

Airport planning application

Carlisle City Council

Audit 2009/10

Summary report

Introduction

- 1 I am the external auditor appointed by the Audit Commission to audit the accounts of Carlisle City Council (the Council) for the financial year ended 31 March 2010.
- 2 Since November 2008 several local electors have raised concerns with me in correspondence about:
 - the lease agreement between the Council and the operator of Carlisle Airport;
 - the Council's handling of a planning application relating to the airport in the 2008/09 financial year; and
 - the Council's decision in May 2009 to contest a judicial review, which it eventually lost, of the grant of planning permission.
- 3 In August 2010 a local government elector made an objection to the Council's 2009/10 accounts under Section 16 of the Audit Commission Act 1998 (the Act). The objector asked me to:
 - make an application to the court under section 17 of the Act to confirm that an item of account is unlawful and to order rectification of the accounts; and
 - issue a report in the public interest under section 8 of the Act to bring the matter to the attention of the public.

Background

- 4 The objection concerns costs estimated by the objector at £0.25 million incurred by the Council in preparing for and unsuccessfully contesting a judicial review of a planning decision taken in December 2008.
- 5 The substance of the objection is that the Council acted unlawfully over a planning application for development at Carlisle Airport and then contested:

"a judicial review in the face of legal advice to the contrary."

The objector asserted that this was:

"a serious misuse of public funds by a Council who have succumbed to bullying of a developer and ignored the duties to the tax-paying public."

- 6 By way of background, in October 2007 the developer - a major employer in Carlisle and Cumbria - made the first planning application for development at Carlisle Airport.

7 In April 2008 the Council's Development Control Committee (DCC) resolved to refer the application to the Secretary of State as a Departure from the Development Plan. A Departure is a proposed development that is not in accordance with a local plan, but which due to exceptional circumstances the local planning authority proposes to accept.

8 In June 2008 the Secretary of State called in the airport application so it could be considered at a Public Inquiry. In July 2008 the developer chose to withdraw the application. The Public Inquiry did not go ahead.

9 In October 2008 the developer put in a second application for a smaller scale development at Carlisle Airport. Unlike the first application, the second included no airside works relating to, for example, the runway or a passenger terminal.

10 On 19 December 2008 the Council's DCC gave the Head of Planning and Housing Services authority to issue approval for the proposal, subject to completion of a Section 106 Agreement on future airside works. A Section 106 Agreement is a binding agreement between a council and a developer associated with a grant of planning permission and regarding matters linked to the proposed development. Both parties signed an agreement and the Council granted planning permission on 12 March 2009.

11 Solicitors acting for Mr G Brown issued Judicial Review proceedings in April 2009 to overturn the planning approval granted by the Council. On 1 May 2009 the DCC decided the Council would contest the Judicial Review. The Council's defence was twice successful in the High Court in June and October 2009, but in December 2009 Mr Brown was given permission to appeal. On 19 May 2010 Mr Brown succeeded in having the planning permission quashed in the Court of Appeal.

12 The Council was ordered to pay Mr Brown's costs, which were eventually agreed at £105,000. In addition the Council incurred:

- its own external legal costs, such as advice from Counsel and representation in Court, which it has quantified as £80,460 excluding VAT; and
- in-house costs, such as the costs of legal and other officers' time.

13 In reviewing the matters raised by the objection, I considered it necessary to look also at the way in which the Council dealt with the two planning applications it received in respect of the airport in my capacity as the Council's appointed auditor.

14 The Council has now received and is processing the developer's third application for development at Carlisle Airport. The aim of this report is to draw attention to defects in the Council's arrangements that I believe contributed to the situation outlined above and to seek to ensure that lessons are learned for major planning applications in the future.

Conclusions

15 In my view there is no unlawful item of account. A decision as to whether I should exercise my discretion to apply to the court for a declaration under section 17 of the Act does not therefore arise.

16 I have considered carefully whether I should issue a Report in the Public Interest under Section 8 of the Act. My view is that I should exercise my discretion not to issue a section 8 report, because the Council has agreed to publish this audit report, consider it at a full Council meeting on 13 September 2011 and publish its response to my findings and recommendations in the form of an action plan.

17 I have summarised my overall conclusions below.

Overall conclusion

18 The Court of Appeal determined that the Council made a wrong planning decision. That is not a matter for my audit, unless the Council did so wilfully or reached a decision that was so unreasonable that no reasonable body could have made it. I do not believe that is the case based on the evidence I have seen - both in relation to the planning decision itself and to the decision to contest the subsequent judicial review.

19 However, I do believe that mistakes were made when the two applications relating to the airport redevelopment were received and that there are lessons to be learned for the management of future major planning applications.

The separation of planning and economic development considerations

20 The Chief Executive is responsible for leading and directing operations in accordance with the Council's policies and objectives. In doing so, she works to the Leader. As such, she is chief executive of the local planning authority and has a responsibility for the proper oversight of both economic development and development control activities. It is entirely appropriate for her to maintain oversight of development control matters. But at times there can be tensions between the dual roles for:

- economic development, championing the local economy; and
- development control, where as local planning authority the Council must act impartially and objectively within a statutory and policy framework.

21 The two airport applications have both been high profile and attracted much press coverage. There were some perceptions both within and outside the Council that there may have been a blurring of the Council's economic development ambitions and its regulatory planning role.

22 In fact, my review has confirmed that senior officers are aware of the Council's separate roles in economic development and planning. Indeed there is evidence that they stressed this to the developer and that, as a result, relations between the developer and Council were, at times, adversarial and not indicative of a cosy relationship. For example, the Council did refer the first application as a Departure as a consequence of which it was called in.

23 However, I have also found evidence that, at times, officers and members did not demonstrate the distinction between these roles in the way they behaved. This contributed to perceptions in some quarters, illustrated in a formal complaint from a member of the public, that the Council was compromising its regulatory planning role. For example:

- during the first application some members of the DCC seemingly felt the Chief Executive had been "*pushing*" the developer's case;
- the Council Leader was pictured in local newspapers shaking hands with the developer's Chief Executive immediately after a meeting to negotiate planning conditions; and
- the Chief Executive exerted pressure on planning officers which she has stressed to me was intended only to accelerate the planning process, in respect of the timing of the reports and to encourage officers to be more effective, but which was interpreted by them as her seeking to influence the outcome.

24 I also question if it was advisable for the Council Chief Executive to accept an invitation from the Chief Executive of North West Development Agency (NWDA) to chair a stakeholder meeting in July 2008, accompanied by the Council Leader, at which the developer's planning intentions and timescales were discussed. This meeting was attended by representatives from a range of stakeholders including the NWDA, Government Office for the North West (GONW), Cumbria County Council, Cumbria Vision and others. Chairing such meetings can be a key part of the local authority chief executive role, but having already encountered perceptions that she was "*pushing*" the airport case to the detriment of planning considerations, more caution might have been exercised.

Managing the consideration of significant planning applications

25 Whilst I have found no evidence of bias in the final decisions taken by the Council, there are aspects of the handling of these high profile applications which may have undermined public confidence in the Council. There is a need to put in place added safeguards to protect the Council's reputation when handling major planning applications in the future.

26 The Chief Executive has described the airport redevelopment as a "*once in a lifetime*" scheme for the area which was consistent with regional, sub-regional and Council economic strategies. This reflects not just the scale of the applications but:

- the potential economic benefits to Carlisle of airport development;

- the possible consequences if the scheme did not proceed. Officers believed there was a genuine risk that the developer - the main employer and investor in the city - might leave Carlisle; and
- the level of public and media interest.

27 Despite this, when the first application was submitted in October 2007, no special arrangements were put in place by the Council to ensure that such a complex application could be handled within a reasonable timeframe or to demonstrate that the Council's economic development interests would not affect its planning responsibilities for such a "once in a lifetime" opportunity.

28 The Chief Executive has told me she became concerned in early 2008 that the planning application was not being handled well by the Council and Government targets were likely to be missed. She was aware the developer was becoming concerned about progress and there was a growing public perception that the application "had the potential to drift on". She told me she offered additional resources to the planning team, but this offer was declined. However, planning officers have told me they had concerns about the difficulties they had in getting information from the developer necessary to process the application. They could not recall any offer of additional support.

29 Once it was clear that the first application would not be ready for a decision to be made at the 15 February 2008 DCC meeting, the Chief Executive became involved. She discussed the way forward with the Director of Development Services and the Head of Planning and Housing Services and it was agreed that the application would go to the DCC on 28 March 2008. This is highly unusual because the Director of Development Services and the Head of Planning and Housing Services apparently did not consult:

- the Chair of the DCC about the date of this meeting; or
- the Development Control Manager, who was responsible for managing the application. He has said subsequently that he would have preferred more time so that all information received could have been considered and included in his report.

30 The Chief Executive has told me that her personal circumstances in the spring of 2008 meant that at times her involvement often had to be by telephone, in less than ideal circumstances, which made effective management and communication difficult.

31 In the event, the DCC was unable to determine the application on 28 March 2008 because some information requested from the developer had been received only in the previous day or so. As a result, the conditions attached to the application were likely to need rewording. The DCC met again on 4 April 2008, but was again unable to approve the application. At the next meeting, 25 April 2008, the application was approved as a Departure from the Development Plan. It was called in by the Secretary of State in June 2008 for consideration at a public inquiry. It was subsequently withdrawn by the developer.

32 The developer's stated preference to have the second airport application considered at the December 2008 DCC meeting, which was comfortably within the relevant Government target, contributed to the pressure on planning officers dealing with that application. It was clear that the Chief Executive was committed to working within the developer's desired timescales which she believed were entirely reasonable. I can understand the Development Control Manager's perception that the Chief Executive, by saying she would write the planning report herself, added to those pressures. There is conflicting evidence about what else the Chief Executive may have said to planning officers.

33 Such pressures contributed to the Development Control Manager's statement that he deliberately worded the Officer's Report in an unusual and non-committal way, because he was professionally unhappy with the situation he found himself in.

34 It is now clear that the Chief Executive had some concerns about the way in which planning officers handled these applications. However, I note that these concerns did not lead to any consideration of performance or conduct in line with the Council's HR policies and performance management framework.

Obtaining legal advice

35 The Council obtained Counsel's opinions in September and November 2008 in respect of the second airport planning application.

- The first opinion addressed whether an Environmental Impact Assessment (EIA, which evaluates the likely environmental impacts of a development and is required in relation to certain types of development projects specified in legislation) was necessary and whether it must include the future airside works. Counsel's advice that the Council needed to give this proper consideration was not acted upon fully. The rationale for eventually accepting a two-stage approach to the EIA, under which environmental assessment of the airside works was deferred to a possible later stage, was not documented at the time. The Officer's Report and the DCC meeting failed to address the issue, despite the Council's position being challenged by Mr Brown's solicitor and another member of the public. These failures were subsequently critical to the outcome of the Judicial Review.
- The second opinion considered whether a Section 106 Agreement was a suitable mechanism for ensuring that the airside works, which the Council was in favour of, came to fruition. Counsel accepted it could be in principle, but on the evidence he saw, which included draft Heads of Terms for the Section 106 Agreement, was not satisfied that all the tests were met. Officers did not consult Counsel again on that issue.

36 In my view, in both instances it would have been advisable to consult Counsel again as the application progressed and the Section 106 agreement was fleshed out. It would also have been appropriate to brief DCC members more fully on Counsel's observations and how officers had addressed them. It is not clear to me that officers ensured that, in making their decision on the second application, members were able to take all relevant factors into account.

Contesting the Judicial Review

37 Faced with a Judicial Review application, the Council obtained clear advice from Counsel not to contest its alleged failure to assess the environmental impact of the airside development properly. Ultimately that advice proved to be correct in the Court of Appeal.

38 However, a combination of pressure from the developer, whose two legal advisers contradicted the Council's one, and the intervention of the Chief Executive and Council Leader, who discussed their concerns with the Head of Legal Services, led the Council to seek a second opinion at a late stage. I accept that was a reasonable action to take. The second opinion, from another specialist in planning law, contradicted the Council's first one and said the Council had grounds to resist the judicial review.

39 The Council now had two Counsels' opinions that differed starkly on the prospects of successfully defending the grant of planning permission. It is my view that when the DCC met to decide whether to contest the Judicial Review, members took too little time to read legal documents that were tabled. However, a barrister and the Head of Legal Services explained the Council's two legal opinions and the associated risks of each in a balanced way - if anything, they erred towards not defending the claim.

40 I conclude therefore that members were properly appraised of the issues and risks of the two courses of action open to them in respect of the application for Judicial Review. In reaching their decision, DCC members took account of the Council's economic development aims, which does not seem to me unreasonable. However, they also took account of the interests of the developer. In my view, members afforded too much weight to the developer's reduced prospects of defending the Judicial Review without the Council standing alongside.

41 That the Council successfully defended its position twice in the High Court demonstrates the legal arguments that eventually prevailed in the Court of Appeal were finely balanced. I do not therefore accept the objector's argument that the Council unreasonably committed "*a serious misuse of public funds... and ignored the duties to the tax-paying public*".

42 On the balance of the evidence available to me, I do not believe the decision to contest the Judicial Review was an unreasonable exercise of the Council's discretion. It is, however, true that had the Council:

- accepted the clear advice of its first Counsel, rather than seeking a second opinion at a late stage under pressure from the developer; and
- examined the arguments put to it by Mr Brown's solicitors and a member of the public before granting planning permission on 19 December 2008:

it could have avoided incurring its own and Mr Brown's legal costs in contesting his application for Judicial Review.

The role of members

43 There is no evidence that the outcome of the December 2008 DCC meeting was predetermined. However, I am surprised that members:

- asked just two questions of Council officers about the second application, despite its complexity and high-profile;
- failed to pick up on the EIA issue, despite receiving representations on it from a member of the public and Mr Brown's solicitor; and
- did not query the non-committal wording used in the Officer's Report which deliberately stopped short of a clear recommendation to members.

44 Members of the Committee have told me that training for DCC members could be improved.

45 With regard to their decision whether to contest the Judicial Review, whilst I consider the decision itself was reasonable, I am concerned that DCC members:

- took insufficient time to read documents which were tabled at the start of the meeting on 1 May 2009; and
- took account of factors that were not directly relevant to the decision they needed to make.

Next steps

46 The Council now needs to consider carefully the issues I have raised in this report and my recommendations that I have summarised below. It then needs to agree the detailed actions needed in response and oversee their implementation. I intend to review the progress made as part of my current audit.

Summary of recommendations

R1 Strengthen arrangements for safeguarding and demonstrating the integrity and transparency of the regulatory planning process and ensuring it is not unduly influenced by economic development aspirations.

Summary of recommendations

- R2 Ensure that planning applications do not proceed to committee stage until supported by the information that planning officers require to properly report the matter to members.
 - R3 Ensure that where legal advice identifies issues requiring resolution, such issues are demonstrably resolved. This may involve seeking further legal advice to confirm the adequacy of actions taken.
 - R4 Ensure that reports to Committee are clear on the nature of legal advice obtained and actions taken as a result.
 - R5 Review the existing "Members Planning Code of Good Practice" to ensure it adequately covers the requirements on officers. This will ensure that Planning Officer Reports include a clear recommendation or, exceptionally, clarify why no recommendation has been possible.
 - R6 Ensure important professional planning judgements receive sufficient attention and are adequately documented on a timely basis.
 - R7 Review the provision of specialised training for members of the Council's Development Control Committee and other committees that fulfil specific statutory roles.
 - R8 Ensure that where independent legal advice is required it is obtained on a timely basis, including any requirement for a second opinion.
 - R9 Avoid tabling important documents in Committee meetings. If, exceptionally, documents cannot be circulated in advance members must take sufficient time to properly read and consider all new information.
 - R10 Ensure that decisions only take into account relevant considerations and do not, for example, afford undue weight to the interests of third parties.
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Detailed report

Introduction and brief history

47 The objection concerns costs estimated by the objector at £0.25 million incurred by the Council in preparing for and unsuccessfully contesting a judicial review of a planning decision taken in December 2008.

48 The substance of the objection is that the Council acted unlawfully over a planning application for development at Carlisle Airport and then contested

“a judicial review in the face of legal advice to the contrary.”

49 The objector asserted that this was

“a serious misuse of public funds by a Council who have succumbed to bullying of a developer and ignored the duties to the tax-paying public..... the Council appears to be biased towards the developer.”

50 The objector asked me to:

- make an application to the court under section 17 of the Audit Commission Act 1998 (the Act) to confirm that an item of account is unlawful and to order rectification of the accounts; and
- issue a report in the public interest under section 8 of the Act to bring the matter to the attention of the public.

51 By way of background, in October 2007 the developer - a major employer in Carlisle and Cumbria - made the first planning application for development at Carlisle Airport. The application included significant warehousing and airport-related developments.

52 In April 2008 the Council's Development Control Committee (DCC) resolved that the Council would refer the application to the Secretary of State as a Departure from the Development Plan. A Departure is a proposed development that is not consistent with a local plan, but which due to exceptional circumstances the local planning authority proposes to accept.

53 In June 2008 the Secretary of State called in the airport application to be considered at a Public Inquiry. In July 2008 the developer decided to withdraw the application. The Public Inquiry did not go ahead.

54 In October 2008 the developer put in a second application for a smaller scale freight storage and distribution facility (referred to from now on as non-airside works) at Carlisle Airport. Unlike the first application, the second included no airside works relating to, for example, the runway or a passenger terminal.

55 On 19 December 2008 the DCC gave the Head of Planning and Housing Services authority to issue approval for the proposal, subject to completing a Section 106 Agreement on future airside works. A Section 106 Agreement is a binding agreement between a council and a developer associated with a grant of planning permission and regarding matters linked to the proposed development. Both parties signed an Agreement and the Council granted planning permission on 12 March 2009.

56 Solicitors acting for Mr G Brown issued Judicial Review proceedings during April 2009 to overturn the planning permission granted by the Council. On 1 May 2009 the DCC decided the Council would contest the Judicial Review. The Council's defence was twice successful in the High Court in June and October 2009, but in December 2009 Mr Brown was given permission to appeal. On 19 May 2010 Mr Brown succeeded in having the planning permission quashed in the Court of Appeal.

57 The Council was ordered to pay Mr Brown's costs, which were eventually agreed at £105,000. In addition the Council incurred:

- its own external legal costs, such as advice from Counsel and representation in Court, which it has quantified as £80,460 excluding VAT; and
- in-house costs, such as the costs of legal and other officers' time.

58 In reviewing the matters raised by the objector, I considered it necessary to look also at the way in which the Council dealt with the two planning applications it received in respect of the airport in my capacity as the Council's appointed auditor.

59 The Council has now received and is processing the developer's third application for development at Carlisle Airport. The aim of this report is to draw attention to weaknesses in the Council's arrangements that I believe contributed to the situation outlined above and to seek to ensure that lessons are learned for future major planning applications.

60 The rest of this Detailed Report is based on a chronology covering the period from October 2007 to May 2010. I set out my detailed findings, conclusions and recommendations in four sections covering:

- the first planning application;
- the second planning application;
- deciding whether to contest the Judicial Review; and
- contesting the Judicial Review.

The first planning application

61 While the objection to the Council's 2009/10 accounts was about the second application and later Judicial Review proceedings, there are matters from the first application which are relevant to what happened subsequently.

Handling the first application

62 In October 2007 the developer made the first planning application for development at Carlisle Airport, which it leases from the Council. The application included:

- construction of a replacement runway;
- warehousing and distribution facilities;
- a new passenger terminal;
- offices;
- hangars;
- a new air traffic control centre; and
- other associated infrastructure and facilities.

63 The Council's Chief Executive has told me that she became concerned early in 2008 that planning officers had fallen behind in their handling of the application and that Government timescales could be missed. The application was high profile. The Chief Executive was aware of concerns raised by the developer and a growing public perception that the application *"had the potential to drift on"*. She told me that:

- in her opinion, managers should have "had more of a grip" and were not effective in their roles;
- she felt planning officers were "dealing with the airport application in a desultory way";
- the Planning Team was "sinking"; but
- her offer of extra resources for the planning service, so that the airport application could be given sufficient attention, was declined by the Head of Planning and Housing Services.

64 The relevant Government target for deciding major applications is 16 weeks from when the application and environmental statement are received by the Planning Authority. Assuming that the application and environmental statement were complete when first submitted, the target date would have been 5 February 2008. However, planning officers have stated that the original environmental statement was inadequate and there were problems getting information and clarifications from the developer. Planning officers also had no recollection of being offered additional resources.

65 The DCC had been due to consider the application at a meeting on 15 February 2008, but the meeting had to be cancelled because the Council was awaiting responses from some key consultees and more information was being sought from the developer. On 5 March the Chief Executive met with the Director of Development Services and the Head of Planning and Housing Services. It was agreed that a special meeting of the DCC would take place on 28 March 2008 to consider the application.

66 The Development Control Manager, whose job it was to manage the application process for the Council and write the necessary Committee report, was apparently not consulted by his line manager about the date of the meeting. He said subsequently that he had never known a chief executive becoming involved in setting a planning committee meeting date before. He also said that with regard to the 28 March deadline, he would have preferred more time so all information received could have been included in his report. However, he had to work with the information available at the time.

67 The Council's Economic Development Strategy, the Sub-Regional and North West Economic Development Strategies recognise the importance of the airport development for Carlisle. However, the Chief Executive has made clear to me that she recognised the dual role of the Council. It has a remit for economic development, but that must be kept separate from its statutory role as the Planning Authority for the area. The Chief Executive has assured me that her only concern was to ensure the new timescale was adhered to and that she did not in any way seek to influence outcome of the application.

68 The Council's Chief Executive has told me that her personal circumstances in the spring of 2008 meant that at times she could only discuss matters with her managers by telephone, in less than ideal circumstances, which made effective management and communication difficult.

69 The Chief Executive also told me that on 28 March the Chair and two other members of the DCC "demanded" a meeting with her during a short adjournment in the DCC meeting. They raised concerns that:

- the Chair had not been consulted by officers about the date set for the DCC which had been imposed; and
- the case for the airport "was being pushed".

70 The Chief Executive told me that the meeting was prompted by the Development Control Manager "lobbying" against her, a suggestion which he denies. I have interviewed the three councillors concerned and none had a clear recollection of the meeting or what prompted them to request it. However, the Chief Executive wrote to them after the meeting to respond formally to the matters they had discussed. The letter:

- said the decision to set a 28 March deadline for the application to go to the DCC had proved helpful as it:

"really did focus the efforts of Planners, Consultants and the Applicant and it did help to bring together all the outstanding information....."

- recognised the Council's dual roles:

"I have worked very hard to keep those positions separate, but I do need to emphasise that my main role as Chief Executive is to champion the development of the Airport. Having said that I am acutely aware of your

role and that of the Development Control Committee. I also clearly understand the role of the Planning team in terms of its own statutory duty."

71 I note that the Chief Executive's concerns about the way in which planning officers were managing this application did not lead to any consideration of performance or conduct in line with the Council's HR policies and performance management framework.

72 Although 28 March 2008 was set as the deadline for determining the application, it actually took several meetings before the DCC was able to conclude its consideration of it.

- At the 28 March 2008 meeting the Head of Planning and Housing Services circulated the draft conditions submitted by the developer. He *"cautioned that as much of the information had been received over the last day or so, some of the conditions would require rewording....."*. The meeting was adjourned for 25 minutes to allow members to read the draft conditions. After hearing representations from members of the public and questioning officers, members

"RESOLVED – That whilst the Committee are minded to approve the application at Carlisle Airport and forward the application and related documents to the Government Office North West for determination under the Departure Procedures the meeting be adjourned to enable the full Committee to give detailed consideration to the draft Conditions which had been circulated at the meeting."

- The DCC reconvened on 4 April. The Head of Planning and Housing Services outlined correspondence that had been received in the intervening seven days and tabled a new set of draft conditions received from the developer. Members:

"expressed disappointment and concern that they had only just received sight of the suggested draft Airport conditions submitted by the Applicant"

and:

"RESOLVED – That the Committee was minded to approve application 07/1127 for development at Carlisle Lake District Airport subject to conditions, the broad content of which was as detailed in report DS.50/08 (subject to possible modifications that might arise in responses awaited from Statutory Consultees and the Consultants appointed by the Council and from consideration of the issues raised by Cumbria Wildlife Trust), and to the attainment of a Section 106 Agreement securing the necessary mitigation measures for the loss of habitat within the County Wildlife Site at

the Airport. The Committee further ratified that, when all appropriate technical input into final wording had been obtained, the application and related documents be referred to the Government Office for the North West under the Departure procedures."

- Following the meeting, press reports suggest the developer threatened to move their other business interests away from Carlisle. Senior Council officers have told me that they believed such threats were genuine and would have serious implications for jobs. Meetings between the developer, planning officers and other Council representatives took place on 7 and 10 April to resolve outstanding issues affecting the planning conditions. The meeting on 7 April was initiated by the Council Leader and attended by him and the Deputy Chief Executive. I have seen no minutes of that meeting, but other available records clearly demonstrate that a detailed discussion of planning conditions took place. Although the Council Leader did not attend the meeting on 10 April, he was photographed immediately following the meeting shaking hands with the developer's Chief Executive outside the Civic Centre. This photograph appeared in the local press with a statement that "they shook hands on a revised list of conditions for the plan".
- On 25 April 2008 the DCC met again to consider revised conditions and:

"RESOLVED – That, subject to the receipt of further clarification where information was outstanding, the revised Schedule of Conditions, coupled with the attainment in due course of a satisfactory Section 106 Agreement to secure mitigation/compensation for habitat loss (as previously required by the Committee), be approved as the basis on which the Council would refer the application to the Secretary of State as a "Departure" from the Development Plan."

73 In June 2008 the Secretary of State called in the airport application to be considered at a Public Inquiry. In July 2008 the developer chose to withdraw the application.

Complaint from a member of the public

74 The Council's handling of the first application was the subject of a formal complaint by a member of the public, indicating that concerns about its handling extended outside the Council. The complaint was wide-ranging, including that:

"the process that the Council used for dealing with the application had been characterised by rush, incompleteness and pressure from the applicant".

The complainant contended that the date for the DCC meeting had been set when it was known that the application was incomplete and draft conditions had been tabled at the meeting with insufficient time for Members to scrutinise them.

75 The complaint was investigated and subsequently heard by the Council's Appeals Panel Number 1 on 8 and 15 September and 19 December 2008. At the 15 September meeting the Appeals Panel interviewed the Development Control Manager about the application. The Panel asked him several questions including:

- had there been any external pressures that may have affected Officers' handling of this application?
- had there been unusual pressures of time during this application?
- the effect of the large amount of information involved in this case;
- guidance given to this and previous applicants;
- if any discussions had taken place between the first and second Council meetings; and
- if anything had taken place that could have been construed as favourable to the developer.

76 At its 19 December meeting the members of the Appeals Panel asked the Chief Executive and the Council Leader questions which included:

- had there been meetings between the Developer and the Chief Executive and the Leader, why had they become involved in the application?
- had the application been rushed through unnecessarily or to comply with outside pressure?
- had the Planning Section been protected from any of the articles in the media? and
- what were the normal practices and processes for dealing with major applications such as this one?

77 Minutes of the Appeals Panel do not record respondents' answers to those questions. The Appeals Panel:

".... were satisfied that the process of dealing with the airport application had been carried out correctly and that the change in the timing of the Development Control Committee did not affect the overall decision of the Committee

.... found that the meetings held between the Applicant, the Leader of the Council and the Chief Executive were normal practice but planning matters were not discussed at the meetings and none of the meetings included any member of the Planning Section."

78 The available records of the meeting held on 7 April 2008 (paragraph 72 above refers) clearly indicate that a detailed discussion of 25 or more planning conditions took place at that meeting, which was initiated and attended by the Council Leader. This contradicts the second part of the Appeals Panel's conclusion above, as do the minutes of the stakeholder meeting on 14 July 2008.

Conclusions

79 The first application was high profile and attracted much press coverage. There were some perceptions that the application was handled differently from other applications - that unusual time pressures were imposed and that there may have been a blurring of the Council's economic development ambitions and its regulatory planning role. Whilst I have found no evidence of bias in the final decision, I believe that mistakes were made that fueled such perceptions. There is a need to put in place added safeguards to protect the Council's reputation when handling major planning applications in the future.

80 I note that the Chief Executive's concerns about the way in which planning officers were managing this application did not lead to any consideration of performance or conduct in line with the Council's HR policies and performance management framework. This meant that, notwithstanding her concerns, the same officers would deal with the second application.

Recommendations

- R1 Strengthen arrangements for safeguarding and demonstrating the integrity and transparency of the regulatory planning process and ensuring it is not unduly influenced by economic development aspirations.
 - R2 Ensure that planning applications do not proceed to committee stage until supported by the information that planning officers require to properly report the matter to members.
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The second planning application

81 After the developer withdrew the first application on 7 July 2008, various meetings took place between the developer and the Council.

82 The Council's Chief Executive accepted an invitation from the Chief Executive of North West Development Agency to chair a meeting of airport stakeholders on 14 July 2008. This meeting was attended by the Leader of the Council and four representatives of the developer along with representatives from a broad range of stakeholders including:

- North West Development Agency;
- Government Office for the North West;
- Cumbria County Council;
- Carlisle Airport;
- The Chamber of Commerce;
- Cumbria Vision;
- Carlisle Renaissance Board; and
- Carlisle Partnership.

83 At this meeting, the Council's Chief Executive underlined the Council's "dual roles" for economic development and planning. Notes of the meeting record the developer's Chief Executive stating his intent to put in a new application and that his time-frame was six months. Actions from the meeting included "*Ensuring that the application is dealt with within the shortest time-frame*".

84 The new application was proposed to be significantly different to the first, with no airside works, although such works were still part of the developer's future intentions. Council planning officers met with the developer twice later that month.

- The Head of Planning and Housing Services' notes record that during a meeting on 25 July 2008 the developer's Chief Executive expressed a desire to submit an application that would not be called in.
- Similar notes of a meeting on 31 July 2008 suggest a possible difference of opinion between the Council and the developer over whether the developer's proposed application for just a warehouse and haulage depot would be a Departure Application. Officers said the Council would be seeking Counsel's opinion on that matter and on whether a stand-alone application would require an Environmental Impact Assessment (EIA). An EIA evaluates the likely environmental impacts of the development, with an assessment of how the severity of the impacts could be reduced and is required in relation to certain types of development projects specified in legislation.

85 Following that meeting the Council asked Counsel to:

- consider the issue of linkage between the proposed haulage depot and the redevelopment of the airport and advise on the most suitable means of ensuring that airside works, which the Council wanted to see, would be completed;

- advise on whether an EIA would be necessary; and
- advise on the argument being put forward by the developer that an application for a haulage depot alone need not be a Departure Application.

86 The resulting Counsel's opinion dated 3 September 2008 identified "a number of concerns" about the developer's "possible strategy" including:

- on the EIA issue:

"...it may nevertheless be considered EIA development requiring submission of an ES (*environmental statement*) if in reality the proposal 'is properly to be regarded as an integral part of an inevitably more substantial development'. This will be a question of fact for the Council to determine";

and:

"whether.... an EIA is nevertheless required (for the passenger terminal use and/or the haulage development) whether individually or because they are an integral part of an inevitably more substantial development (this would need to be considered further on the facts)";

- that haulage use appeared to be a departure from the Local Plan.

87 Counsel concluded that:

"The sensible way forward would be for the applicants to resubmit their withdrawn application and to expect to argue the matter at a public inquiry.....

.... I would advise that they be encouraged to resubmit the withdrawn application (assuming that they have confidence that it will be permitted on appeal)."

88 In a meeting with the developer on 4 September 2008, the Council's Head of Legal Services stated that the Council was supportive of the application. However, as the Local Planning Authority it had to "keep things at arm's length". He restated Counsel's advice as "*Environmental assessment was required particularly when taking into account the cumulative impact of the development*". He also stated Counsel's advice that "*it would be better to resubmit a whole application*". However, the developer's legal adviser "*stated a repeat application was out of the question as it would be "called in" and they would run out of time*". The developer stressed the desire for the DCC to consider the application at its 19 December 2008 meeting (within the developer's six month timescale stated at the meeting on 14 July 2008). The Council's Head of Planning and Housing Services said this was "*technically possible.... but it was an extremely tight timetable*". The Government target would have allowed until 4 February 2009.

89 The second application was submitted to the Council on 14 October 2008. At the same time the developer published a brochure - "Carlisle Airport: Towards a sustainable future" - that was critical of the Council's and others' past actions. For example, it said:

"At the end of June the development plans for Carlisle Airport, which had been in the news for over a year, died.....

After many delays the application went before the Council's Planning Committee at the end of March 2008. Attached to it were some 60 roughly drafted conditions which had not been discussed with [us] in advance....

A critical point was the Council's assertion that the proposed development was a departure from the Development Plan.... "

90 The second application sought permission for a distribution centre, refrigeration facilities and offices on land at the airport that would enable the developer to move their Carlisle haulage operations to the airport. Unlike the first application it did not include any airside development. Smaller scale airside works were still proposed, but the developer considered they would not require planning permission as they would be covered by Permitted Development Rights [that is, rights to carry out certain limited forms of development without the need to make an application for planning permission]. Based on legal advice it had obtained, the Council was not convinced about the Permitted Development argument and officers contend that they reserved the right to require a full planning application and environmental assessment of the airside works at a later date.

91 The first application had been supported by an EIA of its airside and non-airside aspects, but that application was withdrawn. The second application was supported by an environmental assessment which addressed only the non-airside development covered by the application. This was despite what the Head of Legal Services had told the developer on 4 September 2008 (paragraph 88 refers).

92 Within the Council's Planning Services, responsibility for managing the second application was divided between two senior officers as follows.

- The Development Control Manager was responsible for technical planning issues, all consultation and drafting and presenting the Officer's Report to the DCC.
- The Head of Planning and Housing Services would deal with the EIA.

93 As explained previously, a Departure Application is one that is not compliant with one or more local planning policies. Planning authorities must refer Departure Applications to the Secretary of State who can then decide whether to call in the application - as happened with the first application. However if, by imposing planning conditions, a Planning Authority can make what would otherwise be a departure application compliant with all local planning policies, then the Council can decide the application without referring it.

94 The Council believed the proposed non-airside development was a Departure when considered in its own right and advertised it as such initially. However, it also viewed any future airside works as desirable in economic terms and planning policy compliant. Such development could only be facilitated if the non-airside works, which were said to be required to make the airport as a whole viable, went ahead.

95 The developer, supported by their own legal advice, disagreed with the Council over the Departure issue. Council officers with responsibility for legal and planning issues met with the developer on 12 November 2008 to discuss various matters, including the Departure aspect. Notes taken by the Council's Head of Planning and Housing Services record the developer's position as follows:

"If it is advertised as a departure it will not go ahead. It is out of [the developer's Chief Executive's] hands. Company will form its view from the Departure advertisement. He will be suing the Council big time!!"

96 The developer proposed a Section 106 Agreement as a way forward to address the Council's concerns. Together the Council and the developer devised Heads of Terms for a Section 106 agreement which, in practical terms, would mean that developer could undertake the non-airside development, but could not make it operational until airside works physically began. Effectively the Council sought to ensure the airside works it favoured would have to happen, with the non-airside works necessary to make the whole financially viable.

97 The Council obtained its own legal advice on the Departure issue and the draft Heads of Terms for the Section 106 Agreement. Counsel's Opinion dated 27 November 2008 covered the issues in detail. Its conclusions included that:

"a section 106 obligation can in principle affect the 'accordance' of the proposal with one or more provisions of the development plan."

but:

"...it does not appear at present possible to conclude that a section 106 would ensure that the development accords with the provisions of the development plan."

and:

"... in my view it is open to the Council, as a matter of law, to take the view that the application is a departure application. The point is a narrow one, limited to the Local Plan on the facts of this particular matter. The principal concern is that the proposed development would not of itself constitute 'inward investment'."

98 Counsel's Opinion was based on draft Heads of Terms. Council officers have explained that after it was received much work was undertaken to strengthen the Heads of Terms before a later version was considered by the DCC with the second application on 19 December 2008. However, despite earlier reservations, officers did not consult Counsel again on the revised Heads of Terms to confirm that they had been suitably strengthened. The Council's then Head of Legal Services has explained that this was partly because of Counsel's availability, but also the final judgement was a matter for planning officers to decide. In my view it would have been advisable to consult Counsel again as the Section 106 agreement was fleshed out and to brief DCC members more fully on Counsel's observations and how officers had addressed them. The failure to do so is surprising given that officers did apparently speak to him by telephone during this period to clarify aspects of the earlier advice.

99 On 5 December 2008 solicitors, who subsequently represented Mr Brown in his Judicial Review proceedings against the Council, wrote on his behalf to the Head of Planning and Housing Services about the second application. That letter can be summarised as saying that either:

- the development proposed in the second application should be considered on its own merits, in which case it should be referred as a Departure; or
- if that development is deemed to enable the benefits arising from future airside development, secured through a Section 106 Agreement, then that airside development:

"should be regarded cumulatively with the environmental impact or potential environmental impact of the proposed [non-airside development]".

100 Since early September 2008, the developer had been pressing for the DCC to consider the application at its meeting on 19 December 2008, even though Government targets would have allowed it to be considered at the next scheduled meeting in January 2009. An Officer's Report to that meeting would usually have been required to be ready by an internal deadline of 5 December. However, I understand that because of the complexity of the second airport application and the workload involved, coupled with difficulties in getting clarifications from the developer, the deadline for the report was extended to 11 December.

101 The Officer's Report published on 12 December was more than 200 pages long, including appendices. This was the last date by which the Council could comply with legal obligations to provide access to reports to certain Council meetings in advance. I note that the Report:

- did not address the question of whether the accompanying Environmental Statement, which only covered the proposed non-airside works, should also have covered the future airside works. On the basis that the Council had legal advice (paragraph 86 above refers) that a comprehensive EIA might be required and had communicated that to the developer, this was an unexpected omission;
- paraphrased elements of the Counsel's Opinion dated 27 November 2008, but made no reference to Counsel's statement that *'it does not appear at present possible to conclude that a Section 106 would ensure that the development accords with the provisions of the development plan'*. Nor did the Report address that statement by updating members on how matters had been progressed in the interim;
- includes non-committal statements such as:

"it is open to Members to come to a view that, with a combination of appropriate planning conditions and S106 obligations, the proposals in their entirety would be 'in accordance' with the Development Plan"

and:

"it is open to Members to take the view that, with the provision of the matters identified in para 5.163, the Heads of Terms, as now firmed up and fleshed out by the applicants, is: sufficient to secure the City Council's support for the development; and achieve "accordance" of the proposal, in planning terms, with the Development Plan."

- concluded with the following statement which falls short of an officer recommendation:

"Consequently, and in conclusion, if Members are satisfied that:

103 I interviewed other officers about the comments attributed to the Chief Executive by the Development Control Manager.

- The Chief Executive told me that she did not see a draft Report and therefore definitely did not say it should be rewritten. Also she had no recollection of saying the second application should not be referred as a Departure. On the third point she told me that she had been frustrated by delays in dealing with the application and *"in the heat of the moment probably did say 'if you don't write it, I will!'"* She said it was a throwaway remark and was obvious as such, because she does not have the necessary experience of planning issues to write a report of this type. She also referred me to detailed notes of the Appeals Panel Hearing (paragraph 76 refers) which record her saying that:

"Some Chief Executives would write the report themselves. I did not. I did step in as it was necessary as the agenda was so important to Carlisle".

- The then Head of Legal Services (now Assistant Director - Governance) told me that, on the matter of whether the Chief Executive had said the application should not be referred as a Departure, there was a strong preference for it not to be referred and the Civic Centre had been a "pressure cooker" over that particular issue.
- The then Head of Planning and Housing Services recalled the statements attributed to the Chief Executive, but was not certain if he had been present in the meeting or if they had been relayed to him by the Development Control Manager. He did however refer to the Chief Executive exerting pressure towards not referring the application as a Departure and adopting an attitude which he interpreted as "the Council has to approve it [the second application] come what may". The Chief Executive has told me that she never said that and disputes his interpretation.

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104 The Chief Executive told me that she believed planning officers had contributed to the time pressures they experienced and that this was damaging to the Council's reputation.

105 I also asked Council officers how they progressed from getting legal advice (paragraph 86 above refers) that a comprehensive EIA might be required and communicating that to the developer, to seemingly deciding the EIA could properly be dealt with in a two-stage process.

- The Head of Planning and Housing Services, who had responsibility for the EIA issue, mentioned "Circular 02/99: Environmental Impact Assessment". He told me that he had possibly over-relied on a paragraph that refers to a developer being *"asked to provide an Environmental Statement only in respect of the development he has proposed"*. He had possibly attached too little weight to the preceding paragraph which says *"For the purposes of determining whether EIA is required, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of*

a) The associated planning conditions that are recommended will deliver an acceptable development as proposed; which

b) Coupled with the related obligations under S106 that the applicants will commit to as part of the development will lead to the delivery of a fully operational, modern Airport, potentially yield the restoration of passenger services, lead to expansion of the area's wider connectivity and give Cumbria better access to markets, suppliers and services, all the economic benefits flowing from these fully justify support for the proposals

the Committee may resolve to grant planning permission, subject to the prior attainment of the S106 agreement."

102 As stated previously, the Development Control Manager was responsible for managing most aspects of the application and for drafting the Officer's Report. When I interviewed him about the second application, he made some statements that concerned me. These included:

- the developer being the most difficult to deal with that he experienced in his 35-year career. The then Head of Legal Services similarly described the developer's conduct as "unprecedented". This resonates with the Chief Executive's statement to me that they "took lobbying activity to a level the Council had never experienced before";
- his perception that some senior managers and members were prepared to support the application while there were still genuine planning obstacles to be overcome;
- his first draft report had recommended that planning permission be refused. He told me that, in a meeting where the Council's Head of Legal Services and Head of Planning and Housing Services were also present, the Council's Chief Executive:
 - said that was not acceptable;
 - instructed him that the application should not be referred as a Departure either; and
 - said that she would write the Officer's Report herself if necessary;
- he admitted deliberately wording the final Officer's Report in a non-committal way, with no clear recommendation, because at the time he was professionally unhappy with the line he had been pressured into taking. Although no longer of the view that permission should be refused, he still believed it should be referred to the Secretary of State. The then Head of Legal Services told me that he thought this was a reasonable stance for the Development Control Manager to adopt, but he questioned if it was fair to members of the DCC. It is highly unusual for planning officer reports to the DCC not to contain a clear recommendation to either approve or refuse an application.

an inevitably more substantial development". The lack of information from the developer on what precisely the future airside works would include also influenced his judgement. There is no documentary evidence of how this officer considered and applied his judgement at the time.

- The Head of Legal Services told me that, with hindsight, the EIA issue, received insufficient consideration. A rationale for accepting a two-stage EIA was only documented after the event. The planning judgements had been made in the face of detailed challenge from the developer who *"would have got five legal opinions supporting their case if need be"*.

106 In my view, having received legal advice, officers should have taken a more deliberate approach to demonstrating how they resolved the situation, including taking further legal advice if appropriate.

107 On 16 December 2008 the solicitors, who subsequently represented Mr Brown in his Judicial Review proceedings, having seen the officer's report to the DCC, sent a second letter to the Head of Planning and Housing Services. The letter:

- stated that the officer's report may not help members *"to make sensible determinations"* and that *"a flawed and challengeable consent will be issued by the Council"*;
- drew attention to *"the need for environmental impact assessment of the whole of the consequences of the scheme"* and stated that the EIA that supported the first application could not be relied on; and
- formally asked for the letter be copied to all members of the DCC.

108 The DCC met to consider the second application on 19 December 2008. The minutes are detailed and record that:

- *"the fundamental matter that the Committee needed to address"* was whether the development proposed in the second application was necessary to realise planning objectives for the airport;
- if members accepted amended planning conditions, which were projected onto a screen during the meeting, *"it was consequently recommended that the application be approved and that Officers be authorised to issue planning permission subject to....."*;
- members of the public were given opportunity to speak. One *"informed the Committee that today they were judging a planning application for a project which began on 14 July 2008 in a meeting with their most senior Officer, most senior politician, the applicant and others"*. He also drew attention to *"the lack of an Environmental Impact Assessment for the reinforced runway...."*;
- the solicitor's letter referred to in paragraph 107 above had been provided to members who were asked to confirm that they had taken account of it; and
- the Committee:

"RESOLVED – That the Head of Planning and Housing Services be granted authority to issue approval for the

proposal, subject to the completion of a Section 106 Agreement, the key points of which were as detailed in the Schedule of Decisions attached to these Minutes."

109 The Minutes also record that DCC members asked just two questions before:

"A member commented that the application represented an opportunity not to be missed. He then moved the Officer's recommendation for approval.... which was duly seconded."

The DCC decision was unanimous.

110 The Minutes suggest that, as with the Officer's Report, there ~~was no~~ member consideration of whether the two-stage EIA approach was appropriate. This seems strange given that the adequacy of the EIA had been challenged by the solicitor's letter presented and also by a member of the public verbally during the meeting. Furthermore DCC members did not see and were not made fully aware of the Counsel's Opinions dated 3 September and 27 November 2008 obtained by officers.

111 On 11 March 2009 the developer and the Council signed a Section 106 Agreement and the Council granted planning permission. The Council's "Summary of the Reasons for the Decision" states that:

".... The Council is satisfied that the achievement of the renewal of the principal runway and the provisions of passenger terminal facilities can be delivered through the mechanism of the S106 agreement and that, by providing those facilities, the development as a whole can be regarded as policy compliant....."

In granting this planning permission the City Council has taken into account all relevant environmental information....."

Training for members

112 I interviewed three members of the DCC. In view of the apparent lack of member questions at the meeting on 19 December 2008 and their not having picked up on the EIA issue, I asked if members of that committee received enough training to fulfil their roles effectively. Two thought they did not, although both had attended Planning Summer School which had been helpful. One mentioned a lack of training on decision making.

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Conclusions

113 Whether the Council made a wrong planning decision is not a matter for my audit, unless the Council reached a decision that was so unreasonable that no reasonable body could have reached it and then incurred costs as a result. I do not believe that is the case based on the evidence I have seen. However, I do believe that mistakes were made in handling the second airport application, some of which might have been avoided if earlier lessons had been learned.

114 Senior officers are clearly aware of the Council's separate roles in economic development and planning. Indeed there is evidence that they stressed this to the developer and that, at times, relations between the two became adversarial, probably as a result of the Council's efforts to apply planning regulations. However, public perception is important and others (including members of the public and, it appears, at least one member of the DCC) did not consider that the City Council properly understood the separation of the two roles. During the first application some members of the DCC had seemingly felt the Chief Executive had been "pushing" the developer's case. The Council Leader had been pictured shaking hands with the developer's Chief Executive immediately after a meeting to negotiate planning conditions.

115 Against that background, I question if it was advisable for the Chief Executive to chair the Carlisle Airport Meeting in July 2008 and to be accompanied by the Council Leader (paragraph 82 refers). Chairing such meetings can be a key part of the local authority chief executive role, but having already encountered perceptions that she was "pushing" the airport case to the detriment of planning considerations, more caution might have been exercised.

116 The Council got Counsel's opinions in September and November 2008.

- The first addressed the EIA issue, but there is no evidence that Counsel's advice on that matter was acted on fully. The rationale for eventually accepting a two-stage approach to the EIA was not documented at the time. The Officer's Report and the DCC meeting failed to address the issue, despite the Council's position being challenged by Mr Brown's solicitor and another member of the public. This matter was subsequently critical to the outcome of the Judicial Review.
- The second considered whether a Section 106 Agreement was a suitable mechanism for ensuring that the airside works, which the Council was in favour of, came to fruition. Counsel accepted it could be in principle, but on the evidence he saw was not satisfied that all the tests were met. Officers did not consult Counsel again on that issue.

117 In my view, in both instances it would have been advisable to consult Counsel again as the Section 106 agreement was fleshed out. It would also have been appropriate to brief DCC members more fully on Counsel's observations and how officers had addressed them. It is not clear to me that officers ensured that, in making their decision on the second planning application, members were able to take all relevant factors into account.

118 The Council's Chief Executive told me she had some concerns about the way in which planning officers handled the second application. Whilst there is conflicting evidence about what the Chief Executive said to planning officers, it is clear that she became involved in the process. The developer's need to have the application considered at the December 2008 DCC meeting also contributed to the pressure on planning officers.

119 I am concerned about the Development Control Manager's assertion that he deliberately worded the Officer's Report in an unusual and non-committal way, because he was professionally unhappy with the situation he found himself in. This was apparently not questioned by other officers or by members of the DCC.

120 There is no evidence that the outcome of the December DCC meeting was predetermined. However, I am surprised that, for such a complex and high-profile application, DCC members asked just two questions of Council officers and did not query the unusually worded officer's recommendation before approving the second application unanimously. Members of the Committee have told me that training for DCC members could be improved.

Recommendations

- R3 Ensure that where legal advice identifies issues requiring resolution, such issues are demonstrably resolved. This may involve seeking further legal advice to confirm the adequacy of actions taken.
- R4 Ensure that reports to Committee are clear on the nature of legal advice obtained and actions taken as a result.
- R5 Review the existing "Members Planning Code of Good Practice" to ensure it adequately covers the requirements on officers. This will ensure that Planning Officer Reports include a clear recommendation or, exceptionally, clarify why no recommendation has been possible.
- R6 Ensure important professional planning judgements receive sufficient attention and are adequately documented on a timely basis.
- R7 Review the provision of specialised training for members of the Council's Development Control Committee and for other committees that fulfil specific statutory roles.

Deciding whether to contest the Judicial Review

121 On 30 March 2009 solicitors acting for Mr Brown issued a pre-action protocol letter to the Council. The letter outlined three grounds for judicial review of the 12 March 2009 planning decision. It said that judicial review proceedings would be instituted after seven days unless the Council signalled it would either revoke the planning permission or an intention to consent to judgment once proceedings were instituted.

122 This letter was put on the agenda of the next scheduled DCC meeting on 24 April 2009, by which time Judicial Review proceedings had been issued on four grounds. DCC members considered two short reports. The reports were supplemented by a verbal briefing from the Head of Legal Services who had attended conference with Leading Counsel on 23 April (the same Counsel who provided the September and November 2008 opinions referred to previously). The meeting was adjourned to 1 May 2009 to allow further information and, if necessary, Leading Counsel's advice to be obtained, so that the Council might file grounds for resistance by the 5 May deadline.

123 On 29 April 2009 members were sent a third report that had a summary of Counsel's advice dated 23 April attached. Counsel's advice opened by saying:

"We advise that there is a good basis for resisting grounds 2 (development plan departure), 3 (reporting of legal advice) and 4 (reasons),

However, in our view the claim is highly likely to succeed on ground 1 (environmental impact assessment)."

It concluded

"We do not advise filing a 'holding defence' given the strength of Ground 1: it will simply lead to additional cost for the Council. We therefore advise consenting to judgment on Ground 1."

124 Counsel's advice on Ground One was that the Council had been wrong not to assess the environmental effects of the airside works that were the subject of the Section 106 Agreement.

125 The 29 April report to the DCC said that Leading Counsel would be present on 1 May to further advise members and answer questions. It gave no indication of any intention to seek a second Counsel's opinion. It also said the developer had "*requested that the grounds of resistance that they will argue in the Judicial Review process be put before Members as they will be pertinent to Members' deliberations*". The recommendation was that Members:

"1. Note the legal advice contained within the report and given to them by Leading Counsel; and

2. Determine the Council's response to the Judicial Review application lodged by Mr Gordon Brown."

126 The then Head of Legal Services has told me the Counsel's advice was not what either the Council or the developer (an "Interested Party" to the Judicial Review) had wanted to hear. However, Counsel had been very clear and was not going to change his position.

127 The former Head of Planning and Housing Services told me that, based on Counsel's advice, officers had been preparing to not contest the Judicial Review. Other Council officers have told me about meetings that then took place before the DCC reconvened on 1 May 2009.

- The then Head of Legal Services referred to a meeting with the developer's representatives on 30 April where Council officers came under significant pressure to defend the judicial review. The developer had two legal opinions that contradicted the Council's one.
- The Chief Executive told me that she and the Council Leader had discussed whether the Council needed a second opinion with the Head of Legal Services. The developer strongly advocated their legal arguments, using two or more legal advisers. In view of this, she and the Leader decided a second opinion was necessary to protect the Council's position.

128 On 30 April the Head of Legal Services gave verbal instructions to a second Counsel who, like the first, was a specialist in planning law. The newly appointed Counsel provided his Opinion in time for it to be tabled at the DCC meeting the following day. Counsel restated his instructions as:

"I have been asked to give my opinion on the merits of that ground of challenge (i.e. ground 1 as advised not to defend by the first Counsel) and, in light of that, to say whether I consider that the Council is in a position to defend the claim for judicial review".

and concluded that:

"In my opinion, the Council does enjoy reasonable prospects of defending this claim should it decide to take that course. I consider that Ground 1 lacks legal merit and is likely to be rejected by the Court. I would assess the Council's prospects of a successful defence as good.

.... I would advise the Council to defend this challenge".

129 When the DCC reconvened on 1 May, members adjourned to read two tabled documents:

- the developer's grounds for resistance (as Interested Party) which covered 26 pages and concluded that *"it is submitted that the claim is manifestly unfounded and that permission for leave to apply for judicial review should be refused"*; and
- the second Counsel's opinion obtained by the Council covering seven pages.

The adjournment lasted for 23 minutes.

130 The published Minutes record that the first Counsel's junior barrister attended to explain his role in advising the Council, the differing legal opinions from the first and second Counsels and the options available to members. The barrister and the Council's Head of Legal Services responded to members' questions.

131 The Minutes understandably do not record this discussion in detail as it could have been damaging to the Council's case. However, from detailed notes taken by the Committee Clerk and retained, it is clear to me that:

- the barrister discussed the two contradictory Counsels' opinions. He made clear his view that *"the safest option... would be to consent now because that minimises your costs"*, but that the second Counsel's opinion was *"a perfectly respectable view to take"*;
- the barrister highlighted the risks of defending, including that Mr Brown was likely to pursue his case *"all the way"*; and
- the Head of Legal Services highlighted that costs which might be awarded against the Council if they contested unsuccessfully would be *"a six-figure sum"*.

I am, therefore, satisfied that members received a balanced assessment of the arguments and the likely risks and costs involved.

132 The Committee Clerk's notes also record that other considerations were factored in to members' decision, such as:

- whether the developer's prospects of contesting the Judicial Review would be *"weakened"* if the Council took the *"safe option"* in its own interests - in my view that was not a relevant consideration;
- whether the airport development would be *"doomed"*;
- the risk the developer might leave Cumbria *"if the Council is not signed up to stand alongside"* and that the Council *"can ill afford to do anything that looks as if we are pushing jobs away"*;
- the view that the Council *"would be failing in our duty of care to the people of Carlisle if we do not defend it. People want the Airport."*

133 The published Minutes record that:

"In considering the matter, Members recognised that they had a duty of care to the people of Carlisle. They emphasised the need to do what was right for the Council as the local planning authority; and for the community as a whole.

Following voting, it was:

RESOLVED UNANIMOUSLY -

(1) That the legal advice contained within report LDS.43/09 and provided by Leading Counsel be noted.

(2) That the Director of Legal and Democratic Services, in conjunction with the Chairman of the Development Control Committee, and Portfolio Holder, be authorised to take all necessary action to defend the Judicial Review application."

Conclusions

134 Faced with a Judicial Review application, the Council got clear advice from its first Counsel not to contest its alleged failure to assess the environmental impact of the airside development properly. Ultimately that advice proved to be correct in the Court of Appeal.

135 However, a combination of pressure from the developer, whose two legal advisers contradicted the Council's one, and the intervention of the Chief Executive and Council Leader, who discussed their concerns with the Head of Legal Services, led the Council to seek a second opinion at a late stage. I accept that was a reasonable action to take. The second opinion, from another specialist in planning law, contradicted the Council's first one and said the Council had grounds to resist the judicial review.

136 It is my view that when the DCC met to decide whether to contest the Judicial Review, members took too little time to read legal documents that were tabled. However, a barrister and the Head of Legal Services explained the Council's two legal opinions and the associated risks of each in a balanced way - if anything, they erred towards not defending the claim being the "safe option". I conclude therefore that members were properly appraised of the issues and risks of the two courses of action open to them.

137 In reaching their decision, DCC members took account of the Council's economic development aims, which does not seem to me unreasonable. However, they also took account of the interests of the developer. In my view, members afforded too much consideration to the developer's reduced prospects of defending the Judicial Review without the Council standing alongside.

138 Notwithstanding that error of judgement, on the balance of the evidence available to me, I do not believe the decision to contest the Judicial Review was an unreasonable exercise of the Council's discretion.

Recommendations

- R8 Ensure that where independent legal advice is required it is obtained on a timely basis, including any requirement for a second opinion.
 - R9 Avoid tabling important documents in Committee meetings. If, exceptionally, documents cannot be circulated in advance members must take sufficient time to properly read and consider all new information.
 - R10 Ensure that decisions only take into account relevant considerations and do not, for example, afford undue weight to the interests of third parties.
-

Contesting the Judicial Review

139 The Council filed its grounds for resisting the claim on 5 May 2009.

140 Mr Brown's five grounds for seeking Judicial Review are summarised by me in table 1.

Table 1: Mr Brown's grounds for Judicial Review

Ground	
1	The Council failed to recognise the airside works should have been considered cumulatively for their environmental impact.
2	The Council failed to refer the application to the Secretary of State as a departure application.
3	The Council failed to convey properly to the DCC the nature of legal advice it had received.
4	The Council had failed to give adequate reasons for not referring the second application as a departure.
5	The Council took into account an immaterial consideration and acted irrationally in granting permission.

The first Court judgment

141 On 29 June 2009 in the High Court, the Judge refused to grant Mr Brown's Judicial Review application, dismissing all five grounds. His decision was based on reviewing documents filed by Mr Brown's solicitors, the Council (as defendant) and the developer (as interested party). The Judge ordered Mr Brown to pay £1000 costs each for the Council and the developer.

142 On the alleged failure of the Council to assess the environmental impact of the airside development properly (ground one), the Court accepted the arguments put forward by the Council and the developer. These included that the airside works were not integral to the development for which planning permission had been granted and could later be the subject of a separate EIA and planning permission.

The second Court judgment

143 On 16 October 2009, also in the High Court, a different Judge refused Mr Brown's application for judicial review for a second time, based on a Hearing and review of written evidence.

144 The second judgment largely accepted the Council's legal arguments in respect of four of the five grounds put forward by Mr Brown. But on the EIA issue (ground one), the Judge found the decision to grant planning permission was arguably flawed as the DCC had failed to address whether the proposed development was integral to a larger development, including the S106 airside works. However the judgment also:

- says that airside development could be required to be subject to an EIA and separate planning application, so there was no prospect of EIA Regulations being breached or circumvented;
- accepted that requiring an EIA to include the Section 106 works "*could not conceivably affect the outcome of the planning application*"; and
- said that "*No purpose would therefore be served by permitting the claimant to pursue his claim on this ground.*"

The Court of Appeal

145 Having twice had his application for Judicial Review refused, Mr Brown appealed against the second judgment.

146 On 9 December 2009 Lord Justice Sullivan, based on documentary evidence, but without an oral hearing, granted permission for the Judicial Review application to be heard in the Court of Appeal. He commented that:

"The Grounds of Appeal have real prospect of success for the reasons set out in the Appellant's Amended Skeleton Argument."

147 The Judicial Review application was heard in the Court of Appeal on 21 April 2010. The Approved Court Judgment was issued on 19 May 2010. Lord Justices Sullivan, Waller and Jacob all agreed to "*allow the appeal and quash the planning permission dated 12 March 2009.*" The Council was ordered to pay Mr Brown's legal costs "*in this Court and below*". Permission to appeal to the Supreme Court was refused.

148 Lord Justice Sullivan quashed the planning permission on Ground One as he clearly accepted the airside works should have been subject to EIA:

"there is no doubt, in my judgment, that the grant of planning permission was unlawful because there was a failure to comply with regulation 3(2) of the EIA Regulations."

149 The Judgment is critical of the Council in a number of areas. For example, on Ground One it:

- challenged how the Council could contend that:

"the Interested Party's commitment in the Section 106 Agreement to bring forward the airport works could on the one hand have been sufficient to ensure that, as the Committee said in the Summary Reasons for granting permission, 'the development as a whole' could be regarded as policy compliant for the purposes of the Development Plan; but on the other hand have been insufficient to ensure that the bringing forward of the airport works would be part of the cumulative effects of the development for the purposes of the EIA Regulations."

- stated that:

"there is no evidence that after the second application was submitted either the Planning Officer or Committee ever addressed their minds to the question: given our insistence upon a legally binding commitment to the airport works in order to ensure that this application is policy compliant, should the Environmental Statement consider the environmental effects of those works as part of the cumulative effects of the development for which permission is being sought?"

Had the Committee considered that question an affirmative answer would have been the only rational response."

- drew attention to the inconsistency between what the Council's Head of Legal Services had said to the developer in September 2008 (*"environmental assessment was required particularly when taking into account the cumulative impact of development"* - paragraph 88 of this report refers) and the stance subsequently adopted by the Council.

150 Having quashed the planning permission on Ground One, the judgment does not address the other four grounds in any great detail. In summary it comments:

- on Ground Two - it had been conceded that the Court was unlikely to quash planning permission on this Ground alone, although the Council's defence of it had undermined their defence of Ground One;
- on Ground Three - *"there is force in this criticism of the (Planning Officer's) Report"* and the Council's response to ground 3 served to reinforce Mr Brown's challenge on Ground One;
- that Ground Four failed because the Court accepted the Secretary of State had decided not to call in the application; and

- that Ground Five "*provoked the intended response from the Defendant and the Interested Party*", further reinforcing the challenge on Ground One.

151 Mr Brown claimed costs of £135,800 from the Council. The two parties settled the claim for £105,000 after the Council had it reviewed by a specialist costs solicitor, the use of which is standard practice in such situations. In addition the Council incurred:

- its own external legal costs, such as advice from Counsel and representation in Court, which it has quantified as £80,460 excluding VAT; and
- in-house costs, such as the costs of legal and other officers' time.

Conclusions

152 The Council had two Counsels' opinions that differed starkly on the prospects of successfully defending Ground One. That it successfully defended its position twice in the High Court demonstrates the legal arguments that eventually prevailed in the Court of Appeal were finely balanced. I do not therefore accept the objector's argument that the Council unreasonably committed "*a serious misuse of public funds... and ignored the duties to the tax-paying public*".

153 On the balance of the evidence available to me, I do not believe the decision to contest the Judicial Review was an unreasonable exercise of the Council's discretion. It is, however, true that had the Council:

- accepted the clear advice of its first Counsel, rather than seeking a second opinion at a late stage under pressure from the developer; and
- examined the arguments put to it by Mr Brown's solicitors and a member of the public before granting planning permission on 19 December 2008:

it could have avoided incurring its own and Mr Brown's legal costs in contesting his application for Judicial Review.