



## SSE Briefing Note on Planning Application UTT/18/0460/FUL

### Comments on the Officers' Report ahead of the Extraordinary Council Meeting ("ECM") on 28<sup>th</sup> June 2019

#### Introduction

1. The Officers' Report for the ECM on 28 June presents all the arguments that officers can think of for not changing the November 2018 decision of the Planning Committee. This is a misconceived approach because the issue at hand is merely whether the Planning Committee should be allowed to exercise its judgment on these matters. In this regard it is worth reminding members of Mr Harborough's advice in his report for the ECM on 25 April 2019:

*"Members should be very cautious about bringing planning matters to full Council meetings. This should only happen in very exceptional circumstances and must not be used to attempt to reopen planning decisions with which individual councillors disagree. The determination of planning applications is a complex and technical matter. For that reason, the Council delegates its planning function to the Planning Committee and to professional officers. Care is taken to ensure that members of the Planning Committee receive full training to allow them to exercise planning powers on behalf of the Council.*

*Other members of the Council are unlikely to have received up to date training in the exercise of planning functions. In addition, for more complex cases, supplementary briefings are provided to the Planning Committee, as occurred for the application the subject of this debate. A further risk is that the planning process could become politicised, bringing the Council into disrepute. Taking planning decisions on a whipped basis is likely to amount to maladministration. Planning decisions must be taken strictly on the basis of material planning considerations."*

2. In view of the above extract from the Officers' Report for the April ECM, it is surprising that the Officers' Report for the June ECM comments in such detail on specific planning issues which are said to be matters for the Planning Committee, not Full Council.
3. It must now be abundantly clear to everyone involved with the 2018 Stansted Airport Planning Application that it should have been dealt with at national rather than local level.

#### Legal Advice

4. We now know that members were misled at the meeting on 9 April 2019 when it was claimed that the Council had obtained QC opinion to the effect that officers could lawfully issue a Decision Notice. The only external legal advice that UDC officers had received at that time was from junior barrister, Christaan Zwart.
5. It is disingenuous for officers to claim<sup>1</sup> that the legal advice called for by the motion has now been obtained. The wording of the motion is clear. It requires:

*"... obtain independent legal corroboration that the legal advice provided to officers, including the QC opinion referred to by the Leader of the Council on 9th April 2019 confirms that the proposed Section 106 Agreement with Stansted Airport Limited fully complies ...etc" [emphasis added]*

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<sup>1</sup> Introductory paragraph, page 3 of Officers Report for ECM on 28 June.

6. It was not until around the middle of May 2019 that UDC officers instructed Stephen Hockman QC on this matter. The legal advice subsequently provided cannot rightfully be described as "independent legal *corroboration*" since it was the result of a *collaboration* between Stephen Hockman QC and Christiaan Zwart, the same junior barrister who provided the original advice. Plainly, the requirements of the ECM motion have not been met.
7. Moreover, the instructions given to the QC by UDC legal officers appear to have been designed to elicit confirmation that there was no impediment to officers issuing a Decision Notice. (For example: "The application is about numbers of people not numbers of planes.")
8. Notwithstanding the above, we understand that the advice provided by Hockman and Zwart acknowledges that it would be entirely lawful for Planning Application UTT/18/0460/FUL to be referred back to the Planning Committee. Indeed, that is the sensible and prudent approach so that the Planning Committee, having been trained in the exercise of planning functions, can weigh the issues before them and form a judgment both with regard to the adequacy of the proposed S.106 Agreement and the materiality of new factors.
9. Furthermore, it is not only entirely lawful for Planning Application UTT/18/0460/FUL to be referred back to the Planning Committee but it is also the correct legal approach to refer Planning Application UTT/18/0460/FUL back to the Planning Committee, viz:

*"... where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty."*

[R. (ota Kides) v South Cambs District Council [2002] EWCA 1370]

10. The Officers' Report lists six examples of material considerations provided by SSE and dismisses each in turn. In so doing the authors reinforce the argument that the application should have been dealt with nationally rather than locally. However, we need not provide any rebuttal here because it is for the Planning Committee – not officers, nor Full Council, nor even SSE – to decide whether or not a consideration is material. In the same case as above, Lord Justice Parker defined materiality as follows:

***"In my judgment a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues."***

11. It follows from the above that it would take a very weighty factor (or combination of factors) to be considered 'material' where the earlier decision was unanimous. However, if the earlier decision was finely balanced, as in the instant case, a less weighty factor (or combination of factors) could satisfy the test of materiality.
12. The Officers' Report quotes one extract from Mr Justice Sullivan's judgment in Kings Cross Railways Lands Group v London Borough of Camden LBC [2007] EWHC 1515 but omits a key part of his summing up:

***"Mr Hobson [the QC representing the Claimants] submits, correctly, that while a material change of circumstances since an earlier decision is capable of being a good reason for a change of mind, it is not the only ground on which a local planning authority may change its mind. A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taker considers that a different weight should be given to one or more of the relevant***

***factors, thus causing the balance to be struck against rather than in favour of granting planning permission.” [emphasis added]***

13. The above case is clear on the point that a Planning Committee can lawfully reach a different decision to its predecessor provided it has good planning reasons for doing so. Conversely, if a Planning Committee were to change its mind for no good planning reasons, the Council would be at risk of costs. We deal with this more fully below.

### **Costs**

14. From the moment that UDC validated Planning Application UTT/18/0460/FUL on 22 February 2018, the Council was at risk of costs because if it refused the application, the Applicant would almost certainly appeal. That was the position on 14 November 2018, when the application was originally determined and it is the same position now. To that extent, the Council has been under pressure from the outset. Members of the Planning Committee are well aware of the potential cost implications of refusing any application for no good planning reasons.
15. Stansted Airport's 2006 planning application for 35mppa was (unanimously) refused by UDC Planning Committee. This led to an appeal which was heard at a five-month Public Inquiry in 2007. The Secretary of State eventually approved the application in 2008, awarding costs against UDC. In total UDC had to pay STAL £100,000 in costs, of which £11,000 was recovered from Hertfordshire County Council.
16. At this stage, however, it is premature to be speculating about costs. The issue at hand is whether the Planning Committee should be allowed to review outstanding issues in relation to Planning Application UTT/18/0460. Costs would only arise in the event that:
  - (i) The Planning Committee reversed its November 2018 decision;
  - (ii) There were no good planning reasons for refusal;
  - (iii) Stansted Airport lodged an appeal;
  - (iv) The Secretary of State ruled in STAL's favour; and
  - (v) The Secretary of State awarded costs against UDC.
17. It is crossing too many bridges at once to decide that the Planning Committee should not be allowed to review the application for fear of a costs award. Officers would have ample opportunity to provide advice (including legal advice) and make recommendations to the Planning Committee prior to any decision being taken by the Committee.
18. The Officers' Report is silent as to the potential cost implications of issuing a Decision Notice without first having allowed the Planning Committee an opportunity to consider the adequacy of the proposed S.106 Agreement and the materiality of new considerations and changes in circumstances since November 2018, if this was subsequently found to have been unlawful.

### **Conclusion**

19. The correct approach – legally, procedurally and democratically – is to refer the Stansted Airport Planning Application back to the Planning Committee to consider the adequacy of the proposed S.106 Agreement and the materiality of new considerations and changes in circumstances since November 2018.

Members of the Planning Committee have a democratic mandate and have had special training in planning matters. They need to be trusted to exercise their quasi-judicial function. It is not for officers to circumvent the judgment of the Planning Committee by taking it upon themselves to dismiss identified shortcomings in the proposed S.106 and/or to decide unilaterally that there have been no new material considerations or changes in circumstances since November 2018. Whilst officers must advise it is for members to decide.

*Stop Stansted Expansion  
25 June 2019*