



Costs Decision

Inquiry held between 20 July – 8 October 2021

Site visits made on 22 July, 25 - 26 August, 13 October 2021

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Inspectors appointed by the Secretary of State

Decision date: 8 June 2022

Costs application in relation to Appeal Ref: APP/D0121/W/20/3259234 Bristol Airport, North Side Road, Felton, Bristol BS48 3DY

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Bristol Airport Limited for a full award of costs against North Somerset Council.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for outline planning application (with reserved matters details for some elements included and some elements reserved for subsequent approval) for the development of Bristol Airport to enable a throughput of 12 million terminal passengers in any 12 month calendar period, comprising: 2no. extensions to the terminal building and canopies over the forecourt of the main terminal building; erection of new east walkway and pier with vertical circulation cores and pre-board zones; 5m high acoustic timber fence; construction of a new service yard directly north of the western walkway; erection of a multi-storey car park north west of the terminal building with five levels providing approximately 2,150 spaces; enhancement to the internal road system including gyratory road with internal surface car parking and layout changes; enhancements to airside infrastructure including construction of new eastern taxiway link and taxiway widening (and fillets) to the southern edge of Taxiway GOLF; the year-round use of the existing Silver Zone car park extension (Phase 1) with associated permanent (fixed) lighting and CCTV; extension to the Silver Zone car park to provide approximately 2,700 spaces (Phase 2); the provision of on-site renewable energy generation; improvements to the A38; operating within a rolling annualised cap of 4,000 night flights between the hours of 23:30 and 06:00 with no seasonal restrictions; revision to the operation of Stands 38 and 39; and landscaping and associated works.
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Procedural matter

1. An application for costs by North Somerset Council (NSC) against Bristol Airport Limited (BAL) is the subject of a separate decision.

Decision

2. The application for an award of costs is allowed, in part, in the terms set out below.

The submissions for Bristol Airport Limited

Overview

3. The Inspector Panel ('the Panel') were informed of BAL's intention to seek an award of costs before the close of the Inquiry. In accordance with an agreed timetable the application was made in writing after the close of the Inquiry.
4. The claim is that NSC's behaviour was unreasonable and caused unnecessary expense in four respects, as addressed under separate subheadings below.

Rejection of officer's advice

5. There is a distinction between the merits of the appeal and the reasonableness of NSC's February 2020 decision. NSC was entitled to argue that some matters had changed since it made its decision to refuse the application. However, in order to gauge the reasonableness of NSC's decision, the argument that some matters have changed is not of any great assistance.
6. Had Members not unreasonably refused planning permission, against officer's advice, then the appeal would not have been necessary. The changed circumstances on which NSC relies only arose because of its unreasonable behaviour in refusing permission in the first place.
7. The report to the Committee was the culmination of over a year's work by NSC officers, their advisers (dealing with forecasting, socio-economic impacts, highways, carbon and climate change, and noise and vibration) and BAL. As part of that process, BAL provided additional information in response to two requests under the Regulation 25 of the EIA Regs. Officers recommended approval, there were agreed conditions, and agreed s106 Heads of Terms.
8. In determining the application, NSC was under a legal obligation under Regulation 26(1) of the EIA Regs. This required that the environmental information be examined, a reasoned conclusion reached on that information, and that the conclusion be integrated into the planning decision.
9. If Members wished to depart from their officer's analysis and advice, the Reg 26(1) obligation fell on them. There is no evidence that this happened and vague, generalised or inaccurate assertions concerns about the impact were not sufficient. The decision to refuse planning permission was made without any alternative expert advice or environmental information. The Committee would have been entitled to request further information if it were not satisfied, but it did not do so.
10. Officers warned that the decision must be based on evidence but the decision to refuse permission was made without any foundation. This is contrary to the purpose of the costs system which is to encourage local planning authorities to properly exercise their development management responsibilities.
11. It is not clear on what basis Members' original draft reasons for refusal were proposed. The decision to refuse permission was confirmed and the final reasons for refusal were settled at a further meeting in March 2020. The report to this meeting reiterated the original recommendation, and advice was given on the reasons for refusal and the risk of costs. No further technical input was requested or obtained.

12. No witness for NSC gave evidence during the Inquiry to explain the evidential basis on which Members departed from officer's advice. There is a lack of transparency about how the reasons for refusal were arrived at.

Legal submissions by Rule 6 parties

13. Before the February 2020 Committee meeting, the Parish Councils Airport Association (PCAA) and Bristol Airport Action Network (BAAN) commissioned the preparation of an opinion by Counsel. The opinion was produced six days after the publication of the Committee report. It included legal submissions relating to the ability of Members to depart from the advice of officers, the risk of a legal challenge to the decision if the application were approved, and suggested reasons for refusal. (The opinion did not cover Regulation 26 of the EIA Regs.)
14. At the Inquiry PCAA confirmed that the opinion was sent directly to all NSC Councillors between 5-7 February 2020. It was not sent directly to NSC officers, nor to BAL. PCAA confirmed at the Inquiry that the motive was to try to influence Councillors and, on that basis, PCAA's position was that there was no obligation to send it to BAL.
15. BAL understands that NSC officers indirectly obtained a copy of the opinion from Councillors later that week. BAAN subsequently published a copy of the legal advice, a copy of which was obtained by BAL just 2-3 working days before the Committee meeting. BAL was taken by surprise by the legal opinion and was not left with adequate time to respond. Despite this the meeting was not adjourned in order to allow BAL to consider and respond to the contents of the opinion, which would have been the reasonable course of action. The direct result of this was that BAL was unable to respond substantively to the legal submissions.
16. The draft reasons for refusal proposed by the Committee reflect some of those identified in the opinion. NSC acted unreasonably and unfairly in failing to adjourn the meeting in order to permit BAL an opportunity to properly consider and respond to the advice which had clear potential implications for the outcome of their application.

NSC's case at the Inquiry

17. NSC has frequently alleged that BAL has not undertaken one form of assessment or another, and that BAL has not disclosed the inputs and the details of the full models it employed.
18. NSC appears to be under the mistaken impression that there a burden of proof on BAL and that NSC plays an auditing role. The courts have made it clear that the civil law concept of burden of proof plays no part in the planning system.
19. Inspectors have to determine whether there are reasons to refuse planning permission, within the overall legal framework. It is as much for NSC to make out its case why planning permission should be refused as it is for the BAL to make out a case that it should be granted. To act reasonably a local planning authority must produce evidence to substantiate each (clear and precise) reason for refusal.
20. The reasons for refusal do not allege that assessments were not carried out or that inputs or models were not disclosed. The reasons put forward positive

objections to the proposed development. These are the reasons that NSC should have substantiated if it was to act reasonably, and it is not enough for it to allege that BAL has not carried out certain assessments or has not provided information that NSC now says are needed. NSC should have made out its case supported by its own evidence to substantiate the reasons for refusal.

21. Instead, a new case was developed that could not possibly have been in the minds of Members at the time that the application was refused. An example was NSC's theme related to uncertainty resulting from factors such as Covid-19, Brexit and the Jet2 announcement. NSC's evidence focussed on the alleged difficulties with understanding the likely impacts due to uncertainties, but this did not form part of any of the reasons for refusal. This part of NSC's case bears no resemblance to the positive objections contained in the reasons for refusal.
22. A theme of NSC's evidence at the Inquiry was the failure of BAL to carry out a range of assessments. An example is NSC's position in respect of the impact of the proposed development on health. However none of the NSC witnesses had any expertise in public health, nor was there an alternative assessment of public health impacts. NSC simply criticised the assessment carried out by BAL and failed to substantiate its reason for refusal by producing any positive evidence. NSC's evidence on surface access followed a similar approach.
23. With regards to climate change, NSC's case relied heavily upon the Sixth Carbon Budget and the Government's publication of Decarbonising Transport and the Jet Zero consultation. None of these had been published prior to the decision of the Committee and therefore could not have underpinned the reasons for refusal. NSC's position was that it would be premature to grant planning permission when there had been no assessment by the Government of whether any airport expansion is compatible with these documents. This is wrong as an approach and departs from the reason for refusal which states that the proposal would exacerbate climate change and that this would conflict with the duty in the Climate Change Act.
24. NSC clearly considers its role as an auditor rather than as a party that has to substantiate its reasons for refusal. But the role of the planning authority is not simply to test BAL's evidence - it has to produce a positive case to substantiate its reasons for refusal.
25. Overall NSC failed to substantiate its reasons for refusal and pursued a different and new case. That is unreasonable behaviour.

Additional reasons for refusal

26. In addition to the change in nature of NSC's case, there are a number of points that were previously agreed between BAL and NSC but have now become matters in dispute and are in effect new reasons for refusal.
27. In particular the design of the A38 improvement works, which were the product of cooperation between BAL and NSC and their expert advisers is one such new issue. The design of the A38 works is not in the reasons for refusal. The appeal scheme is virtually identical to NSC's own Major Route Network improvement to this section of the A38. The extensive criticism now made of the design is in substance a new reason for refusal.

28. NSC also raised objections to the absence of an up-to-date travel plan. This was not referred to in either the report or the reasons for refusal. Nor was the relevant development plan policy referenced. But NSC's highway witness alleged conflict with policy on the basis that there was no up-to-date travel plan. NSC therefore effectively presented an additional reason for refusal.
29. In relation to Green Belt, nowhere in the report or the reasons for refusal was it stated that the A38 works and the taxiway widening and fillets constituted inappropriate development in the Green Belt. But NSC's planning witness recorded his view that both were inappropriate development by virtue of their impact on openness. He accepted that his evidence exceeded the scope of the reason for refusal and stated that he had not taken these elements into account when striking the planning balance – but did not withdraw this part of his evidence. He suggested that he was acting in accordance with his professional duty – but he should have focussed on NSC's case – and he confirmed that NSC had seen his evidence. Once these new points were unreasonably made, BAL had no option but to respond.
30. In relation to air quality, NSC raised the failure to assess the impact on ultrafine particles. But the scope of the ES, including the air quality impact assessment, was agreed with NSC. NSC's position in its Scoping Opinion was that the scope and methodology of the assessment was acceptable. Neither the report nor the reasons for refusal make any reference to ultrafine particles. But a major part of NSC's evidence concerned BAL's failure to assess the effect of these particles and this constitutes an entirely new and additional reason for refusal.
31. Overall NSC acted unreasonably by materially expanding its case beyond the reasons for refusal, departing from positions previously agreed and thereby presenting additional reasons for refusal to which BAL had to respond.

Conclusion

32. The unreasonable refusal of planning permission resulted in a nine-week Inquiry during which NSC has acted unreasonably in a number of respects. In *Viridor Waste Management v Bristol City Council* the Secretary of State found that the Inquiry had only been held because of the refusal of planning permission by the local planning authority. It was necessary for BAL to respond to the points raised. Had permission been granted by NSC, the Inquiry would not have gone ahead, and the witnesses would not have needed to be called.
33. For the reasons set out above, BAL seeks a full award of costs against NSC.

The response by North Somerset Council

Overview

34. NSC's response to the costs application was made in writing. BAL's application is flawed as it relies on the contention that it was unreasonable to have refused planning permission in February/March 2020 and that, on BAL's approach, there was no need to hear NSC's case at the Inquiry. BAL's application is for a full award of costs and therefore, in order to obtain a full award of costs on a substantive basis, BAL must establish that it was unreasonable for NSC to oppose the grant of planning permission throughout the period from the date of

refusal. Only if this is established can BAL claim the costs of the whole appeal as a result of unreasonable behaviour. BAL must therefore establish that, at all times since the refusal of planning permission, it would be unreasonable to apply section 38(6) of the Planning and Compulsory Purchase Act 2004 having regard to all relevant material considerations and then come to the conclusion that planning permission should be refused.

35. The Panel was not charged with reviewing NSC's reasons for refusal; rather it had to apply the statutory framework and reach their own judgment. The Panel had to address matters as they existed at the date of its decision.
36. In this case, matters changed significantly in the period between the refusal and the start of the Inquiry. BAL voluntarily presented an entirely new case, based on forecasts for new assessment years – it did not seek planning permission on the basis of the evidence as it existed when permission was refused or when the appeal was lodged.
37. BAL's position is that to avoid costs a planning authority must demonstrate on the basis of the evidence as it existed at the date of the refusal that the decision was justified. This would mean that a local planning authority would be under an obligation to present evidence on appeal to demonstrate that the original decision was reasonable and also that it was still appropriate to refuse the proposal at the end of the appeal process. That is not correct and in almost every appeal, the evidence moves on from that which existed at the date of refusal, whether by the submission of new evidence or by changes in circumstances. To require local planning authorities to present two cases on appeal would be unreasonable. Further, as a matter of logic, it could that a local planning authority could paying costs for an appeal which it won.
38. All that a local planning authority must do to avoid costs is demonstrate in the appeal process that its reasons for refusal were pursued on a reasonable basis. Unless it can be shown that NSC's evidence at the Inquiry was substantively unreasonable, then there is no basis for concluding that the refusal of planning permission was itself unreasonable.

Departure from officer's advice

39. BAL's costs submissions regarding Regulation 26(1) of the EIA Regs are wrong. At no stage up the costs application has BAL suggested that NSC failed to have regard to the environmental information (including the Environmental Statement (ES) and representations received in relation to it). NSC had regard to that material along with the officer's advice.
40. It is not correct that, to depart from the views in an ES, a local planning authority must produce its own ES setting out differing views. That is not part of the EIA process. Decision makers should not conflate conclusions regarding the likely significance of an effect in the EIA process with whether an effect is significant in terms of planning policy or whether an effect conflicts with or accords with the development plan. It is open to decision makers to conclude that a conflict with the development plan arises from a proposal even where particular effects are not identified as likely significant effects in the ES. The ES (and ESA) were considered and interpreted in relation to the development plan and national policy.

41. Members are not bound to follow the advice of their officers and there is nothing unreasonable in refusing planning permission against officer's advice. NSC substantiated the reasons for refusal at the Inquiry and it presented evidence in support of its case from qualified expert witnesses in respect of the reasons for refusal.
42. What matters is whether evidence was produced on appeal which demonstrated that it was reasonable to refuse planning permission. That was done.

Legal submissions by Rule 6 parties

43. There are two problems with this aspect of the costs claim. First, BAL has not established that NSC's conduct was unreasonable. Secondly, BAL has not established that, even if there was unreasonable conduct, that conduct justifies a full award of costs.
44. BAL cannot criticise NSC either for the production of the BAAN/PCAA Legal Opinion or its distribution to Committee Members: those matters were entirely outside NSC's control. So all that remains is the argument that NSC acted unreasonably by failing to adjourn the first Committee meeting to give BAL the opportunity to respond.
45. As is clear from BAL's costs application, it was aware of the existence of the opinion prior to the Committee meeting. BAL was professionally represented throughout the process and its advisers could have sought an adjournment if they perceived any lack of fairness in proceeding with the February meeting. No such request was received and BAL does not suggest that it ever asked for an adjournment in relation to either Committee meeting.
46. Therefore BAL cannot have seen any unfairness or unreasonableness in the process arising from the production of the opinion or it would have raised its concerns, sought an adjournment and requested the opportunity to reply. The fact that BAL did neither means its claims of unfairness and unreasonableness must be rejected.

NSC's case at the Inquiry

47. The key policy is CS23, which requires resolution of environmental issues. NSC's position is that this requires environmental issues to be mitigated to acceptable levels. This is a reasonable approach.
48. In relation to the noise issue it was reasonable for NSC to consider that the impact assessment did not capture the full likely impact of changes in the number of flights (particularly at night). NSC presented evidence to support this position and address the BAL's understatement of the impact. The mitigation proposals, especially for those between LOAEL and SOAEL, were demonstrated to be inadequate – thus causing a breach of development plan and national policy.
49. In relation to surface access, it was reasonable to take the view that the proposed development would give rise to adverse impacts. This issue resulted in BAL proposing amendment to junction design.

50. NSC presented evidence questioning the extent of the economic benefit. The reasonableness of this approach was highlighted by BAL's reduction in its own appraisal of the economic benefit in the ESA.
51. In relation to air quality, NSC put forward the argument that the ES/ESA under-estimated the significance of the airport's impact, since they used UK AQO's which were over 10 years and which did not reflect important subsequent research. That position was entirely reasonable and was vindicated by the publication of the WHO Guidelines 2021. It was reasonable to contend that BAL had not proposed any satisfactory mitigation of the air quality impact. Policy CS26 requires large-scale development to contribute to improvements to health and well-being. It was reasonable for NSC to contend that the proposed development conflicted with policies CS3, CS23 and CS26.
52. NSC's position in respect of climate change was clearly set out. It was reasonable to contend that the proposed development would be contrary to the Climate Change Act 2008. The grant of planning permission was unlawful.
53. In relation to Green Belt matters, it is common ground that the Silver Zone car park and the year round use of the seasonal car park constitute inappropriate development and would cause harm in spatial and visual terms. The dispute is the extent of that harm and it was reasonable for the NSC to conclude that the harm was greater than that asserted by BAL. This is a matter of planning judgment and permits a wide range of reasonable conclusions. The assessment of potential very special circumstances is a balancing exercise which again permits a wide range of reasonable conclusions.
54. In relation to public transport it was reasonable for NSC to take issue with the proposed level of provision given the total absence of any complete assessment of potential options. Even at the Inquiry, BAL only assessed the impact of some of the proposed public transport measures. In the light of the evidence it was reasonable to adopt a position related to a higher uplift.
55. In relation to the socio-economic benefits, it was reasonable, on the basis of NSC's evidence, to conclude that these were small. In these circumstances, it was reasonable to conclude that BAL's claims of significant economic benefit were overstated.
56. Overall, it was reasonable for the NSC to conclude that the proposed development was contrary to local and national policy – which requires a balance to be struck between costs and benefits. NSC's evidenced position was that the costs of the proposed development outweighed the benefits and that therefore national policy weighed heavily against the proposal. In these circumstances, it was reasonable to conclude that the conflict with the development plan, with relevant parts of the NPPF, and with national aviation policy justified refusal and continued to do so.

Alleged new case beyond the reasons for refusal

57. None of the matters which BAL has raised represent a case beyond the reasons for refusal.
58. The uncertainty which NSC highlighted has been tied directly to the reasons for refusal. Both in terms of how that uncertainty affects the assessment of effects and how that uncertainty affects the benefits of the appeal scheme. These all fall within the reasons for refusal.

59. A number of factors relevant to uncertainty, such as the pandemic, arose after the refusal of permission, but NSC was entitled to refer to these as they bear on those reasons for refusal. NSC considered all relevant factors in its evidence to the Inquiry and submissions.
60. It was entirely reasonable for NSC to indicate the deficiencies in BAL's evidence, including where assessments either had been deficient or had been omitted. Those deficiencies went to the testing of BAL's evidence on each of the reasons for refusal and goes to the weight to be attached to that evidence. All of the criticisms of BAL's evidence had been raised in NSC's Statement of Case and BAL did not contend otherwise.
61. The criticism of NSC's highways evidence is unfair. All of the deficiencies were directed at the adverse impact of the proposed development on surface access infrastructure, within the first reason for refusal.
62. The Sixth Carbon Budget, Decarbonising Transport and Jet Zero are directly relevant to the issue of climate change. They had to be addressed in the determination of the appeal and it was reasonable for NSC to address these matters in its evidence and submissions.
63. Overall, the fact that some matters arose after the decision to refuse planning permission does not prevent NSC relying on them in support of its reasons for refusal.

Alleged new reasons for refusal

64. This ground is fundamentally flawed as NSC did not introduce any new reasons for refusal and, even if it had, this could not justify a full award of costs. None of the matters in BAL's costs application amount to a new reason for refusal.
65. The concerns regarding the adequacy of the A38 mitigation works fall within the first reason for refusal, which refers to adverse impact on inadequate surface access infrastructure. The deficiencies explained in evidence by NSC resulted in an adverse residual impact. This was not a new reason for refusal and was not unreasonable.
66. The suggestion that Travel Plans (related to policy DM26) comprise an additional reason for refusal is rejected. It is not a policy cited in NSC's Statement of Case; it was touched on briefly in evidence and was the subject of only three questions in cross-examination. It was referred to in a single footnote in BAL's closing submissions (to confirm that it was not in issue). These passing references cannot amount to a reason for refusal.
67. NSC did not advance a new reason for refusal in respect of inappropriate development in the Green Belt. NSC's witness was very careful not to do so, and in particular to present a planning balance which was expressly on the basis of the reasons for refusal. All NSC's witnesses were careful to ensure that they presented their evidence in accordance with their professional duties. An expert witness who has concerns beyond those raised by their client must raise them. This is not an enlargement of NSC's case but the fulfilment of professional obligations.
68. NSC's case on air quality was fully justified and relates directly to the reason for refusal, which referenced the unacceptable impact on the health of those

living around the airport. BAL failed to recognise that ground level concentrations below UK AQO levels pose a risk to public health - but NSC's approach was vindicated by the publication of the WHO Air Quality Guidelines 2021. The case aligns with the reason for refusal.

Further grounds for resisting the costs application

69. The grant of planning permission for the proposed development has been unlawful since at least 20 April 2021. In its third reason for refusal NSC identified that a grant of planning permission would be contrary to the duties contained in the Climate Change Act. BAL presented no answer to this point and its pursuit of the appeal was entirely unreasonable.
70. The overall planning balance presented by BAL changed during the course of the appeal. BAL did not present a case that planning permission should be granted on the basis of the evidence as it stood when NSC determined the application, but with reference to the material produced after BAL had launched its appeal and lodged its Statement of Case.

Conclusion

71. The only costs that could, potentially, be recoverable would be the costs of dealing with a particular point. BAL has not come close to establishing that. Throughout the period since the refusal of planning permission, NSC's judgment that planning permission should be refused was not unreasonable.
72. It is notable that it is not said in BAL's costs application that the case presented in NSC's closing submissions was unreasonable. Since it has not made such a submission and could not come close to justifying it, BAL's application for costs must be refused. NSC submits that the costs application should be dismissed.

Reasons

73. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The PPG gives examples of unreasonable by Councils, including references to new reasons for refusal and the fact that costs applications may relate to events before the appeal or other proceeding was brought.

Rejection of officer's advice and ES matters

74. The officer's report to the Committee was a very lengthy document, amounting to almost 150 pages with a further 69 pages of appendices. It was prepared using specialist external consultants and covered the full range of potential issues and consultation responses. It was a very thorough piece of work, and included details of a wide range of representations from interested parties – many of whom were opposed to the proposal. The recommendation was to approve the scheme.
75. However the recommendation was not accepted by the committee and permission was refused. BAL's position is that this was unreasonable and that it was a decision not based on proper planning or technical evidence. However there was a wealth of material before the Committee, including the objector's legal opinion discussed below, which provided ample material for the Committee to come to the conclusion it did.

76. BAL maintains that the Committee should have been provided with alternative expert advice in order for it to come to a different decision to that recommended by its officers. Given the amount of information before it, from officers, BAL and consultees, there is no reason for that to have happened and, in the experience of the Panel, would be highly unusual.
77. There is nothing inherently unreasonable in elected Members taking a decision contrary to the recommendation of its professional officers, as happened here. What matters is whether, on appeal, the evidence supporting that decision shown that the authority had acted reasonably. In this case, the authority sought to substantiate all the reasons for refusal by way of a range of appropriately qualified professional witnesses.
78. The role of the Panel was not to review NSC's decision but to deal with matters as they stood at the conclusion of all the evidence and at the time of the Panel's decision. The fact that the Panel considered that, on balance, planning permission should be granted is not indicative that the NSC acted unreasonably in taking the decision that it did. Indeed the s78 decision, at several points, made it clear that the decision was finely balanced.
79. BAL has criticised the fact that no witness, i.e. a Councillor, was called by the authority to explain the basis of the decision to refuse permission. However, as is required, the reasons for refusal were set out in the decision notice, and if an individual Councillor was to have appeared all they could have done would be to explain their own personal thought process. This would not have assisted the consideration of the planning merits of the case.
80. BAL has referred to the obligation on NSC to consider the environmental information submitted as part of the application in relation to the EIA Regs. However there was nothing in evidence before the Panel to suggest that the authority did not have due regard to environmental information – indeed, substantial evidence was submitted on that matter. It cannot be the case that, in order to depart from the conclusion of an ES, an authority must do its own ES – it is perfectly reasonable to conclude that there was a conflict with policy even if the effects of development might not be significant in ES terms.
81. Overall, the NSC's decision to reject the advice of its officers was not unreasonable.

The legal opinion sent to Councillors

82. BAL's costs claim is based on the argument that NSC did not give BAL the opportunity to respond to a legal opinion prepared by BAAN/PCAA. This was circulated to Councillors and not seen by officers or BAL until a short time before the first Committee meeting.
83. It is entirely normal and proper for local people and groups to contact Councillors before a decision is taken in order to inform them of their view and hopefully to persuade elected Members to support their position. That this contact included Counsel's opinion is unusual but not unknown and was not improper. It is for those contacting Councillors to decide to whom they wish to copy the documents. In this case BAL (and NSC officers) had a few days in which to digest the representations. The fact that the opinion was produced and circulated, and to whom this was done, was entirely outside NSC's control.

84. It is not clear to the Panel if BAL was represented by Counsel at that time but, in any event, it is clear that they were very fully represented by a range of experts. There is nothing to suggest that anyone in BAL's team contacted NSC on receipt of the BAAN/PCCA opinion to ask for an adjournment – as would have been the normal course of action if they considered that BAL was being unfairly treated. Nor, from the evidence put to the Panel, did they do so when they spoke at the February Committee meeting. It is understood that BAL did not speak at the subsequent meeting.
85. It can never be known how much effect any particular representation may have had. But that is the nature of the process. Had BAL considered that the process was prejudicial, which it does not appear to have been, they had several opportunities to ask NSC officers or the Committee for an adjournment, but they did not.
86. Overall, neither the production and distribution of the opinion, nor the NSC's failure to adjourn the committee meeting(s) was unreasonable.

Substantiation of reasons for refusal and alleged new case within the reasons

87. The first limb of this part of the claim is that NSC failed to substantiate its reasons for refusal and did not present a positive case, in the light of the reference in various reasons for refusal referencing harm which would be caused by the proposal.
88. We have referred to this matter above, and to the fact that, in the view of the Panel, NSC presented evidence by appropriately qualified witnesses to substantiate each reason for refusal. In relation to some issues, the Panel agreed with the thrust of NSC's case and found that the proposal would cause harm and, even in those areas where the Panel did not agree with the authority, a reasonable case was put forward to justify their position. It is correct, as BAL states, that a number of the matters raised by NSC alleged deficiencies in BAL's case, and these alleged deficiencies were explored in depth in evidence and at the Inquiry. However this is not unreasonable and it must be open to an authority to highlight concerns about deficiencies in a proposal and test the appellant's evidence.
89. The discussion as to whether an authority has to present a positive case is not particularly helpful – what matters is whether the authority can substantiate each reason for refusal, based on material drawn from a number of sources – and this assessment can properly include criticism of the case being put by another party. This can reasonably include allegations that BAL's case was in some way inadequate and/or that input data or methodology has not been revealed. Each reason for refusal was therefore fully supported and the stance of the authority was reasonable, if not eventually persuasive.
90. The second limb of this part of the claim is that NSC pursued a new case that could not have been known to the authority when the decision to refuse permission was taken. This allegation is, to an extent, correct and could be directed towards both parties – but is far from unusual and is not inherently unreasonable.
91. In very many appeals, matters move on between the date of the decision by the authority and the determination of the appeal. This is commonplace and can sometimes result from the production of expert evidence or the passage of

time which elapsed and changes in circumstances. In this case, with a substantial period between NSC's decision and the Inquiry and appeal decision, so this was inevitable. In particular the effects of an unprecedented pandemic on demand and forecasting (and consequently on the assessment of benefits arising from the proposal) led to very considerable changes to the cases of both parties. Added to this were a range of other factors, including the arrival at the airport of a new airline (with implications for forecasting and noise), and matters based on 6th Carbon Budget and Jet Zero which were highly relevant to the appeal.

92. These matters led to very substantial changes to the assessment and case put forward by BAL, most notably in the form of the ES Addendum, and by NSC. Both parties relied on new and updated analysis and evidence – and it was necessary and reasonable to have done so. It would have been entirely unreasonable for either party to base their case on the world which existed at the time of the Council's decision and had the cases not been updated, it is inevitable that the Inquiry would have been adjourned to allow for updating.
93. What matters in relation to this costs claim is that, in each case, the updating of the NSC's position fell squarely within the original reasons for refusal, and was not unreasonable.

Additional reasons for refusal

94. The claim by BAL is that NSC presented a case that, in effect, raised additional reasons for refusal. It should be noted at the outset that NSC specifically stated that the authority was not raising additional reasons for refusal, so for this aspect of the costs claim to be successful there would need to be a new or substantially new matter raised in evidence which went beyond the reasons for refusal. There are four areas where this matter is claimed to have occurred and we will deal with these in turn.
95. The first matter relates to the detailed design of the A38 highway works, where NSC is said to have acted unreasonably in pursuing an objection to a very similar scheme to that being promoted by NSC. That is a valid criticism of NSC's position on appeal, and was one of the factors which led to the Panel's conclusion that there would not be an unacceptable effect on highway safety. In addition NSC did not put forward positive arguments to demonstrate the harm which would be caused – for example there was no survey evidence or junction modelling which would normally be expected. The evidence of the authority was extensive but almost entirely directed to criticism of BAL's position, and this weakened their position on appeal.
96. However all of this was under the umbrella of a reason for refusal which referenced an adverse impact on surface access infrastructure. The detailed matters raised by NSC on appeal were not persuasive in relation to the appeal decision, but fell within the reason for refusal and there was no new reason introduced.
97. The second matter related to the allegation that the lack of an up to date Travel Plan and the references to policy DM26 were new matters. However two reasons for refusal referred to surface access and modes of travel, and references to the Travel Plan fall within that ambit. The references to the policy were not substantial. NSC did not act unreasonably in dealing with these matters under the overall banner of the two reasons for refusal.

98. The third matter related to NSC's concern regarding the health effects of ultrafine particles. It is true that the scope of the ES, and its approach to ultrafine particles, had been agreed with NSC officers, but the reason for refusal dealt with the alleged significant impact on public health and well-being of local residents. Within that heading, it was not unreasonable for NSC to express concern related to ultrafine particles.
99. The fourth matter related to the A38 and the taxiway/fillets in the context of Green Belt policy. The position here is different to the first three matters we have examined above. In this case the reason for refusal was quite specific in that it specifically referenced those elements of the proposal – the proposed formation of one car park and the year round use of another – as constituting inappropriate development in the Green Belt. This was factually agreed between BAL and NSC.
100. There was no reference in the reason for refusal to the A38 works and the taxiway works, and this absence was specifically noted by NSC's witness – who nevertheless expressed his view that these additional works were inappropriate development and therefore harmful. Whilst he was clear that this was his professional view and accepted that this matter went beyond the reason for refusal, he also confirmed that the Council had seen his evidence before he submitted it.
101. National and local Green Belt policy is an important matter and, given that an NSC witness had unexpectedly introduced additional elements into the picture, it was inevitable that the BAL would produce further evidence in response. Indeed, had they not done so, the Panel would have asked for the BAL's view. Whether these matters were factored into the planning balance by the witness is not of great consequence – as the fact remains that the introduction of these new elements at the late stage of the exchange of proofs was unreasonable. The witness was called by NSC to deal with their case and defend the reasons for refusal, and to introduce these additional elements without warning at this stage was unreasonable and went significantly beyond the specific reason for refusal.
102. Overall, whilst the first three matters did not constitute unreasonable behaviour on the part of NSC, the Green Belt matter was tantamount to the unreasonable introduction of an additional reason for refusal.

Examples of unreasonable behaviour in other costs decisions

103. BAL has put forward three appeal decisions which illustrate the types of behaviour that has been found to justify an award of costs. Obviously these decisions relate to different circumstances and little is known of the detail of the cases, but they do merit further comment.
104. In a report to the SoS related to an appeal at Avonmouth in 2010¹, the Inspector reflected the advice related to the need to show reasonable planning grounds and produce relevant evidence to support the decision. However it is noted that the Inquiry in that case did not raise any new evidence which was not before the Committee when it made its decision – that is wholly different to the current case. In a costs decision related to an appeal in Shefford in 2019² the Inspector recorded that the change in the Council's position stemmed

¹ APP/Z0116/A/10/2132394

² APP/PO240/W/18/3210480

purely from a change in the highways officer considering the proposal – there is no comparable position in this case. Finally in a decision related to an appeal in Baslow in 2016³ the Inspector concluded that the position of the planning authority had not been substantiated. In the current case, although the Panel allowed the appeal, that is far from saying that the case of the authority was insubstantial.

105. Overall, these decisions submitted by BAL add very little to the consideration of this costs claim.

Conclusion

106. The Panel considers that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has not been demonstrated in relation to the majority of the claim, and therefore concludes that a full award of costs is not justified.
107. However we find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated in relation to the Green Belt issue described above and that a partial award of costs is justified.

Formal Decision and Costs Order

108. In exercise of our 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 powers enabling me in that behalf, WE HEREBY ORDER that North Somerset Council will pay to Bristol Airport Limited, the costs of the appeal proceedings, limited to those costs incurred solely in relation to the issue of the A38 and taxiway works in the Green Belt, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under section 78 of the Town and Country Planning Act 1990 as amended against the refusal of planning permission (as set out in full in the bullet point heading above) at Bristol Airport, North Side Road, Felton, Bristol BS48 3DY.
109. The applicant is now invited to submit to North Somerset Council details of those costs with a view to reaching agreement as to the amount.

P. J. G. Ware
Lead Inspector

C. Searson
Inspector

D. M. Young
Inspector

³ APP/M9496/W/16/3157101