APP/C1570/W/20/3256619 (UTT/18/0460/FUL)

AIRFIELD WORKS COMPRISING TWO NEW TAXIWAY LINKS TO THE EXISTING RUNWAY (A RAPID ACCESS TAXIWAY AND A RAPID EXIT TAXIWAY), SIX ADDITIONAL REMOTE AIRCRAFT STANDS (ADJACENT YANKEE TAXIWAY); AND THREE ADDITIONAL AIRCRAFT STANDS (EXTENSION OF THE ECHO APRON) TO ENABLE COMBINED AIRFIELD OPERATIONS OF 274 000 AIRCRAFT MOVEMENTS (OF WHICH NO MORE THAN 16 000 MOVEMENTS WOULD BE CARGO AIR TRANSPORT MOVEMENTS (CATM)) AND A THROUGHPUT OF 43 MILLION TERMINAL PASSENGERS, IN A 12 MONTH CALENDAR PERIOD AT STANSTED AIRPORT

SUBMISSIONS ON BEHALF OF UTTLESFORD DISTRICT COUNCIL

IN RESPONSE TO A COSTS APPLICATION MADE BY

STANSTED AIRPORT LIMITED ON 12 MARCH 2021

[Page number references are to the printed page unless otherwise stated; [CD10.1] = Core Document 10.1; **[34]** = page 34 of the Costs Bundle accompanying these submissions]

Introduction

1 Over the course of 30 sitting days, from 12 January 2021 to 12 March 2021, three Inspectors ("the Panel"[1]) heard an appeal[2], brought by Stansted Airport Limited ("STAL") against a decision of the local planning authority, Uttlesford District Council ("UDC") ("the Appeal").

2 From inception of the Appeal on 24 July 2020, STAL had maintained that:

> '*...there was no reasonable or sound basis for UDC to reverse its original resolution to grant planning permission and ultimately, after a lapse of 14 months, to refuse permission. These actions, and its formulation of unclear, imprecise reasons for refusal have led to an avoidable appeal, creating delay and uncertainty, and wasted expenditure for the Appellant*' (Statement of Case §4.3)

[1] In what follows, it is assumed that where an individual Inspector commented or gave direction to the parties, that comment / direction is to be attributed to the Panel.

[2] By inquiry, pursuant to s.78 of the Town and Country Planning Act 1990

3 Thereafter STAL menaced UDC with the threat of costs but persistently refused to make the application, still less articulate what it would rely on to support it. Indeed, STAL even refused to confirm that one would be made.

4 Then, on the afternoon of the last day of the inquiry, as a coda to the whole proceedings, Queen's Counsel for STAL[3] made a costs application, conjuring a 22-page written submission setting out, for the first time, the application, its grounds, and what it was relying on to support it.

5 This is not how costs applications in planning inquiries are to be made.

6 It is an affront to the orderly conduct of inquiries. It is an affront to the fairness of the process. This Inquiry should not condone such behaviour. It is unforgiveable. If rejecting this inexcusably late application really leaves STAL deprived of costs, its remedy lies elsewhere.

7 These submissions and accompanying documents[4] constitute UDC's response to the costs application, submitted pursuant to directions issued by the Panel on 12 March 2021. They are divided into the following sections:

(1) Timing of the application
(2) Procedural history relating to the costs application
(3) Resulting unfairness and prejudice to UDC in responding to the costs application
    (i) Ensuring fairness to the recipient of a costs application
    (ii) Ensuring that matters relating to any costs application are properly ventilated and considered
    (iii) Avoiding delays by additional time having to be set aside to deal with a late costs application
(4) Relevant legal background
    (i) General legal principles applicable to costs applications
    (ii) Discussions at Planning Committees, Minutes, and Reasons for Refusal

[3] Mr. Thomas Hill QC
[4] A Costs Bundle and Authorities Bundle accompany these submissions.

(iii) Immateriality of advice on costs consequences to question of reasonableness

(iv) Proper scope of legal advice on material considerations

(5) Response to Grounds 1 – 3

(i) UDC's detailed consideration of the application

(ii) Reasonableness of the decision in January 2020

(iii) Substantiation of UDC's decision at the time it was taken through expert evidence on appeal

(iv) UDC's position after publication of the ESA on 16 October 2020

(v) Residual points under Grounds 1 – 3

(6) Response to Ground 4

(7) Response to Ground 5

(8) Conclusion

8 The timing of the application, and the way it has been allowed to be made, has caused prejudice to UDC in its ability fully and fairly to respond to it. Quite apart from that fatal flaw, the application is devoid of any merit and should be refused.

(1) Timing of the application

9 STAL waited until the very last minute to make its costs application, to reveal its grounds, and to reveal what it relied upon to support it.

10 STAL's 12 March application was not based on procedural matters or the conduct of UDC at this inquiry. Not at all. Rather, the costs application is founded upon and revolves around antecedent matters. What it is based on was just as manifest in July 2020 as it was in March 2021. The application is expressed to be based upon, first and foremost, the conduct of UDC in handling the application, involving factual matters which took place over 15 months ago (between November 2018 and January 2020), and which have been known to STAL since it lodged its appeal in July 2020.

11 The making of a costs application on the last day of an 8-week inquiry, based on historic factual matters known to the applicant for many months, is a repudiation of the guidance on costs

contained in the PPG. The PPG spells out the procedure that is to be followed for making such applications (ID: 16-035, emphasis added):

'*Applications for costs should be made as soon as possible, and no later than the deadlines below:*

- *In the case of appeals determined via the Householder Appeals Service, Commercial Appeals Service, appeals against the refusal of advertisement consent and appeals against tree preservation orders…*
- *In the case of appeals determined via written representations …*
- *In the case of hearings and inquiries:*
    - *All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions.*
    - *If the application relates to behaviour at a hearing or inquiry, the applicant should tell the Inspector before the hearing is adjourned to the site, or before the inquiry is closed, that they are going to make a costs application. The Inspector will then hear the application, the response by the other party, and the applicant will have the final word. The decision on the award of costs will be made after the hearing or inquiry.*

- *For all procedures, no later than 4 weeks after receiving notification from the Planning Inspectorate of the withdrawal of the appeal or enforcement notice …*

Anyone making a late application for an award of costs outside of these timings will need to show good reason for having made the application late, if it is to be accepted by the Secretary of State for consideration.'

12 The phrase '*as soon as possible*' is more stringent than '*as soon as reasonable*' or even '*as soon as practicable*'. It demands a higher degree of expedition: its yardstick is what is possible rather than what is reasonable or what is practicable. It is impermissible to dilute the meaning of the phrase by an application of the PPG that does not inquire as to when it would have been possible to make the application or, having ascertained that date, to brush over or make light of the time that elapses thereafter. And if the guidance in the PPG is not to be followed, that needs to be recognised and justification for the deviation articulated. To do otherwise is an error of law.

13 The relevant terms of the PPG are not new. They have been in place for years. The guidance is not to be ignored, least of all by those boasting three decades' experience of planning inquiries.

14 Rather, STAL's 12 March application was an expression — the first expression — of the particulars that lay behind the generalised criticism that STAL had made in its Statement of Case way back in July last year. These had all been known to STAL in July last year. But in defiance of the PPG, STAL elected — presumably on professional advice — to hold back on these so as to keep known to just itself how it would frame the application. This, of course, secured an advantage to it in the preparation of proofs, in the presentation of its witnesses and in the cross-examination of UDC's witnesses. STAL subordinated obedience to the requirements of the PPG to its own tactical interests.

15 This disobedience to the Guidance strikes at its rationale. The rationale for the Guidance is to ensure that costs applications are front loaded and are made when the basis for them arises, with a view to achieving three aims:

(1) Ensuring fairness to the recipient of a costs application in knowing at an early stage whether a costs application is to be made or is anticipated and on what basis;
(2) Ensuring that matters related to any costs application are properly ventilated and considered through relevant evidence heard and tested at the inquiry;
(3) Avoiding delays by additional time having to be set aside to deal with an application made at a late stage, which could otherwise have been dealt with during the scheduled inquiry.

16 As explained below (§63ff.), STAL's costs application confounds each of these aims. It amounts to an ambush of UDC and results in serious and substantial unfairness to UDC in responding to it.

(2) Procedural history relating to the costs application

17 By decision notice dated 29 January 2020, UDC refused planning permission for airfield works and additional aircraft stands at Stansted Airport so as to enable an additional 8 million passengers per year, resulting in a total throughput of 43 million passengers per year. The refusal was on the basis of four stated reasons for refusal (RFRs) contained in the Decision Notice at [CD12.10] (in summary):

(1) A failure to demonstrate that the proposal would not result in detrimental effects from aircraft noise.
(2) A failure to demonstrate that the proposal would not result in detrimental effects on air quality.
(3) The incompatibility of the additional emissions resulting from the proposal with climate change policy and targets.
(4) A failure to provide the necessary infrastructure to support the proposal or necessary mitigation to address the detrimental impact resulting from it.

18 On 4 February 2020, at one of a number of regular meetings between UDC Officers and STAL to discuss operational matters at Stansted Airport, officers were informed that STAL was considering a range of options as to how it might respond to the refusal of their application in January 2020, including a resubmission of the application, an NSIP, or an appeal **[3]**. On 3 March 2020, officers were informed that if an appeal were to be lodged, STAL would seek to update its Environmental Statement for the appeal. After that appeal was lodged in July 2020, upon enquiring as to the scope of that update, officers were told only that the base date would be updated together with revised air traffic forecasts **[4]**.

19 On 24 July 2020, almost 6 months after UDC's decision of 29 January 2020, STAL issued its appeal. Its Statement of Case referred, variously, to unreasonableness relating to [CD24.1, §§4.3, 4.15, 4.20, 4.31, 4.35]:
(1) UDC's decision to reverse its original resolution to grant permission in November 2018;
(2) The noise RFR given the negligible noise impacts and condition offered;
(3) A lack of technical evidence supporting the air quality RFR; and
(4) A lack of clarity and precision in the carbon and infrastructure RFRs.

20 It is not uncommon for an appellant to refer in an appeal to what it considers to be unreasonable behaviour, and to threaten to make a costs application, without ever making an application for costs. That is precisely why the PPG requires parties to be open and transparent about whether a costs application is likely to be made and to do so, as soon as the basis for such an application is known. Despite the references above to unreasonableness, no application for costs was threatened in STAL's Statement of Case, and no application was made.

21 By letter dated 12 August 2020, PINS issued its standardised start letter, directing UDC to submit its Statement of Case by 16 September 2020 **[5-9]**. On 20 August 2020, within one week of receipt of the start letter, UDC sought a 4 week extension to that deadline from PINS, explaining that the decision was an overturn of officer recommendation, meaning that external expert consultants would need to be instructed and briefed for the Appeal, that delays had been caused by the summer period and COVID-19 restrictions, that there was a wide range of potential issues (with STAL proposing to call 11 witnesses), that this was reflected in the estimated length of inquiry (40 days), and that there was no prejudice to STAL by such an extension **[10-12]**. By letter of the same date, STAL objected to any extension, without raising any prejudice **[13-14]**. The request for an extension was refused by email on 25 August 2020, with the Inspector stating that it is '*important that all parties are aware of the issues involved as soon as possible if the inquiry is to proceed efficiently*', and that UDC '*should be able to provide details of its reasons why it refused planning permission and the case it will make without delay*' **[15-16]**. The use of the phrase '*as soon as possible*' is to be noted – it is the same phrase as appears in the relevant paragraph of the PPG.

22 By late August, UDC had instructed its expert witness team. Just over 2 weeks later, on 16 September 2020, UDC duly submitted its Statement of Case which was directed to its RFRs. It concluded that [CD24.2, §§5.2-5.4] (in summary):

(1) Given both the nature of the proposal and the sensitivity of the site, the application was rightly subject to detailed evaluation by UDC.
(2) The proposal was recognised to be a very important development, and UDC had a heavy and enduring responsibility to its constituents in considering it.
(3) The consideration of the application through a sequence of meetings between November 2018 and January 2020 showed that UDC needed to be convinced about the nature and scale of effects that would result from the implementation of the planning permission, and importantly, the ability for those effects to be adequately mitigated.
(4) As an outcome of that process, UDC concluded that the information provided as at January 2020 fell short of that required to properly assess the environmental impacts associated with the application. Without that information, it was not possible to conclude on the nature of the impacts arising and, as a consequence, the adequacy of the proposed mitigation, leading to refusal of the application.

(5) UDC proposed to call expert witnesses to demonstrate the assessments which should be undertaken in relation to aircraft noise, air quality, and carbon emissions, which may require additional mitigation and alternative controls. If necessary measures were not feasible or enforceable, the appeal should be dismissed.

23 UDC's Statement of Case addressed the valid reasons why its consideration of the application had been lengthy and detailed, reflecting the scale and importance of the proposal, the environmental effects of which would be experienced for generations. UDC's Statement of Case also clearly signalled the prospect that adequate mitigation for the proposal was a key concern. Despite this, STAL did not approach UDC at any point after UDC's Statement of Case was submitted (or indeed at any point after its decision in January 2020) to discuss whether alternative or strengthened mitigation in the form of conditions could be agreed, and it was not until late in the inquiry that any meaningful discussion on mitigation was raised by STAL at all[5].

24 On 17 September 2020, in the normal way, PINS' Agenda for the forthcoming Case Management Conference included '*Costs*' as an item, putting the parties on notice that costs would be discussed (Agenda Item 12).

25 On 24 September 2020, at the Case Management Conference (CMC), Inspector Boniface observed that there was no costs application before the Panel, and said that, as such, he assumed there was no application to be made. The parties were asked directly whether any costs application was contemplated.

26 STAL – represented by Queen's Counsel - remained silent.

27 That silence in the face of the Inspector's observation and question signified that, despite having complained about UDC's refusal in its Statement of Case, STAL was making no costs application. It would have been obvious to STAL that that was what it was signifying to UDC and the Rule 6 party, Stop Stansted Expansion ('SSE'). The position was recorded in the Panel's

[5] Whilst comments on the general Conditions proposed by UDC were made by STAL, and updates to the s.106 were discussed, STAL did not approach or engage with UDC on Condition 15 – which was proposed by UDC on 4 December 2020 – until after 5 February 2021, once the aircraft noise, air quality, and carbon emissions sessions at the inquiry had completed. STAL proposed its Condition 10B (seeking to deal with Air Quality, but not Carbon Emissions) on 1 March 2021.

CMC note of 2 October 2020 at para. 34, together with a reference to the PPG as to the timing of any application for costs **[22]**:

> '*No application for costs is currently anticipated by any party. If an application is to be made, the Planning Practice Guidance makes it clear that they should be made in writing to the Inspector before the Inquiry or as soon as reasonably possible…*'

28 STAL did not write to suggest that this did not faithfully record STAL's position.

29 At the CMC, having previously indicated that its Environmental Addendum Statement would be published in late September[6], STAL sought, and was granted, additional time for the submission of its Environmental Statement Addendum (to 16 October 2020), in part in order to respond to points made in UDC's Statement of Case. This was recorded in the Panel's CMC note of 2 October 2020 (**[21]** §26). At the same time at the CMC, the parties were also directed to submit proofs of evidence by 8 December 2020 (1 week earlier than the usual 4 weeks before commencement of an inquiry) on the basis of the proximity of the Inquiry to the Xmas break (§28).

30 On 16 October 2020, STAL submitted its ESA. This was a substantial document, comprising 18 Chapters of main text (over 400 pages), plus numerous Appendices and a Non-Technical Summary in a total of 4 volumes [CD7.1-7.18, 8.1-8.9, 9.1-9.4, 10.1]. The base date for assessment was moved forward by 3 years (from 2016 – 2019) and it included a new set of air traffic forecasts which sought (inter alia) to account for the effects of the COVID-19 pandemic. Within the ESA, STAL took the opportunity to respond to matters raised in UDC's Statement of Case [CD10.1, p.2, last para.]. None of the responses set out in Appendix 2A asserted that UDC had behaved unreasonably [CD8.2]. Consistently with its stance at the CMC, STAL did not make a costs application at or about the time of it submitting the ESA. The added significance here is that by now STAL knew full well what UDC's case was and STAL had had a full month to analyse and absorb it.

31 On 3 December 2020, Mr. Coppel QC (representing UDC) telephoned Mr. Hill QC (representing STAL)[7] with a view to discussing draft "Condition 15". Condition 15 was a Condition formulated

[6] As recorded in its letter for the CMC dated 23 September 2020 **[25-26]**.
[7] Hereafter Mr. Coppel QC and Mr. Hill QC respectively.

by UDC's appointed expert team following its consideration of the ESA and the environmental effects predicted. It comprised a single mechanism to address and mitigate all of the environmental effects referred to in UDC's Decision Notice of January 2020 in the light of the environmental effects presented in the ESA, which had been published on 16 October 2020.

32 A meeting was arranged between Counsel for the day after, on 4 December 2020. On the morning of 4 December 2020, on a without prejudice and confidential basis, Mr. Coppel QC sent an email to Mr. Hill QC enclosing a draft of Condition 15 (with some parts of the Schedules to be filled) **[27-28]**. The email stated that at the meeting Mr. Coppel QC would explain how the Condition worked, the thinking behind the paragraphs, and answer any questions of understanding which Mr. Hill QC might have, so that Mr. Hill QC could take instructions from STAL and respond. The email stated that the draft, or something substantially the same, might serve to bridge the gap between UDC and STAL, or certainly narrow the gap sufficiently that whatever remained could be overcome. The meeting between Counsel took place at 4.30pm that day. No response to Condition 15 was made by STAL following that meeting. No application for costs was made by STAL after that meeting.

33 On 8 December 2020, pursuant to the directions issued at the CMC, proofs of evidence were exchanged. Each of UDC's proofs on aircraft noise, air quality, and carbon emissions, reviewed the application and the evidence before UDC when it took its decision in January 2020. Each proof expressly concluded that, in the view of the particular expert witness, UDC's decision was both reasonable and understandable[8]. UDC's planning proof came to the same conclusion, based on the expert opinions of UDC's other witnesses[9]. Some of STAL's evidence sought to analyse the strength of UDC's objection prior to the publication of its ESA on 16 October 2020. STAL's planning witness, Mr. Andrew, included a section in his proof on UDC's handling of the application [STAL/13/2, section 8].

34 Once again, no costs application was submitted by STAL.

35 On 22 December 2020, pursuant to the directions issued at the CMC (**[22]** §30), final timings for witness handling were sent to PINS by all parties. UDC's time estimates were duly based

[8] See Mr. Trow on aircraft noise at UDC/1/2, §§6.2, 8.8, and UDC/1/4, responding to paras. 3.1, 6.8.2, 8.1.1; Dr. Broomfield on air quality at UDC/2/2, §§113, 55-57, and UDC/2/4, p.9; Dr. Hinnells on carbon emissions at UDC/3/1, §§29, 99.
[9] See Mr. Scanlon on planning at UDC4/1, §2.3.

on the issues of difference arising out of the evidence submitted. Given that there was no costs application, UDC could not identify the matters upon which such an application would be based, still less work out which witnesses could speak to those matters or calculate the time needed for questioning them about those matters.

36 On 5 January 2021, rebuttal evidence was exchanged. None of STAL's rebuttal evidence sought to argue with UDC's expert evidence that UDC's decision was a reasonable one at the time it was taken[10]. As to UDC's position following the publication of the ESA and exchange of proofs of evidence, two points were raised (as relevant):

(1) STAL's Carbon-Technical witness, Mr. Vergoulas, asserted that it was unreasonable for UDC's carbon emissions witness, Dr. Hinnells, to make requests for further clarification of the ESA carbon projections in his proof [STAL/9/3, §31]. Following exchange of proofs, this point had been further discussed and addressed in the Statement of Common Ground on Carbon [CD25.5, 18 December 2020]. It also does not form part of STAL's costs application.

(2) STAL's planning witness, Mr. Andrew, included a section on Condition 15 in his rebuttal [STAL13/4]. Despite the meeting held between Counsel on 4 December 2020 during which Condition 15 was presented and explained, this was the first response received by STAL. The rebuttal proof asserted that it would be unreasonable for STAL to agree to a proposition that would effectively allow growth only in annual increments [§3.5]. This assertion disclosed a misunderstanding as to the meaning and effect of Condition 15 (UDC's Closing, §§124-135). No application for costs was made by STAL.

37 On 12 January 2021, the inquiry opened as scheduled. In making his opening remarks, Inspector Boniface once again drew all parties' attention to the PPG on the award of costs at inquiries. He stated that he was not inviting any such applications, but that if there were to be any, then they should be made '*at the earliest possible opportunity*', and certainly before the inquiry closes. When asked if any party had an intention to seek costs, Mr. Hill QC stated that it was a matter touched upon '*albeit very briefly*' in STAL's Opening. In response, Inspector Boniface stated that if there was an intention to seek costs, STAL should make everybody aware of it as soon as possible, so that there would be '*no surprises*' and everybody had an opportunity to address those matters. Mr. Hill QC stated that he completely understood that

[10] Mr. Cole's Rebuttal simply reiterated statements made in his proof that the noise RFR was unreasonable.

and that he also assumed that the Panel would want any application to be made in writing with an opportunity for the party to respond and then a final right of reply. Inspector Boniface agreed, but indicated that the Panel may hear those applications orally as well, but it would certainly be useful to have them in writing.

38 For the first time in its Opening submissions, STAL revealed that it was contemplating a costs application. In a single sentence, STAL said that it was giving a '*warning*' both to UDC and SSE that once the evidence was complete it would seek compensation for any wasted costs it was obliged to bear in prosecuting the appeal. STAL's Opening went on to comment that that was '*for another day*' [INQ1, §105-106]. No basis for any contemplated application, let alone a reasoned basis, was set out. No reference was made to the PPG or to paragraphs against which a costs application was contemplated.

39 Both UDC and SSE objected to the mere warning of a costs application at this stage, and the unfairness of the approach taken and suggested. In particular, UDC:

(1) referred the Panel to the PPG guidance (ID: 16-035);
(2) noted that when asked at the CMC in September 2020, the prospect of a costs application had not been raised by STAL (as recorded by the Panel);
(3) noted the lack of any application and any particulars as to its basis;
(4) stated that any costs application would affect the way in which evidence was given, namely the way in which UDC's witnesses would give their evidence, and the way in which STAL's witnesses might need to be cross-examined;
(5) stated that UDC's time estimates had been provided on the basis of no costs application and the inquiry schedule set accordingly, and that a costs application would affect those time limits.

40 "Warnings" form no part of the PPG in dealing with costs. What the PPG demands from a party seeking its costs is an '*application*' for costs – not a "warning" of one – and for it to be made '*as soon as possible*' – not "at the last moment possible". If Mr. Hill QC actually thought that uttering a "warning" was enough to wriggle out of what the PPG demands, he was wrong.

41 In response, Inspector Boniface reiterated – not for the first time - that any costs application should be made as soon as possible. He suggested that Mr. Hill QC share any details as to the

basis of its costs application with UDC outside of the inquiry. He requested that a formal application be made as soon as possible. He noted that a feature of the evidence before the inquiry and Opening submissions had been the process followed by UDC and whether the decision was justified. Whilst he was happy for that to be aired, those were matters for any costs application, and the Panel did not want to keep hearing about those matters in evidence. Rather, the inquiry should focus on the evidence before it now. The parties were asked to frame their evidence and arguments on that basis.

42 Pausing there, if it had not been obvious to STAL before, the Inspector's reiteration should have made it so. Absent a costs application founded upon or directed to the process that UDC had followed and the reasonableness of the decision, these were not matters in issue before the inquiry and so time with witnesses was not to be wasted on them.

43 Following that exchange, at no stage did Mr. Hill QC or STAL approach UDC either formally or informally to confirm that it would be seeking costs or to provide the basis of any application.

44 Having noted Inspector Boniface's comments, and the lack of any costs application against it, UDC did not spend inquiry time going over the history of the application which had been covered in its written evidence. To have sought to do so without a clear articulation by STAL as to exactly what facet of UDC's decision-making process was relied upon would have been impossible – or at least impossible without devoting days to chasing down every possible avenue of complaint: it had been a very involved decision-making process.

45 As part of examination in chief, each of UDC's expert witnesses on aircraft noise, air quality, and carbon emissions simply read out and confirmed the opinions contained in their written evidence that, at the time the decision was taken, UDC's decision was a reasonable one. Importantly, none of UDC's witnesses were challenged in cross-examination on these opinions, which had been stated in writing and confirmed orally. Rather, STAL spent a limited amount of time in cross-examination asking UDC's witnesses to confirm facts around the history of the application, without ever putting its case on unreasonableness, fairly and squarely, to any UDC witness.

46 In week 6 of the inquiry, on Wednesday 24 February 2021, and in advance of the sessions involving planning evidence, Inspector Jones requested an update from STAL as to its position

on any costs application, '*particularly bearing in mind what ha[d] been said previously*'. This presumably referred to the need for a costs application to be made as soon as possible.

47 On the same day, Mr. Hill QC responded that, having given an early indication that it was considering a costs application, final instructions on whether a costs application would be made could only be received after all of the evidence had been heard against the background of the case. As soon as the evidence had been completed, STAL would give an indication as to what would be forthcoming.

48 Mr. Coppel QC again responded and reiterated that no application had been made (whether against UDC or SSE). A marker was put down that, to the extent that any application related to matters which took place before the start of the inquiry, UDC may be seeking to recall witnesses, and that all questioning of UDC's witnesses and cross-examination of STAL's witnesses had been predicated on there being no costs application, which had accelerated matters at the inquiry. Mr. Hill QC responded that he did not want UDC to anticipate STAL's application before it was made, and then gave evidence to the inquiry that he himself had never made an application for costs in advance of the close of an inquiry, and that the guidance was clear that there was no imperative on any party to make an application prior to that time. If the application could have been made earlier and matters drawn to the attention of the parties earlier, then – he carried on - there may be something to say about that, but STAL's focus was how the case unfolded in the round once tested in cross examination. Inspector Jones noted that there was no application before the inquiry and if one were to be made, all parties affected would be given a '*full opportunity*' to respond. Inspector Jones confirmed from Mr. Hill QC that STAL's position was that there was a possibility of a costs application, but that Mr. Hill QC had no instructions on it at the moment.

49 Again pausing here, client instructions do not provide an escape route from the requirements of the PPG or from elementary principles of fairness. It is the duty of counsel to advise the client of the requirements and of the consequences of non-adherence. Mr. Hill QC's statement that only after the evidence had been completed would STAL give an indication as to whether it would be making a costs application was a further repudiation of the requirements of the PPG to make such applications '*as soon as possible*' and a deliberate ignoring of the repeated reminders given by the Panel.

50 Pursuant to that exchange and given the lack of any costs application to address in evidence, UDC did not spend time in examination in chief of its planning witness, Mr. Scanlon, covering the history of the application, which was a matter addressed in the written evidence. Based on the expert evidence of UDC's other witnesses, whose views had not been challenged by STAL on this point, Mr. Scanlon recorded that there was a failure to demonstrate that there would not be a detrimental effect on environmental conditions, and the refusal to grant permission was appropriate [UDC/4/1, §2.3]. As to the history of the application, in cross-examination, STAL's questions were limited to factual matters as to what officers had concluded previously and how the application had proceeded, the weight which officers gave to certain material considerations, what the minutes of meetings did or did not say, and the conclusions of the ES and ESA. At no point did STAL seek to challenge the view recorded by Mr. Scanlon that the decision was a reasonable one at the time it was taken.

51 At the end of week 7, on 5 March 2021, after all the evidence had been heard and after the Planning Conditions and Obligations session, Mr. Hill QC revealed that STAL would be making a single costs application against UDC (not SSE) for the full costs of the inquiry. Disregarding what he had told the inquiry on 24 February (i.e. that the application would be made after all the evidence had been heard), Mr. Hill QC did not then make the application and gave no grounds, particulars, or other indication of what it would contain.

52 Inspector Boniface then asked if STAL had prepared its costs application in writing. Mr. Hill QC responded that STAL were doing that, but that it was – now - in large part parasitic on STAL's closing submissions which were still being completed, and that it was STAL's intention to make its application after closing submissions and that the costs application would be available in writing thereafter. Mr. Hill QC's '*instinct*' was to allow UDC a 7 day period thereafter to respond in writing, then to allow STAL a further 7 day period for a final right of reply. Mr. Hill QC did not even pretend that it would not have been possible for STAL to have made the application sooner.

53 UDC reserved its position in relation to making a cross-application for costs. Mr. Coppel QC stated that the position was wholly unsatisfactory and wholly unfair on UDC. UDC needed to see exactly what was in the costs application in order to be able to respond to it. He stated that on seeing it and having the opportunity to respond, UDC may make a cross-application,

and quite possibly, there may be a need to recall witnesses to cover matters which would have been in issue had STAL indicated the basis for its costs application at an earlier stage.

54 Inspector Boniface enquired why the contents of STAL's application for costs would have a bearing on UDC's evidence. Mr. Coppel QC reiterated that UDC needed to know the basis for the costs application. If there were matters which were known to STAL before the start of the inquiry, but STAL had chosen not to disclose their basis for costs, that would have changed the way in which UDC had questioned UDC and STAL's witnesses. By not disclosing the basis for the costs application, STAL had been given an unfair advantage over UDC in presenting its case. Inspector Boniface asked whether UDC was in a position to agree to the costs application being dealt with in writing. Mr. Coppel QC confirmed as UDC had not yet seen the application UDC was not in a position to agree that, but that oral submissions were very likely to be needed. Inspector Boniface commented that he would be a little surprised if that were the case since – in the Inspector's view - much of UDC's evidence seemed to go to the point of costs.

55 On 11 March 2021, both SSE and UDC delivered their closing submissions. On the morning of 12 March 2021, STAL delivered its closing submissions. At the end of those submissions, Mr. Hill QC said that STAL would circulate its costs application over the lunch adjournment to allow the Panel an opportunity to consider whether it was content to follow the approach of dealing with costs by an exchange of written submissions. Inspector Boniface agreed with that approach, noting that that would give an opportunity for both the Panel and UDC to look over the application over lunchtime. He indicated that the Panel was minded to, or hopeful, that the costs application could be dealt with in writing, but they would see what the application said. Mr. Hill QC indicated that STAL would do that as soon as the inquiry was adjourned. The application was received 10 minutes later at 1310hrs. It consisted of 22 pages of submissions, based on 5 stated grounds, referable to the PPG. It is focussed on UDC's handling of the application between November 2018 and January 2020 – all well known to STAL by July 2020.

56 Fifty minutes later, at 1400hrs, the luncheon adjournment having concluded and the inquiry resumed, Inspector Boniface asked whether UDC was able to agree that the application could be dealt with in writing. Based on a first look at the application, Mr. Coppel QC objected to the timing of the application, reiterating points it had warned of previously, and in particular noting that the application was based on matters known to STAL before the inquiry

commenced, and that there was no legitimate reason for the application being made right at the last minute. Had the application been made at an early stage, in compliance with the PPG, those matters raised could then be covered in evidence and tested in cross-examination. Mr. Coppel QC stated that it was a totally unsatisfactory way for an application to be made. STAL had gained an unfair advantage by not disclosing the basis for its costs application in advance of the inquiry, which UDC had not had a chance to address in its evidence or to explore with STAL's witnesses. Mr. Coppel QC sought time to consider and take instructions on the application and to decide how to respond, whether with submissions, further documents, and / or the calling of further evidence. Directions were sought to allow UDC to suggest an appropriate way forward with a view to further case management by the Panel thereafter. The possibility of a cross-application for costs was raised based on the lateness of the application and consequential costs. Given the sums of money potentially involved, a proper time to respond was needed.

57 Inspector Boniface stated that the application and the matters raised should not have come as a surprise to UDC given the indication that a costs application would be made. In Inspector Boniface's view, there was nothing which explained why it would be necessary to recall witnesses. The Panel was minded to deal with the matter in writing. Mr. Coppel QC made clear that it needed a proper opportunity to take instructions on how the application could best be dealt with, without compromising fairness. The Panel then adjourned for 10 minutes to consider the way forward.

58 Having resumed, the Panel rejected UDC's suggested way forward. It ruled that, having heard the submissions of the parties, the Panel would deal with costs in writing. The reasons given for that decision were as follows: '*There has been a clear application, and provided the Council has sufficient time to consider it and make a response, there is no reason why that should be unfair or that it shouldn't adequately deal with the matter.*' No reference was made to the guidance in the PPG, still less was any attempt made to reconcile the timing with the requirement in the PPG that costs applications be made '*as soon as possible*'.

59 UDC was granted 28 days to respond to the application in writing (9 April 2021), with STAL having a further 14 days for a final written reply (23 April 2021). No opportunity to respond to STAL's reply was granted to UDC on the basis that any reply from STAL would not raise new matters.

(3) Resulting unfairness and prejudice to UDC in responding to the costs application

60 The costs application is for a full award of costs against UDC for the whole of the appeal. It is based on 5 separate grounds (in summary):

(1) Preventing development which should clearly be permitted

(2) Imprecise, vague and / or unsubstantiated reasons for refusal

(3) Refusing planning permission on grounds which were capable of being conditioned

(4) Seeking to impose Condition 15 which is unlawful and does not meet the policy tests for a condition

(5) Unlawfully revisiting the merits of Government policy

61 The primary focus of the costs application relates to historic matters leading to UDC's decision of January 2020. That is the basis for Grounds (1) to (3). Insofar as the submissions relating to those Grounds refer to evidence given at the inquiry, they seek to record purported concessions by UDC witnesses as to those historic events. Ground (4) relates to Condition 15, which STAL has known about since 4 December 2020 when it was shared with Counsel as a basis for discussion, and which STAL sought to address in its rebuttal evidence of Mr. Andrew submitted on 5 January 2021. Ground (5) applies both to the RFR on Carbon Emissions of January 2020 and the alleged pursuit of an unlawful approach to Government policy at appeal which, if true, would have been known to STAL from exchange of proofs on 8 December 2020 at the latest.

62 There is no legitimate reason why the costs application, focussed as it is on matters leading to UDC's decision of January 2020, could not have been made with the Appeal in July 2020, or soon after 16 September 2020, when UDC's Statement of Case was submitted. Grounds (4) and part of Ground (5) could have been raised well before the start of the inquiry on 12 January 2021. To the extent that STAL has relied on matters that post-date July 2020, they are introduced by STAL to deflect attention from the central plank of the costs application – that the January 2020 refusal was an unreasonable decision – and betray STAL's recognition that it needs to disguise it deliberate decision not to disclose the application it had intended to make from inception of its appeal.

(i) Ensuring fairness to the recipient of a costs application

63 It is a fundamental principle of fairness that a party to legal proceedings should know the case which it has to meet. In relation to costs applications in planning appeals, that is the reason why the PPG advises that costs applications should be made as soon as possible. That part of the advice was recorded in writing in the Panel's CMC note of 2 October, repeated to STAL by Inspector Boniface on the opening day of the inquiry 12 January 2020, and plainly motivated the raising of the issue by Inspector Jones on 24 February 2021. It is clearly envisaged within the PPG that a costs application can be made, identifying its basis, but then can be supplemented or added to if the manner of presentation at the inquiry itself gives grounds for doing so. The point is that it should be made early so that the party receiving it knows the case that it has to meet and the basis for it. Such an approach is consistent with ensuring fairness between the parties in dealing with such applications. It is a central tenet of all adversarial proceedings, whether called "inquiries" or "court proceedings" or "arbitrations".

64 Not only has STAL failed to follow the advice in the PPG, but it has acted in flagrant disregard of it and its rationale. It has done so in order to gain an unfair advantage over UDC. There is no lawful basis for disregarding the PPG as to the timing of costs applications. There is no lawful basis for allowing tactical favours to one party against another.

65 When asked directly by Inspector Boniface on 24 September 2020 whether any costs application was anticipated, STAL should have stated that a costs application was anticipated relating to UDC's refusal of the application. By remaining silent, STAL gave the false impression that matters raised in its Statement of Case were not matters which would form the subject of a costs application against UDC. When on 12 January 2021 Inspector Boniface again requested that any costs application be made as soon as possible and suggested that Mr. Hill QC share the basis of any potential costs application with UDC, STAL's failure to make any application, and Mr. Hill QC's failure to contact UDC to explain its basis, repeated the false impression that no costs application was contemplated against UDC, in circumstances where both UDC and SSE had been warned of the potential for a costs application in a single sentence in STAL's Opening.

66 Instead, STAL has operated under the radar in relation to its potential costs application, leading its own evidence and asking some questions of UDC's witnesses by stealth, without

disclosing the detailed basis and grounds for its anticipated costs application, which would have allowed UDC to challenge the evidence and to make a proper and full response.

(ii) Ensuring that matters relating to any costs application are properly ventilated and considered

67 Given that no costs application was made with the appeal in July 2020, no costs application was disclosed as being anticipated when STAL was asked in September 2020, no costs application was made when the ESA was published in October 2020, nor when proofs were exchanged in December 2020 (or thereafter), UDC provided its final time estimates for examination in chief of its witnesses and cross examination of STAL's witnesses on 22 December 2020 without including time to deal with costs matters. The inquiry schedule was set accordingly.

68 In reliance, first, on Inspector Boniface's clear indication on the opening day of the inquiry that, whilst historic matters relating to the justification for UDC's decision had been and could be aired, the Panel did not want to go over historic matters but wanted to focus on the evidence as it was now, and in reliance, secondly, on there being no costs application, UDC's witnesses dealt briefly with UDC's decision by reading out relevant parts of their written evidence, and then focussed on the environmental effects as reported in the ESA. STAL's witnesses were not, and could not, be cross-examined on as yet unknown and unparticularised costs matters.

69 Had a costs application been made at an early stage, in any event before the inquiry, and in a timely fashion, identifying what was relied upon for that application, UDC would have been in a position:

(1) to work out what lines needed to be pursued and calculate the additional time in examination in chief required of its own witnesses to deal with costs matters;
(2) to work out what sections of proofs needed to be tested by cross-examination of STAL's witnesses in relation to costs matters and to calculate the time needed for that; and
(3) to take instructions and submitted further documents and / or called further evidence as to historic matters relating to costs.

70 The importance of these cannot be over-stated. They are not empty assertions. Fundamentally, UDC has not been afforded the opportunity to cross-examine STAL's witnesses as to the reasonableness of UDC's decision in January 2020, based on the matters raised in STAL's costs application, rather than focussing for the inquiry on the planning merits of the position after the ESA was published, as directed by the Panel. Three specific examples – and there are others - illustrate the above points.

71 First, under Ground 1, the costs application makes the following point to support the claim that the application should clearly have been permitted (§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.*'

72 The point completely ignores UDC's written evidence:

(1) On aircraft noise, Mr. Trow's expert view was that further assessment work should have been undertaken to further articulate and communicate the effects of the development within the ES [UDC/1/2, §8.8; see also §§5.13 and 6.2]. These shortcomings were clearly set out in Mr. Trow's rebuttal in response to the alleged comprehensiveness of the ES, and Mr. Cole's consideration of the WHO ENG2018 and noise effects on schools in his proof [UDC/1/4, responses to §§3.1, 6.8.2, and 8.1.1].
(2) On air quality, Dr. Broomfield's expert view was that there were shortcomings in the air quality assessment in the ES and further information should have been required on certain matters (e.g. levels of nitrogen dioxide in the Bishop's Stortford AQMA) [UDC/2/2, §§57 and 61; UDC/2/4, p.9].
(3) On carbon emissions, Dr. Hinnells's expert view was that the evaluation of the carbon emissions was flawed at the point of decision because it failed to acknowledge, grapple with or address evolving carbon emissions policy [UDC3/1, §§99, 24-29].

73 These expert views were made within the scope of the respective RFRs and formed part of those experts' judgments that the RFRs were reasonable, based on a review of the evidence before UDC when the decision was taken in January 2020.

74 Had the costs application and its basis been revealed to UDC before the start of the inquiry, UDC would have asked its witnesses to expand upon these views relating to the ES, and would have addressed the extent of their concerns, with specific reference to the EIA Regulations and / or one of the core principles of extant aviation policy, namely transparency, the need to have clear and transparent information, and the need for those affected by aviation to have a clearer understanding of the facts ([CD14.1], p.8, §3, referred to in UDC's Opening at [INQ2], §63).

75 Moreover, had STAL not kept mum about its costs application and its basis and, instead, followed PPG requirements by making its costs application before the start of the inquiry, UDC would have cross-examined STAL's expert witnesses on the adequacy of the ES (Mr. Cole, Dr. Bull, Mr. Robinson, and Mr. Vergoulas), and would have elected to cross-examine Mr. Thompson on EIA matters, with a view to putting its case as to the reasonableness of the concerns raised by its expert witnesses.

76 The opportunity to expand on these points in oral evidence and to test STAL's evidence on them, would have allowed the issue to have been properly ventilated, ensuring fairness between the parties. Instead, the inquiry has heard no oral evidence from UDC on the above points and has a partial picture of the evidence, which prejudices UDC.

77 Secondly, STAL notes more than once in its costs application that no-one was called by UDC to expand upon how UDC arrived at its decision (§§9, 24). No wonder. Had STAL not kept under wraps that it would be making a full costs application against UDC on the basis of the considerations before the Planning Committee between November 2018 and January 2020, that too is a matter which UDC would have addressed both in written and oral evidence. It would have been addressed by Mr. Scanlon taking more detailed instructions and presenting more detailed evidence in his proof and orally on the assessment of the application by UDC, so as to expand upon his view, that UDC's decision was a reasonable one at the time it was taken.

78 Further, had the costs application and its basis been revealed to UDC when it could and should have been made (i.e. in July 2020 or shortly thereafter), UDC would have cross-examined Mr. Andrew on the application history in more detail, with a view to putting its case as to the reasonableness of the decision at the time it was taken.

79 Instead, STAL revels in the advantage it has secured for itself, boasting in its costs application that it has '*fully explored*' these matters in cross-examination of Mr. Scanlon (§9) and criticising Mr. Scanlon for his alleged attempt to '*glide over*' a period of months in summarising the consideration of the application by UDC (§15). STAL "fully explored"[11] those matters in full knowledge of the application it had stowed away, but knew it was going to make. Mr. Scanlon cannot be criticised for summarising parts of the history of the application, when there was no costs application signalling that as an issue to be dealt with. The inquiry has not heard full evidence from UDC on these matters, and has a partial picture of the evidence, which prejudices UDC.

80 Thirdly, STAL asserts in its costs application that the delays in the consideration of the planning application were solely down to UDC (§41), repeating a point made in its closing that UDC's Planning Committee '*filibustered for 14 months*' following the resolution to grant (§280).

81 The point ignores relevant facts from the history of the application, which would have been explored and tested in evidence, as to the causes of any delay. SSE made requests of the SoS to call in the decision on the application in February and November 2018 (referred to in the list of Appendices to [CD12.15b]). As a result of those requests, on 7 November 2018, the SoS issued a direction to UDC not to issue any decision before the SoS had concluded whether to call in the application for determination **[29]**. The resolution to grant permission subject to a s.106 Agreement was passed after that on 14 November 2018. It was not then until 20 March 2019 that the SoS decided not to call in the decision [CD12.15a]. Thereafter, the s.106 Agreement was not signed by STAL until 12 April 2019 [CD15.1, p.9]. Thus, for a period of approximately 5 months after the 14 November 2018 resolution, any delays in completing consideration of the application were not due to UDC. The reasons why STAL agreed to extend the Planning Performance Agreement rather than appeal for non-determination, would also have been explored and tested (see below).

82 Further, STAL's assertion that the delays in considering the planning application were caused by UDC, amounted to filibustering, and were unreasonable, are at odds with their own statements at the time. The clear implication of STAL's costs application is that the new

[11] As explained above and below **(§§46, 50, 86, 104, 149, 155(1), 176)**, STAL did not properly or fairly put its case to UDC's witnesses.

administration at UDC were set on refusing the application, leading to the delays (§22). STAL claims that it proceeded in good faith to negotiate the s.106 Agreement in the belief that the decision notice would then be issued (§15), implying that it was bad faith that motivated members thereafter.

83 Yet, in addressing UDC's Planning Committee at the January 2020 meeting, STAL's CEO expressly stated that STAL '*recognised the challenges facing a new administration*' and that STAL had tried to be accommodating and respectful of UDC's wish to thoroughly examine the issues. He also thanked both UDC members and officers for the time and effort they had devoted to carefully and professionally considering the application, '*particularly over the past few months*' [CD13.4a, pp.49-50].

84 Nowhere in STAL's costs application or evidence has STAL acknowledged the delays caused by the SoS call-in, the reasonable time taken before the signing of the s.106 Agreement, or the comments of its own CEO in January 2020 in addressing UDC's Planning Committee.

85 Passing reference was made to the SoS call-in by Mr. Scanlon in cross-examination. Reference was made to the first part of the CEO's speech in cross-examination of Mr. Andrew. Given its importance to the costs application as now revealed, this was a wholly unsatisfactory way for this point to be dealt with in evidence. Had the costs application and its basis been revealed to UDC when it should have been (July 2020 or shortly thereafter), it would have explored these issues in far greater detail in Mr. Scanlon's evidence and in cross-examination of Mr. Andrew, particularly with a view to understanding the disjunct between the accusation now made of filibustering and STAL's recognition of the reasons for the delays through its CEO in January 2020.

86 Fourthly, the costs application refers to part of the July 2019 Minutes in order to make an allegation that the reallocation of financial reserves would be '*an improper use of these ringfenced funds*' (§22). That is a serious allegation of financial mismanagement aimed at a public body, in documentation submitted to a major public inquiry. Apart from noting this part of the Minutes with Mr. Scanlon in cross-examination, Mr. Hill QC did not actually put this allegation to Mr. Scanlon[12]. This is inexcusable, not least on professional grounds. The other suggestion made is that members approached the application with a closed mind, which again

[12] It is responded to in the witness statement of Adrian Webb **[1-2]**.

is a serious allegation which has not been put in oral evidence. Indeed, neither serious allegation is made in terms in the evidence produced by STAL.

87 Had UDC been made aware – as it should have been – that this was part of the costs application, UDC would have taken the opportunity to deal with it through its own witnesses, and through cross-examination of Mr. Andrew. This is the very sort of procedural injustice that the requirement of the PPG that costs applications be made '*as soon as possible*' is designed to forestall. It is not open for these to be brushed aside. Any departure can only be mandated by externalities.

88 As a result of STAL's decision to wait until the very last minute to reveal its costs application, its detailed basis and grounds, none of the above matters have been properly ventilated at this inquiry. This is significantly prejudicial to UDC's ability to respond to the application.

(iii) Avoiding delays by additional time having to be set aside to deal with a late costs application

89 UDC made its position clear that it would need proper time to take instructions and potentially call and / or recall witnesses to deal with matters contained in a late costs application, particularly where it related to historic matters which could have formed the subject of an application at an early stage. It made these points on the opening of the inquiry on 12 January 2021, in week 6 on 24 February 2021, in week 7 on 5 March 2021, and in response to the application on 12 March 2021, having been given 50 minutes to digest and take instructions on the 22 page application. UDC's proposal, that it be given adequate time to consider and take instructions on the application and respond with a way forward, would have led to delays, which were wholly avoidable had the costs application been made in a timely fashion. Importantly, they were delays which would have allowed for the costs application to be dealt with fairly between the parties – particularly by the party against whom the application is made - by the re-calling of witnesses who would have been tested on costs related matters. In the event, its proposal has been rejected by the Panel for the reasons set out by Inspector Boniface on 12 March 2021.

90 It is no answer to the above points to suggest that UDC has addressed its evidence to the reasonableness of its decision, or to suggest that these matters can be dealt with in writing.

91 As to the first point, surmising that UDC had addressed its evidence to the reasonableness of the decision, UDC's newly appointed expert team did, in the usual way when dealing with a decision overturning officer recommendation, turn their minds to the application papers and the decision in January 2020, giving their overall view as to its reasonableness. However, that is in no way a substitute for knowing the full basis of a costs application which is to be made, so that the specific matters within the process relied upon to show unreasonableness can be focussed upon and properly covered in written evidence and expanded upon in the oral evidence of those witnesses. Requiring parties to respond to allegations of unreasonableness in a Statement of Case or in proofs of evidence, which are not supported by a properly particularised costs application, results in an exercise of shadow boxing. Moreover, here, STAL gave the false impression that the allegations in the Statement of Case were not anticipated to be the subject of a costs application at the CMC in September 2020. See also Mr. Vergoulas' suggestion that the timing of Mr. Hinnells' request for clarification of carbon projections in the ESA was unreasonable, which does not form part of the costs application here (§36(1) above).

92 As to the second point, dealing with the costs application in writing has denied UDC the opportunity to cross-examine STAL's witnesses on points arising from their costs application, with a view to demonstrating the reasonableness of its position, an opportunity which STAL alone has been afforded (and has not properly undertaken).

93 It is no excuse for Mr. Hill QC to say that he had no instructions to make a costs application until all of the evidence has been completed and, even then, at the very last minute: Queen's Counsel cannot shield himself behind any inadequacies of a client. That is completely inadequate as a response to why the application here, and its basis, could not have been provided at an early stage and in any event before the inquiry commenced, allowing for it to be addressed properly in evidence, and for it to be supplemented where necessary. Allowing Mr. Hill QC's approach is a repudiation of what is required by the PPG. This is not an application arising from conduct at or during the inquiry, for which there might be some justification for late notification of a costs application. Allowing costs applications to await "final instructions" without any disclosure as to their basis or allowing a proper ventilation of the issues before that, would give carte blanche to any developer to ride roughshod over the PPG. In every such case, it would be tactically advantageous to them to wait until the last

minute to reveal their costs application and its basis. It makes a nonsense of the PPG and its rationale, and leads to clear unfairness, as has occurred here.

94 STAL has highlighted the very substantial costs of bringing its appeal (§8), resulting from its decision to call 11 witnesses over the course of 30 sitting days[13]. On any view, a full costs award for the costs of the whole of the appeal would be substantial. Procedural rigour in the application of the PPG on costs is all the more important in those circumstances. The scale of the likely costs award further supports the need for the Panel to ensure fairness to UDC in its response to the points made. It is respectfully submitted that that has not been achieved by the way in which STAL has been allowed to make its costs application, and the Panel's ruling that it should be dealt with in writing. The facts and circumstances surrounding this appeal provide a very good example of why costs applications should be made at an early stage.

95 UDC's response to the costs application which follows should be considered expressly subject to the points made above as to the unfair advantage which STAL has gained by the timing of its application, and the prejudice caused to UDC in responding to the application.

(4) Relevant legal background

(i) General legal principles applicable to costs applications

96 Section 250(5) of the Local Government Act 1972 provides a statutory discretion to the SoS to make orders as to costs. Guidance as to the way in which that discretion may be exercised is set out in the PPG (ID: 16-027 – 16-050).

97 Unlike in civil litigation, costs in planning appeals do not follow the event. In planning appeals, the parties '*normally meet their own expenses*' (ID 16-028). That is because planning decisions engage the public interest, affecting local residents and other stakeholders beyond the individual interests of the applicant for permission and the local planning authority as decision maker. The decision in this appeal fully reflects those concerns, given its scale, permanence, and effects, as demonstrated by the full engagement of SSE and other interested parties at both the application stage and on appeal. The fact that a public planning inquiry took place to

[13] Five witnesses were needed to respond to UDC's case at appeal, Mr. Cole (aircraft noise), Dr. Bull (air quality), Mr. Robinson and Mr Vergoulas (carbon emissions), and Mr. Andrew (planning).

hear from all interested parties and determine all of the issues raised does not, of itself, warrant any award of costs.

98 Against that background, the discretion to award costs is only engaged if two pre-conditions are both met (see ID: 16-030):

(1) UDC has behaved unreasonably in its decision to refuse permission as articulated in its RFRs; and
(2) That unreasonable behaviour has directly caused STAL to incur unnecessary or wasted expense in the appeal process.

99 As is clear from the PPG and s.250(5) of the 1972 Act, even if the two pre-conditions are met, there remains a discretion as to whether costs should be awarded (ID: 16-030 – 16-031).

100 As to the pre-conditions, the word '*unreasonable*' in the PPG is to be used in its ordinary meaning. Whether a party has acted unreasonably is to be judged having regard to the picture as a whole (*Manchester CC v SOSE* [1988] JPL 774, per Kennedy J at pp.775, 777).

101 The proper approach to the application of the guidance on costs, in the exercise of a discretion to make an order for the costs of a planning appeal, has been addressed by the courts (*R v SOSE, ex parte North Norfolk DC* [1994] 2 PLR 78, per Auld J at pp.83H, 84A, as relevant, emphasis added):

(1) '*Clearly, the evidence upon which the authority relies to support a ground for refusal of permission must have some substance in the sense of providing some respectable basis for their stance upon a particular issue. But it need not be of such substance as to persuade the inspector to find in the authority's favour on the issue. Otherwise every evidential failure to persuade an inspector on an issue would expose the loser to a finding of unreasonableness on an application for costs in relation to that issue.*'
(2) '*In addition, the test is one of unreasonableness, not just of whether an authority has produced evidence to substantiate their case on a particular issue.*'

102 It is clear from the *Manchester* and *North Norfolk* cases that when considering whether there is some substance to a RFR, the decision maker must look at the picture as a whole, considering all of the evidence given at the appeal.

103 Further or alternatively, where a decision has been taken to overturn an officer recommendation to grant permission, it is wholly unsurprising for RFRs not to be "substantiated" at the time of the decision, since there is no requirement or expectation for an Officer Report to set out and evidence the basis for a decision contrary to its recommendation. In those circumstances, such evidence must necessarily be considered on appeal as is acknowledged in the PPG[14]. Unreasonableness should therefore be considered in the round, having regard to all of the evidence submitted by UDC to defend its RFRs on appeal.

104 Against that background, the submission of expert evidence, which assesses the evidence before the local planning authority when the decision was taken, and gives the view that the decision was a reasonable one in the circumstances, is the clearest demonstration of there being some respectable basis for the local planning authority's stance on appeal. That is precisely what UDC has done through its expert witnesses in this appeal, each of whom has given their view that, on their area of expertise, UDC's decision was a reasonable one at the time it was taken. There has been no suggestion by STAL that these were not appropriately qualified and experienced witnesses in their area. Importantly, the expert views of each of UDC's witnesses on the reasonableness of the UDC's decision at the time it was taken has not been challenged, fairly and squarely, as it should have been.

105 As to causation, RFRs (1) – (3) each stand independently of one another (RFR4 is related to and dependent on the other RFRs). Each RFR was reasonable when considered against the evidence as a whole. However, even if only one RFR were considered to be reasonable, that would have been sufficient to cause an appeal. On appeal, it is plain that SSE (and indeed other 3rd parties without Rule 6 status) would have caused a number of other issues to be considered. STAL would have responded to those issues with expert evidence, as it has done on each of UDC's issues, plus each of those raised by SSE. As a result, if just one of the RFRs is considered to be reasonable, there had to be an appeal which would have addressed all of the issues which have in fact been covered. It follows that if only one of UDC's RFRs is considered to be reasonable, no costs award should made.

(ii) Discussions at Planning Committees, Minutes, and Reasons for Refusal

[14] '*[F]ailure to produce evidence to substantiate each reason for refusal <u>on appeal</u>*' is cited as an example of unreasonable behaviour (ID: 16-049, emphasis added).

106 STAL has spent time at this inquiry seeking to pick over what may or may not have been openly discussed or expressed to be reasons for the decision, by reference to recollections of the discussions, the Minutes of the January 2020 meeting, and Minutes of previous meetings. STAL has also spent inquiry time picking over what may or may not have been before UDC's Planning Committee when it made its decision in January 2020 by reference to the Officer Reports and supporting documentation.

107 Such matters are of very limited relevance to this costs application because: (1) the RFRs are those contained in the Decision Notice; and (2) the need for unreasonableness to be considered against all of the evidence heard at the appeal, including that of UDC's expert witnesses, for the reasons set out above.

108 Further or alternatively, the Courts have provided relevant guidance on how the discussions of Councillors at a Planning Committee meeting should be approached, albeit in the context of challenges to the grant of planning permission.

109 First, the Courts have made a clear distinction between, on the one hand, the decision notice containing the RFRs, and on the other hand, the resolution of the committee recorded in the Minutes. The decision notice constitutes the decision and the reasons on which the decision was made. It is the decision notice and its reasons which give rise to the appeal, not the Minutes. The drawing up of Minutes is directed to a different statutory obligation under the Local Government Act 1972 to provide a record of the proceedings after a committee meeting (s.100C and Sched. 12), not to give reasons for the committee's decision pursuant to the Town and Country Planning Act 1990 and Article 35 of the Town and Country Planning (Development Management Procedure) Order 2015 (*R (Hawksworth Securities Plc) v Peterborough CC et al.* [2016] EWHC 1970 (Admin) per Lang J at §§73-74).

110 Here, the reasons contained within the Decision Notice at [CD12.10] constitute UDC's RFRs, a point which seems to be lost on STAL, given its repeated focus on the Minutes of meetings. Fundamentally, through those RFRs, UDC articulated that STAL had failed to demonstrate that the aircraft noise and air quality effects would not be detrimental, and that UDC's view was that the carbon emissions were incompatible with climate change policy and targets.

111 Secondly, when considering discussions at a planning committee, it is necessary to bear in mind that the committee are taking a collective decision on a planning application. The general tenor of the discussion must be considered rather than individual views expressed by committee members, let alone the precise terminology used (*R v Exeter CC ex parte Thomas & Co. Ltd.* (1989) 58 P&CR 397, per Simon Brown J at p.408[15]). There are real difficulties in establishing the reasoning process of a corporate body which acts by resolution. What an individual says during the debate may or may not be how he acts when he casts his vote after the debate. Many of those present may make no verbal contribution (*R (Tesco Stores Ltd.) v Forest of Dean DC* [2014] EWHC 3348 (Admin), per Patterson J at §73, points which remain unaffected following the appeal [2015] EWCA Civ 800).

112 Here, the general tenor of the Minutes of the January 2020 meeting (and in fact those which went before), was that STAL had failed to convince members as to the extent of environmental impacts relating to aircraft noise, air quality, and carbon emissions arising from their proposals and whether they could be adequately addressed. UDC's experts have each confirmed that that stance was a reasonable one at the time the decision was taken.

113 The Courts' guidance, that extreme caution should be applied with regard to individual comments by members during the debate of a planning application, applies with particular force to Councillor Hargreaves' comment as to the availability of financial reserves to defend any decision, which STAL wrongly seeks to rely upon (§21). Such comments are wholly irrelevant to the merits of this costs application. STAL's focus on this comment is designed to divert attention from the proper planning concerns which lay behind the decision, which have been supported by expert evidence on appeal.

114 As to reasons generally, at para. 14 of its costs application, STAL refers to the leading case of *Dover DC v CPRE (Kent)* [2018] Env LR 17, without acknowledging its particular application here. The Court noted that it has long been the case that local planning authorities must give reasons for refusing permission, which appears to have been a corollary of the fact that in those cases there is a statutory right of appeal (per Lord Carnwath at §27, referencing the 2015 Order). The Court went on to comment that if a recommendation to grant is accepted

[15] Referring with approval to Pickford LJ's comment in *R v London County Council* [1915] 2 KB 466 at p.490, that '*there are probably few [Council] debates in which someone does not suggest a ground for decision something which is not a proper ground and to say that because somebody in debate has put forward an improper ground the decision ought to be set aside as being founded on that particular ground is wrong*'.

by members, no further reasons may be needed. '*Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference.*' (§42).

115 STAL has spent inquiry time seeking to make the case that UDC was required formally and expressly to revisit and undertake the planning balance in its consideration of the planning application in January 2020. However, that ignores the way in which the RFRs were framed, making clear that the Committee had not been convinced by the evidence put before them on the issues of aircraft noise, air quality, and carbon emissions. That is the context in which the planning balance was addressed. In any event, even if there was a requirement to address the planning balance, there is nothing requiring that to be formally expressed within the duty to give full reasons. There is nothing in statute, case law, or guidance which requires a local planning authority to set out in a decision notice how the planning balance has been undertaken.

116 What the Supreme Court recognised in the *Dover* case is that the requirement to give reasons for a refusal should be considered within the context of the statutory appeal which is available for any such refusal. That reflects the fact that the terms of a refusal, contained in a Decision Notice, will be expanded upon in the planning authority's Statement of Case and then in its evidence on the appeal, as has occurred here. In this case, that process has substantiated the RFRs articulated in UDC's decision notice.

(iii) Immateriality of advice on costs consequences to question of reasonableness

117 STAL devotes significant passages of its costs application to the fact that UDC's members were made aware of the financial implications of any decision to reverse the resolution of the Committee in November 2018 (§§18 – 24, 38 - 39). These matters are completely irrelevant to the merits of whether UDC's decision was a reasonable one. It is well known that, although local planning authorities can properly be made aware of the financial implications of their decisions, the costs consequences of any decision should not influence the exercise of planning judgment on an application, as they are not a material planning consideration (*R (East Bergholt PC) v Babergh DC* [2019] EWCA Civ 2200, per Lindblom LJ at §82).

118 It does not follow that because a Planning Committee is given proper advice as to the potential financial implications of a decision, the taking of that decision is unreasonable, whether at

that time or when considered on appeal. By focussing on the advice given – quite properly - to the Planning Committee on costs consequences, STAL seeks to colour the Panel's judgment on the reasonableness of UDC's decision and to draw attention away from the proper planning concerns which lay behind that decision. Having been made aware of the financial implications of their decision, the Planning Committee held firm in their planning judgment that their concerns as to the environmental effects had not been properly addressed, a point made good on appeal through UDC's expert witnesses.

(iv) Proper scope of legal advice on material considerations

119 The costs application suggests that any decision to reverse the November 2018 resolution was contrary to the consistent advice of Counsel and Leading Counsel that there was no lawful basis for so doing, referring to legal advice received by UDC (§§16, 18). The point is both wrong on the facts and misconceived as a matter of law.

120 Legal advice was received by UDC, which was properly referred to in the Report to the Planning Committee of January 2020 [CD13.4b, §§6-11]. As stated in that Report, that advice was shared with members on a legally privileged and confidential basis.

121 Quite separately, the January 2020 Report properly set out the approach for the Planning Committee, including whether there were any new material considerations that would justify a different decision to that resolved in November 2018 [CD13.4b, §§10, 52-53].

122 The approach set out for the Planning Committee properly reflected the scope of what were legal matters, and what were matters for the Planning Committee: whether or not a particular consideration is a material consideration is a matter of law on which legal views can be taken. However, subject to irrationality, it is a matter within the exclusive province of a decision maker to decide the weight which should be accorded to a material consideration (*Tesco Stores v SOSE* [1995] 1 WLR 759, per Lord Hoffmann at p.780F, see also Lord Keith at p.764G):

'*The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that*

the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.'

123 The Courts have also addressed what a material consideration is in the planning context (*R (Kides) v South Cambridgeshire DC* (2003) 1 P&CR 19, per Jonathan Parker LJ at §121, emphasis added):

'*In my judgment a consideration is "material", in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decisionmaker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.*'

124 To suggest, as STAL does, that any decision to reverse the November 2018 resolution was contrary to legal advice and had '*no lawful basis*' (§18), is both misleading, given the proper way in which the legal advice was referred to in the Officer Report, and misconceived as a matter of law. STAL's suggestion that the decision was contrary to legal advice is yet another attempt to colour the Panel's judgment on the reasonableness of UDC's decision.

(5) Response to Grounds 1, 2, and 3: Preventing or delaying development which should clearly be permitted; imprecise and vague RFRs / failing to substantiate RFRs; refusing planning permission capable of being dealt with by condition

125 Grounds 1 - 3 can be taken together. They are devoid of any merit when the proper context for UDC's decision is considered.

(i) UDC's detailed consideration of the application

126 The following relevant parts of the timeline up to the meeting in January 2020 can be noted.

127 On 19 February 2018, SSE made a request to the SoS that the application be called in for determination (See Appendices to [CD12.15b]). As a result of that request, on 7 November 2018, the SoS requested that UDC not issue any Decision Notice until the request for call in had been fully addressed **[29]**.

128 On 14 November 2018, UDC's Planning Committee resolved to follow the recommendation in its Officer Report and to give conditional approval to the application, subject to a s.106 Agreement being agreed and signed. The resolution was passed by casting vote, reflecting the hugely contentious nature of this major application and its importance to the constituents which the members represented.

129 Over 4 months later, on 20 March 2019, the SoS decided not to call in the application [CD12.15a].

130 On 12 April 2019, and 5 months after the November 2018 resolution, the s.106 Agreement was signed by STAL and sent to UDC for signature [CD25.1, p.9].

131 Local elections held in May 2019 resulted in the election of a completely new administration for the Council. Whilst certain members from the November 2018 committee remained, the elections resulted in a significant change to the make-up of the Planning Committee to reflect the new political balance. Both before and after those elections, motions were considered to instruct officers not to issue the Decision Notice. These motions were based on members wanting to review the adequacy of the s.106 Agreement which had been negotiated (25 April 2019), and subsequently also to consider whether there were any new material considerations and / or changes in circumstances since the November 2018 resolution to which weight might now be given in striking the planning balance.

132 An informal meeting was held on 30 April, and at an Extraordinary Council Meeting on 28 June 2019, officers were instructed not to issue the Decision Notice pending consideration of the adequacy of the s.106 Agreement and any new material considerations and / or changes in circumstances. Legal advice was obtained and considered both before and after those meetings, and workshop sessions arranged for members to consider the s.106 Agreement and issues that might be raised as material considerations [CD13.4b, §§4-12].

133 By reference to the above timeline, it cannot sensibly be claimed that UDC are in any way culpable for the 5 month period between the resolution of November 2018 and the signing of the s.106 Agreement by STAL on 12 April 2019. UDC were under a direction not to issue the

Decision Notice until the application had been considered by the SoS. After that, the s.106 Agreement was negotiated by officers.

134 As to the period after 12 April 2019:

(1) There is nothing unreasonable in a Planning Committee wanting to review the adequacy of a s.106 Agreement and to seek legal advice as to its legal adequacy to assist in that process.

(2) There is nothing unreasonable in a Planning Committee wanting to consider whether any new material considerations have arisen since its resolution which might affect the planning balance.

(3) Local elections and changes in the political make-up of local authorities are a fact of life. It was entirely sensible for new members to the Planning Committee to be brought up to speed on an application which was highly contentious and remained under consideration.

(4) Given the history of airport expansion at Stansted, together with the scale of this application, its importance to local residents - with a new residents-based administration - and with environmental effects lasting for generations, it was not unreasonable that members of UDC's Planning Committee would wish to subject the application to detailed scrutiny.

135 Significantly, the detailed scrutiny given by UDC's members to the application, and the reasonableness of that approach was something which STAL itself accepted and emphasised when addressing the Planning Committee in January 2020. In his address to the Committee on 24 January 2020, Ken O'Toole, CEO of STAL stated as follows ([CD13.4a], pp.49-50, as relevant, emphasis added):

'*I want to start by thanking the UDC members and officers for the time and effort they have devoted to carefully and professionally considering our application, particularly over the last few months.*

…

Our planning application was submitted in February 2018. We have been patient; recognised the challenges facing a new administration; and have tried to be accommodating and respectful of your wish to thoroughly examine the issues.'

136 Mr. Andrew accepted in cross-examination that there was nothing to suggest that the sentiments contained in Mr. O'Toole's speech were not genuine.

137 The statements above provide the complete answer to the claim by STAL that UDC's consideration of the application amounted to filibustering, or that UDC unreasonably delayed the determination of the application ([INQ1] §90, STAL's Closing §280, costs application §41).

138 In any event, the application was subject to a Planning Performance Agreement signed on 21 February 2018 **[33-36]** including an agreed timetable with a view to resolution of the application by 18 July 2018 **[35]**, a date which was clearly not achieved given STAL submitted 808 pages of consultation response and clarifications by letter dated 5 July 2018 [CD11.2]. The first page of the PPA expressly recorded that nothing in the agreement restricted or inhibited STAL from exercising its right of appeal under s.78 of the TCPA 1990 **[33]**. If at any stage after 18 July 2018, STAL had genuinely considered that UDC were unreasonably delaying consideration of the application, STAL could have refused to extend the period for consideration and appealed for non-determination. Instead, STAL agreed to extensions to the determination period up to 30 September 2019 **[37]**, and then from 20 December 2019 until 29 January 2020 **[40-43]** (the period between 1 October 2019 and 19 December 2020 provided a 10 week window when there was no extension sought by UDC, which STAL could have used to appeal for non-determination, if it so wished).

139 The reality is that, whilst STAL was in receipt of a favourable recommendation and resolution, they were content to support UDC in its detailed further consideration of the application following the May elections and change in administration. However, when that democratic process resulted in a unanimous resolution[16] and decision to refuse permission for the reasons set out in the Decision Notice, as part of this costs application, STAL now seeks to criticise the very process it was content to support. STAL's position is utterly disingenuous.

(ii) Reasonableness of the decision in January 2020

140 The RFRs contained within the Decision Notice provide the basis for UDC's decision and its scope. The reasons for the decision are not to be gleaned from Minutes or Officer Reports. The Courts have urged extreme caution in seeking to pick over details from Minutes to elicit reasons, given that planning committees take collective decisions on planning applications (*Hawksworth Securities*, *Thomas*, *Forest of Dean*).

[16] With 2 abstentions

141 The RFRs in the Decision Notice are summarised above and are at [CD12.10]. In essence, they articulated the Planning Committee's concern that STAL had failed to demonstrate that the aircraft noise and air quality effects would not be detrimental, and the Planning Committee's view that the carbon emissions were incompatible with climate change policy and targets. More broadly, they reflected the Planning Committee's concern as to the extent of the environmental impacts relating to aircraft noise, air quality, and carbon emissions arising from the proposal and whether they could be adequately addressed.

142 Insofar as reference can be made to the Officer Report, and the discussions reflected in the Minutes of the January 2020 meeting, bearing in mind the extreme caution which the Courts have urged in seeking to draw out reasons for a decision from Officer Reports and Minutes, it can be noted that a number of valid concerns were before the Planning Committee and / or discussed ([CD13.4g], §§1-4; [CD13.4a], pp.8-11), including:

(1) The extent to which the environmental impacts assessed were reliant on fleet mix assumptions which included new generation aircraft such as the Boeing 737MAX, an aircraft which had been grounded since March 2019. This had the potential to affect aircraft noise and carbon emissions in particular.
(2) The extent to which the WHO ENG 2018 had been considered and explained by STAL. This was relevant to the tightening of standards for aircraft noise, in circumstances where the additional passenger throughout above current capacity would not occur for some years (based on the 2018 ES).
(3) The extent to which the effects of fine particulate matter (PM2.5) had been considered and taken into account. As with aircraft noise, this was relevant to tightening policy on air quality referable to the life of the scheme as referred to in (2).
(4) The application of carbon policy, that airport applications for capacity growth must demonstrate that their emissions will not impact on the government's ability to meet carbon reduction targets, when considered against the advice of the Committee for Climate Change on emissions from aviation and shipping, and the recent amendment to the Climate Change Act to reflect net zero.

143 Each of the above concerns were material planning considerations in the sense of being factors which carried some weight in the decision-making process (*Kides*). There was no

suggestion to the contrary in the Officer Reports[17]. The weight to be given to those material considerations in considering the application was therefore a matter for the Planning Committee, subject to *Wednesbury* irrationality (*Tesco Stores*).

144 In addition, what has to be borne in mind when assessing the reasonableness of UDC's decision in January 2020 is that it was a decision taken by Councillors sitting on a Planning Committee. Whilst they had received assistance from officers and others in determining the application, they were ultimately exercising a planning judgment on the application. Considered against that proper context, it was entirely reasonable for the Planning Committee to consider that:

(1) Their concerns as to fleet mix would affect the extent of the environmental impacts assessed.
(2) The evidence before them did not demonstrate that the aircraft noise and air quality impacts had been adequately addressed, whether in light of the concerns as to fleet mix or when considering the tightening policy in these areas against the longer term impacts of the proposal.
(3) The carbon emissions arising from the proposal would be incompatible with climate targets and net zero.

145 The above considerations (and others discussed at the January 2020 meeting) amply provide '*some respectable basis*' for the RFRs (*North Norfolk*). The fact that STAL or even the Panel may not agree with the robustness of the points which lay behind the RFRs at that stage, does not make the RFRs themselves or the decision to refuse unreasonable.

146 Given their concerns about fleet mix assumptions based on new generation aircraft – one type of which, in January 2020, had been grounded for many months - it was reasonable for the Planning Committee to consider that the roll forward of the existing noise contour condition would not adequately limit the effects arising from the airport, the noise profile of flights in the short term, nor secure the forecast improvements expected from new generation aircraft in the longer term.

[17] See [CD13.4g] and particularly the Additional Supplementary Pack for the April 2019 meeting in which a correction was made to the April 2019 report, to confirm that the WHO ENG2018 did carry weight (albeit in officers' view negligible) ([CD13.2c], p.3).

147 It was also reasonable for the Planning Committee not to have to address the planning balance expressly in its deliberations or reasons. It is nonsensical to suggest that the planning balance was not something very much in the minds of the Planning Committee in considering the application, both through the detailed scrutiny which had been given to the application over many months, and at the January 2020 meeting, when:

(1) The Officer Report for the January 2020 meeting addressed new material considerations in the context of the overall conclusions of the November 2018 Report, and directed members to whether there were any new material considerations or other changes in circumstances to justify a different conclusion ([CD13.4b], §§32-33).
(2) At the start of the second day of the January 2020 meeting, the Chair read out the resolution of the June 2019 meeting, to the effect that consideration would be given to any new material considerations to which weight may now be given in striking the planning balance.
(3) The Members Discussion also commenced by considering whether there were relevant changes in circumstances which should be sufficient to tip the tilted balance ([CD13.4a], pp.6, 8).

148 There was no requirement mechanistically and expressly to revisit the planning balance in deliberations or the decision, when the proper context for the decision had been established in the Officer Report and was well understood by the Planning Committee through their comments. Nor is there anything in statute, case law, or guidance which requires a Planning Committee to set out in a decision notice how the planning balance has been undertaken. It is enough for the RFRs to be '*limited to the points of difference*' (*Dover*), which members can be taken to have considered against the planning balance, leading to refusal.

149 Here, as in other areas, STAL has not put its case properly or fairly to the relevant witness. Mr. Scanlon unsurprisingly accepted in cross examination that as a planning expert, it is essential to any planning assessment to undertake the planning balance (costs application, §33). But that does not amount to a concession as to what a Planning Committee must expressly do when arriving at its decision on this application, where it has made clear statements which show that the planning balance is the context in which that decision is taken.

(iii) Substantiation of UDC's decision at the time it was taken through expert evidence on appeal

150 Even if, contrary to the above, it was considered that the RFRs had no proper basis at the time of the decision:

(1) It is in the nature of an overturn decision that the RFRs may not be well evidenced at the time the decision is taken, given the decision will be contrary to the position set out in the Officer Report;
(2) Unreasonableness should be considered in the round, having regard to all of the evidence submitted by UDC to defend the RFRs on appeal (*Manchester*);
(3) Both (1) and (2) are reflected in the PPG, which references the failure to produce evidence to substantiate RFRs '*on appeal*' as an example of unreasonable behaviour (ID: 16-049).

151 By reference to the PPG, UDC plainly has produced evidence to substantiate its RFRs on appeal. Each of UDC's expert witnesses reviewed the application and supporting information and gave their professional view that at the time the decision was taken, the RFRs were both reasonable and understandable.

(1) On aircraft noise, Mr. Trow's expert view was that the decision was understandable, and further assessment work should have been undertaken to further articulate and communicate the effects of the ES [UDC/1/2, §8.8; see also §§5.13 and 6.2], and that a set of noise limits aligning with the demands of policy was necessary rather than a continuation of the historic form of restrictions. These shortcomings were clearly set out in Mr. Trow's rebuttal in response to the alleged comprehensiveness of the ES by Mr. Cole, and Mr. Cole's consideration of the WHO ENG2018 and noise effects on schools in his proof [UDC/1/4, responses to §§3.1, 6.8.2, and 8.1.1].
(2) On air quality, Dr. Broomfield's expert view was that the decision was reasonable [UDC/2/2, §113]. There were shortcomings in the air quality assessment in the ES and further information should have been required on certain matters (e.g. levels of nitrogen dioxide in the Bishop's Stortford AQMA) [UDC/2/2, §§57 and 61; UDC/2/4, p.9].
(3) On carbon emissions, Dr. Hinnells's expert view was that the evaluation of the carbon emissions was flawed at the point of decision because it failed to acknowledge, grapple with or address evolving carbon emissions policy, and the RFR was reasonable [UDC/3/1, §§99, 24-29].

152 The shortcomings identified by UDC's experts were all clearly made in the context of the EIA Regulations whether explicitly (e.g. Dr. Broomfield [UDC/2/2, §61]), or implicitly (e.g. Dr. Hinnells' references to '*flaws*' at the point of decision). Importantly, the shortcomings were also identified applying the core principles of extant aviation policy in the APF ([CD14.1], §3, emphasis added, referred to in UDC's Opening at [INQ2], §63):

'*The Aviation Policy Framework .. is underpinned by two core principles:*

- *Collaboration: By working together with industry, regulators, experts, local communities and others at all levels, we believe we will be better able to identify workable solutions to the challenges and share the benefits of aviation in a fairer way than in the past.*

- *Transparency: To facilitate improved collaboration, it is crucial to have clear and independent information and processes in place. Those involved in and affected by aviation need to have a clearer understanding of the facts and the confidence that proportionate action will be taken at the international, national or local level.*'

153 As to the principle of providing transparency for those involved in and affected by aviation, it is notable that STAL did not seek to update its ES after the consultation response and clarifications documentation dated 5 July 2018 [CD11.2]. STAL has sought to hide behind the lack of specific requests from UDC's officers for further environmental information but, quite separately under national aviation policy, the responsibility to provide a clearer understanding of the environmental effects for those affected by aviation falls equally on the airport seeking to expand, especially where policy is evolving. UDC's Statement of Case detailed relevant changes to policy, guidance, and legislation on aircraft noise, air quality, and carbon emissions, all published after the submission of the application in February 2018 [CD24.2, Table 2.2]. Most of these changes occurred in the period after July 2018 and before the determination in January 2020. For example:

(1) The publication of the WHO ENG 2018 in October 2018 and their application was a matter which UDC's Scoping Opinion specifically asked to be addressed [CD12.9, App. A, §27]. Mr. Trow's position was that, although the Guidelines are not without criticism, they should have been formally and properly addressed by STAL before determination of the application, to show that the full effects of the development had been clearly explained and considered [UDC/1/4, §6.8.2][18].

[18] As Mr. Trow openly acknowledged in this same part of his written evidence, the WHO ENG 2018 did not provide a more appropriate basis for conducting noise assessments, but made clear that they should have been used to inform the assessment of aircraft noise on health.

(2) The publication of the national Clean Air Strategy in January 2019 set out how the Government proposed to tackle all sources of air pollution moving forward, containing a clear commitment and direction of travel towards tightening the air quality objective for PM2.5. Dr. Broomfield's position was that a large scale and long term project such as the proposal should take that commitment at a national level into account [UDC/2/2, §32].

(3) The Committee for Climate Change's letter of February 2019 [CD17.44], its Net Zero Report of May 2019 [CD17.26], and its letter of September 2019 [CD17.46], together with the amendment in June 2019 to the Climate Change Act 2008 to reflect net zero, were material considerations which Dr. Hinnells considered should have been addressed by STAL [UDC 3/1, §29[19]].

154 The fact that the above matters were not properly addressed by STAL during the consideration of the application, supports the reasonableness of UDC's decision at the time it was taken. The direction of travel in policy in each of these areas has informed UDC's position even after the ESA was published in October 2020.

155 As to oral evidence at the inquiry on UDC's decision:

(1) None of UDC's witnesses were challenged in cross-examination on their opinions as to the reasonableness of UDC's decision, which had been stated in writing and confirmed orally. Rather, STAL spent a limited amount of time in cross-examination asking UDC's witnesses to confirm facts around the history of the application, without ever putting its case on unreasonableness, fairly and squarely, to any UDC witness. It was not sufficient to dance around the edges of these issues, if they were to become the subject of a costs application.

(2) In any event, with respect to air quality matters, Dr. Broomfield confirmed in Re-examination that, notwithstanding the limited ambit of the questions put to him in cross-examination, as to the way in which air quality was addressed by the Planning Committee, none of those points altered his view that UDC's decision was a reasonable one.

(3) On carbon emissions, the foundation of STAL's case was and is that carbon emissions are a matter for international and national governments, not for local planning authorities in local planning decisions. Yet STAL's carbon policy witness, Mr. Robinson, accepted in cross examination that carbon emissions can be a matter to be taken into account in local

[19] This was in a section of Dr. Hinnells' proof entitled '*Evolution of policy after the application was submitted but before final determination, which was not addressed by STAL.*'

planning decision making (UDC's Closing, §84)[20]. UDC's RFR on carbon emissions is readily substantiated (by reference to the January 2020 decision and since publication of the ESA) when this concession is taken together with the following pieces of evidence (UDC's Closing, §§106-108):

- Dr. Hinnells' judgment, that the carbon emissions arising from the proposal would be significant, and almost certainly adversely impact on the UK's ability to meet its 2050 net zero target to a degree which cannot be overlooked.
- The acceptance by Mr. Vergoulas, STAL's carbon technical witness, in cross examination that there was nothing technically or methodologically unsound in Dr. Hinnell's approach, and that the difference between himself and Dr. Hinnells was one of professional judgment.

(iv) UDC's position after publication of the ESA on 16 October 2020

156 It was STAL's decision to "update" its ES after UDC's decision in January 2020, and to publish the ESA on 16 October 2020.

157 The ESA effectively constituted a new ES in all but name. It was on any view a substantial document, comprising 18 Chapters of main text (over 400 pages), plus numerous Appendices and a Non-Technical Summary in a total of 4 volumes [CD7.1-7.18, 8.1-8.9, 9.1-9.4, 10.1]. More pertinently, there were significant changes to the content:

(1) The ESA was based on a wholly new set of aviation forecasts, with a baseline moved forward by 3 years (2016-2019). Those forecasts incorporated delays to the Boeing 737 Max program into fleet mix assumptions [STAL/2/2, §4.12], and sought to account for the unprecedented effects of the COVID-19 pandemic, which were still evolving at the time [STAL/2/2, §4.3].

(2) The result of those forecasts was to push back the forecasts in the 2018 ES by a further 4 years, with current capacity expected to be reached in 2027 (originally 2023), and the proposed 43mppa expected to be reached 12 years after publication of the ESA, in 2032 (originally 2028).

[20] The interpretation and application of MBU policy as allowing consideration of carbon emissions in local decisions places it within the third category of consideration material to a decision (*R (Friends of the Earth Ltd. et al.) v Heathrow Airport Ltd.* [2020] UKSC 52, at para. 116, per Lord Hodge and Lord Sales [CD14.74], as referred to by Dr. Hinnells in cross-examination.

158 At the same time, given its publication a month after UDC's Statement of Case, STAL took the opportunity within the ESA to respond to matters raised in UDC's Statement of Case [CD10.1, p.2, last para.].

159 The environmental effects estimated to result from the forecasts, and the assessments undertaken in the ESA, were considered in detail in UDC's written and oral evidence and shall not be repeated here. However, it can be noted that:

(1) the noise exposure forecasts in the ESA presented more favourable outcomes than in the ES on key metrics, principally at night whereby the effects of the development have changed from being adverse to beneficial [UDC/1/2, §§6.15, 6.25];
(2) the NOx emissions presented across the 2019-2032 period in the ESA were notably different from those across the 2016 – 2028 period in the ES, due to reductions from road traffic over the longer period in the ESA, and changes to fleet mix assumptions ([CD3.10], Fig. 10.6, §§10.116-7 vs [CD7.10], Fig. 10.2, §§10.7.5-10.7.8]). The NOx emissions for the DC year reduced from 88t/yr in the ES to 48t/yr in the ESA.
(3) the 4 year push back in the forecasts also resulted in a lower amount of carbon emissions estimated for the DC year in the ESA (2032) when compared to the ES (2028) ([CD3.12], Fig.12.6 vs [CD7.12], Fig. 12-3).

160 At the same time, each of UDC's expert witnesses have explained how, given the clear direction of both extant and emerging policy applicable to airport expansion, and the relatively long (6yr) period before the additional passenger numbers are expected to be needed, and the proposed capacity is to be reached (11yrs), there is a need for the environmental impacts of the proposal to be controlled and mitigated in both the short and longer term through a dynamic phased release condition.

161 Finally, having regard to extant and emerging air quality and carbon emissions policy, Dr. Broomfield and Dr. Hinnells have explained that the emissions of key pollutants and carbon emissions are indeed significant (UDC's Closing §§67, 75, 78, 106-109).

162 Against that background, it is a gross oversimplification by STAL to suggest that, because the headline outcomes presented in STAL's ESA are not significantly different from those in the

ES, UDC's decision and UDC's position on appeal is unreasonable (costs application §41). That belies the significant differences in content (including amendments to assessment methodology and scope)[21], the changed aviation forecast periods, and resulting changed environmental forecasts presented, all of which falls to be assessed against extant and emerging policy, policy which STAL has failed properly to address in material respects in arriving at its ESA conclusions.

163 In those circumstances, it is a complete mischaracterisation of UDC's case to suggest that it has '*abandoned*' any attempt to defend its RFRs on appeal, or that UDC's position represents a '*volte face*', as suggested in the costs application (§§3, 7). Having received the ESA, UDC's expert team has evaluated the changed picture it presents, and considered that against:

(1) the inherent uncertainties of aviation forecasting exacerbated at an airport specific level and compounded by the effects of the COVID-19 pandemic;
(2) the significantly longer periods now involved before the existing and proposed capacities are forecast to be reached; and
(3) the direction of travel in applicable extant and emerging policy on noise, air quality, and carbon emissions.

164 It is those factors which have led UDC to formulate a '*workable solution*' (APF, [CD14.1], §3) to the challenges faced by this appeal and the issues which UDC has addressed in its evidence, in the form of Condition 15. It is by that mechanism that UDC has sought to bridge the gap between STAL's and UDC's position, which it sought to do as early as 4 December 2020, having received the ESA just over 6 weeks previously, on 16 October 2020.

165 UDC has been perfectly clear in its evidence and submissions that, unless appropriate and necessary mitigation or limits cannot be secured, the appeal should be refused (UDC's Opening §64, UDC's Closing §159). Mr. Scanlon's planning evidence on behalf of UDC is that the grant of permission is dependent on securing the environmental mitigation through

[21] For example, on air quality, the ESA does include new material on issues which were not addressed in the ES, including an assessment of concentrations in zones around the M11 and A120 as required in UDC policy ENV13, a sensitivity test on aircraft departure thrust settings, and update to emissions data for LEAP engines, a sensitivity test on airport vehicle speeds, an assessment against WHO air quality guidelines for PM2.5, discussion of ammonia emissions from aircraft and road traffic, further information on Thorley Flood Plain and Little Hallingbury Marshes SSSIs, and further information on the potential impacts ay Elsenham Woods SSSI [UDC/2/3, §§ 123-139].

Condition 15 or equivalent conditions (UDC's Closing §§116-117). STAL persists in misreading his evidence in its costs application (§37), and falls into the trap of failing to read his evidence as a whole, supplemented (if it were necessary) by his oral evidence (UDC's Closing, §§116-117).

166 Nor is it remotely credible for STAL to suggest that UDC could have sought further information or imposed conditions to resolve their concerns in January 2020 (costs application, §29). That conflates the issues which lay behind the RFRs, and the position now, following publication of the ESA and assessment of its effects in the light of the factors set out above (§§157-164 above). At the time of the January 2020 decision, the ES had not been updated to reflect a series of material considerations. There were issues which had not been properly addressed (§151 above). Further, it was not unreasonable for the Planning Committee to conclude that, following the detailed scrutiny which the application had been given over several months, their matters of concern could not at that time be addressed by conditions, and therefore to conclude that the application should be refused. From February 2020, STAL was stating to UDC's officers that it was considering a range of responses to UDC's refusal of the application, including a resubmission of the application or an application for an NSIP **[3-4]**. From March 2020, STAL was referring to a revised ES if an appeal were to be made **[4]**, which it then did not publish until October 2020. It was reasonable for UDC to await publication of the ESA to consider its position, given the need for an updating of the environmental effects.

167 In any event, even if, contrary to the above, it was considered that UDC should have sought to formulate conditions to meet its concerns, STAL would not have accepted them. Following the scrutiny of an inquiry appeal process, it is perfectly plain that STAL is implacably opposed to any form of phased release condition, whether in the form of Condition 15[22] or otherwise. Moreover, UDC's alternative Conditions (7, 10A) are not accepted by STAL. The air quality condition (10B) which STAL did not offer until 2 March 2021[23], does not provide an effective means of limiting the air quality effects of the development, as explained in UDC's Position Statement [CD26.29]. Finally, STAL offers no condition at all to control its carbon emissions to this inquiry (UDC's Closing, §§156-158).

[22] On Condition 15, STAL asserts as much at §82 of its costs application.
[23] Just 3 days before the second and final Planning Conditions and Obligation session, and fully 3 months after UDC had provided its draft Condition 15 to STAL.

168 The fact that UDC had the power to impose the conditions it saw fit provides no answer on this point (costs application, §77). Given its stance on the conditions discussed at this inquiry, if UDC had imposed conditions adequate to achieve the mitigation required for this application back in January 2020, STAL would inevitably have appealed against those conditions, resulting in an appeal process such as that which has taken place (s.78(1)(a) TCPA 1990).

169 Taken as a whole, it cannot sensibly be contended that UDC has failed to produce evidence substantiating its RFRs on appeal. Evidence has been produced by appropriately qualified, experienced experts which has defended the RFRs and advocated a workable solution for this appeal following publication of the ESA.

(v) Residual points under Grounds 1 - 3

170 The submissions above respond to the substance of Grounds 1 - 3 and provide a complete response to those Grounds. However, for the sake of completeness, certain residual points can briefly be dealt with.

171 As to RFR1 on noise (costs application, §§48-57):

- It is a misreading of UDC's case to suggest that it no longer puts forward a case that permission should be refused on noise grounds. If appropriate and necessary mitigation and limits in the form of Condition 15 or alternatively Condition 7 (in the form sought by UDC) cannot be secured, permission should be refused on noise grounds[24].
- Mr. Trow's evidence was that the RFR on noise, based on the ES, was understandable and he neither departed from, nor was challenged on this expert view.
- It was a shortcoming of the ES that it did not properly explain and communicate the effects of the WHO ENG 2018, even if the ultimate acceptability of the proposal was not to be assessed against them. The fact that they were not properly explained, combined with the uncertainty around the fleet mix assumptions, supported the reasonableness of the decision. This matter was then addressed by STAL within the ESA and Mr. Cole's written evidence.

[24] The SCG on aircraft noise, agreed by Mr. Cole, confirms as much. The development is acceptable, '*subject to mitigation and appropriate conditions*' ([CD25.3], emphasis added).

- Quite separately from the WHO ENG 2018, Mr. Trow's evidence points to additional assessment work which in his professional view should have been undertaken as part of the ESA to fully articulate and communicate the effects of the development having regard to policy, particularly as part of the night-time and schools assessments, as carried out at other UK airports.
- The principle of the noise contour would have provided a safeguard, but as at January 2020 the daytime contour was not set at a policy compliant level, and no night-time contour was included. As such, at January 2020, the control on daytime noise was not set at a value aligned to the effects of aircraft noise in evidence or in policy.
- As recently as 5 January 2021 in his rebuttal, Mr. Cole remained wedded to the 57dB metric for the daytime contour (UDC's Closing §22). There is no evidence that STAL ever offered or stated it would be content with the 54dB contour (UDC's Closing §23). It is the scrutiny of the inquiry process which has resulted in that change in position.
- STAL maintains it opposition to a night time noise contour. It also objects to the inclusion of Thaxted Primary School in the enhanced insulation scheme. Both are necessary parts of the noise mitigation which UDC seeks.

172 As to RFR2 on air quality (costs application, §§58-67):

- As with RFR1, the acceptability of the proposal in air quality terms is only ensured by the imposition of Condition 15 or alternatively Condition 10A. If appropriate and necessary mitigation in the form of Condition 15 or alternatively Condition 10A cannot be secured, permission should be refused on air quality grounds.
- Dr. Broomfield's evidence was that the RFR on air quality was reasonable and he neither departed from, nor was challenged on this expert view.
- Reading the Minutes fairly, and with the caution required, the RFR was animated by concerns as to air quality impacts over the life of the scheme. The fact that the discussions covered health impacts is reasonable, unsurprising, and does not detract from the cause of the concern which has been addressed by expert evidence. The RFR is not limited to health impacts.
- Dr. Broomfield's evidence on appeal substantiates that RFR. When considering the responsibility on airports to improve air quality as expressed in national policy, and the tightening standards on PM2.5 in particular, the emissions of key pollutants caused by the proposal need to be controlled and mitigated.

- Dr. Broomfield's evidence on appeal is that there is a potentially significant impact from NOx emissions related to the Bishop's Stortford AQMA.
- Whilst it was agreed that there is no recognised way of assessing UFPs, that does not mean they should not be addressed, given the increasing focus on UFPs in advice to central government and emerging aviation policy (UDC's Closing §§71-75). Dr. Broomfield's evidence is that Condition 15 (or Condition 10A) allows for UFPs to be mitigated through control of PM2.5. In the absence of any consideration of UFPs in the ES and supporting documentation, it was both reasonable and necessary for this issue to form part of the refusal and appeal, so that appropriate controls could be considered and imposed to protect public health and the local environment.
- The alleged vagueness of RFRs is to be assessed in the round. There is nothing vague about this RFR as expanded upon the UDC's Statement of Case and addressed by Dr. Broomfield in his evidence.

173 As to RFR3 on carbon emissions (costs application §§68-70):

- The costs application seeks to summarise points from STAL's Closing. UDC's Closing on carbon emissions provides the complete response to those points (UDC's Closing §§79-113[25]). If appropriate and necessary mitigation in the form of Condition 15 or alternatively Condition 10A cannot be secured, permission should be refused on carbon grounds.
- The test for this costs application is whether UDC's position on carbon emissions is unreasonable. It plainly is not.
- Mr. Robinson's acceptance in cross-examination that carbon emissions are a matter which can be taken into account in local decision making is not only at odds with STAL's case, but fundamentally supports the reasonableness of UDC taking carbon emissions into account under RFR3. That also brought his evidence on this point into line with Dr. Hinnells' evidence in cross examination, that carbon emissions could be considered in local decision making[26].
- Dr. Hinnells has provided expert evidence on appeal that UDC's RFR was reasonable and that the carbon emissions arising from the proposal will be significant.

[25] In particular, noting the full reasoning behind Dr. Hinnells' view that the carbon emissions arising from the proposal would be significant §§106-107, which STAL continue to misinterpret in their costs application at §68(iii).

[26] They fall within the third category of material consideration referred to in the *Heathrow* case (*R (Friends of the Earth Ltd. et al. v Heathrow Airport Ltd.* [2020] UKSC 52, per Lord Hodge and Lord Sales, at §116, [CD14.74].

- Mr. Vergoulas' acceptance in cross examination that there was nothing technically or methodologically unsound in Dr. Hinnell's approach, and that the difference between himself and Dr. Hinnells was one of professional judgment, further underlines the reasonableness of UDC's position at appeal.
- The alleged vagueness / inaccuracy of parts of a RFR are to be assessed in the round. Dr. Hinnells' evidence was not cast in terms of generally accepted perceptions and understandings of climate change, nor did he argue that it would be inappropriate to approve the application at this time (both as referred to in the RFR). There was nothing vague or inaccurate about his evidence, which was foreshadowed in UDC's Statement of Case.
- The amendment to the Climate Change Act 2008 in June 2019 to reflect net zero, combined with recent statements of the Committee for Climate Change provided a proper basis for this RFR. It is disingenuous of STAL to claim that they have not understood its basis. There has been a clear focus to the evidence on carbon emissions given at this inquiry over the course of 1 week. Further or alternatively, NPPF paras. 7, 8, and 148 provided a proper and reasonable policy basis for the RFR, as referred to in Dr. Hinnells' proof on appeal [UDC/3/1, §101].

174 As to RFR4 on necessary infrastructure or mitigation (costs application §§71-74):

- It is not uncommon for a decision notice to include a RFR which articulates that there has been a failure to provide adequate and necessary mitigation arising from the issues raised in the other RFRs. There is nothing inherently unreasonable in a local planning authority taking that approach, particularly when considering a major application such as this.
- The RFR refers to a failure to provide necessary infrastructure and necessary mitigation, a point which STAL appears to miss.
- Arising from its evaluation of the ESA on appeal, UDC has sought necessary mitigation in the form of conditions. It has also sought further mitigation within the s.106 Agreement in relation to the enhanced sound insulation scheme.
- UDC has also scrutinised and highlighted the limitations of the air quality mitigation within the s.106 Agreement (UDC's Closing §§61-63). Ultimately, UDC's approach through Condition 15 is the means by which it seeks to address those limitations.
- The RFR was not vague or inaccurate in recognising that the concerns raised through RFR1-3 needed to be considered through mitigation.

175 As explained above (§105), whilst each RFR both was and is reasonable when considered against the evidence as a whole, even if only one RFR were considered to be reasonable, that would have been sufficient to cause an appeal, with the result that all of the other issues considered on this appeal would have had to be considered with expert evidence. It follows that if only one of UDC's RFRs is considered to be reasonable, no costs award should made.

176 The costs application makes a wholly unfounded assertion that only certain of UDC's witnesses supported Condition 15 '*with any real enthusiasm*' (costs application, §76). There is simply no basis for this assertion, and it certainly was not something put to those, or any of UDC's witnesses in cross-examination.

(6) Response to Ground 4: unreasonableness of Condition 15 as unlawful and / or contrary to the policy tests

177 The PPG provides the following as an example of unreasonable behaviour (ID: 16-049):

- '*imposing a condition that is not necessary, relevant to planning and to the development to be permitted, 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.*'

178 The example cited is clearly directed at the imposition of a condition by a local planning authority, not one proposed at an appeal. That is because the seeking of conditions on appeal can be fully considered through the appeal process in the normal way.

179 The reasonableness of UDC's approach on Condition 15 is borne out by UDC's disclosure of it to STAL on 4 December – over 5 weeks before the inquiry was due to commence - and its offer to explain and discuss further any points of concern **[27]**.

180 The unreasonableness of STAL's approach on Condition 15 is its complete failure to engage with UDC on its substance or detail, until after the evidence sessions to which it related had been completed. None of STAL's witnesses provided credible answers in cross-examination as to why they had not sought to discuss Condition 15 with UDC's experts[27]. Resistance to, or

[27] Dr. Bull specifically accepted in cross-examination that, with hindsight, it would have been better to have engaged with Dr. Broomfield on Condition 15.

lack of co-operation with another party in discussing an appeal is also cited as an example of unreasonable behaviour in the PPG (ID: 16-052).

181 The legality and policy compliance of Condition 15 has been well traversed in the evidence and written submissions provided by UDC, and will not be repeated here (UDC's Closing §§121-155). At its heart, it is a scheme based, phased release condition, which does not revisit the principle of permission. The concepts which lie behind the condition are not alien to planning.

182 The question for the costs application does not turn on whether the Panel agrees that Condition 15 should be imposed[28]. It turns on whether UDC's approach in proposing it is reasonable. When asked about it in cross-examination, none of STAL's witnesses could articulate clear reasons why Condition 15 was objectionable in principle. In reality, the key focus of Mr. Andrew's concerns were to do with the practicalities of compliance and legal points (which have been dealt with in legal submissions). None of this demonstrates that the Condition is an unreasonable one for UDC to seek as a means of providing a workable solution to the challenges in this appeal.

(7) Response to Ground 5: acting contrary to, or not following, well-established case law

183 As with the other Grounds, this one is devoid of any substance or merit. Both the legal principles applicable to conditions, and the terms of the alternate decision making procedure and their consistency with the statutory appeals mechanism within the TCPA 1990, have been comprehensively addressed in UDC's submissions under Condition 15 ([CD26.6]; [CD26.17a]). Condition 15 is consistent with the authorities and law on conditions.

[28] Yet again, STAL' propensity to mischaracterise what was said at the inquiry is revealed under this Ground (§81). On the opening day of the inquiry, Inspector Boniface mentioned Condition 15, stating that the Panel had '*some reservations*' about its approach, which he was flagging at the outset, so that UDC could set out and justify how it would meet the test for conditions, and also so that UDC could address the situation where that condition was not found to be appropriate. It is wrong to characterise those comments as noting '*serious reservations*' with the Condition.

184 The principle from *Bushell*, on which STAL seeks to rely, is that the merits of Government policy are not a matter which can be subject to investigation when determining individual planning applications.

185 Two points should be noted in relation to the *Bushell* case:

186 First, as a matter of law, the "principle" sought to be relied upon by STAL was actually a comment (obiter dicta) made by Lord Diplock on a point which was conceded by the respondent to that appeal (p.98B-C). The appeal actually concerned a challenge to the decision of the Inspector to disallow cross-examination of the relevant department's witnesses at the public inquiry into 2 draft schemes for the construction of motorways. The "principle" only has binding legal force to that more limited extent.

187 Secondly, the statement of the minister's reasons for proposing the draft scheme stated, in terms, that the government's policy to build the new motorways '*will not be open to debate at the forthcoming inquiries*' (p.98A). The policy and supporting statement on which the House commented in *Bushell* was not analogous to the policy in MBU and how it has been explained by the DfT here:

(1) MBU gives qualified support for all airports wishing to make best use of their runways, subject to environmental issues being addressed, a point which UDC has always accepted ([UCD/4/1], §9.47). But it is not an airport specific policy in the way that the policy to build specific motorways was in *Bushell*.
(2) On carbon emissions, Sarah Bishop's evidence to the High Court in relation to MBU states that there is '*no requirement*' for local authorities to assess proposals under MBU against wider national carbon emission ambitions ([CD17.65], §61). That is a qualified statement which does not say such matters are not open for debate, as was stated in terms in the department's statement considered in *Bushell*.

188 For the above reasons, it is questionable whether there is any principle from *Bushell* which falls to be applied here.

189 In any event, UDC's position, that the weight to be given to MBU in the planning balance is discounted because of the direction of travel in carbon policy (UDC's Closing §118(4)), and

that carbon emissions can be taken into account in local decision making, does not fall foul of any such principle. It is a function of the proper interpretation of the policy in MBU and its application to this proposal[29].

190 Moreover, the fact that Mr. Robinson conceded in cross examination that carbon emissions are a matter which a local planning authority can take into account under MBU (UDC's Closing §84) cannot be saved by STAL's attempts refer to *Bushell* here.

(8) Conclusion

191 For all of the above reasons, the Panel is respectfully invited to dismiss the application for costs (whether for a full or partial award). STAL's costs application is devoid of any substance or merit, and there is nothing to justify a departure from the normal rule for appeals, that each party bears their own costs.

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9 April 2021

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[29] See UDC's Closing at §§84-93, including reference to the *Drax Power* decision at Footnote 4. Also reference by Dr. Hinnells in cross-examination to carbon emissions coming within the third category of material consideration in decision making by reference to the Heathrow case (*R (Client Earth Ltd. et al. v Heathrow Airport Ltd.* [2020] UKSC 52, per Lord Hodge and Lord Sales, at §116 [CD14.74]).