EVERSHEDS SUTHERLAND

UTTLESFORD DISTRICT COUNCIL

ADVICE IN AUDIT AND ASSESSMENT OF THE DECISION MAKING PROCESS AND PROCEDURE FOLLOWED BY THE LOCAL PLANNING AUTHORITY

RELATING TO THE EXPANSION AND DEVELOPMENT OF STANSTED AIRPORT

1. Executive Summary

1.1 Eversheds Sutherland (International) LLP ("ES") were instructed by Uttlesford District Council ("UDC") to undertake an audit and assessment of the decision making process and procedure relating to the airport expansion scheme proposed by Stansted Airport Limited.

1.2 That assessment was undertaken in reliance upon the material reported to the relevant UDC meetings, external legal advice, the evidence presented at Inquiry and the associated appeal and High Court determinations. In turn, ES have not relied upon any verbal evidence, exchanges of correspondence, informal meeting notes or any other uncorroborated material.

1.3 UDC's approach to the consideration of the Proposal from submission of the application to the Order of the High Court Judge was flawed. This was a product of overall system failure, rather than at the fault of any individual Councillor or Officer.

1.4 Our review highlights that there were obvious, apparent and pronounced risks to UDC that should have been clearly communicated and understood by all involved and that should have been subject to automatic and ongoing procedures of monitoring and review.

1.5 The need for such a review mechanism was twofold. Firstly, Councillors unanimous refusal of the Proposal without clear evidential justification. Secondly, Officers in formulation of the appeal case transitioned from the reasons for refusal to conditional support subject to the provision of an appropriate mitigation package.

1.6 There was a clear error of judgment by both Councillors and Officers in failing to secure an automatic review procedure, following the decision of the Extraordinary Committee Meeting in January 2020 to refuse the Proposal against Officer advice.

1.7 Notwithstanding the overarching need for both Councillors and Officers to be aware of UDC's Constitution, common sense should have dictated that the profile of the case and the potential reputational and costs consequences of an adverse appeal decision were sufficient to have required an informed and effective review mechanism to assess and minimise all risks.

1.8 Whilst such a review mechanism may not have altered the ultimate route that was taken, the apparent weaknesses in communication would have been resolved and an opportunity would have been provided to consider and debate the transitioning appeal case, as it evolved in advance of the Inquiry.

1.9 That oversight would have ensured that there would have been absolute clarity between Councillors and Officers in the professional teams transition at Inquiry from the terms of the RoR to the presented case, which was in essence, of conditional approval of the Proposal. The attendant risks of a costs award and reputational damage could also have been made clear.

1.10 There was, in addition, a clear and apparent weakness to UDC's central approach at the Inquiry in respect of the proposed use of 'Condition 15' as a mechanism to effectively mitigate and safeguard the appeal proposal. In our view, that condition was succinctly described by the panel of Inspectors as *"unnecessarily onerous and misconceived condition that patently fails to meet the relevant tests"*. Such an interpretation should have been readily apparent to the UDC team and its legal advisors.

1.11 The details of our recommendations are included at section 14 of this report, and include the mechanism to provide an automatic referral for an Extraordinary Meeting in specified circumstances and formalise an auditing process by the Monitoring Officer or Chief Finance Officer. Finally, the provision of training and support to both Officers and Councillors should not be overlooked and provides the fundamental foundation to allow for the robust consideration of increasingly complex planning matters.

2. Introduction

2.1 ES have been instructed by UDC to undertake an audit and assessment of the decision making process and procedure followed by the local planning authority in connection with the airport expansion scheme proposed by Stansted Airport Limited ("SAL").

2.2 UDC have, in particular, asked ES to identify any procedural error in the process and procedure followed in determination of the planning application, the conduct of the appeal proceedings and the subsequent High Court challenge as relates to the Proposal (as defined below). UDC are further concerned to determine if there are any improvements that might be made to the established decision making process to avoid the risk of substantial further costs awards against the local planning authority in the future.

2.3 It is important to note this assessment was been undertaken in exclusively reliance upon the material reported to the relevant UDC meetings, external legal advice, the evidence presented at Inquiry and the associated appeal and High Court determinations. ES have deliberately avoided placing any reliance upon any verbal evidence, exchanges of correspondence, informal meeting notes or any other uncorroborated material.

2.4 This approach has been taken to limit the scope of the assessment to verified evidence, to avoid the significant expansion of the process into a review of many years of handwritten notes, e-mail exchanges etc. and because all material decisions made in respect of the Proposal will, or should, have been conducted within the terms of UDC's Constitution.

3. Background

3.1 The planning application made by SAL was submitted on 22nd February 2018 and related to the proposed:

"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 not 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" ("the Proposal")

3.2 The Proposal was first reported to Planning Committee with an Officer recommendation for approval (subject to conditions and a S106 Agreement) on 14th November 2018. The

Planning Committee followed that recommendation and approved the Proposal subject to the identified conditions and the completion of the S.106 Agreement. This approach was then endorsed by the Secretary of State ("SoS") who confirmed on 20th March 2019 that he would not exercise his discretion to call in the planning application on the grounds that the Proposal did not *"involve issues of more than local importance justifying the Secretary of State's intervention"*.

3.3 There was then a motion put to Full Council on 25th April 2019 seeking the instruction of the Chief Executive and relevant officers not to issue a Decision Notice until the related S106 Agreement between UDC and SAL had been entered into and the conditions have been scrutinised, reviewed and approved by the Council's Planning Committee after the local elections. That motion was defeated and Councillor Lodge then presented a requisition for an Extraordinary General Meeting ("ECM") to the Chairman.

3.4 A further motion (as amended) was put to an ECM on 28th June 2019 seeking the instruction that the Chief Executive and relevant officers should not issue the Decision Notice unless and until the UDC's Planning Committee had sufficient opportunity to consider in detail:

3.4.1 the adequacy of the proposed S106 Agreement between UDC and SAL, having regard to the Heads of Terms contained in the resolution approved by UDC's Planning Committee on 14th November 2018; and

3.4.2 any new material considerations and/or changes in circumstances since 14th November 2018 to which weight may now be given in striking the planning balance or which would reasonably justify attaching a different weight to relevant factors previously considered;

and thereafter requesting that the Planning Committee determine the authorisation of the issue of a Decision Notice.

3.5 That motion was endorsed by the ECM and a Planning Committee meeting was reconvened on 24th January 2020. The Planning Committee, on this occasion, resolved to refuse planning permission for the Proposal by reference to the "material change in circumstances since the consideration of the application" on 14th November 2018. The Decision Notice was issued on 29th January 2020 and identified the following Reasons for Refusal ("RoR"):

1) *"The applicant has failed to demonstrate that the additional flights would not result in an increased detrimental effect from aircraft noise, contrary to Uttlesford Local Plan Policy ENV11 and the NPPF.*

2) *The application has failed to demonstrate that the additional flights would not result in a detrimental effect on air quality, specifically but not exclusively PM2.5 and ultrafine particulates contrary to Uttlesford Local Plan Policy ENV13 and paragraph 181 of the NPPF.*

3) *The additional emissions from increased international flights are incompatible with the Committee on Climate Change's recommendation that emissions from all UK departing flights should be at or below 2005 levels in 2050. This is against the backdrop of the amendment to the Climate Change Act 2008 (2050 Target Amendment) to reduce the net UK carbon account for the year 2050 to net zero from the 1990 baseline. This is therefore contrary to the general accepted perceptions and understandings of the importance of climate change and the time within which it must be addressed. Therefore, it would be inappropriate to approve the application at a time whereby the Government has been unable to resolve its policy on international aviation climate emissions.*

4) *The application fails to provide the necessary infrastructure to support the application, or the necessary mitigation to address the detrimental impact of the proposal contrary to Uttlesford Local Plan Policies GEN6, GEN1, GEN7, ENV7, ENV11 and ENV13."*

3.6 SAL submitted a planning appeal against UDC's decision to refuse planning permission on 24th July 2020. UDC then instructed Philip Coppel QC and Asitha Ranatunga of Cornerstone Chambers to advise on the local authority's case at appeal and, in turn, expert witnesses were then instructed to advise and give evidence on matters referenced in the RoR including aviation movements, noise impacts, air quality, carbon emissions and the planning balance.

3.7 The Planning Inquiry programme was confirmed by the Planning Inspectorate ("PINS") on 12th August 2020 and Stop Stansted Expansion (SSE) were accorded the status of a Rule 6 party to the appeal shortly thereafter. UDC then submitted its Statement of Case to PINS on 16th September 2020 and, in turn, a general Statement of Common Ground was agreed between UDC and SAL on 28th October 2020.

3.8 The Inquiry opened on 12th January 2021 and was conducted over 30 days of hearing sessions (with adjournments) until it closed on 12th March 2021. SAL made a costs claim at the close of the Inquiry and UDC's response was submitted on 9th April 2021.

3.9 There was then an announcement by the Government in respect of commitments in relation to the reduction of carbon emissions. The Inspectors at the Inquiry invited further submissions in response to this policy announcement on 23rd April 2021 and further submissions were made by UDC, SAL and SSE by 7th May 2021.

3.10 The appeal decision allowing the Proposal and granting a full costs award against UDC was issued by PINS on 26th May 2021. UDC lodged a claim for a Planning Statutory Review pursuant to S.288 of the Town and Country Planning Act 1990 on 7th July 2021. The claim citing three grounds of challenge.

3.11 The application for permission to apply for Planning Statutory Review was assessed on the papers by the Honourable Mrs Justice Lang DBE and the Order of the High Court was then issued on 1st October 2021. The application grounds were all rejected as being "unarguable" and the application for permission was refused.

3.12 Following the decision of the Full Council meeting on 5th October 2021, UDC made no further applications to the Appeal Courts to renew the claim for a Planning Statutory Review. Notably, there was also no further action taken by SSE.

4. **Approach**

4.1 It is clear in review of the available background papers that UDC's case in assessment and determination of the Proposal evolved and substantially changed between the submission of the planning application by SAL on 22nd February 2018 and the claim presented to the High Court on 7th July 2021.

4.2 This is reflected in our instructions that are concerned to identify:

4.2.1 "what actually happened" from the start of pre application discussions in 2017 to the recommendation to approve the Planning Application, to its refusal through to appeal and PIN's decision, up to the Full Council decision not to pursue and challenge the dismissal on the papers of the s288 application under the Town and Country Planning Act 1990;

4.2.2 whether all steps and actions accord with the Councils Constitution;

4.2.3 whether all steps and actions accord with best practice (planning and governance); and

4.2.4 the lessons to be learnt and what recommendations should be made in relation to future applications and decisions.

4.3 It is, in this context, important to understand each step that was taken by the Council in assessment of the Proposal. In response, the approach adopted in this report is to focus on the issues that were identified in the RoR:

4.3.1 from the first determination which recommended approval;

4.3.2 the second determination that led to the identified RoR;

4.3.3 how the RoR evolved through the appeal process;

4.3.4 the processes and procedures followed in response to the changing RoR case; and

4.3.5 the approach taken in assessment by the Appeal Inspector and, where relevant, the High Court judge.

4.4 ES have taken this approach to ensure that the assessment of the key concerns identified at the ECM meeting in January 2020 are examined chronologically and in detail. In turn, the clear intention is to avoid the potential distraction that would be caused in consideration of the array of issues that were identified by local residents and other objectors over the course of the 2-3 years determination period.

4.5 This report will then seek to identify any procedural errors and, if there was any clear failures or deficiencies in the decision making process, whether this was due to an error of process, procedure and/or judgement. In each scenario, the report will then seek to identify any steps that might be taken to minimise the risk of any future reputational damage and substantial costs awards against the Council.

5. First determination

5.1 As detailed above, the Proposal was first reported to Planning Committee on 14th November 2018. The Committee Report provided a substantial and detailed assessment of the Proposal in review of 14 separate topic areas, that included an assessment of noise, air quality, climate change and overall policy compliance. The recommendations made by Officers in respect of these 4 issues were framed in the following terms:

5.2 Noise

5.2.1 The report uses as a point of reference the Do Minimum (DM) and Development Case (DC) scenarios, in assessment of the 'air noise' produced by aircraft on departure from the start of the departure roll along the runway and, on arrival, ceasing at the point of departure onto a taxiway. In the DC scenario there would be 72 additional movements during the day (712 between 07:00 and 23:00) compared to the DM scenario (640 between 07:00 and 23:00). The night time overflights analysis indicates that there would be little difference between the DM and DC scenarios. The analysis also indicates that at the majority of schools the internal LAmax was acceptable (not expected exceeding 60 dB LAmax) with open windows, due to the noise benefits associated with new generation, quieter aircraft.

5.2.2 The report confirms that the findings of the Environmental Statement (ES) were generally accepted by the Council's Environmental Health Manager (EHM) and the consultants BAP, together with the proposed programme of mitigation measures. In conclusion the report advised Members that:

"The ES is comprehensive and UDC's consultants advise that they have no doubts over its integrity. The ES demonstrates that the proposed noise impacts should not be materially different between the DM and DC scenarios."

5.2.3 The reports assessment of 'ground noise' references the applicant's ES conclusion in respect of operational noise that there should be no adverse effects, with only minor adverse effects arising at Molehill Green due to a daytime increase of 1dB between the DM and DC scenario and an exceedance of the threshold of only 0.1dB. The EHM further concluded that a comparison of data sets shows negligible impact and that the level change when compared to the DM scenario was equally negligible.

5.2.4 In terms of night time noise, the comparison of the ground noise contours with and without the development in place, showed they were virtually indistinguishable throughout the surrounding community, except where benefits would arise at the northside apron where ground noise levels were expected to reduce.

5.2.5 The assessment of 'construction noise' and 'surface access noise' were also referenced in the Report and the report briefly concluded that this aspect of the development would be of *"negligible significance"*.

5.3 Air quality

5.3.1 The assessment of the air quality impacts of the Proposal are rigorously considered in the report. It was, in this context, generally accepted by UDC's consultants that there should be no predicted increase in pollutant levels at modelled receptors in Stansted Mountfitchet. However, the Proposal would increase pollutant emissions as a result of additional vehicle movements within the Bishop's Stortford Air Quality Management Area. These health effects were considered against the benefits of the scheme and an appropriate balance of mitigation were sought through the S.106 Agreement.

5.3.2 The report also references the assessment of nitrogen deposition rates and the available information on sensitive habitats within designated sites. In turn the report advises that UDC's consultant confirms they had no concerns with regards to the identified ecological receptors. Notably, this position appears to have also been reservedly endorsed by Natural England.

5.4 Climate change

5.4.1 This issue is considered in the report under the general heading of 'carbon emissions'. Notably the report advises that by 2028, between the DM and DC scenarios there would be a 23% increase in the 'million passengers per annum' (mppa), a 10% increase in ATMs (air traffic movements) and a 10% increase in flight carbon emissions. In turn, the carbon intensity of the DC scenario would improve by around 4% (flights only) in 2028 from 105kgCO2/passenger to 100kgCO2/passenger compared with the DM scenario. In the DC scenario, after 2028, passenger numbers would remain around 43mppa and the carbon intensity per passenger would fall to between 56kgCO2/passenger (best practice) and 77kgCO2/passenger (pessimistic). By 2050, the annual flight emissions from Stansted are projected to reduce to between 1.5MtCO2 (best practice scenario) and 2.0MtCO2 (pessimistic scenario). This represents between 4% and 5.3% of the 37.5MtCO2 target for UK aviation by 2050.

5.4.2 The report further advises that transport carbon emissions relating to employee and passenger travel to Stansted are the second largest source of emissions after flights, accounting for 6% of the airport's total annual emissions in 2016 and 5% of the total annual emissions in 2023 and 2028. It was predicted that emissions would increase for the DC scenario between 2023 and 2028 as increases in passenger numbers would outweigh the vehicle efficiency improvements.

5.4.3 The report then references the ES conclusions that Stansted Airport's share of UK aviation carbon emissions would rise from 4% in 2016 to between 4% and 5.3% of the UK's aviation emissions target in 2050, that this would not be a substantial change, and with annual aviation carbon emissions predicted to decrease between 2028 and 2050. In conclusion, the report confirms that the DC scenario is unlikely to materially impact the UK's ability to meet its 2050 national aviation target of 37.5MtCO2e and *"that the application proposals will not materially impact on the ability of the government to meet its national carbon reduction target"*.

5.5 Policy compliance

5.5.1 The report provides a comprehensive review of national and local planning policy and reaches an overall conclusion that:

"It is reasonable to consider that the requirement for more intensive use of other airports, such as Stansted, by making best use of their infrastructure, is a government imperative based on evidence and consultation and so can be given significant weight".

5.5.2 The report further advices that it is reasonable to attribute significant weight to national policy in support of the best use of existing runways, subject to the environmental impacts being managed or mitigated. The report indicates that it is on this basis that SAL were applying for an increase in passenger numbers from the permitted 35mppa to 43mppa and that this would be achieved within the context of the currently permitted aircraft movements of 274,000 per annum.

5.5.3 This limitation on aircraft movement was derived from the extant 2008 planning permission and, in turn, Officers advised that this represented a *"realistic fall back position"*. This then set the context for the determination of the planning application and, taken with the assessment of the other material considerations, informed the overarching recommendation that the application should be approved based on the proposition that:

"Overall, the proposals comply with the relevant local plan policies. The proposals also comply with the material considerations of national policy, the policies as set out in the NPPF (2018), the APF (2013) and the BTH (June 2018), and insofar as it is relevant ANPS (2018). The APF sets out the government's primary objective which is to achieve long-term economic growth. The aviation sector is seen as a major contributor to the economy and its growth is supported but within a framework which maintains a balance between the benefits of aviation and its costs, particularly its contribution to climate change and noise. Whilst issues around climate change and carbon emissions are to be dealt with at a government level, it is considered that this application balances the primary objective of economic growth with the impacts of aviation. Appropriate mitigation measures are identified and could be secured by way of conditions or s106 Legal Obligation."

5.6 It was, on this basis, that the Officers recommendations were endorsed by the Planning Committee subject to the identified conditions and the completion of a S.106 Agreement.

6. **Second determination**

6.1 It is important to note in review of the subsequent report presented to the Extraordinary Planning Committee meeting on 17th and 24th January 2020 (being some 14 months after the first Planning Committee) that it includes reference to those matters agreed at an informal meeting held on 30th April 2019 and this confirmed:

"that officers would not complete the section 106 agreement and issue the planning consent for the time being;

that the legal advice previously obtained from Christiaan Zwart, barrister, would be circulated to all members;

that a briefing session would be held for all members, with Christiaan Zwart in attendance to answer questions about his advice;

that, if need be, further advice would be sought at Q.C. level and a further briefing for all councillors would be held. This advice would focus on whether the planning obligation requirements made by the Planning Committee have been incorporated fully and effectively into the s106 agreement, and on the origin and consequences of any "gaps" if any between the Planning Committee Resolution and the resulting S106 Agreement."

6.2 The report then continues to confirm that a briefing meeting for all Councillors was called on 14 May 2019 and that the advice obtained from UDC's barrister, Christiaan Zwart, was circulated prior to the meeting and he then attended to answer questions. Further advice was then obtained from Stephen Hockman QC (working jointly with Christiaan Zwart) and their joint advice was provided prior to a second briefing meeting held on 21 May 2019. Again, they attended this second briefing meeting and answered questions raised by members. Issues raised at the second briefing meeting with members, and by SSE separately, led to additional further advice from Stephen Hockman QC and Christiaan Zwart. This was also shared with Members of UDC.

6.3 Further expert legal advice was then obtained from Philip Coppel QC at the request of Members. The report presented to the Extraordinary Planning Committee confirms that Officers had also been engaged in a series of workshop sessions, in review of the content of the draft S.106 obligations and any other issues that might be raised as potential new material considerations since 14 November 2018.

6.4 This overview provides some context for the Extraordinary Planning Committee report and, very helpfully, provides a public record of the informal meeting programme and the associated legal advice obtained following the earlier resolution and prior to the discussion in January 2020. The content of that advice will be considered in further detail in the next section of this report.

6.5 Before turning to the content of the report to the Extraordinary Planning Committee meeting, it is also important to acknowledge that detailed written and oral representations were made to UDC by SSE. The relevance and importance of these representations is reflected in the inclusion of the PowerPoint submissions made by Paul Stinchcombe QC that are attached to the Minutes of that meeting and that identify the following issues were relevant material considerations:

"New evidence relating to aircraft noise and air pollution

Impact of B737 MAX problems

Number of flights

Expansion plans of competitor airports – "Need" case

Climate Change – new evidence, policy developments

Emerging Policy – Local and National

Economic and Employment considerations."

6.6 The report to the Extraordinary Planning Committee meeting is surprisingly short in comparison to the November 2018 report and relies on the premise that:

"The starting point for assessment of the Agreement's adequacy is the decision of the Planning Committee on 14 November 2018. It resolved to approve the planning application for the Stansted Airport proposals subject to the applicant entering into planning obligations complying with the Heads of Terms put to the Committee at the meeting. That decision to approve the application implicitly means an agreement that accorded with the Heads of Terms would adequately address the impacts of the proposed development."

6.7 The report further confirms that:

"There are no new material considerations or other change in circumstances that now justify a different overall conclusion."

6.8 It is also noteworthy that the Report makes specific reference to the emerging policy position relating to climate change and advised the Committee that:

"The government has adopted a similar approach in relation to carbon emissions and climate change. Whilst it has put its net zero carbon emissions target on a statutory footing, it has not yet developed a clear set of policies and interventions for achieving that target. There are no policy limits for individual airports that constrain the maximum permitted emissions from aircraft movements to and from each UK major airport.

It is not open to a local planning authority in determining a planning application to seek to anticipate what national policy choices the government may, or should, take. Nor is it appropriate to assume that the government will seek to manage air noise impacts or carbon emissions mainly through land use decisions."

6.9 In conclusion the report confirms that:

"There are no grounds for deeming the S106 Agreement to be inadequate. Further work to review the obligations has been concluded and it has been amended where possible within the legal constraints.

There are no new material considerations that would justify a different decision to that resolved by the Planning Committee on 14 November 2018.

The development plan framework position has not changed materially since 2018.

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

6.10 It is noted that the report concludes with a risk assessment and advises that there is a (Scale 3) significant risk of a *"major planning inquiry [that] would require significant reallocation of resources and the use of reserves"*. Notably, there is no reference to the risk of a costs award in any appeal proceedings and the (Scale 4) level of *"near certainty of risk occurring, catastrophic effect or failure of project"* was not relied upon in the assessment (despite being specifically highlighted by Leading Counsel).

7. Advice and Briefings

7.1 It is reasonable to assume that Councillors were aware of the existence of advice notes and opinions obtained from Counsel and Leading Counsel throughout the determination of the Proposal from November 2018 to January 2020. It is also the case, that the signposting of

that advice in the report to the Extraordinary Planning Committee, ensured that Councillors were aware of its existence and could have requested further guidance on the contents from Officers.

7.2 It follows that the advice notes and opinions are an important part of the background to this matter and should be considered as part of the matrix of relevant information.

7.3 Advice of Christiaan Zwart dated 28th March 2019

7.3.1 This advice note deals exclusively with the lawfulness of the proposed draft planning obligations to be secured by S.106 Agreement in respect of the Proposal and in satisfaction of the resolution of the Planning Committee decision on 14th November 2018.

7.3.2 The advice concludes that the proposed provisions satisfy the recommendation and the statutory tests contained at Regulation 122 of the Community Infrastructure Regulations 2010 (as amended).

7.4 Joint Advice of Stephen Hockman QC and Christiaan Zwart dated 20th May 2019

7.4.1 This advice note again deals exclusively with the lawfulness of the proposed draft planning obligations to be secured by S.106 Agreement in respect of the Proposal and in satisfaction of the resolution of the Planning Committee decision on 14th November 2018.

7.4.2 Again, the advice concludes that the proposed provisions satisfy the recommendation and the statutory tests contained at Regulation 122 of the Community Infrastructure Regulations 2010 (as amended).

7.4.3 Notably, the advice confirms that the consequences of the earlier determination are that *"in law, consistency requires the Council to act consistently with its decision on 14th November 2018 in the current absence of alternatives."*

7.5 It is noted by the reference to the report to the Extraordinary Planning Committee meeting in January 2020, that further advice was then obtained from Stephen Hockman QC and was discussed at a meeting held on 21 May 2019. We understand that no written advice was provide in preparation for this briefing.

7.6 ES have been supplied with a handwritten note of that session by way of background information. It is not possible to verify the content of this note and, on this basis, it is only referenced to gain some understanding of the process detailed above. That note would suggest that the briefing related to the content of the earlier advice notes and then potentially extended into a commentary on the capacity/lawfulness of the Planning Committee to refuse the Proposal against Officers recommendations and the risk of an order of costs at appeal.

7.7 Advice of Phillip Coppel QC dated 3rd September 2019

7.7.1 The advice note confirms that Leading Counsel had attended a meeting with Councillors and Officers on 22nd August 2019 to "field questions" arising from the resolution to grant planning permission for the Proposal at the Planning Committee on 14th November 2018.

7.7.2 The advice references the identified "new material considerations" relating to "climate change and net zero carbon emissions" that had been identified in those discussions. The advice note then confirms the following:

"I confirm the view which I expressed on 22 August 201; namely, given the thorough preparation which preceded the 14 November 2018 meeting, the length, detail and matters of debate, the extensive public preparation and the conspicuous care and fairness of the material before the Committee on that date, it would require weighty different material to warrant a re-evaluation sufficient to justify displacing that resolution with a new resolution. It would be an exceptional thing to do.

Having reviewed again the material with which I have been provided, so far as I can see the matters referred to in the 28 June 2019 motion fall short of constituting good reason for refusing to grant the permission it has already resolved to grant. Absent such good reason, the Committee risks breaching its public law obligation to act consistently and/or reasonably, and being subject to a substantial adverse costs award on any planning appeal that the applicant might bring."

7.7.3 The advice then concludes with a detailed review of this position and at paragraph 46 makes clear:

The most immediate practical consequence of UDC now refusing to grant permission …without a very good reason for changing its mind, is that STAL would likely appeal against the refusal to the Secretary of State. This would give rise to a lengthy and expensive public inquiry, at which, irrespective of the outcome, UDC would have to meet its own costs. The material with which I have been provided suggests that STAL would be successful in that appeal. In that event, UDC would likely face an application made by STAL for its costs on account of UDC's unreasonable behaviour resulting in STAL incurring wasted or unnecessary cost. I cannot say with any precision what those costs would be, but what I can say is that they would be very significant indeed."

7.8 Opinion of Phillip Coppel QC dated 4th September 2019

7.8.1 This opinion is concerned with a discrete issue relating to preclusion of Councillors in determination of the Proposal at the forthcoming Committee meeting as a result of apparent bias or predetermination.

7.9 Opinion of Phillip Coppel QC dated 13th December 2019

7.9.1 This short opinion starts in reiteration of the advice above from 3rd September 2019. The advice then further reviews the content of the revised draft S.106 Agreement and concludes that the revised terms do not give rise to any concerns as to UDC's duty to act consistently or as to general legal compliance.

7.10 Further opinion of Phillip Coppel QC dated 10th January 2020

7.10.1 This further short opinion again revisits the issue of bias and predetermination by Councillors.

7.10.2 ES are not aware that these earlier concerns have any bearing on this advice note.

7.11 Further note of Phillip Coppel QC dated 6th January 2021

7.11.1 This further short note was produced in response to 16 questions that were raised by Councillors in respect of the case to be presented at Inquiry on behalf of UDC and the concern of members that the emerging case did not reflect the reasons for refusal. Notably, the short advice note was produced just before the opening of the appeal case.

7.11.2 It is important to recognise that the note was produced in the form of an email response and during an intense period of preparation on the eve of the forthcoming Inquiry. As a consequence, the note is in a short form, reflects a tension between the profession team and Councillors and the further apparent tension with the SSE case.

7.11.3 The commentary in the note is relevant because in response to the first question Leaning Counsel directly answers the complaint of Councillors that the emerging appeal case for UDC is inconsistent with the RoR. That question was framed as follows:

"How did we get from a unanimous Planning Committee decision to "refuse on the basis that the application to expand Stansted was unsustainable" (based on MAG's 13,000 pages of evidence), to an appeal 'defence' of "approval with conditions" as stated by the defence team at the most recent Briefing?"

7.11.4 The response from Phillip Coppel QC was as follows:

"The words quoted in Q.1 don't appear in my copy of the Decision Notice dated 29/1/20. It is the decision recorded in that Decision Notice that is being appealed. Compliance with UDC's condition 15, together with the other conditions + s 106 agreement, would, according to the professionally qualified experts UDC has engaged, meet the reasons for refusal as recorded in the Decision Notice dated 29/1/20 and be consistent with governing planning policies, both national and local."

7.11.5 Leading Counsel also responded to the final question, which was drawn as follows:

"Considering the controversy and history of this application, the overwhelming support of the district and the amount of time and resources spent on the January Decision, hasn't this matter been allowed to fail without sufficient cabinet oversight?"

7.11.6 His response was:

"No: a robust and sustainable defence of position, supported by all four experts through their detailed and careful proofs of evidence, consistent with planning policy and faithful to the reasons stated in the Decision Notice, has been mounted. Having done so, it would not be sensible for UDC to take flight on the eve of the Inquiry."

8. UDC's appeal case

8.1 ES are aware from the January 2020 report to the Extraordinary Planning Committee that there were a series of further meetings, discussions and workshop sessions between Officers and Councillors. Again, we have been provided with some handwritten notes of some of these meetings. These notes are incomplete, unverifiable and in places difficult to read. In the circumstances, we do not intend to place any reliance on their content for the purpose of this report.

8.2 There is, on this basis, very little further available information to assist in understanding the processes followed by Officers in preparation of the appeal case. It is, however, reasonable to assume that Officers relied upon the identified RoR in formulation of a case in response to the SAL appeal. It is, in turn, clear that Officers instructed experienced and respected expert witnesses in preparation of their case on those terms.

Statement of Case

8.3 The Statement of Case submitted on 16th September 2020 identified that the following three concerns of UDC that would be addressed in evidence:

1. *"A clear implication arising from STAL's proposals is that they will give rise to a change in air traffic activity at the airport, from that considered and approved in the 2008 appeal, and the environmental impacts arising from this change have not been adequately assessed;*

2. *There has been a change in circumstances since the ES was published in February 2018, which gives rise to concerns around the robustness of the demand forecast exercise undertaken in support of the application, and whether the forecast can be relied upon for the assessment of environmental impacts; and*

3. *There has been a change of policy position since the application was submitted in 2018, that was not considered within the application submission, adding to the shortcomings in assessment work."* (para.2.1)

8.4 The Statement of Case does not follow the normal structure for this form of appeal submission and does not seek to identify those matters that will be disputed in evidence at the Inquiry. To the contrary, the submission confirms that:

"As an outcome of this process, it 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 this information, it was not possible to conclude on the nature of impacts arising, and as a consequence, the adequacy of the proposed mitigation, leading to refusal of the application." (para.5.3)

"UDC will call expert witnesses to demonstrate that there are assessments that should be undertaken in relation to air noise, air quality and carbon emissions and the associated consequences for health and wellbeing of local communities. These may require additional mitigation and alternative controls. If necessary measures are not feasible or enforceable, the appeal should be dismissed." (para.5.4)

<u>Opening Submission and Evidence</u>

8.5 ES have been provided with copies of the settled expert witness statements and a series of supporting Statements of Common Ground. We have also reviewed the Opening Submissions (OS) made on behalf of UDC and SAL.

8.6 Those submissions made by UDC confirm that the Proposal seeks to secure an 8 million increase in the maximum number of passengers arriving or departing form Stansted Airport each year. That is 35 million to 43 million, or some 23%. The attendant consequences would relate to more noise; degraded air quality; greater carbon emissions; and greater infrastructural strain. However, as the UDC submissions make clear:

"none of those four reasons expressed an in-principle objection to any form of any development of Stansted. The uniting theme in those reasons is that the developer fell short in convincing Councillors that the development being proposed was sustainable; that the development being proposed was consistent with the planning policies that govern development throughout the district of Uttlesford."

8.7 The SAL OS, by comparison, confirm that the appeal was concerned solely with the question of whether SAL should be allowed to undertake a small number of adjustments to its airfield infrastructure (in the form of additional taxiway and stand provision) and then utilise these adjustments to accommodate an eventual annual passenger throughput of 43mppa. That being 8mppa more than the 35mppa presently permitted, whilst remaining within the total number of aircraft movements for which it already has planning permission.

8.8 The SAL OS further argued that Government policy (The future use of Aviation: Making Best Use of existing runways (MBU)) relating to the best use of their existing runway capacity could not be a matter for debate at the Inquiry. In turn, the principle of growth to 43mppa was established by national policy and was also not open for debate at Inquiry subject to relevant local considerations being satisfactorily addressed.

8.9 It is clear that both OS's seek to confirm then that the issues before the Inquiry related to the impact of the development upon relevant local considerations. In the case of UDC, this is explained at paragraph 34 of the OS:

"Following UDC's decision notice of January 2020, and the developer's decision to appeal in July, the Council assembled a team of independent experts to review the application and take a fresh look at the concerns raised by UDC in its decision. On each of the Reasons for Refusal, specific areas of concern as to the assessment of the impacts on aircraft noise, air quality, and carbon emissions were identified by these experts and included in UDC's Statement of Case [CD24.2, 16 September 2020]. In summary, in material respects, the assessment of aircraft noise, air quality, and carbon emissions in the ES was considered to be lacking, unclear, or not sufficiently evidenced or explained, such that UDC's decision to refuse on the basis of a failure fully to address the impacts was readily understandable and justifiable."

8.10 It is further noted, in response to the further noise assessment contained in the updating Environmental Statement Addendum, that the UDC OS confirmed that:

"The conclusions in the Addendum therefore alleviate many of the valid concerns which lay behind the Reason for Refusal."

8.11 The approach to air quality by UDC is more refined. Whilst acknowledging that the Environmental Statement Addendum updated the assessment and provided some additional information, the Council maintained that the Proposal could still *"result in harm to the health of local people and designated nature conservation sites, in contravention of national and local policy and guidance"*. However, it is noted that:

"Each of the air quality impacts identified by Dr. Broomfield is capable of being mitigated through an appropriate condition or mitigation package. A phased release condition is proposed, allowing for a progressive release of airport capacity, contingent on the demonstration of air quality improvements against the standards which fall to be applied at the time the extra capacity is sought, together with ongoing management."

8.12 This is later described in the appeal proceedings by reference to draft Condition 15 and, given SAL's clear objections to this proposition, this in all likelihood explains why SAL didn't take advantage of these concessions and agree conditional terms in a Statement of Common Ground.

8.13 The UDC case relating to carbon emissions makes no specific complaint as to unacceptability or policy breach, but rather continues in raising concerns as to the availability of reliable evidence and advise the Inquiry that:

"There remain considerable uncertainties over the quantum of emissions and their significance despite the updates made to the carbon emissions chapter of the Environmental Statement Addendum and associated appendices."

8.14 It was, in this context, that the overall planning balance case was framed on the following basis:

"It is axiomatic to UDC's position that if the developer is to have the benefit of the additional 8mppa which they seek, those benefits are shared with the local communities around the

airport through the capacity increase being tied, as a minimum, to the environmental benefits which the developer says it can achieve over the period they have assessed."

8.15 Again, this proposition was put forward in reliance upon draft Condition 15, to which there were 4 proposed limbs:

8.15.1 ties the future growth of the airport in passenger throughput to the predicted environmental benefits and setting these predicted impacts as minimum targets which must be achieved;

8.15.2 limiting growth above 35mppa to phases, to ensure that its future growth and the environmental effects are managed. This would require SAL to submit for approval an 'Environmental Scheme' addressing noise, air quality, and carbon emissions. This would require the submission of the past performance of the Airport across the three topics, and details of the mitigation proposes to reduce emissions over the next phase of development;

8.15.3 for the submissions to be reviewed by UDC with due regard to prevailing legislation and policy as applicable at that time; and

8.15.4 a robust dispute resolution procedure, to ensure all parties operate appropriately in the discharge of their commitments.

8.16 The terms of this condition then became the focus of the UDC case, as confirmed in the SAL OS:

"It is fair to summarise the UDC case (as now advanced at this inquiry) as being focused upon securing appropriate planning conditions and obligations; the acceptability of the development in principle is accepted.

Whilst STAL acknowledges the need for appropriate conditions to regulate the future operation of the airport, it cannot support the imposition of a system of "micro-management" such as apparently now proposed by UDC in the form of its new "Condition 15"."

Closing Submissions

8.17 It is important to acknowledge that the written evidence submitted in the course of the appeal proceedings represent only part of the evidence presented on behalf of UDC and this is particularly the case where the conduct of the proceedings are complex and extend over many sitting days. It is, in consequence, inevitable that appeal cases will evolve and adapt in response to the approach taken by the appointed Inspector and in reliance upon the submissions or concessions made by other parties during the course of the case. This is, in essence, the purpose of the Inquiry process and in overview it is often the Closing Submissions (CS) that best represents the final case presented by the parties.

8.18 The CS for UDC provide an overview of the evidence discussed at the Inquiry and, in broad review, would suggest some hardening of the Council's position on the evidence by the close of the Inquiry. It is, however, clear that this approach is principally directed at the focused justification for the imposition of draft Condition 15. This can be seen at paragraph 63 which, by reference to the air quality evidence, confirms the following:

" …the measures in the Transport Section of the UU are not specific to air quality, lukewarm with regard to mode share, and heavily qualified, leading to uncertainty as to whether air quality improvements would actually be achieved. Moreover, there is no assessment provided in the ES, ESA, or Dr. Bull's evidence that demonstrates the extent to which these measures would improve air quality. All this, in circumstances where that is the objective of extant and emerging policy."

8.19 Whilst a similar approach is taken in respect of the carbon emission case, the assessment of SAL's case does then rely heavily on the proposition that the MGU is *"out of date and should carry little weight in the context of net zero"* (para. 91) and the following (somewhat principled) standpoint:

"When viewed together, STAL's refusal to acknowledge relevant and longstanding national planning policy on radically reducing carbon emissions, its misinterpretation of aviation policy in MBU so as to suggest that carbon emissions are a matter to be dealt with at a national level and cannot be considered by LPAs in local decision making (before resiling from that position in oral evidence), its overstatement of the carbon analysis lying behind MBU as "pre-authorising" airport growth in carbon terms, and its failure to accept that MBU is now out of date in carbon terms, reflect an airport which is failing to acknowledge and grapple with its responsibilities on carbon emissions. Against a context where, since 1990, the rest of the economy has achieved very significant reductions in CO2, whilst aviation's emissions have more than doubled, STAL's approach at this inquiry, that in policy terms these are not matters for local decision making, is both stark and unbalanced. It is symptomatic of an applicant that has not played its part in the planning process in a way that fostered trust and confidence in anything it said."

8.20 Again, this approach is taken to inform UDC's justification in imposition of Condition 15 as a means of monitoring, assessing and regulating the development. This is based upon the proposition that the proposed condition would enable *"future generations to maintain the contemporaneity of environmental mitigation measures as the developer increases by steps the operations allowed by the planning permission"* and that this *"is necessary so as not to contravene paragraph 7 of the NPPF"*.

Appeal Decision

8.21 The case presented by UDC at the Inquiry is further summarised in the appeal Decision Letter in the following terms:

National Aviation Policy and Introductory Matters

"The Council, whilst highlighting the inherent uncertainty in forecasts and projections into the future, did not dispute the appellant's position on forecasting, concluding that the predictions were reasonable and sensible." (para.27)

Aircraft Noise

"The Council's position is that the development is acceptable in terms of aircraft noise, subject to suitable mitigation measures." (para.42)

"The Council agrees that this maximum level would ensure that internal noise levels would not exceed 60 dB, with windows open. This provides a good degree of certainty that noise levels would be in accordance with BB93 which states that indoor ambient noise levels should not exceed 60 dB LA1, 30 mins." (para.53)

Air Quality

"Although it has raised a number of issues concerning the methodology used and the robustness of the assessments during the appeal process, the Council made no request for further information under the EIA Regulations." (para.63)

"The Council, while raising concern over UFPs [Ultrafine particulates], is nonetheless content that permission could be granted subject to conditions requiring monitoring of air quality. The UU secures such monitoring, and condition 10 requires implementation of an air quality strategy, which is to be approved by the Council." (para.75)

"The ES concluded that there would be no significant effect at ecological receptors. The Council considers that the development would be acceptable in air quality terms subject to imposition of suitable conditions to limit the air quality effects and to secure mitigation measures." (para.80)

Climate Change

"There is broad agreement between the parties regarding the extremely serious risks associated with climate change. These risks are acknowledged and reflected in Government policy." (para.82)

"Nonetheless, in spite of that general accord there remains much disagreement between the main parties to the Inquiry over how the effects of the development on climate change should be assessed, quantified, monitored and managed, including into the future." (para.83)

"The reason for refusal relating to carbon emissions and climate change refers only to the proposed development's effects resulting from additional emissions of international flights. Nonetheless, the evidence put forward as part of the appeal process also refers to wider potential effects on climate change, including carbon emissions from sources other than international flights." (para.99)

"Discussion and testing of the evidence during the Inquiry process revealed no good reasons to conclude that any such effects would have any significant bearing on climate change. Indeed, the Statement of Common Ground on Carbon between the appellant and Council states that the emissions from all construction and ground operation effects (i.e. all sources of carbon other than flight emissions) are not significant. It adds that Stansted Airport has achieved Level 3+ (carbon neutrality) Airport Carbon Accreditation awarded by the Airport Council International." (para.100)

"Given the conclusions outlined above regarding the potential effects of the appeal development arising from international flights, the evidence does not suggest that the combined climate change effects of the development would be contrary to planning policy on such matters, including the Framework, or that it would significantly affect the Government's statutory responsibilities in this regard. Furthermore, no breach of the development plan associated with carbon/climate change is cited in the relevant reason for refusal and none has been established as part of the appeal process." (para.101)

Planning Balance

"The Council and the appellant agree that the proposed development accords with the development plan, taken as a whole. It is further agreed that the Framework's presumption in favour of sustainable development should apply as a result of the proposals' accordance with an up-to-date development plan. In these circumstances the Framework states that development should be approved without delay." (para.155)

Condition 15

"The Council proposes alternative conditions to deal with noise, air quality and carbon. Its primary case involves a condition, referred to during the Inquiry as 'condition 15', which would impose restrictions based upon the impacts assessed in the ES/ESA, along with future more stringent restrictions (using some interpolated data from the ES/ESA) and a process that would require the Council's reassessment and approval periodically as the airport grows under the planning permission, allowing for a reconsideration against new, as yet unknown, policy and guidance. In light of the Panel's conclusions on these matters, there is no policy basis for seeking to reassess noise, air quality or carbon emissions in light of any potential change of policy that might occur in the future. Furthermore, it would be likely to seriously undermine the certainty that a planning permission should provide that the development

could be fully implemented. This appeal must be determined now on the basis of current circumstances and the proposed 'condition 15' is not necessary or reasonable." (para.142)

8.22 This assessment informed the conclusion of the Inspectors that:

"Overall, the balance falls overwhelmingly in favour of the grant of planning permission. Whilst there would be a limited degree of harm arising in respect of air quality and carbon emissions, these matters are far outweighed by the benefits of the proposal and do not come close to indicating a decision other than in accordance with the development plan. No other material considerations have been identified that would materially alter this balance."

9. **Costs Letter**

9.1 The assessment of UDC's case at appeal is presented in far more strident terms in the Inspectors assessment of the costs case. Importantly, the Inspectors assessment is closely aligned with the advice presented to the Extraordinary Planning Committee in January 2020 that:

"Whilst there is nothing wrong with a different committee exercising different planning judgement, such a drastic change in position by a public body should be fully and robustly justified."

9.2 The Inspectors then note that a different decision was reached in 2020, notwithstanding the negligible impacts that had been identified. It is also noted that at *"no time was additional information sought from the appellant under Regulation 25 of the EIA Regulations that might have overcome any such concerns or provided an answer to other queries of the Council"*.

9.3 Turning to the case at Inquiry, the Inspectors conclude that:

"The reasons for refusal were unquestionably vague and generalised, suggesting that the appellant had failed to demonstrate the effects on aircraft noise and air quality despite the extensive evidence presented and accepted on these topics. The reasons for refusal left the actual and specific concerns of the Council opaque, even having regard to the committee minutes. Ultimately, the issues relied upon at appeal, some of which had been discussed during the committee, could not reasonably have been expected to materially alter the favourable planning balance. Indeed, the Council's own appeal evidence was that the planning balance was favourable, such that planning permission should be granted.

The reasons for refusal became vaguer still at reason 3 which sought to rely on a conflict with general accepted perceptions and understandings of the importance of climate change. Climate change and related policy matters had been considered at length by the Council in light of extensive submissions on the topic. Whilst the 2050 Target Amendment to the Climate Change Act 2008 occurred after the initial resolution to grant, no material change in relevant and applicable policy was identified by the Council, nor were the negligible impacts of the development altered. It was not credible or respectable for the Council to identify this as a matter that should now result in the refusal of permission.

The final reason for refusal related to a failure to provide necessary infrastructure and mitigation. However, it remains unclear what was needed that could not have been secured by condition; was not already provided for in the S106 agreement before the Council; or could not have been secured through negotiations on the submitted planning obligations. It was open to the Council to impose whatever conditions it saw fit applying the relevant tests.

Attempts to substantiate these reasons for refusal during the appeal were not convincing. Nor was the reliance on additional information provided in the ESA, which identified only

marginal changes in the assessment of effects from the ES. The Council nevertheless maintained its case and presented evidence relating to all four refusal reasons.

This was notwithstanding the Council's witnesses individually accepting that the issues raised could be overcome by conditions or obligations, and its planning witness having accepted in written evidence that the development was acceptable in planning terms overall. Again, it was concluded that the development would accord with the development plan and should be granted planning permission subject to conditions and obligations. Such an approach could and should have been taken at the time of the Council's decision and did not warrant the Council's continued opposition to the proposal at appeal. So far as conditions were pursued, much time was taken at the Inquiry dealing with 'condition 15', an unnecessarily onerous and misconceived condition that patently fails to meet the relevant tests. The strength of evidence in favour of the proposal is such that the application should clearly have been granted planning permission by the Council. Its reliance on a perceived direction of travel in policy or emerging policy that may never come into being in the form anticipated is not a sound basis for making planning decisions. As such, the appeal should not have been necessary."

9.4 This commentary is an important assessment of UDC's case and raises a series of issues that are considered in further detail in the following parts of this report.

10. **Decision of the Honourable Mrs Justice Lang DBE**

The application for permission for a Statutory Review of the appeal decision was considered on the papers and failed on all grounds. We focus for the purposes of this report on 'Ground 1 and 2' and the High Court Judge's assessment dated 7th July 2021 that:

"…this submission to be unarguable. On a fair reading of the Decision Letter (DL), the Panel correctly identified and understood the relevant national and local policies. It was correct to find that carbon emissions policies are addressed at a national level, in the MBU, and are not a matter for local planning decision-makers. It was entitled to conclude that the national policy "Making best use of existing runways" ("MBU"), published in June 2018, was made in full knowledge of the UK's then commitments to combat climate change, and that it thoroughly tested the potential implications of the policy in climate change terms (DL 18). It was also entitled to conclude that the Government has not altered the policies in the MBU, notwithstanding changes to the targets for reduction of greenhouse gas emissions (DL 24-25).

Under the heading "Carbon and Climate Change", the Panel considered the specific climate change implications of the proposed development. It clearly considered the competing views of the parties and took into account Government announcements which post-dated the MBU. Its judgment was that carbon emissions weighed against the proposal only to a limited extent (DL 153). It is not open to the Claimant to challenge that exercise of planning judgment in a claim for statutory review.

… Its reasons for concluding that Condition 15 was not necessary or reasonable were clearly explained at DL 142. It applied the correct legal and policy tests. This was an exercise of planning judgment which the Claimant cannot challenge in this claim."

11. **Full Council**

11.1 It was recommended in the subsequent report to Full Council on 5th October 2021 that the judgement of the Honourable Mrs Justice Lang should be accepted and any further action in the matter should focus on managing the implications of the full costs award in favour of SAL.

11.2 The report confirmed that UDC had incurred some £1,034,000 in presenting its case at the Planning Inquiry and that it was anticipated that SAL's costs would be in the region of

£1.5million. The report summarised the key elements of the application for the Statutory Review in the following terms:

"The Planning Inspectors had erred in excluding from consideration relevant climate change and carbon emissions policies, and reading national aviation policy (Aviation Policy Statement 2013, Making Best Use 2018 and the Aviation National Policy Statement 2018) as "unassailable and untouched" by other more recent government policy.

The Panel were wrong in rejecting Condition 15 proposed by the council as unnecessary and unreasonable, and failed to properly explain why it had been rejected. The council's planning evidence that the appeal should be granted was expressly founded upon Condition 15 being in place.

The Panel's costs decision was flawed on eleven grounds including a failure to attach weight to Planning Policy Guidance that applications for costs should be made as soon as possible, a failure to consider the council's submissions on the unfairness and prejudice to the council in the timing of Stansted Airport Ltd's costs claim at the close of the inquiry hearings, or alternatively, an explanation as to why the Panel rejected those submissions, the unjustified characterisation of the council's grounds for refusal as vague, generalised and opaque, without any reference to the council's third reason (additional carbon emissions against a background of amendments to the UK's carbon account)."

11.3 This summary assessment is surprisingly forthright and was clearly at odds with the findings of the three Inspectors and, most importantly, those of the High Court. The report, in turn, confirms the assessment detailed in the preceding section of this report that each of these claims were "inarguable" and noted in respect of the costs issue the Judge's assessment that:

"A decision whether or not to make an award of costs is pre-eminently a matter of discretion, and the Inspector who actually hears the appeal is in the best position to judge whether an award should be made. The Court will only interfere with an Inspector's exercise of discretion to award costs in exceptional circumstances."

11.4 The report then advises that:

"There is a high likelihood that a final judgement on permission to challenge will be consistent with that of the Inquiry Panel and Mrs Justice Lang. In the unlikely event that permission to challenge is granted, there are potential submissions that could be made in response to Her Ladyship's Page 7 reasons, but the outcome of a S288 Planning Statutory Review Full Hearing is similarly likely to be consistent with previous decisions."

11.5 It was, in these terms, that the Council resolved to accept the judgement of The Honourable Mrs Justice Lang DBE.

12. Procedural requirements

12.1 ES have been supplied with a copy of EDC's current Constitution which provides the terms, limitations and requirements the local authority have placed upon itself to ensure that it operates and functions within its legal remit and in the interest of the residents and businesses within the District. It is noted that Article 13.2 of Part 2 of the Constitution identifies the principles that will be upheld in any Council decision will include:

"proportionality (i.e. the action must be proportionate to the desired outcome);

due consultation and the taking of professional advice from officers;

respect for human rights;

a presumption in favour of openness; and

clarity of aims and desired outcomes."

12.2 It is further noted that Article 13.3 of Part 2 of the Constitution identifies those decisions reserved for Full Council and, by reference to Article 4.2.13, it is also clear that this might extend to such other functions that *"the Council decides should be undertaken by itself"*. It is, in turn, noted that the normal mechanism for referral to Full Council is then by way of Motion under Rules 10 and 11 of Part 4 of the Constitution. The only other mechanism in elevation of a decision would by a Senior Officer calling an Extraordinary Meeting pursuant to Rule 3 of Part 4 of the Constitution. These latter provisions would require a request from:

12.2.1 *"the Council by resolution;*

12.2.2 *the Chairman of the Council;*

12.2.3 *the Monitoring Officer;*

12.2.4 *the Chief Finance Officer; and*

12.2.5 *any five members of the Council if they have signed a requisition presented to the Chairman of the Council and he/she has refused to call a meeting or has failed to call a meeting within seven days of the presentation of the requisition."*

12.3 The provisions of Article 13.3.2 of Part 2 of the Constitution then define those *"key decisions by or on behalf of the Leader or Cabinet"*. This second category of decision is identified at Article 13.3.2 by reference to *"decisions likely to result in …expenditure in excess of £100,000*", but this is only then qualified by reference to land transactions. It is also the case that the further categories of *"key decisions"* makes no provision for those decisions made in conflict with Officers advice and where any such decision might present a high risk of significant expenditure, reputational damage or a substantial costs award against UDC.

12.4 Finally, it is the provisions of Part 3 of the Constitution that include the broad delegated authority to the Assistant Director Planning & Building Control which includes responsibility to:

"Carry out all functions related to appeals against planning and enforcement decisions made by Uttlesford District Council."

13. **Assessment**

The Decision Making Process

13.1 The preceding part of this report provides a step by step review of the process in determination of the planning application for the Proposal, to its refusal and appeal process and the subsequent decision of Full Council not to pursue the dismissal of the s288 Statutory Review.

13.2 It is clear in review of the available material that Officers from their original assessment of the Proposal in November 2018 through to its refusal in January 2020 provided consistent, detailed and robust advice that the Proposal was compliant with policy, that there were no other relevant material considerations to displace that policy presumption and that the proposed expansion at the Airport should be approved. That advice was supported by very clear and exacting advice from Leading Counsel, in the following blunt terms:

"The most immediate practical consequence of UDC now refusing to grant permission… without a very good reason for changing its mind, is that STAL would likely appeal …This

would give rise to a lengthy and expensive public inquiry, at which, irrespective of the outcome, UDC would have to meet its own costs. The material with which I have been provided suggests that STAL would be successful in that appeal. In that event, UDC would likely face an application made by STAL for its costs …I cannot say with any precision what those costs would be, but what I can say is that they would be very significant indeed."

13.3 That advice proved to be entirely accurate and it was clearly either not made available to Councillors or it was not understood, ignored or dismissed by Councillors, who then resolved to refuse planning permission for the Proposal at the Extraordinary Planning Committee meeting in January 2020. It is important to stress that the decision to refuse was reached and the RoR were identified:

13.3.1 absence any available and identifiable evidence to demonstrate that the additional flights would result in an increased detrimental effect from aircraft noise;

13.3.2 without identifiable evidence to support the claimed detrimental impact on air quality resulting from the additional flights;

13.3.3 in reliance upon the inherently tenuous argument that current Government policy (contained in Aviation Policy Statement 2013, Making Best Use 2018 and the Aviation National Policy Statement 2018) was out of date and should be considered in the context of the amendment to the Climate Change Act 2008 (2050 Target Amendment) to reduce the net UK carbon account for the year 2050 to net zero from the 1990 baseline; and

13.3.4 without any specific evidence relating to the absence of necessary infrastructure to support the Proposal.

13.4 We note, in this context, that no request was made by Officers or Councillors for the provision of further information to address these concerns and as might be the normal good practice before refusing planning consent for a scheme due to the absence of available and identifiable evidence. Also, as is highlighted in the costs award, it is important to acknowledge that there was no specific Regulation 25 request made by UDC for the provision of further information to support or address any perceived gaps in the submitted Environmental Statement.

13.5 On these terms, the unsubstantiated decision was clearly reached in the belief or assumption that evidence could be secured to support the proposition that the Proposal was contrary to national and local policy in accordance with the identified objections detailed in the RoR. At that time and on these terms, this was a decision that was consistent with a perceived breach of *"a plan or strategy (whether statutory or non-statutory) … adopted or approved by the Council".*

13.6 On this basis, this was a decision within the terms of the Article 3.3 of Part 3 of the Constitution. The Extraordinary Planning Committee were clearly entitled within the terms of the Constitution to reach that decision and, by reference to the Constitution, this did not automatically precipitate any further decision, audit or review by Officers or the Executive.

13.7 It is, however, surprising to ES that there is no apparent safeguarding measures at Article 13.3.2 of Part 2 of the Constitution in respect of any *"key decisions"* that conflict with Officers advice and where the determination would present a high risk of significant expenditure, costs liability or reputational damage to UDC. This is a matter that is returned to in our recommendations below at section 14.

13.8 In the absence of any available evidence to support the identified RoR, it is also reasonable to conclude that UDC's decision in refusal of the Proposal was politically motivated and was, to some degree, informed by the then unsubstantiated representations made by the local

resident groups. This include the forceful submissions made by SSE that were supported by detailed arguments presented by Paul Stinchcombe QC.

13.9 It is, at this point, important to note that members of a Planning Committee are entitled to reach decisions in conflict with Officer advice. There are also a reasonable proportion of such planning cases that are subsequently substantiated in evidence by a team appointed advisors (either internal or external) and that fail to secure planning permission at appeal. These cases are not commonplace, but they are also not exceptional.

13.10 It might, in normal circumstances, be reasonable for Councillors to assume that an appointed team of experts might be able to formulate an arguable case in objection to the Proposal. The obvious abnormality of this case, is that Councillors had already appointed Phillip Coppel QC who is a very experienced and senior legal advisor and they had the benefit of his clear advice that the case was without substance. Therefore, the Extraordinary Planning Committee made their decision in refusal of the Proposal in direct conflict with the expert advice and at obvious risk.

13.11 In our view, this ensures that the decision of the Extraordinary Planning Committee in January 2020 relied not, upon evidence known at the time, but entirely upon the anticipated identification and availability of any evidence to support the RoR. Absent that evidence, Councillors and Officers had been clearly advised that the UDC case had no prospect whatsoever of being sustained at appeal and that UDC would likely be exposed to a substantial costs award.

13.12 It is, in this context, very surprising that there was no formal process put in place to provide for the further review and assessment of the anticipated appeal case. If such review(s) were to have taken place, it would have provided the opportunity to consider whether it was still appropriate to maintain all of the RoR or whether particular issues could be withdrawn on the basis of the available evidence, thereby limiting risk and costs exposure.

The Preparation of Evidence

13.13 There is nothing to suggest that the Officers failed in their duties in the appointment of the professional team formulation, who were all experienced and reputable consultants. It is also the case, that the Officers and their appointed advisors cannot be criticised for failing to find any substantive evidence to support the RoR. That conclusion is supported by the detailed assessment of the Proposal at the earlier Committee, the very detailed advice obtained from a selection of legal advisors and, most notably, the inability of the professional team representing SSE to present any convincing case at the Inquiry.

13.14 The apparent limitations of the RoR were reflected in the subsequent output of the appointed professional team. Whilst the instruction of the professional team and the production of evidence is always iterative, the limitations of the case were identified at the outset in the content of the Statement of Case. This can be seen in the submissions at paragraph 5.4:

"UDC will call expert witnesses to demonstrate that there are assessments that should be undertaken in relation to air noise, air quality and carbon emissions and the associated consequences for health and wellbeing of local communities. These may require additional mitigation and alternative controls. If necessary measures are not feasible or enforceable, the appeal should be dismissed."

13.15 In short the Statement of Case makes clear that evidence will be presented by UDC to demonstrate the alleged limitations of the assessed Proposal and, in turn, in identification of proposed mitigation and control mechanisms that will allow the appeal scheme to be approved.

13.16 It is also clear that this approach continued through to the close of the Inquiry. This is signposted in the Opening Statement for UDC in confirmation that *"none of those four reasons expressed an in-principle objection to any form of any development of Stansted."*

The Noise Case

13.17 The UDC case then unfolds in the effective withdrawal of the RoR relating to the alleged noise impacts, on the basis that the ES Addendum *"alleviate many of the valid concerns which lay behind the Reason for Refusal".* This is set out in the (unchallenged) assessment of the Council's case at paragraph 42 of the appeal Decision Letter:

"The Council's position is that the development is acceptable in terms of aircraft noise, subject to suitable mitigation measures."

The Air Quality Case

13.18 A similar approach is then taken with the air quality case, on the basis that *"the air quality impacts [are] capable of being mitigated through an appropriate condition or mitigation package".* Again, this is set out in the (unchallenged) assessment of the Council's case at paragraph 80 of the appeal Decision Letter:

"The Council considers that the development would be acceptable in air quality terms subject to imposition of suitable conditions to limit the air quality effects and to secure mitigation measures."

The Carbon Emissions Case

13.19 The UDC case relating to carbon emissions made no specific complaint as to unacceptability or policy breach, but remained concerned as to the *"considerable uncertainties over the quantum of emissions and their significance".* This then informed the proposed imposition of Condition 15 in an attempt to secure *"the environmental benefits which the developer says it can achieve over the period they have assessed."*

13.20 As before, this is set out in the (unchallenged) assessment of the Council's case at paragraph 101 of the appeal Decision Letter:

"Given the conclusions outlined above regarding the potential effects of the appeal development arising from international flights, the evidence does not suggest that the combined climate change effects of the development would be contrary to planning policy on such matters, including the Framework, or that it would significantly affect the Government's statutory responsibilities in this regard. Furthermore, no breach of the development plan associated with carbon/climate change is cited in the relevant reason for refusal and none has been established as part of the appeal process." (para.101)

The Planning Balance Case

13.21 In this context, it is also important to note that the overall planning case presented by UDC confirmed that the Proposal was compliant with the development plan policy. This is confirmed at paragraph 155 of the appeal Decision Letter in the (again unchallenged) assessment of the UDC's case in respect of the overall planning balance:

"The Council and the appellant agree that the proposed development accords with the development plan, taken as a whole. It is further agreed that the Framework's presumption in favour of sustainable development should apply as a result of the proposals' accordance with an up-to-date development plan. In these circumstances the Framework states that development should be approved without delay."

13.22 This was, on any reasonable assessment, a case presented in conditional support for the Proposal and that did not seek to argue any inherent conflict with national or local policy. Importantly, this approach is reflected in the commentary note provided by Leading Counsel on the eve of the Inquiry and his assessment that:

"It is the decision recorded in that Decision Notice that is being appealed. Compliance with UDC's condition 15, together with the other conditions + s 106 agreement, would, according to the professionally qualified experts UDC has engaged, meet the reasons for refusal as recorded in the Decision Notice dated 29/1/20 and be consistent with governing planning policies, both national and local."

13.23 Whilst we acknowledge that this assessment was produced in haste, it does present some challenges when read against the RoR. In the first instance we recognise that some elements of the RoR as "*recorded in the Decision Notice"* would provide the opportunity for the provision of additional information *"to demonstrate that the additional flights would not result in an increased detrimental effect from aircraft noise"* and *"to demonstrate that the additional flights would not result in a detrimental effect on air quality"*. The third reason for refusal, however, is presented as a form of prematurity case and in terms that suggest *"it would be inappropriate to approve the application at a time whereby the Government has been unable to resolve its policy on international aviation climate emissions"*.

13.24 It is, on balance, possible to see the genesis of Condition 15 in the terms of this reason for refusal and also in the final reason relating to the alleged absence of *"necessary mitigation to address the detrimental impact of the proposal contrary to Uttlesford Local Plan Policies GEN6, GEN1, GEN7, ENV7, ENV11 and ENV13"*.

13.25 There is, in our view, an inevitable subtly to the proposition presented in Leading Counsel note of 6th January 2021 that required a detailed understanding of the terms of the RoR and the wider approach taken in evidence as part of complex planning appeal cases. As a consequence, it is unreasonable to assume that the approach being taken by the professional team on behalf of UDC would have been abundantly clear to Councillors and they might have been quite reasonably concerned that their perception of *"a unanimous Planning Committee decision to "refuse on the basis that the application to expand Stansted was unsustainable""* wasn't then reflected in a case presented in conditional support for the Proposal.

Engagement with Councillors

13.26 This was then a matter of communication, which we understand was addressed by Officers through the provision of a series of 'members briefings' and other further internal meetings between Officers and Councillors. These were informal discussions without a published agenda and without formal minutes.

13.27 Whilst this is to be expected to some degree in the management of a complex decision making process, it is clear that all of these discussions were conducted through these informal lines of communication and without any Committee oversight. The obvious risk being that both Officers and Councillors believed that their concerns had been understood, there was common understanding as to the next steps and all concerned had then accepted the prevailing approach to the appeal case.

13.28 It is impossible for us to determine if the available handwritten notes of some of these meetings provide a reliable record and we have placed no reliance upon this material for this reason. In many respects, this is unimportant because these meeting are not contemplated in the Constitution and provided no formal structure in explanation and redefinition of the appeal case.

13.29 It was, in our view, the reliance upon these informal meetings that introduced a clear point of weakness and vulnerability to the decision making process by UDC and that then precipitated the 16 questions raised by Councillors in early January 2021. This was an

entirely avoidable point of complaint by Councillors, that would have been resolved if there had been a clear structured process of referral back to Committee in update of the emerging appeal case. It might be argued that this action wasn't taken to avoid the potential leakage of evidence to SSE, but this isn't supported by the provision of the 'members briefings' that would inevitably have been prone to the same weakness.

13.30 The emerging limitation of the UDC appeal case is reinforced by Leading Counsel's own assessment in the commentary note of 6th January 2021, which ensured that UDC's professional team presented no evidence in support of the case in objection to the first, second and fourth reasons for refusal. They then focused the case upon the provisions of 'Condition 15' as a means of regulating the development within the scope of the third (and to some degree the fourth) RoR and, in turn, as a basis for conditional support of the Proposal.

13.31 The first judgement made by the professional team had inevitable consequences in exposing UDC to an obvious and certain costs award, which could only be mitigated by the withdrawal of the relevant reasons for refusal. That didn't happen and, as a matter of process, it could have only been realised with Committee approval. In our view, this is where Leading Counsel's assessment of the capacity of the RoR to provide the ability to redefine the case finds its greatest point of weakness, absent referral back to the Councillors to secure Committee endorsement.

13.32 As above, the provision of a more formal process of review by Committee as the case for the appeal was formulated and evolved would have provided the clear opportunity to address this issue. The conclusion of the professional team that there was no case to answer on air quality and noise impacts could have been spelt out to Councillors, together with the very clear attendant risk of costs in continuing with these unsubstantiated complaints. It would appear that such advice, in all likelihood, would have not been followed by the Committee, but Officers would then have been absolved of any responsibility and any need to find any further blame would have been clear. The certain consequence of not taking this action are made clear in the assessment of the three Inspectors in the costs award:

"Attempts to substantiate these reasons for refusal during the appeal were not convincing. Nor was the reliance on additional information provided in the ESA, which identified only marginal changes in the assessment of effects from the ES. The Council nevertheless maintained its case and presented evidence relating to all four refusal reasons.

This was notwithstanding the Council's witnesses individually accepting that the issues raised could be overcome by conditions or obligations, and its planning witness having accepted in written evidence that the development was acceptable in planning terms overall. Again, it was concluded that the development would accord with the development plan and should be granted planning permission subject to conditions and obligations. Such an approach could and should have been taken at the time of the Council's decision and did not warrant the Council's continued opposition to the proposal at appeal. Ultimately, the issues relied upon at appeal, some of which had been discussed during the committee, could not reasonably have been expected to materially alter the favourable planning balance. Indeed, the Council's own appeal evidence was that the planning balance was favourable, such that planning permission should be granted."

13.33 The second judgement made by the professional team relied heavily on the ability to convince the Inspectors that Condition 15 was reasonable, appropriate and satisfied the tests in Regulation 122 of the Community Infrastructure Regulations 2010 (as amended). Whilst the provision of the suggested condition obviously required some refinement of the case presented by the fourth RoR, the greater risk it presented was the highly significant prospect that it wouldn't be acceptable to the appeal Inspectors as it would not satisfy the necessary legal tests.

13.34 In our view, those risks should have been abundantly clear to the professional team, and in particular the legal team, because the form of Condition 15 on any reasonable examination

was convoluted, unduly restrictive and would unnecessarily and unreasonably affect SAL's ability to bring the development forward. We would, on these terms, unreservedly agree with the assessment provided in the SAL full response to Condition 15 in their submissions of 24th February 2021:

"The fact that condition 15 seeks to regulate the environmental effects of development plainly cannot be justification for the imposition of a completely novel type of planning condition, which seeks to revisit the principle of the development following the grant of permission. It is commonplace for conditions to be imposed for the purpose of regulating environmental impacts, including in respect of major development projects. The fact that condition 15 is not "necessary" to regulate the environmental impacts of the scheme is underlined by the fact that UDC has been unable to identify any precedent for the imposition of a 'phased release' condition of the kind proposed here. Moreover, and fundamentally, there is no evidence that this development will give rise to any significant environmental effects, so as to justify the imposition of this condition in the first place. The condition is clearly neither "necessary" nor "directly related" (i.e. proportionate) to the negligible environmental impacts that have been assessed as arising from this development."

13.35 The limitations of the approach taken by the professional team are made clear in the assessment of the three Inspectors at paragraph 142 of their Decision Letter:

"The Council proposes alternative conditions to deal with noise, air quality and carbon. Its primary case involves a condition, referred to during the Inquiry as 'condition 15', which would impose restrictions based upon the impacts assessed in the ES/ESA, along with future more stringent restrictions (using some interpolated data from the ES/ESA) and a process that would require the Council's reassessment and approval periodically as the airport grows under the planning permission, allowing for a reconsideration against new, as yet unknown, policy and guidance. In light of the Panel's conclusions on these matters, there is no policy basis for seeking to reassess noise, air quality or carbon emissions in light of any potential change of policy that might occur in the future. Furthermore, it would be likely to seriously undermine the certainty that a planning permission should provide that the development could be fully implemented. This appeal must be determined now on the basis of current circumstances and the proposed 'condition 15' is not necessary or reasonable."

13.36 This assessment is further expanded upon by the Inspectors in the cost decision in the following terms:

"The reasons for refusal became vaguer still at reason 3 which sought to rely on a conflict with general accepted perceptions and understandings of the importance of climate change. Climate change and related policy matters had been considered at length by the Council in light of extensive submissions on the topic. Whilst the 2050 Target Amendment to the Climate Change Act 2008 occurred after the initial resolution to grant, no material change in relevant and applicable policy was identified by the Council, nor were the negligible impacts of the development altered. It was not credible or respectable for the Council to identify this as a matter that should now result in the refusal of permission…

So far as conditions were pursued, much time was taken at the Inquiry dealing with 'condition 15', an unnecessarily onerous and misconceived condition that patently fails to meet the relevant tests. The strength of evidence in favour of the proposal is such that the application should clearly have been granted planning permission by the Council. Its reliance on a perceived direction of travel in policy or emerging policy that may never come into being in the form anticipated is not a sound basis for making planning decisions. As such, the appeal should not have been necessary."

13.37 Importantly, this assessment was also endorsed by the Honourable Mrs Justice Lang DBE on 7th July 2021 in her review of the application for the Statutory Review. In her judgement:

"Its reasons for concluding that Condition 15 was not necessary or reasonable were clearly explained at DL 142. It applied the correct legal and policy tests. This was an exercise of planning judgment which the Claimant cannot challenge in this claim."

13.38 As above, the provision of a formal process of review by Committee would have provided the opportunity to address this further issue. Once more, the conclusion of the professional team that the proposed Condition 15 was the correct response to the last two RoR could have been debated and the condition might have been abandoned, revised or accepted. In any event, all of the attendant cost risks could have been identified and the responsibility for proceeding with that risk would clearly then have then rested with the Councillors. Absent this process of review, it wasn't reasonable for the professional team to assume that this cost risk had been implicitly accepted by Councillors in reliance upon their interpretation of the RoR and in their unsupported promotion of Condition 15.

13.39 In our view, the risks of a full award of costs against UDC in the promotion of the appeal case would have been very clear and apparent to the professional team. The fact that this had already been flagged by Leading Counsel's in his very clear assessment of the case and the costs risk at the time of the Extraordinary Committee Meeting in January 2020, made certain that the identified risk could only increase (in prospect and cost) with each step taken to justify the RoR on the terms identified in evidence.

Constitutional Safeguards

13.40 Reading between the lines, the view was formed by Officers (and possibly, in the turn, by the professional team) that Councillors had made a bad decision against very clear advice; that decision wouldn't change in the face of any expert assessment or advice; seeking further instructions would be painful and pointless; the best had to be made of a bad lot; and, ultimately, the Councillors only had themselves to blame if a full costs award followed. All this, may of course be entirely accurate, but the primary duty of any Officer is to protect the interests and reputation of the Council and in this case the available safeguards weren't followed.

13.41 Whilst limited, those safeguards are available in the Constitution and are provided by reference to the function of the Monitoring Officer and Chief Finance Officer in requiring the provision of an Extraordinary Meeting pursuant to Rule 3 of Part 4 of the Constitution.

13.42 Turning back to the January 2020 determination, that decision was made by Councillors at the Extraordinary Committee Meeting in the belief that the refusal of planning permission for the Proposal would be "*contrary to Uttlesford Local Plan Policy ENV11, …ENV13 and GEN6, GEN1, GEN7, ENV7, ENV11 and ENV13."*

13.43 That clear position entered a process of transition from a claimed conflict with adopted policy to one of potential compliance, at the submission of UDC's Statement of Case. This then moved to a place of substantial compliance at the submission of the UDC evidence to the Inquiry on the terms detailed above. This required the exercise of planning judgement and, as such, the transition from the terms of the RoR to the presented appeal case could have only have been sanctioned in reliance upon the broad delegated powers made available to the Assistant Director Planning & Building Control. Whilst, the same delegated authority is made available to the Chief Executive Officer and the Director of Public Services it is, in our view, only fair to suggest that the final planning judgement could only be made by those with the direct conduct of this complex case. That being, the Assistant Director Planning & Building Control and, possibly, by the relevant legal advisor within UDC. Whilst nuanced and conditional, this transition in the UDC case was made abundantly clear in Leading Counsel's commentary note of 6th January 2021.

13.44 In our view, this must have been very clear to the supervising Officer(s) who had the conduct of the appeal case and in their participation in the settlement of the evidence that was ultimately submitted to the Inquiry in December 2020. At the very latest point, the

issued raised in the Councillors complaint and the response from Leading Counsel should have required Officers to revisit the RoR as referenced in the '16 questions'. At the very lowest level, this should have raised a concern with Officers that the earlier determination in January 2020 was, by this point, potentially defective.

13.45 The Officer(s) with delegated authority who were involved at that time should have been aware of this potential flaw in the decision making process and, in remedy, a request should have been made (most probably by the Monitoring Officer or Chief Finance Officer) for an Extraordinary Meeting pursuant to Rule 3 of Part 4 of the Constitution. Even if this interpretation of the provisions of the Constitution is overstated, common sense would suggest that the profile of the case and the potential reputational and cost consequences of the approach taken by the professional team were sufficient to have required an informed and effective Monitoring Officer/Chief Finance Officer to take this step.

14. Lessons Learned

14.1 It was on any reasonable examination predictable that any appeal against the RoR by SAL would present a very difficult case for UDC to defend. Indeed, this outcome had been predicted in the clearest possible terms by Leading Counsel. There was, as a consequence, a very high prospect that the appointment of the professional team would come at a substantial cost, that the outcome of the proceedings presented a very high likelihood of a substantial costs award against UDC and that there was the potential for further reputational damage to the local authority.

14.2 These were obvious, apparent and pronounced risks to UDC that should have been reflected in an automatic procedure of monitoring and review. It was a clear error of judgement by both Councillors and Officers that this facility was not put in place at the Extraordinary Committee Meeting in January 2020.

14.3 This absence of oversight was then compounded by the approach taken by the professional team under the supervision of the relevant Officers who had delegated authority and the conduct of the appeal case. Those Officers supervised and endorsed the transition of the appeal case from the terms of the RoR to the presented case of conditional approval of the Proposal. Whilst there was some limited scope for this interpretation and approach within the terms of the RoR, the obvious and inevitable exposure to costs should have forced those Officers to refer the case to the Monitoring Officer/Chief Finance Officer with a request that an Extraordinary Meeting should be secured pursuant to Rule 3 of Part 4 of the Constitution. In turn, it must also the case, that if either the Monitoring Officer or Chief Finance Officer were already fully aware of the emerging case they should have taken this action under their own initiative.

14.4 It should, however, be stressed that this is an extreme case by reference to: the decision making process leading to the appeal; the profile and exposure of the proceedings; and the consequential financial and reputational cost to UDC. This should then temper the response of UDC to the issues raised by this specific decision making process and, in broader application, any new procedural steps that are put in place should be realistic and proportionate.

14.5 As detailed above, the current terms of the Constitution rely upon individual Officers to raise a request for an Extraordinary Meeting based entirely upon their judgement and intervention. The need for that judgement to be made will almost always arise in an period of intense work and, as in this case, where political pressure is heightened. It is, in this context, unreasonable and unrealistic to assume that Officers would regularly reflect on the terms of the Constitution (in the way detailed above) and then conduct an audit of their decisions to maintain confidence of continuing compliance.

14.6 In this context, the obvious remedy would be to extend the provisions of Article 13.3.2 of Part 2 of the Constitution that define those *"key decisions by or on behalf of the Leader or*

Cabinet" to provide an automatic referral process in specific circumstances. We would recommend that this is achieved by the extension of the categories of decisions identified at Article 13.3.2 to include:

"The decision relates to a planning proposal likely to potentially result in a cost award against the Council in excess of £[X]00,000 or the provision of external professional services in excess of £[X]00,000 "

14.7 These terms could be extended to address those planning decisions made against Officer advice or in conflict with adopted policy, but in our view this is too broad a category of decision and would act against the interests of good management of UDC's business by overburdening the decision making processes identified in the Constitution. We also take a similar view in respect of those decisions on planning matters that might cause reputational harm, because this is too subjective and would be open to misinterpretation.

14.8 The proposed approach would ensure that any planning decision presenting this cost risk that is made by the Planning Committee or is managed and determined through delegated authority should be automatically elevated to the Leader or Cabinet as a "key decision" requiring oversight and approval. The Leader or Cabinet, in turn, would then have authority to direct those identified under Rule 3 of the Constitution to call an Extraordinary Meeting.

14.9 These arrangements should not take away from the continuing functions in monitoring and assessment of planning decisions by the Monitoring Officer and Chief Finance Officer that are currently envisaged by the Constitution. There is, however, scope to better formalise these arrangements by the extension of the provisions of Part 3 of the Constitution relating to the function and duties of these appointed Officers.

14.10 These revised terms could require the Monitoring Officer or Chief Finance Officer to audit and review decisions that relate to any planning proposal likely to result in a potential cost award against UDC that fall below the thresholds detailed in the proposed amendment to Article 13.3.2 detailed above and, in particular, where there is an anticipated risk of escalation beyond the identified cost thresholds.

14.11 This approach would create a formal context for the audit of planning decisions as detailed above and, in turn, might assist in managing the potential administrative burden associated with the proposed amendments to Article 13.3.2 of Part 2 of the Constitution. It is also an approach that would assist in providing an established process for review by the Monitoring Officer or Chief Finance Officer that should then protect and give justification for any necessary intervention.

14.12 The provision of training and support to those Officers holding delegated authority should also be considered in response to an increasingly complex planning process and which requires very specific expertise in response to rapidly changing policy and legislative. That same training and guidance should obviously be extended to Councillors who often have to make challenging decisions in response to a myriad of documentation and a range of complex and inter-playing material considerations.

15. Summary and Conclusions

15.1 The advice of Officers in assessment of the Proposal from their original assessment in November 2018 through to the determination of the appeal was based upon consistent, detailed and robust advice. The decision of the Extraordinary Committee Meeting in January 2020 was reached without the benefit of any substantiated evidence in respect of a Proposal that was substantially compliant with national and local policy. Whilst Councillors were clearly entitled to reach that decision, it inevitably exposed UDC to a clear financial risk both in terms of their own costs in defence of their case and because of the high prospect of a costs award against the local authority.

15.2 In turn, the Officers approach in formulation of the UDC appeal case was always reliant upon the weakest of foundations and this was then reflected in the difficulties faced by Officers and the appointed consultative team in the preparation of their evidence. The attendant risk of a full award of costs against UDC would have been very clear and apparent by the professional team throughout this process and as identified in the clearest possible terms in Leading Counsel assessment of the case at the time of the Extraordinary Committee Meeting in January 2020. It is, however, clear that very modest steps were taken to mitigate that risk and this was particular the case with regard to missed opportunity to withdraw some of the RoR in response to the clearly limited available evidence in support of the Council's case.

15.3 In our view, this was the product of a system failure rather than the mistake of an individual Councillor and Officer, that centred upon the absence of sufficient oversight in the provision of an automatic procedure of monitoring, review and reassessment. Again, this mechanism should have been put in place by both Councillors and Officers at the Extraordinary Committee Meeting in January 2020 in response to the obvious reputational and cost risks. The absence of these arrangements placed Officers in an invidious position because they had been tasked in the formulation of an apparently hopeless case that was very clearly politically charged and in the absence of any apparent 'safety net' or other form of safeguard.

15.4 The absence of oversight was then compounded by the approach taken by the professional team under the supervision of the relevant Officers who had delegated authority and the conduct of the appeal case. Those Officers supervised and endorsed the transition of the appeal case from the terms of the RoR to the presented case at Inquiry of conditional approval of the Proposal. It must , in turn, have been the case that the identified risk could only increase (in prospect and cost) with each step taken to justify the RoR on the terms identified in evidence.

15.5 The remedy should be to provide an automatic referral process in specific circumstances where there is a significant cost or reputation risk to UDC and to imbed these terms in the Constitution. Those arrangements would safeguard both Councillors and Officers and, ultimately, would operate in the best interests of the local authority and members of the public.

Eversheds Sutherland (International) LLP

5th May 2022