

**Committee:** Full Council

**Date:**

**Title:** Stansted Airport Planning Application  
UTT/18/0460/FUL

28 June 2019

**Report Authors:** Roger Harborough, Director of Public Services  
[rharborough@uttlesford.gov.uk](mailto:rharborough@uttlesford.gov.uk)

Tel: 01799 510457;

Simon Pugh, Assistant Director Governance  
Legal and Monitoring Officer

[spugh@uttlesford.gov.uk](mailto:spugh@uttlesford.gov.uk)

Tel: 01799 510416

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**If members wish to discuss the legal position and the advice received, or if they wish to seek further advice from Council officers, they are recommended to resolve to exclude the press and public from the meeting while this takes place pursuant to paragraph 5 of Schedule 12A, Local Government Act, 1972: Consideration of legal advice in public would involve the disclosure of Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.**

### **Introduction**

This Extraordinary Council Meeting was summoned to consider the following motion:

*To instruct the Chief Executive and fellow officers not to issue the Planning Decision Notice for planning application UTT/18/0460/FUL until members have had an opportunity to review and obtain independent legal corroboration that the legal advice provided to officers, including the QC opinion referred to by the Leader of the Council on 9th April 2019, confirms that the proposed Section 106 Agreement with Stansted Airport Limited fully complies with the Resolution approved by the Planning Committee on 14 November 2018 such that officers are lawfully empowered to conclude and seal the Agreement without further reference to the Planning Committee.*

Since submission of the requisition calling the meeting, matters have moved on. The detailed legal advice called for by the motion has been obtained and has been shared with all members on a confidential basis. The advice confirms, subject to one point, that the draft S106 Agreement with Stansted Airport Ltd faithfully reflects the requirements of the resolution approved by the Planning Committee on 14 November 2018 and there is no impediment to issue under the second part of its resolution.

A minor amendment to the draft section 106 agreement has now been negotiated to meet the requirement of the Resolution with regard to the transport users' discount. (See paragraph 19.)

## **Background**

1. On 22 February 2018, Stansted Airport Limited submitted an application for planning approval for:

*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.*

2. On 14 November 2018, Uttlesford District Council's Planning Committee resolved to grant the application, subject to conditions and subject to completion of an agreement imposing legally binding planning obligations ("section 106 agreement"). The Report and Supplementary Reports identified the planning obligations required. The precise form that the section 106 agreement should take in accordance with the amended recommendation was resolved to be delegated to officers. Subsequently, a proposed S106 Agreement was drawn up between the Council, Essex County Council (as relevant highway authority) and Stansted Airport Ltd.
3. An Extraordinary Meeting of the Council was called for 25 April 2019 to consider the following motion:

*To instruct the Chief Executive and fellow officers not to issue a Planning Decision Notice for planning application UTT/18/0460/FUL until the related Section 106 Legal Agreement between UDC and Stansted Airport Limited and the Planning Conditions have been scrutinised, reviewed and approved by the Council's Planning Committee after the local elections.*

The motion was defeated by 14 votes to 18 votes.

4. A further Extraordinary Meeting was called to consider the following motion:

*To instruct the Chief Executive and fellow officers not to issue the Planning Decision Notice for planning application UTT/18/0460/FUL until members have had an opportunity to review and obtain independent legal corroboration that the legal advice provided to officers, including the QC opinion referred to by the Leader of the Council on 9th April 2019, confirms that the proposed Section 106 Agreement with Stansted Airport Limited fully complies with the Resolution approved by the Planning Committee on 14 November 2018 such that officers are lawfully empowered to conclude and seal the Agreement without further reference to the Planning Committee.*

The meeting was originally scheduled for 3 June but was deferred until 28 June to allow further time for consideration of legal advice.

5. An informal meeting was held on 30 April with members who had requisitioned the Extraordinary Meeting. It was agreed:
  - That officers would not complete the section 106 agreement and issue the planning consent for the time being;
  - That the legal advice previously obtained from Christiaan Zwart, barrister, would be circulated to all members;
  - That a briefing session would be held for all members, with Christiaan Zwart in attendance to answer questions about his advice;
  - That, if need be, further advice would be sought at Q.C. level and a further briefing for all councillors would be held. This advice would focus on whether the planning obligation requirements made by the Planning Committee have been incorporated fully and effectively into the s106 agreement, and on the origin and consequences of any “gaps” if any between the Planning Committee Resolution and the resulting S106 Agreement.
6. A briefing meeting for all councillors was called for 14 May. Advice obtained from the Council’s barrister, Christiaan Zwart, was circulated prior to the meeting. He spoke to his advice on 14 May and answered questions.
7. Further advice was then obtained from Stephen Hockman, Q.C. working jointly with Christiaan Zwart. Their joint advice was sent to members prior to a second briefing meeting held on 21 May. They answered questions raised by members at that briefing. Issues raised at the briefing meeting by members, and by Stop Stansted Expansion separately, led to additional further advice from Stephen Hockman, Q.C. and Christiaan Zwart. This also was shared with all members of the Council. In all cases information was shared on a legally privileged and confidential basis.

## **Legal Background and Options**

8. If members wish to discuss the legal position and the advice received, or if they wish to seek further advice from council officers, they should resolve to exclude the press and public from the meeting while this takes place. This is important. The advice obtained by the Council is protected from disclosure to third parties by “legal professional privilege”. It is addressed to it and it alone. This protection does not only arise where litigation may be pending, but also in the course of giving independent and objective advice to the client. The council is the client of the two barristers referred to above. Legal professional privilege may be lost if legal advice is published, or disclosed publicly. Once legal privilege is lost, protection can be removed from all legal advice, not just that advice disclosed. The Council is entitled to consider legal advice in private so that it can weigh the risks and benefits of any particular course of action, without damaging its position in any subsequent legal proceedings.

9. The circumstances in which it would as a matter of law be open to a local Planning Authority to reverse any previous resolution by a local authority committee in favour of granting planning permission were considered in the case of *Kings Cross Railways Lands Group v London Borough of Camden* in 2007. Mr Justice Sullivan drew attention to the desirability in principle of consistency in decision making by local Planning Authorities and pointed out that *“if a local Planning Authority which has decided only 8 months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable.”* The Judge accepted that a change of mind may (emphasis added) be justified even though there has been no change of circumstance whatsoever if the subsequent decision taker considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission. In that case, a new development plan had been adopted after the resolution to grant planning permission and it was the requirement of the granting committee that a subsequent planning obligation be reviewed at a later committee. In the circumstances of this Council, no development plan has been adopted after 18<sup>th</sup> November 2018 and the Planning Committee did not require the planning obligation to be reviewed by a subsequent committee before issue of the decision notice. Instead, that Committee required an officer to issue the decision notice after an agreement had been concluded.
  
10. It follows from that case that any reason relied upon for a change of course from the Planning Committee’s resolution of 14 November must satisfy two criteria. First it must be a relevant or material factor i.e. a factor which relates to land use issues. Second it must be a very good planning reason. Whilst such a reason may relate to the weight to be given to the particular factor, the reason must be a planning factor and a factor of such nature as to justify, or to help to justify, the refusal rather than the grant of permission, and to be capable (where appropriate in combination with other material factors) of constituting a reasonable case on behalf of the local Planning Authority in the context of a planning appeal.”
  
11. The Council is currently well outside the legal time limit for determining this application. The planning performance agreement between STAL , ECC and UDC provided for an extension of time beyond 13 weeks but this was concluded when the s106 was signed by them and their related signatories. The applicant is entitled to appeal to the Secretary of State for non-determination. If the applicant does this, the matter is taken out of the Council’s hands. An appeal hearing would be held by a planning inspector. Once an appeal is made, the Council cannot then recover the power to deal with the application.

## **Financial Implications**

12. The usual rule in a planning appeal is that the parties bear their own costs. If there is an appeal to the Secretary of State, however, as well as incurring its own costs, the Council may be subject to an application for costs by the applicant. Interested parties, including statutory consultees, may also apply for costs, or the Secretary of State may choose himself to award costs without having been asked by any party to do so. It is obvious that the costs incurred by the applicant in relation to an appeal are likely to be very substantial indeed. The Council has previous experience of a planning appeal when it refused planning permission for the 2007 airport planning application. This was granted by the Secretaries of State on appeal and the appellant was successful in an application for costs.

13. The following information is provided to assist members in understanding how the issue of costs is addressed on appeal. Costs may be awarded where these criteria are met:

- A party has behaved unreasonably.
- The unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

The word "unreasonable" is used in its ordinary meaning rather than the public law meaning of what is generally known as "Wednesbury unreasonableness".

14. Unreasonable behaviour that could give rise to costs may be either

- Procedural (relating to the process).
- Substantive (relating to issues arising from the merits of the appeal).

15. In relation to non-determination, Government guidance on the award of costs includes:

*"If it is clear that the local planning authority will fail to determine an application within the time limits, it should give the applicant a proper explanation. In any appeal against non-determination, the local planning authority should explain their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period.*

*"If an appeal in such cases is allowed, the local planning authority may be at risk of an award of costs, if the Inspector or Secretary of State concludes that there were no substantive reasons to justify delaying the determination and better communication with the applicant would have enabled the appeal to be avoided altogether. Such a decision would take into account any unreasonable behaviour on the part of the appellant in causing or adding to the delay."*

16. Cost awards do not depend on the outcome of the appeal. Therefore, one party may win an appeal and obtain its costs, or lose an appeal and gain its costs. This is because the underlying concept in planning appeal costs awards is to instill discipline in decision making and appeal conduct.

17. The Council maintains a planning reserve to provide for the costs of the local plan in excess of the budget provided, and all planning appeals. A substantial award of

costs, together with the costs that would be incurred by the council, would significantly deplete the reserve.

18. In light of the legal advice received, it is therefore the strong advice of the s151 Officer that the Council releases the officers from the instruction to withhold the decision notice and removes any impediment to discharge by officers of Recommendation (2) of the Planning Committee. In the event that members refer the matter back to the Planning Committee, it is the strong advice of the s151 Officer that expenditure from the Strategic Initiative Fund (SIF) is suspended pending the outcome of this matter.

### **Matters relating to the Planning Obligations**

19. Several points have been raised about the obligations to address the effects of the proposed development on transport networks. The mitigation measures stem directly from the Transport Assessment work and the consultation responses from the highways authorities (Essex and Hertfordshire County Councils and Highways England) as revised prior to the Planning Committee. The objections were withdrawn on the basis of the amended recommendation terms as amended that included the County's requirement for a commitment to use reasonable endeavours to ensure mode share targets were met. The mode share targets have their basis in the transport modelling work that the local highways authority had tested. They ensure that current voluntary targets are adhered to, and establish a baseline replacing the lower target that had been required in 2008. This is set out in the Transport Assessment of the Environmental Statement and its Addendum. Sensitivity testing was carried out using alternative mode share assumptions. The Local Road Fund of £800,000 was quantified from estimates for indicative local highway improvement schemes that the local highway considered could potentially be necessary from the TA work, subject to the impact on the network of specific non airport developments. The extended rail users discount scheme allows discounted parking to rail season ticket holders and its wording has been perfected to ensure a higher rate of discount would be provided. The amended clause in the obligation is appended.
20. The other principal point related to the Sound Insulation Grant Scheme. This is considered below in paragraph 26 in the context of the government's Aviation 2050 green paper. The point based on a per passenger comparison of airport operators' contributions to community trusts is not a material planning consideration.

### **Assertions of a material change in circumstances warranting consideration by the Planning Committee**

21. The report to the ECM held on 25 April shortly before the local government elections set out officers' comments on a number of points which had been made by a third party, Stop Stansted Expansion in correspondence to the Leader of the Council with copies to other group leaders and to the Chief Executive. The correspondence asserted that there have been material changes in circumstances since the resolution of the Planning Committee on 14 November. The key point remains whether those changes are relevant to the consideration of

whether there be a change to the Planning Committee's resolution to approve the application to a decision that it should be refused and whether the weight that would potentially be applied to any changes could be justified.

22. It has been asserted by some that as the 35 million passengers a year limit effectively means that there would be fewer passenger flights than with 43 million passengers, the impact of the additional passenger aircraft should have been taken into account. This was taken into account. The information was before the Planning Committee on 14 November. Whilst a material factor, that Committee would not have been justified in refusing the application on this basis. This is because the 2008 decision by the Secretaries of State had approved 274,000 total aircraft movements of all types of flights. The airport has the benefit of the 2008 permission and by statute could remain able to handle up to 274,000 flights a year. Greater flexibility as sought by the application to enable more passenger flights by reducing the number of cargo flights and general aviation and other flights would not breach that total limit of 274,000 flights that today remains permitted. The change in the type of flights to passenger flights would not result in an increase in the area of the noise contour which is used as a key metric for community noise exposure, but would reduce its area. The current contour area was lawfully imposed by the Secretaries of State in 2008 and cannot be exceeded by virtue of a condition on the 2008 permission, a condition which the applicant has not sought to vary. The Planning Committee resolved in November to grant permission subject to condition 7 (like the previous Secretaries of State). Condition 7 ensures that the contour of noise must reduce by a particular date, regardless of the particular type of aircraft available at that date
23. The Government published "Aviation 2050" in December after the Planning Committee meeting but it is not itself a policy document and remains a consultation document about future policy. The consultation period on most of the questions therein was extended and closed as recently as 20 June. Negligible weight falls to be attached to its content in considering whether to impede Recommendation (2) and the determining of current proposals. Decision making in the planning sphere is made against the certainty of the development plan where other policy remains dynamic, It would not be reasonable to defer a planning decision until Government policy is settled.
24. Significant weight was attached by the Planning Committee in November 2018 to the most up to date government interim guidance set out in its policy paper "Beyond the Horizon Aviation Strategy: Making best use of existing runways (June 2018)". This interim guidance has not been superseded and remains unchanged, notwithstanding consultation on other policy and announcements..
25. It has been asserted that WHO Environmental Noise Guidelines published in October 2018 were not taken into account by the Committee in November. This is not correct. The report to the Planning Committee in November expressly referred to them on pages 8 (summary table row 8), pages 17, 52, and 161, as did some of those who made representations at the public participation events on 6 and 7 November to several of the Committee Members . The report to the Council meeting on 25 April advised that negligible weight can be attached to these guidelines as they are directed at governments in preparing national policy on

airports and aviation and not to local authorities carrying out their regulatory functions. It is notable that the UK Government's Aviation 2050 consultation document itself questions the appropriateness of these WHO guidelines. Whilst acknowledging that "there is also evidence that the public is becoming more sensitive to aircraft noise, to a greater extent than noise from other transport sources, and that there are health costs associated from exposure to this noise", and that "the government is considering the recent new environmental noise guidelines for the European region published by the World Health Organisation (WHO), and that it agrees with the ambition to reduce noise and to minimise adverse health effects, it wants policy "to be underpinned by the most robust evidence on these effects, including the total cost of action and recent UK specific evidence which the WHO report did not assess." Although the Council has expressed its support for the 2018 WHO Guidelines in its response to Aviation 2050, the government's consultation document would not form the basis for a sound reason for refusal at this time.

26. It has also been asserted that the application sound insulation scheme is in some way inadequate. This is another matter raised in the Aviation 2050 consultation document. The draft 2019 planning obligation sets out in detail the proposed scheme for Stansted. It was covered in the officer's report to the 2018 Planning Committee meeting and page 123 shows the area it would cover and its extended reach. The DfT policy proposal is that the noise insulation policy threshold should be extended beyond the current 63dB LAeq 16 hour contour to 60dB. The scheme that is subject of draft 2019 obligation is broader than the DfT's consultation proposals because the middle category noise impact zone would already cover the area between 63 to 60 dB LAeq 16 hour, and introduces a further and wider lower noise impact zone covering the 57dB LAeq 16 hour. The extent of the Upper, Middle and Lower noise impact zones would also be defined not only on the basis of the LAeq metric but also using other metrics if they indicate the need for broadening of the zones' extent.

27. Other topical matters raised by some are: the problem that Boeing has with its B737 Max-8 aircraft; Heathrow Airport Ltd's submission of its application for a Development Consent Order under the nationally significant infrastructure project regime, the date that its additional runway capacity would become available and any potential effect on demand at Stansted; and the government tabling a statutory instrument to put its net zero carbon emissions by 2050 target on a legal footing.

28. Boeing's problem is neither a new nor a material consideration, whether it proves to be transitory or of longer term significance. The general consideration of aircraft fleet mix assumptions over time was considered at the Planning Committee in November 2018. The resolution to grant planning permission was subject to condition 7 limiting the extent of the 57 dB LAeq 16 hour noise contour. It also required that: *By the end of the first calendar year that annual passenger throughput exceeds 35million, or by 31 December 2024, whichever is the sooner, a strategy shall be submitted to, and agreed with, the local planning authority, which defines the measures to be taken by STAL or any successor or airport operator to reduce the area of the noise contour by the end of 2028 for daytime noise to 28.7sq km for the area exposed to 57dB(A) Leq 16h (0700-2300).*

*Thereafter, from 2029, the area enclosed by the 57dB(A) Leq 16hr (0700-2300) contour shall not exceed 28.7sqkm for daytime noise.* This reduction is required regardless of the aircraft type available by 2028. It was one of a number of planning conditions that are considered enforceable (as the Secretaries of State also so considered in 2008 when they imposed a similar contour condition on the 2008 planning permission) and planning obligations that the Planning Committee deemed on 14<sup>th</sup> November 2018 to be then necessary to make the development acceptable. This particular condition has the effect of constraining the number and/ or type of aircraft. If more older and noisier aircraft are retained in airlines' fleets over time, then this must result in fewer slots being allocated to ensure compliance with the planning condition, which is a lawful and enforceable safeguard. Just as with the noise contour condition lawfully imposed by the Secretary of State in 2008, it has remained to be enforced by the local planning authority as the enforcing authority. The council would remain as the enforcing authority for the new noise contour condition 7. The general requirement is for the local planning authority to consider whether service of a breach of condition notice or an enforcement notice requiring cessation of any breach would be fair, proportionate and expedient, having regard to the degree of harm arising, but this is not a justifiable reason for refusing a development if a planning condition is necessary to make the development acceptable. In the event of a breach of condition, that would be a matter for the local planning authority to consider at that time.

29. In relation to the recent announcement of the third runway at Heathrow proposals, the Environmental Statement supporting the Stansted application set out the key assumptions on runway capacity that had been made. This included the assumption by the Department for Transport that it was confident that by 2030 a third runway at Heathrow would be open. The current government policy position on UK aviation, *Beyond the Horizon: The Future of UK Aviation* (June 2018), does not suggest any policy constraint on airports arising from Heathrow development but instead is a policy (stated in paragraph 1.29 of that document) for airports that wish to increase passenger or air transport movement caps to be able to do so, "taking careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations". The Planning Committee undertook that careful consideration. The DfT's forecasts in that guidance are not meant to be interpreted as policy constraints. There is no policy requirement to demonstrate need. Additional capacity at Heathrow is needed because of its particular international hub role, hence policy on that is set out in the Airports National Policy Statement made for the purposes of a different statutory regime: the Planning Act 2008. By contrast Stansted primarily serves a point to point role, and there is no reason to believe in a competitive air transport sector, cost conscious point to point traffic will necessarily move to Heathrow just because it has more runway capacity. It is important to note that although Heathrow Airport is planning to have the third runway open by 2026, the full range of related facilities will be delivered on a phased basis. The additional runway capacity will provide greater resilience at Heathrow from 2026, if indeed the operator manages to meet its project delivery plan, rather than provide a basis for taking market share from other London airports in the South East.

30. The recent tabling of the Statutory Instrument committing the UK to achieve net zero emissions is not a new material planning consideration. The submitted Environmental Statement Chapter 12 addressed Carbon Emissions including agreement of the International Civil Aviation Organisation in 2016 to implement its Carbon Offset and Reduction Scheme for International Aviation (CORSIA) with the objective of achieving carbon neutral growth. The report to the November Planning Committee dealt with the consideration of reducing carbon emissions. Government policy set out in Beyond the Horizon recognizes CORSIA and provides guidance that carbon emissions from aviation would be addressed through aviation fuel taxation. The Statutory Instrument does not suggest any change in government policy in relation to appropriate mechanisms. The contribution of Stansted Airport to UK aviation to the UK's 2050 national aviation budget target is not expected to change substantially in any event, so the new net zero target does not make a material difference.

### **Background Papers**

31. The draft section 106 planning agreement is available on the Council's website. Other background papers are legally privileged and are exempt from publication or inspection.