APP/D0121/W/20/3259234

APPEAL BY BRISTOL AIRPORT LIMITED
AGAINST THE REFUSAL OF APPLICATION 18/P/5118/OUT
SEEKING PLANNING PERMISSION FOR AIRFIELD INFRASTRUCTURE
AND AMENDMENTS TO EXISTING PLANNING CONDITIONS
AT BRISTOL AIRPORT

APPLICATION FOR COSTS
ON BEHALF OF THE APPELLANT

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1. This is an application for costs by Bristol Airport Limited ('BAL') against North Somerset Council ('NSC'). It is with a sense of regret and some sadness that BAL feels obliged to make this application, but it feels genuinely aggrieved at the way that its application was determined by NSC in February / March 2020 and by aspects of NSC's conduct of the ensuing planning appeal.

2. The Planning Practice Guidance states that the aims of the costs regime include to:

   "encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay"
   (ID: 16-028-20140306)

3. This is an application is for a full award of costs against NSC on both procedural grounds and substantive grounds (ID: 16-031-20140306). It should be read together with BAL's closing submissions and related evidence (where necessary).

4. It is submitted that the two conditions for an award are satisfied, namely that:

   a. The party against whom the application is made has behaved unreasonably; and

b. The unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

(ID: 16-030-20140306).

The timing of the application

5. This application complies with the requirement that "*All costs applications must be formally made to the Inspector before the hearing or inquiry is closed*" (ID: 16-035-20161210). The guidance further states that "*as a matter of good practice, and where circumstances allow, costs applications should be made before the hearing or inquiry"* (ibid.). In the present case, circumstances did not allow an earlier application. BAL did, however, state in its Statement of Case[1] that it considered the NSC decision to be *"unreasonable"* and in its Opening Submissions[2] that *"BAL feels that it has been treated unfairly by the planning system and put to substantial cost, and that NSC's behaviour has been both wrong and, indeed, unreasonable."*

6. The application relates in part to the substance of NSC's case and BAL needed, therefore, to hear that case and the evidence at the inquiry before it could reach a properly informed view on an application for costs. In that context, BAL indicated at the outset of the inquiry, in response to the issue being raised by the inspectors, that it would indicate at the close of the evidence whether it intended to make an application for costs. At the close of the evidence on Friday 1 October 2021 BAL informed the inspectors that it intended to make an application for costs against NSC[3] and asked the inspectors for guidance as to how they would like any such application to be made. The inspectors stated that they would want any applications for costs made in writing by 5pm on Friday 8 October. This application was provided in writing to the inspectors and those representing NSC 8 October 2021, as requested.

Relevant guidance

7. The PPG makes clear that *"The word 'unreasonable' is used in its ordinary meaning, as established by the courts in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774."* (ID: 16-031-20140306).

[1] BAL SoC (**CD21.1**) (Sept 2020) paras 1.2 and 13.8.
[2] **INQ-001** (July 2021) para 33.
[3] Having informally discussed this with Counsel for NSC earlier in the week.

8. The PPG provides the following relevant (and non-exhaustive) examples of behaviour which is unreasonable on procedural grounds:

- *prolonging the proceedings by introducing a new reason for refusal*

(ID: 16-047-20140306)

9. The PPG also gives the following relevant (and non-exhaustive) examples of behaviour which is unreasonable on substantive grounds include:

- *preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations*
- *failure to produce evidence to substantiate each reason for refusal on appeal*
- *vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis*
- *refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead*

(ID: 16-049-20140306)

10. The guidance specifically notes that *"Costs applications may relate to events before the appeal or other proceeding was brought"* (ID: 16-032-20140306).

Examples of unreasonable behaviour in other costs decisions

11. Some of the types of behaviour that have been found to justify an award of costs in previous decisions by Inspectors or the Secretary of State are as follows:

a. In circumstances where a committee has departed from officers' professional advice in respect of an application, costs may be awarded where there is a failure to show reasonable planning grounds and provide evidence on appeal to support the decision in all respects;[4]

[4] Viridor Waste Management v Bristol City Council (APP/Z0116/A/10/2132394), para 4 (**Appendix 1**).

b. A sudden change in position by a local planning authority between the stance adopted in pre-application advice and the determination of the application, in the absence of a change in development plan policy or relevant guidance;[5] and

c. Failure by a local planning authority to produce evidence to substantiate its reason for refusal and relying on generalised or inaccurate assertions about a proposal's impact, which are unsupported by objective analysis.[6]

Unreasonable behaviour by NSC

Context

12. It is important to note at the outset that there is a clear distinction between the merits of the appeal on the one hand, and the reasonableness of the Committee's February 2020 decision on the other.

13. Clearly, the Inspectors must consider the merits of the appeal on the basis of all the evidence now before them. This includes circumstances that have changed, matters that have moved on or new evidence that has become available since the original planning decision. In this context, NSC is perfectly entitled to argue that some things have changed since February / March 2020 and that the appeal should be refused. However, when we are considering the reasonableness of the February / March 2020 decision, which has caused there to be a long planning inquiry, the contention that (inevitably) some things have changed is not of any assistance.

14. The plain fact is that, if Members had not unreasonably refused planning permission in February / March 2020, this planning appeal would not have been necessary and BAL would not have been put to all the effort and expense of producing evidence and fighting an appeal in relation to changed circumstances. The changed circumstances on which NSC relies only arises because of its own unreasonable behaviour.

15. Furthermore, the fact that things have moved on simply cannot explain 'why' the Committee made the decision it did. It cannot justify the decision that was made before things moved on. Indeed, making a case that centres on such matters reinforces the conclusion that the original decision was not justified and cannot be supported. Similarly, presenting a purely negative case cannot explain

[5] Black Horse Residential Ltd v Central Bedfordshire Council (APP/P0240/W/18/3210480), para 12 (**Appendix 2**).
[6] Peter Brett Associates v Peak District National Park Authority (NP/DDD/0115/0040), para 10 (**Appendix 3**).

why the Committee rejected the application when the Committee's own reasons for doing so allege positive objections based on the impacts of the proposed development (as explained further below).

16. It should also be noted that not a single Officer from NSC has been called to give evidence during the course of the inquiry. In some respects, this is unexpected; NSC Officers supported BAL's application. But what this also indicates is that they remain of this view. Indeed, if Officers had changed their position then they would no doubt have been called to explain that; they weren't. It was put to Mr Melling in cross-examination on Day 31 (AM session) that Officers would not have recommended approval if they were advising members in the context of the current circumstances. There is no evidence at all to support such a suggestion and Officers, some of whom have sat in the inquiry hall, could have made that abundantly clear if it had been the case.

Overview

17. NSC's behaviour has been wholly unreasonable in four principal respects, all of which have caused unnecessary and wasted expense in the appeal process. These grounds are to some extent interrelated, and should be considered as such, but are identified separately here for convenience.

    a. Members rejected the clear advice of officers on planning and technical issues without proper evidence to the contrary and without therefore themselves reaching a 'reasoned conclusion' on the significant effects of the development taking into account the environmental information submitted as part of the application as required by reg.26(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ('TCP (EIA) Regs')[7];

    b. NSC failed to afford BAL an adequate opportunity to respond to legal submissions sent to Members just before the determination of the application;

    c. NSC failed to substantiate its actual reasons for refusal and, instead, pursued a new case that was not and could not have been known to Members when they made their decision; and

    d. NSC presented a case that has, in effect, raised additional reasons for refusal.

Rejection of Officers' advice

[7] (**CD5.5**).

18. The February 2020 Officers' Report[8] was the culmination of over a year's work by NSC Officers, their expert advisers and BAL to resolve issues relating to the proposed development and provide the information required to determine the application. As part of this process, BAL provided substantial additional information in response to two responses under the regulation 25 of the TCP (EIA) Regs 2017[9]. Officers concluded that the proposed development complied with the development plan taken as a whole, and recommended that planning permission be granted[10]. The Officers Report, which ran to some 146 pages with a further 69 pages of appendices, contained a very detailed analysis of the planning and technical information provided by BAL in its application documents, including the Environmental Statement ('ES') and the subsequent responses to the regulation 25 requests. Full agreement was reached between Officers and BAL about the conditions to be imposed[11] and the proposed Heads of Terms for a section 106 agreement[12].

19. Regulation 4(5) of the TCP (EIA) Regs[13] states clearly that *"[t]he relevant planning authority or the Secretary of State must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement."* This is particularly important where, as here, many of the issues are highly technical. NSC instructed specialist external consultants, Jacobs, in the fields of forecasting, socio-economic impacts, highways, carbon and climate change and noise and vibration, to advise them on the technical aspects of BAL's application.

20. The analysis of the technical evidence contained in the Officers' Report, which was so informed by independent expert technical advice, provided the Officers' reasoned conclusion on the environmental impact of the proposed development and the overall planning balance:[14]

    a. The proposed development would achieve substantial economic benefits, which is a matter of significant weight in favour of the proposal;

    b. The level of additional carbon emissions is 'not significant' and are unlikely therefore to compromise the UK's ability to meet its climate change obligations;

[8] (**CD4.11**).
[9] (**CD3.6.1 – 3.6.23**).
[10] (**CD4.11**), page 2.
[11] (**CD4.11**), pages 146 to 166.
[12] (**CD4.11**), page 224, Appendix 3.
[13] (**CD5.5**).
[14] (**CD4.11**), pages 141 to 146, 'Issue 24'.

c. Subject to the agreed conditions and obligations, there is no objection to the proposed development in terms of noise impacts;

d. The harm caused to the openness of the Green Belt is outweighed by very special circumstances;

e. There is no objection to the proposed development in respect of air quality;

f. The public transport mode share target is "*ambitious and realistic*". The highways mitigation works are technically acceptable, and the residual impact on roads and junctions are considered acceptable;

g. There will be no additional public health impacts that need to be mitigated.

21. In determining the application, NSC was also under a specific legal obligation in regulation 26(1) of the TCP (EIA) Regs. Regulation 26(1) provides (emphasis added) that:

"When determining an application or appeal in relation to which an environmental statement has been submitted, the relevant planning authority, the Secretary of State or an inspector, as the case may be, must —

(a) examine the environmental information;

(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;

(c) integrate that conclusion into the decision as to whether planning permission or subsequent consent is to be granted; and

(d) if planning permission or subsequent consent is to be granted, consider whether it is appropriate to impose monitoring measures." (Emphasis added).

22. Thus there was a legal duty on NSC to 'examine the environmental information' and to 'reach a reasoned conclusion on the significant effects of the proposed development on the environment'. It is, of course, perfectly acceptable for Members to delegate to Officers the task of examining the environmental information and reaching a reasoned conclusion on likely significant effects in order to then advise the relevant Committee. But, and this is important, if Members want to depart from their Officers clear analysis and advice, the legal duty falls on them to grapple properly with the environmental information themselves, in order to come to an adequately 'reasoned conclusion' of

their own and then 'integrate' that conclusion into their decision whether to grant planning permission or not. There is no evidence that this happened (see below) and it is clear that *"vague, generalised or inaccurate assertions"*[15] or similar concerns about a proposals impacts is not sufficient.

23. NSC's Planning and Regulatory Committee had before it BAL's planning application and the advice in the Officers' Report at a meeting on 10 February 2020. At that meeting, the Committee resolved to refuse planning permission. This resolution was passed without any alternative expert advice and without any alternative environmental information that would be capable of justifying a departure from the conclusions of Officers and their expert advisers. Whilst the Committee would have been perfectly entitled to request further information if it were not satisfied with the advice provided by Officers, it did not do so. Indeed, Mr Melling (who was present at the meeting) explained in his evidence in chief that no further environmental information was provided at the Committee meeting and that one of the Officers had expressly warned the Committee that it must base its decision on the environmental evidence provided.[16] It is notable that he was not challenged on this point. Despite that warning, the rejection of the Officers' analysis of the technical evidence was supported by no alternative expert evidence or advice whatsoever. In this context, the Committee's reasons for refusal represent a root and branch rejection of the detailed technical analysis of Officers on the environmental effects of the proposed development without any foundation in the evidence before them. Members failed with the most basic legal duty to consider fairly the application before them and then come to a 'reasoned conclusion' upon its significant environmental effects. This strikes at the very heart of the reasons for costs being awarded (see above), that is, to *"encourage local planning authorities to properly exercise their development management responsibilities"*.

24. Indeed, having rejected the Officers' 'reasoned conclusion' on the likely significant environmental effects of the proposed development, the irresistible inference is that the Committee itself failed to reach any 'reasoned conclusion' as required by the TCP (EIA) Regs.

25. It remains altogether unclear as to the basis on which Members' original draft reasons for refusal were proposed. The decision to refuse permission was confirmed, however, and the final reasons for refusal were settled at a further Committee meeting on 18 March 2020. The Officers' Report which was provided in relation to the March meeting reiterated its original recommendation and advice was given on the reasons for refusal and the 'risk of costs'[17]. No further technical input was requested or obtained by the Committee, despite the technical nature of the reasons for refusal.

[15] See reference to the PPG advice at paragraph 9 above.
[16] Mr Melling, evidence in chief, Day 31, am session.
[17] (**CD4.13**).

26. Not a single witness has given evidence during the course of the inquiry who would be capable of explaining the evidential basis on which members departed from Officers' advice in respect of the application. No Member of the Council has given evidence, no Officer has given evidence, no expert consultant involved in the pre-determination stages of the application has given evidence; there has been a thundering silence as to 'why' it was that Members rejected the expert evidence before them and refused BAL's application. Nor do we really understand, therefore, 'how' the reasons for refusal were arrived at. We are simply left with reasons for refusal that assert 'positive' impacts from the proposed development in respect of a series of highly technical issues and in circumstances where there was no evidence to support such conclusions.

27. For these reasons, the conduct of Members in departing from detailed analysis and advice of Officers and their external advisers on the significant environmental effects of the proposed development in the absence of any alternative or additional environmental information on which they could have reached their own reasoned conclusion, as required by law, was simply unreasonable.

<u>NSC failed to afford BAL an adequate opportunity to respond to legal submissions sent to Members just before the determination of the application</u>

28. Shortly before the Committee meeting held on 10 February 2020, the Parish Council's Airport Association ('PCAA') and Bristol Airport Action Network Coordinating Committee ('BAANCC') commissioned the preparation of a legal opinion by counsel[18]. The opinion, which is dated Tuesday 4 February 2020, was produced six days after the publication of the Officers' Report on 29 January 2020. The opinion contained legal submissions relating to (i) the ability of members to depart from the advice of NSC Officers, (ii) the risk of a legal challenge to the decision if members were to approve the application and (iii) provided suggested reasons for refusal. These included key technical issues such as greenhouse gas emissions, biodiversity and the Green Belt, on which NSC had received its own expert advice leading Officers to recommend approval. Unfortunately, the opinion did not remind the Committee of its duties under regulation 26 of the TCP (EIA) Regs.

29. Ms Burn, on behalf of the PCAA, confirmed in oral evidence that the opinion was sent <u>directly</u> to all NSC Councillors at some time between 5th and 7th February 2020[19]. So far as BAL is aware, and NSC has never suggested otherwise, it was not sent directly to NSC Officers, which would have been the proper course of action in the circumstances. Nor was it sent to BAL as the applicant. Indeed, Ms Burn confirmed that the opinion was "*trying to influence the District Councillors*" and on this basis

[18] (**CD19.11**).
[19] Ms Burn, cross-examination, Day 11, pm session.

the PCAA's position was (and remains) that there was no obligation to send it to BAL[20]. In the event, BAL understands that NSC Officers indirectly obtained a copy of the opinion from Members later that week. BAANCC subsequently published a copy of the legal advice, a copy of which was obtained by BAL just 2-3 working days before the Committee meeting scheduled for 10 February 2020.

30. Needless to say, BAL was completely taken by surprise by the PCAA/BANCC legal opinion and was not left with adequate time to respond; Counsel had not been instructed at that stage because the PCAA/BAANCC legal opinion was not expected. Despite this, the meeting went ahead as planned despite Members' awareness of the contents of the opinion and the potential implications for BAL's application. The meeting was not, however, adjourned in order to allow BAL to consider and respond to the contents of the advice, which would have plainly been the reasonable course of action in the circumstances. The direct result of this was that BAL was unable to respond substantively to the legal submissions in the opinion prior to the Committee meeting. The Committee was therefore not in receipt of BAL's position at the time that the resolution was passed. It is notable that the draft reasons for refusal proposed by the Committee[21] reflect some of those identified as potential reasons for refusal in the opinion.

31. In the circumstances, NSC acted unreasonably and unfairly in failing to adjourn the Committee meeting in order to permit BAL, as the applicant, an opportunity to properly consider and respond to third party legal advice that had clear potential implications for the outcome of its application and, as Ms Burn made clear, was intended to do so. This is particularly unfortunate when the clear purpose of the submission of the advice was precisely to influence Members in order to persuade them to depart from the Officers' recommendation. Failing to allow BAL adequate opportunity to consider the new legal material submitted against the application, take advice on the issues raised and respond in advance of the Committee's consideration of the application, was both unfair and unreasonable.

<u>NSC failed to substantiate its actual reasons for refusal and, instead, has developed a new case that was not and could not have been known to Members when they made their decision</u>

32. Throughout the inquiry NSC frequently complained that: (a) BAL has not undertaken one form of assessment or another; or (b) BAL has not disclosed the inputs or models for those assessments that it has undertaken. NSC appears, at times, to have been under the impression that there is some sort of 'burden of proof' on BAL and that NSC simply plays an audit role; this is completely wrong. The

[20] Ms Burn, cross-examination, Day 11 pm session.
[21] (**CD4.13**).

Courts have long made clear that the civil law concept of 'burden of proof' plays no part in the planning system[22].

33. The obligation in the Town and Country Planning (Development Management Procedure) (England) Order 2015, Article 35(1)(b) is that (emphasis added) *"(1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters … (b) where planning permission is refused, the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision"*

34. It is in that context that, in turn, the inspectors deciding a planning appeal have to consider all the evidence to determine whether there are reasons to refuse planning permission, within the overall legal framework of s.38(6) of the Town and Country Planning Act 1990. In this context, it is as much for NSC to make out its case as to why planning permission should be refused as for the appellant to make out a case that it should be granted. For it to act 'reasonably', however, a local planning authority that has refused planning permission must *"produce evidence to substantiate each reason for refusal"* (PPG ID: 16-049-20140306), within a context where those reasons should have been clearly and precisely stated. Here is it important to consider carefully NSC's reasons for refusal.

35. NSC's reasons for refusal do not allege that assessments were not carried out or that inputs or models were not disclosed; the reasons put forward a positive case in respect of its objections to the proposed development:[23]

    a. Reason for refusal 1 alleges, *inter alia,* that the proposed development would result in adverse environmental impacts on communities arising from noise, traffic and off airport car parking, and would have an adverse impact on an inadequate surface access infrastructure;

    b. Reason for refusal 2 alleges, *inter alia,* that the noise and air quality impacts generated would have a significant adverse impact on the health and well-being of residents in local communities;

    c. Reason for refusal 3 alleges, *inter alia,* that the proposed development would exacerbate climate change;

[22] See, for example, *Pye (Oxford)* [1982] JPL 577 and *Federated Estates* [1983] JPL 812.
[23] (**CD4.16**).

d. Reason for refusal 4 is a Green Belt ground; and

e. Reason for refusal 5 alleges, *inter alia,* that the proposed public transport provision is inadequate and will not sufficiently reduce the reliance on car to access the airport.

36. These are the 'reasons' that NSC must 'substantiate' if it is to act reasonably, and it is simply not good enough for it to allege that BAL has not carried out assessments that it now claims are required, or has not provided information or models that it now says are needed. NSC must make out its own case supported by its own evidence to substantiate its reasons for refusal.

37. Indeed, NSC's evidence has altogether failed to substantiate its actual reasons for refusal (i.e. the reasons that actually motivated Members to refuse planning permission), but has instead presented a new case that could not possibly have been in the minds of Members at the time that the application was refused:

a. A major theme of NSC's case has concerned *"uncertainty"* resulting from factors such as COVID-19, Brexit and the announcement that Jet2 will commence operations at Bristol Airport.[24] Whilst, of course, it is right that these factors are now taken into account by the inspectors in determining the appeal (see above), they do not explain the position of Members in refusing the planning application. Indeed, had Members not unreasonably refused planning permission it would not have been necessary to grapple with these more recent issues (again, see above).

b. This theme on *"uncertainty"* impacts NSC's position in respect of forecasting, which in turn informs its position on the scale of socio-economic benefits (in particular, business productivity benefits) and the inputs to the environmental assessment. As a consequence, NSC's evidence on the environmental impacts has focussed on the alleged difficulties with understanding the likely impacts and the risk that the actual effects exceed those assessed, predominantly due to *"uncertainties"* around fleet mix[25]. This major aspect of NSC's case did not form part of any

[24] Mr Folley, Proof of Evidence (**NSC/W1/1**), page 3, section 3. Mr Siraut, Proof of Evidence (**NSC/W2/1**), page 48, section 8. Mr Fiumicelli (**NSC/W3/1**), pages 110 to 115. Dr Broomfield, Proof of Evidence (**NSC/W4/1**), page 30, section 5.5. Dr Hinnells, Proof of Evidence (**NSC/W5/1**), page 43, para 157(d).
[25] Mr Fiumicelli, Proof of Evidence, (**NSC/W3/1**), pages 110 to 115. Dr Broomfield, Proof of Evidence (**NSC/W4/1**), page 30, section 5.5. Dr Hinnells, Proof of Evidence (**NSC/W5/1**), page 43, para 157(d).

of the reasons for refusal. Indeed, two of the major causes of this perceived uncertainty, the Jet2 announcement and the COVID-19 pandemic, post-date the Committee's determination. More importantly, however, this significant theme of NSC's case bears no resemblance to the positive objections contained in the reasons for refusal (as set out above). There is no suggestion in the reasons for refusal that Members considered the effects uncertain; indeed, if they had, then the requirement in art. 35(1)(b) (above) would have required them to state this "*clearly and precisely* . This represents a distinct departure from the reasons for refusal and a change in the nature of objections to the proposed development.

c. A further, but related, major theme of NSC's evidence before the inquiry is the failure of BAL to carry out a range of necessary assessments[26]. This approach adopted, for example, in NSC's position in respect of the impact of the proposed development on health. None of the witnesses called by NSC have any expertise in public health.[27] Nor has NSC conducted an alternative assessment of the public health impacts of the proposed development. Far from putting forwards a positive case to reflect reason for refusal 2, it has simply criticised the assessment carried out by BAL.[28] In this regard, NSC has failed to substantiate its reason for refusal that it *"would"* have a "*significant adverse impact*" on health by producing no positive evidence capable of supporting such a finding.

d. Similarly, a significant proportion of Mr Colles's evidence in respect of surface access consists of assertions that BAL has failed to provide information or to carry out updated assessments[29]. But reason for refusal 1 raises no issue relating to the traffic modelling or assessments carried out. This is not surprising; the scope, approach and methodology of the highways modelling was agreed with NSC and Highways England (now National Highways) in advance of the

[26] Mr Fiumicelli, Proof of Evidence, (**NSC/W3/1**), page 136, para 9.9 (different fleet mixes), page 92, para 7.21 (analysis of additional awakenings), page 64 and para 4.96 (assessment of impact on tranquillity). Dr Broomfield, Proof of Evidence (**NSC/W4/1**), page 27, para 91.

[27] Mr Fiumicelli, cross examination, Day 11, am session: Mr Fiumicelli stated that it was not him to comment on the correct approach to carrying out an HIA ; Dr Broomfield, cross examination, Day 14 am session.

[28] For example, Mr Fiumicelli, Proof of Evidence, page 46, para 4.42 (failure to refer to academic literature on the link between noise exposure and cardiovascular impacts). Dr Broomfield, Proof of Evidence (**NSC/W4/1**), page 25, para 70 (the need for an assessment of health impacts on non-threshold air quality effects). This is also set out in NSC's Statement of Case (**CD21.2**), page 22, para 74.

[29] Mr Colles, Proof of Evidence (**BAL/W4/1**), page 20, section 4.3 (traffic flow movements), page 21, section 4.4 (queue surveys), page 22, section 4.5 (A38 proposed mitigation drawing), page 22, section 4.6 (swept path analysis), page 23, section 4.7 (road safety audit), page 24, section 4.8 (collision analysis), page 24, section 4.9 (walking, cycling and horse riding assessment), page 25, section 4.10 (growth scenarios).

submission of BAL's application[30]. The issues now raised by Mr Colles not only depart from that agreed position but are not supported by Highways England. NSC's evidence also fails altogether to demonstrate that there would be an "*adverse impact on surface access infrastructure*" as alleged in the reason for refusal. Indeed, the NPPF makes clear that development should only be refused on highways grounds if there would be an "*unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe."*[31] Claiming that information has not been provided and assessments have not been updated does not make a positive case about the impact of the proposed development. Atkins, on behalf of NSC, is plainly capable of conducting its own modelling and assessments in order to demonstrate that there would be an adverse impact, but it has not done so.

e. With regards to climate change, NSC's case has relied heavily upon the Sixth Carbon Budget and the Government's recent publication of Decarbonising Transport[32] and the Jet Zero Consultation[33].[34] None of these had been adopted and / or published prior to the decision of the Committee and therefore could not underpinned reason for refusal 3. NSC's position is that it is premature to grant planning permission for the proposed development when there has been no assessment by the UK Government of whether any expansion of airport capacity is compatible with net zero and the Sixth Carbon Budget.[35] In these circumstances, NSC argues, there can be no determination of whether or not the proposed development would materially impact the ability of Government to achieve net zero. [36] Not only is this wrong as an approach, it does not reflect reason for refusal 3, which alleges that the proposed development *"would"* exacerbate climate change and that this would conflict with the duty to obtain net zero in section 1 of the Climate Change Act 2008.

38. As noted above, what is apparent from the approach adopted by NSC is that it wrongly considers its role as one of 'auditor' or 'scrutiniser', but not as a party that has to substantiate its actual reasons for refusal. As stated above, the case law has made clear that the concept of a "*burden of proof*" is

[30] Mr Witchalls, Proof of Evidence (**BAL/W4/2**), para 5.1.5. See ES Chapter 6 – Transport (**CD2.5.8**), page 17, section 6.5, especially para 6.5.2.
[31] NPPF (**CD5.8.1**), para 111.
[32] (**CD9.134**).
[33] (**CD9.135**).
[34] See Dr Hinnells, examination in chief, Day 21 am session.
[35] See Dr Hinnells, examination in chief, Day 21 am session. Dr Hinnells was asked at 10:28, "*In advance of any concluded assessment for attainment of 6th carbon budget target, to what extent can it be demonstrated at this Inquiry that the proposed development is consistent with UK's carbon target?"* Dr Hinnells response was: *"It cannot be demonstrated*."
[36] Ibid.

not appropriate in the context of planning appeals.[37] It is not, therefore, for the Appellant to discharge a burden of proof in order to 'overturn' the local planning authority's reasons for refusal. The role of the local planning authority is not, therefore, simply to 'test' the Appellant's evidence. Clearly, NSC does not have to produce a positive case to substantiate its reasons for refusal, but it fails to do so at its peril.

39. The ramification of this is that NSC has failed to substantiate its reasons for refusal and has instead pursued an altogether different and new case, which centres on seeking to identify holes and uncertainty in BAL's case, rather than producing evidence to substantiating the 'positive' case identified in its reasons for refusal; that, in the circumstances, is unreasonable behaviour.

NSC presented a case that has, in effect, raised additional reasons for refusal

40. The above failure of NSC to properly substantiate its reasons for refusal, but to develop a new case has had clear implications for the scope of the evidence that it has presented. As explained above, the evidence presented on behalf of NSC has materially departed from the scope of the reasons for refusals and in so doing, raised new issues that amount to entirely new reasons for refusal. In addition to the change in nature of NSC's case, there are a number of points that were previously agreed between BAL and NSC but have now become matters in dispute. In particular:

a. A significant proportion of the evidence of Mr Colles concerns the perceived inadequacies with the design of the A38 improvement works;[38] this is, frankly, extraordinary. As explained by Mr Witchalls, the design of the works was agreed with NSC prior to the determination of the application.[39] The works had been the product of cooperation between BAL and its expert advisers, and NSC and its expert advisers; indeed, it is a scheme virtually identical to NSC's own Major Route Network improvement to this section of the A38. The design of the A38 works does not feature anywhere in the reasons for refusal. In these circumstances, the extensive criticism now made of the design, which comprises much of Mr Colles's evidence, is in substance a new reason for refusal. In so doing, NSC's position has changed dramatically and without any explanation since the point at which the design was agreed. As a result, Mr

[37] *Pye (Oxford) Estates Ltd v Secretary of State for the Environment* [1982] J.P.L. 577, Mr David Widdicombe Q.C. (sitting as Deputy Judge).
[38] Mr Colles, Proof of Evidence (**NSC/W4/1**), page 22, section 4.5 and section 4.6, page 23, section 4.7, page 24, section 4.9, page 26, section 4.12, page 27, section 4.13 and page 29, section 4.14.
[39] Mr Witchalls, Rebuttal Proof, page 5 to 6, paras 2.2.9 – 2.2.14; Appendix B (pdf page 82) 15 May 2019 – A38 mitigation package agreed.

Witchalls has been required to produce detailed responses to a vast range of concerns about the A38 works[40] and deal with these matters in oral evidence. Inquiry time has also been spent on long cross-examinations of both Mr Witchalls and Mr Colles on these matters.

b. NSC has raised an additional transport objection to the proposed development based on the absence of an up to date travel plan (as required by policy DM26 of the NSC Development Management Policies: Sites and Policies Plan (Part 1))[41]. This was not referred to in either the Officers' Report or the Committee's reasons for refusal. Nor is the relevant development plan policy, policy DM26, referred to in the reason for refusal. Despite this, Mr Colles's evidence alleges a conflict with policy DM26, policy CS1, the NPPF, the APF and Aviation 2050 on the basis that there is a lack of an up to date travel plan.[42] In so doing, Mr Colles's evidence effectively presents an additional reason for refusal relating to highways and surface access.

c. With regards to the extent of inappropriate development in the Green Belt, the view of BAL, NSC Officers and, it would appear, the Planning Committee, was that the proposed year-round use of the existing seasonal Silver Zone car park and the car park extension constitute inappropriate development in the Green Belt. Nowhere in the Officers' Report or the reasons for refusal did NSC indicate that it also considered that the A38 works and the proposed taxiway widening and fillets constitute inappropriate in the Green Belt. Despite this, Mr Gurtler's evidence on behalf of NSC "records his view" that both the A38 road improvements and elements of the proposed airside infrastructure are also inappropriate in the Green Belt by virtue of their impact on openness.[43] The inclusion of this allegation necessitated a written response from Mr Melling in his evidence. Mr Gurtler accepted in examination in chief that his evidence exceeded the scope of the reason for refusal in this regard but insisted that he had not taken these elements into account when striking the planning balance.[44] Despite this, however, Mr Gurtler confirmed that he was not withdrawing this part of this evidence.[45] As a result of this position, Mr Melling has had to respond to Mr Gurtler's position in written[46] and oral[47] evidence, in addition to the inquiry time spent on cross-examination of Mr Gurtler on this point. It is quite unacceptable to seek refuge behind the suggestion that Mr Gurtler was

[40] Mr Witchalls, Proof of Evidence (**BAL/W4/3**), pages 5 to 9, 10, and 11 to 17.
[41] Mr Colles, Proof of Evidence (**NSC/W4/1**), page 41, para 6.1.4.
[42] Mr Colles , Proof of Evidence (**NSC/W4/1**), page 42, paragraph 6.2.5.
[43] Mr Gurtler, Proof of Evidence (**NSC/W7/1**), pages 13 - 14, paras 46 and 49.
[44] Mr Gurtler, cross-examination, Day 25 am session.
[45] Mr Gurtler, cross-examination, Day 25 am session.
[46] Mr Melling, examination in chief, Day 29 am session.
[47] Mr Melling, Proof of Evidence (**BAL/W8/2**), pages 84 to 85, section 5.1.

simply acting consistently with his professional duty; his professional duty should have directed him to focus on the Council's case – he was not some sort of freelance *amicus curiae* to the inquiry. That is why he was asked in cross-examination whether NSC had seen his evidence before it was submitted; he confirmed that it had been seen.[48] Clearly someone at NSC should have made it clear to Mr Gurtler that he was being instructed in relation to NSC's case, not a case of his own making. Once made, however, it was inevitable that the inspectors would have to grapple with the issues and so BAL had to respond.

d. In respect of the impact of the proposed development on air quality, one of only two substantive issues raised in the Proof of Evidence of Dr Broomfield concerns the failure to assess the impact on ultrafine particles ('UFPs')[49]. The scope of the ES, including the air quality impact assessment, was agreed with NSC through the submission of a Scoping Report by BAL in June 2018 and the response from NSC in the form of a Scoping Opinion produced in August 2018.[50] NSC's position in its Scoping Opinion[51] was that the scope and methodology of the assessment, which would include NO_2, PM_{10}, $PM_{2.5}$ and NO_x, was "*acceptable*". Neither the Officers' Report nor the reasons for refusal make any reference to a failure to assess UFPs. Despite this, a major part of NSC's evidence on this topic concerns BAL's failure to assess the impact of the proposed development in respect of ultra-fine particulates. This objection constitutes an entirely new and additional reason for refusal that the Committee itself did not agree with. Indeed, if the Committee had shared Dr Broomfield's concern, it would have been obliged to particularise it in the reasons for refusal[52].

e. Indeed, reason for refusal 2 actually alleges that it is the *"noise and impact on air quality generated by the increase in aircraft movements and in particular the proposed lifting of seasonal restrictions on night flights would have a significant adverse impact on the health and well-being of residents"*. In the event, Dr Broomfield's evidence on air quality went well beyond the effects generated by the increase in aircraft movements that were identified by Members in the reason for refusal.

[48] Mr Gurtler, cross-examination, Day 25.
[49] Dr Broomfield, Proof of Evidence (**NSC/W4/1**), page 27, section 5.3.
[50] BAL's Scoping Report is at (**CD4.8.1 – 4.8.7**) and NSC's Scoping Opinion is at (**CD4.9**)**.**
[51] (**CD4.9**).
[52] Town and Country Planning (Development Management Procedure)(England) Order 2015, Art.35(1)(b).

41. In this regard, NSC has acted unreasonably by materially expanding its case beyond the actual reasons for refusal, departing from positions previously agreed (including through the formal EIA scoping process) and thereby, in effect, presenting additional reasons for refusal to which BAL has to respond.

The unreasonable behaviour has directly causing unnecessary expense in the appeal process

42. The unreasonable conduct of NSC in respect of the determination of BAL's planning application in February / March 2020 resulted in the refusal of its application. BAL's appeal, and the nine week planning inquiry at which that appeal has been considered, is a direct result of NSC's unreasonable conduct.

43. Indeed, during the inquiry itself NSC has failed to act reasonably in a number of respects, as outlined above. This has materially increased the time spent preparing written evidence and hearing oral evidence, as explained above.

44. Furthermore, five Rule 6 parties participated in the inquiry. They each called evidence in respect of a range of topics. BAL's witnesses responded to the challenges raised by these parties and inquiry time was spent hearing oral evidence from their witnesses. In previous costs decisions local planning authorities have, on occasion, argued that some issues raised during the appeal process by interested parties have exceeded the reasons for refusal and that the local planning authority should not be held responsible for such issues. In *Viridor Waste Management v Bristol City Council*[53] the Secretary of State considered this very argument and found that the inquiry had only been held because of the refusal of planning permission by the local planning authority. This had necessitated the Appellant's response to the points raised, even if they were not of concern to the local planning authority. Had permission been granted, the inquiry would not have gone ahead and the witnesses would not have needed to be called.[54]

45. During the course of the inquiry, many issues have been raised by Rule 6 parties that far exceed NSC's reasons for refusal. These includes landscape and visual amenity, ecology and the need for webTAG / Green Book analyses. BAL has had to respond to all of these issues both through evidence and/or in submissions. The costs incurred in doing so flow directly from the unreasonable refusal of planning permission by NSC, which necessitated BAL's appeal.

[53] (APP/Z0116/A/10/2132394).
[54] (APP/Z0116/A/10/2132394), paras 33 to 34.

Conclusions

46. For the reasons set out above, BAL seeks a full award of costs against NSC.

Michael Humphries QC

Daisy Noble

8 October 2021

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Appendices

Appendix 1 – Viridor Waste Management v Bristol City Council (APP/Z0116/A/10/2132394)

Appendix 2 – Black Horse Residential Ltd v Central Bedfordshire Council (APP/P0240/W/18/3210480)

Appendix 3 – Peter Brett Associates v Peak District National Park Authority (NP/DDD/0115/0040)