STANSTED AIRPORT 35 + PLANNING APPEAL
PINS Appeal Ref: APP/C1570/W/20/3256619

APPELLANT'S FINAL REPLY TO UTTLESFORD DISTRICT COUNCIL'S RESPONSE ON COSTS DATED 9 APRIL 2021

INTRODUCTION

1. These submissions are made in reply to UDC's Costs Response, dated 9 April 2021, to STAL's application for a full award of costs made at the close of the inquiry on 12 March 2021. They should be read in conjunction with STAL's original submissions on costs, dated 12 March 2021, and with its Closing Submissions.

2. Despite the generous period of time granted to UDC to respond to this application (from 12th March to 9th April 2021), UDC devotes 27 pages of its response to a lengthy diatribe about the perceived unfairness of a costs application – of which UDC was given notice in STAL's Opening Submissions - being made at the close of the evidence and before the close of the inquiry, entirely in accordance with the costs guidance in the PPG and with normal practice. UDC appears to be under the completely erroneous misconception that STAL was required to make its application as long ago as July 2020[1], long before the true nature of UDC's case at this appeal became clear and without testing the evidence, including in respect of matters which were plainly relevant to the issue of costs and which were put in issue by UDC itself.

3. These submissions are addressed further below. At best, they betray an extraordinary and complete failure to understand the purpose, effect and operation of the costs regime in planning proceedings. At worst, they are a wholly disingenuous attempt to distract from the merits of an application for costs, which UDC plainly anticipated would be forthcoming and which it addressed at considerable length both in its written and its oral

[1] See paragraph 78 of UDC Costs Response (where it is asserted that the application could and should have been made "in July 2020 or shortly thereafter")

evidence. Indeed, we note that the Inspector, Mr Boniface, observed on the final sitting day that "much of UDC's evidence at the inquiry" appeared to have been directed at responding to an application for costs. STAL agrees with this observation.

4. The costs regime is there to instil discipline into the conduct of the parties. It applies at all times to guide the conduct of the parties from the moment that a planning application is made. It is engaged at all times and parties should abide by it and avoid unreasonable conduct at all times. Indeed, Inspectors have the express power to make an award of costs quite irrespective of any applications which may be made by the parties[2]. All parties are accordingly under a continuing obligation to adhere to the principles set out in the costs guidance in the PPG, and costs remain a sanction available to the parties (and the Inspector) right up to the closing day of any appeal proceedings.

5. A party which has kept these principles firmly in mind throughout the determination and appeal process and abided by them should have no difficulty in demonstrating the reasonableness of its conduct and in defending a costs application. Moreover, given that UDC was told in terms that a costs application would be made if the evidence at the inquiry supported it, it would have been well advised to focus its efforts on framing its evidence and its case accordingly, rather than seeking to rely on wholly unmeritorious procedural arguments to shirk the consequences of its unreasonable conduct.

6. STAL fully accepts that there may be cases where it is possible to reach a concluded view as to whether there are proper and fully established grounds for a costs application at an early stage in the appeal process (for example, where a reason for refusal is withdrawn without adequate explanation but after expenditure has been incurred by the Appellant in addressing it). But on many - indeed most – occasions, the merits of a costs application will turn on the evidence to be adduced and tested at the inquiry. For that reason, the overwhelming majority of costs applications are made at the close of appeal proceedings, when the evidence of the parties is concluded and clear.

[2] PPG para 029:
"An Inspector or the Secretary of State may, on their own initiative, make an award of costs, in full or in part, in regard to appeals and other proceedings under the Planning Acts if they consider that a party has behaved unreasonably resulting in unnecessary expense and another party has not made an application for costs against that party."

7. There is absolutely no legal or procedural bar to a party making its application at the close of an inquiry and indeed this is the proper approach to the majority of costs applications, including the current one. It ensures that any such application is made on the basis of the evidence as properly tested and only where the evidence squarely supports an allegation of unreasonableness.

8. In this case, STAL's application plainly rests to a very large degree upon the evidence adduced by UDC at the inquiry, and the contrary evidence adduced by STAL, as to the basis for UDC's decision to refuse permission in January 2020 (in the face of the clear and consistent advice of its Officers that the development complies with all relevant national and local policies and that permission should be granted), and whether this decision was ultimately substantiated by its witnesses on appeal.

9. STAL went as far as it properly could in opening its case, by warning that it would make a costs application if it determined at the close of the evidence that such was justified when applying normal principles. It did not presume or prejudge what the outcome of the testing of the evidence might be, but it put each party on notice that a costs application was in contemplation. Again, quite properly, nothing was pre-determined; indeed it will be noted that STAL has only, in the event, made an application against UDC.

10. The unreasonableness or otherwise of the Council's conduct is a matter of judgment and that judgment could only reasonably be made at the completion of – and in the light of – all the evidence, including (and perhaps particularly) that of Mr Scanlon, adduced by the Council to defend its reasons for refusal ("RfRs"). That this would be STAL's approach was clearly stated and STAL duly reported its intentions to the parties at the close of the planning evidence.

11. While UDC has performed a complete *volte face* at the appeal stage and now accepts that permission should be granted subject to the imposition of conditions, it has not withdrawn any of the RfRs and it has continued to defend the appeal on all four grounds. It has also continued to plead alleged deficiencies in the information before the Committee in January 2020 in an attempt to justify the reasonableness of its decision to refuse permission. That the reasonableness of this decision was in issue cannot have been in

doubt; demonstrating that its refusal was reasonable in the circumstances is a basic obligation upon any local planning authority in an appeal context.

12. Plainly, UDC *might* have made good its case on this issue, so as to demonstrate that - whatever the position at the time of the inquiry - Members' conduct in rejecting their officers' advice and overturning the Council's previous resolution to grant was reasonable as at the date of the decision in January 2020. STAL gave UDC the benefit of the doubt at the opening of the inquiry. However, STAL took the view at the close of the evidence that there was no credible evidence of any material deficiencies in the information before the Committee and that UDC had failed to justify the original decision to refuse permission. Likewise, in relation to mitigation, STAL took the view that the mitigation package offered by STAL in January 2020 (or some reasonable variant of it which UDC could easily have sought) was and remained appropriate and CIL compliant and that it was wholly unreasonable of UDC to refuse permission without any consideration being given to whether this package, or some alternative package of mitigation, might address its concerns.

13. These preliminary observations provide a complete answer to UDC's preamble, much of which is laced with preposterous hyperbole and none of which goes to the merits of STAL's costs application at all. Nonetheless, it is also necessary for STAL to address the numerous legal and evidential misconceptions in UDC's lengthy response, in respect of both the procedural arguments and UDC's response to the substantive application for costs.

14. In the interests of concision and to avoid repetition, this reply does <u>not</u> respond to every point made by UDC, many of which have been anticipated and addressed in STAL's closing submissions and submissions on costs.

(1) <u>THE PROCEDURAL REQUIREMENTS FOR COSTS APPLICATIONS</u>

(i) <u>Timing of costs applications by reference to the guidance in the PPG (see UDC Costs Response paras 9-16)</u>

15. UDC appears to be under the completely erroneous impression that, unless the costs application was founded upon procedural matters or the conduct of UDC at the inquiry itself, any application for costs had to be made before the start of the inquiry (see UDC response, para 10).

16. This is plainly not what the PPG says. The PPG makes clear that the only requirement (defined by the use of the verb "must" rather than "should") is that applications are to be made no later than the close of the hearing or inquiry.

> "*Applications for costs should be made as soon as possible, and no later than the deadlines below:*
>
> *…*
>
> *In the case of hearings and inquiries:*
>
> - *All costs applications must be formally made to the Inspector before the hearing or inquiry is closed…*"

17. The guidance does not therefore even mandate that costs applications must always be made while the inquiry is still physically convened. The only requirement is that all applications must be made before the inquiry closes, which may not be the same as the final sitting day. Thus, in relation to behaviour at an inquiry, the PPG advises that the applicant need only "tell" the Inspector that an application will be made at the inquiry. The Inspector will then make arrangements for the inquiry to remain formally open until the costs application has been submitted, with sufficient time for a response and final right of reply, and any decision will be made following the close of the inquiry.

18. The PPG *encourages* applicants to make costs applications before the hearing or inquiry but only "as a matter of good practice and where circumstances allow". Thus, even where circumstances do allow for an application to be made at an earlier stage, there is still no legal or procedural requirement to make an application at that time. Although costs are always at the discretion of the decision-maker, the PPG clearly sets out the timescales for costs application to be made. It is only when an application falls outside these timescales (i.e. it is not made before the close of the inquiry) that it will be deemed to have been submitted "late" and "good reason" will need to be shown under the PPG.

19. The use of the phrase "as soon as possible" plainly does not therefore oblige the Panel to "inquire as to when it would have been possible to make the application" (UDC response, para 12) and, by inference, reject any application not made at the earliest opportunity as being "late". If this was the intention, the word "must" would also have been used (see, by analogy, CPR r54.5 in relation to (non-planning) judicial review timescales: "The claim must be filed promptly…").

20. The PPG imposes no such requirement. The deadlines for making costs applications are clearly set out in the PPG and will be familiar to the Panel.

21. Moreover, even these deadlines are only guidance. They are not akin to statutory time limits and it is always open to a decision-maker to depart from the procedure in the PPG, provided that reasons are given. In particular, and as noted above, it is always open to Inspectors to order an award of costs of their own initiative, outside the normal procedure for the making of costs applications by the main parties to an appeal.

22. As to the rationale behind the guidance on timescales, this is clearly not to ensure (as UDC mistakenly asserts at para 15 of its Response) that "costs applications are front loaded'. The procedural guidance and the timescales for making costs applications are there to ensure the orderly conduct of proceedings and to ensure that the party at the receiving end of the application is given a reasonable opportunity to respond to it. Where the costs application does not depend on how the evidence emerges during the course of an inquiry, it is unsurprising that the PPG encourages applications to be made as soon as possible to enable the procedure to be accommodated within the timescales set for the inquiry. Where this is not possible because the application turns on the evidence, arrangements will have to be made to ensure that the party against whom the application is made is given an opportunity to respond. Ordinarily this will be by way of an exchange of written submissions, as has happened here.

23. None of this is remotely controversial, much less an 'ambush' (UDC Response, para 16), and it is frankly extraordinary that the very familiar procedure for making costs applications should need to be traversed – and at length - in this exchange of submissions.

24. For these reasons, there is plainly no requirement under the PPG to make a costs application at any time earlier than before the close of the Inquiry, although it may well be good practice to do so in a case where the application does not turn on the evidence nor on any issue which remains live between the parties. That is manifestly not the case here, for the reasons set out below.

(ii) <u>The nature and timing of this application (see UDC Response paras 19-59)</u>

25. Grounds 1-3 of the costs application all relate to the reasonableness of the decision by UDC to refuse permission for this development in January 2020 <u>and</u> whether the Council has substantiated its RfRs on appeal. Ground 4 relates to condition 15, which was formally aired for the first time at the appeal stage in Mr Scanlon's proof of evidence and was the subject of extensive discussion at the inquiry. Ground 5 relates to the case as put by UDC on appeal in relation to the MBU policy.

26. Thus, the first three grounds relate to the reasonableness of the decision taken in January 2020 <u>and</u> whether the RfRs have been substantiated on appeal. The fourth and fifth grounds relate to the case as advanced by UDC for the first time at appeal.

27. Even if there was any requirement under the PPG to make a costs application at any earlier time than before the close of the inquiry, it is nonsensical to suggest that a costs application made on these grounds should - or could properly - have been made before the evidence had even been heard. The merits of the application depend on whether the Council has been able to substantiate the RfRs promulgated in January 2020 on appeal. STAL's position from the outset was that it considered UDC's behaviour to have been unreasonable[3]; but UDC contested this. The competing positions therefore had to be tested in the evidence, in order to determine whether a costs application had merit.

28. In this regard, and as UDC emphasises in its response (see para 22(4)), a central part of UDC's case on appeal was that there were shortcomings in the information submitted by STAL as at January 2020 and that these shortcomings made it reasonable for UDC to

[3] As UDC was well aware: see UDC Costs Response para 19

have refused permission at that time[4]. The adequacy of the material before the Committee in January 2020 (and whether any shortcomings justified the refusal of permission in any event, rather than seeking further clarification from STAL) was therefore a matter which was put in issue by UDC.

29. As this matter was put in issue by UDC, STAL's witnesses addressed not only the updated position in the ESA (necessary largely because of the length of time taken by UDC to determine this application) but also the adequacy of the original ES in their proofs of evidence[5]. The alleged deficiencies in the information provided – and the alleged reasonableness of the decision in January 2020 - were also explored by UDC in its evidence. Thus, UDC positively asserts in its response that each of UDC's witnesses gave evidence in their respective proofs that the Council's decision in January 2020 was "both reasonable and understandable" (see UDC Costs Response para 33).

30. The reasonableness of UDC's decision to refuse permission for this development in January 2020, which has resulted in STAL incurring the very substantial costs of this appeal, was therefore plainly a live issue about which there were conflicting views on the evidence before the Inquiry. That this issue was apparent from the outset is clear from the fact that both parties anticipated and addressed it in their main proofs of evidence (and did not wait to deal with it by way of rebuttal).

31. This issue was then the subject of extensive evidence at the inquiry, including XX of both Mr Andrew for STAL and Mr Scanlon for UDC, with the latter maintaining in XX that there were material deficiencies in the ES which had only been remedied by publication of the ESA. The question of whether there was some material deficiency in the information before the Committee in January 2020 therefore remained in issue right to the end of the proceedings.

32. Given that the reasonableness of the decision taken in January 2020 was a live issue, which had been squarely addressed by STAL and UDC's witnesses in their proofs of

[4] See, generally, UDC SoC para 1.36. In relation to the RfRs see e.g. SoC para 4.2 (noise), para 4.46 (air quality), para 4.7 (carbon policy)

[5] See, for example, Cole paras 2.5-2.6, 6.1.1-6.1.4, Bull, section 6, Vergoulas, section 7.1.

evidence, it is self-evident that no application for costs could properly have been made at any of the earlier points in time suggested by UDC (see response at para 19 onwards):

a. **July 2020 (STAL's SoC)**: UDC protests that STAL should have made its application for costs at the same time as it filed its SoC, as long ago as July 2020. This is a hopeless argument. At that time, STAL quite properly pleaded its case that - in its view - UDC's conduct in overturning the original resolution and refusing permission for the reasons that it did amounted to unreasonable behaviour. This must have put UDC on notice from the outset that there was a risk of an application for costs being made in due course, if the evidence substantiated STAL's pleaded case. However, at that time STAL had no idea how UDC would develop or seek to support its RfRs or how it would put its case on appeal - particularly as it was clear that UDC would need to appoint a new team of experts to defend a decision which was taken in the face not only of advice from its Planning Officers but also of the independent consultants appointed to advise UDC on the air quality and noise impacts of the development (two of the three environmental RfRs).

b. **September 2020 (UDC's SoC and the CMC)**: UDC's SoC was submitted on 16 September 2020. This was the first indication that STAL had of the basis on which UDC said (at that time) that it would defend the RfRs and resist the appeal. This was also the first time that STAL had any indication as to what RfR 4 might relate to, given that no consideration was given to the s106 at all during the Committee meeting (and the issue concerning the implementation of the Junction 8 works post-dated the decision). UDC's SoC also put the adequacy of the information in the ES squarely in issue and it said that it would 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". UDC also said that it would call a witness on "Aviation Forecasts and the implications for air transport and other aircraft movements at Stansted". This clearly indicated that UDC intended to take issue with the forecasts underpinning the assessment of environmental impacts as well.

c. It would have been impossible and completely premature for STAL to make a costs application at this stage or at the CMC (which took place just one week after UDC's SoC had been filed, when STAL and its consultant team were still in the process of

reviewing the SoC, which in places expanded considerably on the original RfRs with a long list of additional complaints, many of which were not ultimately pursued[6], and elsewhere did not particularise its case at all[7]). At that time, STAL still did not know what the evidential basis underpinning the RfRs and UDC's case as pleaded in its SoC would be, let alone whether UDC would be able to demonstrate evidentially at the inquiry that a reasonable decision had been taken. STAL was plainly not in a position to say at that stage whether a costs application would be made or not and it quite properly did not give an indication either way. The issue of costs was left open.

d. The Panel's note of the CMC records, correctly, that no costs application was "anticipated" at that time and then goes on to remind the parties of the normal guidance in the PPG concerning the timing for such an application. The Panel also reminded the parties of its power to award costs. The Panel therefore understood perfectly well that an application for costs might be made at a later stage and had not been ruled out (and, indeed, that the Panel might itself make an order for costs).

e. **October 2020 (publication of the ESA)**: At para 30 of the response, UDC criticises STAL for not making a costs application at the same time as publication of the ESA. However, the ESA has no bearing on the reasonableness of UDC's decision in January 2020, given that it post-dated that decision. It is UDC which now seeks to rely on the ESA in defence of the costs application. It would have made no sense for STAL to make a costs application on the back of publication of the ESA.

f. **December 2020 (telephone call concerning condition 15 and exchange of proofs)**: The purpose of the telephone call between Counsel (referred to by UDC at para 32 of its Costs Response) was for UDC to try to explain its wholly new "condition 15" (an early draft of which was provided to STAL's Counsel on a confidential basis very shortly before the call). This was the first time that STAL had heard anything about "condition 15" and Mr Coppel QC confirmed at that time that this proposed condition would be addressed by UDC's witnesses in their evidence, to be served two working days later. However, it was only when proofs of evidence were exchanged on 8th December 2020 that UDC's changing position

[6] See, further, fn 21 below in relation to air quality.
[7] See, for example, para 4.76 in relation to RfR 4.

in these proceedings started to become apparent. This was when STAL first learned that UDC's planning witness, Mr Scanlon, considered that the planning balance favoured the grant of permission and that the appeal should be allowed subject to conditions. This was not made clear to STAL's Counsel during the call on 4th December and STAL could not possibly have known "what UDC's case was" before the exchange of evidence (let alone that it no longer intended to advance a case that any of the RfRs merited the refusal of permission on appeal). The suggestion that this telephone call should have immediately triggered a fully formulated costs application is risible.

g. Moreover, as UDC is at pains to emphasise (see, for example, para 36 of the Costs Response), each of UDC's witnesses also argued in their proofs of evidence that – whatever the position on appeal now - the original decision in January 2020 had been "reasonable and understandable"[8], based on the information available at that time, and that there were matters that had not been addressed in the ES, which should have been. Those issues were plainly relevant to the question of costs.

h. As noted above, each of STAL's witnesses also spent some time in their main proofs of evidence dealing with the ES process, including the absence of any objection from UDC officers and statutory consultees, or any requests for further information, and responded to the allegations of deficiencies in the ES. Mr Andrew's proof of evidence also contained a lengthy section criticising UDC's handling of the application. He concluded that none of the RfRs provided a reasonable basis for refusing permission and referred in terms to the guidance in the PPG on costs[9] and the examples of unreasonable behaviour, which now form the basis for the costs application. The position was clearly set out in the proofs of evidence of STAL's technical witnesses and did not need to be repeated in rebuttal proofs, save to address specific points raised by UDC's witnesses. However, STAL did respond to the newly formulated "condition 15" at that time and it made clear –

[8] Para 33 UDC Costs Response

[9] See e.g. section 9 of Mr Andrew's proof of evidence, headed "reasons for refusal", where he set out "the specific and detailed justification as to why the Council's reasons for refusal are unclear and imprecise, and formed without proper or reasoned consideration of the impacts clearly evidenced in the accompanying ES…" In the conclusions section, at para 11.11-11.2, Mr Andrew stated that UDC had "unreasonably and erroneously refused planning permission and formed unclear and imprecise reasons for refusal" and that "a correct approach to determining this application would have led any decision maker to approve planning permission."

through the evidence of Mr Andrew – that it considered that condition 15 was unlawful and failed the applicable policy tests.

i. **January 2021 onwards (the inquiry)**: At paras 37-58 of its Costs Response, UDC rehearses the various points during the course of the inquiry when the issue of costs was raised, either by the parties or by the Panel. As this chronology confirms:

   i. STAL made clear at the outset its intention to make a costs application at the close of the evidence, if the evidence supported it. The Panel heard UDC's arguments at that time but it clearly did not accept them and made no objection to the approach and timescales indicated by STAL.

   ii. An update on costs was sought in week 6 of the inquiry, when STAL again made clear that no final decision could be made as to costs until the evidence was complete and that any application would be made following the close of the evidence (see UDC Costs Response para 47). Again, UDC protested about this course of action but the Panel clearly did not accept the merits of its arguments and it was content for STAL to proceed as it had indicated.

   iii. At the close of the evidence, STAL confirmed that it would be making an application for costs against UDC (but not SSE) and that the application would be submitted in writing together with (and cross-referring to) STAL's Closing Submissions, upon which it would be parasitic. The Panel was clearly content with this approach and with the suggestion that costs be dealt with by way of an exchange of written submissions, and this is what it ultimately directed.

33. The reasonableness of the Council's decision in January 2020, which was the basis for the first three costs grounds, was plainly a matter which was in dispute and which would need to be resolved as part of the inquiry process. Any application for costs made before the evidence of the parties on this issue had been tested would have been misconceived and premature. The other two grounds both related to the case as put by UDC on appeal and so were necessarily entirely contingent on the evidence adduced at the inquiry.

34. Moreover, it is appropriate to observe that at no point did the Panel object to or challenge the approach which STAL made clear that it intended to adopt, including the timescale for making its costs application. UDC took the opportunity to complain about the timing of the costs application on numerous occasions during the course of the inquiry but the Panel did not accept UDC's arguments. If UDC's procedural arguments had any merit, the Panel would plainly have made this clear to STAL and would have directed that any costs application be made at an earlier stage. Instead, having heard the arguments, the Panel did not object to - and ultimately adopted - the procedure that STAL had suggested for dealing with costs (which it maintains is entirely normal practice).

35. For all these reasons, UDC's contention that this application for costs should be rejected on the grounds that it was not made at an earlier stage, before the evidence had been explored at the inquiry - or even produced by UDC - is hopelessly misconceived. The application was made entirely in accordance with the guidance in the PPG and with the normal practice for making cost applications. STAL cannot possibly be criticised for waiting until the evidence had been tested before deciding whether or not UDC had substantiated its reasons for refusal such that a costs application should be made. On the contrary, this was an entirely proper course of action, and it is wholly unsurprising that the Panel was content with this approach. We note that in the second part of its Response (see below for Reply), UDC (see para 150) positively avers that "unreasonableness should be considered in the round, having regard to all the evidence submitted by UDC to defend the RfRs on appeal". We agree with that proposition, which must preclude the making of a premature costs application which has not had regard to all the relevant evidence before the Inquiry.

(iii) Has there been any procedural unfairness resulting in prejudice to UDC as a result of the procedure adopted in respect of costs? (reply to UDC Costs Response paras 60-95)

Legal principles

36. The relevant legal principles are not controversial. The rules governing procedural fairness in the context of planning inquiries require that parties to a planning inquiry should know the case they have to meet and be given a reasonable opportunity to adduce

evidence and make submissions in response: see ***Hopkins Developments Ltd v Secretary of State for Communities and Local Government*** [2014] P.T.S.R. 1145.

37. However, where a party knows or ought reasonably to know that matters are in issue before the inquiry, it is incumbent upon that party to avail itself of the opportunity to test the evidence and to make its submissions in response. The onus on the parties applies even where an issue emerges for the first time during the course of an inquiry, for example where it is raised by a third party. As Beatson LJ put it, in the context of that case:

> "*97. In this case two issues not identified [at the outset by the Inspector] as a main issue clearly emerged as significant issues as a result of the evidence of the third parties at the inquiry. I have concluded that a developer who does not avail himself of the opportunity to test evidence adduced about such an issue (if necessary by seeking an adjournment to adduce further evidence) or to make submissions about it may not complain of procedural unfairness if the Inspector's decision is based in whole or in part on that issue. This conclusion follows from the fundamental nature of "natural justice"/ "procedural fairness", the structure of the 2000 Regulations, and the approach of the authorities on planning inquiries.*"

Application to the facts

(i) Whether UDC knew or ought reasonably to have known that the reasonableness of its decision in January 2020 was in issue before the Inquiry

38. STAL has made a substantive application relating to the failure of UDC to justify in the evidence adduced its refusal of STAL's application in January 2020. Other matters relating to the case put by UDC on appeal are also pursued as separate grounds of challenge but the first three grounds of the costs application are clearly directed at the reasonableness of UDC's original decision, as is positively asserted by UDC (see Costs Response, para 62).

39. For UDC now to suggest that it did not appreciate that this was a live issue (and so did not know the case it had to meet) is simply absurd. UDC is trying to have it both ways, by arguing on the one hand that STAL always plainly intended to make an application for costs and, on the other hand, that UDC has somehow been caught by surprise by this application and has been prejudiced by it:

a. UDC goes to great lengths in its Costs Response to emphasise that STAL first alleged unreasonable behaviour on the part of UDC in its SoC in July 2020, relating to the reversal of the original resolution to grant without any sound planning basis for doing so, and the absence of any evidential basis for each of the three RfRs. That remains precisely the basis for the costs application now. UDC cannot possibly now complain that it was unaware that the reasonableness of its decision to refuse permission (and therefore costs) would be in issue from the outset. The Committee was, of course, warned in the clearest terms that costs would be in issue if it ignored the advice of Officers and refused permission for the reasons it was contemplating, as far back as June 2019[10].

b. Mr Andrew's proof of evidence dealt with the Council's unreasonable conduct and handling of the application at length and it is replete with references to the unreasonableness of the Council's conduct and the wording of the PPG on costs: see fn 9 above. Faced with these explicit references, UDC could hardly have failed to appreciate that there was a risk of a costs application relating to its handling of this application and its decision to refuse permission. Mr Andrew's evidence could not have been clearer in this regard.

c. In opening, STAL put UDC on notice that it considered UDC's conduct in refusing permission to be unreasonable in light of the position now taken by its experts and it warned that it would be seeking costs <u>when the evidence was complete</u> for any wasted costs which it had been obliged to bear in prosecuting this appeal. If UDC had somehow failed to appreciate that the reasonableness of its decision to refuse permission was in issue before then, it can have been left in no doubt - as a result of that explicit warning - of the need to ensure that it was in a position, evidentially, to defend a costs application in due course. The dicta of Beatson LJ in ***Hopkins Developments*** are directly relevant here.

d. Thereafter, each of UDC's witnesses was cross-examined in relation to the Committee's handling of the application and the material which was before the Committee in January 2020, including exploration of the issue of the ES vs the ESA in XX of Mr Scanlon towards the close of the evidence.

[10] CD 13.3b

e. As submitted above, UDC was also fully aware of how STAL proposed to deal with costs and it knew that the Panel was content with this approach. It therefore knew how costs were to be dealt with at the inquiry and it should have prepared itself accordingly.

40. Far from "operating under the radar in relation to its potential costs application, leading its own evidence and asking some questions of UDC's witnesses by stealth" (UDC Cost Response para 66), STAL (i) pleaded its case in July 2020 that it considered the Council's conduct to be unreasonable, (ii) adduced evidence in terms as to the unreasonableness of UDC's refusal of permission in its proofs of evidence, by reference to the guidance in the PPG, (iii) explicitly warned in its opening submissions that, subject to the evidence, it would be making a costs application at the close of the evidence, (iv) duly led evidence and cross-examined all of UDC's witnesses as to the basis for UDC's decision in January 2020 and as to the Committee's reasoning in deciding to refuse permission contrary to all professional advice.

41. Moreover, UDC was plainly perfectly aware that the reasonableness of its decision was in issue, as demonstrated by its focus on the alleged deficiencies in the ES in its own evidence and by the way it put its case at the inquiry (as the Inspector, Mr Boniface, astutely observed). UDC's allegation of procedural unfairness is an artificial and wholly opportunistic attempt to distract from the merits of the substantive costs application.

(ii) Whether UDC has had a reasonable opportunity to adduce evidence and make submissions to defend the reasonableness of its decision in January 2020

42. At various points in UDC's submissions (see, for example, Costs Response paras 42 & 44, para 50), it seems to be suggested that UDC was somehow misled into believing - as a result of comments from STAL or from the Panel - that costs were not an issue that had to be addressed and / or that UDC did not need to spend inquiry time dealing with the reasonableness of UDC's original decision. This is absurd. Quite apart from the fact that UDC did, in fact, address this issue extensively in evidence, STAL made clear at the outset of the inquiry that it anticipated making a costs application and UDC could hardly have failed to notice that STAL cross-examined each of UDC's technical witnesses at some length in relation to the January 2020 decision and the reasoning of the Committee.

43. Unsurprisingly, no objection was made by the Panel to this line of questioning by STAL. Nor was there any suggestion that matters relevant to the costs application could not be pursued with witnesses. On the contrary, and as UDC acknowledges at para 44 of its Costs Response, the Inspector - Mr Boniface - stated at the outset that he was "happy [for the procedure and justification for UDC's decision] to be aired", although clearly the appeal would be determined on the basis of the evidence at the time of the decision, and this had to be the main focus of the evidence. That approach was clearly correct.

44. Nor can UDC glean any support for its procedural complaints from the Panel's approach to the issue of costs. As explained above, the chronology at paras 14-59 of the UDC Costs Response demonstrates that, despite UDC's protestations (see, for example, paras 39 & 48), the Panel - having quite properly revisited and sought updates as to the position on costs with the parties at various stages during the course of the Inquiry - was content with STAL's explanation that a final decision on costs could only be taken once the evidence was complete. This is wholly unsurprising, given that STAL's application for costs was made entirely in accordance with the PPG and with usual practice.

45. In short, it is the fault of UDC – not STAL or the Panel - if UDC now feels that it failed to adduce sufficient evidence to enable it to respond to the costs application. Although, as noted above, it is submitted that UDC's protestation is in reality an entirely forensic device to distract from the force of STAL's application and the absence of evidential material ultimately available to UDC to defend its position.

46. If UDC genuinely believed that it did not need to have the costs guidance in mind unless an application had been formally made against it before the start of the inquiry (see para 68 of the Costs Response), it was operating under a woeful misapprehension as to the procedure for making cost applications under the PPG.

47. In any event, and as noted above, these protestations of ignorance cannot be reconciled with the way UDC actually put its case at the inquiry. Although UDC now complains that it has "not been afforded the opportunity to cross-examine STAL's witnesses as to the reasonableness of UDC's decision in January 2020", the reality is that Mr Coppel QC cross-examined STAL's witnesses, in particular Mr Andrew, at length in relation to the Committee proceedings and the alleged reasonableness of UDC's decision.

48. Equally, although UDC now says that it would have taken instructions and / or submitted further evidence and / or prepared its case differently, had a formal application for costs been made before the inquiry began, UDC knew full well that the primary basis of any costs application would be that it behaved unreasonably by refusing permission in January 2020 and that it had not substantiated the RfRs on appeal. It knew that the history of the application would be in issue, as explored in Mr Andrew's evidence and also by Mr Scanlon (c/f para 81 of the Costs Response). Even if UDC was somehow notionally unaware that the explicit references to unreasonable conduct in STAL's SoC and Mr Andrew's proof of evidence pointed to the risk of a costs application, it still had eight weeks from the point when STAL warned expressly that it would be seeking costs at the close of the evidence to consider how to present its case to defend the decision taken in January 2020.

49. No request was made to submit further evidence or call additional witnesses during the eight-week period of the inquiry. It remains wholly unclear what evidence UDC says it would have submitted, or what submissions it would have made, in response to a costs application which is entirely consistent with the case pleaded by STAL as far back as July 2020.

50. The "examples" given by UDC at paras 71-72 of the costs response only serve to illustrate this point. At para 71, UDC cites STAL's submissions that "none of the evidence before the inquiry has pointed to any shortcoming in the assessment undertaken in the ES…". UDC then argues that this "ignores UDC's written evidence", including the matters referred to at para 72. UDC was clearly not therefore deprived of any opportunity to put forward evidence to defend the reasonableness of its decision and these matters were then fully explored in oral evidence at the inquiry[11]. STAL's position following the close of the evidence remains that none of this evidence has pointed to any material shortcoming in the ES which made it reasonable to refuse permission, without considering whether its concerns could be overcome by mitigation, and that permission should clearly have been granted.

[11] In XX of Mr Trow, Dr Broomfield and Dr Hinnells

51. It will be a matter for the Panel to decide whether the matters raised at para 72 constituted a reasonable basis for refusing permission, but UDC cannot possibly complain that it did not have a reasonable opportunity to respond to the case made against it in evidence.

52. The same is true of evidence relating to the history of the application (see UDC Costs Response, para 81 onwards). As noted above, UDC was plainly aware that its handling of the application was a live issue. Although Mr Scanlon prepared a rebuttal proof of evidence, he failed to take the opportunity to respond to Mr Andrew's evidence on this issue, even though Mr Andrew devoted 9 pages of his proof of evidence to UDC's conduct. However, UDC duly did address this issue in oral evidence. The period when the call in application was being considered was addressed in evidence by Mr Scanlon, and a great deal of time was spent in XX of Mr Andrew considering the comments made by Mr O'Toole at the Committee. As part of this line of XX, there was nothing whatsoever to prevent UDC from referring to the planning performance agreement and putting questions to Mr Andrew on this issue, if it considered this to be helpful to its case. It failed to do so.

53. The suggestion that UDC was somehow deprived of the opportunity to call witnesses as a result of the timing of the application is also absurd. UDC now complains, for the first time, that had a formal application been made before the start of the Inquiry, it would have elected to cross-examine Mr Thomson on EIA matters, and that it would have called someone from UDC to defend the decision in January 2020. Yet:

    a. As previously emphasised, the issue of the adequacy of the original ES was obviously a live issue, raised extensively by UDC in its SoC. STAL made clear from the outset (in its SoC) that it intended to call Mr Thompson to give evidence in relation to the EIA process. UDC presumably had its own reasons for deciding not to XX Mr Thompson – as STAL's witness on EIA matters - on the alleged deficiencies in the ES, but there was nothing to prevent it from doing so, having led evidence on this issue through its technical witnesses. Alternatively, it may well have taken the perfectly legitimate view that it would prefer to take any technical EIA points via its "topic specific" technical witnesses, as it had no overarching EIA compliance point to make.

b. Given that the decision was taken contrary to officer recommendation and contrary to all professional and legal advice, it should have been obvious to UDC that it would need to justify the January 2020 decision on appeal, not just to rebut the allegations of unreasonableness in STAL's SoC and evidence (particularly the evidence of Mr Andrew) but also bearing in mind the Panel's own power to award costs. It is common practice for a member of the Committee to be called to give evidence in these circumstances, and UDC would have been well advised to call a member of the Planning Committee if it felt that this would have supported UDC's case.

c. Even if UDC failed to consider the need to call a witness to speak to the Committee's decision when it identified its list of witnesses, there was nothing to prevent it from making an application to adduce further evidence at any time during the course of the eight weeks of the inquiry or from taking further instructions: see, by analogy, ***Hopkins Developments***.[12] Instead, having been expressly warned that a costs application was in contemplation, UDC appears to have decided to focus its efforts on pursuing hopelessly misconceived procedural arguments, rather than putting its best case forward to justify the reasonableness of its conduct.

54. Unsurprisingly, given that UDC had ample notice of this application and ample opportunity to adduce evidence to demonstrate the reasonableness of its decision and to substantiate the RfRs on appeal, UDC's complaints that the inquiry should be reconvened to allow UDC to recall witnesses to address these well-trodden issues were rejected by the Panel. UDC seems to be under the extraordinary misapprehension that a party can only be expected to address the reasonableness of its conduct in evidence, once it has seen the costs submissions of the other party (see, for example, UDC Costs Response para 85). This is not how planning appeal proceedings work, as UDC's Counsel must surely know. Reconvening the inquiry to deal with a substantive costs application directed at the reasonableness of the Council's decision to refuse permission would have been a wholly exceptional course of action, particularly after an inquiry lasting for 30 sitting days.

[12] The same is of course true in relation to Councillor Hargreaves' comments, which were explored with Dr Hinnells in week 4 of the inquiry.

55. In short, there was nothing remotely unfair or unusual about the procedure adopted by the Panel in relation to costs. On the contrary, UDC was granted a generous period of time (28 days) to respond to the costs application and it has produced lengthy submissions running to 55 pages and responding to each of the grounds by reference to the evidence, together with a 44-page bundle of documents including two witness statements.

56. UDC cannot sensibly claim that it has not been given a sufficient opportunity to respond to this application, nor that it has been in any way prejudiced by a costs application which has been made entirely in accordance with the guidance in the PPG.

(2) STAL'S REPLY TO UDC'S RESPONSE ON THE SUBSTANTIVE APPLICATION FOR COSTS

Legal principles relating to costs applications (UDC Costs Response paras 96-124)

General principles

57. The general principles governing the award of costs in planning appeals are not in dispute (see Costs Response paras 96-103). In particular, and as emphasised above, it may well be the case that a Council is able to "salvage" the RfRs promulgated by its Committee at the appeal stage through the provision of further evidence. In those circumstances, an Appellant will face an uphill battle persuading an Inspector that the Council has acted unreasonably in refusing permission, since the decision will subsequently have been shown to have been a defensible one.

58. That is plainly not what has happened here. UDC's witnesses have not substantiated the RfRs on appeal at all, let alone provided "some respectable basis" for its decision to refuse permission, per ***North Norfolk***. On the contrary, each of UDC's witnesses now accepts that the development is acceptable subject to the imposition of conditions, and the Council's own planning witness has stated in terms that the planning balance favours the grant of permission and that the appeal should be allowed subject to the imposition of conditions[13].

[13] See, further, paras 11 and 262 of STAL's closing submissions as to Mr Scanlon's evidence

59. Consequently, the causation principle (UDC Costs Response, para 105) works against UDC, not in its favour. Had UDC not unreasonably refused permission in the first place, no appeal would have been necessary and there would have been no opportunity for SSE (and others) to add to the length of the inquiry process. The costs of the inquiry flow directly from UDC's unreasonable refusal of permission, which is why STAL is fully justified in making an application for a full award of costs against UDC only.

60. The 'causation' argument does not, however, work the other way and UDC's response at para 105 reveals a fundamental lack of understanding about the costs procedure. STAL's application is expressly made either for a full award of costs or, alternatively, for a partial award of costs on any of the grounds set out in its application, including RfR 4. This RfR forms the basis for a costs application in its own right, for the reasons set out at paras 71-74 of STAL's costs submissions. It is hopelessly vague and imprecise and UDC plainly has not substantiated its case on appeal that the s106 agreement was in any way inadequate, so as to justify refusing permission on the grounds of lack of supporting infrastructure or mitigation. Given that UDC has abandoned any attempt to defend the first three RfRs as reasons for refusing permission, the reasonableness of this RfR clearly needs to be considered in its own right when considering whether to make a full or a partial award of costs.

61. It follows that the Panel can indeed make a partial costs award, relating to the costs incurred by STAL in responding to any one of the RfRs, even if the Panel were to conclude that the other RfRs were justifiable. And it could do so of its own initiative, even if STAL's costs application were not framed in this way.

The Committee minutes and reasons

62. At para 106 onwards, UDC seeks to rely on the authorities relating to the scope of the legal duty to give reasons for planning decisions to suggest that it was somehow inappropriate of STAL to explore the minutes of the meeting in January 2020 with UDC's witnesses, in order to ascertain the matters which influenced the Committee's decision to refuse permission.

63. However, these authorities are directed at a completely different issue, namely the adequacy of the reasons provided by a Committee and whether a planning decision should be quashed for a failure to give adequate reasons i.e. "whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why": see ***Dover District Council v CPRE Kent***[14]. The Panel is invited to read the relevant passages of this judgment to confirm that they do not bear upon the issues herein.

64. The exercise that STAL went through carefully with UDC's witnesses was to establish the evidential basis for UDC's decision, including whether the Committee turned its mind to the benefits of the scheme and the planning balance at all (c/f UDC's response at paras 115-116), or the mitigation proposed by STAL or the scope for some variation of this mitigation to address its concerns, and whether there was any valid evidential or policy basis for rejecting the detailed advice and recommendations of UDC's officers. The minutes of the meeting formed part of the evidence at the inquiry and it was entirely legitimate and proper for STAL to explore this evidence with UDC's witnesses.

65. Moreover, STAL's case that there was no reasonable basis for the decision to refuse permission in January 2020 does not depend on taking statements made by individual Members in isolation. It is squarely focussed on the issues which led the Committee collectively to determine that permission should be refused and which are clear to see from the "general tenor of the Minutes" (see UDC Costs Response paras 111-112)[15].

[14] The citation from Dover DC v CPRE Kent at para 114 of UDC's costs response needs to be understood in its proper context. The full paragraph reads as follows:

> "*42. There is of course the important difference that, as Sullivan J pointed out in Siraj , the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt ... as to what (it) has decided and why.*"

[15] The example given by UDC at para 113 of Councillor Hargreaves' comments is a red herring in this regard. Councillor Hargreaves' comments were not made in the context of determining this application. They are relied upon by STAL as evidence of the new administration's reckless attitude towards its development control responsibilities and specifically towards this development.

66. Given that UDC took nine months to approve these minutes, it can hardly now complain that they are not a fair reflection of the discussion that took place. Nor is there in fact any dispute as to the issues which exercised the Committee and led it to refuse permission, namely the fleet mix issue, WHO ENG 2018, PM 2.5 emissions and net zero and the CCC's advice in September 2019 (see UDC response, para 142, where these issues are summarised).

The Council's advice on costs consequences

67. As with the authorities relating to Committee minutes, the dicta of Lindblom LJ in ***R (East Bergholt PC) v Babergh DC*** [2019] EWCA Civ 220 are also directed at a completely different issue to the one before the Panel now.

68. In ***East Bergholt***, the question for the Court was whether there was anything unlawful about an Officer reminding Members about the financial consequences to the Council that would flow from a refusal of permission and a likely appeal. The Court of Appeal held that there was nothing unlawful about the Council's approach. On the facts of that case there was:

> *"… no evidence of an approach whose aim was to avoid for the district council the financial burden and risk of appeals, rather than one that would produce a "robust" assessment in accordance with national policy and guidance*."(per Lindblom LJ at para 71)

69. Per ***East Bergholt***, it is perfectly lawful for a Council to take account of the potential costs consequences in seeking to ensure that its decision is robust and can be defended on appeal by reference to relevant local and national policy and guidance. It is not lawful for a Council to allow its proper assessment of the merits of the decision, by reference to policy and other material considerations, to be distorted by concerns about the costs of an appeal.

70. There is no evidence whatsoever that Members here were being invited to take a decision which did not reflect the merits of the application, due to concerns about the costs of the appeal process. Quite to the contrary, Officers were urging Members to make their decision on the basis of the planning merits alone, and reminding Members that an indefensible decision would have serious costs consequences. The fact that Members

nonetheless proceeded to reach a decision which has been shown at this appeal to lack any valid evidential or policy basis, in reckless disregard of this advice, only serves to emphasise the unreasonableness of UDC's conduct. Indeed, far from the decision being influenced by concerns about costs, the attitude of the Council – as exemplified by Councillor Hargreaves' comments – appears to have been that the risk of costs need not stand in the way of making an indefensible decision, because the Council had the resources available to cover those costs. This is precisely the kind of unreasonable and irresponsible conduct, which the costs regime is there to prevent and to sanction.

Legal advice on material considerations

71. At paras 119-124 of its Costs Response, UDC dances around the question of whether the decision taken by the Committee was contrary to the legal advice received and suggests that the Committee's decision was simply a legitimate exercise of planning judgment as to the weight to be given to the "new" material considerations identified by it in the planning balance.

72. If this was an accurate reflection of the legal advice received, it is surely surprising that UDC has not chosen to disclose this advice, given its obvious relevance to the reasonableness of UDC's decision and the importance of the issues at stake for UDC.

73. In any event, it is clear from the January 2020 OR[16] that the decision was not taken in accordance with the legal advice received and that there was no sound planning basis for overturning the original decision. On the contrary, having recorded the issue before the Committee as being whether there were "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", Officers advised in terms that there were no new material planning considerations, which might justify reversing the original decision. In other words, the matters being aired by SSE and by Members, as potentially justifying a reversal of the original decision – fleet mix concerns, the WHO ENG 2018 guidelines, fine particulates, and net zero – were neither "new" nor objectively or reasonably capable

[16] See, further, STAL's costs submissions at para 19 and CD 13.3b

of tipping the balance "to some extent one way or the other", per ***Kides***. It is perfectly obvious that the legal advice received by the Council at the time of its decision in January 2020 supported directly the report and recommendation of its senior planning officers.

Reply to UDC's response on grounds 1-3

The handling of the application by UDC (UDC Costs Response paras 126-139)

74. The Panel is respectfully referred to STAL's costs submissions at paras 9-30 for a full account of the chronology leading up to the decision to refuse permission in January 2020. In this context, the suggestion that the events from April 2019 onwards were simply an unavoidable consequence of the change of administration and the need for the new administration to be "brought up to speed" on this development is, again, absurd. Moreover, the contention that this chronology showed that UDC "needed to be convinced about the nature and scale of effects that would result from implementation" (UDC Costs Response, para 22(3)) only serves to demonstrate the unreasonableness of UDC's conduct: in light of the previous resolution, it was not open to UDC simply to change its mind as to the merits of the application, without "very good" planning reasons for performing such a *volte face*: per Sullivan J in ***Kings Cross Railways Lands Group v London Borough of Camden*** [2007] EWHC 1515 (Admin).[17]

75. In this regard, the call-in direction is a complete red herring (see UDC Costs Response, paras 127 onwards). At that time, STAL still believed that the negotiations it was conducting in good faith with UDC's officers as to the terms of the s106 agreement would lead to the decision notice being issued in accordance with the November 2018 resolution (see STAL's Opening Submissions at para 91). Even at the time of the Committee meeting in January 2020, STAL still hoped that Members might see sense, and it is therefore wholly unsurprising that Mr O'Toole adopted a diplomatic tone towards Members at that meeting (c/f UDC Costs Response, para 135).

76. The same is true of STAL's willingness to agree to extensions of time for the determination of the application when these were requested by UDC (c/f UDC Costs

[17] As referred to at CD 13.4g.

Response, para 138) particularly when a resolution to approve was still in existence right up until the January 2020 committee. STAL cannot possibly be criticised for making every effort to avoid incurring the very substantial costs and delay of this appeal. It was indeed keen for this application to be determined at a local level, provided - and on the understanding - that UDC would behave reasonably in determining the application.

77. It was only when Members threw out the application without any proper basis, having largely adopted the case made by SSE in its presentation to the Committee, that it became clear to STAL that its efforts had been wasted, and that UDC had indeed been engaged in filibustering for a very extensive period, and that the new administration never had any serious intention of determining the application on the planning merits nor of granting permission for this development.

78. UDC's submissions in relation to the handling of the application only serve to demonstrate that STAL has behaved entirely reasonably and in good faith throughout the period of the determination of the application. It is extremely regrettable that the same cannot be said of UDC, and that STAL has been left with no choice but to bring this appeal and now to seek compensation for the wasted costs it has incurred.

The decision in January 2020 (UDC Costs Response paras 140-149)

79. It is common ground that the factors relied upon by the Committee as constituting new material considerations said to justify the reversal of the original resolution and the refusal of permission were (i) the fleet mix issue, (ii) the WHO ENG 2018 guidelines, (iii) PM 2.5 emissions and (iv) net zero and the CCC's September 2019 advice: see para 142 of UDC's response.

80. These matters were fully explored in evidence and are addressed in STAL's Closing Submissions and its Costs Submissions (see, in particular, STAL Costs Submissions, paras 48-74 and STAL Closing Submissions at 113-117, 167-173 and 234-237). Those submissions are not repeated here. No further information was requested from STAL in relation to any of these matters by the Committee and, as Officers repeatedly advised, there was no proper evidential or policy basis for the Committee's decision to refuse

permission on these grounds, let alone any good planning reason to justify reversing the original resolution.[18]

81. Specifically, and in relation to the fleet mix issue (as considered at para 146 of UDC's Costs Response), UDC's submissions on this point make no sense. The noise contour condition before the Committee plainly is not just a "roll forward of the existing noise contour condition." The 27 sqkm contour is a consequence of the fleet mix projections and is very considerably tighter than the 33.9 sqkm area conditioned by the 2008 planning permission and currently in force. Moreover, this reduction is not affected by the debate about whether the condition should be tied to 57db (as agreed with UDC Officers) or 54db or indeed 51db (as proposed for the first time by UDC on appeal): as explained in STAL's closing submissions (para 102), and as is self-evident, the contours move together, so a tighter 54dB contour will also be a tighter 57dB contour. It is for this reason that Mr Trow conceded in XX that the noise contour condition provides a complete answer to this issue. This was also the advice of Officers in the January 2020 OR, which Members entirely disregarded.

82. As to para 147 of UDC's Costs Response, the fact that UDC is able to point to the words "planning balance" and "tilted balance"[19] in the minutes of the January 2020 meeting does not begin to show that UDC turned its mind to the benefits of the scheme or conducted a proper planning balance. Mr Scanlon's evidence on appeal confirms that, had it gone through this exercise and done so properly, it would inevitably have concluded that the planning balance favoured the grant of permission and that permission should have been granted.

83. For all the reasons set out in STAL's Costs Submissions and Closing Submissions, it is clear that there was no reasonable basis for UDC's decision to refuse permission in January 2020, contrary to the advice of its officers and legal and professional advisers, and without giving any consideration to whether further information should be requested

[18] As to fn 17 of UDC's response, it is difficult to understand how a factor which attracts only "negligible" weight could rationally be said to be capable of tipping the balance one way or another in the planning balance, so as to constitute a material planning consideration, per ***Kides***.

[19] Noting that there was also no suggestion in the Officer Report that the tilted balance under para 11(d)(ii) was engaged at all. Nor did Mr Scanlon suggest that the tilted balance applied: his evidence was that the development complied with the development plan so that para 11(d)(i) applied.

from STAL, or whether UDC's concerns were addressed by the mitigation proposed (or could be addressed by seeking different or additional mitigation, whether via planning conditions or an amendment to the s106).

UDC's case on appeal (UDC Costs Response paras 150-155, paras 166-169)

84. Far from being "caught off guard" by this costs application, UDC's submissions at para 150 onwards reveal that the focus of UDC's case at this appeal has been on the reasonableness of its original decision rather than defending the appeal on its merits (see, for example, para 151).

85. However, the onus on a Local Planning Authority is to produce evidence to substantiate its RfRs at the time of the appeal. If UDC was no longer of the view that the RfRs were properly defensible, the proper course of conduct would have been to withdraw those RfRs at the earliest opportunity and to amend its Statement of Case.

86. Neither course was adopted and UDC has plainly failed to discharge that obligation. Instead, each of UDC's witnesses now accepts that permission should be granted, but subject to the imposition of conditions. UDC has not substantiated the RfRs on appeal. This is quintessentially unreasonable conduct, which has led directly to the costs of this appeal.

87. In any event, there is no merit whatsoever in UDC's contention that there were material deficiencies in the ES, which meant that it was reasonable for UDC to refuse permission in January 2020. The various matters referred to by UDC's technical witnesses (and summarised at paras 151 and 153 of its Costs Response) are all either matters which were fully explored and addressed at the Committee stage[20], or which have only been raised for the first time by UDC's technical witnesses at this appeal in an attempt to substantiate the RfRs, and which have been shown to have no bearing whatsoever on the validity of the original assessment in the ES.[21]

[20] E.g. WHO ENG 2018 and net zero/ the CCC advice

[21] See, for example, the long list of additional matters raised by Dr Broomfield and referred to at fn 21 of UDC's response, none of which has demonstrated that there was any shortcoming in the assessment of air quality impacts in the ES, nor that the original assessment was anything but entirely sound. See, in particular, STAL's Closing Submissions at paras 134-135 concerning the Clean Air Strategy, as referred to at para 153(2) of UDC's

88. In this regard, it is completely absurd for UDC to accuse STAL of "hiding behind the lack of specific requests from UDC's officers for further environmental information" in relation to any such perceived deficiencies (UDC response, para 153). There is a statutory process for the determination of EIA applications, including the procedure for requiring the provision of further information under Regulation 25. It is plainly not for an applicant to try to second guess what further information a Local Planning Authority may require, particularly when the ES had been the subject of extensive scrutiny and discussion by UDC's officers, expert advisors and all statutory consultees and had been signed off by them.

89. The deficiencies now alleged in the ES were never raised or explored at the time of the decision[22]. They have clearly been conjured up by UDC and its technical witnesses in an attempt to defend a costs application, which UDC anticipated would be forthcoming.

90. Moreover, none of the matters now said by UDC's technical witnesses to have been omitted from the ES has, in fact, resulted in any adverse environmental impact being identified (see, further, below). UDC's point about the alleged deficiencies in the ES does not therefore begin to demonstrate that the Committee acted reasonably by refusing permission outright in January 2020. Moreover, if UDC had any residual concerns about whether the likely significant environmental impacts of the development had been properly assessed in the ES (as has been demonstrated on appeal), it should – acting reasonably - have sought such clarification or further information from STAL as it required at that time.

91. Nor can it possibly be said to have been reasonable for UDC to refuse permission outright, in circumstances where it now accepts on appeal that the development is acceptable subject to the imposition of conditions (c/f UDC Costs Response, paras 166-168). As repeatedly emphasised by STAL, the imposition of conditions is within the gift of the Council. If the Council wanted to impose a different set of conditions it did not need STAL's consent or agreement, and it is clearly no answer to this ground to suggest (see UDC Costs Response para 168) that STAL might have appealed against any condition

Costs Response. As explored with Dr Broomfield in XX, this long list also included a number of matters which had in fact been fully addressed at the ES stage in any event (see STAL Closing Submissions at para 146).

[22] Ibid

which UDC sought to impose. The reality is that UDC gave no consideration whatsoever to whether there were conditions which might overcome its concerns (including the fleet mix issue, for which the noise contour condition provided a complete answer).

92. In any event, the Panel will also note that STAL has, in fact, agreed to various revisions to the conditions proposed by UDC on appeal, insofar as those conditions satisfy the relevant legal and policy tests, specifically the revised noise contour condition and the provision of an air quality management strategy. It does not agree to the imposition of condition 15 because condition 15 is manifestly unreasonable and unlawful for the reasons set out in STAL's costs submissions and in its closings.

93. At para 166 of UDC's Costs Response, and in the witness statement of Mr Glenday, reference is made to a meeting which took place between STAL and UDC after UDC's decision to refuse permission. The account of this meeting in Mr Glenday's witness statement is not accepted and the discussion at that time has clearly been misconstrued. In particular, it is self-evident that STAL never intended to pursue a judicial review or an ombudsman complaint, neither of which would have led to the grant of permission, and there was no question of STAL submitting an NSIP application for >10mppa because there is no project for >10mppa, which might qualify as an NSIP in the first place, as has been repeatedly confirmed by STAL in evidence. Plainly, however, once UDC had refused permission in the manner that it did, STAL turned its attention to the appeal process. It is impossible to understand what relevance this meeting can possibly be said to have to the reasonableness of UDC's decision as at January 2020.

94. At various places in UDC's Costs Response, it is asserted that STAL did not challenge UDC's witnesses in XX as to their views concerning the reasonableness of UDC's decision (see, for example, para 149 and para 155(1)). As with so many aspects of UDC's Costs Response, UDC appears to be operating under a complete misapprehension and has the cart before the horse. The question of whether UDC's decision was a reasonable one is a matter of judgment for the Panel at the close of the inquiry. STAL was under no obligation to formulate its costs submissions in advance of the evidence and put these submissions to the individual witnesses. Instead, it has made its submissions based upon the evidential picture which ultimately emerged (via its own and UDC's witnesses) as to the reasonableness of UDC's conduct. That is an entirely proper approach.

The relevance of the ESA (UDC Costs Response, paras 156-164)

95. As noted above, there is no evidence at the end of the inquiry that there were any significant environmental impacts, as at January 2020, which had not been assessed and which might reasonably have led to the conclusion that the adverse impacts of this development outweighed the benefits contrary to the previous resolution to grant permission. This was all explored in XX of Mr Scanlon, who confirmed that UDC's case was premised not on there being any material change in the environmental effects as between the ES and the ESA, but rather on the alleged deficiencies in the information provided to the Committee. This argument is addressed above.

96. It therefore remains wholly unclear how the ESA can be said to justify UDC's *volte face* in these proceedings. The ESA plainly is not "a new ES in all but name" (c/f UDC para 157) (if this were correct, it is extraordinary that UDC did not seek to raise this with Mr Thompson in evidence). However, it was regrettably necessary to update the baseline and forecasting years, largely due to the delays caused by UDC's conduct (see STAL Costs Submissions, para 41). While it is true that the updated forecasts have resulted in some further improvements in the assessment of environmental impacts (see UDC Costs Response, para 163), this is simply a consequence of the later forecasting dates. The fact that the position has now improved still further does not begin to justify the refusal of permission in January 2020, absent any evidence of any more than negligible environmental impacts at the time of the original decision.

Residual points

97. The matters raised by UDC under the heading "residual points" have all been addressed by STAL in its Costs Application and in its Closing Submissions in respect of each of the RfRs. Those submissions are not repeated here.

Reply to Ground 4: Condition 15

98. At para 177 of its response, UDC appears to suggest that condition 15 is somehow exempt from the test of reasonableness because the PPG refers to "imposing" a condition, whereas UDC has only conjured up condition 15 at the appeal stage.

99. This is a hopeless argument. The examples given in the PPG are not intended to be read as if they were a statute and they are not prescriptive. It is just as unreasonable to pursue an unlawful condition on appeal as it is to seek to impose an unlawful condition on the grant of permission, particularly where the Council has abandoned any attempt to argue that the development is not acceptable in principle and its case on appeal begins and ends with the conditions subject to which permission is granted.

100. It is equally hopeless for UDC to suggest (see response at para 182) that Mr Andrew's objections to condition 15 were based only on "practicalities of compliance and legal points" and did not go to the unreasonableness of the condition. Mr Andrew's evidence in relation to condition 15 was entirely clear and unequivocal. He went so far as to say in XX that the phased release approach which underpins condition 15 was not how the planning system was intended to operate (see para 271 of STAL's Closing Submissions). His position, as a planning witness, was that condition 15 failed every one of the six policy tests in the NPPF.

101. Thus, the unreasonableness alleged in relation to condition 15 is on substantive grounds. Paras 179-180 of UDC's Costs Response are wholly irrelevant to the merits of this argument. Para 180 was also fully addressed in STAL's Submissions in response to condition 15[23] and those submissions are not repeated here.

102. As UDC asserts in its response, it has (regrettably) been necessary to devote a great deal of time at the inquiry, traversing the lawfulness and policy compliance of condition 15 both in evidence and in submissions. This is the basis for ground 4 of the costs application. For the reasons set out in STAL's Costs Submissions, Closing Submissions (paras 264 onwards) and in STAL's Submissions on condition 15, UDC's promulgation of this condition on appeal – which it alone has pursued - is plainly unreasonable and this has led to substantial wasted inquiry time and wasted costs by STAL.

Reply to Ground 5: Acting contrary to, or not following, well-established case law

103. STAL does not repeat its submissions in relation to condition 15, as set out above.

[23] CD 26.8

104. As to ***Bushell*** (UDC Costs Response, paras 185-189):

a. Unsurprisingly, UDC does not seek to argue that the "principle" in ***Bushell***, that the merits of national policy and the methodology underpinning it are not a matter which are suitable for debate by local decision makers, does not have binding legal force. It is an uncontroversial and long-established proposition, which explains why it was conceded by the Secretary of State in that case. It is also a principle which is founded on good sense: the current appeal demonstrates very clearly why the merits of and methodology underpinning national policy are wholly unsuitable for interrogation through the narrow lens of a local planning inquiry.

b. STAL has never sought to dispute that MBU leaves open to decision makers the assessment of <u>local</u> environmental and other impacts, and the weighing of these impacts against the in principle support provided by the policy for making best use applications, such as the current one. However, it is hopeless to suggest that MBU leaves it open to LPAs to assess the carbon impacts of an MBU proposal at their discretion, for the reasons set out in STAL's Closing Submissions at para 181.

c. Per para 182 of STAL's Closing Submissions, para 190 (and para 173) of UDC's Costs Response is a <u>complete and unacceptable mischaracterisation</u> of Mr Robinson's evidence. Mr Robinson did <u>not</u> agree that carbon emissions were a matter which MBU left open to LPAs to take into account. As the Panel's notes of his evidence will show, although he agreed that MBU does not <u>explicitly</u> say that LPAs "must not" consider carbon issues, he went on to say that MBU does "set out [the Government's] expectation of how the issue should be treated. And <u>carbon emissions should clearly be treated at a national level, and that is plainly what the document says</u>." As the Panel's notes of the evidence will show, Mr Hawkins also gave evidence on this issue. He was also clear in his evidence that MBU deals with the national issue of carbon emissions and therefore narrows the range of issues for Local Planning Authorities to consider to local issues only. The good sense underlying this policy approach was addressed at the inquiry and needs no further comment here.

d. For the reasons set out in STAL's Closing Submissions (para 184), arguments about the "weight" to be given to MBU in this context are an illegitimate attack on the

merits of MBU, dressed up as a question of planning judgment. UDC's Costs Response does not address these submissions at all.

CONCLUSION

105. For the reasons set out above, and in STAL's submissions on costs and its Closing Submissions, the Panel is respectfully invited to make a full (or, alternatively, a partial) award of costs against UDC.

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23 April 2021