

Committee: Council **Date:** Tuesday, 19 July 2022
Title: Stansted Review – lessons learned action plan
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Summary

1. This report proposes the action plan to be implemented to apply the lessons drawn from the independent expert review into the handling of the Stansted Airport expansion, 2017-2021, the report of which it is presented alongside.
2. It is important to note that this report is essentially about good governance, rather than solely about the handling of planning applications and appeals, as the lessons learned apply much more widely than only to that particular area of the council's statutory duties.
3. It is similarly important to note that this particular Council report looks forwards not backwards. In making proposals for the future, it rightly draws the important lessons from the past from the independent expert report which looked in considerable depth and detail at the history of its particular subject matter.
4. Running a council, with its broad range of statutory duties and discretionary services is a shared endeavour between elected Council Members and permanent, professional Council Officers, each playing their appropriate roles, and acting at varying times independently and at other times in close concert. This report therefore necessarily seeks to add clarity and understanding in the practical measures in the action plan to how that shared endeavour can be best delivered in practice in deliverance of good governance, and how good quality decision making can lead ultimately to better outcomes for local residents.
5. Elected Members' duties and powers in decision making are generally at a higher level than those delegated to Officers, though in taking those decisions Members necessarily and appropriately rely on the advice and assistance of professional Officers, and occasionally through Officers on the further advice of external expert professionals commissioned to assist. In contrast, those powers held by Officers in decision making are in large part delegated to them from Members – although they also have some duties given to them in their own right by Law – and in either case, they hold their own responsibility and accountability for their actions and decisions. Necessarily therefore each

element in this action plan falls into one of two categories: either those decisions reserved to Members in line with the law and/or the Council's Constitution which they are asked to decide and then separately those other actions relating to responsibilities which are held by Officers, either delegated in the course of deliverance of their professional duties, or else (occasionally) held statutorily in their own rights, which Members are asked instead only to note.

6. Unusually, this Officer report contains not only the name of its lead author, the Chief Executive, who would routinely be supported in its drafting by other relevant lead officers. Instead, this report at its head carries the names also of the Director of Planning (as the professional lead adviser to the Council on all planning matters), the Section 151 Officer (who carries statutory responsibility in his own right for certain matters of financial propriety) and the Monitoring Officer (who carries statutory responsibility in her own right for certain issues of good governance). This is to reinforce that this report represents a broader settled and unanimous assessment and advice to Councillors from a range of senior Officers.

Recommendations

7. That those action plan changes requiring changes to either the Council's Constitution or explicitly to future Member behaviours – as clearly identified thematically in each section of the report are approved.
8. Specifically, that Council forms a Task and Finish Group to consider draft Constitutional Changes as proposed in section 15.2.2, to be made up of one member each nominated by the Conservative and Independent party groups, and two members from the joint Liberal Democrat and Green group, alongside five members nominated by the majority Residents for Uttlesford group.
9. That those action plan changes relating to operational processes and approaches in areas either delegated to Officers or else held independently by Officers statutorily in their own rights – again as clearly identified thematically in each section of the report are noted.

Financial Implications

10. The direct or immediate financial implications of this report and its adoption are extremely limited. The indirect or longer-term financial implications are in contrast potentially extensive, as this action plan is intended to protect the authority from future substantial legal costs in pursuance of future decision making and operation of Council services.

Background Papers

11. The following papers were referred to by the author in the preparation of this report and are available for inspection from the author of the report.
 - The report of the independent expert review into the Council's handling of the Stansted Airport expansion application, 2017-2021

- The Council's Constitution

Impact

12. Various elements of the impact of this action plan are addressed in more detail in the body of the report. At a headline level, the impact of this action plan is:

Communication/Consultation	Issues around the quality and consistency of communication, both orally and in writing, largely internally to the Council between Members and Officers but also externally, are at the heart of a sizeable proportion of the matter.
Community Safety	None directly – beyond positive outcomes in this regard being more likely to be delivered through improved governance.
Equalities	None directly – beyond positive outcomes in this regard being more likely to be delivered through improved governance.
Health and Safety	None directly – beyond positive outcomes in this regard being more likely to be delivered through improved governance.
Human Rights/Legal Implications	Issues around governance, are at the heart of a sizeable proportion of the matter, and are addressed extensively in the main body of this report.
Sustainability	None directly – notwithstanding that the subject of the Stansted Airport issue itself related closely to environmental sustainability – beyond positive outcomes in this regard being more likely to be delivered through improved governance.
Ward-specific impacts	All wards
Workforce/Workplace	Issues around systems of staff working, management and accountability are central to this action plan, the introduction of which will also contribute positively to staff recruitment and retention issues.

Situation

13. Considering financial implications as part of considering individual planning applications

13.1 Narrative:

- 13.1.1 Matters which are relevant to consider when determining a planning application - whether to approve it, to approve it with imposition of conditions, or to reject it – are relatively tightly defined by statute and precedent. This is the case whether that application is taken under delegated powers by Officers or else escalated for decision at Planning Committee. By the nature of the criteria for escalating individual applications to the Planning Committee, those that also have substantial financial implications to the authority are essentially a subset of the Major Applications considered at committee.
- 13.1.2 The basic requirement for good governance applies to quasi-judicial consideration of individual cases on their own merits at the Planning Committee as much as it does to any other aspect of Council decision making, namely **the Wednesbury Test**: good decisions are those on which all proper and material considerations are weighed whilst all irrelevant factors are put aside and not allowed to influence the decision made.
- 13.1.3 Any such Major Application is potentially expensive to the authority should it be appealed to the Planning Inspectorate. Should the Council's case at such an appeal be considered materially weak by the Inspector appointed, there is the potential for the Inspector to order that the reasonable costs incurred by the appellant are also met by the authority.
- 13.1.4 In relation to the Stansted Airport expansion appeal, the Council's own costs ran to just over £1 million. In that case, the Inspector found that the authority's case at appeal was so materially weak as to make it appropriate to order that the appellant's reasonable costs were also met by the Council. Those costs are still being negotiated between the authority and the Airport, and were subject to a public report to Council in June 2022, in which Members authorised Officers to offer £1.4 million in settlement thereof.
- 13.1.5 Costs to the authority in recent history of such appeals have been substantial, albeit none in the same league as the costs of the Stansted appeal costs, both direct to the authority and costs of the appellant awarded against the authority.
- 13.1.6 The total net expenditure on the full range of Council services in each of those years is approximately £16 million, so it can be seen that the costs of servicing Planning Appeals – whether won or lost – is a substantial proportion of the authority's budget, with any costs in excess of budgetary provision needing to be met from reserves. These are legitimate costs, and every Planning Authority needs to make suitable provision for such expenditure as the cost of doing business in defending its entirely legitimate duty to reject inappropriate planning applications.

- 13.1.7 The ultimate decision to either approve or reject planning applications is not an exact science, even when properly applying the Wednesbury Principles. Having a proportion of decisions appealed is actually a positive indicator of the Planning Authority's overall effectiveness. If none were appealed, this might be an indicator that an authority had become overly timid in its proper use of its powers to reject anything more than absolutely open-and-shut cases of fatally flawed applications.
- 13.1.8 It is an unarguable reality that Uttlesford District Council is in a weaker position than other authorities in being able to confidently defend any rejected applications taken to appeal by the applicant because of the combination of not having an up to date Local Plan in place [which is the subject of extensive work reported elsewhere to remedy], of not having a 5 year housing land supply at the level required by Government [which is again being addressed through the Local Plan process], and of being currently the only English local authority placed in 'special measures' by Government as a result of exceeding the upper ratio established nationally for proportion of major applications overturned at appeal [which is being addressed through a detailed action plan of its own, which is routinely reported to Councillors elsewhere]. The widespread knowledge of this situation potentially creates a vicious cycle in which applicants disappointed by rejection of their application may perceive that they have a greater chance of success if they were to appeal (compared to other council areas across the country), and thus generate more appeals and increase costs to the authority, even if the Council successfully defends against those appeals.
- 13.1.9 Notwithstanding the sizeable costs to the authority of planning appeals – won or lost – and the relative weakness of the authority (and the potential impact of the perception thereof), **the potential cost of an appeal is not a legitimate and material consideration for members of the Planning Committee to factor into their decision making over any individual application before them.** Every single planning application must be considered solely against relevant considerations and on its own merits, and not part of a bigger picture relating to affordability overall of defending planning appeals.
- 13.1.10 It would therefore be entirely and wholly wrong to make any systems changes or to promote any behavioural changes that led Members of the Planning Committee to consider the risk and scale of individual costs at appeal before they decide to either approve or reject any specific application before them. Recently introduced mandatory training for Members of the Planning Committee (building on years of earlier such training long since in place) has reinforced this point.
- 13.1.11 The independent expert review rightly drew attention to the difference between on the one hand the advice (such as in the financial implications section of the report to full Council in June 2019) which were stark and unequivocal in highlighting the impact and likelihood of substantial abortive expenditure flowing from an appeal should the previous planning decision be materially altered to the detriment of the Airport as applicant and on the

other hand the almost cursory and mildly-phrased financial implications section of the report to Planning Committee in January 2020. To be clear, this contrast was appropriate and proper, as it would have been improper to encourage Members at that Planning Committee to continue to approve the application on the grounds of the likelihood of substantial costs – which we now know to be well into seven figures.

13.1.12 Having made clear that the implications of the Wednesbury Test as applied to all future considerations of the Planning Committee as they have been in the past, there is though an entirely appropriate general approach which can legitimately and clearly needs to be further reinforced in training for Members of the Planning Committee, but also for all other Members who do not sit on the Planning Committee.

13.1.13 Councillors who do not sit on the Planning Committee also have a role in calling in individual applications for consideration by their colleagues at the Planning Committee, where they would otherwise be decided by Officers under delegated powers. It is therefore important that all 39 Councillors are better trained on and made aware of the overall implications to the authority's delivery of wider service and outcome ambitions that flow consequentially from the costs of those appeals.

13.1.14 As illustrated by the airport expansion application that triggered the commissioning of the independent expert review, Councillors who do not sit on the Planning Committee also potentially played a role deciding whether to refer back a matter to the Planning Committee for fresh consideration. The number of such considerations for referral back may indeed increase as a result of other recommendations arising from this independent expert review, so it is doubly important that all 39 Councillors understand the wider context and implications of costs of appeals, particularly lost appeals.

13.1.15 Put simply, Councillors need to be better supported and reinforced in their understanding that the costs flowing from appeals generally, particularly lost appeals, are significantly harmful to the delivery of their overall policy objectives, and that the importance of taking the appropriate decision on a quasi-judicial basis of any individual application before the Planning Committee is acute, even though the individual cost of a potential appeal (won or lost) against that individual decision before them is very explicitly not a proper material consideration. Councillors not sitting on the Planning Committee need also to be better supported and reinforced in their understanding of how these issues are also for them, albeit at a lower level than covered by the mandatory training already in place for Members of the Planning Committee itself.

13.2 Action plan elements requiring formal Member decision:

13.2.1 That Members add to their recent decision to make training mandatory for all Planning Committee members, in deciding to make training compulsory for all Councillors at an appropriate level addressing the points covered in sections 12.1.12 to 12.1.15 above.

13.2.2 That Members agree that this additional general Member training should be developed and delivered as soon as possible, and then delivered afresh following the May 2023 elections, with annual refreshers thereafter, and also urgently individually to any new Members elected at by-elections.

13.3 Action plan elements to be implemented by Officers as delegated/on their own authority:

13.3.1 Officers will develop the training for all Councillors at an appropriate level addressing the points covered in sections 12.1.12 to 12.1.15 above, and deliver it as approved by Members in sections 12.2.1 and 12.2.2 above.

13.3.2 Officers will urgently review the wording used in the financial implications section of reports to Planning Committee with a view to striking the most appropriate balance between proper considerations for Members to consider as part of their quasi-judicial judgment on the application before them [where risk and financial impact of potential appeal is not a proper material consideration] but without running the risk of inadvertently and wholly wrongly giving the impression to Members that there is simply no financial downside to the overall pattern of appeals and associated costs when so very clearly there is.

13.3.3 Senior Officers will assess and act accordingly to address any broader training implications on this issue for staff, both technically and around behaviours, including with a specific focus on Member/Officer relations, and 'telling truth to power'.

14. Decision Notices following consideration of individual planning applications

14.1 Narrative:

14.1.1 The capturing, recording and conveying to both applicants and other interested parties of important elements of detail in giving effect to decisions on applications at the Planning Committee is necessarily complex.

14.1.2 Decision Notices containing this detail often take some time to be finalised by Officers after the meeting of the Planning Committee in question, although clearly this needs to be as speedy as is reasonably practicable.

14.1.3 Because of the technical complexity required in this process, the drafting and issuing of Decision Notices is necessarily a professional task, and is therefore appropriately delegated to Officers.

14.1.4 Any requirement for the Planning Committee to routinely consider and approve draft Decision Notices at a future meeting would be undesirable in terms of the delays it would lead to, and because of the volume of such notices, it would also be an unreasonable demand on Members' scarce time. It would also be an unreasonable expectation to place on Members that they took responsibility for signing off such technical documents without often substantial additional advice deconstructing and explaining

each such Decision Notice if it were taken back to Committee – meaning that any such change to routine procedure would also place a very substantial additional burden on Officers in terms of workload.

- 14.1.5 Notwithstanding the rationale for delegated responsibility to Officers for the drafting and then issuing of Decision Notices set out in sections 13.1.1-13.1.4 above the independent expert review of the Stansted Airport expansion decision which has triggered this process highlights an important anomaly, which has also been the subject of considerable Member discussion, namely how the Planning Committee of January 2020 in reconsidering the Stansted expansion application, on referral back by full Council in June 2019, reached a decision to reject but that the subsequent Decision Notice delegated to Officers instead showed a decision to accept but subject to important conditions.
- 14.1.6 For avoidance of doubt, it is clear that Officers, under their delegated powers, issued this Decision Notice in good faith and to seek to give effect to the desired outcome of the Planning Committee – namely to halt the proposed substantial increase in airport passenger numbers that was the clear policy objective behind the Planning Committee’s vote to reject. This approach was clearly taken by Officers under their delegated powers because of the weight of best professional advice that the Planning Committee’s intent would less likely be achieved by issuing a Decision Notice to reject rather than one which accepted subject to conditions so onerous as to likely frustrate the expansion. This decision was clearly taken specifically in anticipation of how to defend the appeal.
- 14.1.7 Ultimately, as is a simple matter of history, the appeal found in favour of the Airport and the go-ahead for the expansion was given – and the imposition of such onerous conditions lay behind the published reasoning of the Inspector to award costs against the authority.
- 14.1.8 Although it cannot be said with the absolute certainty of lived history that the outcome of the appeal would have been the same, including costs also awarded against the authority, should the Decision Notice have been one showing outright rejection rather than acceptance on strict and onerous conditions, it is clearly the weight of best professional advice that this negative conclusion would have been even more likely. Put another way, the acceptance but on imposition of onerous conditions was an ultimately fruitless attempt, but it was attempted because it stood possibly greater chance of success in defending the appeal than any attempt to defend a flat rejection would have been.
- 14.1.9 That all notwithstanding, looking to the future, there is certainly a strong argument that any professional decision taken by Officers under delegated powers to so materially alter the basic decision on any application taken at Planning Committee (whether from a rejection to an acceptance but under strict and onerous conditions as in this case, or any other such material shift) should be referred back to the Planning Committee for fresh decision before enactment. Although this would generate fresh work in a detailed Officer report explaining the apparent anomaly and the reason for an on-

the-face-of-it different/contradictory approach, and it would also potentially risk a delay, it would be ultimately beneficial in terms of transparency and public accountability.

- 14.1.10 This same principle should also be applied equally to any other kind of decision taken by any other Council Committee where a Committee decision in its implementation appears to be materially altered once delegated to Officers, even if such a fresh approach were taken following a professional assessment of how best to achieve the original policy decision imperative.

14.2 Action plan elements requiring formal Member decision:

- 14.2.1 To commission Officers to urgently bring back for full Council debate and decision any Constitutional amendment necessary to give life to the actions proposed in 13.1.9 [re the Planning Committee] and 13.1.10 [re all other formal decision making for a] above.

- 14.2.2 That Members undertake to actively participate in any training developed to support them in operating within this new referral back process – importantly to understand their role in considering complex technical factors, understanding the importance of avoiding the risks associated with seeking to apply matters of professional expertise outside their role in substituting their own technical solutions beyond those contained in options brought before them.

14.3 Action plan elements to be implemented by Officers as delegated/on their own authority:

- 14.3.1 To urgently prepare such Constitutional amendments as necessary to give life to the actions proposed in 13.1.9 [re the Planning Committee] and 13.1.10 [re all other formal decision making for a] above under the Chief Executive's own authority, even if not commissioned to do so under recommendation 13.2.1 above.

- 14.3.2 Pending any Constitutional changes being agreed as per section 13.2.1 above, Officers will be instructed with immediate effect by the Chief Executive to bring forward any such cases as would be covered by such Constitutional changes for him to consider taking back to the relevant Committee under his own authority, with those reports containing lawful options open to the Members along with clear advice on the route best likely to achieve their previously settled policy decision.

- 14.3.3 To prepare henceforth an annual report to go to the Council's Governance, Audit and Performance Committee listing any individual uses from this date forwards of these new procedures and seeking to draw out any issues or trends from the broader picture, with recommendations and learning points as necessary.

- 14.3.4 Senior Officers will assess and act accordingly to address any broader training implications on this issue for staff, both technically and around

behaviours, including with a specific focus on Member/Officer relations, and 'telling truth to power'.

15. Management of Planning Appeals

15.1 Narrative:

- 15.1.1 As can be seen from the table in para 12.1.5 above, the authority routinely defends planning appeals from applicants when either their appeal has been rejected, or approved but with what they consider to be unreasonably onerous conditions, or on grounds of non-determination.
- 15.1.2 As alluded to in 12.1.6 and 12.1.7 above, being taken to Appeal by an applicant is a natural, proper and even healthy element of an effectively operating Planning Authority.
- 15.1.3 By definition, the Planning Authority is going to want to defend its decisions at appeal. This is because the authority should only take planning decisions (and decisions generally) that it is proud to stand behind and defend. In planning terms, it is never acceptable for the authority to either reject an application without solid grounds for doing so, nor to approve it with conditions it believes to be unreasonably onerous in the hope that the applicant will simply back off and not choose to appeal.
- 15.1.4 As a general rule therefore, every appealed planning determination will rightly be vigorously defended.
- 15.1.5 As explored above, this can be a very expensive process, even just in the Council's own costs, as a successful defence will often require the commissioning of additional expert evidence (in terms of reports, and potentially in-person expert witness attendance at the Appeal itself), as well as using a barrister, possibly consultants, and in considerable staff time.
- 15.1.6 A balance will in each case need to be struck between constraining the Council's costs incurred and the likelihood of the input required to enable the Council to have the best chance to win. A further consideration is that an appeals can in some circumstances lead to the awarding of costs against the authority, meaning that a greater expenditure up front by the Council will need to be weighed against an assessment of external costs which may be awarded against it.
- 15.1.7 Striking this balance is not an exact science, but it is a matter of professional judgment best taken by the professional experts the authority employs.
- 15.1.8 The grounds on which the authority's defence is mounted will normally be straightforward – the defence will be on the grounds of the Decision Notice prepared and issued by Officers under their delegated powers, which in turn will reflect the decision taken (whether at Planning Committee or else directly by Officers under their delegated powers). Circumstances in which there is still discretion on which grounds to defend an appeal are dealt with in section 13 above – ie where an Appeal is lodged before a Decision

Notice is issued. This section [14] therefore seeks only to address the nature of the defence decisions in terms of scale and approach, rather than on underlying grounds.

15.1.9 It would seem sensible that the management of each Appeal is governed by an individual Appeal Management Strategy, setting out both allocation of resources and choice of tactical focus – ie main grounds for argument. Necessarily such Appeal Management Strategy will be highly sensitive, as they would be of massive use to the appellant should they be leaked, and so they will be highly restricted documents amongst relevant Officers and others such as any barrister commissioned, and potentially witnesses called.

15.1.10 Where possible, a shorter and less sensitive summary version should be afforded to Members, as well as to interested members of the public and to partners, such as interested Parish Councils, who often follow such appeals closely, and attend them in person. The publication of this de-sensitised version – a Summary Appeal Management Plan – will help reinforce Member, public and partner confidence, as well as serving our fundamental general commitment to transparency.

15.1.11 As with any such system, it is sensible to have a review mechanism to technically quality assure whilst they are live, and to review post implementation. In a Member-led organisation such as Uttlesford District Council, it will also be appropriate to brief Members and allow them to quality assure the broader application of this process over time.

15.2 Action plan elements requiring formal Member decision:

15.2.1 That Members undertake to actively participate in any briefing developed to support them in operating within this individual Summary Appeal Management Plan process, as well as with periodic reports summarising the issues associated with appeals over that period, including any lessons to be learned and implemented generally.

15.3 Action plan elements to be implemented by Officers as delegated/on their own authority:

15.3.1 The Director of Planning will review the current approach to handling Planning Appeals, and introduce a new system for instituting confidential Planning Appeal Plans and publishing Summary Planning Appeal Strategies as he considers appropriate and proportionate, including quality assuring individual plans prior to adoption at a suitably senior level.

15.3.2 The Director of Planning will also consider and implement a new periodic review process for both confidential discussion in more granular and confidential detail amongst Officers and expert partners, as well as perhaps annually at a higher level with Councillors, albeit with fewer specifics that give away less general strategy of value to future appellants.

- 15.3.3 The Director of Planning will also consider the partnership approach with other interested parties also represented at Appeals, including (but not limited to) Parish/Town Councils. This should reflect synergies and shared objectives whilst also maintaining an appropriate distinction where interests are not necessarily 100% aligned.
- 15.3.4 Officers will develop and deliver briefings/training on this approach to Members, with Parishes, and at a headline explanatory level to members of the public.
- 15.3.5 Senior Officers will assess and act accordingly to address any broader training implications on this issue for staff, both technically and around behaviours, including with a specific focus on Member/Officer relations, and 'telling truth to power'.

16. Revisiting decisions previously formally taken

16.1 Narrative:

- 16.1.1 It is – rightly – truly exceptional for any individual case (whether it is a planning application or any other element of council business, such as a licensing application or a grant application) to be considered once, decided on, enacted (to whatever degree) only then for the original decision to be revisited afresh. Such second-guessing leads to uncertainty, lack of transparency, and a greater likelihood of unfairness, inconsistency and inequity. The impacts on third parties who are relying on the Council making a decision and sticking to it are particularly acute – and in a general sense, likely to lead to negative impacts and increased costs on their part, which they would unsurprisingly often want to seek to reclaim from the authority. There is also a clear division of responsibilities between key decisions reserved for elected Councillors and for the mass of more routine, lower-level decisions delegated to Officers – and the clarity for this division is as set out in the Schedule of Delegated Powers. This reinforces the general point for key decisions that 'Officers advise, but elected members decide'.
- 16.1.2 In contrast, with policy decisions, it is routine good practice to reconsider them and refresh them in light of experience and changing external circumstances from time to time, such as on an annual/four-yearly basis. Refreshed and revised policies should of course in general be applied prospectively (from that point or a future date onwards) and not retrospectively, as this too would likely lead to confusion, unfairness and potential claims against the authority.
- 16.1.3 The Stansted Airport expansion application subject of the independent expert review commissioned by the Council is of course one such case where the Planning Committee decided on the original planning application – to approve it – only then to have the matter referred by vote of full Council after an all-out election back to the Planning Committee.

16.1.4 Members were advised in that case that although they did indeed have the power to make such a referral back, there were considerable risks and likely costs (both financial and reputational) if they were to do so (and were the Planning Committee to not simply re-approve the application). At a simplistic level, all any aggrieved party needs to do to contest a decision of a body that first decided one way and then the other is to play back the decision maker's own words/logic from the time they decided on the occasion that suits the third party's preferred outcome.

16.1.5 One of the clear implications arising from this review which requires action is therefore around Member training to better understand such risks should they consider such a comparable option in future. This should clearly better support Members in understanding factors generally related to the subject under consideration but which are not always aligned with the proper material considerations allowed for in law.

16.1.6 The independent expert review does though clearly conclude that there does need to be better and more formal explicit Constitutional provision for reconsideration of various matters in certain exceptional circumstances. It says at para 1.4

“There was a clear error of judgment by both Councillors and Officers in failing to secure an automatic review procedure, following the decision of the Extraordinary Committee Meeting in January 2020 to refuse the Proposal against Officer advice.”

16.1.7 And continues on that theme in the recommendations section at sections 15.3-15.5:

“In our view, this was the product of a system failure rather than the mistake of an individual Councillor and Officer, that centred upon the absence of sufficient oversight in the provision of an automatic procedure of monitoring, review and reassessment. Again, this mechanism should have been put in place by both Councillors and Officers at the Extraordinary Committee Meeting in January 2020 in response to the obvious reputational and costs risk. The absence of these arrangements placed Officers in an invidious position because they had been tasked in the formulation of an apparently hopeless case that was very clearly politically charged and in the absence of any apparent ‘safety net’ or other form of safeguard.

The absence of oversight was then compounded by the approach taken by the professional team under the supervision of the relevant Officers who had delegated authority and the conduct of the appeal case. Those Officers supervised and endorsed the transition of the appeal case from the terms of the RoR to the presented case at Inquiry of conditional approval of the Proposal. It must, in turn, have been the case that the identified risk could only increase (in prospect and cost) with each step taken to justify the RoR on the terms identified in evidence.

The remedy is to provide an automatic referral process in specific circumstances where there is a significant cost or reputation risk to UDC and to imbed these terms in the Constitution. Those arrangements would safeguard both Councillors

and Officers and, ultimately, would operate in the best interests of the local authority and members of the public.”

16.1.8 And specifically in para 14.6

“In this context, the obvious remedy would be to extend the provisions of Article 13.3.2 of Part 2 of the Constitution that define those “*key decisions by or on behalf of the Leader or Cabinet*” to provide an automatic referral process in specific circumstances. We would recommend that this is achieved by the extension of the categories of decisions identified at Article 13.3.2 to include:

“The decision relates to a planning proposal likely to potentially result in a cost award against the Council in excess of £[X]00,000 or the provision of external professional services in excess of £[X]00,000 ””

16.1.9 This provides both an argument that there needs to be provision for an automatic review process, as well as introducing a financial trigger above an as-yet unspecified number of hundreds of thousands of pounds worth of costs.

16.1.10 The building of this trigger around the word ‘likely’ suggests perhaps a minimum threshold of better-than-50:50 chance of incurring such costs, and that is necessarily subjective. It would also suggest that the trigger would not be met if the professional advice was that there was a 60:40 chance of not incurring costs above that threshold – it a 40% likelihood of potentially costing maybe millions of pounds, but not hitting the trigger.

16.1.11 Although there is necessarily some inexactitude in putting a cost to an enquiry before it has even started, this too could be worked through to make good use of such a phrasing for a trigger.

16.1.12 Although Planning Committee decisions are very much quasi-judicial and not matters for the Cabinet, nor indeed for full Council to reverse, once a decision has been taken by the Planning Committee, it is indeed potentially appropriate to refer back to either Cabinet or full Council.

16.1.13 It is a matter of fine judgment if the referral to Cabinet served a sufficiently positive purpose if Cabinet in turn needed to recommend reconsideration to full Council for full Council to refer the matter back to the Planning Committee.

16.1.14 Considering the time sensitivity of Planning Committee matters, it might be considered advantageous instead to grant named Officers the power to short-circuit this proposed new review process, by using powers to refer the matter straight to full Council (which of course also has the power to appoint and dismiss Members from the Planning Committee).

16.1.15 As such, the Chief Executive instead offers the similar construction for a Constitutional amendment in the form of:

16.1.16 *“Where a decision relates to a planning decision with a substantial likelihood of resulting in costs to the Council in excess of £200,000 by way of costs awards*

and/or or the provision of external professional services the Chief Executive or Planning Director shall take a report in a timely fashion to a meeting of full Council to discuss and determine whether to refer back to the Planning Committee for reconsideration. There shall only be one such referral per application, with the Planning Committee entitled to reconfirm its decision without further such referral back.”

16.1.17 The recommendation below to this affect affords Members the opportunity to discuss and debate this wording, as well as for Officers to seek further expert advice thereon before bringing back proposed Constitutional amendments to full Council for decision. This further reinforces the point that although additional powers are proposed for Officers to be able, in exceptional circumstances only, to be able to refer a matter back to Members for reconsideration, that it will still be for such key decisions that ‘Officers advise, but elected Members decide’.

16.2 Action plan elements requiring formal Member decision:

16.2.1 That Members undertake to actively participate in any training developed to support them in operating within this approach to the exceptional cases where pre-existing casework decisions are revisited.

16.2.2 That Members establish a new task-and-finish working group to consider the wording of a potential Constitutional amendment as discussed in sections 15.1.6 to 15.1.15 and as currently drafted in section 15.1.16.

16.3 Action plan elements to be implemented by Officers as delegated/on their own authority:

16.3.1 To develop and deliver such Member training.

16.3.2 Senior Officers will assess and act accordingly to address any broader training implications on this issue for staff, both technically and around behaviours, including with a specific focus on Member/Officer relations, and ‘telling truth to power’.

16.3.3 To support the Member task and finish group proposed in section 15.2.2 above.

17. Provision of expert advice to Members in support of their decision making

17.1 Narrative:

17.1.1 The Council employs staff, with years of relevant experience, and requiring professional qualifications and ongoing continuous professional development in their field. This is routinely supplemented as necessary by the commissioning of external expert advice, usually because the matter at hand is so specialist, although also at times because of reasons of in-house capacity.

- 17.1.2 Councillors come with an electoral mandate and a range of skills, knowledge, experience that Officers do not have – particularly the ongoing direct link to understanding our residents’ lived experiences and priorities. Councillors routinely develop considerable knowledge in the areas of council services they spend most time on, particularly in the case of Planning Committee members, who pick up a huge amount of relevant detail over the years. Although sometimes Councillors also have professional skills from their own careers that come to the table with them, it is important for them to rely on the best professional advice they are given and to apply their best judgment to it, rather than seek to out-expert the experts.
- 17.1.3 This joint enterprise between Councillors and Officers (and external experts commissioned) is more often than not a well-trodden and highly productive relationship.
- 17.1.4 Decisions taken at different levels needs to be (and generally is) clearly distinguished, both by our Constitution and by the accompanying Schedule of Delegated Powers. Earlier sections in this action plan tease out some areas at the margins between Member decision making and delegated Officer powers requiring some tweaking.
- 17.1.5 It is particularly important in taking decisions that there is a clear audit trail, that supports Members and Officers to show that the Wednesbury Principles are being followed. Officer reports are constructed to enable that.
- 17.1.6 The independent expert review report does however point at multiple occasions in the handling of the Stansted Airport expansion application where the audit trail and thus the evidence of strong governance is considerably wanting, if not downright absent – particularly when it came to the advice received from external experts, mainly leading barristers.
- 17.1.7 The independent external review reveals quite clearly how many of those external consultations had no real audit trail. This has been a matter of understandable consternation to various Councillors, including Members of the Task and Finish Group established by the Scrutiny Committee to see that this independent expert review process was properly completed, and reported up to Scrutiny and full Council, as it now has been.
- 17.1.8 Where some Members of the Task and Finish Group expressed a wish for further evidence to be taken, including from interviewing various Councillors, Officers and external third parties who took part in those various exchanges to try to get closer to who said what, the Chief Executive advised that this was not possible on two grounds. Firstly, and most importantly, the expectation that a clear and consistent ‘single version of truth’ would somehow emerge from seeking to interview dozens of different people who sat through lengthy discussions now some years ago, is so unlikely as to be a hopeless mission. Secondly, the cost and time that would almost certainly be taken up by such a process would be disproportionate to the almost certainly vague outcome it would produce.

- 17.1.9 This view is shared by the independent expert commissioned to carry out the report. He would not accept the commission to do that work even if we did think it a good idea and the use of many extra tens of thousands of pounds of taxpayers' money.
- 17.1.10 Importantly though, Members can take value from the conclusions that the independent expert reviewer has included in his report and from which positive, valuable learning can be drawn for the future.
- 17.1.11 The first positive learning point is around audit trails and clarity of the important things that Members should take away from workshops or question-and-answer sessions with experts, whether in-house professionals or external consultants, QCs etc. Although free-flowing workshops and question-and-answer sessions can serve a valuable purpose, alongside formal, locked-down Officer reports, to make them fit properly into an audit trail and thus flow through to a clear and proper application of the Wednesbury Principles.
- 17.1.12 Specifically, any such workshop or question-and-answer session should have a clear framework set out in the invitation – ie what will be covered. It may prove helpful to start off any such session with a presentation, and this too can be captured and shared as part of the audit trail showing how there has been a clear focus on relevant factors and a setting aside of irrelevant factors. Finally, any such meeting should be followed up routinely in future by a written note of key take-away points. Such a follow up note should explicitly not try and capture a whole one or two hours work of he-said-she-said, but instead focus down onto the key points – ie those that Members should pay regard to in reaching any formal decision.
- 17.1.13 The independent expert review report also lays bare the somewhat extraordinary number of senior barristers from whom the authority sought advice on this one case. Even if there were very good reasons for seeking so many different external opinions, one obvious and entirely predictable outcome in terms of perception is that the authority kept on trying QCs until it could find one whose advice sufficiently fitted its world view enough to carry on towards its desired course of action, regardless of the risks.

17.2 Action plan elements requiring formal Member decision:

- 17.2.1 Members are invited to accept the principle that any future free-flowing workshops or question-and-answer sessions with experts (in-house or external) are going to be slightly more structured, and with the relevant points captured and shared in writing, so that they can be supported in fulfilling their duties under good governance to focus on relevant factors and disregard irrelevant factors.
- 17.2.2 Members are invited to accept the principle that for purposes of transparency, clear accountability, and good governance that should they wish for a second opinion on a matter, from an external expert, that this should be made through the relevant Officer, who will consider it, and seek agreement from the Chief Executive as necessary. Members should

accept that although an external expert opinion will often be commissioned, the seeking of ‘third opinions’ will very rarely be approved.

17.2.3 Members are invited to accept the principle that if they have prior experience of any particular external expert – positive or negative – they are welcome to share this with the relevant Officer prior to the selection of any external expert, but that the principles on which a selection will be made are those as set out in 16.1.1 above.

17.2.4 That Members undertake to actively participate in any training developed to support them in operating within this approach to the exceptional cases where pre-existing casework decisions are revisited.

17.3 Action plan elements to be implemented by Officers as delegated/on their own authority:

17.3.1 The Chief Executive will ensure a clear expectation amongst Officers that on future occasions where there is a sense that Members will benefit from supplementing formal written Officer advice with free-flowing workshops or question-and-answer sessions, that these are organised in line with the principles set out in 16.1.12 above.

17.3.2 Further, the Chief Executive will instruct that Officers seek his personal approval prior to commissioning any second or subsequent external expert to provide advice on essentially the same matter, with that approval only likely to be given in genuinely exceptional circumstances.

17.3.3 The Chief Executive will instruct Officers that their first priority in selecting any external expert adviser is the quality and independence of that external advice, and that taking recommendations from any Member on who or who not to commission for that purpose is generally to be avoided. Moreover, Officers are to be instructed that if any Member does recommend selecting or avoiding any external expert unsolicited, then that should be promptly reported to the Chief Executive who will take a view as to how, if at all, that should be allowed to influence the selection of an external expert.

17.3.4 Senior Officers will assess and act accordingly to address any broader training implications on this issue for staff, both technically and around behaviours, including with a specific focus on Member/Officer relations, and ‘telling truth to power’.

Risk Analysis

18.

Risk	Likelihood	Impact	Mitigating actions
That publication of the independent expert review report and subsequent consideration of its	low	low	The authority has already published and publicly debated a report at full Council in

content in public undermines the ongoing costs negotiations between the authority and Stansted Airport			June 2022 making an offer to Stansted Airport in settlement of costs.
That the authority fails to learn and implement lessons from this matter	low	high	The cross party task and finish group that has worked on this process is illustrative of the whole council appetite to learn and implement positive learning. The commissioning of an independent expert to conduct the review adds to its credibility and objectivity.

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.