APPEAL REFERENCE: APP/D0121/W/20/3259234

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BRISTOL AIRPORT, NORTH SIDE ROAD, FELTON, WRINGTON BS48 3DP

NORTH SOMERSET COUNCIL'S RESPONSE TO THE COSTS APPLICATION BY BRISTOL AIRPORT LIMITED

I. INTRODUCTION

1. North Somerset Council ("**the Council**") resists the application for a full award of costs by Bristol Airport Limited ("**BAL**").

2. BAL's costs application is the latest example of its corporate arrogance. BAL is so convinced that it has an untrammelled "*licence to grow*" that its immediate response to any resistance to the expansion of Bristol Airport is to claim that the contrary view is unreasonable and justifies the award of costs, without a moment's thought that there could be an alternative view.

3. In an apparent attempt to draw a fig leaf over this aspect of its conduct, BAL now claims in its costs application that it had '*had to hear [the Council's] case and the evidence at the inquiry before it could reach a properly informed view on an application for costs*'.

4. However, BAL's application for costs is not based upon the evidence presented at the Inquiry; rather its manifestly flawed application is based upon the contention that it was unreasonable to have refused planning permission in February/March 2020. Thus, on BAL's own approach there was no need to hear the Council's case at the Inquiry at all.

5. BAL's assertion that it had to hear the Council's case are hollow words which are belied by its own conduct. For example:

   (a) BAL's solicitors, Womble Bond Dickinson ("**WBD**") wrote to the Council by letter on 16 March 2020 ("**the WBD Letter**"), after the first committee meeting

on 10 February 2020 and before the second committee meeting on 18 March 2020. In the WBD Letter, it was asserted that the draft reasons for refusal (which were amended at the later committee meeting) '*do not constitute proper reasons for refusal of this development and if they are required to be addressed at appeal, considerable time and expense will be unreasonably incurred by our client*'. This is remarkable. At a time when the decision to refuse planning permission had not been confirmed, when the decision notice had not even been issued and BAL did not know what the final form of the reasons for refusal would be, it still contended that the refusal of planning permission was unreasonable.

(b) In its Statement of Case, BAL asserted at [1.2] that the Council '*has not provided any proper justification for reaching a different conclusion and departing from the balanced and well-reasoned advice of its own officers. In all the circumstances, NSC's decision was unreasonable*'. At this date, September 2020, BAL had not seen the Council's Statement of Case or its evidence, yet still it contended that the refusal of planning permission was unreasonable. Indeed, BAL itself had not even completed the production of a huge volume of new evidence appraising the impact of the proposed development against a new assessment year, evidence which was not provided until the publication of the Addendum Environmental Statement ("**ESA**") in late November 2020.

(c) BAL's Chief Executive appeared in local media on the first day of the inquiry explaining that a costs application would be made. This was before any evidence had been called or tested.

6. Accordingly, it is clear beyond doubt that BAL's application is not one made '*with a sense of regret and some sadness*' or which was based on an '*informed view*' after considering the evidence. Rather, it was an application that BAL was always going to make, come what may. This is an application founded in close-mindedness and corporate arrogance. Ultimately, there has never been any question in BAL's mind: if the Council refused to grant planning permission, it would apply for costs, irrespective of the merits of the reasons for refusal, the Council's evidence or its own evidence.

II. BAL'S ERRONEOUS APPROACH TO COSTS

7. The important starting point is to note that BAL's application is for a full award of costs. In order to obtain a full award of costs on a substantive basis, BAL must establish that it was unreasonable for the Council to oppose the grant of planning permission for the proposed development throughout the period from the date of refusal until the present day. It is only if this is established that BAL can demonstrate that the costs of the whole appeal were incurred as a result of unreasonable behaviour.

8. In that regard, in order to make good its costs application, BAL has to establish that, at all times since the refusal of planning permission, it would be unreasonable to apply s. 38(6) of the Planning and Compulsory Purchase Act 2004 ("**PCPA 2004**"), having regard to all relevant material considerations (including APF, MBU and the NPPF) and come to the conclusion that planning permission should be refused.[1]

9. It follows that paragraphs 12 to 16 of BAL's cost application entirely miss the point because BAL seeks to attack the substantive reasonableness of the reasons for refusal without any consideration of the evidence and submissions made by the Council at the Inquiry.

10. On appeal the decision maker has an original jurisdiction, as the words of s. 79(1) of the Town and Country Planning Act 1990 ("**TCPA 1990**") make clear: the decision maker '*may deal with the application as if it has been made to him in the first instance*'. In other words, the decision maker determines the appeal *de novo*. There are two consequences of this.

    (a) First, the decision maker is not reviewing the local planning authority's reasons for refusal and is not confined to the alternative courses advocated by the parties; rather, the decision maker is tasked with applying the statutory framework, in particular s. 70(2) TCPA 1990 and s. 38(6) PCPA 2004, and reaching their own judgment as to whether planning permission should be granted.[2]

[1] BAL's paragraph 34 is wrong in suggesting that the task is to determine whether or not there are reasons to refuse planning permission; rather the task is to determine the appeal within the statutory framework provided by s70 of the TCPA 1990 and s38(6) of the 2004 Act. See below.
[2] See, for example, ***Robert Hitchins Builders v Secretary of State for the Environment*** [1979] JPL 534; and ***Shanley (MJ) Ltd (In Liquidation) v Secretary of State for the Environment*** [1979] JPL 380.

(b) Secondly, the decision maker must address matters as they exist at the date of their decision.

11. In this case, matters changed significantly in the period between refusal and now. These are explained in the Council's closing submissions.[3] BAL voluntarily presented an entirely new case, founded upon new forecasts for new assessment years in November 2020. It has not sought planning permission on the basis of the evidence as it existed as at the date of the Council's decision to refuse planning permission, or even as it existed on the date when it appealed.[4]

12. Properly understood, BAL's position is that to avoid costs a local planning authority must demonstrate on the basis of the evidence as it existed at the decision date that refusal was justified. The logical consequence of this position is that in order to avoid costs, a local planning authority is under an obligation to present evidence at an appeal on two bases:

(a) First, to demonstrate that in circumstances as they exist at the end of the appeal, planning permission should be refused; and

(b) Secondly, to demonstrate that in the circumstances that existed on the date of its refusal, planning permission should be refused.

13. That cannot be, and is not, correct. In almost every appeal, the evidence moves on from that which existed at the date of refusal, whether by the submission (by both local planning authority and appellant) of new expert evidence or by evidence having to address changes in circumstances (e.g. changed housing land supply or new national or development plan policy). To require local planning authorities to present two planning balances on appeal would be unreasonable. It would prolong appeals; increase the cost of appeals as the parties argue over a planning balance of no relevance to the determination of the appeal; create yet further delay in the planning system; and

[3] NSC closing submissions, section XI - The New Planning Balance, paragraphs 681 to 684.

[4] See, especially, the ESA. Further, it is important to note that the Council has not contended that if Officers reconsidered the matter today they would recommend refusal. Contrary to paragraph 16 of BAL's costs application, what was put to Mr Melling in XX was that given the extent of the changed circumstances, we cannot know whether Officers would recommend approval of the proposed development now or not. This remains the case.

is manifestly unreasonable. The costs regime exists to avoid these very consequences, not to create them.

14. Further, as a matter of logic it would mean that costs would be payable by a local planning authority if planning permission is refused on appeal due to new evidence or a change in circumstances, but where refusal at an earlier stage could not be justified. In other words, the local planning authority would end up paying costs for an appeal which it won. This is absurd.

15. BAL's position is thus one which is extreme, contrary to the objectives of the costs regime within the Planning system's regulatory framework and to be rejected.

16. All that a local planning authority must do to avoid costs is demonstrate in the appeal process that its reasons for refusal were pursued at the appeal on a reasonable basis.

17. As Inspector Ware said on the final day of the inquiry, 8 October 2021, all parties, thus including the Council, had "*powerfully and positively*" presented their cases in closing. That is not a description of a case which it was unreasonable to pursue.

18. Indeed, the fact that BAL has made its costs application on a basis which seeks to ignore the evidence and submissions presented at the Inquiry illustrates why its application must fail: unless it can be shown that the Council's evidence and submissions at the Inquiry were substantively unreasonable, then there is no basis for concluding that the refusal of planning permission was itself substantively unreasonable. BAL does not even begin to confront this challenge: nowhere in either BAL's closing submissions or in its costs application does BAL assert (let alone demonstrate) that the Council's evidence and submissions at the Inquiry were substantively unreasonable. To the contrary, the attempt in paragraph 12 of BAL's costs application to separate the merits of the Council's position from the reasonableness of the decision to refuse planning permission is a tacit recognition that the Council's evidence and submissions at the Inquiry <u>were reasonable</u> and thus the Council demonstrated that to refuse planning permission was (at the very least) reasonable.

III. RESPONSE TO GROUNDS ADVANCED IN COSTS APPLICATION

19. The Council responds to each of BAL's grounds for asserting that the Council has acted unreasonably in turn below.

(a) The Refusal of Planning Permission

20. This ground is predicated on BAL's approach of omitting consideration of the Council's evidence and submissions at the inquiry. Given that such an approach is in error for the reasons explained above, this ground must be rejected. In any event, it is a ground which fails for the following reasons.

The EIA Regulations

21. BAL's submissions regarding the legal duties upon the Council in relation to the environmental statement ("**the ES**") are bizarre and founded upon an error of law. Regulation 26(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("**the EIA Regulations**") materially provides:

> *'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 […]'*

22. There was no allegation, either in BAL's Statement of Case or its evidence (see in particular Mr Melling's evidence) that the Council had failed to comply with reg. 26 of the EIA Regulations. Further, at no stage has BAL suggested (in evidence or correspondence) that the Council (or the planning committee) failed to have regard to the environmental information, which includes both the ES and any representations received from the public in relation to it. That is because the Council, and specifically the planning committee, did have regard to the totality of that material along with the

advice given by Officers. Of course, they did not, and could not, have regard to the large volume of material produced in late November 2020 as the ESA. That material forms part of the environmental information to which the duties in reg. 26 now apply (those duties falling on the decision maker, but which was considered by the Council in its evidence in detail in any event).

23. It is not the case that, to depart from the views of significance in an environmental statement, a local planning authority must produce its own environmental statement setting out its own differing views on the likely significant impacts. That forms no part of the EIA process under the EIA Regulations. Moreover, it is clear from reg. 26(b) that there is no duty on a local planning authority to undertake its own supplementary examination of the environmental effects before reaching a conclusion on the issue of significance of effect.

24. Further, it is established that decision makers should not conflate conclusions regarding the likely significance of an effect in the EIA process with either (1) whether an effect is significant in terms of planning policy or (2) whether an effect conflicts or accords with the development plan. For example, in ***R. (Thakeham Village Action Ltd) v Horsham DC*** [2014] Env. L.R. 21 at paragraph 118 Lindblom J (as he then was) explained:

> *"The conflict of that proposal with relevant policy in the development plan, which was accepted by the Council's officers in their committee reports, did not compel the Council to require an EIA. No support for that idea is to be found either in the case law or in relevant policy and guidance.* ***The submission made by Mr Taylor and Mr Warren that the screening process under the regime for EIA is different from the planning decision process is valid, and important.*** *The difference between the two processes has been acknowledged by the Court of Appeal, for example in paragraph 20 of Moore-Bick L.J.'s judgment in Bateman and in paragraphs 45 and 46 of Pill L.J.'s, with the agreement of Sullivan and Toulson L.JJ. in Loader (see paragraphs 30 and 31 above). It is also implicit in government policy, in paragraphs 34 and 35 of Circular 02/99.* ***A proposal may be in conflict with one provision or another of the development plan, and the conflict may be a significant one. But it does not follow that the development in question must therefore be regarded as likely to have significant effects on the environment.*** *" (emphasis added)*

25. Thus, it is reasonably open to a decision maker to conclude that a conflict with development plan policy arises from the effects of a development even where those effects are not identified as likely significant effects in an environmental statement.

26. It follows that there was no obligation as a matter of law on the Planning Committee to accept that since the ES identified no likely significant effects on a particular issue that the proposed development accorded with the development plan (and national policy) on that issue. BAL's submission to the contrary must be rejected in the light of the ***Thakeham*** case. That submission is wholly misconceived.

27. It further follows that the results of the ES (and ESA) are thus open to interpretation in the context of the development plan and national policy as a whole.

28. The Council reached a reasoned conclusion on the significant effects of the proposed development in its reasons for refusal by reference to that environmental information as supplemented by officer advice. At no stage did BAL ask for clarification of the scope of those reasons. They were clear and precise.

29. Thus, it can be seen that the reliance on the EIA Regulations is ultimately a red herring. The points made do not lead to the conclusion that the Council's continued objection to the proposed development was unreasonable.

Departure from Officers' Advice

30. It is, of course, correct that Members refused planning permission in circumstances where officers had recommended approval of planning permission. However, the members of a planning committee are not bound to follow the advice of their officers. There is nothing unlawful or unreasonable in refusing planning permission against an officer's advice.

31. The Council substantiated the reasons for refusal through its evidence and submissions at the inquiry. The Council's case was pursued on an entirely reasonable basis. It presented evidence in support of its case from qualified expert witnesses in respect of all reasons for refusal – this was not a case where members refused but no professionally qualified expert was called to support the views reached by members; rather the refusal was supported by expert evidence from witnesses who all expressed the view that the refusal to which their evidence related was justified.

32. The fact that appropriately qualified professionals provide evidence which supported each of the reasons for refusal, demonstrates that the Council acted reasonably in pursuing its objection. This was not a case where a Council offered no evidence.

Rather, it was a case where the Council was entitled to rely upon expertise of the witnesses it called. That reliance was not unreasonable.

33. The suggestion that a local planning authority which is considering a refusal of planning permission against an officer recommendation must first obtain supporting advice from relevant consultants is also to be rejected. What matters is whether on appeal evidence is adduced which demonstrates that it was reasonable to refuse planning permission on the basis identified. That has been done in the present case for reasons explained in the Council's closing submissions and below.

Alleged "absence" of evidence from members of the planning committee

34. It is established that decisions of planning committees are expressed by voting on a resolution. As was explained recently in ***R. (Cross) v Cornwall Council*** [2021] EWHC 1323 (Admin) *per* Tipples J at [57] – [58]:

> *"57. […] a committee, such as the Committee in this case, 'expresses itself by voting on a resolution and the minute then forms the public record of its decision. In normal circumstances, the decision can only be ascertained by reference to the terms of the resolution' (see* ***R (Shelley) v Carrick DC [1996] Env LR 273****, Carnwath J (" Shelley ") at 283). The reasons cannot be identified from the debate because, as was explained by Schiemann J in* ***R (Beebee) v Poole Borough Council*** *[1990] 2 PLR 27 ("Beebee") (at 31E):*
>
> > *'All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may well have changed them because of what was said subsequently in debate.'*
>
> *58. It is not permissible to look at extraneous documents to which the statement of reasons do not refer "and in effect [conduct] a "paper chase" though the local planning authority's minutes": see* ***R (Macrae) v County of Herefordshire District Council*** *[2012] EWCA Civ 457 ("Macrae"), per Sullivan LJ at paragraph [28])."*

35. Accordingly, the evidence from individual councillors to explain their personal reasons for refusing planning permission would not have been appropriate since the reasons of the Council were expressed in the resolution which the Committee passed i.e. the reasons for refusal, as recorded in the decision notice which is before the inquiry.

Substantive reasonableness

36. For the reasons above, this ground goes nowhere. However, for completeness and out of an abundance of caution, the Council makes the following brief submissions on each reason for refusal ("**RFR**") (all of which are explored in more detail in the Council's evidence and submissions).

37. The key policy in the Development Plan is CS23. That requires resolution of the "environmental issues". The Council has explained that properly interpreted this policy does not require an internal balance to be struck as BAL contends; rather it requires environmental issues to be mitigated to acceptable levels.[5] The Council's interpretation of that policy is (at the very least) arguable and reasonable. Further, the Council's contention that the environmental issues have not been mitigated to acceptable levels is reasonable and justified as we explain further below.

38. In terms of RFR 1 this reads:

> *"The further expansion beyond 10mppa now proposed would generate additional noise, traffic and off airport car parking resulting in adverse environmental impacts on communities surrounding Bristol Airport and which would have an adverse impact on an inadequate surface access infrastructure. The claimed economic benefits arising from the proposal would not outweigh the environmental harm caused by the development contrary to policy CS23 of the North Somerset Core Strategy 2017.*

39. The Council submits:

(a) It was reasonable to take the view that the approach to the assessment of impact (by reference to change in the LAeq 16 hour or 8 hour index) did not capture the full scope of the likely impact of large changes in the number of flights (particularly at night) and indeed that an approach solely based upon the LAeq metric was not consistent with the requirements of the NPPF/NPSE.

(b) It was reasonable to take the view that the proposed development was contrary to the approach set out in the APF relating to air noise because it did not result in a fair share of the noise reduction that would be expected to arise from technological improvement.

[5] NSC Closing submissions paragraph 22 and following

(c) It was reasonable to take the view that as at the date of determination the assessment of significance of the noise impacts understated the impact of the proposed development. The subsequent Number Above assessment[6] revealed that a far greater number of people would be significantly and adversely affected by day and by night by noise levels above SOAEL which will not be mitigated than the ES and even the ESA identified.

(d) No mitigation is offered to those experiencing noise levels between LOAEL and SOAEL. This is contrary to the requirement in the NPPF/NPSE to reduce noise to a minimum for those residents residing in locations experiencing noise between LOAEL and SOAEL. It is thus reasonable to conclude that this gives rise to a breach of national planning policy and the Development Plan.

(e) In terms of the residual noise impacts of the proposed development, it was reasonable to contend that these do not comply with either national or Development Plan policy.

(f) It was reasonable to take the view that the proposed development would give rise to adverse impacts on the surface access infrastructure: indeed, Mr Witchalls has been forced to propose amendments to the design of the junctions (despite such amendments not being legally permissible) in an attempt to overcome the adverse impacts identified by Mr Colles.

(g) It was reasonable to question the extent of the economic benefit which BAL identified, in particular where: BAL reduced its own appraisal of the economic benefit significantly in its ESA; BAL failed to reflect the true cost of carbon; BAL needed to reflect the effect of displacement, i.e. to calculate the net effect, but did not do so; it was (at the very least) reasonable to conclude that net increase in business travel had not been established and that the growth included by BAL should be discounted; and the resultant calculation of net present value is equivalent to only £10m a year over 60 years.

40. In terms of RFR2, this reads:

[6] Only produced in rebuttal by BAL as a direct consequence of Mr Fiumicelli's criticisms in his proof of evidence.

"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 local communities and the proposed development would not contribute to improving the health and well-being of the local population contrary to policies CS3, CS23 and CS26 of the North Somerset Core Strategy 2017"

41. The Council submits:

(a) The Council adopted a position on noise impacts which was and is reasonable for the reasons set out above.

(b) It was reasonable to conclude that the ES/ESA under-estimated the significance of the airports impacts upon air quality since they used UK AQO's which are over 10 years only and which do not reflect important subsequent dose-response research. That position was entirely reasonable since it is vindicated by the publication of the WHO Guidelines 2021. These demonstrate that even without the impact of the proposed development those living around the airport will be subject to important risks to public health. With the proposed development this position is materially worsened.

(c) It was reasonable to contend that BAL did not and has not proposed any satisfactory mitigation of the air quality impacts. It has not even formulated any measures for inclusion in its AQAP and has not identified what impact the AQAP may have on local air quality.

(d) BAL's position in respect of air quality impacts was not reasonable, did not and does not reflect the important risks to public health that the airport causes.

(e) In terms of the impact on public health, for the reasons set out in the Council's closing submissions, it was and is reasonable to conclude that policy CS26 requires large-scale development (including the proposed development) to contribute to improvements to health and well-being of those affected by the environmental impacts that the proposed development will give rise to.

(f) The Council has explained in its closing submissions that the proposed development will have a material adverse impact upon the health and well-being of those living around the airport. This was reinforced by the clear

evidence from residents to the Inquiry of the impact which the airport already has upon them prior to any further expansion.

(g) In order to satisfy policy CS26, there has to be evidence which demonstrates that those living around the airport receive health benefits sufficient to outweigh the harm to health caused by the environmental impacts that the proposed development will give rise to. It was reasonable to contend that there is no such evidence since BAL presented so such evidence either to committee or to the Inquiry.

(h) As a result, it was reasonable to contend that the proposed development conflicts with policies CS3, CS23 and CS26.

42. In terms of RFR 3, this reads:

> *"The scale of greenhouse gas emissions generated by the proposed increase in passenger numbers would not reduce carbon emissions and would not contribute to the transition to a low carbon future and would exacerbate climate change contrary to the National Planning Policy Framework, policy CS1 of the North Somerset Core Strategy 2017. and the duty in the Climate Change Act 2008 (as amended) to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline"*

43. The Council submits:

(a) The Council has set out its position in respect of the proposed development and climate change in its closing submissions.

(b) The contention that the proposed development would be contrary to the duties in the CCA 2008 set out in RFR3 was and is reasonable. The grant of planning permission for the proposed development was and remains unlawful.

44. In terms of RFR 4, this reads:

> *"The proposed extension to the Silver Zone car park and the year round use of the seasonal car park constitute inappropriate development in the Green Belt which is by definition harmful to the Green Belt. There are no very special circumstances which outweigh the harm to the Green Belt caused by reason of inappropriateness and any other harm including the encroachment of development on the countryside and loss of openness contrary to the National Planning Policy Framework and policy DM12 of the Development Management Policies Sites and Policies Plan Part 1 2016."*

45. The Council submits:

(a) It is common ground that the Silver Zone car park and the year round use of the seasonal car park constitute inappropriate development.

(b) It was also common ground that the Silver Zone car park and the year round use of the seasonal car park harm the openness of the Green Belt in spatial and visual terms. The dispute between the parties is to the extent of that harm. It was reasonable for the Council to conclude that the harm to the openness of the Green Belt was greater than that asserted by BAL: such a conclusion was in accordance with the view of officers'; BAL's evidence to the contrary was ex post facto, being produced only after it had asserted that there was limited harm; indeed, using Mr Melling's own criteria, it was clear that the harm was greater than he had assessed. The assessment of the level of harm in these circumstances is a classic matter of planning judgment which permits a wide range of reasonable conclusions. The Council's position was (at the very least) a reasonable conclusion within that range.

(c) Similarly, the assessment of very special circumstances is, by definition, a balancing exercise which permits a wide range of reasonable conclusions. Again, the Council's position was (at the very least) a reasonable conclusion within that range. This was all the more the case in circumstances where BAL had slashed its own assessment of benefits and where it could not justify a need for all of the parking spaces proposed since the UPDS assessment was flawed. There were obvious failings in BAL's assessment of parking demand, as explained in the Council's closing submissions[7].

46. In terms of RFR 5, this reads:

> *"The proposed public transport provision is inadequate and will not sufficiently reduce the reliance on the car to access the airport resulting in an unsustainable development contrary to the National Planning Policy Framework and policies CS1 and CS10 of the North Somerset Core Strategy 2017."*

47. The Council submits:

(a) It was reasonable for the Council to take issue with the proposed level of public transport provision given the total absence of any complete assessment of

[7] NSC closing submissions paragraph 465 and following.

potential options. Indeed, even at the Inquiry, Mr Witchall's evidence only assessed the impact of some of the proposed public transport measures.

(b) Further, in light of Mr Colles evidence, it was reasonable of the Council to adopt the position that a 5% uplift should have been provided. Indeed, such an uplift was less than 1% higher than the uplift predicted in Mr Witchall's scenario 2 (itself founded upon an incomplete assessment of effect).

48. In the light of these reasons for refusal, it was reasonable to conclude that the proposed development was and is contrary to the development plan.

49. In terms of the material considerations, for the reasons set out in the Council's closing submissions, it was reasonable to conclude that the proposed development was contrary to the APF/MBU. Both of these policy statements require a balance to be struck between costs and benefits in order to determine whether they weigh in favour or against the grant of planning permission as material considerations.[8]

50. It was reasonable to conclude that on balance the costs of the proposed development outweigh the benefits both as at the date of refusal and ever since. It was then reasonable to conclude that the APF/MBU weigh heavily against the grant of planning permission.

51. It was also reasonable to conclude that the proposed development does not share the benefits of growth fairly with those adversely affected by the airports operations and is thus contrary to the approach required by the APF[9].

52. It was reasonable to conclude that the socio-economic benefits of the proposed development are small, a position supported by the evidence of Mr Siraut. He emphasised the need to examine the net economic benefits of a grant of planning permission compared to the position if planning permission were refused. The result of that approach and the need to reflect the true carbon abatement costs is a development with NPV benefits of just £10m a year over 60 years which is not enough for the airport to return to profitability even in its highest passenger throughput year of 2019[10]. That level of economic benefit is very small when compared to other schemes

[8] See the Council's closing submissions at paragraph 6 and following.
[9] See the Council's closing submissions at paragraph 15 and following. Also see, for example, paras. 179 to 198.
[10] BAL made a loss of some £33m in 2019.

for example the Junction 21 Enterprise zone. In these circumstances, it was reasonable to conclude that BAL's claims of significant economic benefit were and are overblown.

53. It was reasonable to contend that the proposed development also conflicts with key policies in relation to the NPPF in relation to noise, air quality, surface access and the Green Belt. Thus, these weigh against the grant of planning permission.

54. In these circumstances, it was reasonable to conclude that the conflict with the development plan, with relevant parts of the NPPF and with national aviation policy justified refusal and continue to do so.

(b) The BAAN/PCAA Opinion

55. There are two insurmountable difficulties with this ground. First, BAL has not established that the Council's conduct was unreasonable. Secondly, BAL has not established that even if there was unreasonable conduct, that conduct justifies a full award of costs.

No unreasonable conduct

56. BAL cannot criticise the Council either for the production of the BAAN/PCAA Opinion or its distribution to the Committee: those matters were entirely outside of the control of the Council. Therefore, the essence of this ground is BAL's contention that the Council acted unreasonably by failing to adjourn the first planning committee meeting. That contention is entirely unsustainable for the following reasons:

    (a) As is clear from paragraph 29 of the costs application, BAL was aware of the existence of the Opinion prior to the Committee meeting. BAL states that it obtained a copy "*2-3 working days before the Committee meeting scheduled for [Monday] 10 February 2020*". That is, the Wednesday or Thursday of the preceding week (so 5 or 6 February 2020).

    (b) BAL was professionally represented throughout the decision-making process. It had access to specialist planning consultants and legal advice prior to the meeting on 10 February 2020.[11] Its professional advisers could have sought

[11] At the very least, BAL had access to the services of Wood and Womble Bond Dickinson. The Council are also surprised by the statement at paragraph 30 of the costs application that '*Counsel had not been instructed at that stage*' because on 7 February 2020, Mr Humphries QC discussed the Opinion with Mr Alistair Mills, then instructed as Counsel for the Council. Even if Mr Humphries QC was not instructed

adjournment from the Council if they perceived any lack of fairness in proceeding with the February meeting. No such communication was ever received. BAL does not contend that it ever asked for an adjournment.

(c) Moreover, BAL did not seek an adjournment of the February committee meeting in order to present a response to the Opinion. Indeed, Mr David Lees, BAL's Chief Executive, spoke personally at the February Committee meeting after reference had been made to the Opinion by other speakers. He could have raised any concerns relating to the Opinion or sought an adjournment but did neither.

(d) In addition, there was a further opportunity to raise any concerns regarding the Opinion between the February and March committee meetings or at the March meeting. No-one from BAL even spoke at the March meeting. Further, the WBD Letter, sent between the February and March meetings, made no reference to the Opinion at all. This silence is particularly damning: BAL had the opportunity to address the Opinion and its contents, but it neither did so, nor asked for further time to respond.

(e) Accordingly, BAL cannot have seen any unfairness or unreasonableness in the decision-making process arising from the Opinion or it would have raised its concerns, sought an adjournment and the opportunity to raise further matters in reply. It did not.

(f) In the light of the above, it is bizarre that BAL has sought to make so much of events which it did not seek to address at the time. Its claims of unfairness and unreasonableness must be rejected.[12]

No justification for a full award of costs

Even if there had been unfairness or unreasonable, this could not form the basis of a full costs claim for the appeal, since (1) any unfairness or unreasonableness does not

by that date (which would be surprising, given his discussions with Mr Mills on behalf of BAL), it would have been straightforward for BAL to request an adjournment so as to instruct Mr Humphries QC.

[12] This is also the approach of the courts: see, for example, ***EU Plants Ltd v Wokingham Borough Council*** [2012] EWHC 3305 (Admin) at [65] where the claimant alleged unfairness (bias) but had waived its objection because it had been professionally represented at the committee meeting and, with full awareness of the facts later relied on to allege unfairness, failed to object.

go to the substance of the merits of the appeal; and (2) in any event, BAL has not explained how an adjournment would have avoided the need for an appeal (i.e. why the adjournment would have caused the Council to grant planning permission, rather than to refuse planning permission).

57. First, BAL has not explained what it (or anyone else) would have done if the first committee meeting was adjourned which would have avoided the decision to refuse planning permission and thus avoided the need for this appeal. As set out above, BAL had the opportunity to make representations on the Opinion but did not do so. In such circumstances, it is untenable to suggest that an adjournment would have made any difference to the Council's decision.

58. Secondly, BAL has not demonstrated that the Opinion caused the refusal of planning permission. As set out above, the Committee's reasons for refusing planning permission are those set out in the decision notice. There is no reference to the Opinion in the reasons for refusal. Accordingly, it is speculation on the part of BAL to assert that Members were influenced by the Opinion circulated by objectors. There is no evidential basis to support the view that the **Council's decision** (i.e. the collective decision of the Committee) as expressed in the reasons for refusal was founded upon that Opinion. To the contrary, there is positive evidence that the Committee reached its own view: the Opinion recommended additional reasons for refusal based on biodiversity (net gain) and habitats (bats), but neither issue is raised in the actual reasons for refusal; and, whilst the Opinion does discuss the issues of climate change and the Green Belt, it is clear that the Council did not adopt the reasons for refusal formulated in the Opinion, rather the Council reached its own conclusions and formulated its own reasons for refusal, in its own words.

(c) Alleged failure to substantiate reasons for refusal

BAL's erroneous approach

59. BAL's approach under this ground is erroneous in numerous respects.

60. First, as explained above, it is clear from paragraph 34 of the costs application that BAL's approach to the task of the decision maker on appeal is flawed.

61. Secondly, BAL fails to appreciate that a local planning authority is entitled to rely upon evidence from any source to support its reasons for refusal and to advance its case by

reference to the totality of the evidence before the inquiry. The purpose of cross-examination is, after all, to seek to prove a case with the testimony given by the other party's witnesses. It is submitted that in key respects identified in its closing submissions BAL's witnesses supported the Council's case.

62. Thirdly, it follows that the idea that there is some requirement on a local planning authority to present a "positive case" is to be rejected. A local planning authority can justify its refusal in reliance upon evidence and testimony from whatever source. The Council has done precisely this, as explained in detailed its case in closing submissions which run to some 188 pages and over 64,000 words.

63. Fourthly, BAL's argument that the Council had to advance a positive case is simply an attempt to import a burden of proof onto the Council when, by BAL's own admission, there is no such burden of proof on any party in the appeal. In particular, the partial and inaccurate paraphrasing of the reasons for refusal at paragraph 35 of the costs application is misleading: each reason for refusal is focussed on setting out which policy(ies) in the development plan the proposed development fails to accord with. It is that conflict which sits at the heart of each reason for refusal, reflecting the statutory framework in which the appeal must be determined, and it is that conflict which the Council's evidence and submissions have been directed at and have substantiated.

No "new case" beyond the reasons for refusal

64. None of the matters which BAL relies on at paragraph 37 of its costs application represent a new case beyond the reasons for refusal. In particular:

(a) The uncertainty which the Council has highlighted has been tied directly to the reasons for refusal, first in terms of how that uncertainty affects the assessment of effects; and secondly in terms of how that uncertainty affects the benefits of the appeal scheme. These are all relevant matters falling within the reasons for refusal.

(b) Of course, a number of factors relevant to uncertainty, such as Covid-19, arose after the decision of the Council to refuse planning permission, but there is no restriction on the Council referring to matters arising after the reason for refusal which bear on those reasons for refusal. As explained above, the determination on appeal is one made *de novo*, thus relevant matters arising after the decision

to refuse planning permission must be considered by the decision maker. It is, thus, both fair and reasonable that the parties address those matters. The Council considered all relevant factors in its evidence to the Inquiry and in its submissions.

(c) It was entirely reasonable for the Council to indicate the deficiencies in BAL's evidence, including where its assessments either had been deficient or had been omitted altogether. All of those deficiencies went to the testing of BAL's evidence on each of the reasons for refusal. That is an entirely proper and orthodox part of testing the evidence at an inquiry since it goes to the issue of the weight to be ascribed to that evidence. The reasonableness of the Council's approach is underlined by the fact that at no point was BAL surprised: all of the criticisms of BAL's evidence had been fairly raised in the Council's Statement of Case and BAL did not contend to the contrary.

(d) The criticism of Mr Colles' evidence is not fair. All of the deficiencies that Mr Colles identified were directed at the adverse impact of the proposed development on surface access infrastructure, squarely within the first reason for refusal. For example, the absence of swept path analyses goes directly to the acceptability of the proposed junction works, that is, the surface access infrastructure, proposed by BAL. So too the other matters raised by Mr Colles, for example the absence or deficiencies in the queue surveys, proposed mitigation design, road safety audit and walking, cycling and horse-riding assessment. All of these are relevant matters bearing on whether the impact of the proposed development on surface access infrastructure is acceptable and whether the effect of the proposed surface access mitigation is acceptable. These matters fall squarely within the first reason for refusal and are part and parcel of assessing the adequacy of BAL's evidence, the effect of the proposed development and the compliance of the proposed development with the development plan policies on surface access.

(e) BAL's criticism of the Council's submissions based on the Sixth Carbon Budget ("**6CB**"), Decarbonising Transport and Jet Zero are absurd. All three of these matters are directly relevant to the issue of climate change and the third reason for refusal. Moreover, all of these matters must be addressed in the

determination of the appeal. Accordingly, it was entirely reasonable for the Council to address these matters in its evidence and submissions.

65. Ultimately, the high point of BAL's argument on these matters is the assertion that these matters '*could not possibly have been in the minds of Members at the time that the application was refused*'. However, this betrays a fundamental error in BAL's approach: so long as these matters were relevant to the reasons for refusal – which they were and are – the fact that they arose after the decision to refuse planning permission does not prevent the Council relying on those matters in support of its reasons for refusal. On BAL's approach, it can rely on matters arising after the decision to refuse planning permission – see, in particular, the ESA – but the Council cannot, despite their relevance to the reasons for refusal. This is absurd and erroneous.

(d) Alleged new reasons for refusal

66. This ground is fundamentally flawed for two reasons. First, the Council did not introduce any new reasons for refusal and thus there was no unreasonable conduct. Secondly, even if the Council did introduce a new additional reason for refusal (which is not accepted), the introduction of a new reason for refusal does not – and cannot – justify a full award of costs.

No new reasons for refusal

67. None of the matters asserted at paragraph 40 of BAL's costs application amount to a new reason for refusal.

68. First, Mr Colles' concerns regarding the adequacy of the A38 mitigation works fall squarely within the first reason for refusal, as he explained in re-examination. The first reason for refusal includes the '*adverse impact on an inadequate surface access infrastructure*'. Here, the adverse impact referred to must be the residual impact; that is, the impact after consideration of the proposed A38 mitigation works. Thus, it is clear that the Mr Colles position falls squarely within the first reason for refusal: he considered that the deficiencies he had identified in the A38 mitigation works resulted in a solution which was unsuccessful and resulted in an adverse residual impact. Accordingly, this was not a new reason for refusal and was not unreasonable.

69. Secondly, the suggestion that policy DM 26 has been advanced as an additional reason for refusal is unreal. It is not a policy cited in the Council's Statement of Case; it is

touched on briefly in a single paragraph by Mr Colles in his POE; Mr Witchalls and Mr Melling refer to it in passing in their RPOEs in one sentence each, without making any substantive response on the matter; policy DM 26 was the subject of just three questions in cross-examination of Mr Colles; it is not referred to in the Council's closing submissions and it is referred to in a single footnote in BAL's closing submissions (to confirm that it is not in issue). On no rational view can these passing references be said to amount to a new reason for refusal; much less a new reason for refusal which has caused BAL to incur any cost whatsoever.

70. Thirdly, Mr Gurtler did not advance a new reason for refusal in respect of inappropriate development in the Green Belt. Quite the contrary: he was very careful not to do so, in particular to present a planning balance which was expressly on the basis of the reasons for refusal. BAL's suggestion to the contrary is untenable.

71. Fourthly, the Council's case on air quality has been fully justified. It contended in its RfR (see above) that the proposed development would have unacceptable impacts upon the health of those living around the airport which had not been appropriately mitigated. It has explained that the focus of policy is to drive down emissions where ground concentrations remain at levels which pose a risk to public health. BAL has at every stage resisted an approach which requires it to deliver improvement beyond UK AQ objectives and, in so doing, failed to recognise that ground level concentrations below UK AQO levels pose a risk to public health. The Council's approach has been entirely vindicated by the publication of the WHO Air Quality Guidelines 2021 which demonstrate that even without the proposed development ground level concentrations will be at levels significantly above thresholds which represent important risks to public health. The additional impact of granting planning permission thus makes a position where significant risks to public health exist materially worse. This case is on all fours with the reasons for refusal. BAL suggestion to the contrary is untenable.

72. Fifthly, all of the witnesses called on behalf of the Council were careful to ensure that they presented their evidence in accordance with their professional duties. As Mr Witchells and Mr Melling accepted in XX, an expert witness who has concerns beyond those raised by their client must raise them in order to fulfil their professional obligations. Where this was done in the Inquiry, all of the witnesses presented on behalf of the Council were careful to explain the position. This is not an enlargement

of the Council's case but rather the fulfilment of professional obligations which cannot simply be omitted from evidence without professional misconduct issues arising.

No justification for a full award of costs

73. Even if any of the matters asserted at paragraph 40 of BAL's costs application amounted to a new reason for refusal (which is not accepted), that does not justify a full award of costs as BAL contends. The only costs that could, potentially, be recoverable would be the costs of dealing with the particular point in question, not the entirety of the costs of the appeal and not the entirety of the costs associated with addressing any of the reasons for refusal in the decision notice.

IV. RULE SIX PARTIES

74. The Council is not responsible for determining whether others should be given rule 6 status nor the extent to which dealing with those parties results in expense for BAL. Rule 6 parties are entitled to raise issues outside of the scope of reasons for refusal and NSC cannot stop that process. If Rule 6 parties raised issues that BAL considers that it was unreasonable to pursue and which resulted in BAL incurring wasted costs, then BAL should have applied for costs against those Rule 6 parties. The fact that no such applications were made amounts to an acceptance that the issues raised by Rule 6 parties were not raised unreasonably.

V. FURTHER GROUNDS FOR RESISTING THE COSTS APPLICATION

75. There are two further and insuperable difficulties for BALs application for costs:

(a) The grant of planning permission for the proposed development has been unlawful since at least 20 April 2021.

(b) The overall planning balance presented by BAL has changed during the course of the appeal. There is legitimate scope for disagreement regarding the outcome of that balancing exercise. Thus, it was not unreasonable to pursue a case that planning permission should eb refused.

(a) Unlawful to grant planning permission

76. In its third reason for refusal the Council identified that a grant of planning permission would be contrary to the duties contained in the Climate Change Act 2008. The

reasoning for this was explained in its Statement of Case, in the evidence of Mr Hinnells, in detail in its closing submissions[13] and in its costs application against BAL. BAL has presented no answer to the reasoning provided by NSC in this respect.

77. In a context where it is unlawful to grant planning permission for the proposed development, BAL's pursuit of this appeal was entirely unreasonable, and its costs application is hopeless.

78. Indeed, given that a grant of planning permission is unlawful. The only reason course of action for NSC was to pursue its objection to the grant of planning permission.

(b) BAL's Changed Case

79. BAL has not presented a case that it should be granted planning permission on the basis of the evidence as it stood when the Council determined the application. None of its witnesses sought to assess the impact of the proposed development on the basis of the assessment years presented in the ES or the evidence in the ES. All of them presented evidence by reference to the vast quantity of material produced in November 2020, after BAL had launched its appeal and lodged its Statement of Case.[14]

80. Accordingly, this is not a case where an appellant has presented the same case on appeal to that which it presented to the Council at the application stage and then seeks its costs; rather BAL fundamentally and totally changed its case. As explained in the Council's closing submissions, this resulted in a completely different planning balance having to be struck in a completely different factual and evidential context.

81. This means that success for BAL on appeal does not necessarily mean that it would have succeeded on the basis of the case presented to Committee which differed in numerous respects, and which has not been tested at the Inquiry.

82. Further and in any event, BAL has sought to avoid scrutiny of two key aspects of its case which were not available to members – the logit passenger allocation model and the calculation of parking demand. This has meant that key aspects of its case were not subject to scrutiny and so cannot be given anything other than limited weight without unfairness arising.

[13] See the Council's closing submissions at paras. 25 to 128; as well as the costs application in its entirety.
[14] See the Council's closing submissions at para. 681 and following.

VI. CONCLUSION

83. In light of the submissions above and the Council's highly detailed closing submissions, the Council submits that BAL has not come close to establishing that, throughout the period since the refusal of planning permission to the present day, the Council's judgment that, applying the approach required by s. 38(6) of the 2004 Act, planning permission should be refused was unreasonable.

84. Indeed, it is notable that it is not said in BAL's costs application that the case presented in the Council's closing submissions was unreasonable. That is a submission that had to be made and justified by BAL if it was to succeed in its costs application. But BAL did not make that submission. Since it has not made such a submission and could not come close to justifying it, BAL's application for costs must be refused.

85. For the reasons above, the Council submits that the costs application should be dismissed.

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