STANSTED AIRPORT 35 + PLANNING APPEAL

PINS Appeal Ref: APP/C1570/W/20/3256619

APPELLANT'S SUBMISSIONS ON COSTS

Introduction

1. This is an application for a full award of costs made by STAL against UDC. The application is for a substantive award of costs and is made on the basis that UDC has behaved unreasonably in defending the appeal, and that this unreasonable behaviour has directly caused STAL to incur the wasted costs of bringing this appeal.

2. This application should be read in conjunction with our opening and closing submissions, as well as our legal submissions concerning UDC's 'condition 15', which we do not repeat here.

3. Notwithstanding the obfuscation surrounding 'condition 15', UDC's position at the close of the evidence is clear. It has abandoned any attempt to defend the four reasons for refusal promulgated by its Committee, and, at the conclusion of the evidence, it is clear that its expert witnesses all now accept that the development is acceptable in principle subject to the imposition of suitable conditions and planning obligations. It has therefore come full circle to the position endorsed by its highly experienced planning officers in their comprehensive officer report ("OR") dated November 2018[1] and accepted by the previous Committee in resolving to grant permission.

4. It can come as absolutely no surprise, therefore, that STAL now makes this application for costs against UDC. Indeed, as we explain below, and as Mr Scanlon accepted in XX, UDC Members were expressly warned of the very real risk of a "substantial" award of costs against it when the new Residents for Uttlesford administration embarked upon the course

[1] CD 13.1b

of action, which led to the reversal of the original resolution to grant permission, contrary to all the professional advice provided to it, and which has now led directly to this appeal[2].

5. Despite UDC's protestations that it has somehow been caught off guard by this application for costs, which has been made entirely in accordance with the very familiar procedure in the PPG[3], there can be no doubt that UDC fully anticipated that a costs application would be forthcoming and, indeed, that its witnesses were instructed to focus their energies on defending such an application, by seeking to uphold the "reasonableness" of UDC's original decision. It is for this reason that references to the alleged "reasonableness" of the Committee's decision are peppered throughout the proofs of evidence submitted by UDC's witnesses[4]. As the Inspector (Mr Boniface) noted in response to Mr Coppel's protestations that he would need to recall witnesses to deal with this application (which was clearly flagged in our Opening Submissions), much of the Council's evidence at the Inquiry has also been directed at resisting costs.

6. This also explains why all four of UDC's witnesses now seek to rely upon the publication of the ESA, as somehow justifying their position at this appeal that the impacts of the development are acceptable, subject to the imposition of conditions.

7. We consider the issue of the ES vs the ESA in more detail below but, as we go on to explain, it is not remotely credible to suggest that there is anything in the ESA which might justify this dramatic *volte face* by UDC in respect of each of the reasons for refusal, in the absence of any material change in the assessment of the significance of the environmental impacts resulting from the updated forecasts.

8. Before setting out the grounds for this application for costs, it is necessary to revisit the sorry tale of UDC's handling of this planning application in light of the evidence as tested at the Inquiry. It is this chain of events which resulted in the decision to refuse permission, contrary to the original resolution to grant, and which has left STAL with no choice but to incur the very substantial costs of bringing this appeal.

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[2] CD 13.2b

[3] See Paragraph: 035 Reference ID: 16-035-20161210:
"In the case of hearings and inquiries: all costs applications must be formally made to the Inspector before the hearing or inquiry is closed."

[4] See, for example, Broomfield p/e para 113, Hinnells p/e para 29, Scanlon para 2.2

Background to this application for costs

9. As Mr Andrew explains, the handling of the application was "*one of the most extraordinary determination processes*" that he has witnessed during his professional planning career[5]. The chronology of events culminating in the refusal of permission in January 2020 was fully explored in XX with Mr Scanlon. It is documented in the various reports and minutes in evidence before the Inquiry. No Member of the Planning Committee or the Council was called by UDC to give evidence about this meeting, which ran over two days and lasted for 11 hours.

10. Mr Andrew was, however, present throughout this meeting and he gave evidence to the Inquiry about the procedure adopted and the matters that were, and were not, considered by Members. We return to his evidence below.

11. The starting point is the careful and considered assessment by UDC's planning officers of the application, in their comprehensive OR running to more than 120 pages, of November 2018. This followed many months of discussions and negotiations between STAL and UDC Officers and their advisers and relevant consultees, including extensive consultation and further discussions following the submission of the ES in February 2018.[6]

12. Having undertaken a thorough assessment of the planning balance, Officers advised that the development accords with the development plan, complies with the principle in favour of sustainable development and the policies in the NPPF, complies with national aviation policy in the Aviation Framework and MBU (to which Officers, correctly, gave substantial weight)[7], and that there were no other material considerations which would outweigh this policy compliance.[8]

13. It was on the basis of this advice (informed by the expert advice of the Council's appointed consultants), that Members originally resolved to grant permission, subject to completion of a s106 agreement in accordance with the detailed Heads of Terms endorsed by the Committee.

[5] STAL/13/3 Andrew p/e para 25
[6] See e.g. CD 11.2a
[7] CD 13.4b para 10.9
[8] CD 13.4b paras 10.106- 10.111

14. It is well-established that Members are presumed to have adopted the reasoning set out in the Officer Report[9], where they follow the recommendation made by Officers in reaching a decision on a planning application. The original resolution to grant was, therefore, taken by UDC's Committee on the basis of a proper consideration of the planning balance, including the application of the statutory test under section 70(2) Town and Country Planning Act 1990 and the presumption in favour of sustainable development in paragraph 11c of the NPPF. There has been no suggestion at this Inquiry by UDC that the November 18 OR was in any way flawed or that the Committee fell into any error in resolving to grant permission in accordance with the advice it contained.

15. In the months that followed, which Mr Scanlon sought to glide over in his otherwise full and lengthy proof of evidence[10], STAL, UDC and ECC Officers proceeded in good faith to negotiate the s106 agreement, in the belief that this would result in the decision notice being issued.

16. During the period from April 2019 to January 2020, Members were given clear and consistent advice in a series of Officer Reports (informed by legal advice received from no fewer than three experienced Counsel and leading Counsel) that there was no lawful basis for revisiting the decision taken in accordance with the advice in the November 18 OR and that there were no new material planning considerations that might justify such a decision. Consequently, Members were repeatedly urged to proceed to grant planning permission for this development without further delay[11].

17. Officers also arranged a series of workshop sessions to take Members through the content of the draft obligations and to discuss the issues that were being aired by Members (clearly led on by SSE) as potentially constituting "new" material planning considerations[12]. This process could not have been more thorough and inclusive, as Mr Scanlon conceded in XX.

18. In the OR produced in advance of the second EGM in June 2019[13], Officers also made it abundantly clear to Members that serious cost consequences were likely to follow in the event that they persisted with their plan to reverse the resolution lawfully made by the

[9] See, for example, *Dover DC v Campaign to Protect Rural England (Kent)* [2017] UKSC 7
[10] UDC/4/1, Scanlon p/e para 5.9
[11] CD 13.2(b), CD 13.3(b), CD 13.4(b)
[12] See e.g. CD 13.4(b) para 11
[13] CD 13.3(b)

original Committee, contrary to the consistent advice of Counsel and Leading Counsel[14] instructed by UDC that there was no lawful basis for so doing.

19. Thus, having set out the relevant guidance and the approach to awarding costs in planning appeals in full, and having warned Members that "*It is obvious that the costs incurred by the applicant in relation to an appeal are likely to be very substantial indeed"*, the Council's s151 Officer advised Members that:

> "18. In light of the legal advice received, it is… the strong advice of the s151Officer that the Council releases the officers from the instruction to withhold the decision notice and removes any impediment to discharge by officers of Recommendation (2) of the Planning Committee."[15]

20. There can be no doubt, therefore, that UDC Members were fully alive to the very real risk of costs if they continued to withhold the decision notice without valid reason. Regrettably, however, UDC chose to ignore this advice and the costs warnings very properly made by its experienced officers, and instead resolved not to issue the decision notice but instead to send the decision back to the newly constituted Planning Committee.

21. It was shortly after this meeting, on 30 July 2019, that Councillor Hargreaves reassured Members that the Council's strategic initiative fund, its transformation reserve and its future development project fund could all be made available to cover the costs associated with this appeal:

> "Councillor Hargreaves, in his role as Cabinet Member for the Budget and Finance, listed the financial reserves available to Council; the Strategic Initiative Fund - £1.6 million, the Transformation Reserve - £1.1 million and the Future Development Project fund - £200,000. He said this £3 million could be used to prevent climate change and if necessary to fight the Stansted Airport application if it was taken to appeal."[16]

22. These are not the words of a rogue Councillor. This suggestion was made by UDC's new Member with responsibility for making budgetary and financial decisions. Quite apart from the fact that this is clearly an improper use of these ringfenced funds, Councillor Hargreaves' suggestion speaks volumes about the new administration's attitude towards

[14] Christian Zwaart, Stephen Hockmann QC and Philip Coppel QC
[15] CD 13.3b, para 18
[16] CD 17.34

the determination of this application. It explains why STAL was left with no choice but to incur the costs of bringing this appeal.

23. At the Committee meeting in January 2020, Members had before them a further Officer Report[17], which reiterated that:

    i. There were no grounds for deeming the S106 Agreement to be inadequate.

    ii. There were no new material considerations that would justify a different decision to that resolved by the Planning Committee on 14 November 2018. This advice followed extensive analysis of all the matters raised by SSE, in particular, which were said to amount to new material considerations.

    iii. The development plan framework position had not changed materially since 2018.

    iv. The decision notice should be issued granting planning permission for the development as proposed in the application subject to the revised planning conditions recommended to the Committee on 14 November 2018, as soon as the amended planning obligations had been signed by all parties.

24. Against this backdrop of clear and correct advice from UDC's officers that there were no legitimate planning reasons to revisit the original resolution to grant permission, and clear warnings about the very substantial costs risk of doing so, it has been necessary to devote some considerable time in evidence to exploring the basis for the Committee's decision to refuse permission, as set out in the minutes of the Committee meeting, which were only finally agreed by the Council nine months later, in September 2020. As we have noted, no Member of the Planning Committee was called to give evidence to explain how it had arrived at this decision, which was so starkly at odds with all the professional planning and legal advice provided to it.

25. Nonetheless, the minutes are highly revealing, both as to the approach adopted by the Committee and the matters relied upon in reversing the original resolution, and as to the influence exerted by SSE over the decision ultimately reached to refuse permission. They

[17] CD 13.4b

demonstrate that none of the reasons for refusal were based on any proper application of the relevant statutory and policy framework, nor on any sound evidential basis.

26. As Mr Andrew explained in XinC, there was also no discussion by Members at the meeting about the adequacy of the s106, which had been negotiated over so many months. He fairly described it as "*staggering*" that the Committee could have resolved to refuse permission outright, without any substantive debate of the extensive mitigation package in the s106 agreement, and without considering at all whether this mitigation package might address the Committee's concerns.

27. The minutes also reveal that there was no evaluation of the benefits of the scheme against the perceived harms, nor any evaluation against national aviation policy including MBU. Instead, and as explained by Mr Andrew in XinC, having resolved not to issue the decision notice due to alleged "*changes*" between November 2018 and January 2020, in respect of noise, carbon and the impact of particulates on health and well-being, the Committee moved immediately to resolve to refuse permission on this basis, without undertaking any reweighing of the planning balance and, as we have already noted, without any consideration being given to the mitigation package or proposed set of planning conditions.

28. As Mr Andrew also said in XinC, if the Committee was genuinely still uncertain about any aspect of the development or the ES, despite the clear advice received from Officers and the series of workshops and meetings described above, there was nothing to prevent it from requesting such further information as it required at the January 2020 meeting. This could have been done formally through Regulation 25 of the EIA Regulations or as an informal request for clarification to STAL. No such requests were made.

29. Equally, if Members felt that some other formulation of the conditions was necessary, it was entirely within their power either to seek a deferral of the decision to enable this to be considered or, indeed, to grant permission subject to a different set of conditions. Instead, Members elected to refuse permission outright, for reasons which have proved to be wholly misconceived and which UDC no longer seeks to defend at this appeal. It is impossible to escape the conclusion that the Committee was set on refusing permission for this development, come what may and without any regard for the very substantial local and regional benefits this development will bring.

30. Against this background, we turn to consider the grounds for this application for costs by reference to the guidance in the PPG and the examples of unreasonable behaviour identified therein.

(1) Preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations

31. As Mr Scanlon accepted in XX, the Committee's decision in January 2020 was taken contrary to the "*proper*" and "*professional*" advice of UDC's planning officers that the development was in accordance with the development plan, national policy and all other material considerations, and that permission should be granted. It was also taken contrary to the advice from the very extensive list of consultees set out in the original OR[18], as well as experienced independent consultants on air quality and noise (White Young Green and Bickerdike Allen Partners), that there were no matters of concern which had not been satisfactorily addressed or could not be mitigated against.

32. As the sequence of ORs discussed above reveal, Members also received clear and consistent legal and planning advice that the matters relied upon in promulgating the reasons for refusal were not legally capable of constituting new material planning considerations, sufficient to justify the decision to revisit the original resolution to grant.

33. This is clearly not, therefore, an example of Members legitimately forming a different judgment to Officers as to the weight to be given to competing considerations in the planning balance. Indeed, as we explain above, there was no attempt to undertake the planning balance at all although, as Mr Scanlon agreed in XX, the evaluation of the range of impacts associated with a development of this scale and the overall balancing of these impacts is an <u>essential</u> stage in reaching a properly considered view as to whether or not permission should be granted.

[18] Essex County Council, Hertfordshire County Council, East Herts District Council, Place Services, Network Rail, Highways England, Natural England, UDC's Environmental Health Officer, Senior health Improvement Officer, Communities Manager, the Environment Agency, Thames Water

34. Had the Committee approached this decision in the proper way, it would have been bound to conclude, in accordance with the consistent advice of UDC's experienced planning officers, that the decision notice should be issued without delay.

35. The advice of UDC's officers that the development complies with the development plan and with the presumption in favour of sustainable development, and that the planning balance favours approval of the scheme, subject to conditions and a s106 obligation, has also now been endorsed by both of the expert planning witnesses on appeal, including UDC's own planning witness, Mr Scanlon.

36. Indeed, having explained his view that the development complies with an up-to-date statutory development plan and that it also benefits from the presumption in favour of sustainable development, Mr Scanlon went so far as to say in XX that "*when you undertake the exercise [set out in paragraph 11 of the NPPF] the **only conclusion you can reach** is that [the development] benefits from this presumption*."

37. We address Mr Scanlon's evidence in more detail in our closing submissions, and in particular his confirmation in response to questions from the Inspector (Mr Boniface) that he does not resile from the conclusion set out at para 9.77 of his proof of evidence, that the planning balance favours the grant of permission and that the appeal should be allowed, based on the environmental impacts as assessed in the ESA.

38. It is unsurprising and inevitable, but no less extraordinary for this reason, that UDC should now have decided that its Officers were right after all, three years after this planning application was originally submitted. The Committee's wilful disregard of all the advice provided to it, which has now been endorsed by UDC's own expert planning witness at this appeal, is precisely the kind of unreasonable conduct which the costs regime is intended to protect against, as the PPG makes clear.[19] A Local Planning Authority which chooses to behave as UDC has done here must know that costs consequences will result from its actions.

[19] PPG para 28:
"*The aim of the costs regime is to:…*
encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay."

39. As we note above, UDC - advised by its planning officers and legal advisers – is clearly under no illusion as to the costs consequences of refusing permission and continuing to defend an appeal, in circumstances where the decision was taken contrary to clear and thorough officer advice, as well as the advice of all statutory consultees and the independent consultants appointed at that time, and where its own expert planning witness now accepts on appeal that permission should be granted.

40. It is for this reason that each of UDC's witnesses now seeks to argue that the assessment of noise, air quality and carbon impacts has somehow changed as a result of the ESA and/ or that the original ES was somehow so inadequate that it was reasonable of the Committee to refuse permission on the basis of the information contained therein.

41. The ESA was, of course, only required in the first place due to the passage of time that had elapsed since the original ES was submitted. This is entirely due to the delays caused by the course of conduct embarked upon by UDC, as set out above. Moreover, the ESA does no more than to update the original conclusions in the ES, taking account of the revised forecasting years. There is no change to the overall significance of the effects identified in the ESA, when compared to the equivalent conclusions in the ES. This was accepted by Mr Scanlon in XX.

42. In the absence of any material change in the conclusions in the ESA concerning noise, air quality and carbon impacts, it is simply not credible to suggest that the ESA provides the rationale for UDC's change of stance at the appeal stage. The ES vs ESA debate is clearly a red herring, intended to distract from and to justify UDC's *volte face* at this appeal.

43. None of the evidence before the Inquiry has pointed to any shortcoming in the assessment undertaken in the ES, nor any failure to identify or consider any likely significant environmental effect, contrary to the evidence of Mr Thompson who has explained the comprehensive assessment undertaken in the ES and ESA in his proof and rebuttal and in oral evidence. If the ES was deficient in any material respect, or lacking any relevant information, this would surely have been flagged up by UDC's Officers or by one of the

many consultees during the extensive consultation process and engagement with STAL and its consultant team that followed the submission of the ES in February 2018.[20]

44. Moreover, even if there was some minor omission in the ES, which only the Committee had identified, this still plainly would not have justified the decision to refuse permission in January 2020. Instead, the Committee should have sought further clarification from STAL, to see whether its outstanding concerns could be resolved through the provision of further information, so as to enable it to grant permission for this policy compliant and sustainable development.

45. The Committee's decision to refuse permission outright was particularly egregious, when one considers that it was taken in the face of an original resolution to grant permission and following extensive discussions and negotiations over a prolonged period between UDC and STAL, to ensure that all outstanding issues had been addressed.

46. The refusal of permission for development, which all planning professionals agree should be permitted having regard to its accordance with the development plan, national policy and any other material considerations - and which has the explicit support of a recently published and up to date statement of national aviation policy in MBU - is quintessentially unreasonable behaviour, which has led directly to STAL incurring the costs of this appeal.

(2) Formulating imprecise and vague reasons for refusal/ failing to produce evidence to substantiate each reason for refusal on appeal and making vague generalised or inaccurate assertions about the proposal's impact, unsupported by any objective analysis

47. The minutes of the January 2020 meeting reveal just how far adrift the Committee came from the proper discharge of its development management responsibilities and the proper approach to the determination of planning applications, based on the evidence before it and by reference to the development plan and other material planning considerations. The substance of each of the four reasons for refusal is addressed more fully in our closing

[20] See CD 11.2a and the annexes at CD 11.2b-j and generally CD 11.2-11.14

submissions. As we explain below, however, none of these reasons for refusal withstands scrutiny, when tested against the costs guidance in the PPG.

Reason for Refusal 1: Noise

48. It is clear from the Members' discussion, as recorded in the minutes of the January 2020 meeting, that the two issues which motivated their decision to refuse permission on noise grounds were: (i) the WHO ENG2018 guidelines; and (ii) concerns around the fleet mix assumptions in the ES, in light of the grounding of the Boeing 738 MAX.

49. Both of these issues were comprehensively addressed by Officers in the OR and reaffirmed by UDC's Directors in their advice to the Committee on the day[21]. They reminded Members that WHO ENG were not a new material planning consideration at all, as they were published before the November 2018 meeting and considered at that time. They emphasised that these guidelines were still not Government policy and that the response to these guidelines was a matter for the Government to address, through the forthcoming Aviation Strategy[22]. Mr Trow in XX confirmed that this advice was correct.

50. In relation to fleet mix, Officers again advised Members that there was no evidence - beyond mere speculation - that the fleet mix assumptions would prove to be incorrect. They also emphasised that the fleet mix assumptions in the ES were conservative, in that they were based on a slower rate of take up than was viewed as likely, and that they included sensitivity testing to allow for fewer aircraft reaching the standards of the 737 MAX series.

51. Ultimately, however, and crucially, Officers advised that concerns about uncertainties surrounding the fleet mix were addressed by the noise contour itself, which already takes account of variation in the fleet mix:

> "… there is a further safeguard in the noise contour condition. Not only would it potentially limit the number of aircraft movements, if the fleet is not modernised as anticipated, to stay within the noise cap, but it would also address the carbon reduction point, because older noisier aircraft are also less fuel efficient."[23]

[21] CD 13.4b
[22] CD 13.4b page 12, para 39
[23] CD 13.4b, page 15, para 49

52. In XX, Mr Trow agreed with all of this advice. He confirmed that the principle of a noise condition is an appropriate way "*of dealing with any uncertainty surrounding fleet mix assumptions*" and that it provides '*an appropriate safeguard*." Indeed, he went so far as to confirm that he was not challenging the fleet mix in the ES or the ESA because, in his words:

> "if a condition is set appropriately at an appropriate value the fleet mix the applicant has assumed would need to materialise in line with the condition. The effects are acceptable irrespective of how you get there provided you limit the impacts."[24]

53. This is undoubtedly correct. However, the minutes of the meeting reveal that Members ignored the advice of Officers, now endorsed by Mr Trow, and instead promulgated a noise reason for refusal on the basis of misconceived concerns about the reliability of the fleet mix assumption and the alleged failure to assess the noise impacts of the scheme against WHO ENG18.

54. This reason for refusal was not therefore supported by any objective analysis and there was no proper assessment of the noise impacts of the development taking account of the noise contour condition, although this condition is clearly a critical component of this assessment.

55. Mr Trow also quite properly confirmed in XX that it was no part of his evidence that the acceptability of these proposals should be judged against the WHO ENG18 45 dB L_{den} or 40 dB L_{night} levels. On the contrary, he is of the view (shared by Mr Cole) that "*reducing aircraft noise down below the levels recommended by WHO ENG18 is not feasible without a significant step change in aircraft technology, otherwise reduction to these levels would result in significant harm to the aviation industry and economies*."[25]

56. This reason for refusal was therefore clearly not formulated by reference to the applicable policy framework, which <u>still</u> does not include WHO ENG18. There was no legitimate planning basis for Members' reliance on these guidelines, as confirmed by the evidence of Mr Trow and Mr Cole.

[24] Trow XX
[25] UDC/2/1,Trow p/e, para 4.21

57. The statement of common ground agreed by Mr Trow[26] confirms that "*subject to mitigation and appropriate conditions the development is acceptable and there are no noise grounds on which to refuse the current application*." The Council therefore no longer puts forward any positive case that permission should be refused on noise grounds. Nor does Mr Trow suggest that the noise impacts of this development are not capable of being addressed by the imposition of a noise contour condition. There was manifestly no proper or reasonable basis for the decision to refuse permission on noise grounds.

Reason for Refusal 2: Air Quality

58. As the minutes reveal, the resolution passed by the Committee was that due to "*changes since 14 November 2018*" in relation to "*air quality, specifically PM 2.5 and ultrafine particles, resulting from the development as fully implemented*", the decision notice granting permission should not be issued. This reflects the discussion at the meeting, which centred around PM 2.5 and UFP impacts from aircraft. This was the basis on which the Committee resolved to refuse permission for this development.

59. As we explain in our closing submissions, this reason for refusal was lifted from the presentation made by SSE to the Committee, which included a slide headed "*Health Impacts*" and which made generic references to health impacts from PM 2.5 emissions "*at levels below WHO guideline limits*" and a "*growing concern*" around UFPs, which - it was said - "*have been found 14 miles from an airport*." This slide concluded that "*Safeguarding the health of the community must be a material consideration*." In XX Dr Broomfield was unable to point to any other "*evidence*" which might have led the Committee to refuse permission on this basis.

60. Dr Broomfield also confirmed in XX, however, that he had not been instructed to give evidence on health impacts associated with air quality emissions, and that no other witness from UDC was giving evidence on these impacts.

61. Dr Buroni, by contrast, *did* give evidence on behalf of STAL on health impacts, including health impacts associated with PM 2.5 emissions and UFPs. He confirmed that a full

[26] CD 25.3

Health Impact Assessment ("HIA") had been undertaken and submitted in the ES and that the health impacts of fine particulate matter were fully assessed as part of the HIA. As he explained in his written and oral evidence, the methodology in the HIA considers the absolute change in air pollution and the associated health impacts are not therefore assessed by reference to any particular guideline value.

62. The HIA included in the ES therefore contained a full assessment of the health impacts of fine particulate matter below the WHO guideline level and concluded that the impacts on health would be negligible.[27]

63. Dr Buroni also confirmed that, for health assessment purposes, UFPs are treated as a subset of PM 2.5 and PM 10 emissions, and that consideration of UFPs was therefore also embedded in the HIA. As the ES and the ESA demonstrate, and as Dr Buroni confirmed in his evidence, the health impacts associated with AQ impacts arising from this development are negligible.

64. This evidence was not considered at all by the Committee in formulating this reason for refusal, based on vague assertions about the health impacts of PM 2.5 and UFP emissions from airports generally rather than *any* identified impacts arising as result of this development, contrary to the clear guidance in the PPG. Nor has any health evidence been produced by UDC to substantiate this reason for refusal on appeal.

65. There was also clearly no evidential basis for the Committee's decision that the development would give rise to unacceptable levels of fine particulate matter, nor ultrafine particulate matter, nor any other pollutant for that matter. On the contrary, the minutes record that Members were reminded by UDC's Director, Mr Harborough, that "*Dispersion modelling of fine particles had been carried out and concluded that the airport expansion would have no significant effects on the concentration of such particles*."[28]

66. That advice was undoubtedly correct and was confirmed by Dr Broomfield in XX, who agreed that it was no part of his case that the development would give rise to unacceptable impacts in terms of PM 2.5 or PM 10 emissions. It was also common ground between Dr Broomfield and Dr Bull that there is no way of assessing UFPs, and that no scientific

[27] STAL/6/2, Buroni p/e, para 3.42 and 3.46 and in XinC
[28] CD 13.4b para 5

consensus currently exists as to the level below which any adverse health impacts on human or ecological receptors may arise.

67. As with noise, this reason for refusal has been abandoned at the appeal stage and Dr Broomfield now accepts that the development is acceptable on air quality grounds, subject to the imposition of suitable conditions. As with noise, there was quite plainly no proper or reasonable basis for this reason for refusal either, on the undisputed evidence before the Committee.

Reason for Refusal 3: Carbon

68. The problems with this reason for refusal are myriad and were explored with Dr Hinnells in XX. We do not repeat our closing submissions here but, in summary, and in relation to the reason for refusal specifically:

i. There was no evidence before the Committee that the "*additional emissions from increased international flights*" would be "*incompatible with the Committee on Climate Change's recommendation that emissions from all UK departing flights should be at or below 2005 levels in 2050*". The reference to "*emissions… at or below 2005 levels*" is a reference to the planning assumption of 37.5MtCO2. The emissions associated with this development have been modelled by the Government in formulating its MBU policy. And yet, MBU explicitly confirms the Government's view that these emissions - and the emissions from all airports making best use of existing runway capacity - are "*compatible"* with this planning assumption.

ii. As we explain in our closing submissions, IAS emissions are not caught by the amendment to net zero and the planning assumption at the time of the decision was and remains 37.5MtCO_2. It is therefore wholly unclear why the Committee considered that the "*backdrop*" of the amendment to net zero was a new material planning consideration affecting the determination of this application at all.

iii. Moreover, it is agreed (and indeed positively asserted by UDC in its closings[29]) that the "*additional emissions*" from this development are just 0.09Mt$C0_2$. These are, as

[29] UDC Closings para 106(2)

Dr Hinnells agreed, a "*tiny fraction*" of the headroom available for IAS. This would be true whether IAS were included in the net zero target or not. There was simply no evidential basis for the Committee's decision that the emissions associated with this development were somehow incompatible with the headroom available for IAS, against the "*backdrop*" of net zero or otherwise.

iv. "*General accepted perceptions and understandings of the importance of climate change and the time within which it must be addressed*" are clearly not a material planning consideration[30]. Nor is this a reasonable or objective basis for making planning decisions. Quite apart from being wholly imprecise and unclear, the language adopted by the Committee in formulating this reason for refusal reveals a complete failure to grapple with the policy framework for considering the carbon impacts of this development. This is despite the clear and correct advice from Officers that: MBU had not been withdrawn or caveated and remained extant Government policy; there were no policy limits for individual airports to constrain maximum permitted emissions from aircraft movements; that it would be for the Government to consider the CCC's net zero advice and to address this through the Aviation Strategy and that it was not for Local Planning Authorities to embark on "*predictive judgements as to the timing and likely effectiveness of government decisions on achieving the statutory net zero carbon emissions target*."[31]

v. In XX Dr Hinnells abandoned any attempt to defend the Committee's assertion that it would be "*inappropriate to approve the application at a time whereby [sic] Government has been unable to resolve its policy on international aviation climate emissions*". As we explain in our closing submissions, far from being "*unable*" to resolve its policy on IAS, the Government has been clear and consistent that IAS continue to be excluded from the net zero target and that the Government remains committed to addressing IAS through a sectoral, international approach in the first instance. Moreover, the Government's policy on non DCO MBU proposals such as this one is set out in MBU, which *is* extant policy and which confirms that the carbon impacts of this development are acceptable.

[30] See, for example, *Stringer v Minister of Housing and Local Government [1971] 1 All E.R. 65*, at 77
[31] CD 13.3(b) at para 43

69. As we explain in our closings, the minutes of the meeting reveal that Members were in fact preoccupied with the declaration of a local "*climate emergency*" by UDC and other local authorities, which was identified as being a new "*material consideration*". They also appear to have been under the entirely erroneous impression[32] that aviation's 6% contribution to total UK emissions was a "*new*" development since November 2018[33].

70. This discussion then led to the formulation of a reason for refusal which is hopelessly vague and imprecise and is not based on any objective analysis of the impacts of the development nor the policy and decision-making framework, contrary to the clear advice of Officers as to how the carbon impacts of this development should be addressed. As with the other two reasons for refusal, there was plainly no proper or reasonable basis for the decision to refuse permission on the grounds of carbon impacts.

Reason for Refusal 4: Infrastructure

71. There was no debate of this reason for refusal at the meeting and it is not referred to in the resolution to refuse permission. Its provenance remains a mystery.

72. The infrastructure issue that *has* arisen on appeal, and which is considered by Mr Scanlon in his proof of evidence in relation to this reason for refusal[34], concerns the improvement works to Junction 8 of the M11. However, as Mr Scanlon confirmed in XX, the ECC funding issue relating to these works – now no longer an issue for the purposes of this appeal - only arose for the first time after this reason for refusal was promulgated. This cannot therefore explain reason for refusal 4.

73. In closings, UDC now suggests that this reason for refusal is just a "logical extension" of reason for refusals 1-3. If this is correct, however, the Committee's failure to give any consideration to the s106 agreement at the January 2020 meeting beggars belief. Members cannot possibly have formed any proper or informed view of the adequacy of the infrastructure or mitigation package in support of the application, without first turning their minds to the contents of this agreement, which had been so carefully negotiated between STAL, ECC and UDC's Officers over a period of 15 months. By "logical extension",

[32] As agreed by Dr Hinnells in XX
[33] 13.4(a) page 8
[34] UDC/4/1, paras 7.29-7.31

Members also plainly cannot have properly assessed the environmental impacts of this development, without giving *any* consideration to the mitigation and other measures proposed as part of the application.

74. On any analysis, this reason for refusal is therefore wholly unclear and imprecise, has not been substantiated on appeal, and is clearly not a proper or reasonable basis for refusing permission, whether by reference to reasons for refusal 1-3 or otherwise.

(3) Refusing planning permission on a planning ground capable of being dealt with by conditions

75. All four of the witnesses called by the Council conceded that the development was acceptable, subject to the imposition of conditions.[35] UDC has, therefore, produced no witness to support its decision to refuse planning permission for this development.

76. Of the four expert witnesses called by the Council, only Dr Hinnells and Mr Scanlon sought to press condition 15 on the Panel with any real enthusiasm. Dr Broomfield and Mr Trow were clearly not wedded to this approach. For the reasons set out under (4) below, they were right to distance themselves from this manifestly unlawful condition.

77. Moreover, as Mr Cole and Mr Andrew both emphasised in evidence, the imposition of planning conditions is not a matter that requires the agreement of the applicant. It is within the gift of the Council, provided that any conditions meet the relevant legal and policy tests. Given that UDC's witnesses all now accept that any outstanding issues are (and were) capable of being addressed by conditions, it was clearly unreasonable of the Committee to refuse permission outright without at the very least considering whether its concerns could be resolved by the imposition of a revised condition or set of conditions, or whether the decision should be deferred to enable this option to be explored further by Officers.

78. In fact, and as we explain above and as Officers explained at the time, the noise contour condition already provided a complete answer to Members' concerns about the fleet mix projections, which clearly influenced the noise, AQ and carbon reasons for refusal. But if,

[35] Trow and Broomfield xx

for example, Members also wanted a 54dB contour instead of a 57dB contour, or if Members wanted to see an air quality management strategy, there was absolutely no reason why these conditions could not have been imposed by it then, rather than forcing STAL to come to appeal only to raise these issues for the first time now. These were not *even* conditions that STAL would have objected to, had they ever been proposed or requested by UDC.

79. As with the other grounds relied upon, this behaviour falls squarely within the definition of "unreasonable" behaviour, as expressly envisaged by the PPG, and it has led directly to STAL incurring the costs of this appeal.

(4) Seeking to impose a planning condition – condition 15 - which does not accord with the law and is not necessary, relevant to planning and to the development to be permitted, or enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and obligations

80. Having abandoned any attempt to defend the reasons for refusal on their merits, UDC now seeks to hang its hat on a planning condition – condition 15 – for which it can identify no precedent, and which was acknowledged by Mr Scanlon to be "*novel*". However, the main and insuperable difficulty with condition 15 is not its "*novelty*" but that it is plainly unlawful and does not come close to meeting the policy tests in para 55 of the NPPF, for all the reasons set out in our legal submissions and in our closing submissions, which we reply upon but do not repeat here.

81. The guidance in the PPG makes it absolutely clear that a Local Planning Authority will be liable for a costs order against it, if it seeks to rely on a condition which cannot be shown to be lawful or to meet the well-known para 55 tests. UDC would therefore have been well advised to heed the clear indication given by the Panel at the outset of the Inquiry about its serious reservations concerning this condition.

82. Condition 15 would not have been reasonable had it been dreamed up at the time of the original decision, and it is not a reasonable basis for UDC's defence of this appeal now, in circumstances where all its witnesses accept that the development is acceptable in

principle. As UDC itself observes in closings[36], much time has however been spent on Condition 15, both in questions to witnesses and in written submissions. This has materially added to the length of this Inquiry, which should never have been necessary in the first place, and to the costs incurred by STAL in responding to the case as now put by UDC.

(5) Acting contrary to, or not following, well-established case law

83. As we explain in our legal and closing submissions, UDC's reliance on condition 15 is contrary to extremely well-established legal principles and case law, governing the imposition of planning conditions and the statutory decision-making framework under the Town and Country Planning Act 1990.

84. In addition, UDC has pursued a case at this Inquiry that MBU allows Local Planning Authorities to revisit the carbon impacts of MBU proposals for themselves[37], contrary to the clear direction in MBU that it is local environmental and other impacts (i.e. not carbon emissions from IAS), which should be weighed in the balance with the in principle support provided by MBU.

85. As we explain in our closing submissions, this flies in the face of the extremely well-established and long-standing principle, established forty years ago by the House of Lords in the ***Bushell*** case, that the merits of Government policy are not a matter which can be subject to investigation when determining individual planning applications.

86. This flagrant disregard for the ***Bushell*** principle goes directly to the unreasonableness of reason for refusal 3 and UDC's carbon case at this Inquiry which has occupied such a disproportionate amount of time in evidence and submissions. But it also clearly goes to the unreasonableness of UDC's case as a whole, given the obvious importance of MBU and the weight that must be accorded to its support for this development in the overall planning balance.

[36] UDC Closings para 121
[37] As put to Mr Robinson in XX. See also e.g. UDC/4/1 Scanlon p/e para 9.52

Conclusion

87. For all the above reasons, we respectfully invite the Panel to make a full award of STAL's costs of this appeal against UDC. Alternatively, we invite the Panel to make a partial award of costs, in respect of any of the grounds set out above.

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12 March 2021