

**TOWN AND COUNTRY PLANNING ACT 1990**  
**APPEAL BY CAPEL HOUSE PROPERTY TRUST LTD**  
**IN RESPECT OF A SITE AT**  
**MONKSMOOR FARM, WELTON LANE, DAVENTRY**

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**Submissions on behalf of the Highways Agency resisting  
the costs application made by  
Capel House Property Trust Limited**

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- 1 These submissions are made in response to the application for costs being put forward by Capel House Property Trust Limited (CHPT).
- 2 As paragraph 6 of Annex 1 of Circular 8/93 makes clear the party against whom the application of costs are sought must have behaved unreasonably and this unreasonable conduct must have caused the party seeking the costs to incur wasted expense unnecessarily, either because it should not have been necessary for the matter to have been determined by the Secretary of State, or because of the manner in which another party has behaved in the proceedings (for example, because the arranged inquiry or hearing had to be cancelled or extended, resulting in wasted preparatory work or unnecessary additional expense).
- 3 In this instance there has been no unreasonable behaviour by the Highways Agency and nor has any expense been unnecessarily incurred or wasted by CHPT.

- 4 Circular 8/93 (para 12) makes clear that “In this guidance, the term "principal party" refers to the relevant planning authority and the appellant. All other interested parties are defined, for the purposes of this guidance, as third parties. Awards of costs either in favour of or against third parties will be made only in exceptional circumstances, as explained in Annex 4. Paragraph 2 of Annex 4 provides “2. Awards of costs either in favour of or against third parties, including statutory consultees, will be made only in exceptional circumstances. In general, third parties will not have costs awarded to, or against, them where unreasonable behaviour by one of the principal parties relates to the substance of the case (i.e. the appeal, or the refusal or permission, is considered unreasonable). But, where unreasonable conduct relating to procedural matters at the inquiry, or hearing, causes unnecessary expense, third parties may be awarded costs, or have costs awarded against them. An example would be an unnecessary adjournment caused by unreasonable conduct, whether of a third party or of another party”.
- 5 The Highways Agency, in accordance with the Circular, is and remains a third party. It cannot be deemed to be any other type of party such as “main party” as described by CHPT<sup>1</sup>. Hence the exceptional circumstances test applies. No such exceptional circumstances exist here. Nor on any other basis do any other circumstances arise which would justify an award of costs to CHPT.
- 6 It is notable that no other party has sought to make any application for costs against the Highways Agency. The Monksmoor developers stand alone. No other party has sought to contend that the Highways Agency has behaved unreasonably. That is with good reason: the Agency has not behaved unreasonably.
- 7 It is similarly notable that the application is made solely against the HA, notwithstanding that the work that it is alleged has not been completed in a ‘timely’ manner was commissioned and undertaken jointly by the HA and NCC to examine the impacts of the appeal proposals on both the SRN (A5) and the county road network outside Daventry Town (A45). Neither of these types of impacts had been

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<sup>1</sup> CHPT costs claim para 4

assessed in the Transport Assessment submitted with the appellants planning application, or in appeal submissions subsequently.

8 CHPT found their claim of unreasonable behaviour against the HA on three bases:

- (1) It failed to act reasonably in negotiations with CHPT over the scope of the work to be provided for the planning application made on the site by CHPT;
- (2) It failed to act reasonably in delaying until late 2008 – far too late - the work on impacts on the Strategic Road Network (“SRN”) that it should have carried out much earlier; and
- (3) It failed to take a reasonable attitude to the way that the CHPT development on the site would affect the key junction on the SRN for these purposes, namely that at the meeting of the A45 and A5.

9 The HA reject these allegations.

10 The chronology of this case is set out in the Agency’s main closing submissions. However, by way of summary the following pertain:-

- (1) The discussions which took place involving the HA, NCC and the consultants for Danetree, Churchfields and Monksmoor were in the context of the Daventry Transport Study. These were to inform, among other things the local development framework. There has been nothing to indicate that those discussions were to be by way of substitute for pre-application discussions between any of the applicants for planning permission and other public authorities including the Highways Agency.
- (2) Jeremy Hurlstone on behalf of Monksmoor confirmed (xx by PG) that he made no pre-application enquiry of the Highways Agency with regard to the scope of the transport assessment which he prepared. Indeed there is no correspondence whatsoever (whether pre-application, pre-appeal or post appeal) between Mr Hurlstone and the Highways Agency pertaining to Monksmoor’s planning application.

- (a) Such an approach is at variance with the advice contained in Guidance on Transport Assessments, Circular 2/2007 and PPG13.
- (b) In so far as it may be suggested that any party has behaved unreasonably, that allegation might perhaps best be laid at Monksmoor's door itself.
- (3) Notwithstanding this point, the Agency has decided not to pursue an application for costs against CHPT. This is despite the pro-active role of the HA in resolving the transport issues before the Inquiry, a role that has resulted in significant expenditure of public funds to undertake works to support a private enterprise.
- (4) Insofar as any contact was made with the Highways Agency for a scoping opinion (in the context of an Environmental Assessment) this was sought by Jeremy Hurlstone on 7 October 2005. In response, the Agency made clear "the EIA should include a transport assessment (TA) that assesses the impact of development on the trunk road network, particularly the A5, M1 and A45". We are told this was received in a package of information on 27 October 2005.<sup>2</sup>
- (5) It would appear that Mr Keith Day, of NCC, was regarded by Monksmoor as being the relevant spokesperson for the Highways Agency as well as NCC. with regard to all highways issues. Notwithstanding the clear views expressed by the HA it would appear that at no time did Mr Hurlstone or CHPT make a written or verbal request to the Highways Agency to try and confirm that the position set out in their 7 October 2005 letter had in any way been altered or abridged by the reference in Arups meeting notes of 27 October 2005. CHPT contend that Mr Day "was in constant and close contact with the HA throughout the period...". This point is in no way stood up by CHPT in evidence and nor is there any explanation as to why this was not pursued by CHPT with both NCC and HA. As Miss Bennett made clear in evidence [xx] that was a technical meeting attended only by a technical representative of Faber Maunsell who was a junior employee and who would have no authority either express or implied to bind the Highways Agency. But in any event the most that could be said was that HA/FM were to "provide feedback regarding the strategy for dealing with trunk road impacts".

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<sup>2</sup> CHPT/9 para 2.7

There is no express or reasonably implied justification for contending that the HA agreed to take the unprecedented departure from policy and accept that all traffic assessments submitted in support of any planning applications could ignore the impact on the trunk road network.

11 It also seems clear that Mr Hurlstone, at the time, doubted that this was the case. Paragraph 2.9 of CHPT/9 makes clear

*“Following the meeting and having read the letter from the HA, I contacted Keith Day of NCC on 28 October 2005 to discuss the stance of the HA, which appeared to be totally contrary to the philosophy of the various developers agreeing the strategy utilising the model to assess the impacts of proposals on the wider highway network. Keith Day again confirmed that the EIA should just refer to the flow increases from the model which the HA would then use to assess the implications on the trunk road to determine what improvements are required”.*

12 It is clear that Mr Hurlstone did not consider that the highways position was as he has latterly sought to contend for it. Yet without an explanation being offered by him either then or to the inquiry (xx PG) he at no time sought to clarify this point with the HA itself whether in writing or even orally.

13 What Mr Hurlstone does accept (PG xx) is that

- (1) His proposal does have a material impact on the trunk road network and
- (2) Such impact should be mitigated in accordance with Circular 2 of 2007 .
- (3) Further, transport assessments have to be carried out in accordance with the Circular and the Guidance on transport assessment and
- (4) the responsibility for the production of such rests firmly with the promoter of development (Circular 02/2007 para 47): and
- (5) His transport assessment simply did not deal with the trunk road network.

14 When the application was submitted the HA made its position clear in its consultation response dated 29 August 2007 following receipt by the Highways Agency on 13

August 2007 of the planning application dated 8 August 2007.<sup>3</sup> This set out a range of unresolved transportation issues and as the application as it stands has insufficient information to warrant a substantive response from the Highways Agency. The HA made clear the information was incomplete and the 21 day response period could not start.

15 Subsequently, in July 2008, the HA issued an article 14 direction directing the Local Planning Authority not to grant permission pending the resolution of the identified issues.

16 What is self evident is that all of these matters pre dated the appeal and the public inquiry by a considerable period of time.

17 In fact between October 2005 and the lodging of the appeals in late 2008, the appellant made no attempt to discuss their concerns with the HA.

18 Notwithstanding the HA's Direction and the clear reasons therefor CHPT still appealed the decision for non-determination even though it had at no stage resolved any of these issues, or even approached the HA with a view to resolving them

19 It is suggested that CHPT need not have appeared at the inquiry in respect of highway matters. That cannot be correct since even at this point CHPT rejects the need to provide for SBA4 which is the minimum that the HA requires (purely from the point of achieving nil detriment). In addition, the contributions offered by the appellants in respect of the bypass is at odds with the views of NCC, WNDC and DDC and this point also remains unresolved. In fact NCC, DDC and WNDC suggest that the proposal should be refused in the absence of an improved offer. Mr Hurlstone's attendance at the inquiry in order to defend the appellants position in respect of both SBA4 and bypass contributions, would have been necessary, irrespective of earlier completion of the highway modelling undertaken by the HA and NCC. The work undertaken by Mr Hurlstone in relation to the Inquiry would thereby have had to have

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<sup>3</sup> See appendix 7 HA6/3.

been carried out in any event. An analysis of modelling outputs would have had to be undertaken by Mr Hurlstone, given that such outputs were critical to the case which Monksmoor was seeking to advance in respect of the calculation of the costs of any contributions towards mitigation. Beyond that Mr Hurlstone admitted in xx that he had not engaged in any way discussions with other parties in order to develop the evidence base before the Inquiry. On this basis it is strongly refuted that the appellant has incurred any additional costs as a consequence of the actions of the HA. In fact, the decision of the HA and NCC to undertake time consuming and costly modelling has saved the appellants considerable expense.

- 20 Some criticism has been made at the delay in resolving the modelling.
- 21 Once again Monksmoor are the sole party to make this criticism or to contend that it represents a justifiable reason to seek costs against the Highways Agency. The Agency rejects this allegation.
- 22 The Agency together with NCC (see para 6) has had to expend considerable amounts of time and resources in order to ensure that there is adequate information upon which both the Agency and the inquiry could proceed.
- 23 None of the applicants had done any of that modelling themselves (as required by Circular 2/2007 and GTA). Clearly that is work that would have been done in context of the emerging LDF but was substantially accelerated as a consequence of the appeals. This work could have been done earlier (VB xx)<sup>4</sup>. Indeed it could: by the developer. The HA was, not unreasonably, working within the framework provided by WNDC (the delivery authority) to a timetable governed primarily by the LDF process.
- 24 Had the appellant desired to accelerate this process to suit their own planning application timetable then this was not communicated to the HA. In addition, it was clearly open to the appellant to undertake the work themselves to ensure they were in

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<sup>4</sup> CHPT costs claim para 16

control of their own timetable and compliant with circular advice. The fact is that the appellant at no time checked with the HA whether the work *they believed* the HA was undertaking was progressing in sufficient time to support a planning application. In any event the Highways Agency was dependent upon the modelling work undertaken by the County Council. Its analysis was exclusively derived from that information and was not available until 22<sup>nd</sup> December 2008. Indeed it did find a number of errors, inconsistencies and omissions in the outputs that it had received from NCC and it is for that reason that the first modelling notes were not issued by Faber Maunsell until 29<sup>th</sup> January 2009. Subsequent notes were issued by FM as the analysis proceeded.

25 The Agency rejects any contention that in carrying out this work (so that the inquiry could make informed decisions upon the appeals launched by the appellants) that it has behaved in an unreasonable manner given that the responsibility for transport assessment lay at all times with the appellants.

26 In relation to the HA's stance in respect of the Monksmoor proposals, that has been entirely in accordance with policy set out in Circular 02/2007. Mr Hurlstone accepted in xx that the Monksmoor proposals would have an impact on the SRN and in particular the A5/A45 junction. He also agreed (PG xx) that under the terms of the policy it was incumbent upon the developer to mitigate that impact. However, Mr Hurlstone sought to contend that the clear policy requirement set out in paragraph 28 of Circular 2/2007 was itself unreasonable. That reaction is telling as to Monksmoor's approach to these matters.

27 Notwithstanding this, it should be noted that this appellant's criticism of the HA appears to be based on a significant mis-understanding of the HAs position. Paragraph 26 of the submission suggests the HA's position is that the Monksmoor proposals should be refused, unless delivery of the bypass is guaranteed (even with SBA4). This is not correct. The HA, as clearly set out in HA15, is content to accept a proportion (depending on scenario) of the Monksmoor scheme to be brought forward in advance of certainty over the bypass, subject to SBA4 being implemented. Only

where SBA4 is not to be implemented does the HA require certainty over the bypass before any development is commenced. Additionally, the Secretary of State will have to consider whether the appellant's proposed contributions to the FWBP are adequate.

28 The appellant's position in respect of the unreasonableness of the policy position set out in the Circular underlies its stance of resisting the introduction of SBA4. The matters at issue between the appellant and the HA therefore go beyond the agreed level of contribution to the bypass and would not have been resolved outwith the public inquiry arena, even if modelling work had been completed earlier.

29 In relation to 'pain', the HA indicated at the earlier roundtable session that it might have been prepared to consider some temporary degradation in the performance of the A5 / A45 junction. The HA did give thought to this. However, in the absence of a proposal from any of the appellants indicating the level of pain that might be expected and its duration, it was unable to determine any reasoned basis for establishing such a level. This position was clearly indicated in the proof of evidence of Ms Bennett (submitted in April 2009 and re-iterated in rebuttal) and all appellants were therefore invited to assist the HA with further information. Even at the close of the Inquiry, no party, including Monksmoor, have responded to this request.

(1) As recorded in evidence, the emergence of the SBA4 scheme has rendered such discussions irrelevant. Clearly, the point was initially raised by the HA in an attempt to be pro-active and to identify solutions to the highway issues before the Inquiry. Both the HA and NCC have taken the lead in moving matters forward productively and constructively as, latterly have WNDC (SBA4) and Danetree (forward funding scheme). The Churchfields team have also given consideration to solutions as demonstrated through their 'roundabout in a field' scheme. It is additionally disappointing to note the absence of constructive contribution from Monksmoor, which makes their accusation that others have been 'opportunistic' even more difficult to understand.

- 30 It is contended by Monksmoor that the HA has take an unreasonable attitude to the way that the Monksmoor site affects the A5/A45 junction.
- 31 The HA rejects that criticism. The impact of the proposed development was and is material. JH accepts that there is no policy basis for the clear policy in C2/2007 not to apply to the Monksmoor site.
- 32 Further, and in the absence of any proposals whatsoever being forthcoming from CHPT there was an objection to the Monksmoor site that subsisted until it was satisfactorily resolved. Even now, CHPT resist accepting the appropriateness of the application of the mitigation provided by SBA4 to their site. Indeed, the suggestion that the HA's work was in effect simply to facilitate a calculation of what CHPT might now consider that it wishes to contribute to the Flore Weedon Bypass (a method of calculation which is at variance with that adopted all other parties to this inquiry, save Churchfields) further reinforces the artificial air which permeates this costs application
- 33 By reason of the matters set out above the Secretary of State is respectfully ask to reject CHPT's application for costs.

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