LUTON AIRPORT 19 MPPA PUBLIC INQUIRY

CLOSING SUBMISSIONS ON BEHALF OF LUTON BOROUGH COUNCIL

JOHN STEEL KC

Introduction

1. I ask that my opening submissions[1] be considered as part of these closing submissions. It is clear that every one of the points made there are as relevant now as they were before the evidence was heard and tested at this inquiry. They do not change. That maybe shows the strength of the case in favour of the grant of planning permission as determined by the local planning authority, subject to conditions and the section106 planning obligation.
2. External impacts of relevance were considered in the extensive and detailed Officer Report and in particular climate change, transport/highways, socio-economics, air quality, and noise. The officer report was introduced as part of Mr Gurtler's evidence. Of all of these, noise predominated and in respect of this, air noise was the most contentious, ground noise and surface access noise were found to be not a problem.
3. At the end of the inquiry, there were no new issues of potential contention based upon the evidence. Conclusion on all the evidence is that there would be no environmental harm and no significant, material or perceptible increase in any environmental impact which would be caused by the proposals.
4. LADACAN and CPRE Hertfordshire (CPRE) were the two Rule 6 parties who presented evidence through Counsel. The conclusions of the local planning authority at its meeting on 30 November 2021, as amended in evidence as a result of the receipt of ESA 4[2], do not change having heard all of the objectors' evidence.
5. The final position which undeniably results at the end of the inquiry is, hard as it might be accepted on behalf of LADACAN and CPRE as well as other objectors, that there is

[1] [INQ02]
[2] ESA 4 [CD1.16]

clearly no reason for reason for refusal of planning permission which is based upon sound evidence. All of the contentions taken by LADACAN have been examined thoroughly; having done so, the only reasonable conclusion to be reached is that there is no good reason why planning permission should not be granted.

6. As stated in my opening submissions on behalf of the Local Planning Authority, the application is under section 73 of the Act and therefore concerns solely whether a planning permission should be granted differing from the conditions the subject of a planning permission previously granted, namely those in the 13 October 2017 planning permission, and whether they should be amended as proposed in the application or as otherwise determined by the Secretary of State.
7. The two conditions which have been of greatest contention at this public inquiry are those which concern the passenger cap (condition 8) and the application to vary the area covered by the summer noise contours (condition 10). These have been the subject of debate and consideration at the condition session and therefore little further is to be said in these submissions about the details of them as opposed to principles.
8. It is also important to note that although there has been much time taken up in considering the decision of the authority not to take enforcement action, it is common ground that the decision to invite a planning application to regularise the development was a matter for the Council to determine, and if there would be no material adverse impact on the amenity of the surrounding area, it was both logical and in accordance with government guidance in the Enforcement PPG para 011 to invite a planning application to regularise the position – this was accepted by Mr Skelton, LADACAN'S planning witness, in cross examination.
9. There would be no material adverse impact caused by the development, and the decision of the Council to grant permission was wholly correct in all the circumstances. It therefore cannot be faulted even though much heat and little light was shone upon the point before and during the course of the inquiry.

<u>The principle of development</u>

10. It is important to note, as agreed in cross examination of Mr Skelton, that in the event of planning permission being refused, the airport is entitled to return to the 18 mppa planning permission granted in 2017. Although no longer in dispute in evidence, the question of the base case is considered below.

11. There are three aspects of the 2017 planning permission which are materially different to that of the planning application the subject of this inquiry. First, the proposed Noise Management Plan within the proposed section106 obligation ties the airport to reduce noise as a result of introduction of new aircraft types (Neo's and Max aircraft) over the next 9 years to 2031; there is no such requirement currently under the 2017 planning permission.
12. Secondly, the proposed Noise Insulation Scheme (NIS) is a considerable enhancement of the current NIS compared to the 2017 planning permission as set out in Mr Thornely-Taylor's evidence sections 9 and 12. The Council places substantial weight upon this materially enhanced NIS, including (i) that none of the beneficiaries of the scheme would suffer any perceptible increase in noise as a result of the proposals, (ii) that there is no cap on the total amount available for noise insulation, (iii) that the amount available in each case has increased by 50%, and (iv) that the NIS would benefit not only from the opportunity to have noise insulation which reduces the air noise but also all other external noise affecting their residential homes. See for a full description of all the benefits Mr Thornely-Taylor's evidence sections 9 and 12.
13. Thirdly, climate change benefits will result from the introduction of modern aircraft which will be secured by planning condition requiring an agreed Carbon Reduction Strategy based upon the Outline CRP (CD4 .05) to be put into effect. Currently, there is no securing of modern aircraft being introduced and that would be a decision of the airlines. Although that is likely to happen, the risk is that the refusal of planning permission would undermine the confidence of the airlines and serious consequences could result. This is referred to below in the socio-economic section of these submissions.
14. It is now agreed by all expert witnesses and consultants that, on the basis of the information before the inquiry in ESA 4, there would be no material, perceptible or harmful increase in any environmental consequence of the scheme. This is in respect of climate change, air quality, noise, surface access, or any other potential impact. If the information in ESA 4 is accepted, the proposals are therefore fully in accordance with government and development plan policy and, as accepted by Mr Skelton in evidence, it is to be expected the planning permission should be granted.

The base case

15. This is a matter of law and not judgement. It is not capable of argument on the basis of logic or otherwise for by a planning consultant or even leading Counsel; the base case adopted by the airport and the local planning authority is not only in compliance with the regulations and any other base case is not, but that adopted by them is wholly logical.
16. Paragraph 3 of Schedule 4 to the EIA Regulations 2017[3] as applied by regulation 18 (3) requires that the base case is that of the 2017 18 mppa planning permission. There can be no debate about this – that is what the regulations state and this is a matter of law.
17. If that interpretation is accepted, the caveat of Mr Roberts disappears and there is no ground for refusal of the application on the basis of noise. He did not put forward any cogent evidence which undermined the forecasts included in ESA 4.
18. The argument concerning salami slicing has been raised by LADACAN i.e. that the EIA should consider the expansion of the airport from 2012/2014 and not 2017. This does not apply nor is it of relevance for a number of reasons, including the following:
    a. The legal position is as required by the Regulations.
    b. It applies to a 'project' which must for EIA purposes be considered as a whole, such as an orbital motorway around a City[4], not to a case such as this which is wholly different and able to be distinguished on its facts.
    c. It does not apply to a case which is to meet demand which has arisen seeking expansion of a development under an existing planning permission.
    d. In this case the decision is in respect of a temporary position relating to increase of noise due to the proposals, namely for a few years until it returns to the pre-implementation position[5], so there is no salami that is being sliced, but one that expands then contracts over a relatively short period.
    e. The decision being attacked is the screening decision of the Local Planning Authority which is a matter of judgment and the discretion of the Local

[3] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 [CD 9.04]
[4] This was the subject of a case that was heard by the European Court concerning the orbital motorway around Madrid.
[5] The noise levels of the proposals are forecast to increase to a maximum at 2023 then to decrease post 2027/8 to be lower than the pre-implementation (18mppa) noise levels – see ESA4 [CD1.16].

Planning Authority, subject to determination on appeal of that decision by the Secretary of State; that decision is open to challenge by way of judicial review; it in this case should have been taken if at all at that time and not at a later appeal or call-in stage under s77 or 78 of the 1990 Act; it is not that the ES before the Secretary of State here is not an ES within its statutory definition, but a fully effective and lawful ES.

19. It is also important to note that a section 73 application is prospective and not retrospective – it looks forwards not backwards in time in relation to the development the subject of the application. The comparison for consideration as the base case is to consider "the current state of the environment" as a result of the planning permission which the airport is acting under, not the state of the environment when acting under a planning permission which had been granted previously (the 2014 planning permission) but has been superseded by a subsequent planning permission (the 2017 planning permission. This too is wholly logical.

<u>Comparison with the 2014 planning permission and forecasts</u>

20. LADACAN at one stage during the inquiry and prior to the inquiry has argued that there should be a return to the assumptions made in 2012 – 2014 when planning permission was granted. The increase in passengers was unexpected as was observed by the government in MBU[6].

21. The 2014 planning permission which was for almost a doubling of passenger numbers is in complete contrast to the current application which is for a 6% or 1/18 increase in numbers and no material increase in ATMs[7]. Furthermore, in 2014 the Neo's and Max aircraft had not been introduced and the noise levels were therefore a pure prediction not based upon actual measurement of aircraft flying from Luton, unlike the evidence before this inquiry. It is also relevant that there are no new or un-known types forecast to be flown at Luton between now and 2031, or, to put it in Rumsfeldian language, there are no known unknowns.

[6] MBU [CD 10.13] §1.4
[7] ESA4 [CD1.16] Table 2.2

22. It is of relevance to note that the 2014 planning permission was determined on the basis of the 2012 forecasts and that at 2028 it was then considered that 156,800[8] ATMs per year to overfly residential development at Luton. The current forecast is for considerably fewer ATMs per year at 2028 to overfly residential development, namely 140,000 ATMs[9], 11% or nearly 17,000 ATMs fewer than that previously predicted. This is a material change for the better that which was considered acceptable in 2014.
23. Although the forecasts were criticised at some length by LADACAN and their leading Counsel Mr Richard Wald KC, there is no alternative figure or figures put forward in evidence by any of their witnesses or suggested in cross examination, or by any other objector including CPRE.
24. Public inquiries must be decided upon evidence not assertion. It has not been able to be concluded that in the event of any forecast being wrong by X percent or whatever figure might be suggested, a different outcome of any of the impacts of the proposals would result, that the impact of the development might be more than imperceptible or immaterial or, the test in planning, harmful in any way whatsoever. As stated by Mr Holcombe, the impact would be imperceptible, not material and not lead to any harm whatsoever but would lead to benefits in relation to the NIS of those who would become eligible for it.
25. Assertions of harm or inadequacy in evidence by objectors are patently insufficient in planning decision making to undermine the case with a presumption in favour of development where the onus is clearly and squarely upon an objector to prove harm. There was no good reason why the Council could not properly accept the evidence of the airport forecasters, in particular as the airport would be tied to the future contours. The commitments of the major airlines operating from Luton to the acquisition of the new generation aircraft and the fleet mix in the assessment years formed a part of such forecasts and it is to be noted that no person on behalf of any of the objectors has spoken to the airlines [10].
26. The most that can be said is that the nature of forecasts is that they are just that, forecasts, they are inherently uncertain and are more likely to be inaccurate if over a

[8] 2012 ES [CD6.02] §12.2
[9] Hunt Appx 1 p/e Table 1 pdf p 44
[10] OR 30/11/19 Luton DMC [CD 5.08]'s page 21/89 §

long period than a shorter period. They are more likely to be accurate for types of aircraft that have been brought into use (such as was not the case in 2012-2014, unlike the current proposals). As stated in the officer report to the DMC in November/December 2021, "inevitably there is a degree of uncertainty with any forecast"[11]. This is true of the economy, as we have seen recently, the consequences of the pandemic and its recovery, aircraft growth and many other forms of economic forecasts. That does not mean that they should be dismissed from decision-making in planning merely because they are inherently uncertain. That would be absurd.

27. None of this undermines the conclusion that no harm whether environmental or otherwise is likely to result from the development or the conclusion that the enhanced NIS better protects residents from harm. As was stated in his evidence by Mr Thornely-Taylor, with whom Mr Holcombe agreed, it requires a 26% increase in the number of aircraft movements to result in a 1 dB increase in noise level and a 100% or doubling of the number of aircraft before a 3dB increase in noise would occur, a 3dB increase being the minimum noticeable change in noise levels perceived by most people[12]. Nobody has ever suggested that this would occur, including any witness for LADACAN or any other objector. That is the acid test.

28. A further point is that the impact of the development, not to condone the breach of planning control in any way, would be temporary. The contours in condition 10 were breached in 2017 (at night by 2.2 km^2), in 2018 (at night by 1.5km^2) and in 2019 (both day and night contours). They are forecast, secured by the proposed condition 10, to maximise (worst case) in 2023 and then diminish to return from the end of 2027 onwards to the position in 2030 that they would have been at when lawfully under the current 2017 planning permission[13]. The figures in ESA4 Table 2.4 were (in their pre-ESA4 form) in the ES at Table 3.5 in the 2021 ESA2 Addendum[14]. There is no reason why they should not have been accepted by the Local Planning Authority or that the forecasts in ESA4 should not now be accepted.

[11] OR 30/11/19 Luton DMC [CD 5.08]'s page 21/89 §84 and see §§83 – 89
[12] R Thornely-Taylor proof of evidence paragraphs 8.1.6 – 8.1.7
[13] ESA4 [CD1.16] §2.3.8-2.3.11
[14] ESA4 [CD1.16] §2.3.14

29. The ESA4 forecasts are for years a short time in the future from next year to 2031 (all unlike the 2012 forecasts which were predicting the situation 16 years ahead at 2028, including for known neo types of aircraft that had not flown in 2012). There is now the benefit of hindsight of how an 18 mppa airport would actually function in terms of noise – the aircraft types, mix, schedules, profiles, and actual aircraft noise measured are all known. The forecasts were carried out by the airport using information provided by the airlines at Luton concerning aircraft replacement schemes[15]. That approach is entirely reasonable. No other forecasts or criticisms by an expert forecaster are before the inquiry. There is no good reason not to accept the forecasts in ESA4 and Mr Hunt's Appx 1 and give them full weight.

Section 73

30. The fact that the original or baseline planning permission must remain intact, unamended and is capable of implementation in the alternative to any decision on the S 73 planning permission granted is a material and important consideration to take into account by the decision-maker. There is a power to substitute a new permission, but not to rewrite the original planning permission. The scope of the decision-maker's jurisdiction when considering an application under section 73 is, in principle, more limited than when considering an application for full planning permission, in particular where the nature of the condition relates to a narrow issue.[16] Here, the condition does relate to a narrow issue, namely the throughput of the number of passengers permitted at Luton airport in any one year.
31. It is also important to note that the practical consequences of imposing a different condition can be as a matter of law a most important consideration.[17]
32. That is the case here. The practical consequences are set out in appendix 1 of Mr Hunt's evidence from para 60 onwards – these are not forecasting matters but matters which are logical and socio-economic considerations, namely the impact on investor confidence of airlines and other businesses of the refusal of planning permission for the proposed increase in merely 1 mppa on 18 mppa.

[15] ESA4 §§2.3.6, 7.2.3
[16] See *Powergen UK plc v. Leicester City Council* [2000] EWCA Civ 165 at para 28 per Schiemann LJ
[17] See Powergen at para 28

33. The same point was made by the Luton Council Business and Investment Unit in its representations on the application to the DMC which are not general, as was alleged, but specific on the matter[18]. These are referred to below.

Enforcement

34. Even though enforcement is a peripheral matter, I shall address it first before addressing the issues the subject of the Secretary of State call-in letter.
35. A point to note is that although the theme of LADACAN's criticisms has been the failure of the Local Planning Authority to take enforcement action in the past, it has not been alleged that the Local Planning Authority would fail to do so in an appropriate case in the future. However, there is no substance either in its criticisms of the Local Planning Authority's past actions.
36. LADACAN and Mr Lambourne have sought to use the platform of this call-in public inquiry to investigate the decision-making of the local planning authority concerning enforcement of past breaches by the airport as if it was a matter which the Secretary of State had determined in his call-in letter to be an issue that he wished to be informed about. It was not and never has been an issue the Secretary of State considered of importance. He could have made it an issue to seek to be informed about had he had concerns. He did not do so, and in the light of representations from LADACAN through MPs, as was accepted by Mr Lambourne in cross examination, presumably the omission of enforcement as an issue was deliberate.
37. LADACAN have nevertheless persisted and sought to allege that the relationship between the local planning authority and the airport causes 'an obvious and serious case of unresolved conflict of interest'[19] and that there is a lack of transparency[20]. Neither allegation has any substance.
38. The Local Planning Authority addressed in its evidence the issues the Secretary of State stated that he wished to be informed about. It purposefully did not venture into arguments that were not issues he considered important. Nevertheless, as it is a

[18] See OR [CD 5.08] p57/89. See also para 177 and Local Plan policy LLP 13

[19] Mr Lambourne's final conclusions in proof of evidence.
[20] dittto

matter that has formed a basis of the LADACAN case, and which has taken up much time and adverse comment against the Local Planning Authority and its officers by LADACAN at the inquiry, it is necessary to comment upon those allegations and rebut many misleading parts of LADACAN's case which have been based on assumptions and evidence which are total misunderstandings which were then carried forward into cross examination by Mr Wald KC presumably on instructions, as we saw. As with aviation and noise, Mr Lambourne admits he is not an expert on noise, aviation, law, planning or any of the issues with which the Secretary of State is concerned, but seeks to act as if he is one, as is clear from not only his evidence but the preamble to his proof of evidence.

39. Not a single one of LADACAN's or Mr Lambourne's allegations have been made out and no legal action by way of judicial review, the correct forum for such matters to be considered, or otherwise has been taken. This is despite LADACAN and or others engaging specialist planning and public law solicitors and a senior barrister. These allegations and 'whiff of unlawfulness' or of unacceptable decision making have no foundation whatsoever whether based on fact or even their undemonstrated assumptions or allegation of so-called facts. That is an important conclusion to record as there has been a rather unpleasant undercurrent of allegations of wrongdoing by the Council and its senior officers which has been in existence and pervasive for some years which can now be dismissed altogether after airing in a public forum.
40. It may emanate from the above misunderstanding but Mr Lambourne and or LADACAN (the persona seem to be separate and sometimes interchangeable) have sought to imply that ownership of the airport by the Council and its taking of planning decisions in respect of the airport is inherently wrong. The allegation of clear conflicts of interest demonstrates a fundamental misunderstanding of the law as well as of planning policy, PPG and facts.
41. The decision-making statutory function of the local planning authority on planning matters is totally separate from a Council's ownership of land, shareholdings, companies and buildings which it may have in order to run the Council for the benefit of its residents and where possible to generate profits which then subsidise its other functions, all of which are wholly lawful and not unique to Luton Council. There are, for example, numerous other local authorities with ownership in whole or in part of

airports[21]. Despite the note explaining the Council's position having been circulated previously to correct Mr Lambourne's fundamental misunderstanding[22], he persisted in making such allegations when he gave evidence.

42. LADACAN through cross examination and via the evidence of Mr Lambourne was seeking to demonstrate prior to and throughout the course of this inquiry that there had been a wrongful failure of the local authority to act to take enforcement action. Mr Lambourne criticised the local authority for not taking enforcement action when it had evidence that a breach of condition concerning passenger numbers and the contour would occur. This discloses a fundamental misunderstanding of planning law and policy as well as guidance in PPG.

43. A local planning authority cannot take enforcement action if there is evidence that a breach of planning control is likely to occur but has not yet occurred. This matter of law is as a consequence of the wording of section 172 of the Town and Country Planning Act 1990 which requires that a breach of planning control *has* occurred before a local planning authority is empowered to issue an enforcement notice. Even if a breach of planning control has occurred, that does not mean that a local planning authority *must* take enforcement action, or even should take enforcement action, especially if the breach causes no material harm or adverse impact on the amenity of the site or the surrounding area. A local planning authority must conclude after due consideration of relevant factors to take into account that it is *expedient* to take enforcement action.

44. Taking enforcement action here would have been directly contrary to government guidance which includes the option of seeking a planning application to regularise the position – that was exactly what happened. See the PPG 'Enforcement and post permission matters', paragraph 011 [CD 13.10 b] which was considered in some detail in the course of the inquiry. All the evidence and advice of the noise consultants pointed against taking formal enforcement action.

45. Mr Gurtler advised the Local Planning Authority. He is a highly experienced planning expert consultant on airport development engaged until recently as an external consultant by the local planning authority to provide it with specialist airport planning

[21] see the list of airports in public ownership submitted [INQ 71]
[22] Clarification Note dated 28/9/22 (Day 2) [INQ-06]

advice upon the matter. He gave evidence to the public inquiry of the local planning authority's investigations of the breaches in 2017-19 and the background to the decision making which resulted in the planning application being made in January 2021. He has attended many meetings of the Consultative Committee and has discussed and corresponded with Mr Lambourne of LADACAN over many years about the issues raised at the inquiry concerning enforcement. Having reviewed the issues including the appointment of external consultants on planning and noise, enforcement action was in the circumstances not considered expedient, to use the statutory word found in s172 of the 1990 Planning Act.

46. The anticipated breaches of planning control were first notified to the LPA in December 2016 by BAP[23]. The annual noise records were not available until the year end of 2017. As Mr Gurtler made clear in cross examination, he and the local planning authority officers have always taken the breaches seriously and have been active in investigating the anticipated, then actual breaches, including receiving advice from specialist aviation noise consultants, holding meetings with the airport's retained noise consultants (BAP) and planning consultants (Wood) which culminated in the airport making a detailed planning application for the 19 mppa proposal to regularise the position on 08 January 2021. Further information was sought and a Reg 25 request was made. This inevitably took time, especially as the conditions breached were in their form retrospective.

47. The Local Planning Authority and its officers cannot fairly be criticised and what they achieved in the form of a regularising planning application was both logical and wholly in accordance with government guidance in PPG Enforcement para 011,[24] as accepted by Mr Skelton, LADACAN's planning witness, in cross examination.

Socio-economics

48. The local planning authority's evidence on the socio-economic benefits of the proposal is contained in Mr Gurtler's evidence. He referred in particular to the representations of the Luton Council Business and Investment Unit to the DMC which

[23] evidence of Mr Gurtler
[24] PPG enforcement [CD 13.10b]

are not general, as was alleged, but specific on the matter[25]. The unit, as was described by Mr Gurtler, has extensive knowledge of the businesses in the area, talks with them on a regular basis and has a relationship with key businesses in the area including the airport. It makes the point in its representations that the airport is a vital asset in the region and that the aviation sector is a key area for growth and recovery post pandemic. It considers that the expansion is vital to Luton's economy, providing confidence in current providers and to their retention including airlines, retail and leisure clients. The proposal, it says, will bring expansion of services, including new routes to crucial markets outside the EU as well as the development being a key contributor to the councils "Investment Framework" initiative. The proposal will create jobs where the town of Luton has been disproportionately affected by the pandemic, with 32,000 jobs at risk, the 7th highest number of furloughed workers in England and with 33,000 of those employed being in the at risk sectors.

49. The creation of up to 600 (Dr Chapman's estimate with caveats) and 900 (Mr Hunt) new jobs, Mr Hunt's estimated additional GVA per year of between £44m and £48.5m, and the securing of many others at the airport as a result of the planning proposals, are all clearly matters of material importance and significant weight in this context. This is fully in accordance with Local Plan Policy LLP 13.
50. The Business and Investment Unit's representation is further that if the airport is not allowed to grow through the increase in passenger numbers, it runs the risk of decline which will result in airlines and the linked supply chain businesses losing confidence. This is separately and independently mirrored by the evidence of the Airport in Appendix 1 of Mr Hunt.
51. This evidence should be accepted as being of considerable weight. There is not only no evidence to the contrary but these strong conclusions are totally logical. If Luton Airport has a cap placed on its growth by the decision of the Secretary of State, and it is at the maximum of its permitted growth already, then whatever the airport development policy just issued in July 2022 by the government may say the Secretary of State will have concluded that it does not apply to Luton Airport. If other airports in the UK and abroad do not have a cap on growth, it is wholly logical that airlines may

[25] See OR [CD 5.08] p57/89. See also para 177 and Local Plan policy LLP 13

regard this as a constraint on their businesses at Luton and look to seek growth elsewhere. It is also wholly logical that the consequences for Luton and the sub-region would be negative and cause a decline of jobs in an area already suffering economically more greatly than others. A negative approach by the Secretary of State to airport development without any environmental harm would no doubt be noticed elsewhere in the aviation sector in the UK too. If the evidence of the Business and Investment unit is accepted, this in itself adds strong weight to the case supporting the grant of planning permission.

Climate Change

52. The conclusions of the evidence of Dr Hinnells, with which Ms Hewitt on behalf of LADACAN agreed, are set out in his evidence at section 6, §§ 60 – 64. He concludes that based on current government policy there are no policy grounds of refusal on the basis of climate change.
53. Dr Hinnells evidence was that of a clear expert in the subject of climate change generally, and aviation and airport development in particular. He presented a report to the Luton DMC meeting on 30 November 2021 and his evidence to this inquiry was updated to take into account ESA3. ESA4 if anything makes the climate change case in favour of permitting planning permission even stronger.
54. The planning officer report to the DMC [CD 5.08] §§ 90-107 summarises the advice to the Council. It makes the point that climate change is a global issue which requires international action recognised through the UN Framework Convention on Climate Change (1994), Kyoto Protocol (1997) and the Paris Agreement (2015). Under the Framework and protocols, each nation must determine the extent to which it can contribute in tackling greenhouse gas emissions. The Climate Change Act 2008 (CCA) in 2019 amended the target of "net zero" so that by 2050 the net UK carbon account must be at least 100 % below the 1990 baseline.
55. Dr Hinnells said that his advice in May 2021 was not decisive (p/e §23) and his advice to DMC committee in November 2021 took into account the government's updated Climate Change policy direction (published in July 2021, with Transport Decarbonisation Plan [CD 11.12], Jet Zero (albeit at consultation stage at that time) [CD 11.16] and multiple other recent policy documentation on Climate Change set

out in Dr Hinnells evidence [p/e §24). It took into account the Applicant Airport Operator's Outline Carbon Reduction Plan (CRP) submitted to the Council in support of the 19 mppa planning application. This Plan included a substantial number of newly imposed phased measures, to be agreed with the Council and brought into effect by the Airport over time. The CRP is to be updated and agreed by the Airport and the Council as the Carbon Reduction Strategy in the event of permission being granted.

56. It will be recalled that during evidence of Dr Hinnells and replies to the Inspector Panel (in particular Inspector Holden) he said that he would support measures which brought about climate change improvements which included specific measures in the early years with regular 5 year reviews with flexibility to effect specific measures during the next 5 year period. The Council supports this approach.
57. The policy position at the time of the public inquiry is for the proposed development to be in accordance with the Jet Zero Strategy (JZS). JZS reinforced the policy position in its consultation, which was to plan for increased aviation and growth, not to constrain capacity or the planning system but to mitigate impacts to technology and market trading mechanisms, both yet to be developed. The government strategy is for all airport operations in England to be zero emission by 2040, with 5 year reviews in terms of its delivery, and Net Zero by 2050. It also includes an aspiration for zero emission routes connecting different parts of the UK by 2030.
58. The proposed development would not run counter to this objective and based on the forecasts the proposals would be better than the existing situation as introduction of the neo aircraft would be secured. In addition, the Travel Plan if bolstered, and the section 106 obligation incorporating of the to be agreed Carbon Reduction Plan, would also bring about increased carbon reduction compared to the existing situation operating under the 2017 planning permission.

<u>Air Quality</u>

59. Mr Looseley's evidence was contained within the joint statement on Air Quality (AQ) and answers to the Inspector Panel in the round table session on AQ. His conclusion was that ESA2 and ESA4 provide a detailed and robust air quality assessment in compliance with the requirements of the EIA regulations, that the methodology follows best practice for assessments of this kind and that the air quality impacts of

the proposed scheme were negligible and not significant. Concentrations of all pollutants are forecast to be well below their respective AQ zeros in 2024 and impacts are considered to be of a negligible magnitude. Air quality, as it is generally improving over time, will be better in future years than currently – with or without the proposed scheme. As negligible changes in pollutant concentrations of receptors are forecast, there is no reason for refusal on grounds of AQ impacts.

60. There is no good reason not to accept Mr Looseley's evidence. It is unchallenged and should be given full weight.

Surface Access

61. Mr Godden's evidence was that the discussions held with the applicant's highway consultants and National Highways, and consideration of the information submitted during the planning application process, demonstrated that there would be no significant impact as a result of the proposed development on the local highway system as well as on the M1 motorway. Furthermore, key service access targets for sustainable transport in 2022 of both staff and passengers had been met therefore the opportunity arose for more ambitious targets being set in the Travel Plan.
62. Mr Swift in his evidence paid close attention to Luton Council's policies with respect to transport. It has an ambition to make Luton a carbon neutral town by 2040, 10 years ahead of the national target. It recognises Luton Airport as a strategic asset and has an ambition to make Luton airport the most sustainable airport in the UK. Its Local Plan seeks to encourage the use of sustainable transport measures in accordance with the Airport surface access strategy.
63. During the course of inquiry the migration of parking to neighbouring residential areas including as a result of airport car parking restrictions and charges was considered. The evidence was that the local planning authority and highway authority would look to counter this through the introduction of residential parking zone(s) including additional parking restrictions for non-residents. Document INQ36 gives further details of this as well as the evidence given by Mr Godden in the roundtable session.

64. The Direct Air Rail Transit (DART) is due to be opened in 2023 which will introduce a seamless access from Luton Airport railway station to the airport, which is likely to accelerate the rate at which modal shift targets will be achieved[26].
65. The local planning authority welcomes the potential for an enhanced Travel Plan with amended targets. The current Travel Plan is capable of revision and improvement so that it would have teeth actively to reduce journeys by private car with a greater likelihood of shifts to more sustainable modes including public transport taking place in future years of the airport when considered as a whole. This can be made proportionate to the planning application; it is to be noted that the principle of the Travel Plan applying to the airport as a whole, and not merely the extra 1 mppa applied for, has been accepted by the Applicant.
66. The Local Planning Authority looks forward to considering and applying the signposts which the Panel may wish to include in its report to the Secretary of State which the Local Planning Authority is then able to act upon and use to support its seeking a much improved Travel Plan, which will be revised, improved and updated periodically in the future to make the Airport even more and increasingly sustainable.
67. There is no good reason not to accept the evidence that there would be no additional harm caused due to the small but not material increase in vehicles attracted to the airport as a result of the proposals. The evidence is unchallenged and should be given full weight.

<u>Noise</u>

68. The Local Planning Authority accepted the evidence of the airport in relation to forecasts which the airport consultants BAP used to assess the noise impacts. The Local Planning Authority reviewed this noise evidence and found it to be sound. This was reasonable in all the circumstances, as has been stated.
69. The forecasts are that the ATMs to carry 19mppa would not be materially increased from those carrying 18mppa due to increased seat capacity and seat occupancy of new aircraft which would be brought in as a result of the increased permitted passenger

[26] see Swift evidence para 4.9

capacity of the airport.[27] As reported in the 2021 ES Addendum, there would be no expectation of change in the nature or direction of flights.[28] In respect of both points, the evidence cannot be said to be unreasonable and there is no evidence to the contrary.

70. Mr Holcombe's evidence was clear, logical, with its principal conclusions not seriously challenged. His conclusions should be accepted and given great weight, namely that there would be no perceptible, material or significant impacts due to surface access (traffic and transport), ground or air noise due to aircraft as a result of the proposals.
71. The evidence of Mr Holcombe with which Mr Roberts agreed was that 'On the basis of ESA4, subject to one caveat, the impact of the proposal caused due to noise would not justify a reason for refusal of planning permission'. The one caveat of Mr Roberts was in relation to the baseline – he said that it should be on the basis of the 2014 not the 2017 planning permission.
72. If the arguments in favour of any baseline other than that relating to the 2017 permission are rejected and if the evidence within ESA4 is accepted by the Secretary of State, it follows that Mr Roberts evidence agrees with the conclusions of Mr Holcombe. There is furthermore no reason to reject the evidence within ESA4.

Government policy

73. National planning policy supporting the grant of planning permission for the expansion of airports is of great weight. That has been agreed by Mr Skelton on behalf of LADACAN. There are two strands to national policy: the first being national policy in NPPF, the second being specific policy in relation to the expansion of airports.
74. Of relevance in NPPF are the 3 strands of sustainable development – the economic objective, the social objective, and the environmental objective. All 3 are met by the planning application for the proposed development which is subject to the planning controls through conditions and the obligation. These will be considered in due course. The other matters of relevance in NPPF were considered by Mr Gurtler in his evidence and included in his proof of evidence. They are not repeated here except

[27] ESA4 [CD1.16] Table 2.2, §2.3.3 and fleet modernisation §§2.3.5 et seq.
[28] ESA4 [CD1.16] §2.3.4

that mention is made of para 81 which states that "significant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs and wider opportunities for development" as referred to in the Officer Report to the DMC[29].

75. Luton Airport is a driver for development not only in the Borough of Luton, the sub-region which includes Buckinghamshire and Hertfordshire, but also within the UK as its 5th largest airport and a predominantly low-cost airline airport serving that sector of the public which seeks low cost fares for holidays and tourism in the UK and abroad as well as bringing tourists to the UK.
76. Strong government policy support for the development and growth of the airport is contained within a number of different policy documents recently published by the government. They include (i.e. this is not a comprehensive list) the Aviation Policy Framework (March 2013), Making Best Use (2018) [CD 10.13], Flight Path to the Future (May 2022) [CD 11.15], and Jet Zero (July 2022) [CD 11.19].
77. They all point to strong government support for more intensive use to be made of existing infrastructure at airports and in particular of runways, to see the best use is made of existing airport capacity, to improve performance, resilience and the passenger experience[30]. The APF policy restricting growth in the South East has more recently been amended following the Airports Commission's recommendation and accelerated growth experienced in recent years, with demand being 9% higher in London in 2016 than the Airports Commission forecast[31]; the government policy is supportive of airport expansion within the South East, other than in relation to Heathrow which is the subject of a DCO and National Infrastructure Policy Statements[32]. Jet Zero, published in July 2022 makes it clear that the government's existing policy framework for airport planning in England – the Airports National Policy Statement (ANPS) and MBU – have full effect, as a material consideration in decision making on applications for planning permission. It makes it clear that the

[29] [CD 5.08] para 174
[30] see e.g. APF [CD 10.04] para 1.60
[31] MBU [CD 10.13] para 1.4
[32] MBU [CD 10.13] para 1.5

government's analysis shows that it is possible to achieve the goals set out in Jet Zero without the need to restrict people's freedom to fly[33].

78. Making best use of existing airport capacity and infrastructure is not only a sustainability policy so as to ensure that existing capacity of existing airport development is fully utilised before new built development is authorised, thereby minimising wastage of embodied energy within existing buildings and other development, but it also meets the demand for expansion of airports especially in the south-east of England. All such policy support is subject to environmental issues being addressed. The government also states that it will keep under review whether further guidance is needed to assist airport planning decision-making [34].

79. Government policy, which is a material consideration of substantial weight in the context of Development Plan policy, is clear that, given the fact that the runway and other capacity at the airport is not used to its maximum then, subject to the question of meeting environmental obligations and causing no environmental harm, the need for extra passengers to be permitted at Luton Airport as proposed is strongly supported and is not a matter for debate at this inquiry.

Development Plan policy

80. Despite the fact that government policy is normally considered first in any planning policy review in respect of a planning application, as a result of the application of s38(6) of the Planning and Compulsory Purchase Act 2004, government policy is a material consideration and the starting point in law for such decision-making is always the development plan. The development plan here is the Luton Local Plan 2011 – 2031, adopted in November 2017. It is common ground that it is up-to-date and to be given full weight.

81. A number of policies of relevance to the application were considered in the officer report to the DMC and all of those which are or could be relevant have been considered during the course of the inquiry. Other than in relation to the planning conditions discussed concerning previous phases of development and the remaining

[33] Jet Zero page 74 Policy commitment, Implementation approach and delivery milestones
[34] MBU [CD 10.13] para 1.5

elements of phase 3, no on-site impacts arise from the development itself and all are external to the airport site.

82. The policy of greatest relevance to the application is agreed to be Policy LLP6 – London Luton Airport Strategic Allocation. It is important to note that the preamble to the policy is wholly positive and in favour of the application. Section B of the policy is of greatest relevance, and contention, at the inquiry; however, much has been agreed in cross examination.

83. A number of points can be made concerning the preamble to the policy LLP6 B:

a. the preamble requires that proposals for expansion of the airport etc will be assessed against the local plan policies as a whole taking account of the wider sub-regional impact of the airport. The socio-economic impact upon Luton as well as the sub-regional impact is wholly positive as has been stated by Mr Gurtler. See also the officer report to DMC on this matter[35] and the important and wholly supportive representations of the Luton Council Business and Investment Unit concerning the socio-economic benefits of the proposed development[36] relied on by Mr Gurtler in his evidence. It is stated that the Enterprise Zone is built around the airport and the growth of the airport is a central pillar to the Council's Strategic Vision[37].

b. The next point does not really matter in making the decision on the application, but is addressed in case it is considered relevant and important by the Secretary of State. The word "only" in the sentence "Proposals for development will only be supported where the following criteria are met, *where applicable/appropriate having regard to the nature and scale of such proposals*" is clearly superfluous and for emphasis, especially given the material modification introduced by the Local Plan Inspector with his reasons given in his IR at para 3.13[38]. The word "only" does not exclude or include anything – if a criterion is not met the word 'only' adds nothing extra to its being met or not. If met it also adds nothing. Take the word out of the sentence

[35] OR to DMC 30 November 2021 [CD 5.08] paragraphs 167 and 168 – 177, in particular 177.
[36] OR [CD 5.08] page 57/89
[37] OR [CD 5.08] para 195
[38] Skelton appendices Appendix 1 extract

– it means the same but for emphasis. Further, in answer to submission that the word only has significance, consider the inspector's modification: it is clearly illogical to have the word "only" as a control where the criteria can be dis-applied as not being "applicable/appropriate" ['…only supported where [all] criteria are met which are to be disapplied!]. It does not make sense once the words of the mod are added.

c. Furthermore, it is clear that, using the reasoning of the Local Plan Inspector in his IR para 313, the subject application and scheme proposed here is not a "comprehensive scheme to significantly expand the airport and its operations" and therefore is not one where all the criteria must be applied rigidly (as LADACAN seem to require).

d. The Local Plan and not just the policy must be read as a whole and if any one or more of the criteria are not met, that does not mean that the policy let alone the Local Plan is breached or that the development is not overall in conformity with it.

e. Even if one or more of the criteria in LLP6 part B is not met, the policy itself should be interpreted as being in accordance with government policy; it would be contrary to government policy if an interpretation would be attributed to it which would prevent growth of an airport where there is no environmental harm even if all the Local Plan criteria are not met. It therefore follows that non-compliance with one or more of the criteria does not necessarily prevent development in accordance with government policy taking place.

f. The principal policy benefit of the proposed airport expansion is to provide growth in accordance with government policy to meet demand and for best use to be made of existing airport infrastructure without any environmental harm being caused. Even though there is clear evidence of positive benefits which would result, there is no policy requirement for jobs to be created as a result of such expansion (although 600[39]-900[40] would be created in an area of substantial relative deprivation in the UK[41]),. There is, further, no policy

[39]Dr Chapman evidence
[40] Dr Ösund-Ireland evidence
[41] Mr Gurtler's evidence

requirement to secure jobs or underpin business confidence in the airport (although this would take place), no policy requirement for climate change/carbon and noise benefits to result (although this would result with the secured introduction of climate change measures included in the Carbon Reduction Plan based on the Outline CRP[42] submitted). In other words, these benefits resulting are not criteria for government policy to apply.

The negligible increase in flights and imperceptible noise change is not a negative factor but a neutral one as it does not reach the scale where it is material or significant, it is not noticeable. However the positive benefits are to be counted in its favour where they are material or significant, such as those included in the proposed Noise Insulation Scheme (NIS) and enhanced conditions and obligation.

g. there would be no environmental harm caused by the proposals (none of the impacts of the development would reach a position on the impact scale above not material, hence they would be counted as zero or neutral) and all the criteria in policy LLP6 B would be met. If one or more might be argued or concluded not to be not met, then all the positive benefits including the meeting of government policy to increase the capacity of an airport without causing any environmental harm of itself would strongly outweigh such a situation.

84. Examining further whether "The criteria in LLP6 B would all be met":

i) there is no dispute that the proposals directly relate to the airport use of development.

ii) there is no dispute that they contribute to achieving national aviation policies.

iii) There is no dispute that the proposals would be in accordance with an up-to-date Airport Master Plan published by the airport and adopted by the Council (in 2021).

[42] Outline CRP [CD4.05] – see in particular Tables 4.1-4.3 pdf pp19/24 secured by the s106 obligation

iv) This criterion is in 2 parts – (1) that the impacts of any increase in ATMs must be fully assessed; (2) that appropriate forms of mitigation must be identified in the event that significant adverse effects are found to exist.

(1) The evidence is clear that the impacts have been fully assessed. The criticism of LADACAN is without substance. First, all the impacts of the increase in ATMs, which is minimal[43], have been fully assessed. Not only must the proportionality principle be employed[44] but, as Mr Holcomb said, no noise model is able to be 100% accurate especially with respect to areas away from the airport contours where the noise of aircraft is heard but any noise level is not significant, as the airport must concentrate upon those noise levels which are considered by the government to be significant. These are those levels set out in Mr Holcombe's and Mr Thornely-Taylor's evidence, namely those within the relevant noise contours, namely a LOAEL of 51 dB $L_{Aeq\ (16h)}$ during daytime and 45 dB $L_{Aeq\ (8\ h)}$ during night time[45].

(2) Appropriate forms of mitigation have been identified in the NIS (Noise Insulation Scheme). No significant adverse environmental effects have been identified and none would occur as a result of the proposals. A noise increase of 1 dB or more above the LOAEL has been agreed to be significant as a result of the higher noise levels which occur in the residential areas e.g. immediately to the west of Runway 26 threshold (westerly departures) and the evidence that persons who live within an area subjected to higher noise levels are more sensitive to increases in noise. In the case of those residents affected, the noise increase would be less than 1 dB but they would be eligible for noise insulation under the NIS in

[43] See Table 2,2 ESA4 [CD1.16]

[44] CAA Policy on Minimum Standards for Noise Modelling CAP 2091 [CD 13.50] §1.4 page 5 – applicable to DCO applications but applied with caution here: ("The proportionality principle – Our requirements in this policy document are proportionate;… In general, the CAA will expect the noise analysis to be sufficient for it to carry out its duties but also proportionate to the size and likely noise effects of the airport or the proposal under consideration"). See also paragraph 4.11 page 20 in relation to use of radar for track keeping.

[45] R Thornely-Taylor proof of evidence para 2.3.28

accordance with the section 106 obligation and Noise Management Plan (NMP) at noise levels currently at 62 dB $L_{Aeq\ 16h}$. The proposals in the NMP for residential and non-residential premises are explained in the evidence of Mr Thornely-Taylor[46].

v) This criterion is in two parts too:

(1) There is no material increase in day or night-time noise, nor is excessive noise caused (the word 'not' can be introduced as discussed during the public inquiry but this is not necessary to give it sense, as I read it). In any event it is of no import in this case whether or not the word "not" is introduced into the sentence.

(2) The Airport Noise Action Plan would be met after revision which would take place after and consequent upon planning permission being granted, but this should not be regarded as a planning control in any event. In accordance with the Environmental Noise (England) Regulations 2006 [CD 13.05], Part 4 Chapter 3 Regulation 22(4)-(6), the Airport Noise Action Plan must be reviewed and if necessary revised whenever a major development occurs affecting the existing noise situation then submitted to the Secretary of State after its revision. In other words, the revision to the plan (under environmental regulations overseen separately by DEFRA) is required to *follow* any major development which affects the noise situation. This is logical. Here no revision of the Action Plan (made under separate non-planning legislation and not a planning policy document or SPD) would be necessary until the noise contours have been changed i.e. on planning permission being granted (under the planning legislation) for a variation of a planning condition.

vi) There is no dispute that the proposals would include an effective noise control, monitoring and management scheme etc. This is effected through the NMP in the s106.

[46] see Mr Thornely-Taylor's proof of evidence section 5

vii) the proposals would, 'over time, result in a significant diminution and betterment of the effects of aircraft operations on amenity of local residents, occupiers and users of sensitive premises in the area through measures to be taken to secure fleet modernisation or otherwise'. It is clear that there would be betterment which would occur, and the only dispute seems to be whether it would be significant. First, the proposals *secure* fleet modernisation through the section 106 obligation and the outline CRP[47] which would 'over time' bring about significant benefits to climate change as well as noise. Secondly, there would be a diminution in noise levels which would occur after 2027 and which would continue after 2031. See Table 2.4 in ESA 4 volume 2 [CD 1.16] and table 8B.1[48] in ESA4 with a reduction in the day and night-time contour areas over time. Also to be taken into account are the significant benefits under the NIS referred to in Mr Thornely Taylor's proof of evidence (see above under 'Noise'). Considering all the matters in the round, which the decision-maker is required to do in making a planning judgement such as this, having regard to the fallback or baseline position under the 2017 planning permission there is a significant betterment as well as a significant diminution in noise levels in particular for those who are eligible for the NIS over time. They are those who are specifically targeted by the government and noise insulation regulations to be protected from the worst effects of aircraft noise and who would benefit most from the NIS scheme being brought in as a result of these proposals. In any event, the criterion does not state what is meant by "over time"; its objective is to secure fleet modernisation as this is, on the evidence heard, a practical way by which airport expansion can take place and at the same time, but over time, reduce air noise levels at source and receiver. At source this would be the introduction of

[47] outline CRP [CD 4.05]

[48] Table 8B1 in Appendix 8B of volume 3 in ESA4 has been the subject of much consideration at the inquiry but there is no evidence that any of the figures within the proposals are wrong; forecasts are by their very nature not certain; unless there is a comparator put forward to compare with the figures criticised, forecasts should be accepted, particularly if as here they were compiled by those best able to make them, namely the forecasters and others employed by the airport.

There is no evidence that the forecasts are clearly wrong. The opposite is true – as stated in evidence by Mr Holcombe they are robust; they are compiled on the basis of a robust assumption that there would be no material difference in the introduction of modern neo and Max aircraft as far as noise is concerned in the with/without scenarios. Mr Holcombe's carefully considered evidence should be given substantial weight. The forecasts in the ES and ESA4 reasonable in all the circumstances.

neo aircraft; at receiver, the noise levels would be reduced as a result of improvements in the NIS (applying the words "or otherwise" in the criterion relating to diminution and betterment of the effect of aircraft operations on amenity of local residents).

viii) Sustainable transportation surface access measures are to be included in the Travel Plan as revised together with the signposts from the inspector panel which are to be welcomed if given in their report to the Secretary of State. The above points under Surface access are not repeated here. The opportunity for improvement in the existing Travel Plan is also to be welcomed and would be in accordance with government policy seeking sustainability of the development proposed. As stated to the inquiry, the local planning authority would seek to incorporate measures which are seen by the panel to be both practical and proportionate to the planning permission sought.

ix) The information provided to the local planning authority and highway authority in the course of the submission of the planning application demonstrated that there would be no harm caused as a result of the impact of traffic on local highways. The points concerning an enhanced Travel Plan have been discussed above and these have the ability and material benefit significantly to enhance the sustainability of the airport as a whole, directly as a result of the grant of planning permission when implemented.

CPRE Hertfordshire

85. The case for CPRE Hertfordshire (CPRE) reflected that of LADACAN in many respects. It naturally concentrated upon the AONB of the Chilterns and the impact of overflying aircraft.

86. As was accepted by Mr Berry in cross examination, he was putting forward no expert evidence of a technical nature on noise or climate change and was attending the inquiry and making his objection to record the substantial concern of CPRE to the impact of aircraft and aircraft noise on the Chilterns AONB in particular including

aircraft to and from Luton airport which overfly the area. That is understood by the Local Planning Authority.

87. Mr Berry did not put forward any evidence which sought to undermine the technical evidence of the airport or the Local Planning Authority technical expert witnesses nor the conclusions drawn that the impact of noise as a result of the proposals would be imperceptible on any sensitive receiver within the Chilterns AONB.
88. The conclusion to be drawn is that albeit that there is clear policy to protect the AONB and its tranquility, which the Local Planning Authority seeks to ensure is respected, the proposals would have no material or perceptible impact upon the AONB, its tranquility or any sensitive receptor within it. The consequence would therefore be neutral.

Other representations and objections

89. These have been the subject of consideration in the evidence of Mr Gurtler. He also refers to the officer report in relation to the points made and answers to them. Without going through them in any detail, none of them disclose any expert evidence which undermines the conclusions reached by the experts called on behalf of the Council or the evidence of the airport that it and they rely upon.
90. Many objectors are residents of areas outside the 51 dB $L_{Aeq\ 16\ hour}$ contours by day and the 45 dB $L_{Aeq\ 8\ hour}$ contours by night, such as Harpenden and St Albans. There is no doubt that some of these areas are overflown but at heights well above that which gives rise to a significant impact, the determination of which is a matter of government policy.
91. Airports have to exist if government policy is to be met to provide a means by which the travelling public can choose holidays and business trips by air, by which commerce can thrive as well as ensure that the connectivity of the UK to the rest of the world is maintained and enhanced. This comes with significant benefits but also environmental impacts including of aircraft noise. The control of this by applying government policy is what the local planning authority has done in this case. It cannot prevent all aircraft noise affecting all of its residents and those outside its area but

seeks to ensure that its decision-making is in accordance with government and local plan policy when considering airport development. That it has also done in this case.

The Planning Balance

92. As stated in my opening submissions, there is no requirement for a planning balance if there is no planning harm, as here. Even assuming that there is planning harm, which is denied, the factors and need for the expansion of the airport as proposed, fully in accordance with government policy, is overwhelming. The Local Planning Authority here relies upon the evidence of Mr Gurtler.

Conclusions

93. The application before the local planning authority originally and now for determination by the Secretary of State would bring about growth of Luton airport fully in accordance with government and local plan policy. This is because there would be no material or significant environmental impacts which would result from such expansion from 18 mppa to 19 mppa and all the criteria in Local Plan Policy LLP6 B as well are met. No policies of the Local Plan are breached or not met – the opposite is true.
94. The local planning authority welcomes guidance from the Panel and Secretary of State in particular with respect to the environmental and other controls for which it is responsible. This includes that in relation to the Travel Plan.
95. The local planning authority sees no good reason why planning permission should be refused subject to conditions and the obligation which is to be entered into by the applicant Airport and the Local Planning Authority.
96. In all the circumstances, the Local Planning Authority considers that its decision to grant planning permission subject to any call-in by the Secretary of State on 01 December 2021 was the right decision and that it supports the grant of planning permission by the Secretary of State subject to conditions and section106 obligation discussed. The position now is even more strongly in favour of the grant of planning permission as a result of the factors and evidence contained in ESA4 [CD1.16].

John Steel KC

39 Essex Chambers

18 November 2022

Case No: QBCOF 1999/1210/C

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HON. MR. JUSTICE DYSON

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 19 May 2000

B e f o r e :

LORD JUSTICE MORRITT
LORD JUSTICE SCHIEMANN
and
LORD JUSTICE POTTER

- - - - - - - - - - - - - - - - - - - -

POWERGEN UK PLC **Appellant**
- and -
LEICESTER CITY COUNCIL **Respondent**
and
SAFEWAY STORES PLC (2nd. Respondent)

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(Transcript of the Handed Down Judgment of
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MR. DUNCAN OUSELEY Q.C. & MR. MICHAEL REDMAN (SOLICITOR ADVOCATE) (instructed by Clifford Chance London, EC1A 4JJ for Safeway Stores plc**)**
MR. TOBIAS DAVEY (instructed by Anthony Cross Asst. Head of Legal Services for Leicester City Council)

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Judgment
As Approved by the Court

LORD JUSTICE SCHIEMANN:

1. **Introduction**

This appeal by developers raises two points specific to its facts and one point of some general importance in relation to the scope of the powers given to a local planning authority on an application made under s.73 of the Town and Country Planning Act 1990 for a planning permission subject to conditions different from those which were applied to an earlier planning permission in respect of the same land. Such an application is commonly referred to as an application to modify conditions imposed on a planning permission.

2. The background to the present dispute lies in s.92 of the Town and Country Planning Act 1990. That section was enacted to prevent the accumulation of unimplemented permissions. That is undesirable because, when further planning decisions have to be made in relation to an area, it is a help to good planning not to be inhibited by past grants of permission. On the other hand, landowners clearly must have some time in which to implement grants of permission. The section is a compromise between these two desiderata. It is convenient to set out parts of the section because it forms the background to much of the argument.

> (1) .... "outline planning permission" means planning permission granted ..... with the reservation for subsequent approval ..... of matters not particularised in the application ("reserved matters").
>
> (2) ..... where outline planning permission is granted ..... it shall be granted subject to conditions to the effect-
>
> (a) that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission: and
>
> (b) that the development to which the permission relates must be begun not later than-
>
> (i) the expiration of five years from the date of the grant of outline planning permission; or
>
> (ii) if later, the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.

(3) If outline planning permission is granted without the conditions required by subsection (2), it shall be deemed to have been granted subject to those conditions.
(5) [the authority concerned with the terms of an outline planning permission] may also specify ..... separate periods under paragraph (a) of subsection (2) in relation to separate parts of the development to which the planning permission relates; and, if they do so, the condition required by paragraph (b) of that subsection shall then be framed correspondingly by reference to those parts, instead of by reference to the development as a whole.

3. On the 25th January 1995 Leicester City Council ("LCC") granted outline planning permission for "Redevelopment of site for retail use (Class A1), Business use (Class B1) Petrol Filling Station (Sui Generis), Public House/Restaurant (Class A3) and Public open space" on a site of approximately 15 hectares. I shall refer to this as the Total Site.

4. The Total Site is the site of a former power station. In reliance upon the grant of planning permission Powergen have undertaken the demolition of the power station, remediated the whole site, decontaminated the site, constructed a road-link and paid LCC a licence fee at a total cost of £5.7 million. The preparation of the site for development involved a time consuming process longer than was anticipated at the time planning permission was applied for.

5. The planning permission was subject to 25 conditions which, however, did not include a condition on the lines suggested by s. 92(5). Condition 1 provided that:-

Application for approval of reserved matters shall be made within 3 years from the date of this permission and the development shall be begun not later than:

(a) 5 years from the date of this permission; or
(b) if later, 2 years from the date of the final approval of all the reserved matters.

6. The reason given for this condition was "to comply with section 92 of the Town and Country Planning Act 1990".

7. Condition 2 provided that :-

Detailed plans and particulars of the siting, design, external appearance and a means of access to the development, and the landscaping of the site (referred to in condition 1 as reserved matters) shall be submitted to and approved by the City Council as Local Planning Authority before the development is begun and shall have regard to:

(a) the size and height of the development including details of the materials to be used on all external elevations and roofs;
(b) the provision of necessary footway crossings;
(c) a landscaping scheme showing the treatment of all parts of the site to remain unbuilt upon, and including:
(a) details of the position and spread of all existing trees, shrubs and hedges to be retained or removed;
(b) new tree and shrub planting, including planttype, size, quantities and locations;
(c) means of planting, staking and tying of trees, including tree-guards;
(d) other surface treatments;
(e) fencing and boundary treatments;
(f) any changes on levels;
(g) the position and depth of surface and/or drainage runs.

8. The reason given for the condition was “to secure the satisfactory development of the site”.

9. Condition 8 provided:

“If the development is carried out in phases, then the approved landscaping scheme shall also be carried out in phases, each phase of the landscaping scheme to be carried out within one year of completion of the phase of development to which it relates”

10. The reason given for the imposition of this condition was “in the interests of amenity.”

11. As I have pointed out, although condition 8 envisages development possibly being carried out in phases, it is clear that the outline permission imposed the conditions envisaged in s.92(2) and it did not follow the course indicated in s. 92(5) as a possibility.

12. It will be seen that the effect of these conditions was that

(1) No development could be begun until detailed plans of the reserved matters had been approved by the Authority

(2) Application for approval of the reserved matters had to be made before 25.1.1998

(3) The development could only proceed if it was begun within the later of the two time periods set out in condition 1.

13. Matters proceeded slowly and it became apparent to Powergen that unless they secured a relaxation of conditions they might be unable to develop. Mr. Busby of the Authority's Development Control Group on 26th November 1997 wrote a letter to Powergen which included the following:

> "The Council is concerned about what will happen to the rest of the site and whether the remainder will make sense in terms of the overall planning of the site. This is likely to affect the Council's consideration of the application unless other reserved matters, e.g. public open space, nature area, footpath and cycle path networks, are submitted at the same time and it can be demonstrated how the proposed supermarket will relate to the remainder of the site. The deadline for all reserved matters is 24th January 1998 barring some details that could be the subject of planning conditions should permission be granted."

14. Mr. Busby wrote again on 19th December saying:

> "Reserved matters for the other aspects of the outline scheme should be submitted to agree with the description. If they are not submitted before 25th January 1998 the outline permission may lapse."

15. On the 8.1.1998 Powergen submitted an application for the approval of reserved matters pursuant to the planning permission for "83000 sq. foot food superstore and petrol filling station with carwash and 585 car parking spaces together with landscaping and public open space". The land occupied by the development the subject of the reserved matters application occupied a substantial part of the Total Site. I shall refer to it as the "Food Store Segment".

16. On 12.1.1998 Powergen made an application to extend the time period specified in condition 1. That application was refused by the Authority on 15.3.1999 and no challenge has been raised to the legal correctness of that refusal or as to the length of time taken to arrive at the decision. The policy background justifying the refusal of what had previously been permitted in principle was that central and local government policies had changed since 1995 and therefore the Authority were anxious not to do anything which would permit the outline permission to be implemented.

17. On 3.8.1998 an application was made which purported to be for a variation of condition 2 and for consequential variations of various other conditions. The nature of the variation asked for appears from the suggested wording of a new condition 2, namely, "Before the development *or phase of the development* is begun detailed plans and particulars of ….. the development *or phase of the development* …. shall be submitted to and approved by …..". The effect of granting that application would have been to enable the "reserved matters" referred to in condition 1 to comprise, not all the matters relating to every part of the site, but only those relating to that part of the site with which the applicants were at any particular time anxious to proceed. It is submitted to be a consequence of this that the application made on 8.1.1998 would have been made within the time limit specified in condition 1.

18. That would have had a number of advantages from the applicants' point of view. Legally they would be able to assert that condition 1 had been fulfilled by the making of the application for the Food Store Segment. Commercially they would be relieved of the pressure to produce plans for and/or to carry out various landscaping measures, parking provisions, investigations for archaeological remains or for the protection and enhancement of sites of wildlife or other ecological significance.

19. On the other hand the granting of that application had various disadvantages from the point of view of the Authority. In particular it would have enabled the Food store

development to go ahead although this was by now against the Authority's policy. It would have prevented the Authority from having an overall scheme for the site before them before any part of the development took place -– something which they obviously thought desirable. It would also remove the cut off date by which the authority would know that the permission could no longer be implemented.

20. On 15th March 1999 LCC refused planning permission for the section 73 applications. As I have already said, no complaint is made in relation to the refusal of the application relating to condition 1. In relation to the application relating to condition 2 the refusal was for the following reasons:

1. The effect of varying condition 2 would be to allow work to begin on a food superstore having reserved matters approval. That development would be contrary to Policy S6 of the City of Leicester Local Plan which states that planning permission will not normally be granted for additional super-stores in the City.

2. There is no quantitative need for additional large food stores in the Central Leicestershire area.

3. The regeneration of the site by development of retail use is in preference to other more central sites also identified for regeneration and which have been identified as being available, suitable and viable, could have an adverse effect on the continuing investment in the City and other centres by competing for investment.

21. **The Construction of Condition 2**

Powergen's primary submission before Dyson J. and before us was that they have complied with condition 1. They submit that the reference in condition 2 to "the development" is a reference to "such part of the development as the developer chooses to proceed with". The judge rejected this construction of the permission for reasons which he set out in full. He rejected Powergen's submission that such a construction of the permission produced a result which was commercially absurd because, there being no obligation to carry out all of the development, it was pointless for the company to produce, and for the Council and its officers to consider, plans for development which there was no present intention to carry out.

22. It is plain from an examination of s.92 that, absent any specification of separate periods under subsection (5), in that section "reserved matters" refers to every matter reserved by the outline planning permission for subsequent approval of the authority and "development" refers to the development as a whole. Either the permission granted by LCC echoes the section faithfully or conditions having that effect are to be implied - see s.92(3). In those circumstances the resolution of the construction point may not matter. However, I agree with Dyson J. for the reasons which he set out in full, that construing this permission in its context it is clear that throughout the document development refers to the development of the whole.

23. **The effect of dealings between the parties**

Powergen's secondary submission was to the effect that by reason of the dealings between the parties they are entitled to implement that part of the outline permission which relates to the retail development. This submission turns on the details of the dealings between the parties and whether these gave to Powergen any legal rights to proceed with the building of the Food Store without further permissions. The Judge held that the officers, whose words were relied upon as preventing the authority from now taking any point in relation to time, had neither actual nor ostensible authority to make representations to that effect and rejected an argument to the effect that the doctrine of legitimate expectation entitled Powergen to such rights. He went on to hold that the words relied on could not give rise to the expectation asserted and that in any event they had not been relied on. I agree with the reasoning and conclusion of Dyson J. that on the facts of this case it is not possible to show that the doctrine of legitimate expectation operates so as to entitle Powergen to proceed to build the Food Store.

24. **The scope and character of the powers given by s.73**

<u>Introduction</u>

Powergen submit that the decision in relation to condition 2 is legally flawed because the Authority were not permitted to refuse that application for the reason

which they gave. Before turning to the law, I should note the following additional matters of fact.

25. In May 1998 LCC resolved to approve the reserved matters which had been submitted on 8.1.1998 in relation to the Food Store Segment. In recommending approval of the reserved matters application LCC's Director of Environment and Development advised that an indicative lay-out had been submitted by the applicants in relation to what I shall call the Remaining Segment. He stated that whilst this particular block layout would probably not be acceptable in that form, the final form of development (which would be the subject of a separate planning application) was in his view capable of meeting the general requirements of the planning brief and that the design of the super-store and the general lay-out were satisfactory.

26. On 4th January 1999 LCC resolved to grant planning permission for some, but not all, of the Remaining Segment to be developed as Offices, Restaurant and Public House. I assume that at some time a full planning permission in respect of this part of the Remaining Segment was issued.

27. <u>The Legal Background</u>

Section 73 of the 1990 Act provides:

1. This section applies, subject to sub-section (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

2. On such an application the Local Planning Authority shall consider only the question of the conditions subject to which planning permission should be granted, and

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly; and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

4. This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

28. Some preliminary points

The background to this section was considered by Sullivan J. in his judgment in Pye v Secretary of State for the Environment [1998] 3 PLR 72. Sullivan J. said the following:-

"An application made under section 73 is an application for planning permission: see section 73(1). The Local Planning Authority's duty in deciding planning applications is to have regard to both the development plan, which brings into place section 54A, and to any other material considerations: section 70(2).

In general terms, the practical consequences of imposing a condition on a grant of planning permission must be a material consideration that a Local Planning Authority should consider, unless prevented from so doing by some other express provision in the statutory code.

.....Prior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of the conditions had the right to appeal against the original planning permission, but such a course enabled the Local Planning Authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to "go back on the original decision" to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.

It was this problem which section 31A, now section 73, was intended to address.....

While section 73 applications are commonly referred to as applications to "amend" the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and un-amended. That is so whether

the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.

In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to "go back on the original planning permission" under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained.

The original planning permission comprises not merely the description of the development in the operative part of the planning permission..... but also the conditions subject to which the development was permitted to be carried out.....

Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a "normal" application for planning permission under section 70, but as Keene J. pointed out, at page 207 of the Frost[1] case, how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the particular materials to be employed in the construction of the building, the Local Planning Authority's consideration will be confined within a very narrow compass.

Since the original planning permission will still be capable of implementation, the Local Planning Authority, looking at the practical consequences of imposing a different condition as to hours or materials, will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated.

Equally, if an application is made under section 73 within the original time limited for the submission of reserved matters, while implementation of the planning permission is still possible and is not precluded by the provisions of section 93 (4), for a modest extension of time for the submission of reserved matters, the Local Planning

[1] R v London Docklands Development Corporation, ex parte Frost (1996) 73 P&CR 199

Authority's role in considering only the question of conditions subject to which planning permission should be granted will be more confined than in a normal section 70 case. The practical effect of submitting details one year later than would otherwise be allowed may be very limited.

In my view, however, the position is different where.... an application is made under section 73 to alter a condition, so as to extend the period for submission for reserved matters at a time when the original planning permission is no longer capable of implementation by reason of the effect of section 93 (4), because time for submission for reserved matters has expired.

While the Council are constrained to consider only the question of the conditions subject to which planning permission should be granted, in deciding whether to grant a planning permission subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), are they required to ignore the fact that the original planning permission is no longer capable of implementation, so that if they adopt the latter course it will not be possible for the development to take place, whereas if they adopt the former course, it will be possible for the development to take place?

In my view, there is nothing in section 73 that requires the Local Planning Authority to ignore the practical consequences generally of imposing a different condition, and this is surely a most important practical consequence of granting an application for planning permission under paragraph (a) or refusing the application under paragraph (b),

It may well be that the case since the original grant of planning permission, the arguments for carrying out development have strengthened.....

[sc. in such circumstances] Granting a planning permission subject to a condition providing for an extended period for submission of details would enable the development to be carried out, whereas as refusing the application would mean that a permission for a much needed building could not be implemented.

I do not see why, in such circumstances, the Council, in considering the application under section 73, should be required to shut their eyes to those practical

consequences. If that is correct, I do not see why the position should be any different if the planning policies have changed since the grant of the original planning permission so that its implementation has become less desirable in planning terms.

The Local Planning Authority have to have regard to the factual circumstances as they exist at the time and to have regard to the facts that exist at the time of their decisions. If at that time the original planning permission is incapable of implementation by reason of section 93 (4), I can see no basis in the statutory code for requiring the Local Planning Authority to ignore that important fact.

Much less do I see any justification for requiring the Local Planning Authority to base their decision upon a hypothesis: comparing the merits of development proceeding now with the merits of its having proceeded at some time in the past when it is known that the hypothesis does not accord with reality.

29. I express my concurrence with what is there said.

30. Subsection (4) indicates that the section clearly does not apply where the application purportedly made pursuant to it is made at a time when development had not been begun within the time specified by a condition. However, what is the position where the application is made in time but the consideration by the authority of that application is after the expiry of time? Does the Authority lose jurisdiction by reason of the expiry of time? In my judgment, based in part on the use of the verb "apply" in both subsections (1) and (4), the crucial time is the time of the application and there is no subsequent loss of jurisdiction to consider the matter. We have heard no submissions to the contrary.

31. The question can arise whether, on an application which asks for a variation of one particular condition, the authority can grant a new permission subject to a number of conditions which were not the subject of the application to vary. Mr Taylor submitted that a proper reading of subsections (1) and (2) of s.73 led to the conclusion that only the condition the subject of the application was to be the subject of consideration by the authority. I disagree. Just as on an application for permission to carry out a development the authority can impose conditions on a permission for development which they would find objectionable unless such conditions were imposed, so on an application to carry out development without complying with one condition the

authority can impose a different new condition or a number of new conditions and/or remove another condition subject to which the earlier permission was granted. An example given by Mr Ouseley Q.C., who appeared for the second respondent, was a situation where a retail operator wished to have deliveries for longer hours than was permitted under the original permission. In such circumstances the Authority might be content to grant this but only on condition that the warehouse was sited further away from nearby dwellings than had been regarded as acceptable at the time of the grant of the original permission.

32. Submissions and Conclusions

Mr John Taylor Q.C., who appeared for Powergen, drew attention to the opening words of s.73(2)

> … the Local Planning Authority shall consider only the question of the conditions subject to which a previous planning permission was granted.

33. He submitted that these words had the result that an authority faced with a s.73 application was not allowed to refuse it just because it now disapproved of a permission which it or the Secretary of State had granted in respect of the land on an earlier occasion. To refuse for such a reason would be to exercise the power of refusal for an impermissible purpose, namely, to prevent, without paying compensation, the implementation of a permission which had been lawfully granted.

34. He pointed out that s.73(2)(a) contemplated the grant of unconditional planning permission, submitted that this would conflict with the requirements of s.91 and 92 of the Act as to time limits and submitted that therefore the permission granted pursuant to s.73 must in some way relate to the earlier permission.

35. He submitted that to construe s.73 as envisaging the grant of an independently viable permission would produce absurd results in situations where details had already been approved under the earlier outline permission. They would need to be submitted and approved afresh under the later permission. In such circumstances there would be no advantage in making a s.73 application rather than starting afresh.

36. He argued that if each permission pursuant to a s.73 application were to be regarded as an independently viable permission then the time limits for submission of reserved matters and commencement of development would start afresh.

37. He submitted that the Frost and Pye cases to which I have already adverted were cases where what was sought was an extension of the period within which something had to be done whereas the present, in form at any rate, was not.

38. These are powerful arguments and they were skilfully put. Nonetheless, I am not persuaded by them. The purpose behind the imposition of time limits in sections 91 and 92 is to enable the Planning Authority and others to know what outstanding permissions are capable of implementation and which, if I may borrow a term from food retailing, have reached their expiry date. That expiry date can be reached in one of two ways – the expiration of the time within which application for details must be made or the expiration of the time within which the development must be begun. In the uncertain world of planning that at least limits the amount of uncertainty and provides a basis on which decisions have to be reached as to what is to happen to that land and land nearby in the future. There is no doubt that the effect of granting a new planning permission in the terms sought by the appellants would be to enable a development to proceed after the expiry date of the permission. The appellants accept the legal correctness of the Authority's refusal to extend the time period specified in condition 1 of the earlier permission. They argue that they should be allowed to achieve substantially the same end by altering the terms of condition 2. In my judgment that would clearly fly in the face of the policy behind sections 91 and 92.

39. That would not dispose of the point if the words in s.73(2) "shall consider only the question of the conditions subject to which a previous planning permission was granted" clearly prevented the Authority from taking into account the fact that the earlier permission had reached its expiry date. I do not consider that they do. My reasoning is essentially the same as that of Sullivan J. in the Pye case set out above. I accept that there the court was concerned with an application in terms to extend the time for submission of details whereas in the present case the court is only concerned with an application which has that effect, This however seems to me to be a distinction of no significance. If Sullivan J.'s reasoning is correct, as I think it is, then it must apply to both situations.

40. I accept that s.73(2)(a) contemplates the grant of an unconditional planning permission but I do not accept Mr Taylor's submissions to the effect that therefore it is wrong to regard a permission granted pursuant to a s.73 application as not being an independently viable permission because of any application of sections 91 and 92. Those sections also contemplate the grant of unconditional permissions and provide that if permission is granted unconditionally then it shall be deemed to have been granted subject to time conditions.

41. Nor do I accept his argument in relation to having to resubmit details which had already been approved. Sometimes the alteration of a condition which is asked for will involve alterations as to previously approved details, sometimes it will not. In those cases where it does not there is no difficulty in referring to the old plans and it may well be that the Authority will be inhibited by the opening words of s.73(2) from considering their merits.

42. The most seductive way in which Mr Taylor put his submissions was to my mind as follows. He submitted that the Authority must focus on the condition mentioned in the application ("condition x" - in the present case condition 2) and ask themselves "were we to substitute condition y for condition x what harm would result which does not result from the grant of permission with condition x?". I agree that, if it does not now matter from a planning point of view whether the future development of the site is governed by condition x as imposed on the old permission or condition y as suggested by an applicant, then the authority would be wrong to refuse permission just because they objected to the development in principle. An example might be a proposed change in the fenestration in a building.

43. But Mr Taylor's formulation of the question subtly conceals that in the present case it does matter. The comparison is not between the present effects of condition x imposed **now** and the present effects of condition y imposed now but rather between the present effects of condition x imposed **years ago** and the present effect of condition y imposed now. Once it is clear that this is the right comparison, then it is obvious that in a case such as the present the difference is enormous. The present effect of condition 2 imposed years ago is to prevent the Food Store Development going ahead whereas the present effect of a permission containing the proposed condition 2 is to permit the Food Store development. It is in my judgment beyond argument that

current planning policy and facts must be taken into consideration when deciding whether or not to permit that new effect.

44. Mr Taylor had a further argument based on events after the expiry date in January 1995. He submitted

(a) that no condition should be imposed unless its imposition serves some planning purpose;

(b) that the purpose of imposing condition 2 on the 1995 Permission was to secure the approval of the Authority for the details of the development of the Total Site;

(c) that this purpose had been achieved by 15.3.1999, albeit in two bites, namely, (1) the approval of the details for the Food Store Segment in May 1998 pursuant to the application made on 8.1.1998 and (2) the resolution of 4.1.1999; and

(d) that in those circumstances it was irrational on 15th March 1999 to refuse to vary the old condition 2.

45. I accept of course that conditions should not be imposed unless their imposition serves some planning purpose. However, as it seems to me one of the purposes of the imposition of conditions 1 and 2 on the 1995 permission, required as it was by s.92, was to secure a situation in which no development should proceed under that permission unless, amongst other things, application pursuant to the 1995 Permission for approval of all of the reserved matters in relation to the Total Site was made before 25.1.1998. That purpose had not been achieved by 15.3.1999 for three separate reasons. One is that the application for planning permission which produced the resolution of 4.1.1999 did not as a matter of fact cover the Total Site. The second is that this application was, I believe, not made before 25.1.1998. The third is that it was not an application for approval of details under the 1995 permission. The Authority on 4.1.1999 was dealing with an application to grant a new full planning permission. In considering that application it was bound to look primarily at the Remaining Segment which was the subject of this new application and also to bear in mind that the outline permission which had been granted in 1995 for the Total Site was no longer capable of implementation. The conclusion reached by the Authority on the application which resulted in the resolution of 4.1.1999 is not necessarily the same as the one it would have reached on an application for approval of details under the 1995 outline permission for the Total Site.

46. At times Mr Taylor I think came close to submitting that it was irrational of the Authority to refuse the s.73 application in respect of condition 2. If that was his submission I would reject it. When the authority came to consider the application under s.73 to grant a new permission in respect of the Total Site subject to a different condition 2 it was perfectly rational to refuse to do so. It might well have been rational to refuse to do so in 1995 but it was certainly rational to refuse to do so in 1999 when planning policies had changed. The original conditions were imposed in pursuance of the policy set out in s.92 of the Act which is to prevent the accumulation of unimplemented permissions. The application under s.73 was clearly designed to achieve a result which would be at variance with that policy. There is nothing irrational in an authority refusing, **after the expiration of the 3 years referred to in s.92(2)(a)**, to grant such an application in circumstances where the relevant policies have altered. Indeed, in my view, in present circumstances to have granted a permission pursuant to an application under s.73 without considering that a Food Store Development was now governed by different policies from those which appertained in 1995 would have been just as unlawful as granting such a permission following a normal application for full planning permission without such a consideration of current policies.

47. I agree with Sullivan J. that when considering whether or not to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted the authority must take into account the provisions of the development plan and any other material considerations. If one asks "material to what?" the answer is material to the application under s.73. Thus, for instance, if the application is to retain a use of land without complying with a condition imposed on a previous permission that the use should cease after five years it must be right to examine that application in the light of facts and policies as they are at the time of the decision on the new application.

48. In the result, for reasons which are substantially those well set out by Dyson J. in his judgment, I would dismiss this appeal.

LORD JUSTICE POTTER :- I agree

LORD JUSTICE MORRITT:- I also agree

Order:

(1) Appeal dismissed with costs

(2) Leave to House of Lords refused.

(Order does not form part of the approved judgment)