

Retention of public sculpture "Untitled 1986"

(fibreglass shark through roof):

**Transcript of Planning Inspectorate decision in 1992 re the appeal
by Bill Heine against Oxford City Council's refusal to grant planning
permission for the retention of the Headington Shark (90/00084/NF)**

Department of the Environment letterhead

Ref. APP/G3110/A/92/184337

21 May 1992

To Messrs Cole & Cole Solicitors,
George Street

Gentlemen

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78

APPEAL BY MR W R HEINE

APPLICATION NO NF-/0084/90

1. I am directed by the Secretary of State for the Environment to say that consideration has been given to the report of the Inspector Mr P J Macdonald MSc DipArch Reg Arch MRTPI who held a local inquiry into your client's appeal against the decision of Oxford City Council to refuse planning permission for the retention of a public sculpture "Untitled 1986" ("the shark") at 2 New High Street, Headington, Oxford.
2. The Inspector, whose conclusions are reproduced in the annex to this letter, recommended that the appeal be allowed. A copy of his report is enclosed.
3. The Secretary of State notes that the Council allege that the sculpture detracts from the harmonious appearance of the terrace, that it is out of place in the locality and that, for these reasons, its deleterious impact on visual amenity amounts to demonstrable harm sufficient to justify removal. It is not in dispute that the shark is a large and prominent feature in the street scene. That was the intention of the appellant and the artist, but their intention to shock people is irrelevant as far as planning issues are concerned. The issue for consideration in this appeal is whether this incongruity and lack of harmony amount to demonstrable harm to an interest of acknowledged importance, namely the visual amenity of the house and the street scene generally.

4. The Secretary of State agrees with the Inspector that the area immediately surrounding the appeal site is predominantly residential in character. He notes, however, the mixture of styles and ages of the buildings and the Inspector's view that the council have laid too much stress on the supposed harmony of the terrace. He has also had regard to the Inspector's conclusion that the general area is essentially undistinguished. The Secretary of State agrees with the Inspector that lack of harmony in terms of development proposals does not always equate with visual harm, but it is necessary to consider the relationship between the object and its setting. The appearance of the development and its relationship to the surroundings are material considerations. In this case, it is not in dispute that the shark is not in harmony with its surroundings, but it is not intended to be in harmony with them. One must look at the relationship of the shark to the house, as well as to the terrace and wider surroundings. In the Secretary of State's view, even though the shark is large, prominent and out of character with both the appeal building and its surroundings, it is not gravely detrimental to visual amenity in this particular location. He therefore agrees with the Inspector that it has not been demonstrated that it constitutes demonstrable harm to an interest of acknowledged importance.
5. In considering the appeal, the Secretary of State has had regard to the substantial body of representations received. Although most of these are in favour of the shark, he notes the case of *Bromley LBC v SSE and Cope*, referred to by the Council, and agrees that the greater public acceptance of the shark that has occurred over time should not, in itself, be a reason to allow the shark to remain. While relevant views expressed by third parties, by local residents and other neighbouring occupiers of land should be taken into account, the case must be decided on its planning merits, not by resorting to "utilitarianism" in the sense of the greatest good of the greatest number as suggested by the Inspector. He does not therefore agree with the Inspector that the nature of public support adds weight to the case in favour of the shark.
6. On the question of precedent, the Secretary of State notes the examples given by the Council where the shark has already been used as a precedent even though no planning permission exists. He accepts that there may be some "copy-cat" proposals if permission is granted for the shark, but he agrees with the Inspector that they are likely to be few in number and that the Council could decide each case on its merits. He also shares the Inspector's view that the test for other minor proposals, such as dormer windows, garden walls etc., should continue to be whether demonstrable harm is caused and not comparisons with other cases.

7. Accordingly, having considered very carefully all the arguments for and against the proposal, the Secretary of State has concluded that the shark does not cause such demonstrable harm to visual amenity as to justify refusing consent for its retention.
8. The Secretary of State has had regard to the conditions agreed at the inquiry, and whilst he could not normally impose a maintenance condition, he agrees with the Inspector that condition 1 is justified in this particular case where the main issue is the appearance of the sculpture. He thinks that the objective of condition 2 can be achieved by a rewording that makes it less of a maintenance condition.
9. For the above reasons the Secretary of State accepts the Inspector's recommendation. He therefore allows your client's appeal and hereby grants planning permission for the retention of a public sculpture "Untitled 1906" ("the shark") at 2 New High Street, Headington, Oxford, in accordance with application no NF/0084/90 dated 22 January 1990, subject to the following conditions:
 - (1) The sculpture shall be maintained (ie flaking paint removed and the affected areas repainted) every nine months.
 - (2) The sculpture shall not be repaired or repainted other than in naturalistic colours.
 - (3) The illumination of the sculpture shall not exceed 600 cd/m and shall be switched off by 10.30 pm every night.
10. This letter does not convey any approval or consent required under any enactment, bye-law, order or regulation other than section 57 of the Town and Country Planning Act 1991.
11. A separate letter is enclosed about your client's application for an award of costs.

I am, Gentlemen,

Your obedient Servant,

(signed)

MISS A GERRY

Authorised by the Secretary of State to sign in that behalf

CONCLUSIONS

Bearing in mind the above, and taking account of what I saw on my site inspection, I have reached the following conclusions (the numbers in brackets refer to paragraphs within the body of the report):

69. The basic facts of this case are straightforward, and not in dispute (10–19). ‘The Shark’ is there for all to see, and make their own judgement. Both parties are agreed that planning permission is required, and that normal planning considerations should obtain (24, 35, 36, 38). It is not argued that special treatment is due to the shark as a “work of art” (35). It is also accepted by the Council that the normal presumption in favour of development applies, unless harm can be demonstrated to an interest of acknowledged importance (36). It is agreed by both parties that the interest to be considered here is the visual amenity of the appeal site’s immediate surroundings (25, 36). It is not disputed that the shark is (in the words of the reason for refusal) a “large and prominent feature” (2, 32). The Council allege that it detracts from the harmonious appearance of the terrace, that it is out of place in the locality, and that, for these reasons, its deleterious impact on visual amenity amounts to demonstrable harm sufficient to justify removal. The appellant, of course, disagrees. Therein lies the issue in this case.
- 70 There is some slight disagreement about the nature of the upper part of New High Street, adjacent to the appeal site. The appellant describes it as being largely commercial (33), the Council as being residential (47) albeit with some non-residential uses. The Council are, I think, in the right here. The shark is to be considered as being set in a predominantly residential environment. On the other hand, the Council have laid too much stress on the supposed harmony of the terrace (2). In fact, it consists of 4 rather disparate buildings with no strong unifying feature to them (5). This lack of a strong visual unity is typical of the street, and the more general area. It is a typical suburban landscape, pleasant enough but essentially undistinguished (4).
- 71 Into this archetypal suburban setting crashes (almost literally) the shark. The contrast between the object and its setting is quite deliberate, as the appellant has explained (20). In this sense, the work is specific to its setting, and it would ‘read’ quite differently in the context of, say, the foyer to an arts centre in Gloucester Green (15). It is (as the Council say) incongruous, and that incongruity is quite consciously sought by the artist. It is, indeed, out of harmony with its surroundings. It is that lack of harmony, that sense of being “out of place”, to

which the Council objects, and which it equates with demonstrable harm to visual amenity. It is the very same feature which appeals to many of the shark's supporters, and which has made it an urban landmark.

- 72 Whether "lack of harmony" equates with "visual harm" depends upon the context. In a Conservation Area it may very well do so, as it may in any area of pronounced and consistent character or appearance. It is the relationship between the object and its setting that counts. That relationship depends upon the setting, but it also depends upon the object. An 'incongruous' object can become accepted as a landmark in Some cases, becoming well-known, even well-loved, in the process. Something of this sort seems to have happened, for many people, to the

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***The report by Planning Inspector to Michael Heseltine,
Secretary of State for the Environment, follows straight on]***

C/773/BR/P

OXFORD CITY COUNCIL
APPEAL BY W R HEINE

Inspector: P J MACDONALD MSc DipArch RegArch MRTPI
Date: 15–16 October 1991
File Reference: APP/G3110/A/91/184337

Tollgate House
Houlton Street
BRISTOL
BS2 9DJ

29 November 1991

To the Right Honourable Michael Heseltine MP
Secretary of State for the Environment

Sir

1. I have the honour to report that on 15 and 16 October 1991 I held an Inquiry at the Town Hall, Oxford, into an appeal by Mr W R Heine against a decision of the Oxford City Council to refuse planning permission for the retention of a public sculpture 'Untitled 1986' ('the shark') at 2 New High Street, Headington, Oxford.
2. Planning permission was refused by the Council by notice dated 27 November 1990 for the following reason:

"The shark is a large and prominent feature in the street which detracts from the otherwise harmonious appearance of the terrace in which it is located and is out of place in the locality. There are no overriding reasons why such a large and prominent feature should be permitted to remain."
3. This report includes a description of the appeal site and surroundings, the gist of the representations made at the Inquiry and my conclusions and recommendation. Lists of appearances and documents are attached. At the Inquiry, a costs application was made on behalf of the 'appellant, and I am submitting a separate report in respect of it.

THE APPEAL SITE AND SURROUNDINGS

4. The appeal site is a terraced house on the west side of New High Street, Headington, some 2 miles north-east of the City Centre. In spite of its name, the

road is almost wholly residential in character, commercial development being concentrated along the London Road, which the north end of New High Street intersects at right angles. London Road also acts as one of the City's main radial routes, linking the City Centre with the Eastern by-pass road and, via the ring road, with the M40 motorway. The original village of Headington lies to the north of the London Road. The general area is suburban in character, but includes a number of major institutions, notably hospitals (eg the John Radcliffe), and the Polytechnic. Oxford United football club is also situated in the vicinity.

5. The buildings in New High Street, whilst generally residential in scale, vary quite widely in age and style. The appeal property is a double-fronted terraced house, with a similar house abutting it to the south. To the south of that is a shop unit (4d is a bridal shop, 4e is a hairdressers). To the north side of No 2 is a 2-storey building in 3 flats. These 4 buildings form a terrace, 3 of them having a common roof ridge-line, the fourth (the shop) being higher. Three are of brick, the fourth (again, the shop) is mainly finished in render, painted white. The dwellings have small front gardens. To the south of this terrace of 4 buildings is Alison Clay House, a modern development of flats for the elderly. To the north, on the corner of New High Street and London Road, is a public house.
6. The general character of the site and surroundings can be seen in the appellants photographs (Document 42) or those of the Council (Document 6) or, most usefully, in the photographs accompanying the Council Rule 6 statement.
7. On the opposite side of New High Street, stretching from the London Road to just south of the appeal site, is cleared ground. Planning permission has been granted (see drawing at Document 5) for a part commercial, part residential development, 4 storeys (3 floors plus gables) high in part. The residential component of this scheme will lie opposite the appeal site. A revised layout is being discussed for the commercial part of the scheme, but this is unlikely to have any significant effect on the residential element of the proposal, or on the elevational treatment. It may be appropriate here to mention that the cleared site formerly accommodated the 'Not the Moulin Rouge' cinema, in which the present appellant had an interest. This building was the site of the well-known 'can-can legs', now relocated to Brighton.
8. The remainder of the street has clearly developed over a long period of time, and as a result is very varied in appearance. There are detached, semi-detached and terraced dwellings, in a variety of materials, and with varying depths of front gardens. It is a long, straight road which is technically a cul-de-sac, terminating in

a group of modern houses at its southern end. For most of its length it is one-way only, with traffic running south from London Road, before turning east into Bateman Street. On-street parking up to 4 hours is allowed outside the appeal premises, although the other side of the street has double yellow lines. The parallel street to the west is Lime Walk, and views of the rear of the appeal premises are possible from there, over a public house car park.

9. The description so far is, of course, 'Hamlet without the Prince of Denmark'. The subject of this appeal is a 6 m long fibreglass shark, painted in natural colours, crashing into the roof of No 2 New High Street. It is not quite vertical and it does, indeed, appear to have crashed into the roof, leaving broken slates and splintered wood in its wake (this must have created a tricky weatherproofing problem). Its width varies, of course, but at its widest point it has a diameter of some 1.2 m, with the body fins projecting approximately a metre beyond this. It is located on the front slope of the roof and projects some 5.5 m above the ridge-line. The highest point would therefore be some 12 m above street level. It is, of course, thus seen against the background of the sky. The extent to which it is generally visible may be assessed from the photographs.

FACTS NOT IN DISPUTE

10. On 8 August 1986 a hole was made in the roof of the appeal premises, and some preparatory structural works carried out. On the morning of the following day, the shark was lifted into place by crane, witnessed by press and television cameras, together with local residents, on-lookers and (following a warning phone call) the Council's Enforcement Officer. No prior planning application had been made.
11. The City Engineer and Director of Recreation then made a formal request under Section 95 of the 1984 Building Act to enter the premises. On 19 August 1986 plans were deposited for approval under the Building Regulations. Following a site meeting, and the carrying-out of certain works, approval was issued on 30 September 1986 (Document 8).
12. On 3 September 1986, a report was submitted to the Council's Planning Committee in respect of the unauthorised development. Public consultation was then carried out as if a planning application had been received. Fifty two letters of comment were received, 33 against retention, 19 in favour. These were reported to Planning Committee on 15 October 1986. Committee recommended to full Council that enforcement action (6 months for

compliance) be taken, and this was accepted by Council on 17 November 1986. At that time, the appellant presented a petition with 3,109 signatures in favour of retention (Document 44).

13. An enforcement notice was issued on 18 December 1986, to take effect on 30 January 1987. The reasons for issuing the notice were given as:

“1. The erection of the shark in the roof constitutes a breach of planning control.

2. The shark is a large and prominent feature in the street which detracts from the otherwise harmonious appearance of the terrace. It is out of place in this locality. There is no reason why such a large and prominent detracting feature should be permitted to remain.”

The period for compliance was 6 months. The notice was not made the subject of appeal, and took effect on 30 January 1987, with the period of compliance ending on 30 July 1987.

14. On 30 March 1987, Southern Arts made a grant of £1,000 towards the cost of the shark, having first ascertained from the City Council that, at that point in time, no offence had been committed.
15. In the light of this, and because of concern that the views of local residents appeared to have changed in the interim, Planning Committee recommended to Council that no action be taken to secure compliance until further consultations had been carried out. A report on these further consultations was considered by Planning Committee on 7 October 1987, when the Committee was addressed by the appellant and an objector. Committee decided that there had been no material change of circumstances, and that a majority (46 to 37) still objected. Prosecution was deferred, however, whilst alternative sites for the shark were investigated, the Council eventually choosing the foyer of the Old Fire Station Arts Centre in Gloucester Green. The appellant did not agree to relocation, so no action was taken.
16. In March 1989, the Council resolved to commence enforcement proceedings (Document 9). At the appellant's request, there was a period of adjournment to allow him to make an application to the High Court to argue that the notice was a nullity because a work of art did not constitute development. No steps were taken to bring the matter before the High Court, and on 22 January 1990 the appellant was convicted and fined £1,000 and ordered to pay costs of £5,000.

17. On 23 January 1990 a planning application in respect of the shark was registered, and any further action on the enforcement notice was deferred pending its determination. Further consultations were carried out and, after, being deferred, the matter was considered by Planning Committee on 23 May 1990. Both the appellant and an objector, Dr Harwood, addressed the Committee. The appellant presented a traffic survey (Document 10) and a survey of local opinion (Document 11) which was said to demonstrate that 80% of the local residents were in favour of retention. The Council's Officers considered that public reaction was still mixed. Committee were advised that it must reach a decision on the planning merits, given the terms of the enforcement notice already issued and taken through the courts. In their view, no significant changes had occurred since then. Planning Committee resolved to recommend refusal (7 votes to 5). On 25 June 1990, Council referred the matter back for reconsideration on a 21:20 vote, and after lengthy debate.
18. On 25 July 1990, Planning Committee voted 7:5 to approve retention of the sculpture, and this was referred to Council under Standing Orders. Planning Committee reconsidered the matter on 17 October 1990, and came to the same decision. On 29 October 1990, Council (on a 22:21 vote) referred the matter back to Planning Committee with instructions to refuse planning permission. This was done by notice dated 27 November 1990, after the matter had been considered by Planning Committee on 14 November 1990. An appeal was lodged in May 1991 and Planning Committee resolved on 19 June 1991 to take no further action on the continuing breach of the enforcement notice pending the outcome of the present appeal.
19. There are Conservation Areas in Headington, but the appeal site does not lie in or immediately adjacent to one (Document 38).

THE CASE FOR THE APPELLANT

The material points were:—

The Sculpture and its Genesis

20. Mr Heine bought 2 New High Street on 15 April 1986, the day American bombs fell on Tripoli. Later that month (26th) the nuclear power station at Chernobyl exploded. In both cases, ordinary houses that appeared safe and secure came under attack. The appellant wanted to ask people to look at just how safe they

were, how isolated, how connected to each other, and how much at risk from the threat of attack. He wanted to encourage people to look at their hopes and fears and (in a memorable phrase) “their bedroom slippers still sitting underneath the easy chair”. To this end, he joined forces with the internationally renowned artist, John Buckley, and the shark was the result. The piece of sculpture was a fundamental transformation of an ordinary house into a plinth for an object that challenged all other elements of the house, and led beyond the conventional and the comfortable. It was also intended to bring art out of the gallery and into the public street.

21. Although created in response to specific events, the shark was still relevant, as it spoke of and to fundamental feelings and fears and ambivalence. This continuing relevance was shown by the continued public interest in, and support of, the work. If people had rejected it, the appellant would have taken it down. Many letters of support had been received, and 4 petitions or surveys of public opinion had been carried out (Documents 44, 45, 50, 57). These were:
 - (a) In November 1986, a petition was signed by 3,109 people in favour of retention. 2,087 were from Oxford, and the remainder included 22 visitors from overseas. Fifty one residents of New High Street signed (Document 44).
 - (b) In July 1987, a further petition in favour of retention was circulated. 101 residents of New High Street signed (Document 51).
 - (c) In March 1990, a further petition was circulated (Document 50).
 - (d) In September 1991, a survey of opinion in New High Street was carried out (Document 45). 150 people were in favour of retention, 8 had no opinion, and 3 wished to see it removed. Ten households could not be contacted; 7 people in these households were known to have expressed opposition to retention. Alison Clay House had not been surveyed.
22. The City Building Control Officer had examined the structure and was satisfied with it. It had withstood the 1987 hurricane. It had not been, as some had feared, a target for vandalism. Although some objectors had claimed that it caused a traffic hazard, the City Council did not put this forward as an objection. It had not lowered property values. On the contrary, prices in New High Street had risen more sharply than in the City as a whole. It was also claimed that it attracted tourists. However, the City had a policy of encouraging tourists to visit other parts of the City than just the historic core, and the shark

contributed to this end. The Council regularly presented its official guests with a copy of a book entitled “Inspired Images”; this included a photograph of the shark (Document 43).

23. The shark was not, as some claimed, a joke. It was a carefully conceived work, construction of which took 4 months. It was designed to bend in the wind, which caused some flaking of paint. Once every 9 months or so, the artist rinsed it in warm soapy water and carried out any necessary remedial works. Access to the sculpture from the roof void had been built in to allow for maintenance. It was a powerful and serious work, not a visual ‘one-liner’. Nor was it an advertisement for the appellant. Rather than producing any commercial gain, it had cost him over E10,000 so far. The appellant was unclear as to the basis of the City Council’s continuing objection. It did not seem to be based on objection to the colour, texture, materials, design or scale. If the objection was to the subject matter, the Council were trying to impose its own sense of aesthetic judgement, and going beyond its role as planning authority.

Planning Considerations

24. It was not now denied that the shark constituted development, and that it required planning permission. The purpose of the planning system was to regulate the use and development of land in the public interest. It was not to protect the private interests of one (or more) person(s) against the activities of another. As paragraph 17 of PPG1 said:

“The purpose of the planning system is to regulate the development and use of land in the public interest. It is not to protect the private interests of one person against the activities of another. While considerations of public interest may in the particular case serve to protect private interests, the material question is not whether owners and occupiers of neighbouring properties would suffer financial or other loss from a particular development, but whether the proposal would affect the locality generally and unacceptably affect amenities that ought in the public interest to be protected.”

25. The onus of demonstrating why a development should not be permitted lay with the Local Planning Authority. A development which caused demonstrable harm to the visual amenities of the area in general would be likely to give rise to a high level of public opposition, since the public would be able to judge whether the public interest had been demonstrably harmed. In this case, a high and continuous level of public support for the shark had been demonstrated: of

the letters received in connection with this appeal, for example, 90% were in favour of retention. The small number of letters voicing opposition did not form a coherent body of opinion. Only if there was a general consensus of opinion that the sculpture had really detracted from the visual amenities and character of the area could this be equated to an expression of public interest sufficient to meet the tests set out in Paragraphs 2 and 17 of PPG1.

26. Nor was the City Council clearly convinced that the public interest had been harmed. Whilst voting within a Council on planning applications was not normally relevant, in this case the voting pattern was instructive. In June 1990, Council instructed Planning Committee (by 21 votes to 20) to reconsider its decision to refuse retention. In July 1990, and again in October 1990, Committee resolved to grant planning consent. Finally, on 14 October 1990, Planning Committee refused consent on the Chairman's casting vote. This hardly showed that clear evidence of demonstrable harm to any interest of acknowledged importance had been apparent to the Council. The Council was very evenly divided on the matter.
27. Aesthetics was, as PPG1 stated, an extremely subjective matter. The views of the Secretary of State for the Environment were quoted in paragraph 18 of Circular 22/80 "Development. Control – Policy and Practice":

"Far too many of those involved in the system – whether the planning officer or the amateur on the planning committee – have tried to impose their standards quite unnecessarily on what individuals want to do.... Democracy as a system of government I will defend against all comers but as an arbiter of taste or as a judge of aesthetics or artistic standards it falls far short of a far less controlled system of individual, corporate or institutional patronage and initiative...."
28. In this case, the Council was, in fact, seeking to exercise aesthetic control. The shark sculpture was an example of both individual patronage and initiative, and the Council should not have refused consent because they objected to its appearance. The Council was, in any case, divided on the issue, and had not taken proper account of the balance of public opinion. This was not a Conservation Area, nor an area of markedly homogeneous character. There was a wide range of building styles and land uses in the immediate vicinity. This was not an area of "sensitive character" (to use the words of PPG1) where detailed and over-fastidious control was justified. No policies from the development plan (structure plan or local plan), were cited by the District Council in their

refusal of planning permission and this was clearly a case where the individual merits of the development would be decisive.

29. This was not an inquiry into the quality of the development as a work of art, but rather into the question of whether the building as extended and altered caused demonstrable harm through its appearance. The many letters of support, compared to the few letters of objection, represented a sound basis for considering the issue of the public interest, as opposed to private interests.
30. Although the shark through the roof of 2 New High Street was an unusual form of development it was eccentric only in the context of a period of relatively bland and functional architecture. Most of the distinguished buildings in Oxford were those which made strong and individual architectural statements. These buildings contributed to one of the most celebrated sky lines. Although the shark sculpture was of a far more modest scale than the Oxford spires it had become an Oxford landmark with international appeal. Such distinction was not always achieved following the architectural tradition of the day. The shark sculpture was regarded as a particularly fine example of contemporary art and/or architecture. From the many letters submitted on this appeal, those of Lord Palumbo, Chairman of the Arts Council, and Lord Esher, former President of the RIBA, were particularly relevant. They said:

“The sculpture ... has received tremendous popular acclaim. It is an extremely compelling image and it has been featured in magazines and newspapers throughout the world creating great interest and, not, least attracting many visitors. What is otherwise an undistinguished part of Oxford is redeemed by this remarkable sculpture and, in my view, it will be a tragedy to lose it...” (Lord Palumbo)

“This is one of the very few truly popular pieces of public sculpture in the country ... it is the only visually interesting feature in an architecturally benighted part of Oxford and I am sure that there will be widespread sadness if it were to be removed.” (Lord Esher)
31. The 20 or so letters of opposition covered a number of points, not all strictly of planning relevance. There was concern that development took place without planning permission, but that should not affect the present appeal. Traffic generation issues were raised, but these were not supported by the City Council. Personal remarks in respect of the appellant were irrelevant. Some found the shark visually offensive. This was a valid expression of personal opinion, but did not amount to a demonstration of harm, particularly when opposed to the other 90% of the correspondence that was in favour of

retention. Although there was some local opposition, this did not in the main relate to planning matters and demonstrated that those objecting to the appearance of the shark were in a very small minority.

The Reason for Refusal

32. The Council's reason for refusal referred to the shark as a "large and prominent feature in the street". This was not disputed, although its impact would be reduced following the construction of 4-storey buildings on the vacant site across the road. The upper part of New High Street was, in any case, commercial rather than residential in nature. The reason for refusal then went on to describe the terrace including 2 New High Street as 'harmonious', this was incorrect. Two double fronted cottages, both of red brick under slate roofs with projecting bays in matching materials, were sandwiched between an end-terrace house of similar materials and proportions, built in the last 10 years, and a double shop unit. The latter was a building of an entirely different character, and of greater prominence due to its higher ridge-line, chimneys, forward projection, and white painted elevations. North of the terrace was the back yard of the public house fronting on London Road. To the south was a block of 23 elderly persons' flats which, due to its scale and modern appearance, visually separated the terrace containing the shark sculpture from the housing to the south. The terrace containing the shark could not be described as being any more harmonious than any other group of buildings along New High Street or in the general area. Bearing in mind the Government advice that reasons for refusal should be sound and clearcut, this description did not form a sound basis on which to consider the merits of the change caused by the erection of the shark sculpture.
33. The Council had not only judged the proposal in terms of the terrace but also the "locality". Again, this was a term which lacked precision. If the locality was to include the primarily residential area along New High Street then it must also include the even closer area of London Road and the commercial redevelopment site opposite. Within the locality there were churches, church halls, elderly person housing, a football ground and other buildings and uses which individually, might be considered to be equally "out of place". It was not a sound basis for refusing planning permission that any particular development did not conform to a particular style of building existing in the area. PPG1 stated that the planning system should not be regarded simply as a means of preventing change. Although the desirability of protecting or enhancing the

character or appearance of a conservation area was a statutory duty, the locality of the appeal site had no definable character which could be sensibly protected from changes which were not demonstrably harmful. The final sentence of the reason for refusal suggested that large and prominent features required special justification. This was only the case where they cause some demonstrable harm.

34. Within the reason for refusal only one indication of harm was put forward by the Council. The assertion that the shark detracted from the appearance of the terrace depended wholly on the description of it as “otherwise harmonious”. The terrace was, in fact, comprised of varied visual elements with no particular overall character. The reason for refusal had therefore, no sound basis. The shark had now been in position for 5 years, and there was no evidence that harm was being caused other than to the aesthetic tastes and sensitivities of a small number of residents. This was not a sufficient reason for refusal.
35. Although ‘precedent’ was not a reason for refusal, it clearly loomed large in the mind of the Council. The 2 cases they quoted, at the Castle Mound and at Christ Church Meadow, were clearly undergraduate pranks, not to be taken seriously. Apart from that, they could only find a ‘goldfish’ on a listed building at Chichester – hardly a parallel case – and the twin ‘baby sharks’ proposal. The latter was clearly an advertising gimmick. Common sense was needed here. After 5 years there had not been a proliferation of sharks (or other objects) crashing through roofs, nor was there likely to be. The 2 appeal cases involving dormers were hardly comparable with the present case. The appellant did not argue that the shark’s status as a ‘work of art’ should override normal planning considerations, but rather that normal planning principles should be applied. If this were done, the appeal should succeed, since the Council had failed to demonstrate harm to any interest of acknowledged importance. The interest on which they relied was one of visual amenity. The public was the best judge of harm to visual amenity, and they had overwhelmingly supported the shark. It should be permitted to remain.

THE CASE FOR THE COUNCIL

The material points were:

36. The appellant had previously contended that planning permission for the appeal sculpture was not required as it was a ‘work of art’. That contention was

now dropped, and it was no longer disputed that the ‘shark’ was development, and required planning permission. The Council accepted the presumption in favour of development, unless harm would be caused to an interest of acknowledged importance. In this case the ‘interest of acknowledged importance’ was the character and appearance of the building on which the shark was erected, and that of the residential side road in which it was located.

37. In 2 recent appeal decisions involving roof alterations to dwelling houses in Oxford (Documents 13 and 14), the Inspectors had accepted that a detrimental effect on the appearance of a property and its surroundings could be sufficient harm to an interest of acknowledged importance to justify refusal, even though, the sites were not in Conservation Areas. They had then considered various factors, including height, scale, whether what was proposed was discordant or obtrusive, whether it was in keeping with the residential character of the locality, and precedent. All these matters were of relevance in the present case.
38. What was not of relevance to the determination of an application was the merit of the appeal sculpture as a work of art. The Council had judged the appeal development on its planning merits, ie the impact of the proposal on the character and appearance of the building and street. It had not considered the merits of the sculpture as a work of art. As a local planning authority, it did not regard the artistic value of the shark as a material consideration in its assessment of the planning merits of the development. There was no case law, circular advice or planning policy advice, as far as the Council was aware, which established artistic merit as a material planning consideration, and the thrust of central government advice was to discourage local planning authorities from exercising aesthetic control, by acting as an arbiter of taste or as a judge of aesthetic or artistic standards. The idea that artistic merit could override other accepted planning considerations would have far-reaching ramifications, including the implicit acceptance that any development involving “works of art” ought not to be judged by the same criteria as other “non-artistic” development. Such a view would require clear definition of what constitutes a “work of art” and this would be impossible. There would be difficulties with, for example, play sculptures (Document 30A) and advertisements (Document 30B).
39. Some very odd ‘works of art’ had been proposed in the past for Oxford. Two examples were cited. The earliest example was a proposal in 1975 to construct a pyramid on Christ Church Meadow in the City Centre. The monument would

have covered an area of 18.6 acres, with a base of 900 ft sq and a height of 450 ft. The applicants estimated that its construction would have taken approximately 24 years, using 3,000 second year undergraduates as a labour force, and would have required the Thames and Cherwell Rivers to be frozen for 1 mile upstream and downstream for a period of 71 years. The application was duly considered on its planning merits and refused on the grounds that it would conflict with the Council's policy on high buildings in the City Centre, be out of character and overshadow the historical central area; that the construction traffic would be environmentally unacceptable on the only available roads and that the freezing of the rivers would be detrimental to drainage, water supply and navigational interests. (The details of the proposal and the Notice of Refusal dated 8 May 1975 is at Document 16).

40. Two years later, the Council received an outline application for the erection of a statue on the Castle Mound also in the City Centre. The applicant was quoted in the press as saying that he was bored by the view of the Castle Mound outside his office window when one day inspiration struck in the form of an American cat food advertisement. It was a poster showing "Morris" a television cat personality towering over a townscape with the slogan "upgrade your neighbourhood – adopt a cat". The press article continues "Mr Hugh Jones is the first to admit that some might balk at the idea of a 20 ft high feline fibreglass monster. So in his planning application he gives a list of possible subjects ranging from Christ, the Queen, Winston Churchill ... to Morris". The application was considered on its planning merits and refused on the grounds that it would be detrimental to the historic character of the Castle Mound and the Central Conservation Area and would endanger the archaeological remains of the Scheduled Ancient Monument on which it was to be built. (The decision notice and details are at Document 17).
41. The City Council was not opposed to outdoor works of art per se. In 1981, permission was granted for the erection of an Ox statue at the junction of Morrell Avenue and Headington Road (Document 18). In 1986, permission was given for landscaping works in Wellington Square, central Oxford, which included a life-size statue of Harold Macmillan, Earl of Stockton (then Chancellor of Oxford University) (Document 20) and in 1988, the Council raised no objection to a proposal by the Oxfordshire Health Authority for a 12m high kinetic sculpture at the John Radcliffe Hospital, Headington (Document 21). More recently; temporary planning permission was granted for a sculpture by

Andrew Logan entitled “Cosmic Egg” on land adjacent to the War Memorial in St Giles, central Oxford (Document 22).

42. In addition to these proposals, there were a number of sculptures in the grounds of Oxford schools, constructed as local authority “permitted development” by artists in residence at the schools, with the aim of providing future generations of Oxfordshire children with a collection of large scale outdoor modern art (Document 23).
43. References to art in Oxford would be incomplete without mention of 2 other examples which are commissioned by the appellant, and created by John Buckley who made the shark. The first example was a pair of large 3-dimensional hands which projected from the fascia of the Penultimate Picture Palace Cinema in East Oxford (Document 24). The drawing granted advertisement consent for this cinema showed the name of the cinema and its symbol (based on Al Jolson’s Jazz Singer) painted on the facade and illuminated by flood lights, with the film title made of metal interchangeable letters hooked to bars running the length of the facade and also illuminated by flood lights. No action was taken when the painted “hands” of the symbol were replaced by sculptured hands projecting from the facade, as the change to the appearance of the facade was not considered to be material.
44. The second example was the other cinema associated with the appellant, called the Moulin Rouge. This was situated in New High Street, Headington, on the site now cleared of buildings pending redevelopment, opposite and to the north of the appeal site. In May 1981, a pair of painted fibreglass “can-can” legs were erected on the facade of the cinema and as a result of complaints received by the Council; the appellant was invited to submit applications for express consent under the Advertisement Regulations and for planning permission to retain the “legs”. This Mr Heine declined to do, notwithstanding a lengthy correspondence with the City Architect and Planning Officer at the time. The name of the cinema was subsequently changed to “Not the Moulin Rouge” and on this basis the appellant argued that the “legs” could not be construed as an advertisement. He also argued that the erection of the sculpture had not involved a building or engineering operation and therefore fell outside the definition of development for planning purposes; that in any event the Planning Acts were not intended to control public art and that the erection of sculpture was not a planning matter.

45. These views were not accepted by the Council, but before deciding what action, if any, should be taken, the development was advertised as if an application had been made and public comments invited. The outcome was reported to Planning Committee in April 1982 (Document 25), when it was resolved to take no further action in the matter. The appellant was advised in writing:

“So that you (and your successors in title to the cinema) may be in no doubt of the planning position as the Council sees it, I would confirm that the Committee remain of the view that, planning permission is required but having considered the merits of the case, it thinks that permission could be given and in these circumstances the Council is advised not to take enforcement action. Should circumstances change, it is of course open to the Committee to reconsider the position.” (Letter dated 19 April 1982 from. City Architect and Planning Officer.)
46. The examples were relevant to the present case for 2 reasons. Firstly, to show that the Council had not taken a confrontational stance against works of art which required planning permission. Each development had been considered on its merits and permission had only been refused where the development would have caused demonstrable harm to interests of acknowledged importance. It should be noted that only 3 applications were refused, including the one that was the subject of this appeal. The second reason was so that it was clear that the issues debated in the present case were not new either to Oxford or to the appellant, but had been rehearsed several times in the last 25 years and on more than one occasion with the appellant.
47. The appeal building, although altered in the mid-70's, was of traditional scale and appearance, and fitted comfortably into the street scene as one of an harmonious group of buildings. That street scene was formed by residential buildings, predominantly 2-storey in scale, but with a wide mixture of building types and materials giving a lively and interesting appearance. By contrast, the appeal sculpture was of a life-sized shark, 12m above street level at its highest point, clearly visible against the sky, and forming a prominent and discordant feature, out of keeping with the character of the locality. The fact that it was (or could be) illuminated at night merely heightened its discordant nature in the street scene. It was clearly intended to be a dominant and eye-catching feature, to startle, shock and surprise the passer-by. In the light of these observations the Council had come to the inescapable conclusion that the shark was a prominent, obtrusive and discordant feature which was out of character with

the street and with the building on which it had been erected, and this was reflected in the reason for refusal on the decision notice.

46. It should be stressed that works of art involving development requiring planning permission had to be considered in the same way as any other form of development, that is to say on planning permits. In the present case, the visual impact of the development on the appearance of the appeal building and New High Street justified refusal and, since artistic merit was not a material planning consideration, this decision could not be overridden by any merit the Sculpture might have as a work of art (see Document 29: Newport Station sculpture decision letter) and the evident pleasure it gave to many (but by no means all) residents and visitors to the area. In the same way that strong public opposition should not persuade planning authorities to refuse permission where there are no planning reasons to do so, vociferous public support should not exert undue influence on Councils where refusal was justified for planning reasons. Public opinion should not be confused with the public interest. Great caution was needed in interpreting what weight to give to petitions and so-called surveys of public opinion. More weight should be attached to the views of those living in close proximity to the shark than to those living further away, in other parts of the city or, indeed, the world. The Council's consultation exercise, reported to committee in May 1990, showed 9 residents of New High Street in favour of retention, but 21 (including those in Alison Clay House) against.
49. The enforcement notice which was issued in 1986 was served for the same reason that the subsequent appeal application was refused planning permission. In determining the appeal application, the Council therefore had to consider whether there had been any material change in circumstances since the enforcement notice was issued. The Council's view was that there had not been any such changes.
50. In spite of widespread support from the public, and indeed many councillors, who clearly valued the shark for its artistic merit, the local planning authority accepted that the application must be determined on the planning merits of the case. The Council's decision reflected the view that there are no overriding planning reasons why the shark should be retained permanently in this specific location, given the visual impact of this large and discordant element in the street scene of a traditional residential side road. However, the extended period for compliance with the enforcement notice allowed the shark to remain in situ long enough to make its artistic statement, and the Council had

endeavoured to find an alternative location where it could still be enjoyed by the public but without the disturbance to local residents which presently existed. An active and lively arts centre open to the public in the City Centre and popular for its cafe, bar and live music would not have been an appropriate home for such a work of art.

51. The Council was also concerned about precedent, if the appeal succeeded, as the door would be opened for other similar proposals. Whilst this had not happened so far in Oxford, the shark was being quoted as the precedent for a giant gold fish on the roof of a restaurant in Chichester (Document 32). The City Council had recently received a planning application (not yet registered) for twin baby sharks on a guest house in Iffley Road (Document 39). Such a precedent would also have implications for determining other applications for roof-top developments. Applicants would naturally feel aggrieved if their own applications involving, for example, loft conversions or mechanical extraction ducts, were refused because of the visual impact on the street and yet the shark (with arguably far greater impact on the public domain than most roof-top developments) was allowed to remain. In this connection, attention was drawn to 2 letters which appeared in the *Oxford Mail* on 4 October 1991. The writers accused the Council of operating dual standards, in allowing the shark to remain (sic) while refusing planning permission for a front garden wall, on a housing estate designed to have open plan frontages (Document 33).
52. The shark attracted visitors to New High Street, since it was mentioned in some guides (Document 26). Its widespread fame was reflected in the many letters received from outside Oxford. This had led to some disturbance to residents, as their letters showed. It was also clear from these letters that these were considered to be traffic problems. However, although some limited survey work had been carried out, the Council did not consider that there was sufficient evidence as to the level or frequency of nuisance from traffic attributable to sightseers to justify giving this as a reason for refusal.
53. The Council called attention to the case of *Bromley LBC v SSE and Cope* (see Document 41; p62; paragraph highlighted). It was here stated that people, including neighbours, get used to a building as time passes. If the lesser degree of objection that comes with greater familiarity is to be taken into account in cases of development without planning consent, then that would hardly be an incentive to people to go through proper planning procedures. That applied to the present case, and the greater public acceptance of the shark that occurred

over time should not be allowed to weigh in its favour. The Council's initial consultation process had shown a majority against retention, and that should be what counted.

THE CASES FOR INTERESTED PERSONS

The material points were:

54. County Councillor Brian Hook, an architect, whose office was at No 3 New High Street, was opposed to retention of the shark. The best art was in sympathy with, and contributed to, its setting. This was, by contrast, out of scale with the street, with which it had no affinity. It defied good taste, as well as enforcement notices and the City Council. The residents were not consulted beforehand. The issue was the visual effect on the environment, and whether anyone would want one opposite them. If the appellant got away with it, why not others? Sharks could be followed by Mickey Mouse, vampires, flashing lights, etc, etc. By contrast, some of his clients had been refused consent for small scale lettering on buildings that was said to be incongruous and detrimental to amenity. The shark also attracted extra traffic into the street, some of which then turned round and tried to leave against the one-way system. This was detrimental to road safety.
55. Mr Guy Churchill was in favour of retention, as the shark had given a unique character to a drab street. It had wide appeal to all ages, including his 3 year old grandson.
56. Mr Brian Goodey, Reader in Urban Design at Oxford Polytechnic, considered that both Oxford and Headington were better off with the shark than without it, and that it should therefore be retained. It provided an urban landmark in an area that John Betjeman had described in 1938 as "indistinguishable from Swindon, Neasden or Tooting Bec". Few other post-war Oxford features had achieved a comparable level of recognition as urban landmarks and some which had – such as the John Radcliffe Hospital – had done so in a negative sense. It had human scale, and offered the viewer an unexpected, light-hearted and enjoyable statement. It was paradoxical that Oxford would wish to remove one of the very few examples of environmental art in the City which had an international reputation. It was also in the long British tradition of follies provided by private patronage. It was a modest contribution to an otherwise unremarkable townscape, had not bred a profusion of similar features, and

stood as one of the very few artistic statements available to the general, as distinct from the college, public.

57. County Councillor Mrs J G Todd was opposed to its retention. The decision by the City Council was not one taken along political lines, but the process gone through to arrive at the final decision to reject would have been grist to the mill of A P Herbert. Those who were opposed had (unlike Mr Heine) failed to get their case across. The whole thing was a stunt. The views of people from other parts of the City, or other parts of the world, should not count against those of local people who had to live with it. The suggestion that it did not matter what was done because it was only Headington was deeply resented. The people who live there valued their amenities too, and the thing should be seen through their eyes. The people in Alison Clay House, in particular, were very upset by it. There was a strong view in the vicinity that it should be removed, as it was undoubtedly obtrusive.
58. Councillor Christine Simm laid stress on the need for taking account of the views of the public in reaching planning decisions, even though this did not always make for speedy decision-making. She was in favour of retention of the shark, and felt that public opinion had not been fully taken into account by the Council in reaching its decision on this case. The Council itself was deeply divided – not on party lines – and no coherent party or corporate view had been possible. However, the public participation exercise undertaken in 1990 showed a clear local and City-wide preference for retention. In a case where aesthetic matters were paramount and any judgement must be subjective; public opinion should be given full weight. This was normal Planning Committee procedure, but had not been followed in this case.
59. Mrs Rosy Grace, a resident of Alison Clay House, doubted if all the residents of the old people's flats were opposed to the shark, as had been stated by others opposed to it. She was in favour of retention, and had risen from her sick-bed to say so. She did not think that many of those who signed the petition in favour of removal, when it was brought around the flats, knew what they were signing, and some had felt constrained to sign even when they had no real objection. A petition in favour of retention had been refused admission to the flats in 1987.
60. Mrs June Whitehouse was a resident of New High Street, and she was in favour of retention. Following initial surprise and confusion, she had given the matter some consideration and decided that the shark was unique and brilliant. She

could see no planning grounds for objection. It did not cause loss of daylight, overshadowing or loss of privacy; it made no noise and did not smell; and it was not illegally parked on a double yellow line. Traffic in New High Street had been considerable before the introduction of a traffic management scheme, but was now much reduced – to say that traffic had increased because of the shark was a red herring. Mention had also been made of buses bringing people to look at the shark; such buses as entered the street were more likely to be connected with the use of local church halls by language schools. The Council had said that the shark was ‘large and prominent’, but it was less so than the nearby masts and flood lights of the football ground, for which they had presumably given consent. The shark had brought fame and happiness to New High Street. People spoke to each other and friendships had been made. Children loved it. It should remain.

61. Dr Lawrence Harwood, an objector, was present at the opening of the Inquiry, but had to leave. His prepared statement was read in his absence. As former residents of New High Street, he and his wife had suffered intrusions into their privacy, loss of peace and a general degradation of their living environment as a result of the shark. It was an intrusive feature which was totally out of character with a residential street, and this intrusion was exacerbated by its being flood-lit at night. It acted as an attraction to numerous tourists, on foot and by car. Vehicles slowed up while people looked at it, and often turned round and tried to leave against the one-way system. Coaches stopped and people climbed on garden walls to photograph it. It attracted reporters, and TV and radio crews. The increased traffic was particularly injurious to the well-being of the elderly residents of Alison Clay House. It also distracted motorists on the London Road. Equality of treatment with others in dispute with the planning system demanded its removal, and permitting it to remain would set a precedent. There was a strong body of local opposition to its presence, and the appellant had cynically used the shark as an advertisement.
62. Mr Patrick Grey, a former City Councillor, was in favour of retention, and found it difficult to understand the objections. Planning matters must be based on more than personal feelings. The Council was deeply divided on the issue, whilst public support in the area had increased. He was disturbed by the way that the procedures of the City Council had been used by some of those opposed to the shark to get the decision they wanted.

63. Mr John Blackwood, author of 'Oxford Gargoyles and Grotesques' (Document 52) saw the shark as being, perhaps unwittingly, within a very long tradition of architectural decoration in Oxford, rather than as an erratic and intriguing, but ultimately trivial, work. He was in favour of retention. The shark had, in its appearance and its relationship to its surroundings, much the same purpose as the several thousand carvings which clustered on the churches and colleges of the City. Many of these carvings were grotesque, invoking the terrors of the natural world, intending to startle, even shock, the viewer. It might be argued that many of these carvings were old, whereas the shark was new. However, many grotesques had in fact been carved in the last 30 years. Nor was it true to say that they were always small in scale. For example, those at Merton Chapel were several feet long and weighed over a ton (page 14, No 2), whilst those in Magdalen's Cloister Quad (page 26, No 3) were 8 or 9 ft high. It might be said that we had become used to these figures, but the point was that we should not be used to them; there was no presumption in favour of dullness. The meaning behind such grotesques was complex, but had to do with giving expression to the dark side of life. This fitted well with Bill Heine's account of the shark being conceived in response to Chernobyl, and the bombing of Tripoli. It challenged smugness and complacency, and had a message for those with the wit to read it. Just as St Bernard of Clairvaux had raged against grotesque carvings on churches, so the Chairman of the Planning Committee had played a similar role in regard to the shark. We should not mechanically impose restrictive rules against the light of vision, wit and imagination.
64. Mr Bill Dufton, Director, Southern Arts, supported retention. Southern Arts covered 6 counties (including Oxfordshire) and received funds from central and local government to support and promote the arts. It was ultimately accountable to the Arts Council. The shark was a witty and highly original public sculpture of merit and distinction. Southern Arts had made a grant in recognition of its merits, and in enthusiastic support for that work' on its present site. The grant was for a specific work on a specific site, and it was not correct to say that it had been made in general recognition of the past work of the artist, John Buckley. Before making that grant, they had checked with the City Council that the shark was not in breach of the law. It was widely popular, and regarded as interesting. The siting of it was important, in contrast to its unimpressive and unremarkable suburban setting.

65. Mr Peter Bibby, an interior designer and furniture maker, favoured retention of the shark, which considerably improved the townscape of Headington, making an otherwise unremarkable street into an extraordinary example of architecture. It would be of little value if removed from its present suburban location. Placed elsewhere, in a more usual venue for public sculpture, it would be simply a big plastic shark. It must also be remembered that it was not in a Conservation Area, or in proximity to a listed building, where conservation policies would, of course, prevail. Mr Heine might, after all, clad his house in artificial stone, paint it pink with green spots, or do a variety of other things that might outrage the neighbours without needing planning permission. Freedom of the individual and the need to balance that against community interests had to be borne in mind. The Council was in error in arguing precedent, since it relied only on mere fear or generalised concern, which was not enough. This should be regarded as clearly an exceptional case. Their refusal was also flawed in being based on the concept that aesthetic matters could not be a planning issue. The shark had positive landscape merit, which was inextricably bound up with aesthetics, and was undoubtedly a planning matter.
66. Mr Alan Watson, a resident of Bateman Street and thus a near neighbour of the shark, had become an instant fan of the shark on first seeing it. It was invaluable as a landmark when giving directions to his house. Flouting of planning regulations should not be encouraged, of course, but the Council should have bowed to views of local residents, who were almost unanimously enthusiastic. The statement that it generated a great deal of visitor traffic was simply not true. The Council had pursued an apparent vendetta against the shark, when its energies would be better directed elsewhere.
67. Mr Richard Whitecross supported retention, as public opinion had moved in the shark's favour. The right of an individual to step out of line should be respected. The Council was in danger of appearing ridiculous and fuddy-duddy, which was not entirely fair. However, the Council clearly liked its art safely within the 4 walls of a museum. It had allowed tawdry and unsuitable development in the City, but now sought to remove a work of international repute from this City of culture and learning.

WRITTEN REPRESENTATIONS

68. Just over 200 letters have been received, some containing more than one signature. About 90% of those writing were in favour of retention. These included the Folly Fellowship; the sculptor Michael Black; Lord Esher; Dr Robert Bricton of La Jolla, California; Lord Palumbo; Ms Beatrice Duday of Starnberg; Mr Robert Fowler, Principal of the Central School of Speech and Drama; the President of Magdalen; and Dominic Wraith (aged 6). The Oxford Preservation Trust wrote a cautious letter, expressing concern but stopping short of giving a clear view one way or the other. Of the 20 letters objecting to retention of the shark, 5 came from addresses in New High Street, and 6 from other addresses in Headington. None of the letters (Document 3) raise new points, either in support of, or against, retention of the shark.

CONCLUSIONS

Bearing in mind the above, and taking account of what I saw on my site inspection, I have reached the following conclusions (the numbers in brackets refer to paragraphs within the body of the report):

69. The basic facts of this case are straightforward, and not in dispute (10–19). ‘The Shark’ is there for all to see, and make their own judgement. Both parties are agreed that planning permission is required, and that normal planning considerations should obtain (24, 35, 36, 38). It is not argued that special treatment is due to the shark as a “work of art” (35). It is also accepted by the Council that the normal presumption in favour of development applies, unless harm can be demonstrated to an interest of acknowledged importance (36). It is agreed by both parties that the interest to be considered here is the visual amenity of the appeal site’s immediate surroundings (25, 36). It is not disputed that the shark is (in the words of the reason for refusal) a “large and prominent feature” (2, 32). The Council allege that it detracts from the harmonious appearance of the terrace, that it is out of place in the locality, and that, for these reasons, its deleterious impact on visual amenity amounts to demonstrable harm sufficient to justify removal. The appellant, of course, disagrees. Therein lies the issue in this case.
70. There is some slight disagreement about the nature of the upper part of New High Street, adjacent to the appeal site. The appellant describes it as being largely commercial (33), the Council as being residential (47) albeit with some

non-residential uses. The Council are, I think, in the right here. The shark is to be considered as being set in a predominantly residential environment. On the other hand, the Council have laid too much stress on the supposed harmony of the terrace (2). In fact, it consists of 4 rather disparate buildings with no strong unifying feature to them (5). This lack of a strong visual unity is typical of the street, and the more general area. It is a typical suburban landscape, pleasant enough but essentially undistinguished (4).

71. Into this archetypal suburban setting crashes (almost literally) the shark. The contrast between the object and its setting is quite deliberate, as the appellant has explained (20). In this sense, the work is specific to its setting, and it would 'read' quite differently in the context of, say, the foyer to an arts centre in Gloucester Green (15). It is (as the Council say) incongruous, and that incongruity is quite consciously sought by the artist. It is, indeed, out of harmony with its surroundings. It is that lack of harmony, that sense of being "out of place" to which the Council objects, and which it equates with demonstrable harm to visual amenity. It is the very same feature which appeals to many of the shark's supporters and which has made it an urban landmark.
72. Whether "lack of harmony" equates with "visual harm" depends upon the context. In a Conservation Area it may very well do so, as it may in any area of pronounced and consistent character or appearance. It is the relationship between the object and its setting that counts. That relationship depends upon the setting, but it also depends upon the object. An 'incongruous' object can become accepted as a landmark 'in some cases, becoming well-known, even well-loved, in the process. Something of this sort seems to have happened, for many people, to the shark. This brings me to the difficult question of public opinion and its part in this case.
73. In spite of the plethora of petitions, surveys and consultation exercises, the position here can never be entirely clear. Based on these things, and on the considerable body of representations received in connection with the appeal my general judgement is that there is now a wide measure of acceptance, even affection, for the shark, but that a minority remain implacably opposed and will continue to do so. Undoubtedly, some of those most opposed live in New High Street (48). The Council, and some objectors, urge that greater weight be given to their objections than to the support of people who do not live in such close proximity (48). There is some difficulty here. Some of those living in New High Street and objecting can have no view of the shark from their houses, whilst

some of those who actively support it may live in other streets yet have a direct view of it from their windows. If a resident of New High Street objects, but only sees the shark when passing along the public road, is it right that his opinion be given greater weight than that of any other passer-by? I see no solution to these problems, other than to fall back on simple utilitarianism – the greatest good of the greatest number.

74. The Council is right to draw a logical distinction between the public good and public opinion (49). Where sound planning demands it, a Council should not be unduly swayed by public opinion either for or against a proposal, although it will always be necessary to take some account of it insofar as it bears on material planning considerations. In this case, where the only planning consideration is the somewhat subjective one of “visual amenity”, it is proper to ask “who is to define ‘amenity’ in the first place?” In that regard the public are likely to be a good guide to the ‘public interest’ and ‘public opinion’ will assist in determining public interest. The degree and nature of public support for the shark in this case give me added confidence in concluding that (whatever my own personal views of the shark may be, and I shall not intrude them here) the Council have failed to demonstrate convincingly that it constitutes demonstrable harm to an interest of acknowledged importance, sufficient to justify refusing consent in this case.
75. It must be restated that the appellant is entitled to his permission unless that would cause demonstrable harm. That he failed to get consent in the first instance is not relevant; nor is the fact that some people dislike the shark intensely. The mere fact that what you do to your house annoys the neighbours is not sufficient reason to refuse planning consent. The test is (to repeat) demonstrable harm to an interest of acknowledged importance. I am not satisfied that such harm has been demonstrated here and that the undoubted facts that the shark is large, prominent and not in harmony with its surroundings, constitute grave detriment to visual amenity. They seem to me rather to establish its character as an urban landmark.
76. The Council is understandably concerned about precedent here (51) and their concern is on 2 levels. The first concern is simple proliferation, with sharks (and Heaven only knows what else) crashing through roofs all over the City. This fear is exaggerated. In the 5 years since the shark was erected, no other examples have occurred. Only very recently has there been a proposal for twin baby sharks in the Iffley Road (51). When such proposals are made, the City Council

has adequate powers to deal with them as the circumstances of the case demand. If demonstrable harm would be caused, it can refuse consent. Granting consent here is not giving carte blanche for all future proposals. On the contrary, such features become meaningless as they proliferate.

77. The second concern is a more generalised one, and it is that all kinds of proposals for roof tank rooms, dormer windows, garden walls, etc, will be more difficult to resist as disgruntled applicants point to the Headington shark as having been permitted, and compare their own (modest) proposals with the impact of it (51). This is too generalised a concern to be accorded much weight. It is in the nature of things that disgruntled applicants will always find something to put their own (modest) proposals in a good light, and if this line of reasoning were taken to an extreme it is difficult to see what could be permitted safely anywhere. The test in any such instance remains 'demonstrable harm', based on the facts of that case, not facile comparison with other cases elsewhere.
78. I should comment briefly on the other appeal decisions cited by the Council in respect of dormer windows (37). In those 2 instances, the Inspectors studied the circumstances of the individual case and concluded that lack of harmony with the surroundings equated with unacceptable loss of visual amenity. They were doubtless also concerned about the cumulative effect of such proposals where they were likely to be repeated. In this instance, lack of harmony does not, in my judgement, equate with unacceptable loss of visual amenity, although I accept that in very many cases the two will be synonymous.
79. There is a real sense in which permitting the shark to remain is the "risky" option, the safe and easy thing to do being to remove it. However I cannot believe that the purpose of planning control is to enforce a boring and mediocre uniformity on the built environment. Any system of control must make some small space for the dynamic, the unexpected and the downright quirky, or we shall all be the poorer for it. I believe that this is one case where a little vision and imagination is appropriate, and I recommend that the Headington shark be allowed to remain.
80. The conditions agreed at inquiry are at Document 4. The imposition (conditions 1 and 2) of what are in effect maintenance conditions is unusual, but I consider them justified by the circumstances of the (very unusual) case, and I recommend that these conditions be imposed.

RECOMMENDATION

81. That, subject to the agreed conditions, this appeal be allowed and that consent be granted for retention of 'Untitled 1986' at 2 New High Street, Headington, Oxford.

I have the honour to be

Sir

Your obedient Servant

(signed)

P J MACDONALD MSc DipArch RegArch MRTPI

Inspector

[The following material appears in a jumbled order on the planning website and has been put in a logical order below]

INTERESTED PERSONS

County Councillor B L Hook ARIBA

The Forge, Kingston Bagpuize, Abingdon, Oxford, OX13 5AG.,

Mr G. Churchill

23 Staunton Road, Headington. Oxford.

Mr B. Goodey M DipLA FRGS FRSA

Reader in Urban Design, Joint Centre for Urban Design, Oxford Polytechnic, Gipsy Lane, Headington, Oxford OX3 013P.

County Councillor Mrs J G Todd

Foxton Lodge, Foxton Close, Oxford.

Councillor Ms C Simm

70 Argyll Street, Oxford.

Mrs R Grace

Flat 3, Alison Clay House, New High Street, Headington, Oxford.

Mrs J Whitehouse

21 New High Street, Headington, Oxford OX3 7AJ.

Dr L Harwood, The Cobblers Cottage, 35 Park Street, Bladon, Oxfordshire OX20 4RW
(prepared statement read in his absence)

Mr P Gray, 67 Divinity Road. Oxford

Mr J Blackwood, 144 Ferry Road, Oxford

Mr B Dufton, Director, Southern Arts, 13 St Clements Street, Winchester, Hants

Mr P Bibby, 62 Oakhurst Grove, London SE22 9AQ.

Mr. A Watson CEng MCIBSE, Bateman Street, Oxford.

Mr R Whitecross, 35 Linkside Avenue, Oxford.

DOCUMENTS

- Document 1 – Lists of persons present at the inquiry.
- Document 2 – Letter of notification and list of persons notified.
- Document 3 – Letters of representation.
- Document 4 – Suggested conditions as agreed at inquiry by both principal parties.

PUT IN BY CITY COUNCIL

- Document 5 – Site at the corner of London Road and New High Street – redevelopment proposals – elevations to New High Street.
- Document 6 – Photographs of the appeal site and its surroundings.
- Document 7 – Elevation of 2 New High Street approved by planning permission reference A258/76.
- Document 8 – Building Regulations Approval Notice 30 September 1986.
- Document 9 – Planning Committee report to Council, March 1989.
- Document 10 – Traffic survey by local resident (11 March 1987).
- Document 11 – Survey of local opinion presented at Planning Committee, 23 May 1990.
- Document 12 – Traffic survey by City Engineer and Director of Recreation, 15 July 1990).
- Document 13 – 22 Norreys Avenue appeal decision and elevations.
- Document 14 – 3 Salisbury Crescent – appeal decision and elevations.
- Document 15 – Letter circulated by appellant to local residents.

- Document 16 – Pyramid. Christ Church Meadow.
- Document 17 – Fibreglass statue – Castle Mound.
- Document 18 – Ox statue – Morrell Avenue, St Clements.
- Document 19 – Mural – 19 Old High Street. Headington.
- Document 20 – Statue – Wellington Square.
- Document 21 – Kinetic sculpture – John Radcliffe Hospital.
- Document 22 – Cosmic Egg – St Giles.
- Document 23 – Six sculptures for Oxford project.
- Document 24 – Hands – Penultimate Picture Palace.
- Document 25 – Report of the City Architect and Planning Officer to Planning Committee – 7 April 1982 – “The legs”, Not the Moulin Rouge.
- Document 26 – Guide books in which reference is made to the shark.
- Document 27 – Press cutting dated 7 December 1990 and 8 December 1990 from American newspaper about a clown sculpture in Marina del Ray.
- Document 28 – Press cutting – *Daily Telegraph* 4 June 1991 – relocation of the legs.
- Document 29 – Appeal decision – sculpture at Newport Station.
- Document 30 – Photographs of sculptures.
- Document 31 – Press cutting – shark on Hertford College/Bridge of Sighs.
- Document 32 – Press cuttings – ‘Planning’, *Daly Telegraph* – Goldfish on roof of Chichester restaurant.
- Document 33 – Press cutting – *Oxford Mail* 4 October 1991.
- Document 34 – Land use plan of area around appeal site.
- Document 35 – Summary of points made in public comments received during appeal.
- Document 36 – Extracts from letters received from the public during appeal.

- Document 37 – Traffic and parking provisions in area around appeal site.
- Document 38 – Plan of Conservation Areas in Headington.
- Document 39 – Extract from *Oxford Mail*: 6 October 1991 and letter in respect of ‘twin baby sharks’ proposal.

DOCUMENTS (CONTINUED)

- Document 40 – Comments on appellants survey of opinion in New High Street
- Document 41 – JPEL Note of case: *Bromley LBC v SSE and Cope*.

PUT IN BY APPELLANT

- Document 42 – Photographs of site and surroundings.
- Document 43 – Letter from appellant to City Secretary and Solicitor, 16 October 1987.
- Document 44 – Petition with 8,109 signatures in favour of retention; November 1986.
- Document 45 – Appellant’s survey of public opinion. September 1991 (with map).
- Document 46 – ‘The Harpoon’. 1987.
- Document 47 – Letter to Director of Planning from the City Council Leader, 17 February 1987.
- Document 48 – Agent’s particulars of 19 New High Street.
- Document 49 – Various press cuttings.
- Document 50 – Letter accompanying petition in favour of retention. March 1990.
- Document 51 – Petition in favour of retention of shark; October 1987.

PUT IN BY INTERESTED PERSONS

- Document 52 – Book: ‘Oxford Gargoyles and Grotesques’ by Mr John Blackwood.
- Document 53 – Papers put in by Dr Harwood.
- Document 54 – Papers put in by Mrs June Whitehouse.

OXFORD CITY COUNCIL
APPLICATION FOR PERMISSION TO DEVELOP LAND
Town and Country Planning Act 1971

Ref: NF-/0084/90

Date: 27/11/90

NOTICE OF REFUSAL

Proposal: Retention of public sculpture "Untitled 1986"
(fibre glass shark through roof of existing house)

At: 2 New High Street

On behalf of W.H. Heine

W.H. Heine
"Untitled 1986"
2 New High Street
Oxford

Dear Sir

I have to refer to your application in respect of the proposed development outlined above and to inform you that after consideration on 14/11/91 planning permission in respect thereof has been REFUSED for the following reason.

The shark is a large and prominent feature in the street which detracts from the otherwise harmonious appearance of the terrace in which it is located and is out of place in the locality. There are no overriding reasons why such a large and prominent feature should be permitted to remain.

Yours faithfully

(signed)

CITY PLANNING OFFICER

Level 3
Clarendon House
Cornmarket Street
OXFORD
OX1 3HD

IT IS IMPORTANT THAT YOU SHOULD READ THE NOTES ON THE REVERSE OF THIS NOTICE

D/906/JL/P File Ref: APP/G3110/A/91/1841337

APPEARANCES

FOR THE APPELLANT

Mr E E Church,
Solicitor of Messrs Cole and Cole. St Georges Mansions, George Street, Oxford
OX1 2AR

He called:

Mr W R Heine
The appellant, 2 New High Street, Headington, Oxford.

Mr D R Scharf BA MRTPI
Advisor on planning matters to Messrs Cole and Cole, Solicitors

FOR THE CITY COUNCIL

Mr R Rundell
of Counsel, instructed by City Secretary and Solicitor.

He called:

Mrs L Wride DipTP MRTPI
Assistant City Planning Officer (Development Control and Conservation) Oxford City
Council.

C/772/AM/P

OXFORD CITY COUNCIL
APPLICATION FOR COSTS BY W R HEINE

Sent by Department for the Environment to Messrs Cole & Cole, Solicitors

Inspector: P J MACDONALD MSc DipArch RegArch MRTPI

Date: 15–16 October 1991

File Ref: APP/G3110/A/91/184337

[Department of the Environment headed paper]

Gentlemen,

LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78

APPEAL BY MR W R HEINE

1. I am directed by the Secretary of State for the Environment to refer to the attached letter, which contains the decision on the above-mentioned appeal. This letter deals with the application for an award of costs made by the appellant at the local inquiry held on 15–16 October 1991.
2. The submissions made at the inquiry on behalf of your client in support of his application for costs, the reply on behalf of Oxford City Council and the Inspector's comments and recommendation on the matter are set out in the Inspector's costs report, a copy of which is enclosed. In planning appeals the parties are normally expected to meet their own expenses, irrespective of the outcome of the appeal, and costs are awarded only on grounds of unreasonable behaviour. Accordingly the application for costs has been considered in the light of Department of the Environment Circular 2/87, the Inspector's report of the inquiry, his separate report on costs, the appeals papers and all the relevant circumstances.
3. The Inspector's comments on the costs application are as follows:

“In my view, there is no unreasonable behaviour here on the part of the Council that would justify an award of costs. The Council's concern was with the visual amenity of the area, which was a proper concern for a local planning authority to have. They were

not concerned with detailed matters of aesthetics, but with the principle of development per se. I do not consider that they went against the spirit of paragraphs 27–29 of PPG1, and sought to exercise an unreasonable degree of aesthetic control. “Visual amenity” as a concept embodies, of course, the question of appearance, and some aesthetic judgements have to be made. However, those seem to me to be entirely within the scope of those judgements that a local planning authority can properly make in the exercise of its function.”

The Inspector recommended that no award of costs be made in favour of your client.

4. Having considered all the evidence in this case, the Secretary of State agrees with the Inspector’s comments in his costs report and accepts his recommendation. The Secretary of State has therefore decided that an award of costs against the Council on the grounds of unreasonable behaviour would not be justified. Accordingly your client’s application is hereby refused.

A copy of this letter has been sent to Oxford City Council.

I am, Gentlemen,

Your obedient Servant,

(signed)

MISS A GERRY

Authorised by the Secretary of State to sign in that behalf

C/772/AM/P

Tollgate House
Houlton Street
BRISTOL
BS2 9DJ

1991

To the Right Honourable Michael Heseltine MP
Secretary of State for the Environment

- 1 I have the honour to report that on 15 and 16 October 1991, I held an Inquiry at the Town Hall, Oxford into an appeal by Mr W R Heine against a decision of the Oxford City Council to refuse planning permission for the retention of a public sculpture, 'Untitled 1986' ('the shark') at 2 New High Street, Headington.
- 2 I have submitted simultaneously my inquiry report and this report which relates to an application for an award of costs made at the Inquiry by the appellant against the City Council.

SUBMISSION ON BEHALF OF THE APPELLANT

3. In support of the application, it was stated that, in reaching their decision, the City Council has failed to have regard to paragraphs 27–29 of Planning Policy Guidance Note 1, which dealt with aesthetic control. Paragraph 27 referred to the need for Council's to avoid seeking to force developers to adopt designs that were unpopular with their clients. By analogy the Council had here sought to enforce removal of the shark, a course that was clearly unpopular with the public. The clearly expressed public will was ignored. Paragraph 28 stated that Councils could reject obviously poor designs; they had rejected the shark which clearly did not fit that description. Nor was the setting of the appeal site one of those 'environmentally sensitive areas' where detailed and fastidious design control was appropriate. In the terms of paragraph 29, they had sought unjustifiably to control external appearance, and that should lead to an award of costs.

SUBMISSION ON BEHALF OF THE LOCAL PLANNING AUTHORITY

- 4 In reply, the Council stated that they had been at pains throughout the Inquiry to emphasise that they did not object to the design of the shark, but to the principle

of development. Their concern was with the question of visual amenity – a proper planning consideration. To try to bring the application within the scope of those paragraphs dealing with aesthetic control in PPG1 required odd words and phrases to be taken out of their context. It was obvious upon reading the PPG that those paragraphs had nothing at all to do with the present case. To try to equate the public (whose opinion in this case was sharply divided in any case) with the reference to ‘clients’ in paragraph 27 was to do violence to the meaning of the word. Detailed consideration had been given to the issues on several occasions, and there was no ground here for an award of costs.