IN THE MATTER OF UTTLESFORD DISTRICT COUNCIL

AND

PLANNING APPLICATION UTT/18/0460/FUL

OPINION

Introduction

1. I have been asked to advise Stop Stansted Expansion ("SSE"[1]) as to:

    a. The options which are lawfully open to Uttlesford District Council ("UDC") in respect of their consideration of Planning Application UTT/18/0460/FUL, made on 22nd February 2018 by Stansted Airport Limited ("STAL"), given a resolution which was passed by UDC on 28th June 2019; and

    b. The adequacy of a proposed Section 106 Agreement ("S106 Agreement") which has been agreed between UDC, STAL and Essex County Council ("ECC") with regard to that application.

2. The structure of this Opinion is as follows:

    a. In paragraphs 3-15 below, I set out the context within which I have been asked to advise:

        i. First by reference to the resolutions passed by UDC in respect of Planning Application UTT/18/0460/FUL (paragraphs 3-14);

        ii. Then, by reference to a related legal challenge being brought by SSE (paragraph 15);

[1] SSE was established in 2002 in response to Government proposals for major expansion at Stansted Airport. SSE's objective is to contain the development of Stansted Airport within limits that are sustainable.

b. In paragraphs 16-20, below I set out the law regarding circumstances in which a Local Planning Authority ("LPA") may reconsider a resolution to grant planning permission before issuing a Decision Notice;

c. In paragraphs 21-47 below, I address the options open to UDC in the light of the resolutions passed with respect to Planning Application UTT/18/0460/FUL:

   i. First, making some introductory remarks as to the breadth of their discretion and how they should move forward (paragraphs 21-26);

   ii. Then, looking at two areas where there are potential reasons for reaching different planning judgements to those reached earlier, without there being any intervening change of circumstance or new material consideration (paragraphs 27-33);

   iii. Then, looking at four areas where intervening changes of circumstance and/or new material considerations appear to have occurred and/or arisen (paragraphs 34-47);

d. In paragraphs 48-50 below, I identify a practical way forward for UDC in the short-term and pending the outcome of the legal proceedings referred to in sub-paragraph a.ii above;

e. In paragraphs 51-59 below, and without prejudice to the views expressed elsewhere in this Opinion, I address the discrete issues related to the adequacy of the proposed S106 Agreement;

f. In paragraphs 60-61 below, I address the costs risk of UDC potentially changing its mind on Planning Application UTT/18/0460/FUL, and

g. In paragraphs 62-63 below, I make some concluding remarks.

The Context

The Consideration of Planning Application UTT/18/0460/FUL

3. By Planning Application UTT/18/0460/FUL, STAL sought planning permission for the

following development:

> "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."

4. On 14th November 2018, UDC's Planning Committee resolved (albeit by the slenderest of margins - the casting vote of the Chair) to approve Planning Application UTT/18/0460/FUL subject to completion of a Section 106 Agreement ("S106 Agreement") which met specified Heads of Terms. Whilst the Officers' Report identified the obligations required within that S106 Agreement, the precise form that it should take was delegated to Officers. A proposed S106 Agreement was subsequently drawn up between the Council, Essex County Council (as Highway Authority) and STAL.

5. The Secretary of State for Housing, Communities and Local Government instructed UDC not to issue a Decision Notice pursuant to the above resolution until he was satisfied that it was appropriate to do so. On 20th March 2019, however, the Secretary of State notified UDC and other parties that he had decided not to call-in the application, thereby authorising UDC to issue a Decision Notice. The following week UDC's Chief Executive advised members that the Decision Notice would be issued 'within days' and that the S106 Agreement only awaited the official seal of UDC, Essex County Council and STAL.

6. On 9th April 2019, Cllr Dean (the leader of the UDC Liberal Democrats) advised a meeting of the full Council of UDC that he had secured the stipulated minimum of 10 members' signatures to require an Extraordinary Council Meeting ("ECM") of UDC to take place to consider the following resolution:

> "To instruct the Chief Executive and fellow officers not to issue a Planning Decision Notice for planning application UTT/18/0460/FUL until the related Section 106 Legal Agreement between UDC and Stansted Airport Limited and the Planning Conditions have been scrutinised, reviewed and approved by the Council's Planning Committee after the local elections."

7. On 25th April 2019 (shortly before the Local Authority elections on 2nd May 2019), an ECM was held to consider the above motion. It was defeated by 18 votes to 14. Immediately thereafter, however, a further ECM was requisitioned by Cllr Lodge (leader of the "Residents for Uttlesford" group of Councillors) to consider the following resolution:

   "To instruct the Chief Executive and fellow officers not to issue the Planning Decision Notice for planning application UTT/18/0460/FUL until members have had an opportunity to review and obtain independent legal corroboration that the legal advice provided to officers, including the QC opinion referred to by the Leader of the Council on 9th April 2019, confirms that the proposed Section 106 Agreement with Stansted Airport Limited fully complies with the Resolution approved by the Planning Committee on 14 November 2018 such that officers are lawfully empowered to conclude and seal the Agreement without further reference to the Planning Committee."

8. The second ECM was originally scheduled for 3rd June 2019, but was deferred until 28th June to allow further time for consideration of legal advice. In the meantime:

   a. An informal meeting was held on 30th April with those members who had requisitioned the second ECM, at which it was agreed that Officers would not complete the S106 Agreement and issue the planning consent for the time being; and

   b. Shortly thereafter, and on 2nd May 2019, the local elections took place and the political landscape in Uttlesford changed dramatically:

      i. The hitherto ruling Conservative group lost 20 seats, leaving them with just 4 Councillors; and

      ii. "Residents for Uttlesford" gained 16, leaving them in overall control with 26 Councillors (alongside 7 Liberal Democrats and 2 Independents).

9. The newly constituted UDC held the second ECM on 28th June 2019. Inevitably, many members had not participated at all in the prior decision-making on Planning Application UTT/18/0460/FUL and had little or no briefing on the matters to be subject to any S106

Agreement.

10. The second ECM began with the presentation of a residents' petition with 1,700 signatures, stating as follows:

> "The 2018 Stansted Airport Planning Application for 43mppa must now be referred back to the UDC Planning Committee for further consideration having regard to outstanding concerns as to the adequacy of the proposed Section 106 Agreement and to the new material considerations and changes in circumstances that have arisen since provisional approval was granted in November 2018."

11. After the presentation of that petition, the resolution set out at paragraph 7 above was considered, during which an amendment was proposed, deleting the original wording in its entirety and replacing it with the following:

> "In accordance with Section 70(2) of the Town and Country Planning Act 1990 as amended by Section 143(2) of the Localism Act 2011 to instruct the Chief Executive and fellow officers not to issue a Planning Decision Notice for planning application UTT/18/0460/FUL unless and until the Council's Planning Committee have had a sufficient opportunity to consider in detail, as timely as possible:
>
> (i) the adequacy of the proposed Section 106 Agreement between UDC and Stansted Airport Ltd, having regard to the Heads of Terms contained in the resolution approved by the Council's Planning Committee on 14th November 2018;
>
> (ii) 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 ask the Planning Committee to determine the authorisation of the issue of a Planning Decision Notice."

12. There was an Officers' Report which considered the un-amended resolution and another which considered the amendment. For present purposes, I need only quote from the latter:

"3. The main report to this meeting addresses issues raised around the adequacy of the proposed section 106 agreement. The detailed legal advice shared with all members on a confidential basis confirms, subject to one point, that the draft S106 Agreement with Stansted Airport Ltd faithfully reflects the requirements of the resolution approved by the Planning Committee on 14 November 2018 and there is no impediment to issue consent. The issue outstanding at the time advice was obtained related to the rail users' discount. This is addressed in the main report and the officer advice is that the draft section 106 agreement is fully compliant with the instructions of the Planning Committee.

4. The main report also addresses the question of whether there have been "any new material considerations and/or changes in circumstances since 14 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." The report considers considerations that have been raised and explains that there have been no new material considerations and/or changes in circumstances since 14 November that would justify reconsideration of the decision taken by the Planning Committee on that date. It is worth repeating the extract quoted in the earlier report from Mr Justice Sullivan's judgment in *Kings Cross Railways Lands Group v London Borough of Camden* in 2007:

"If a local Planning Authority which has decided only 8 months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable."

5. It may help members if they were to turn their minds to how the Planning Committee could now justify a different decision to that made in November. In particular, what reasons for refusal could possibly be justified now arising from new considerations? Such reasons would have to be expressed in terms of the requirements of Section 70(2) of the 1990 Act as amended. These are:

(a) the provisions of the development plan, so far as material to the application,

...

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations.

Financial implications

6. The potential financial implications of:

- failing to issue a decision notice without reasonable justification or
- refusing the application on grounds that cannot be adequately evidenced, or
- taking into account considerations that are not material to planning, or any other unreasonable behaviour

leading to an adverse award of costs are such that officers will be advising Cabinet that there is insufficient headroom either within revenue budgets or the earmarked planning reserve to cover potential costs. As well as third party costs, the Council would also have to meet its own costs in respect of representation at an appeal.

7. There is £641k in the Planning Reserve of which only £387k is unallocated. However, this balance needs to provide for the cost of all appeals against planning decisions as well as any unexpected or additional Local Plan costs. If a planning decision notice is not issued promptly in the terms authorised by the Planning Committee on 14 November 2019, the Section 151 officer will need to report to Cabinet on measures to ensure that the Council provides for the potential appeal costs relating to this application. Options include freezing the Strategic Investment Fund (£2,160k) until the issue that the Council faces is resolved."

13. Despite the above Officers' Report, the amended resolution was passed overwhelmingly (27 votes in favour, 1 against and 1 abstention).

14. Hence, as matters stand, UDC have formally decided that no Decision Notice is to be issued pursuant to Planning Application UTT/18/0460/FUL until the newly constituted Planning Committee have considered for themselves, both:

a. Whether there have been any changes in circumstances since that date which may justify reaching a different decision to that which was then made; and

b. The adequacy of the S106 Agreement considered against the Heads of Terms as of 14th November 2018 when the first resolution was passed.

The Imminent Judicial Review

15. I come onto certain other changes of circumstance in paragraphs 34-47 below. However, one which needs to be identified at the outset is that on 12th–14th November 2019 (i.e. in less than two months' time), a High Court case is listed for hearing in which SSE is challenging the decision of the Secretary of State for Transport not to treat the development proposed by Planning Application UTT/18/0460/FUL as a Nationally Significant Infrastructure Project ("NSIP"). If SSE's challenge succeeds, UDC would not have legal authority to determine the application at all; rather, it would be a proposal for which a Development Consent Order ("DCO") is required, to be determined at a national level and not by the LPA, UDC.

The Law relating to Reconsideration of Planning Applications following Resolution to Grant and before Issuing a Decision Notice

16. There are four points of decided legal principle which underpin the options open to UDC in the light of the chronology of events described in paragraphs 3-14 above.

17. First, a resolution to grant planning permission is an "inchoate" decision and has no legal effect until the actual grant of planning permission through issuing a Decision Notice. Indeed, it is not inevitable that the resolution will ever ripen into an actual grant. For example, where such a resolution is subject to agreeing a S106 Agreement it is wrong to assume that agreement will be reached; and a LPA may, in its discretion, revoke a resolution – see: ***R (Burkett) v Hammersmith and Fulham LBC*** UKHL 23 at [34], [39] and [42].

18. Second, whenever an intervening change of circumstance/new material consideration arises after a resolution to grant but before the issuing of a Decision Notice, the application must be brought back before the Planning Committee so that the same can be taken into account – see: in ***R (Erin Kides) v South Cambridgeshire DC*** [2002] EWCA 1370 at [121] and [125–126]. In particular:

a. A consideration is "material" if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the 'decision-maker scales', would tip the balance to some extent, one way or the other.

b. Where a delegated officer who is about to sign a Decision Notice becomes aware of a new material consideration, Section 70(2) of the Town and Country Planning Act 1990 requires that the LPA have regard to that consideration before finally determining the application.

c. In such a situation, therefore, the authority of the delegated officer requires him to refer the matter back to Committee for reconsideration in the light of the new consideration. If he fails to do so, the LPA will be in breach of its statutory duty.

d. In practical terms, that meant that:

> "126. ... where, since the passing of the resolution some new factor had arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision."

19. Third, a Council is lawfully entitled to reconsider a planning application after it has resolved to grant but before it issues a Decision Notice and reach a different decision, provided it has a good planning reason for doing so – see: ***Kings Gross Railway Lands Group v LB Camden*** [2007] EWHC 1515 (Admin) at [13–20], a case referred to in the Officers' Report and in which (like Uttlesford) there had been a change of Council control between a resolution to grant and the issuing of a Decision Notice. In particular:

a. The earlier resolution is a material consideration to which the newly elected Council was bound to have regard - see: ***North Wiltshire District Council v Secretary of State for the Environment*** [1992] 3PLR 113 per Lord Justice Mann at [122F-H].

b. The newly elected Council was, however, entitled as a matter of law to "change its mind" and revoke the earlier resolution to grant planning permission - see: ***Burkett*** (supra) at [39].

c. The weight to be attached in any particular case to the desirability of consistency in decision-making, and hence the weight to be attached to the earlier resolution, was a matter for the newly elected Council to decide.

d. However, given the desirability in principle of consistency in decision-making by Local Planning Authorities, in practice the newly elected Council would have to have a "good planning reason" for changing its mind, and in some cases a "very good reason"[2] - that was simply a reflection of the practical realities: if a Local Planning Authority was unable to give a good planning reason for changing its mind, it would probably face an appeal at which it would be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable.

e. A material change of circumstances since the earlier decision was capable of being a good reason for a change of mind – see: ***Erin Kides*** (supra) at [125-126].

f. However, a material change of circumstances was not the only ground on which a Local Planning Authority may change its mind: a newly elected Council was fully entitled simply to come to different planning judgements on the same material and weigh the resultant planning balance differently:

> "18. ... A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taken

[2]"If a local planning authority which has decided only eight months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind" it would be at risk of costs see: [17] of the judgment.

considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission.

19. An example canvassed during the course of submissions was that of a Local Planning Authority which resolved to grant planning permission for an inappropriate development in the Green Belt, subject to a Section 106 Agreement, on the basis that the very special circumstances prayed in aid by the applicant outweighed the harm to the Green Belt and other harm. On revisiting the matter when the Section 106 Agreement was finalised, that Local Planning Authority could properly reverse its earlier decision if, on reflection, it considered the harm was not outweighed by the special circumstances. Thus, it was not necessary for [newly elected Council or newly constituted Planning Committee] ... to be satisfied that there had been any material change of circumstances ... It was entitled to conclude that, having regard to all the circumstances considered [earlier], a different balance should be struck.

20. Neither the Defendant nor the Interested Party dissented from the proposition that, as a matter of law, there did not need to have been a material change of circumstances in order to justify a different decision ... A change in circumstances was one of the more obvious reasons which might justify a change of mind by a Local Planning Authority, but it was not the only possible reason."

20. Fourth, whilst appreciating the concern expressed in ***Kings Cross Railway Lands Group*** that a LPA which changed its mind was exposing itself to a risk of costs unless it was able to give a good reason, or in some cases a very good reason, for that change of mind, it is to be noted that on any consideration (or reconsideration) of a planning application there are series of planning judgements which fall to be made and "since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable" – see: ***R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions*** [2001] EWHC 74 (Admin) at [7].

The Options Facing UDC

Introduction

21. It follows from the analysis in paragraphs 16-20 above that (as reflected in the resolution passed by UDC on 28th June 2019), the newly elected Council:

    a. **May** reconsider Planning Application UTT/18/0460/FUL and come to a different conclusion as a matter of its own planning judgement even if there has been no intervening change of circumstance/new material consideration, provided it has a good planning reason for reaching that different view (and if it has no good planning reason for a change of mind it is at risk of costs being awarded against it, as the Officers' Report reminded members); and

    b. **Must** consider any intervening change of circumstance/new material consideration which has arisen in respect of Planning Application UTT/18/0460/FUL and which might cause it to reach a different decision.

22. I consider each of the above possibilities below and in turn. Before doing so, however, it will be appreciated that any Planning Application to increase a passenger movement cap at a major airport by 8 million per annum necessarily raises multiple issues of planning judgement, as is amply evidenced both by the documentation amassed in connection with Planning Application UTT/18/0460/FUL and the time taken to decide a previous, similar, application in 2006-2008:

    a. As at the date of determination of Planning Application UTT/18/0460/FUL on 14th November 2018, there were 2,352 documents on the application file, amounting to 13,000 pages of evidence, analysis and commentary (by way of comparison, for the similar 2006 STAL Application UTT/0717/06/FUL, the application file consisted of 1,854 documents amounting to 11,000 pages); and

    b. The 2006 Application resulted in a five-month Public Inquiry, followed by three months' consideration by the Planning Inspector and a further nine months' consideration by the Secretary of State, before a Decision Letter was finally issued on 8th October 2008.

23. It follows that, as noted in ***Newsmith Stainless*** at [7], there are likely to be a whole series

of issues in respect of which a significant element of judgment will be involved and on which where there will be scope for a broad range of possible views, none of which can be categorised as unreasonable.

24. Furthermore, and noting the costs concern expressed in ***Kings Cross Railway Lands Group*** where an LPA changes its mind having "decided only eight months previously, following extensive consultations and very detailed consideration", it is also to be noted that whereas the 2006 application was determined by UDC after 19 special meetings of the Planning Committee and, on appeal, after the lengthy Inquiry described above, Planning Application UTT/18/0460/FUL was decided in just one sitting, with members having just 4 hours to ask questions, and having been sent a 196 page supplement to a 277 page agenda on the eve of the meeting.

25. In paragraphs 27-33 below, I highlight just two areas where one can identify particular reasons why the newly constituted Planning Committee might weigh the planning balance differently. Thereafter, and in paragraphs 34-47, I also highlight areas where an intervening change of circumstance/new material consideration may have arisen.

26. However, it strikes me that what is probably needed (but see paragraphs 58-60 below) is for that Committee to reconsider the application entirely afresh, with another Officers' Report (inter alia addressing all of the matters identified below), having been fully briefed on the proposal and its implications and impacts:

    a. First, as identified in paragraphs 22-23 above, there will be multiple issues of planning judgement, upon which different views might reasonably be taken;

    b. Second, UDC has already resolved not to issue a Decision Notice until UDC's newly constituted Planning Committee have had a sufficient opportunity to consider in detail both the adequacy of the proposed S106 Agreement and whether any new material considerations and/or changes in circumstances justify striking the planning balance differently; and

    c. Third, that newly constituted Planning Committee will have many members on it who have not participated at all in the prior decision-making on Planning Application UTT/18/0460/FUL, and had little or no briefing on the matters to be

subject to any S106 Agreement.

Matters of Planning Judgment

Increased Number of Flights

27. On 21st November 2018 it emerged that the (then) Chair of the Planning Committee, whose casting vote proved decisive on 14th November 2018, had not realised that approving the application would result in at least an additional 25,180 flights per annum compared to the number of flights achievable with the extant cap of 35 million passengers per annum ("35mppa"), which Planning Application UTT/18/0460/FUL proposed to raise to 43mppa. It subsequently transpired that at least one other Member of his Committee was under the same misapprehension as at 14th November 2018.

28. It is not surprising that members were unclear on this point because the Officers themselves did not appear to appreciate that whilst there was no proposal to increase the existing cap on the total number of permitted flights from 274,000 per annum, that existing limit was academic in that it could not be reached with the other existing caps of 35mppa, 243,500 passenger flights ("PATMs"), 20,500 cargo flights ("CATMs"), and 10,000 "Other" flights. In particular: STAL predicted in its planning application documents that Stansted would carry an average of 170 passengers per plane. It would therefore take 205,900 PATMs to cater for 35mppa. Thus, even if the CATM and "Other" caps were fully utilised, there would be a maximum of 236,400 flights under the existing permission - i.e. 37,600 below the 274,000 cap;

29. However, STAL does not envisage needing any more than 16,000 CATMs and 5,000 "Other" flights, meaning that Stansted would need no more than 226,900 total flights to cater for 35mppa - i.e. 47,100 below the 274,000 cap.

30. It is to be noted, further, that STAL did a slightly different calculation which produced a figure of 248,820 flights for 35mppa and 274,000 flights for 43mppa, and so STAL acknowledges that approval of the application would enable at least 25,180 extra flights.

31. The above three estimates produce a range of 25,180 - 47,100 additional flights per annum, but at no stage did Officers make it clear to the Planning Committee that allowing an increase in passenger numbers from 35mppa to 43mppa would enable (require) an increase of this range. In my Opinion, that is a material consideration which at least some of the

previous Committee members appear to have overlooked and which might justify a newly constituted Planning Committee weighing the planning balance differently, noting that whilst the number of flights would be within the previously permitted cap, that previously permitted cap could never have been reached.

The World Health Organisation ("WHO") Guidelines

32. On 22nd October 2018, new and updated "WHO Environmental Noise Guidelines" were published, setting significantly lower thresholds for the avoidance of adverse health impacts from environmental noise, including thresholds specifically for aircraft noise. Their importance was recognised, even before they were published, in UDC's December 2017 Scoping Opinion, as follows:

> "In the event that the World Health Organisation ("WHO")'s new evidence on the impacts of aviation noise is published before a determination to grant planning permission, the environmental statement assessment must incorporate this evidence (for example, by way of supplementary assessment)."

33. However, two points arise with regard to these new WHO Guidelines.

a. First, it is unclear whether members of the old Committee were fully aware of the new Guidelines and their importance; the new WHO Guidelines were completely overlooked in the Officers' Report. Further, whilst it has been argued by Officers that the Planning Committee was aware of the new WHO Noise Guidelines because Professor Banatvala (of SSE) had made a (four-minute) slide presentation at a 'Public Speaking' session on 7th November 2018 and had referred to the new WHO Noise Guidelines:

    i. Just one of the Professor's eight slides referred to the new WHO Noise Guidelines;

    ii. The 'Public Speaking Session' on 7th November was not a Planning Committee meeting (and, whilst most members of the Planning Committee accepted the invitation to attend, two were absent); and

    iii. It is therefore not surprising that, as SSE later learned in email

correspondence, the (then) Planning Committee Chair was completely unaware of the new WHO Guidelines at the time of casting his decisive vote (and there may of course have been other members similarly unaware).

b. Second, and in any event, whether or not previous Committee members did overlook those Guidelines, of themselves the fact of new noise thresholds being set specifically for aircraft noise might justify a newly constituted Planning Committee weighing the planning balance differently. The newly constituted Planning Committee should, therefore, be allowed to consider the materiality of the new WHO Noise Guidelines in relation to Application UTT/18/0460/FUL.

Intervening Change of Circumstance/New Material Consideration

Expansion at other London Airports

34. STAL promoted Planning Application UTT/18/0460/FUL on the basis of there being no significant scope for expansion at any other London airport before 2030. This included the assertion that Heathrow and Gatwick were "already effectively full" and its assumption that the third Heathrow runway ("HR3") would not open until 2030. STAL further assumed that Luton would be limited to 18mppa, London City to approximately 6.5mppa and London Southend limited to approximately 2mppa. These projections were accepted at face value by UDC Officers and presented to members in the Officers' Report which reproduced STAL's demand projections and echoed STAL's assertion that there would be "unmet demand in the London area from 2022, assuming existing constraints remain in place".

35. It is now clear, however, that all six London airports have firm plans to increase capacity:

a. The planning for a third runway at Heathrow continues apace, with a view to a 2026 opening (Heathrow currently handles 80mppa and a third runway could increase this to 130mppa);

b. Gatwick has announced plans to expand up to 70mppa, which compares to its present throughput of 46mppa;

c. Luton plans to grow to 36-38mppa – more than double the 17mppa it handled last year;

d. London City Airport has also announced plans to more than double in size from 5mppa last year to 11mppa by 2035; and

e. Southend, which is officially classified as London's sixth airport, plans to grow from the present 2mppa to 5mppa by 2023 and is committed to growing to 10mppa.

36. Thus, all six London airports are currently pressing for permission for major expansion. None of this information was made available to members of the Planning Committee last November. Indeed, they were led to believe that there was a capacity shortage – i.e. a need for the development at Stansted. It is now clear that this is not the case. This, it strikes me, is an intervening change of circumstance/new material consideration which might justify the newly constituted Planning Committee weighing the planning balance differently.

Climate Emergency

37. There has, since 14th November 2018, also been a growing concern that we face a climate emergency to which aviation makes a significant contribution. In particular:

a. On 2nd May 2019 the Committee on Climate Change ("CCC"), the independent body appointed by the Government to provide it with guidance on meeting the UK's legally binding commitments to reduce carbon emissions, published a landmark report recommending that the UK should commit to net zero greenhouse gas emissions by 2050, that this target should include the UK's share of international aviation emissions, and should be met through domestic action rather than international offset credits.

b. On 27th June 2019, in response to the above, Section 1 of the Climate Change Act 2008 was amended so that instead of a legally binding requirement for the UK to achieve an 80% reduction in carbon emissions by 2050, the requirement now is to achieve net zero emissions by 2050;

c. On 30th July 2019, UDC resolved to declare a climate emergency and committed to achieving net zero carbon status by 2030; and

d. On 24th September 2019, the CCC published its recommendations to Government for dealing with aviation emissions consistent with the net zero target for the UK as

a whole. These recommendations include restricting passenger growth to 25% from 2018 - 2050, compared to 49% forecast by the Department for Transport ("DfT"). Accordingly, the CCC has advised the Government to "assess its airport capacity strategy in the context of net zero. Specifically, investments will need to be demonstrated to make economic sense in a net-zero world and the transition towards it." In response, the DfT is to postpone publication of its Aviation White Paper (which had been expected late 2019[3]) until early 2020 to allow it time to consider the CCC advice.

38. Stansted Airport, as the largest single source of carbon emissions in the East of England, cannot be ignored in the light of these developments.

39. However, whilst the position of the DfT is that LPAs need not consider the carbon emissions impacts of airport expansion because this has been factored in at national level, disclosures provided by the DfT in connection with SSE's legal challenge show that the DfT has not made adequate allowance for the carbon emissions which would result from approval of Planning Application UTT/18/0460/FUL:

    a. The DfT projects CO2 emissions of 1.6Mt for Stansted in 2050, based on 204,800 ATMs whereas STAL expects that approval of the 43mppa application will result in 274,000 ATMs - i.e. one third more - resulting in carbon emissions of between 2.0 and 2.1Mt CO2; and

    b. The DfT projects that Stansted will not exceed 35mppa until 2050, when (according to the DfT forecasts) it will reach 36mppa.

40. Given this discrepancy, one which has only recently come to light, and given also the 30th July UDC resolution to declare a climate emergency, it does strike me that, at the very least, the newly constituted Planning Committee should consider seeking clarification from Government on the matter before issuing any Decision Notice.

41. Furthermore, the newly constituted Planning Committee is, in my view, properly entitled to consider afresh the increase in carbon emissions that would be generated locally by the

[3] The DfT originally planned to publish its new Aviation White Paper by the end of 2018.

additional airport-related road traffic (particularly having regard to STAL's projection that, compared to the current mode share, private car use would increase as a percentage of all surface access travel to the airport, as well as in absolute terms, if permission was granted for 43mppa, and public transport mode share would decrease compared to today's levels).

Policies Signalled in "Aviation 2050 - the future of UK aviation"

42. The determination of Planning Application UTT/18/0460/FUL on 14th November 2018 was followed, five weeks later (on 17th December), by the publication of the DfT Green Paper, "Aviation 2050: The future of UK aviation". This set out proposals to limit and, where possible, reduce the adverse effects of aviation noise on health and quality of life, expressing the Government's intention "to extend the noise insulation policy threshold beyond the current 63dB LAeq 16hr contour to 60dB LAeq 16hr".

43. However, the Sound Insulation Grant Scheme ("SIG scheme") set out in the proposed S106 Agreement is based on the 63dBA threshold and so would not meet the requirements of the proposed new Government policy. (By way of contrast, the new Heathrow scheme meets the requirements of the proposed new policy).

44. There is a risk, therefore, that if UDC enters into a S106 Agreement with STAL which includes the less generous Stansted SIG scheme, it may not be possible to upgrade this to the higher standard required to meet the Government's new policy for many years to come. This, too, is a new consideration which a newly constituted Planning Committee should be asked to consider (and see, also, paragraph 58 below).

Problems with the Boeing 737 Max-8 Aircraft

45. One of the most controversial issues considered by the Planning Committee on 14th November 2018 was the assumption made by STAL that new aircraft (which would be 50% quieter) would quickly replace existing aircraft types, thereby ensuring that the overall noise impacts would be contained.

46. In particular, the projected noise contours were based on Ryanair replacing the majority of its present fleet (all Boeing 737-800s) with the "cleaner and quieter" Boeing 737 Max-8 aircraft by 2028. However, all Boeing 737 Max-8 aircraft have been grounded worldwide since March 2019 and there is considerable uncertainty as to when the aircraft will be permitted to return to service.

47. In the light of these ongoing problems with B737 Max-8, the assumptions as to the composition of the Ryanair fleet are now wholly implausible and this was such a material component of the noise and air quality projections submitted by STAL in support of its application that there is a clear case for allowing the newly constituted Planning Committee an opportunity to review the implications: not a single Boeing 737 Max-8 aircraft has so far been delivered to Ryanair and it is highly uncertain as to when the first delivery will take place.

A Way Forward

48. I have advised in paragraph 26 above, that what is probably needed is for the newly constituted Planning Committee to look at everything afresh, including those matters just identified in paragraphs 27-47. However, it is right to point out that there is another option open to UDC in the light of SSE's application for judicial review referred to in paragraph 15 above. In particular, and as already noted, if SSE's application for judicial review succeeds Planning Application UTT/18/0460/FUL will be beyond the jurisdiction of UDC altogether and will have to be decided at a national level through the DCO/NSIP procedure. Given this, the newly elected Council may wish to delay any final decision pursuant to its resolution of 28th June until after the outcome of those legal proceedings is known. (Indeed, as an Interested Party in that application, the newly elected Council could reconsider what position it wishes to take in that application, and potentially support it, or even ask the Secretary of State for Housing Communities and Local Government to review his refusal to call-in Planning Application UTT/18/0460/FUL, if it considered the decision to be beyond its resources as one of the smallest LPAs in England).

49. I appreciate, of course, that if UDC does delay matters, there is a risk that STAL may appeal against non-determination. However, for the following reasons I consider that risk to be both very small and unlikely, of itself, to expose UDC to any costs risk:

    a. First, I would imagine that STAL would themselves delay any such appeal until after the legal proceedings have been completed because, if SSE wins that challenge, any such appeal would be pointless – as above, the application would have to be decided under DCO/NSIP procedure;

    b. Second, if STAL did appeal against non-determination, the outcome of the legal

proceedings would likely be known before that appeal took place, and:

i. If SSE wins its challenge, the appeal would fall by the wayside; and

ii. If SSE loses, UDC could then decide whether it wished to contest the appeal or not (and if the latter, whilst it would be *functus officio* regarding the appealed application, could invite STAL to submit a second application).

50. That is not, however, to suggest that UDC sit idly by. In particular, it is entirely appropriate for UDC to consider Planning Application UTT/18/0460/FUL pending that legal challenge:

a. First, if SSE succeeds, UDC will doubtless want to participate in the DCO/NSIP procedure as an Interested Party; and

b. Second, if SSE loses, UDC will want to be in a position expeditiously to decide how to proceed under the resolution dated 28th June.

S106 Agreement

Introduction

51. Without prejudice to all of the above, and assuming that planning permission is ultimately to be granted pursuant to Planning Application UTT/18/0460/FUL (or a duplicate application), there are discrete issues as to the adequacy (or otherwise) of the proposed S106 Agreement and, specifically, whether it falls short of what was required by the resolution of the UDC Planning Committee on 14th November 2018:

> "The applicant be informed that the Planning Committee would be minded to refuse planning permission for the reasons set out in paragraph (III) unless the freehold owner enters into a binding obligation to cover the matters set out below under Section 106 of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, in a form to be prepared by the Assistant Director – Legal and Governance, in which case he shall be authorised to conclude such an obligation to secure the following: …"

52. There then followed a 'Heads of Terms' list of c.20 items to be included in the S106 Agreement. It should be noted, however, that there were two versions of this 'Heads of

Term' list: the original version provided with the Officers' Report on 22nd October 2018 and an amended version sent to Planning Committee members the night before their meeting on 14th November 2018, in which some of the obligations were diluted (as identified in paragraphs 53-56 below). At least some Planning Committee members were unaware that significant late changes had been made to the Heads of Terms. (At the meeting on 14th November 2018 the Case Officer described the changes as "housekeeping" and "tweaking" but some of the changes were rather more significant than that). Further, whilst members will have expected Officers to negotiate terms comparable to that agreed at other airports, that expectation was not fulfilled either (as identified in paragraphs 57-58 below).

Public Transport Mode Share

53. For example, the original Heads of Terms stated as follows:

> "Revised targets for public transport mode share and 'Kiss and Fly' access for passengers and staff access by single occupancy private car with penalty clauses for missed targets"

Hence, members will have expected that the S106 Agreement will have required the airport to achieve an increased public transport mode share to the 51% achieved in 2016 and 52% in 2017, with penalty clauses triggered if the target is missed.

54. However, the revised version, sent out the night before the meeting, stated as follows:

> "Revised targets for public transport mode share and 'Kiss and Fly' access for passengers and staff access by single occupancy private car with reasonable endeavours clauses for missed targets...
>
> - 50% public transport mode share for non-transfer air passengers;
>
> …"

55. Consistent with this amended version, the S106 Agreement agreed between officers and STAL states as follows:

> "STAL shall use Reasonable Endeavours to:
> (a) maintain a 50% public transport mode-share for non-transfer air passengers;

…″

"Reasonable Endeavours" means it is agreed between STAL and the relevant one of the Authorities that the party under such an obligation shall not thereby be required to take proceedings (including any appeal) in any court, public inquiry or other hearing (unless expressly specified to the contrary) but SUBJECT THERETO such party shall be bound to make all reasonable attempts to fulfil the relevant obligation by the expenditure of such effort and/or sums of money and the engagement of such professional and other advisers as in all the circumstances may be reasonable;"

56. It is therefore apparent that:

a. The proposed S106 Agreement does not include "revised targets for public transport mode share", as required by the Resolution - the target is 50%, despite a 51% public transport mode share in 2017 and 52% in 2016; and

b. The requirement for penalty clauses for missing the target has been removed and replaced by a Reasonable Endeavours ("RE") obligation, with the RE defined restrictively.

S.106 Obligations – Community Fund

57. Members were entitled to expect that Officers would negotiate with STAL a level of contribution to a community fund for local good causes comparable to that provided by other major UK airports where the average is 1.1p per passenger (this is also the amount contributed by Heathrow and Gatwick, although it is not expressed in pence per passenger terms). In the event, however, the proposed S106 Agreement specifies an annual contribution of £150,000 (limited to a period of 10 years) which, at 43mppa, equates to less than 0.4p per passenger.

S.106 Obligations – Home Insulation Scheme

58. Similarly, members were entitled to expect that Officers would negotiate a SIG scheme comparable to that offered by Heathrow (and which the DfT is now proposing should be the norm for UK airports – see: paragraph 42 above). In the event, however, the proposed S106 Agreement specifies a SIG scheme which is inferior.

59. All of the above are matters which, in my view, should be brought before the newly constituted Planning Committee pursuant to the resolution of 28th June 2019.

Costs Risk

60. In paragraph 12 above I quote from the Officers' Report wherein Planning Committee members were, essentially, warned of the risk of incurring costs if they changed their mind and resolved to refuse Planning Application UTT/18/0460/FUL, the previous Committee having resolved to grant it. I have myself acknowledged this risk in my summary of the ***Kings Cross Railway Lands Group*** case in paragraph 19(d) above and footnote 2. I have also in part addressed it in paragraphs 23 and 24 above, in which I noted that:

    a. By reference to ***Newsmith Stainless***, at [7], there are likely to be a series of issues relevant to Planning Application UTT/18/0460/FUL on which there will be scope for a wide range of possible views which are reasonable; and

    b. By reference to ***Kings Cross Railway Lands Group***, at [17], it appears to be the case that the previous Committee may not have had adequate time fully to scrutinise the application (indeed, as pointed out in paragraphs 27-33 above, there are two matters that not all members fully appreciated and, in paragraphs 34-47, there are some new matters which the previous Committee never considered at all).

61. However, it is also worth pointing out that:

    a. In paragraph 5 of the Officers' Report for the ECM on 28th June 2019 reference is made to Section 70(2) of the 1990 TCP Act, as amended, where it lists "… any local finance considerations, so far as material to the application" as a consideration to which members of the Planning Committee must have regard. However, the definition of the term "local finance considerations" can be found in Section 143(4) of the Localism Act 2011, and it refers to "(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or (b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy." In other words, it has nothing to do with the risk of a costs award against the LPA.

    b. More generally, the June 2018 DfT policy statement "Beyond the horizon: making

best use of existing runways" states that where it falls to a LPA is to consider an application, it should consider "each case on its merits". In my view, that must mean **on the "planning merits" only**, which (as with all planning applications) the newly constituted Planning Committee must address reasonably in order to avoid a risk of costs being awarded against it.

Concluding Remarks

62. For all of the reasons expressed above, it is my view that UDC's newly constituted Planning Committee should reconsider Planning Application UTT/18/0460/FUL entirely afresh, with a new Officers' Report addressing all of the concerns dealt with in this Opinion. That Committee is entitled in law to come to different planning judgements to those reached by the former Committee and, moreover, there are several changes of circumstance/new material considerations which must be brought to their attention in any event. If they do decide to approve Planning Application UTT/18/0460/FUL, there are also matters within the proposed S106 Agreement which merit further consideration.

63. However, whilst these are issues which UDC should address expeditiously, there are good reasons (as explained in paragraphs 48-50 above) why UDC should await the outcome of SSE's judicial review challenge before making any formal decision pursuant to the resolution of 28th June 2019.

Paul Stinchcombe QC **30th September 2019**

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