

Stansted Planning Appeal – Costs: Public Report

Committee: Council

Date:

Title: Stansted Planning Appeal - Costs

Tuesday,
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Portfolio Holder: Councillor John Evans, Portfolio Holder for Planning, Stansted Airport, Infrastructure Strategy and the Local Plan

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Summary

1. This paper updates Councillors on the process for settling through negotiation the planning appeal costs due to Stansted Airport Ltd [STAL] which the authority has been ordered to pay, and includes a recommendation that further offers, including a Part 36 Offer under the Civil Procedure Rules (CPR), be made by the authority to STAL in full and final settlement of those planning appeal costs.
2. Information that has been deemed legally privileged by virtue of paragraph(s) 5 of Part 1 of Schedule 12A of the Local Government Act 1972 has been removed from this public report. Members are asked to refer to the restricted report in order to inform their decision making.

Recommendations

3. That Council approve that the Chief Executive be given authority to make a revised CPR Part 36 offer (“the Part 36 offer”) to STAL in respect of the planning appeal costs in the sum of £2,050,000 in full and final settlement (being comprised of £2,000,000 in respect of the claim for costs itself, £0 in respect of VAT and £50,000 in respect of interest).
4. That Council approve that the Chief Executive be given further authority to simultaneously make a second offer (“the all-in offer”) to STAL in respect of the planning appeal costs in the sum of £2,100,000, including all interest and costs incurred by STAL in negotiating this settlement.
5. That Council agrees that, should STAL reject the offers in paragraphs 3 and 4 above, the Chief Executive is authorised to propose to STAL that the matter is dealt with via mediation. Likewise, if STAL offer to resolve the matter by mediation then the Chief Executive is authorised to instruct external expert advice as needed and to enter directly into such mediation with STAL (noting that any settlement potentially arising from mediation over and above the sums authorised in paragraphs 3 and 4 above would be subject to fresh approval by Council).

6. That Council approves the use of Reserves as set out in paragraph 7.

Financial Implications

7. The final settlement sum will need to be paid from Reserves. The Strategic Initiative Fund (SIF) had a balance of £1.663 million from which the £1million paid on account as agreed by full Council in June was drawn, and this will be the primary Reserve used. As the final settlement sum proposed in this report would exceed the balance in this Reserve then the Medium Term Financial Strategy (MTFS) Reserve will be used for the excess of £437,000.

Background Papers

8. 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*.

- Order from the Planning Inspector that UDC meet the applicant's appeal costs.
- Without Prejudice exchanges between UDC/UDC's costs lawyers and STAL/STAL's costs lawyers (*not available for inspection, as legally privileged).
- The report considered by full Council on 15 June 2022

Impact

Communication/Consultation	Cabinet and Party Group Leaders have been informally and confidentially updated as these negotiations have been ongoing
Community Safety	Nil
Equalities	Nil
Health and Safety	Nil
Human Rights/Legal Implications	The details of Legal implications are outlined throughout the body of this report.
Sustainability	Nil
Ward-specific impacts	Nil
Workforce/Workplace	Nil

Situation

9. On 22nd February 2018 STAL submitted a planning application for works and to substantially extend passenger numbers:

“Airfield works comprising two new taxiway links to the existing runway (a Rapid Access Taxiway and a Rapid Exit Taxiway), six additional remote aircraft stands (adjacent Yankee taxiway); and three additional aircraft stands (extension of the Echo Apron) to enable combined airfield operations of 274,000 aircraft movements (of which not more than 16,000 movements would be Cargo Air Transport Movements (CATM)) and a throughput of 43 million terminal passengers, in a 12-month calendar period” (“the Proposal”)

10. That application was refused by the Council’s Planning Committee on the 20th of January 2020.

11. On 24th of July 2020 STAL submitted an appeal against the decision of The Councils Planning Committee.

12. The Planning Inspectorate heard STAL’s appeal over 30 days between 12th January and 12th March 2021. The Inspectors found in STAL’s favour by order dated the 26th of May 2021:

“In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Uttlesford District Council shall pay to Stansted Airport Limited, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.”

13. The Council subsequently challenged the Inspectors’ decision in the High Court, which was dismissed on 1st October 2021.

14. The Council resolved on 6th October 2021 to accept the High Court’s decision without seeking further leave to challenge, and to accept that this battle had ended.

15. STAL’s legal costs of that High Court challenge were assessed by the Court and have been paid. However, payment by the authority of STAL’s costs of the original planning appeal remain outstanding and it is those costs that are subject of this report.

16. The Council’s Chief Executive wrote to STAL on 22nd November 2021 advising that as the legal challenge was at an end, the Council was ready to begin negotiation over settlement of STAL’s costs of the original planning appeal, as ordered by the Inspectors, inviting STAL to submit details of their costs for consideration.

17. STAL replied to the Council on 23rd February 2022, on a Without Prejudice basis, providing details of their costs, invoices and some details of why their costs were being sought at the level they were.

18. The Council engaged a specialist Costs Lawyer to advise and following correspondence between the Council and STAL’s respective lawyers, and an in depth analysis of the claim by the Costs Lawyer appointed for the Council an offer was advised. Full Council considered a report on 15 June 2022, and

agreed to make STAL a Part 36 Offer in full and final settlement of £1.4 million. Council further agreed to make a payment on account to STAL of £1 million.

19. That £1 million was duly paid on account, and the overall Part 36 offer of £1.4 million was made (including the £1 million paid on account). STAL took receipt of the £1 million on account, but rejected the £1.4 million offer, and duly made a counter offer of £2.2 million (including the £1 million paid on account), which included interest but excluded legal costs associated with these settlement negotiations. Those interest costs and associated legal costs are estimated to be between £50,000 and £100,000 for interest and approximately £25,000 for the settlement negotiation costs, the latter being on top of the £2.2 million STAL offer.

20. A number of factors were considered in recommending these two offers.

- 19.1 Firstly, that STAL is entitled to its costs on what is called the “standard basis.” The standard basis is a legal principle that means STAL’s claim for costs must be (i) reasonably incurred; (ii) reasonable in amount; (iii) proportionate to the matters in issue; and (iv) where there is any doubt as to the reasonableness of STAL’s claim for costs, the benefit of that doubt falls in the Council’s favour. Accordingly, the burden ultimately rests with STAL to demonstrate the reasonableness and proportionality of its claim for costs.
- 19.2 The Council has a fiduciary duty to the taxpayer for the effective and economic use of their money. It has a duty to demonstrate and act in good faith in its negotiations.
- 19.3 Consideration must be given to the fact that if an agreement cannot be reached by direct negotiation between UDC and STAL, and subsequent attempts were made to settle STAL’s claim for costs by either mediation or litigation (through the Court), mediation and/or litigation would incur further costs; both in respect of cost to the Council in its own legal fees and also any further legal fees STAL make incur as a result of those processes.

21. The offers recommended to Members in paragraphs 3 and 4 mirror this range when interest and negotiation costs are included, and it is Officer advice, supported by the advice of our retained Costs Lawyer, that to seek to negotiate or litigate further on the point would likely have minimal further gain compared to the risks of a higher settlement and the additional costs being accrued to both sides by continuing the process (with the Council potentially being ordered to pay STAL’s ongoing costs).

22. A part 36 Offer if rejected by STAL, protects the Council should the matter have to be ultimately determined by the Court. If the offer proposed at paragraph 3 above were to be accepted by STAL after 21 days from it being made, or if the Court were to assess the claim for costs at a sum equal to or lower than the offer then STAL would become responsible for the Council’s costs incurred after the 21 day period from the date of making the offer. By way of further information, a CPR Part 36 Offer is required, by law, to include a

provision in the respect of Interest. In other words if the Part 36 Offer were to exclude interest it would be invalid as a Part 36 Offer.

22. To this end the duties and issues in paragraph 18 above have been carefully considered in providing the Council with the recommended offers in paragraphs 3 and 4 above. Accordingly, the offers proposed at paragraphs 3 and 4 above are in the view of the officers and costs lawyer appointed, reasonable and proportionate offers based on the information currently available.

23. Should STAL accept, in particular, the offer at paragraph 4, then this would essentially see the matter resolved, with no further reference to Members.

24. Should STAL nonetheless reject either or both offers, they may:

24.1 Make another counter-offer and seek to enter into further negotiation. Should this be the case, if the counter offer were to be at a level higher than that in either paragraph 3 or 4 above a further officer report would be brought back for Council approval or

24.2 Seek to end the informal negotiation and invite the Council to enter into mediation to seek to resolve the matter. Any amount higher than that in paragraphs 3 and 4 above would be brought back to Council for approval at the end of the mediation process or

24.3 Take the matter through the Court process. This process would require STAL to serve a full and detailed bill of their costs; the Council would have the opportunity to submit written representations challenging the claim for costs (called "points of dispute"); STAL would have the opportunity to submit written representations responding to the points of dispute (called "replies to points of dispute") and then the matter would proceed to a Court hearing before a specialist costs judge who will determine the reasonable and proportionate sum the Council must pay STAL. This process (called "detailed assessment proceedings") can be lengthy and time consuming. Any sum the Court assesses as being reasonable and proportionate (assuming it would be above the threshold requiring full Council approval and above the sum proposed for the Part 36 Offer set out in paragraph 3 above) would require full Council approval in a fresh report at a future meeting. However, in reality, this would merely be a rubber stamp, as by that point it would be a duty to fulfil the Order of the Court, rather than a matter of discretion as today's proposed Part 36 Offer is. Such detailed assessment proceedings would take an estimated 12 to 18 months to complete and will incur further substantial costs both for the Council and STAL, some or all of which might fall either on the Council or STAL, depending on the Court's final settlement in relation to the Council's Part 36 Offer. The Court would also order payment of interest on any sum ultimately awarded at a rate of 8% per annum; a rate fixed by legal statute.

25. The final settlement sum will need to be paid from Reserves. The Strategic Initiative Fund (SIF) has a balance of £1.663 million and this will be the primary Reserve used. Should the final settlement sum exceed the balance in

this Reserve then the Medium Term Financial Strategy (MTFS) Reserve will be used for the excess.

Risk Analysis

26.

Risk	Likelihood	Impact	Mitigating actions
<p>If the Council were not to engage in good faith negotiations over the payment of costs ordered, the risk is that STAL pursue the Council for their full claim of costs in Court (plus further Court costs, potentially plus additional interest charges) if a settlement is not reached either through direct negotiation or mediation</p>	<p>1</p>	<p>4</p>	<p>This risk is mitigated by the active and ongoing engagement with STAL to date and now by this proposed Part 36 offer and payment on account.</p>
<p>Risk that STAL do not accept the offer proposed</p>	<p>3</p>	<p>2</p>	<p>Should STAL not accept this Part 36 offer, the Council will continue to negotiate, will propose mediation, or accept any offer from STAL of mediation and will be protecting the Councils interests by the making of a part 36 offer and payment on account as outlined above. Further Council approval will be sought as detailed in the body of this report.</p>

- 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.