

<b>Committee:</b>	Council	<b>Date:</b>
<b>Title:</b>	Stansted Airport appeal decisions: the Council's Application for permission to apply for a Planning Statutory Review	Tuesday, 5 October 2021
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## Summary

1. The application for permission to apply for a statutory planning review has been refused. The council needs to decide urgently whether to renew its application. This will involve further submissions to a judge on behalf of the council as claimant, The Secretary of State as First Defendant and Stansted Airport Ltd as Second Defendant before a final judgement is made
2. Recommendations:
3. The Chief Executive recommends Council to accept the judgement of The Honourable Mrs Justice Lang DBE.

## Financial Implications

4. The council has already incurred substantial costs at earlier stages of this process. These include £1,034,000 in presenting its case at the Planning Inquiry. Stansted Airport Ltd was also successful in its claim against the council for the full costs of presenting its case at the Inquiry. Planning Inspectors do not assess what the Full Costs amount to. It is for the successful appellant to advise the local planning authority of the sum. The sum will then be subject of negotiation. Currently an extended period for settlement of the costs has been agreed with Stansted Airport Ltd, because of the council's application for the Planning Statutory Review. It is expected that Stansted Airport Ltd's costs will have exceeded those incurred by the Council. The sum will sit on a probability curve which, in Officers' estimation, will peak at around £1.5million. The curve will probably rise quite steeply to £1.5m then fall away more gently with a long tail.
5. In this latest stage, now the Court has also refused the council's application to apply for a statutory planning review, costs of the First and Second Defendants were awarded against the council in the sum of £31,843. The council incurred costs of a similar order, totalling approximately £60,000. The Court did however significantly reduce the sum claimed by Stansted Airport Ltd in making the costs award.
6. If the Council were to renew its application for a hearing, it would incur additional legal costs itself, but not, at this stage, further claims from the Defendants.

7. Members will however also need to take account of the council's potential costs in the scenario of permission being granted and the matter progressing to a full hearing – that is the stage-after-next if this next stage were to be pursued and won. It is difficult to estimate these further costs with precision but they would be substantial, perhaps in the order of a further £100,000 or more.
8. It should be noted that if the Council were to renew its application for a hearing, win that appeal and then ultimately win the subsequent Statutory Planning Review, that could involve the Panel of Inspectors' Costs Decision Letter being quashed in whole or in part. Conversely though, the total could well escalate with further adverse awards of a greater order on top of the earlier planning appeal costs award and the council's own costs if ultimately the judgement in the Review was against the council. That latter outcome would be consistent with the Inquiry Decision Letters and the judgement handed down on 1 October. It is not the role of the Court to be punitive to the Council in ordering costs, though there is a correlation between how long the Council continues to fight an already lost battle (the original lost planning appeal) and the sympathy of the Court for ensuring that the defendants – the Government and Stansted Airport Ltd – are not out of pocket for having to continue to defend themselves against our legal processes.
9. Council will need in due course to consider how it would meet the cumulative costs in excess of approved budgets.

## **Background Papers**

10. The following papers were referred to by the author in the preparation of this report and are to found on this web page <https://www.uttlesford.gov.uk/airport-appeal>

## **Impact**

- 11.

Communication/Consultation	<p>Extensive consultation was carried out on Stansted Airport Ltd's planning application. Representations informed the Planning Inquiry. The timeframe does not permit further consultation before the decision that the council urgently needs to take.</p> <p>The Interested Parties including North Somerset Council have received the judgement.</p> <p>There has been subsequent contact with their representatives, who have asked to be kept informed as soon as the council has made its decision.</p>
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Community Safety	
Equalities	
Health and Safety	
Human Rights/Legal Implications	Leading counsel has been instructed to advise. His opinion is legally privileged.
Sustainability	Sustainability, in particular the implications of the development for carbon emissions and the UK sixth carbon budget, are central to the council's concerns
Ward-specific impacts	
Workforce/Workplace	There is an ongoing need for resources in Legal Services and Planning in particular to be allocated to this issue, notwithstanding the instruction of counsel and the resources of their chambers

## **Situation**

### **The planning inquiry 2021**

12. A planning inquiry was held between 12 January 2021 and 12 March 2021 into Stansted Airport Ltd's appeal against the decision of the council to refuse planning permission in 2020 for its proposals for development that would see a significant increase in the number of air passengers permissible under its existing planning permission: from 35 to 43 million passengers a year.
13. On 21 April 2021, the Government laid before Parliament the Carbon Budget Order 2021 setting the sixth carbon budget at 965 million tonnes of CO<sub>2</sub> Equivalent and stating that emissions from international aviation and shipping from sources in the UK would count towards the sixth carbon budget. As this occurred after close of the oral hearings, the council sought and was granted the opportunity to make further submissions on the sixth carbon budget's bearing on the development proposals.

### **The Appeal decisions**

14. On 26 May 2021, the appeal decision was published allowing the appeal and permitting the proposed development. This was accompanied by a costs decision, ordering the council to pay Stansted Airport Ltd its full costs for having to appeal the council's decision.

### **The challenge under S288**

15. On 5 July 2021, the council sought permission to challenge the lawfulness of both decisions under S288 of the Town and Country Planning Act. It did so in respect of the appeal decision letter on three grounds:
16. The Planning Inspectors had erred in excluding from consideration relevant climate change and carbon emissions policies, and reading national aviation policy (Aviation Policy Statement 2013, Making Best Use 2018 and the Aviation National Policy Statement 2018) as “unassailable and untouched” by other more recent government policy.
17. The Panel were wrong in rejecting Condition 15 proposed by the council as unnecessary and unreasonable, and failed to properly explain why it had been rejected. The council’s planning evidence that the appeal should be granted was expressly founded upon Condition 15 being in place.
18. The Panel’s costs decision was flawed on eleven grounds including a failure to attach weight to Planning Policy Guidance that applications for costs should be made as soon as possible, a failure to consider the council’s submissions on the unfairness and prejudice to the council in the timing of Stansted Airport Ltd’s costs claim at the close of the inquiry hearings, or alternatively, an explanation as to why the Panel rejected those submissions, the unjustified characterisation of the council’s grounds for refusal as vague, generalised and opaque, without any reference to the council’s third reason (additional carbon emissions against a background of amendments to the UK’s carbon account).
19. The full grounds for the challenge under S288 are set out in the background documents that can be found on this web page  
<https://www.uttlesford.gov.uk/airport-appeal>
20. A diagram to explain the sequence of process steps and the current stage is appended.

**Notification of the Judge’s decision on the application for permission to apply for Planning Statutory Review**

21. The notice is appended to this report. The application for permission to apply for a statutory planning review has been refused.
22. The Honourable Mrs Justice Lang DBE considers that “it is unarguable that the Panel failed to have regard to relevant policy developments in relation to climate change and carbon emissions and/or the limitations and reservations in national aviation policy.” Also, “Its judgment was that carbon emissions weighed against the proposal only to a limited extent (DL 153). It is not open to the Claimant to challenge that exercise of planning judgment in a claim for statutory review.”
23. In Her Ladyship’s view, the council’s submission that the Panel erred in rejecting its proposed Condition 15 as neither necessary nor reasonable is unarguable. “The Panel had concluded that the impacts of the development were acceptable, based on the evidence and forecasts before it. Its reasons for concluding that Condition 15 was not necessary or reasonable were clearly

explained at DL 142. It applied the correct legal and policy tests. This was an exercise of planning judgment which the Claimant cannot challenge in this claim.”

24. In respect of the council’s challenge to the costs decision, Her Ladyship’s judgement is that this is unarguable. “A decision whether or not to make an award of costs is pre-eminently a matter of discretion, and the Inspector who actually hears the appeal is in the best position to judge whether an award should be made. The Court will only interfere with an Inspector’s exercise of discretion to award costs in exceptional circumstances.” “The Panel expressly considered the guidance that a costs application should be made as soon as possible. However, the only requirement is that a costs application should be made before the close of proceedings. The Panel was entitled to conclude that the Second Defendant (Stansted Airport Ltd) had not acted unreasonably in deferring its application until the conclusion of the evidence. The Panel set out cogent reasons explaining why it judged the Claimant to have acted unreasonably, resulting in unnecessary or wasted expenses, as described in the PPG. That was an exercise of judgment by the Panel with which this Court cannot properly interfere. The allegations of unprincipled and spiteful behaviour by the Panel are unfounded”, in Her Ladyship’s view.

### **Commentary on the judgement**

25. This commentary has been informed by leading counsel’s oral advice in conference, Philip Coppel QC having been instructed to advise further on this matter. His opinion is legally privileged. This report is officers’ commentary, not leading counsel’s opinion.
26. To aid clarity for members, officers interpret that the regular use of the word ‘unarguable’ in Her Ladyship’s judgement has the meaning of ‘it cannot be reasonably argued’ and not the (effectively opposite) sense of ‘unarguably correct’. That is, the impact of this part of the ruling (and indeed the ruling overall) is against what the Council had argued, and not a finding in favour of our arguments.
27. It should be noted that even if the Statutory Planning Review succeeds, the Court would not substitute its judgment for that of the Panel and instead remit the matter back for a fresh consideration by Inspectors.
28. It might then be necessary for a new Planning Inquiry to be held. Its scope would depend on the judgement, and it would be open to Stansted Airport Ltd not to proceed. Either a new inquiry or revision of the appeal decision letter would probably still result in a grant of planning permission
29. The S288 submissions by leading counsel on behalf of the council were expressed in robust terms, but Mrs Justice Lang’s judgement is unequivocal in all respects. Her views are aligned with those of the Panel in its post Inquiry decision letter. There is a high likelihood that a final judgement on permission to challenge will be consistent with that of the Inquiry Panel and Mrs Justice Lang. In the unlikely event that permission to challenge is granted, there are potential submissions that could be made in response to Her Ladyship’s

reasons, but the outcome of a S288 Planning Statutory Review Full Hearing is similarly likely to be consistent with previous decisions.

30. The options open to the council at this stage are 1) to accept the judgement, in which case the planning permission granted by the Panel of the Planning Inspectorate will stand and the council will need to pay Stansted Airport's costs for its planning appeal in full; or 2) to serve notice by close of business on Friday 8 October that the council intends to renew its application for permission to appeal the Decision Letter dated 26 May 2021 and the related Costs Decision Letter.
31. The decision that Council must make is a matter of political judgement. It should be based on Members' litigation risk appetite. Are Members prepared to incur the certainty of escalating costs set against your analysis of the likelihood of an ultimately successful outcome on the actual planning matter at the heart of these legal processes: the consequences of the allowed increase in airport passenger throughput?

## Risk Analysis

32.

Risk	Likelihood	Impact	Mitigating actions
The final judgement on permission to challenge/ the outcome of a Planning Statutory Review Full Hearing before a Judge is likely to be consistent with the Decision of the Inquiry Panel and The Honourable Mrs Justice Lang DBE	4	4	The skill of leading counsel to articulate the case
Costs of the council and the defendants, if judgement is against the council and awards of costs are made against the council, will	4	4	There is little scope for controlling these costs. Costs awards are at the discretion of the judge.

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1 = Little or no risk or impact

2 = Some risk or impact – action may be necessary.

3 = Significant risk or impact – action required

4 = Near certainty of risk occurring, catastrophic effect or failure of project.