary of State or any Inspector has previously indicated to be acceptable

Not determining like cases in a like manner – for example, imposing a spurious additional reason for refusal on a similar scheme to one previously considered by the planning authority where circumstances have not materially changed."

Summary of the Costs Application

11. HS applies for costs on the following basis:

a. a full award on the basis that the Council was intent on refusing permission, determined to refuse the application irrespective as to the evidence and irrespective as to the content of the SoS's DL and thus approached decision making from a misconceived starting point. Had it adopted the correct starting point, the Council would have (albeit reluctantly) recognised that permission would have to be granted because there were no material changes of circumstances ("MCC") to warrant revisiting the conclusions of the SoS and in respect of alternative sites would have recognised that the only potential competitor was Colnbrook and in respect of that site would have recognised that it was materially inferior and in any event potentially complementary to Radlett;

b. alternatively, a partial award on the basis that had the Council not adopted the approach summarised above the Council would have limited its reasons for refusal to the Alternative Sites Assessment (ASA) and to whether Colnbrook was a better site. This would then have been a much more limited inquiry. Huge amounts of work on other issues would have been avoided;

¹ This is subject to B18 where matters of subjective planning judgement are involved.

c. alternatively, a partial award on the basis that the stance of the Council in respect of individual reasons for refusal, the conditions and the S106 has been unreasonable.

A. The Application for a Full Award of Costs

12. The essential starting point for consideration of the current application for planning permission should have been the decision of the SoS following the last inquiry.

13. The implications of that decision are plain. The Radlett site was in all material respects capable of appropriately operating as an SRFI and had it been demonstrated that there was no other site which could meet the SRFI need whilst causing less GB harm, permission would have been granted.

14. The DL gives a clear indication of what the SoS considered the appellant needed to demonstrate if it was to secure a permission and, thus, what issues the Council should have grappled with when considering a fresh (identical) application.

15. Had the DL been used as the starting point by the Council in addressing the current application it would have considered two core issues only:

- a. Whether the HS ASA demonstrated that there was not a site which could appropriately operate as an SRFI which performed better in GB terms in the north west quadrant; and
- b. Whether there had been any material change of circumstances ("MCCs") in respect of any other matters which could cause the SoS to form a different view from the conclusions reached in the DL.

16. As shown below it is plain that the Council was intent on refusing permission irrespective of the evidence. Had that not been its starting point, and had it adopted the correct starting point as set out in the previous paragraph, it would have engaged with the appellant as it is enjoined to do: see Costs Circular A28 and B4 third bullet and Planning Inspectorate Procedural Guidance:

"1.4.2 There are a number of core principles which underpin the operation of a well functioning appeal system. These are:

The critical importance of regular and continuing dialogue between the main parties to an appeal to ensure clarity of the issues between them and that there are no surprises;

The requirement that local planning authorities ensure that their reasons for refusal are clear, precise and comprehensive with clear guidance as to how reasons for refusal might be overcome;

That local planning authorities should be confident in their ability to defend decisions on the basis of their reasons for refusal..."

17. Through the process of co-operative engagement it would have recognised that there were no other sites which could appropriately operate as SRFIs which occasioned less harm to the GB than the appeal proposals. It would have properly understood and assessed Colnbrook including the importance which the SoS had previously attached to the strategic gap and the current policy framework

applicable there. It would have recognised that the only market evidence demonstrated that Colnbrook was complementary to Radlett.

18. All other issues with alternative sites would have been raised with HS through the co-operative working referred to above. The Council's consultants, SDG, were instructed in March and should have been instructed to enter into that co-operative dialogue but a deliberate decision was clearly made to avoid such co-operation with no response to the methodology until 6 weeks after the Committee meeting, a secret alternative site assessment of their own being worked up and the failure to request information/clarification which would have assuaged those concerns.

19. The matters covered at great length in 9/CD/3.9 would have been grappled with in discussions with HS and the answers provided in 9/HS/1.5 would have convinced it that the methodology was acceptable and that the process of rejecting sites down to the Short List was robust. It would have accepted the north west quadrant approach. It would have recognised that its concerns on individual sites were either unfounded, based on a misunderstanding of the facts or led nowhere. It would not have insisted on all sites in a given location being taken forward to the Short List because it would have recognised the sense of choosing and assessing the best site in a given location. It would then have accepted the short list. From that short list it would have recognised that Harlington, Upper Sundon, and Littlewick Green were markedly inferior to the appeal site.

20. In respect of Colnbrook it would have correctly understood the LIFE report² and its implications in particular in respect of the importance of the strategic gap to the GB in this location: rather than accepted the hopelessly optimistic assessment of the Colnbrook site by Barton Willmore³. It would have recognised that Colnbrook was a materially inferior site to Radlett. Even if it was not so satisfied it would have further recognised that LIFE and Radlett were in any event complementary.

21. In respect of MCCs, it would have recognised that there were no MCCs in respect of: (1) GB issues and in particular the merging of towns; (2) landscape issues; (3) noise issues; (4) highways issues (other than those relating to J21A and J22 which were always capable of settlement through constructive working with the HA); and (5) other residential amenity considerations.

22. In respect of rail it would have been guided by the approach adopted by the SoS – it would not have required guaranteed access nor would it have revisited the gauging, engineering and connection issues.

23. It would have considered the impact of the Key Outputs for Thameslink post - 2015 and considered whether there was any significant change which would make the approach and conclusions of the SoS on rail access inappropriate.

24. On that issue it would have:

- a. engaged with the appellant at an early stage by raising questions on any increase in off peak interpeak services and their implications for rail access⁴;
- b. recognised the implications of the system for timetabling in the rail industry in terms of maximising use of the infrastructure;

² Inspectors report and DL – 9/HS/1.6

³ BW appx K

⁴ The 12 off peak services were known about in 2008 – see Key Output 2 – STRIFE/9/10/01

- c. asked NR its views, would have been told that NR was confident the SRFI and trains to it could be accommodated and would have recognised that those views were to be accorded significant weight having regard to NR's role;
 - d. if that was not enough (which it plainly should have been), it would have reviewed the previous evidence before the last inquiry (including Interfleet). It would then have properly identified the possible number of trains in 2015 (up to a maximum of 8 - not Mr Wilson's 10 - on the slow line past the site) and if that was not enough would have run its own exercise or asked that Interfleet carry out such an exercise.
25. Having carried out that work, it would have recognised that there was no MCC in respect of rail access that would undermine the conclusions of the SoS.
26. It would thus have, no doubt reluctantly, recognised that it had no choice but to grant permission consistent with the decision of the SoS and its obligations as a public authority.
27. It would have considered what conditions were appropriate and in that regard would have recognised that only 9 months previously the SoS had specifically grappled with the appropriate conditions for this development. It would have imposed the same conditions subject to such minor changes as were appropriate to assist clarity or to reflect MCCs.

The Council's actual approach

28. Instead, the Council:
- a. Ignored the starting point created by the SoS's DL – picking out those conclusions of the SoS with which it agreed and ignoring/revisiting those adverse to it;
 - b. Failed to engage with the appellant on the methodology for or the content of the ASA until after the refusal;
 - c. Failed to engage with or ask any questions of NR or the appellant in respect of rail access until well after the refusal;
 - d. Repeated points previously made without any regard to the conclusions of the SoS on those issues and without any new evidence;
 - e. Carried out a minute dissection of the ASA without any discussions with the appellant at all on methodology or the logic for the assumptions and even when the appellant's response to the SDG document was provided ploughed on regardless; and
 - f. Commissioned its own ASA which adopted an approach which has been shown to be patently flawed and self-serving.
29. This was not the approach the appellant was entitled to expect.

The Report to Committee

30. The report to Committee ("the RTC") is a testament to just how badly misplaced was the Council's approach to consideration of this application and how wedded the Council was to refusing permission in this case irrespective as to the

conclusions of the SoS and irrespective as to the evidence. The report is blatantly one sided and unbalanced. The Inspector is requested to review the RTC carefully.

31. In short, the RTC as with the Council's evidence at the inquiry, emphasised those conclusions of the SoS which supported the Council's case but ignored both:

- a. those conclusions which did not assist the Council's case; and
- b. more importantly the core conclusion of the SoS in DL58 to the effect that even with the harm identified, very special circumstances would almost certainly have been found to exist if it had been demonstrated that there was not a site which could operate as an SRFI whilst causing less harm to the GB.

32. Members were invited to revisit all matters afresh without any consideration of the import of the DL. They were thus led down the path of leaving out of account not just a key material consideration but the correct starting point for their assessment of the application.

33. In the light of the way the report to Committee was framed, they felt entitled to refuse without even grappling with the core issues left outstanding by the DL. In short members would have not recognised from the report to Committee that the Council's objections to the scheme in respect of 13 of the 14 topics raised as reasons for refusal had been rejected by the Inspector and SoS after a very full and careful examination of each of them.

34. The report to Committee is partial, biased and in places misleading by omission. By way of example only, in considering the Green Belt and Need issues (see sections 7.1 and 7.2), the report to Committee:

- a. Fails to refer to the overall conclusions of the Inspector and SoS on very special circumstances, quotes DL59 (page 1), but ignores the key DL58. Section 7.1 is thoroughly misleading by omission;
- b. Ignores the north west quadrant conclusions of the Inspector/SoS – and instead states that the north west quadrant is not the correct approach – para 7.2.7 and para 7.2.21;
- c. Suggests that the SRFI should go into a regeneration area – when there had been no significant policy change in that regard – and when that approach had not been endorsed by the SoS (see RTC – para 7.2.8/9);
- d. Suggests need has reduced – which is fundamentally inconsistent with the correct position – para 7.2.11; and
- e. Highlights matters which the SoS did not place significant weight on in her decision – e.g. where employees would come from (see para 7.2.10).

35. It then addresses demand and rail operational issues in a way which simply fails to address or even refer to the conclusions of the SoS on all these matters. Members were being misled as to what the issues were for them to consider. This section of course is based on the SDG draft report which as we have shown in XX simply fails to ask itself the correct questions. The Inspector is asked to read section 7.2 to get a feel for the extent to which the points made there are simply inconsistent with the conclusions of the SoS following a full public inquiry.

36. The approach in that report is reflected in the evidence presented by Mr Hargreaves, Mr Wilson, Mr Billingsley and Mr Stephenson to this inquiry.

Consideration of Alternative Sites

37. In terms of the site search, members were being told the area of search was too limited. It should have gone beyond 32km (para 7.4.3) even though that matter had been grappled with by the Inspector and SoS. More fundamentally, the north west sector approach is said to be flawed without any reference to the conclusions of the SoS on that very matter.

38. Consideration of comparative rail accessibility is highlighted even though that was not a matter with which the SoS expressed concern. The core issue of extent of GB harm from alternative sites was ignored.

39. Had the Council addressed the alternative site issue on a correct basis as set out above:

- a. They would have required SDG to grapple with comparative GB impacts – when in fact there is no attempt to grapple with that issue in the SDG Report or in the RTC;
- b. Through that exercise they would have recognised that Colnbrook scored significantly worse than the appeal site in respect of GB purposes; and
- c. They would have recognised that no other site performed better than the appeal site in GB terms.

40. The Council instead considered the approach to alternative sites from a completely different perspective – wanting a wider area of search than the north west quadrant and with a very heavy emphasis on rail accessibility. And of course in respect of that the Council wholly ignored the conclusions of the inspector at the last inquiry.

41. Had the Council approached the alternative sites issue on a correct basis by reference to the approach of the SoS, they would have recognised that there was no better alternative site in GB terms which could satisfactorily operate as an SRFI.

Material Changes in Circumstances

42. The Council, in the report to Committee, did not consider whether there had been any material changes of circumstances since the DL.

43. By way of example only, the noise issue was grappled with as if there had been no discussion of or conclusion on these issues at the last inquiry: see RTC section 6.4.6 – 6.4.61 and para 7.7.7 (p98ff). This section is wholly misleading and ignores the effect of the conditions as agreed by the SoS last time round. The RTC erroneously reported that there had been a fundamental change to the WHO guidance – something the Council's witness to this inquiry had not supported. The Council having shopped around for a noise witness to re-present its case at this inquiry has alighted on a witness whose position on the advice given to members is different to the consultant then instructed.

44. The same goes for road travel (although at least there it was recognised that the SoS had accepted the position of the HA – para 7.5.10). Notwithstanding that

recognition, all the same issues as raised last time round are revisited and relied upon again. There is no attempt to grapple with the conclusions of the SoS or, at that time, to limit considerations to MCC (although when Mr Humby properly considered the matter several months later he recognised that there were no MCCs and no basis therefore pursuing the reason for refusal: CD3.9).

45. The same goes for landscape – section 7.10.1; and ecology - section 7.10.6.

46. This is a fundamentally flawed approach.

47. Had the Council recognised that the real issue was as defined, and had it properly grappled with those issues through discussion in advance, as it is required to do, there was every prospect of permission being granted. A full costs award is thus justified. This is the first application HS makes.

B. Application for Partial Award of Costs

48. Alternatively, had the Council grappled with the application on a correct basis, the scope of its reasons for refusal would have been dramatically narrower and the scope of this inquiry dramatically reduced. This is the basis of the second costs application HS makes.

49. The sole issue would have been consideration of alternative sites because the Council would, if it had acted reasonably, recognised that there were no adverse MCC which could affect the other conclusions of the SoS.

50. In respect of the alternative sites issue there would have been co-operative working prior to the report to committee to narrow the dispute between the parties which would have resulted in a focused reason for refusal setting out in what regards the Council considered the ASA was flawed or required further work. The Council would have recognised that the allegations of methodological flaws in the SDG report were misplaced or led nowhere. The Council would have previously sought further information where it was not convinced by the judgments made in the ASA. That would have narrowed the issues down to the 5 short listed sites and more particularly Colnbrook. A short and focused inquiry on that aspect would then have been possible.

51. The whole approach of the Council is directly contrary to general principles of public law on consistency of decision making. It demonstrates a wilful blindness to findings of the SoS with which it disagreed and ploughed on regardless.

52. This is thus a classic case to which B29 (4th bullet) and the more general thrust of the circular applies. The Council is seeking a second bite of the cherry at the expense of HS. That is, it is submitted, plainly unreasonable on the facts.

C. Application for Partial Award of Costs in respect of individual reasons for refusal

53. On each aspect of the case the Council should have adopted the SoS's DL as the starting point. The above general comments therefore apply to each reason for refusal and the way most of them are unreasonable in the Circular 3/2009 sense.

54. The Council has to provide reasons for refusal which are clear, precise and comprehensive⁵ and be supported by substantive evidence as the point of the refusal.

55. Where reasons for refusal are stated and then withdrawn at a late stage then paragraph B57 applies.

Green Belt: RfR1

56. It is accepted that if there was to be a refusal then it would have been on GB grounds. However, this ground should have been limited to consideration of alternative sites. In the light of DL58 it should have stated something along the lines of: "there are no very special circumstances because although the need is a material consideration of very great weight which could constitute very special circumstances if there were no alternative sites, HS has failed to demonstrate that there are no alternative sites"⁶. This is effectively RfR 4. RfR1 should therefore have been unnecessary.

57. Instead the Council has put in RfR1 to allow it to re-argue the extent of the GB harm and in particular to seek to revisit the merging of towns issue. The costs of responding to that issue and the time taken in Inquiry on that matter have been incurred by the unreasonable failure of the Council to adopt the correct starting point.

Harm to open character and visual character of the important gap : RfR2

58. There has been no MCC to justify revisiting the conclusions of the SoS on this issue. The conclusions are clear (and incidentally the harm identified by the Inspector and the SoS is broadly that previously argued for on behalf of the Council). DL58 encompasses all this harm and so brings us full circle to RfR4 and alternative sites.

59. Mr Billingsley claimed:

- a. MCCs but those relied are shown to be nothing of the sort;
- b. (wrongly) that some of the judgements of the SoS were based on incomplete evidence; and
- c. that the harm would be greater than the SoS had accepted.

60. In reality, this reason for refusal is simply an attempt to persuade the SoS to make a different planning judgement with no MCC. It engages B29 (4).

61. The full costs of grappling with this reason for refusal (evidence of Mr Kelly), and the time spent in the inquiry on Mr Billingsley's evidence should be awarded.

⁵ HS notes just how imprecise and unclear the reasons are – this was raised on 23rd July 2009 and no response received: 9/HS/1.11. Very significant time has been spent on trying to understand what issues are being raised and, in the absence of clarification from the Council, in abortive grappling with our understanding of the reason for refusal.

⁶ 9/HS/1.11 – this was raised with the Council on 12th October 2009 – the confirmation sought was not provided.

Sustainable Development – RfR3

62. This RfR is entirely unclear. The appellant has sought clarity: see 23rd July 2009 letter⁷. No response was received. There is no MCC on this issue in respect of which the conclusions of the SoS are clear (DL39 and 49). Those conclusions have been taken into account in reaching the conclusion in DL58. There is no justification for raising this issue afresh: see B29(4) and (5).

63. The full costs associated with this reason for refusal should be awarded. This covers evidence and time spent on for example the travel to work and CO₂ savings issue.

Alternative Sites: RfR4

64. If a full costs award is not to be made, then it is recognised that there would have been an issue on alternative sites.

65. However, as already explained that issue could and should have been much, much more tightly defined. After the co-operative process envisaged in the guidance and the Costs Circular, the only issue would have been as to the comparative merits of the shortlist sites and in respect of that list the issue would have narrowed down to Colnbrook versus Radlett. Even in the short time there has been co-operation the Council's "short" list has reduced from over 20 to only 13 and with a constructive approach would clearly have been reduced substantially further.

66. The time spent on this more limited reason for refusal would have been very substantially (and we estimate 75%) less than the total time spent on the alternative site issue.

67. All the time spent in preparation and in the inquiry on BW Appendix I would have been avoided.

68. An award of 75% of the costs since the report to Committee of grappling with alternative sites should be awarded or an award made in principle setting out what matters would have remained in issue at the inquiry, with the appropriate quantum to be deferred to taxation.

Prematurity: RfR 5

69. This reason for refusal is simply misconceived. There has been no adverse MCC in respect of the development plan since the last inquiry at which this issue was comprehensively grappled with.

70. There has been no progress on the joint working to identify sites promised at the time of the last inquiry.

71. Further:

a. prematurity to the NPS is not recognised in government policy or in the recent advice and the argument to the contrary is plainly wrong; and

b. prematurity in respect of HP/LGW coming on stream is simply inconsistent with the 3 – 4 SRFI policy objective and is unjustified in principle.

⁷ 9/HS/1.11

Rail Issues: RfR6

72. The impact of the failure to use the DL as the starting point for consideration of this application is most stark in respect of this reason for refusal.

Pathing, impact on Thameslink and ability to operate as an SRFI

73. The DL is plain – the approach the SoS adopts is not “requiring to be guaranteed” but “reasonable reassurance”: DL33 (as at HP). The Council’s continued insistence on such a guarantee is misconceived yet has influenced its whole approach to rail issues and its approach to alternative sites (including in Appx I).

74. The issues now raised were debated in detail at the last inquiry with Mr Thorne covering most of the ground now raised by the Council.

75. The overall conclusion of the SoS on whether the proposal would operate as an SRFI is clear: DL48.

76. The only substantive claimed MCC is the additional Thameslink services in 2015 in the draft RUS. It is entirely inappropriate to attempt to do the 2015 timetabling exercise here. The correct issue to consider is whether there can be reasonable reassurance that freight trains will be able to access the site consistent with other demands on the infrastructure. That is not the question Mr Wilson has asked.

77. The Council should have recognised that NR as the guardian of the railway was in the best position to advise on this matter and that its advice was no different from last time. Had it adopted the approach of a reasonable public authority, the Council would have engaged with NR and with FCC. FCC would have advised that there was a maximum of 8 trains on each line in the off-peak (not the misconceived 10 from Mr Wilson for which there is no evidential support from anyone in the rail industry). It would have also been recognised that if the services terminated at Brent Cross there would have been only 6 on the slow lines. It would have considered all the historic work on this issue and would have engaged with the appellant on the issue as to pathing into the SRFI - including by reviewing the previous Interfleet work. It would have been further recognised that the timetabling process was as accepted by Mr Clancey in XX with all the scope for co-operative working to maximise the utilisation of the infrastructure. All of this would have been recognised without the need for an inquiry. Once the basic facts were understood (maximum of 8 on the slow line) the approach to the pathing issue would have been wholly different.

78. The reality is that the Council has been determined to find a new basis for refusal and has latched on to the claimed increase in FCC services as preventing access.

79. This was dealt with in detail in closing submissions. The simple point is that had the Council accepted the approach of the SoS in the DL and had engaged as it is required to do, it would not have pursued this pathing issue.

80. The full costs of engaging with the pathing issue should be awarded.

Gauge

81. The reason for refusal says “that there is no evidence that gauge improvements to W9 and W10 standard can be delivered between Radlett and points on the rail network with gauge to these standards”. This issue had been precisely grappled with at the last inquiry: IR16.66 and DL33.

82. The way the reason for refusal has been pursued is much wider than the reason for refusal. In short, in terms of gauge, nothing has changed adverse to Radlett. In fact the current information is that the gauge on the MML is W8 (compare the W7 assumed in 2007).

83. The necessary works and the conditions are identical.

84. Bizarrely, in the ASA part of the case, HS is now criticised for not grappling with gauge at the long list stage when it was criticised for grappling with that issue in the ASA at the last inquiry. Nothing could better illustrate the Council latching onto any point no matter how unfair or inconsistent doing so is.

85. The full costs of grappling with the gauge issues should be awarded.

Demand and north west quadrant

86. This is a simple re-run of the arguments last time in respect of which the SoS has reached clear and unambiguous conclusions: see IR16.124-7 and DL42. Nothing has changed adverse to Radlett. The full costs of grappling with the demand issue should be awarded.

Proposals for landscaping of area 1: RfR7

87. HS sought clarity on this reason for refusal on 23rd July. No response was provided. The impact of the development on the landscape was fully addressed at the last inquiry and nothing has changed – DL21 and DL59.

88. The full costs of grappling with this reason for refusal should be awarded.

Noise levels: RfR8

89. The reason for refusal ignores the conclusions of the SoS and the import of the conditions.

90. Closing submissions demonstrate that there has been no MCC. In reality, as Mr Stephenson appeared to accept, this was simply an attempt to re-run arguments comprehensively grappled with on the last occasion. B29(4) applies and the full costs of this issue should be awarded.

Air Quality: RfR9

91. This reason for refusal was included (at the last moment⁸) despite the clear conclusions of the SoS at the last inquiry: DL31. Nothing has changed. The reason for refusal was dropped in October 2009 but by then considerable cost had been incurred in preparation of AQ reports.

92. B57 and B29(4) are directly on point. A full award of costs should be made for the abortive expenditure on this issue.

⁸ See 9/HS/1.11 letter of 23rd July 2009 page 4

Funding of Mitigation Works/Country Park: RfR10

93. This is an issue about the scope of the conditions and s.106. This matter was grappled with by the SoS and there has been no MCC. The same structure is on offer at this inquiry.

94. The costs of this issue are bound up with conditions below.

Ecology and the local footpath network RFR11

95. The footpath issue was dropped on 12th October. Costs should be awarded from 20th July to that date.

96. In respect of ecology, there is no MCC to impact on the conclusions of the SoS at DL37. The only claimed "adverse" change is in respect of the designation. For the reasons grappled with in XX the designation is unjustified, self-serving and makes no difference to the conclusions of the SoS.

Inadequate S106: RfR13

97. The same S106 Undertaking has been on offer throughout as was accepted by the SoS at the last inquiry⁹. The Council has repeatedly failed to explain in what regards the S106 is inadequate. If the point is meant to cover the "three alternatives" re: binding area 1 then there is simply no excuse for not setting out the Council's position in detail much earlier in the inquiry process.

98. The chronology of correspondence is appalling. Considerable expense has been incurred in seeking to understand the Council's concerns and the delay has increased costs. This reason for refusal is plainly unjustified given the conclusions of the SoS on the last occasion and there has been no MCC.

Local Highways Issues: RfR14

99. The reason is worded as an "insufficient information". No further information had been sought. The reason was abandoned very late following a report from Mr Humby (HCC) which, without relying on any further information, recognised that there had been no MCC. That position should have been arrived at many months earlier.

100. Considerable work was undertaken in the interim which would have demonstrated no MCC.

Conditions

101. The Council seeks to reargue conditions previously agreed by the SoS without any MCC. This has involved very considerable abortive work. There is no justification for revisiting conditions. Substantial time has been wasted in this inquiry because: (1) the Council is seeking to reargue the merits of conditions agreed by the SoS; and (2) the Council has failed to grapple with conditions timeously.

102. The costs of grappling with suggested additional/different conditions should be awarded.

⁹ Subject to certain additional measures required in the light of the Highways Agency issue with junctions 21A and 22.

The Response by St Albans District Council

103. The appellant seeks a full award of costs or, alternatively, a partial award of costs. This response deals with each, but, in short, the application is roundly rejected. It has at times suggested, it appears, variously mal-intent on the part of members, malpractice on the part of officers and self-serving behaviour on the part of professionals. Those are, if made, surprising allegations based on no evidence and should be dealt with summarily.

The Costs Circular

104. Before turning to the appellant's application, the basis for applications against local authorities as set out in Circular 03/09 is as follows:

105. An application will only be made where a party has behaved unreasonably and has caused unnecessary or wasted expense in the process¹⁰.

106. The application is made in respect of the appeal, not the application unless related to the appeal process itself¹¹. The question of what amounts to unreasonable conduct on the part of the authority is set out in Part B of the Annex.

107. Part B points out that planning authorities are at risk of an award of costs if they prevent or delay development which should clearly be permitted having regard to the development plan, national policy statements and any other material considerations.

108. The requirements of relevance in this case are as follows¹²:

a. Planning authorities will be expected to produce evidence to show clearly why the development cannot be permitted.

b. Reasons should be complete, precise, specific and relevant to the application.

c. Planning authorities will be expected to produce evidence at the appeal stage to substantiate each reason for refusal with reference to the development plan and all other material considerations including any relevant judicial authority. The key test will be whether evidence is produced on appeal which provides a "respectable basis" for the authority's stance.

d. Planning appeals often involve matters of judgment and where the outcome of an appeal turns on an assessment of such issues it is unlikely costs will be awarded if realistic and specific evidence is provided about the consequences of the proposed development.

109. Two examples of circumstance which may lead to an award of costs and which are relied upon by the appellant are:

a. "persisting in objections to a scheme, or part of a scheme, which has already been granted planning permission or which the Secretary of State or an Inspector has previously indicated to be acceptable"¹³; and,

¹⁰ Para. 1 of the Introduction, Circular 03/09.

¹¹ Paras A18 and A25, Circular 03/09, Annex.

¹² Para B16, Circular 03/09 Annex.

¹³ Para B29, Circular 03/09 Annex.

b. "not determining like cases in a like manner – for example, imposing a spurious additional reason for refusal on a similar scheme to one previously considered by the planning authority which circumstances have not materially changed."¹⁴.

110. The guidance focuses on the basis of, and evidence for, the reasons for refusal at the outline stage. It notably does not require an Inspector go through the process of second guessing whether a planning permission would have been issued if a different approach had been taken by the authority. It, quite rightly, assumes that each reason for refusal is a separate reason which would have led to an appeal being necessary. That is unsurprising given that it is the Inspector who is determining the application for costs having heard the evidence at the inquiry. He was not present at the Committee stage, no direct evidence is brought to bear on that issue at the inquiry and it would be an invidious task for an Inspector to have to go through.

111. As a result, in deciding whether an appeal for a full award is justified, it is necessary to consider each reason for refusal and determine whether all of those reasons for refusal do not have a respectable basis in the evidence. It is only if all of those reasons are discounted as having had no respectable basis that a full award can be made. If any of those reasons, which are stand alone reasons, are reasonable, there can be no full award, but only a partial award can be made.

112. Before dealing in detail with the approach of the appellant on its application, it is noteworthy that the basis of its application is to seek to establish that the Council's decision would have been different had it approached the matter in what it alleges to be the correct way. That point, as will be demonstrated, is incorrect as a matter of substance, but, more importantly, adopts an entirely wrong approach to a full costs application which should focus on the evidence and other matters at the appeal stage not the application stage. It is notable that the appellant points to no guidance or law which entitles it to take the erroneous approach which it does.

The Appellant's Points

113. The appellant presents numerous points in support of its application:

- a. The Council failed to grapple in the officer's report with the conclusions of the Secretary of State's decision and the Inspector's Report.
- b. Had it understood the terms of the decision and the Inspector's report, there would have been only two issues: whether there were any material considerations justifying a departure and whether the alternative sites assessment was correct.
- c. The Council was intent on refusing the permission.
- d. Had it considered material changes of circumstances, it would have concluded that there were no material changes of circumstances regarding Green Belt issues, landscaping, highways and other amenity considerations.
- e. It would have considered that the pathing difficulties were not good points and accepted that access could be given.

¹⁴ Ibid.

- f. It would therefore have granted permission.
- g. However, it ignored the Secretary of State's decision letter.
- h. And:
 - i. It failed to engage with the appellant's methodology in the alternative sites assessment.
 - ii. Failed to engage with or ask any questions of Network Rail until well after the refusal.
 - iii. Carried out a minute dissection of the appellant's ASA.
 - iv. Commissioned its own alternatives analysis which adopted an approach which was "flawed and self-serving".
- i. It is argued that the report to Committee is biased, partial and in places misleading by omission. It points out that the overall conclusions on the issue of very special circumstances was misleading.
- j. The Council's Committee were told that the area of search was too limited even though the matter had been dealt with by the Secretary of State and Inspector's Report; had the Council addressed the issue on the correct basis, they would have recognised that no other site performed better.
- k. No material changes of circumstances since the decision of the Secretary of State were identified in the report to Committee.
- l. Had the proper approach been taken contrary to the above complaints, there was "every prospect of permission being granted".

114. In short, a myriad of matters are raised; in combination the points brought are thoroughly unconvincing; they have no real substance and should be rejected.

The Council's Response

115. As indicated already, the approach of the appellant in its application is misconceived. The question is not whether an application might have succeeded had there been a different assessment of the position by the Council. The question is whether, having decided in the way it did, was there a "respectable"¹⁵ basis for its case.

116. An additional reason why it is important to focus on the right question is because it disposes of the speculative and pejorative critique which has been undertaken by the appellant in its application. It allows an objective assessment to be undertaken as to whether the evidence brought by the Council at this appeal justifies the position it has taken. It is no doubt because the appellant is well aware that a robust case has been brought at this appeal by the authority that it has sought to focus on the Committee report in its application.

¹⁵ See paragraph B16, Circular 03/09 Annex.

117. It must be recalled what the circumstances were in which the Council was reaching its conclusions; the appellant was saying that it would appeal if no decision had been reached within the time limit for the application¹⁶.

The Council's Justification for its Reasons for Refusal

118. The Council has fully justified each of its reasons for refusal.

Reason for Refusal 4: the Alternatives Reason

119. The Council decided that the ASA was flawed for two primary reasons: first, because no consideration had been given to alternative sites outside the north west sector and, second, because the methodology which had in any event been employed was defective.

120. That this amounted to an independent second limb to this reason for refusal is plain from the officer's report. This dealt with the alternatives analysis in a discrete section¹⁷, the majority of which concentrated on the failings of the methodology if the north west sector was adopted¹⁸. It also pointed out that¹⁹: "Beyond the restriction of the search to the NW quadrant, the next most fundamental concern arises around the use of a 5 km threshold for a link to the national rail network"; "another key failing of the study comes at the final stage²⁰"; "in other words a subjective decision was made not to fully explore the potential of a site simply because it was next to another one which was thought to be better ... The final conclusions may have been different"²¹; this "slants the assessment towards the purely commercial viability of the sites ... This may have excluded potential sites"²²; "as a result of these points the statement that the ASA is robust"²³ is not agreed.

121. The Statement of Case also identified that these were separate reasons for refusal, in terms, that "The appellant has failed to undertake an acceptable assessment of alternative sites even within the unjustly narrow confines of the North West sector"²⁴.

122. Given the existence of this second limb to the ASA, even were it the case that the Council has acted unreasonably in revisiting the question of the north west sector, the Council would nevertheless have rejected the proposals on the basis of the failures in the ASA. In spite of what the Council says, there is just no basis for a contention that its concerns in this regard were unfounded. During the appeal process, the failings of the appellant's study have been compellingly exposed; there simply would not, indeed – given its failings – could not have been an acceptance on the part of the Council of the alternatives assessment.

123. More importantly, since the existence of an adequate ASA was, for the Secretary of State and Inspector Phillipson, the primary issue in relation to whether

¹⁶ See HS1.11, letter 14 May 2009 stated, in part: "In your letter you state that the date by which the Council has to determine the application is 30 July 2009. I would wish to state that if the Council have not determined the application by that date we will be submitting an appeal on the grounds non-determination".

¹⁷ Section 7.4., CD3.1.

¹⁸ 2 pages of the report dealt with the methodology as against ¾'s of a page dealing with the north west sector.

¹⁹ Para. 7.4.10.

²⁰ Para. 7.4.14.

²¹ Para. 7.4.17.

²² Para. 7.4.18.

²³ Para. 7.4.24.

²⁴ Para. 8.2, SoC, CD/3.6.

very special circumstances existed, the decision to reject the ASA on the basis of the methodology alone (that is, aside from the north west sector issue) justified entirely the decision to refuse the permission.

124. It cannot but be said that the Council had a respectable basis for its objections. The methodological issues raised by the Council in this appeal (and set out in the closing²⁵) were put forward in August 2009 by SDG and were not fully answered by the response made by Mr Tilley²⁶. They were not answered when the points were taken forward in the evidence by Mr Tilley's rebuttal or further note²⁷ and still remain outstanding²⁸. They do so on the basis of considerable expert evidence presented by the Council.

125. Given the above, there is simply no basis for a full award of costs – this reason for refusal was fully justified.

The north west sector.

126. The Council has taken the position of disagreeing with the Secretary of State's decision on this point.

127. This matter raises a point of principle applicable to a number of other reasons for refusal, namely, whether the Council is entitled in this case to take a different stance in its evidence from the position taken by the Secretary of State in an earlier appeal which amounted to the same application.

128. The starting point must, again, be the Costs Circular. It must be properly read and must be read in a manner which does not conflict with the law applicable to such appeals. The primary advice is that a Council's reason for refusal must be justified on a respectable basis which, in this case, it has: a considerable amount of expert evidence as well as primary²⁹ evidence has been provided as to why the distribution areas of large occupiers will be regionally-based. It cannot be disputed that a respectable basis for the Council's case has been put forward.

129. The only aspects of the Circular which are relied upon are the two examples contained in paragraph B29. It is to be noted that they are examples of what "may" be the subject of a costs award. This must be interpreted with the law applicable to such appeals, and as indicated in closing submissions, the *Kings Cross Railway Lands Group*³⁰ case is directly applicable. It points out that there would be a costs exposure in circumstances where there is no "good reason" for the decision to reject a case formerly found to be acceptable; that case was looking at a change of decision by the authority in question rather than a reconsideration following an earlier appeal.

130. In the present case, it is to be remembered that the Secretary of State did not find the appellant's case to be acceptable. The Secretary of State actually refused permission on the basis that no very special circumstances existed. On

²⁵ See the paragraphs dealing with the long and short list assessments.

²⁶ HS/1.5

²⁷ See HS1.10

²⁸ See LPA6.6 and the further response.

²⁹ The market research produced by SDG.

³⁰ [2007] EWHC 1515.

this basis, there is actually no requirement to establish a “good reason” at all. It is a fresh application to be determined on its merits.

131. The “good reason” is, as indicated, capable of being made out where there is a different argument, a different person giving the evidence in a sufficiently compelling way or a justified change of view. The Council has provided in this case fresh evidence, different witnesses and new arguments. The fresh evidence was noted before, comprising market research, the evidence of an expert academic and a detailed alternative sites analysis.

132. Further, the intent of the Circular, when giving the examples which it has, cannot be to prevent what the general law has indicated to be appropriate and acceptable, that is, a re-consideration in full of the fresh application, whilst taking into account the previous decision. Mr Tilley³¹ accepted that the proper approach was that the Inspector is entitled to reach a different decision, taking into account new arguments, new evidence or simply a different view on the merits.

133. In the present case, the Council has, quite rightly, taken into account the previous decision, but decided that it was not a soundly-based decision in a number of respects and established compelling evidence as to why that was so.

134. If the examples referred to in the Costs Circular are directed at allowing costs to be awarded in circumstances even where there are good reasons for the decision, this would fly in the face of what has been indicated, as a matter of law, to be appropriate. In short, it would have the real effect of stultifying (as, indeed, the threat of it has done in this case in part³²) the local planning authority’s ability to do what it lawfully is able to do. The reality is that this is not the approach which is sought to be precluded by the Circular. The Circular is looking to penalise an authority which, for no good reason, seeks to reject a development; that is, when, without raising any new arguments, new evidence, new witnesses or any basis for its case, it simply objects to the development. That is, quite obviously, not this case at all.

135. The evidential test to establish a “good reason” is no different from that required by the Costs Circular generally; it is whether the authority has set out a respectable case that it had a good reason for taking a different view. Again, in this case, it quite plainly has produced that.

136. Additionally, and in any event, this case does not fall under either of the examples relied upon by the appellants and, accordingly, there is no requirement to make out a “good reason”. The Secretary of State has not decided that a scheme, or a part of the scheme, is acceptable. No part of the scheme has been found to be acceptable, since very special circumstances were found not to exist. As to the second example, the Council has not acted inconsistently; it has acted entirely consistently in deciding that, both in the previous application and now, planning permission should not be granted.

137. On this basis, there can be no award of costs in respect of the failure to substantial this reason for refusal.

³¹ XX and RX

³² See the restricted approach taken in the 14 October Committee decision.

138. The appellant's case seems to recognise some of this argument since it is accepted that a different decision can be reached if there has been a "material change of circumstances". The restriction of a "good reason" to a material change of circumstances finds no basis either in law or policy and is simply wrong; that is plain from the *Kings Cross Railway Lands Group* case which in terms does not restrict it in that way.

139. The approach taken by the Council on this was entirely justified:

- a. It has independently justified the refusal independent of the north west sector issue.
- b. It was entitled to reconsider the north west sector issue.
- c. It has produced substantial evidence in support of its points.

Reason for Refusal 1: The Green Belt Reason

140. The Council took the view that, on balance, the harm to the Green Belt was not outweighed by very special circumstances. Again, the appellant's case is that there are no changes in circumstances justifying a different decision from that taken by the Secretary of State.

141. The Council's decision was entirely reasonable. First, a judgment on where the balance lies is quintessentially one of judgment³³ and the Council is fully entitled to decide that the balance should not be struck in the way decided by the Secretary of State. This is something on which a lesser test³⁴ than a "respectable" case has to be established.

142. Second, and most importantly, the Secretary of State was careful in her words. The Secretary of State did not actually go through the process of reaching the judgment as to where the balance did lie if there had been a satisfactory alternatives analysis; she indicated that "this would almost certainly have led her to conclude that this consideration, together with the other benefits she has referred to above were capable of outweighing the harm to the Green Belt and the other harm which she has identified in this case". The Secretary of State was measured in her phraseology – that is clear because it differed markedly from Inspector Phillipson on this point³⁵ and was more restrictive in what it said.

143. Third, once a decision had been reached, the alternatives analysis was found to be unconvincing; this provided a sound basis for reaching the conclusion that there were no very special circumstances since, in the Inspector's report, this was a critical factor in the very special circumstances case.

144. Fourth, the Council, when considering GB harm, relied upon the Inspector's analysis; it did not need to do more given the Inspector's consideration of the point. In relation to the assessment of very special circumstances, that was carefully considered and evidence presented in Mr Hargreaves' evidence established where the balance lay.

³³ See the lesser test on this point contained in the Circular with regard to the likelihood of an award being made: para B18, Circular 03/09 Annex; a point even the appellant accepts.

³⁴ See B18, Circular 03/09 Annex; that it is a lesser test is accepted by the appellant.

³⁵ See para. 16.201, Inspector's Report, 9/CD/8.2 : "I would have taken the view that the harm ... would be outweighed".

Reason for Refusal 8: the Noise Reason

145. The Council took the view that the conclusions reached by Inspector Phillipson and the Secretary of State needed to be revisited. Similarly to Reason for Refusal 4, the reconsideration of this matter involves the same matter of principle as dealt with in the context of that reason for refusal.

146. In this case, the Council has put forward considerable evidence as to why the condition is unachievable, and, if unachievable, would not protect residents. New arguments have been put forward as to why this is the case, including the fact that the model would not over-predict as Mr Sharps had contended and that the practical position was, based on Mr Stephenson's experience, that the condition would not be achievable; a case based on the over-prediction of the model was not raised previously (specifically so³⁶).

147. New arguments were raised as to why the condition would not protect residents; first, there would be potential noise complaints from impulsive levels which were not the subject of the case before the Inspector previously. Second, there would be likely to be significant L_{Amax} events from the development which would be damaging to the amenity of local residents. Neither of these elements would be protected by the noise condition.

148. There has, therefore, been significant evidence provided which establishes, at the least, a respectable basis for establishing a good reason for departing from the previous decision.

Reason 2: The Landscape and Visual Impact Reasons

149. Reason for refusal 2 has been presented on the basis of the Inspector's previous conclusions. The Council has acted reasonably in the manner in which it has presented its case by relying on the Inspector's assessment of harm. It has limited its case, reasonably, in that way, following the Committee decision of 14 October 2009³⁷, in order to restrict the level of debate at the inquiry and the degree to which there needed to be significant evidence. That was a plainly reasonable course of action. The only difference from the Inspector's analysis is that, ultimately, the Council has taken the view that this issue should amount to a free-standing reason for refusal, while the Inspector considered this issue as part of the Green Belt balancing test. The Council was entitled to reach the conclusion it did.

Reason 6: Ability to act as an SRFI

150. The primary point in this reason for refusal is whether the proposals would act as an SRFI. The Council has presented significant amounts of evidence as to why this reason for refusal has been made out. It has shown that there are limits in relation to the accessibility to various parts of the rail network. It has provided compelling evidence as to why it is that there would not be paths into and out of the site.

151. To the extent that there needs to be a change of circumstances, there quite plainly has been; the pathing issue of the ability to cross into the site simply was not grappled with at the last inquiry in relation to the 2015 Thameslink

³⁶ See para 6.67 of the Helioslough submissions, Inspector's Report, 9/CD/8.2.

³⁷ CD3.10

service. It is simply wrong to say that the question of pathing has been grappled with at the previous inquiry – that related to pathing within Crossrail and was dealt with in circumstances where the appellant had shown that there could be access. That is not now the case. Further, it has been shown that, on the basis of a more than respectable case, as to why the site does not have good links to any of the expected origins and destinations for rail freight. It has also pointed out that there has been no viability assessment of the gauge enhancement and the ability to undertake it to W9 gauge.

Reason for Refusal 5: Prematurity

152. The Council has, again, put forward considerable evidence on this point and, as was clear from the Committee report of 14 October, was based on the changes of circumstance which had occurred since the date of the last decision. Closing submissions showed why it was that the Council had taken the view that it was important, in the circumstances, to restrict its case in that way. It was not inconsistent on the part of the authority to deal with this part of its case in this way.

153. The question is whether a respectable case was presented on the evidence that there had been a change of circumstances. Quite plainly there was; Mr Hargreaves described the correspondence from EERA and SEERA which was not before the last inquiry and the response of the DfT which was, again, not before the last inquiry. The Council relied on the evidence relating to the DaSYSTs process and the NPS system. The NPS system is plainly capable of producing a prematurity situation, as Mr Tilley recognised when it was put to him that, if the Networks NPS was site specific and did not list Radlett, Radlett would be premature. There is no evidence which has been put forward that is justified on the basis of a government statement that the Networks NPS will not be site specific.

154. On this basis, there quite plainly is a respectable case that the changes of circumstance entitle a different view to be taken.

Reason for Refusal 14: Highways

155. The Council acted entirely fairly and reasonably on the question of the effects on local highways. No point can be properly taken that the Council was not entitled to refuse the permission pending the receipt of further information. Indeed, it does not seem to be suggested by the appellant that the Council could not as a matter of principle reach the conclusion that there was insufficient information initially by which to be sure about the junctions. Councils are expected to “actively review their cases”³⁸; that is precisely what the Council has done.

156. Rather, the complaint seems to be that the Council did not resolve sufficiently quickly not to proceed with this reason for refusal. That is a point which is wholly without substantiation. It is to be recalled that the Council initially refused consent on this basis because of the lack of information apparent within the application which the appellant should have presented. It now seeks to suggest that this failing of the appellant should be placed at the Council’s door.

³⁸ Para. A28, Circular 03/09 Annex.

That is an extraordinary submission and is indicative of the attempts, by this costs application, to put pressure on the Council.

157. The chronology is that further information was not presented in this case until late in the day; and, when received, was properly processed. The County Council had indicated what its position was and it is notable that the appellant does not suggest at what point it considered sufficient information had been presented to the District Council and when it should have reached its decision. In truth, by the time the County Council had indicated what its position was, the appellant was under no illusion but that the highways reason for refusal would be withdrawn. That is clear given the very limited evidence on highways that was initially presented. As a result, it incurred no costs and (notably) none has been particularised. The Council made plain its position on this issue as soon as it was reasonably able.

158. There is really no basis for the contention that the authority's approach towards the highways issue has been unreasonable.

Reason for Refusal 7: Landscape

159. The substance of reason for refusal 7 was dealt with in the context of reason for refusal 2, needless to say, it has been justified.

Reason for Refusal 9: Air Quality

160. It is certainly correct that the Council decided not to proceed with the air quality assessment. While this has the potential to lead to an application for costs, this should not, in the circumstances of this case, be the conclusion. The Council has been careful to assess the proposals further once further information was obtained by it; the "review of its case" and the requirement to "respond promptly to changing circumstances" has been complied with³⁹; doing this can avoid a requirement for costs⁴⁰. The authority did consider the matter as quickly as it was able and withdrew the reason again, at the soonest opportunity. It is to be remembered that the matter is required to go back to Committee if this reason (along with other reasons) for refusal are to be withdrawn. That places time constraints on the ability to withdraw a reason.

Reason for Refusal 10: Country Park, Landscape and Ecological Improvements

161. The Council has restricted its case on this issue, reasonably and fairly by way of its Committee report of 14 October and it is notable that the appellant indicated that it was not proceeding with a case based on the delivery of the country park. What remains under this reason relates to the extent of the landscape and ecological concerns and the lack of benefit provided by them. The basis for the concerns is, as indicated below in relation to ecology and above in relation to landscaping, already taken into account.

Reason for Refusal 11: Ecology

162. The ecology reason for refusal has been clearly stated to have been placed on the basis of whether there have been any changes of circumstances since the last decision. Again, the question is whether there is a respectable basis

³⁹ Para A28, Circular 03/09 Annex.

⁴⁰ Ibid.

for the decision. The answer is, again, that there has been. It is suggested that the decision to designate the site is self-serving. That is a surprising submission, given one of the members of the decision-making panel is a representative of Natural England, a body relied upon by the appellant in support of its ecology case. Aside from the allocation, other wildlife has now been ascribed a higher status than it has hitherto. This must be regarded as a respectable basis for this case.

Reason for Refusal 13: S106 Issues

163. The Council's position is that the S106 Undertaking is defective. The way the application is put by the appellant is, to say the least, curious. It has been indicated that the S106 was "accepted by the SoS at the last inquiry". Of course, the Secretary of State gave the S106 very little weight in the light of the fact that it did not bind all parties⁴¹. It was absolutely clear that the Council's objections followed the concerns of the Secretary of State as to the limits of the development. As indicated, each of the alternatives that is offered up is not capable of meeting the Secretary of State's concerns. In responding to this matter, it is necessary for the Council only to establish that its case is respectable; this has quite plainly been done. The appellant has made no attempt to provide evidence that Condition 2 will be carried into effect within the relevant timescale. The appellant has continued to put forward the first option in spite of the fact that this was roundly rejected by the Secretary of State; the Council should not have had to respond to that. As to the third option, this is built on the second option and thus subject to the same problems. Further, there will still be the requirement to pay money under the condition ultimately (for example, the payment of the rail promotion fund).

164. It is also suggested that the Council's approach generally to the detail of the S106 has been unreasonable, given the timescale within which it has responded. First, there has simply been no loss – the points which were made would have been made earlier if it is right that the Council has acted unreasonably. These are points that the Council would have had to deal with in any event.

Reason for Refusal 12: Highways Agency

165. It is noted that there is no application made in respect of the Council's approach on this issue.

Conditions

166. The appellant complains that further comments on the conditions have been made without there being material changes of circumstances since the last decision. The Council has identified why it is that it was entitled to revisit the conditions. In any event, it is said that there has been abortive work, based, basically, on the point that the Council was not allowed to revisit conditions dealt with at the earlier inquiry.

Summary

167. The response to the application has been structured by reference to each reason for refusal; this indicates, quite clearly, that given that the appellant cannot establish at all that the Council has acted unreasonably in respect of each of its reasons for refusal, which is what it must do to succeed on its full application. In

⁴¹ Para. 52, CD/8.1.

the same way, this has established why it is that there should not, in the circumstances, be a partial award of costs either.

The Appellant's Contentions

168. The appellant suggests that the starting point for the application is the Secretary of State's decision and Inspector Phillipson's report⁴². In fact, however, it goes further than that and suggests that the Council's decision must necessarily be that, having considered it, and having identified no material changes of circumstances, it would have concluded that planning permission should be granted⁴³. That approach is entirely the wrong approach. The Council was entitled as a matter of law to consider the case as a fresh application, which is what it did, taking into account all material considerations, including the Secretary of State's decision, which it did. Had the Council actually considered the application in the way the appellant suggests, that is by following the decision unless material considerations indicated otherwise, it would have acted wrong in law⁴⁴.

169. It is suggested that the Council was intent on refusing the application. That is wrong; the Council assessed the application on its merits and was advised by way of the Officer's report of the merits and demerits of the application along with a recommendation. The forensic second-guessing which the appellant embarks upon in this application indicates why it is that such a form of analysis is not the basis for a costs application.

170. It is contended⁴⁵ that the Council failed to engage with the appellant and that this displayed the clear intent that the Council would refuse the application. However, the Council's approach must be seen against the backdrop of the appellant indicating that, if the decision was not made within the timescale for determination, the appellant would immediately appeal⁴⁶. In short, the Council dealt with the application within a relatively narrow timescale given the significance of the application, and engaged with the appellant as best as it could in the light of the pressure it was under.

171. It is said that, had the Council undertaken cooperative engagement, it would have seen that there were no other alternatives to Radlett⁴⁷. Given that it had received advice that the alternatives assessment was inadequate even without reference to the inappropriateness of the north west sector, it is wholly improbable, even if it was required to do so, that the Council would have concluded that it had been demonstrated that there were no other better alternatives, particularly in the timescales it was having to operate under. The appeal process has shown that there are numerous sites (some 13 long list sites) which should have gone through to the shortlist stage and that the short list analysis was seriously flawed. Given that the appellant did not respond positively to any of the points which the Council did raise, there would plainly not have been (as there was not) a resolution of the issues between the parties. There was an obvious basis for the Council's case, even on the restricted issue of the methodology applied by the appellant. The appellant has sought, between paragraphs 18 – 23 of the application, to suggest that the Council's concerns on the whole of its case, from, for example, the

⁴² Para 12, Costs Application.

⁴³ Para. 15, Costs Application.

⁴⁴ See my closing, part 1, paragraphs 3 – 8.

⁴⁵ Para. 16, Costs Application.

⁴⁶ 14 May 2009 letter - HS/1.11.

⁴⁷ Para. 17, Costs Application.

alternatives issue to the rail issues would have simply fallen away during the period between the application and the appeal. Given the clear series of valid objections that have been raised on the appellant's case, that simply could not have happened.

172. The contention by the appellant that somehow members were misled because there was no reference to the Secretary of State's decision and the Inspector's Report on certain issues is wrong and highlights the dangers of the appellant's approach in seeking to second guess the Committee. First, the decision was referred to. Second, all the members who decided the earlier application had been provided with the decision when it was published and, second, as the Planning Committee dealing with one of the largest planning applications ever to come before it, were well aware of its contents. In any event, the application was a fresh application and the Council assessed the application on its merits, taking into account what members were aware of.

173. That was still more clearly the case since the Council, at the Committee of 14 October, were referred again to what the Secretary of State and Inspector did decide on various issues in a way which showed that the Committee had considerable background knowledge of the decision. There was no suggestion by members of the need to reconsider the Council's decision. The point was that, in spite of being aware of the Secretary of State's and the Inspector's report and the suggestion that there should be concentration only on a material change of circumstances, the Council continued with its decision. It is notable in that regard, that the appellant does not appear to refer to that later Committee decision at all in its application. There is no recognition of the Council having reasonably reviewed and restricted its case.

174. The appellant suggests that, had the Council taken the opportunity to consider the question of alternatives on (what the appellant alleges to be) the proper basis, it would have realised there was no basis for its objections⁴⁸. Again, this seems to be largely a repetition of its earlier complaint. It is outlandish given the failings in the assessment.

175. The appellant, as part of its erroneous approach of seeking to second guess the Committee's decision, sets down a test that there was "every prospect" of the permission being granted if the Committee was correctly directed. There is no basis for that test, which seems to have been plucked out of the air. Again, this highlights the invidiousness of the appellant's approach of sending the Secretary of State down the road of second guessing what the Committee might have done.

176. As to the likelihood of a different decision being forthcoming, the first reason for refusal reached the conclusion that the development was unacceptable on the basis of the harm to the Green Belt; it was reaching a different judgment from the Secretary of State as it was entitled to do. Moreover, the appellant's own complaint in the application is that the Council was intent on refusing. Quite obviously, there would have been no different decision had the Secretary of State's and the Inspector's report been referred to.

177. Further, even on the assumption that the authority had taken a different stance and unreasonableness is established – that is, all of the appellant's

⁴⁸ Para. 42, Costs Application.

complaints – the appellant has not incurred its costs of this inquiry from that unreasonableness. Given that this involves⁴⁹ massive development in the Green Belt, on a nationally significant scale⁵⁰, which, if granted, would be in contravention of the development plan and which has attracted literally 1,000s of representations from local residents, the reality is that this is development which would inevitably have been called in. The appellant has not established a case that the entire costs of the inquiry has been caused by the Council; there can be no full award of costs in that case. Given that local residents and STRIFE's case took in total a week of the inquiry, there would inevitably have been significant costs. As a result, the award could only be a partial one.

178. As a result of the above, there is no basis for the application for costs, and it should be rejected.

Further Submissions of Helioslough Ltd

179. At the last inquiry there were 14 reasons for refusal. HS did not apply for costs in relation to any of them. At that stage, it was not unreasonable for the Council to pursue those issues.

180. Since then of course there has been a full inquiry and a fully reasoned IR and DL. The result is that paragraph B29 fourth bullet is directly engaged.

181. In that context:

(1) There is no "respectable" basis for the Council's case on any of its reasons for refusal unless it could point to a MCC. It cannot do so. For reasons covered in detail in the costs application and the closing speech for HS, a "respectable" case is not created by finding another witness or finding a new issue no matter how misconceived;

(2) In respect of alternative sites, of course the Council could reject the ASA but only if it had respectable grounds for so doing after having properly understood it and the evidence on which it was based and after having engaged with the appellant on it. None of this was done here.

182. In order to justify its refusal the Council would have to have very good planning reasons for departing from the conclusions of the SoS. Simply disagreeing with the SoS is not a "very good planning reason" here given the history and the fact that the SoS (who is the appellate decision maker) has already assessed and reached conclusions on those issues.

183. Because of the failure of the report to Committee to grapple with the findings of the SoS (not gainsaid in the Council's Costs Response) the Council never asked itself whether there were any very good planning reasons for disagreeing with the SoS in respect of any of the reasons for refusal.

184. At this inquiry, the Council has not been able to point to any "very good planning reasons" for reaching a different conclusion to the SoS on any of the reasons for refusal.

⁴⁹ RT XX, PS

⁵⁰ Since the development would be subject to the IPC regime.

185. The Council has (and continues to) simply asked itself the wrong question: whether there is a very good planning reasons for reaching a different view from the SoS. That basic point is not grappled with by the Council's Costs Response. It is unanswerable.

186. In respect of the alternative site assessment, the Council has not raised a "respectable" case but has instead adopted an unreasonable approach as explained in the Costs Application.

187. A full award of costs is justified; alternatively a costs award of the whole inquiry less the costs of an appeal limited to the respective merits of Radlett and Colnbrook.

188. In respect of the individual reasons for refusal, we highlight just a few points:

- (1) the Council contends that if the issue is a matter of judgement it can simply disagree with the Secretary of State That is in straight contravention of B29(4): see Costs Response on RfR 1;
- (2) the Council's noise arguments here are not new - as explained in closing submissions;
- (3) the timetabling issue has not changed in any material respect;
- (4) in respect of air quality, no new information was provided between the reasons for refusal being issued and it being withdrawn;
- (5) the only issue the SoS had on the S.106 was the enforceability of condition 30. That concern does not allow a revisiting or questioning or rewrite of the remainder.

Conclusions

189. I have considered this application for costs in the light of Circular 03/2009 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.

A. Application for a Full Award of Costs

190. The application for a full award by the appellant is based on the impression that the Council were determined to refuse the application irrespective of the evidence and irrespective of the content of the decision by the Secretary of State in dismissing the previous appeal. Therefore, the Council adopted the wrong starting point. I have some sympathy with the stance adopted by the appellant in that, in my opinion, the report about the planning application to the relevant Committee of the Council did not appear to reflect the flavour of the previous decision by the Secretary of State and the fact that many of the objections raised then by the Council were rejected.

191. Included in the overall conclusions by the Secretary of State were that harm from conflicts with the development plan in relation to landscape and visual impact and highways would be insufficient on their own to justify dismissing the appeal. The Secretary of State stated that "the need for SRFIs to serve London and the South East was a material consideration of very considerable weight and, had the appellant demonstrated that there were no other alternative sites for this proposal ... together with other benefits ... were capable of outweighing the harm to the Green Belt and other harm." (DL para 58) The Secretary of State considered that the Alternative Sites Assessment was wholly unconvincing and that this failing was critical. The Council refused the application for 14 reasons, one of them concerning the Alternatives Sites Assessment (ASA) (Reason 4). Therefore, I consider that should the Council satisfactorily demonstrate that it has behaved reasonably in the consideration of the Alternatives, a full award of costs cannot be justified.

192. The Council had decided that the analysis of Alternatives by the appellant was flawed for two basic reasons; the methodology and the restriction of the search to the north west sector. The Council produced substantial evidence to support its own Assessment of the Alternative Sites, including a methodology which was very dissimilar to that of the appellant. It also applied the assessment to a wider area of London and the South East, not just the arc around the north west.

193. I consider that the Council was not at fault for its failure to accord with the appellant's assessment. It was quite at liberty to choose whichever assessment methodology it believed was appropriate for the case. There was no requirement to mirror the appellant. I note the difficulties of cooperation referred to by the appellant, but the gap between the parties was so great that I am sure that, even with a greater dialogue, there would still have been an unbridgeable gulf in the differences in the evidence which would have resulted in a similar length of time spent considering the issue at the inquiry.

194. Therefore, notwithstanding whether or not the assessment should have been restricted to the north west sector, I shall not recommend a full award of costs.

B. Application for a Partial Award of Costs

195. The appellant claimed that had the Council dealt with the application on the correct basis, the reasons for refusal would have been fewer and the inquiry narrower in scope, with the sole issue being the consideration of alternatives because there were no adverse material changes in circumstances which could affect the other conclusions of the Secretary of State. However, this scenario is predicated on the submission that the only reason for a reconsideration of a decision or conclusion is that there has been a material change in circumstances.

196. As the Council points out, the *Kings Cross Railway Lands Group*⁵¹ judgement is authority for the view that a local planning authority may reasonably come to a different view on a proposal similar to one considered before, provided it has a "very good planning reason". This may include a material change in circumstances, but it may also be caused by other factors. In this particular case, the consideration of alternatives in the current appeal compared to the previous appeal was conducted in more depth and breadth, especially as the Secretary of State found that the Alternative Sites Assessment was flawed. I have concluded above that I see no objections in principle to the overall methodology of the Council.

197. So far as the north west sector is concerned, the Council also submitted very good planning reasons why the assessment should be based on a wider area. These included the locations of two other possible alternative SRFIs which were already permitted at London Gateway and Howbury Park, additional emphasis on the railway elements of possible alternative sites outside the north west and also the commercial considerations. In my opinion, the evidence on these topics comprised a respectable basis for the Council's case on the reason for refusal based on the Alternatives.

198. The appellant has claimed that it is a classic case of "...persisting in objections to a scheme, or part of a scheme, which ... the Secretary of State or Inspector has previously indicated to be acceptable." (para B2 of Annex to Circular 03/2009). Nevertheless, I consider that the evidence of the Council comprised a very good planning reason why it should not necessarily support the previous conclusion of the Secretary of State about the ASA and the north west sector.

199. Therefore, I shall not recommend a partial award of costs on the basis of the Council unreasonably failing to limit its reasons for refusal to only considering the ASA and whether Colnbrook was a better site.

C. Application for a Partial Award of Costs based on each of the reasons for refusal and conditions/S106.

200. The appellant claimed that on each aspect of the case, the Council should have adopted the previous decision of the Secretary of State as a starting point. However, in its defence, the Council submitted that it was able to pursue a different stance subject to there being a very good planning reason why it could do

⁵¹ R (oao Kings Cross Railway Lands Group) v Camden LBC [2007] EWHC 1515

so. As I concluded in the report about the planning appeal, I agree with the Council that “a very good planning reason” may constitute a sound basis on which to come to conclusions different to those previously arrived at by the Secretary of State or Inspector. Therefore, although the previous report and decision may not have been used as a starting point by the Council, where it was able to offer very good planning reasons why a previous conclusion or even condition contained in the report and decision could not be supported, I do not consider the Council has behaved unreasonably.

Green Belt: RfR 1

201. The appellant accepted that if there was to be a reason for refusal it would have been on Green Belt grounds but that it should have been confined to the consideration of alternative sites. However, even though there was no dispute that the development would be inappropriate in the Green Belt, I agree with the Council that the stated reason on which the Council relied involved a judgement on where the balance would lie in terms of harm in order to assess whether very special circumstances existed. Substantial evidence was submitted by the Council to demonstrate its opinion of where the balance should be, in terms of harm to the Green Belt and other harm, in addition to the assessment of alternative sites.

202. Nevertheless, the evidence of the degree of harm to the openness of the Green Belt and whether the development would be contrary to the purposes of including land in Green Belts such as to prevent the merging of settlements appeared to be a repeat of the arguments thoroughly aired before the Inspector at the previous inquiry. I can see no evidence to demonstrate that anything new of substance was raised. No very good planning reasons were advanced to suggest that the Secretary of State should come to a different conclusion to his predecessor on this consideration.

203. Indeed with the development being the same as the previous proposal, the physical surroundings being either the same or subject to no new significant planning permissions, and in the light of the evidently thorough inspection of the site and surroundings by the first Inspector and no material changes in circumstances, it is difficult to escape the conclusion that there was no need to revisit these elements of the case. I therefore consider that the Council acted unreasonably in pursuing the harmful effects of the proposal on openness and the purposes of including land in the Green Belt within the reason for refusal at the inquiry, that this has caused unnecessary expenditure by the appellant and that a partial award of costs should be made for the additional preparation and inquiry time incurred in dealing with it.

Harm to open character and visual character of the important gap: RfR2

204. Similarly, I consider that in assessing the harm to the open character and visual amenity of this part of the Green Belt, the Council revisited the conclusions of the Secretary of State on the previous appeal, without bringing forward any good planning reason why there should be any change from those conclusions. The Council submitted that this issue should be a free standing reason for refusal, rather than, as at the appeal, part of the Green Belt balancing exercise. However, in my opinion, no substantial new evidence was brought to the inquiry in support of this approach and there were no material changes in circumstances between the previous and the current appeal.

205. The Council may well feel entitled to refuse the application for the reason it chose because it believed that there would be harm to the character and visual amenity of the Green Belt. However, if, as the Council suggested, the only motive was the procedural issue of a free standing objection or reason for refusal rather than attempting to persuade the Secretary of State to change a conclusion previously reached, I consider that it has behaved unreasonably and caused unnecessary expenditure to the appellant. Therefore, I shall recommend that this part of the application for a partial award of costs should succeed.

Sustainable Development: RfR3

206. The appellant submitted that the reason for refusal was unclear and this resulted in clarification being sought from the Council, which was not forthcoming. No substantial evidence was brought by the Council on this particular issue. However, the Council submitted in closing submissions at the inquiry that the sustainability objection was based on the claim that the development would not act as an SRFI. Furthermore, in the Council's view, additional Government publications gave added emphasis to enhancing sustainability. Given that the Council should have explained its position to the appellant when asked but failed to do so, I agree that time and expenditure have been expended unnecessarily on the travel to work and CO₂ issue when the Secretary of State had previously concluded on those matters: and it must have been plain there would need to be good reason for raising this objection again. I see no evidence of any such good reason based on objective analysis. Therefore, I consider that the Council has behaved unreasonably in this respect and partial costs should be awarded.

Alternative Sites RfR 4

207. I refer to my conclusions above in paragraphs 192 – 199 and consider that the Council did not act unreasonably in respect of this reason for refusal.

Prematurity: RfR 5

208. I agree with the appellant's submissions that there is no evidence of any tangible progress on joint inter-regional working to identify other SRFI sites since the previous inquiry. I see no justification for declaring the appeal premature in order to ascertain the demand for SRFIs following the planning permissions granted at Howbury Park and London Gateway, which were extant and discounted when the Secretary of State came to her earlier decision. There has been no significant change to the development plan to sustain a reasonable argument that a decision on this appeal might be premature.

209. The advent of the IPC and the imminence, at the time of this inquiry, of a National Policy Statement on transport matters which may include SRFIs are changes in circumstances from the previous inquiry. However, there is no evidence to suggest that a NPS would be site specific and no indication from published government policy that decisions on proposals covered by a NPS should be deemed premature pending its publication and designation. Therefore, I conclude that the Council has not advanced any very good planning reasons to support a change to the previous conclusions on prematurity by the Secretary of State and I disagree with the Council that its case was respectable. Accordingly, I find that the Council has acted unreasonably and caused unnecessary expenditure by the appellant by the imposition of this reason for refusal and I shall recommend that partial costs should be awarded.

Rail Issues RfR 6

210. The appellant made submissions on 3 counts: (i) pathing, impact on Thameslink and the ability to function as an SRFI; (ii) gauge; and, (iii) demand and the north west quadrant. The aim of the Council was to show that the development could not act as an SRFI. The Council submitted significant amounts of evidence to substantiate this reason for refusal, including coverage of the components to which the appellant refers.

211. I agree with the Council that new evidence at this inquiry compared to the previous one included consideration of the Thameslink timetable. As a consequence, there appears to have been significantly more examination of the feasibility of gaining access to the site from the rail tracks. Moreover, there was an intensive assessment of the loading gauges available into the site from various origins and destinations of rail freight. The Council submitted substantial evidence on the viability of loading gauge improvements and also, in respect of the north west sector, that the distribution areas of large occupiers would be regionally based.

212. I note that pathing and gauging were considered at the previous inquiry and that the Secretary of State accepted that the development could function as an SRFI. However, I consider that the extra depth to which the Council developed its arguments on the rail issue was sufficient to constitute a respectable basis for the Council's stance and that this also was a very good planning reason why the conclusion of the Secretary of State might change. I have not supported the Council on the planning merits of the case, but I do not accept that their defence of the reason for refusal was unreasonable

Proposals for Landscaping Area RfR 7

213. My conclusions about RfR 2 above apply to RfR 7. Furthermore, the appellant sought clarification for the reason for refusal early in the appeal process and none was forthcoming. I shall recommend that the full costs of dealing with this reason for refusal should be awarded due to the unreasonableness of the reason for refusal and the unnecessary expenditure caused to the appellant in opposing it.

Noise Levels RfR 8

214. The appellant claimed that the reason for refusal ignores the conclusions of the Secretary of State previously and the import of the conditions. There have been no material changes in circumstances and the inquiry was just a re-run of arguments comprehensively considered the last time.

215. However, the Council submitted evidence to attempt to demonstrate that a particular condition would not be achievable and therefore would not protect local residents from the adverse effects of noise. The Council also suggested a further planning condition in order to overcome perceived harm from maximum noise levels. This condition had not been included in the list of conditions discussed at the previous inquiry, and I agree with the Council that its evidence amounted to a respectable defence of its stance and that insufficient attention had been paid to the control of noise from the development. In the event, I have recommended overcoming this defect by the imposition of a condition to limit L_{Amax} . Therefore, I

consider that the Council has behaved reasonably and I shall not recommend a partial award of costs relating to this reason for refusal.

Air Quality RfR 9

216. The reason for refusal on air quality was withdrawn by the Council before the inquiry. The Council may well have responded as quickly as it felt it was able after a review of the case. Nevertheless, the delay due to its requirement to seek authorisation from the relevant Committee was a matter for the Council to deal with, in terms of corporate responsibility, and I consider that the appellant should not have had to incur the unnecessary expenditure due to delay arising from the internal procedures of the Council. The withdrawal of the reason for refusal, without any evidence of materially changed circumstances satisfactorily explaining the withdrawal, leads me to conclude that it clearly should not have been imposed in the first place because it was unreasonable; unnecessary expenditure was caused to the appellant and I shall recommend that partial costs should be awarded.

Funding of Mitigation Works RfR 10

217. The appellant claimed that there have been no material changes in circumstances since the previous inquiry after which the Secretary of State concluded that, although the proposals would not deliver a country park in the generally accepted sense, they would be beneficial to the countryside. The Secretary of State also saw no reason why the country park proposal should not be beneficial overall and add to the biodiversity interests present on the site.

218. I consider that the Council behaved unreasonably in relation to reasons for refusal 2 and 7 and the same points apply in relation to the landscape element of reason for refusal 10. I deal with ecology below in reason for refusal 11. The funding of a long term management regime would be provided for in the Section 106 Undertaking in a similar format to that produced at the earlier inquiry and which the Secretary of State found was relevant, necessary and complied with the policy tests in Circular 05/2005. Nevertheless due to a deficiency in the S106 in dealing with the majority landowner, Hertfordshire County Council, and an unacceptable planning condition to try and overcome that deficiency the Secretary of State only placed limited weight on the Undertaking.

219. The Council disputed the Undertaking and offered substantial evidence against it. Therefore, I consider that the Council made a respectable defence of its position and behaved reasonably. I have already recommended that a partial award should be made due to the landscaping reason for refusal. Therefore, I conclude that no further action need be taken on this reason for refusal because, although there were unreasonable elements concerning the landscaping issue, no unnecessary expenditure would have been incurred over and above that already incurred in responding to reasons for refusal 2 and 7.

Ecology and Local Footpath Network RfR 11

220. The Council does not dispute that the objection based on harm to the local footpath network was dropped during the appeal process on 12 October 2009 after the application was refused on 20 July 2009. In the absence of any satisfactory explanation for the Council's apparent change of mind, I agree with the

appellant that partial costs should be awarded on the basis of unreasonable behaviour resulting in unnecessary expenditure during that period.

221. Although the appellant claims that there were no material changes in circumstances which would impact on the previous conclusions of the Secretary of State, I disagree. The recent definition of a County Wildlife Site on part of the appeal site is a material change and a very good planning reason why the Council acted reasonably in maintaining its objection to the proposal on ecological grounds, notwithstanding the previous conclusion of the Secretary of State.

222. Therefore, I shall recommend that partial costs should be awarded to the appellant but limited to responding to the footpath element of the reason for refusal.

Inadequate S106 Obligation RfR 13

223. I have commented on the S106 Undertaking in paragraphs 218 and 219 above. It might be correct that, as the appellant suggests, there have been no material changes in circumstances. However, the Secretary of State previously only placed limited weight on the similar Undertaking for the reasons explained above. Therefore, I consider that the Council had reasonable grounds for criticising the adequacy of the S106 again. So far as chronology is concerned, the Council maintained its objection throughout the appeal proceedings into the inquiry and made full submissions to support its stance. There are no indications that, had the appellant and the Council been in closer communication about the Undertaking that, either the objection would probably have been withdrawn, or the Undertaking would probably have been altered in some way which would have satisfied the Council. Accordingly, I do not support the application of the appellant for a partial award of costs for this reason for refusal.

Local Highways Issues RfR 14

224. This reason for refusal was not pursued at the inquiry. According to the appellant it was abandoned very late, after a report produced by the local highway authority. The appellant claimed that the report did not rely on any further information and that there had been no material changes in circumstances. The Council responded that the additional information from the appellant had been forthcoming quite late in the day and it had behaved quite reasonably in keeping the case under review.

225. In my opinion, the Council's points do not detract from the principal issue that, although the objection was based on insufficient information, the reason for refusal was not properly supported. There was no indication of a respectable basis for the Council's stance, especially in view of the identical nature of the proposal compared to the previous one and the conclusions of the Secretary of State.

226. There is no indication of the dialogue between the parties to obtain additional information and I note the implication in the point made by the Council that the appellant would have known that the reason for refusal would be withdrawn and would have incurred no costs.

227. However, if, as it appears, the additional information was not used as a basis for withdrawing the reason for refusal, I consider that unreasonable

behaviour has occurred in that the reason need not have been imposed in the first place. Therefore, I shall recommend that a partial award of costs is made based on the unnecessary expenditure for work done in the duration of the time between the refusal of planning permission and the withdrawal of the reason for refusal.

Conditions

228. The appellant alleged that the Council had been unreasonable because it sought to reargue conditions previously agreed by the Secretary of State when there had been no material changes in circumstances. However, where I have found that the Council acted reasonably in defence of certain reasons for refusal and offered a respectable basis for its stance, I also consider that it would have been reasonable to revisit the planning conditions associated with that topic, even though the Secretary of State was satisfied that the conditions proposed on the last occasion were reasonable and necessary and met the tests of Circular 11/95.

229. In addition, I am satisfied that the Council offered a respectable defence of its reasons for wishing to impose the various conditions, or variations to conditions, which were not agreed. Therefore, I do not accept that the Council has behaved unreasonably and that unnecessary expenditure was caused and I shall recommend that the application for a partial award of costs on this ground should fail.

Recommendation

230. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009, has been demonstrated to some extent and that a partial award of costs is justified on the basis of responding to the whole of each of reasons for refusal 2, 3, 5, 7, 9 and 14; and a specific aspect of reasons for refusal 1 and 11 as referred to above in the report.

A Mead

Inspector

Annex A: Reasons for Refusal:

1. The site is within the Metropolitan Green Belt as defined in the St Albans District Local Plan Review 1994 wherein permission will only be given for the erection of new buildings or the use of existing buildings or land for agriculture, other essential purposes appropriate to a rural area or small scale facilities for participatory sport or recreation. The proposed development is unacceptable in terms of Policy 1 of the St Albans District Local Plan Review 1994 and is inappropriate development in terms of PPG2 Green Belts. The harm to the Green Belt by reason of inappropriateness and any other harm is not clearly outweighed by other considerations and accordingly no very special circumstances exist to justify the proposal.
2. The overall size, height, bulk, massing and scale of the proposed development would be highly damaging to, and seriously diminish, the open character and visual amenity of this significant part of the Green Belt which provides amongst other things an important gap between Park Street and London Colney, contrary to Policy 1 of the St Albans District Local Plan Review 1994.
3. The proposal conflicts with the provision of PPS1 in that it fails to demonstrate that the development can be carried out consistently with the principles of sustainable development.
4. Policy T10 of the East of England Plan states that provision should be made for at least one Strategic Rail Freight Interchange unless more suitable locations are identified within London or the South East for all 3 to 4 interchanges required to serve the Greater South East. The 'Consideration of Alternative Sites' study is inadequate and, as a result, the need for the proposed SRFI as set out in Policy T10 of the East of England Plan has not been shown.
5. The proposed development is premature in advance of the National Policy Statement covering SRFI's due to be published in 2010, the completion of a trans-regional assessment of the location of SRFI's in the Greater South East and until demand has been shown to exist through the implementation and occupation of the available SRFI capacity at Howbury Park. The proposal is therefore contrary to the advice in PPS1.
6. The applicant has failed to demonstrate that there are adequate paths in the wider national rail network to support the number of freight trains that the facility is intended to serve, and that the Midland Mainline timetable can accommodate the level of services anticipated. The viability of the rail connection has not been demonstrated and there is no evidence that gauge improvements to W9 and W10 standard can be delivered between Radlett and points on the rail network with gauge to these standards. No demand has been shown for rail freight or an SRFI in the north west sector of London. The proposal is therefore contrary to the requirement that priority should be given to the objectives of the Regional Transport Strategy regarding the sustainable movement of freight set out in Policies T1 and T10 of the East of England Plan and the advice in PPS1 regarding sustainable development.
7. The proposal for the central development site (Area 1) fails to adequately secure and enhance the quality and appearance of the landscape in this area. The proposal is therefore contrary to Policy 143 of the St Albans District Local Plan Review 1994 and PPG Green Belts.
8. The proposals would lead to high noise levels that will be experienced by residents on the eastern side of Park Street / Frogmore and more particularly Radlett and Elstree. The resultant adverse impact and harm caused would be contrary to PPG24 (Planning and Noise).
9. The proposals would lead to harmful air quality conditions experienced by residents in Park Street / Frogmore and more particularly within Radlett and Elstree. These would be contrary to PPG23 (Planning and Pollution Control).

10. The proposal for the Country Park, landscape and ecological improvements intended to mitigate the losses associated with the development are unacceptable in scale, outcome and detail while the process and funding of a long term management regime is not determined. The proposal conflicts with Policy 106 of the St Albans District Local Plan Review 1994.

11. The applicant has failed as part of the proposed development to take mitigating measures to offset the harm of the development to ecology and the local footpath network. The proposal would conflict with Policies 97, 106 & 110 of the St Albans District Local Plan Review 1994.

12. Insufficient information has been submitted by the applicant to enable the Highways Agency to determine if there have been any material changes in circumstances in relation to the impact of the proposed development on the strategic highway network.

13. No adequate Section 106 obligation has been offered by the Applicant.

14. Insufficient information has been submitted by the applicant to enable the Local Highway Authority to determine if there have been any material changes in circumstances in relation to the impact of the proposed development on the local highway network including the A414, A405 and A5183 and the linkages to the national motorway network.

Annex B: Abbreviations

AQ	Air Quality
ASA	Alternative Sites Assessment
CMP	Countryside Management Plan
COPA	Control of Pollution Act
CLG	Department of Communities and Local Government
DEFRA	Department for Environment, Food and Rural Affairs
DfT	Department of Transport
DIRFT	Daventry International Rail Freight Terminal
DL	Decision Letter
DoE	Department of the Environment
EERA	East of England Regional Assembly
EH	English Heritage
EiC	Examination in Chief
EiP	Examination in Public
ES	Environmental Statement
FCC	First Capital Connect
FMMP	Freight Management and Monitoring Plan
GB	Green Belt
GLA	Greater London Authority
GOSE	Government Office for the South East
HA	Highways Agency
HCC	Hertfordshire County Council
HP	Howbury Park
HS	Helioslough (appellant)
IR	Inspector's Report
LGW	London Gateway
LIFE	London International Freight Exchange
LPA	Local Planning Authority
MCC	Material Change in Circumstances
MML	Midland Main Line
NPS	National Policy Statement
NR	Network Rail
PPG	Planning Policy Guidance
PPS	Planning Policy Statement
RfR	Reason for Refusal
RUS	Route Utilisation Survey
RSS	Regional Spatial Strategy
RTC	Report to Committee
RX	Re-examination
SOAF	Statement of Agreed Facts
SoCG	Statement of Common Ground
SoS	Secretary of State
SRFI	Strategic Rail Freight Interchange
SRA	Strategic Rail Authority
TA	Transport Assessment
TL	Thameslink
XX	Cross Examination
WHO	World Health Organisation