

**Committee:** Planning

**Date:**

**Title:** UTT/18/0460/FUL – Stansted Airport

17 and 24 January  
2020

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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.**

### **Recommendation**

The Assistant Director – Planning be authorised to issue the decision notice approving the planning application subject to the planning conditions as resolved by the Planning Committee on 14 November 2018 on signing of the amended S106 Agreement appended to this report.

### **Financial Implications**

1. Expenditure from the Strategic Initiative Fund (SIF) is suspended pending the outcome of this matter in order to ensure that sufficient resources would be available to address the consequences of non-determination of the application or refusal.

### **Background Papers**

2. 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.

Notes of workshop meetings with Planning Committee members held 2 – 22 October 2019 and related papers

Note of meeting with the applicant held 22 November 2019

Correspondence from the applicant and annexes

### **Background**

3. 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.*

4. On 14 November 2018, the 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.

5. 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.

6. 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.

7. 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.

8. 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.
9. 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.
10. At the Extraordinary Meeting of Full Council on 28 June officers were instructed not to issue a Planning Decision Notice for planning application UTT/18/0460/FUL until the Planning Committee had considered:
  - (i) the adequacy of the proposed Section 106 Agreement between UDC and Stansted Airport Ltd, having regard to the Heads of Terms contained in the resolution approved by the Council's Planning Committee on 14th November 2018;
  - (ii) any new material considerations and/or changes in circumstances since 14 November 2018 to which weight may now be given in striking the planning balance or which would reasonably justify attaching a different weight to relevant factors previously considered.
11. Since that meeting further expert legal advice has been obtained from Philip Coppel QC at the request of Members, and officers have been supporting members of the Planning Committee in preparing to consider the two matters set out above through a series of workshop sessions, in part owing to the significant change in membership of the committee. These sessions have taken members through the content of the draft obligations and issues that might be raised as potential new material considerations and regarded as a material change in circumstances since 14 November. They have provided opportunities for councillors and officers to ensure the obligations and issues are fully understood.
12. This report seeks to set out the issues comprehensively, to enable the Committee to comply with the Council resolution and authorise the release of the appropriate decision notice on the planning application.

### **The Adequacy of the S106 Agreement**

13. The starting point for assessment of the Agreement's adequacy is the decision of the Planning Committee on 14 November 2018. It resolved to approve the planning application for the Stansted Airport proposals subject to the applicant entering into planning obligations complying with the Heads of Terms put to the Committee at the meeting. That decision to approve the application implicitly means an agreement that accorded with the Heads of Terms would adequately address the impacts of the proposed development.
14. The obligations fall into the following categories:
- Sound insulation grant scheme
  - Transport
  - Skills education and employment
  - Community Trust Fund
  - Environment (Ecology and Surface Water Discharge Quality)

#### Sound Insulation Grant Scheme

15. The draft March 2019 planning obligation sets out in detail the proposed sound insulation grant scheme (SIGS) 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. This would exceed the DfT's Aviation 2050 consultation proposal that the national noise insulation policy threshold should be extended beyond the current 63dB LAeq 16 hour contour to 60dB.
16. The middle category noise impact zone would already cover the area between 63 to 60 dB LAeq 16 hour, and it introduces a further and wider lower noise impact zone covering the 57dB LAeq 16 hour.
17. 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.
18. For residential properties, the new scheme does not require any owner contribution, which enhances the existing scheme. It also distinguishes the new scheme from the existing grant schemes for other airports, which typically require such a contribution. It is expected that this enhancement will encourage a higher take up rate of grant aid than the normal 50% of eligible properties. Around 2,000 properties would be eligible, as set out in the applicant's clarification letter.
19. A bespoke approach is proposed for eligible non-residential properties, which are individually identified in the proposed obligation.
20. Since June, discussions have been underway with the applicant to determine whether there might be any scope to further improve the obligations within the regulatory constraints imposed by Parliament. Regulations require that obligations must be:

- necessary to make the development acceptable in planning terms;
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

21. This has resulted in a number of amendments to the sound insulation grant scheme., including a commitment to conclude a review of the SIGS zone boundaries in conjunction with the council, to respond where necessary to any confirmed airspace management change that may be introduced in the future; joint promotion of the new scheme with the council; and an openness to all available technologies when considering bespoke measures for non-residential properties.

22. The transport 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 in November 2018. The objections were withdrawn on the basis that the amended recommendations included ECC'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 during assessment of the submitted application. They ensure that current voluntary targets are adhered to, and establish a baseline replacing the lower target that had been required in 2008.

23. 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 authority considered could potentially be rendered necessary from the TA work, subject to the impact on the network of specific other (non-airport) developments.

24. 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.

25. Since June, a number of further amendments have been agreed:

- The Local Roads Network Fund has been increased to £1 million. This is to take account of the broadening of the definition of the scope of the Fund when compared to the definition used in 2008 obligation, to include measures to address off airport parking. This increased scope was reflected in the definition of the Fund in the March 2019 draft Agreement but without any commensurate uplift in the sum of money to be made available. This has now been rectified.
- The applicant is also prepared to agree to a clarification that, where eligible for funding support, highway improvements within a five mile radius of the airport means within 5 miles of the boundary of the airport.

- The applicant is also prepared to agree to a new clause including a commitment to prioritisation of grants from the Local Bus Network Development Fund when the grant application provides for the use of Ultra Low Emission Vehicles (ULEVs), and a business case exists.
26. Officers have raised the council's concerns about local residents being given the opportunity to apply for jobs on the airport. The applicant proposes to respond by adding a commitment to holding local jobs fairs in Part 3, 2(e) of the obligation.
27. On 20 November 2019, the Supreme Court issued its judgement in a case *R (Wright) v Forest of Dean District Council [2019] UKSC 53*. This case is relevant to the proposed obligations for Stansted Airport, particularly the community trust fund. It also contains an excellent explanation of what constitutes a material consideration. The link to the judgement is:  
<https://www.supremecourt.uk/cases/docs/uksc-2018-0007-judgment.pdf>
28. The judgment is in line with advice consistently given to members on the Stansted application. It is very clear that community benefits unrelated to the development are not material considerations and the judgment stresses that planning consent cannot be "bought and sold". Accordingly, pressure to seek additional benefits should not be pursued, particularly in the light of the judgment, which has again authoritatively confirmed previously established case law.
29. The applicant is prepared however to insert a clarification into the community trust fund terms of reference appended to the Agreement confirming that that the reference to Parish Councils as bodies eligible to make applications to the Fund includes Town Councils.
30. The applicant has stressed that, while it is constrained by law from providing additional community benefits through the mechanism of a planning obligation linked to its development proposals it is prepared to consider enhancement of its support for community led initiatives, but this would need to be in a business as usual context. No weight should be attached to such potential partnership arrangements, and they should not be progressed for the time being until after the determination of the current planning proposals has been finally resolved. This was made clear by the Supreme Court in the case referred to above, and the judgement refers specifically to a planning permission already being in place.
31. No specific changes are justified in relation to the obligations to monitor effects on biodiversity and water quality. However, a general compliance monitoring financial contribution has also been added providing £25,000 up front, and ongoing sums of £5,000 a year for ten years. This is emerging standard practice in the planning system nationally for all new agreements, confirmed by Statutory Instrument creating a new CIL Regulation 122 (2A). The Regulations constrain such monitoring contributions to the estimated costs of the Council in carry out necessary monitoring activity.

## New Material Considerations or other changes in circumstances

32. The Planning Officer's report on the planning application prepared for the Extraordinary Meeting of the Planning Committee held on 14 November 2018 came to an overall conclusion in paras 10.106 to 10.111 starting on page 109 of that report. It advised:

*10.106 The ES has demonstrated that there would be negligible impacts arising from the proposals. These have been assessed and tested by various consultees and issues arising have been addressed and appropriate mitigation measures identified.*

*10.107 Section 38(6) of the Planning Act 2004 requires that the determination be made in accordance with the provisions of the development plan unless material considerations indicate otherwise. The application accords with the development plan.*

*10.108 It is considered that the proposal represents a sustainable form of development in line with the NPPF (2018) paragraph 8 and accords with the NPPF.*

*10.109 The application makes best use of the existing runway infrastructure in accord with Beyond the Horizon (June 2018) and the Aviation Framework (2013).*

*10.110 No other matters sufficiently outweigh these considerations.*

*10.111 It is therefore recommended that the application be approved subject to s106 Legal Obligation and conditions*

33. There are no new material considerations or other change in circumstances that now justify a different overall conclusion.

34. The conclusion was based on an understanding of the implications of the proposals in terms of total passengers, passenger air transport movements, cargo air transport movements, other movements and total movements. These key statistics were set out in the report for a series of years as relevant baselines and the key milestones in the Do Minimum Scenario and in the Development Case: 2016 (existing baseline); 2021 (construction baseline); 2023 (Do Minimum baseline); 2023 (Transitional Year) and 2028 (Principal Assessment Year).

35. The report included the following tables:

	2016 (Existing baseline)	2021 (Construction baseline)	2023 (Do Minimum baseline)
Total passengers (‘000s)	24,300	32,600	35,000
Passenger ATMs (‘000s)	152	199	213
Cargo AMTs (‘000s)	12	13	14
Other (‘000s)	16	19	19
Total Movements	181	231	247

('000s)			
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	2023 Transitional Year		2028 Principal Assessment Year	
	Do Minimum Scenario	Development Case	Do Minimum Scenario	Development Case
Total passengers (‘000s)	35,000	36,400	35,000	43,000
Passenger ATMs (‘000s)	213	219	212	253
Cargo ATMs (‘000s)	14	14	17	16
Other (‘000s)	19	20	20	5
Total Movements (‘000s)	247	253	249	274

36. This made it clear that if the 35 million passengers per annum (35 mppa) limit were to be retained this would constrain the total number of aircraft movements to 249,000, notwithstanding that the 2008 planning permission granted by the Secretaries of State permitted 274,000 movements.
37. When the Secretaries of State made their decision in 2008 to approve development to subject to planning conditions limiting the passenger throughput and aircraft movements, it was on the basis that 35 mppa would necessitate 274,000 movements. To now refuse an increase in passenger throughput and effectively cap the number of movements to 249,000 would equate to a new noise restriction.
38. [The Airports \(Noise-related Operating Restrictions\) \(England and Wales\) Regulations 2018](#) came into force on 23 July 2018. The guidance is relevant when major airports in England or Wales are considering the introduction of operating restrictions. Where such restrictions are being introduced through the mechanism of a decision under the Planning Acts, the competent authority is the local planning authority. It must be able to show that in introducing any new restrictions, it is doing so within a balanced approach to noise management involving the reduction of noise at source, land use planning and management, noise abatement operational procedures and operating restrictions. There are process requirements that include the need to assess each type of measure to address noise, the relative cost effectiveness and consultation with all interested parties. Reducing the movement cap by limiting passenger numbers would need to be properly justified.
39. The recommendations to national governments set out in the World Health Organisation Community Noise Guidelines had been published before the meeting on 14 November 2018. There was reference to these guidelines in the public speaking sessions and at the commencement of the Planning Committee meeting. They are referenced in the Supplementary List of

Representations document circulated to the Committee. As noted in the document, these guidelines were not government policy. That remains the case. The government has said its response to the WHO recommendations will be set out in the forthcoming Aviation Strategy.

40. The government has adopted a similar approach in relation to carbon emissions and climate change. Whilst it has put its net zero carbon emissions target on a statutory footing, it has not yet developed a clear set of policies and interventions for achieving that target. There are no policy limits for individual airports that constrain the maximum permitted emissions from aircraft movements to and from each UK major airport. The Committee on Climate Change wrote a letter to the Secretary of State for Transport entitled Net Zero and the approach to international aviation and shipping emissions on 24 September 2019 ) <https://www.theccc.org.uk/wp-content/uploads/2019/09/Letter-from-Lord-Deben-to-Grant-Shapps-IAS.pdf>. Again the government's response was that the CCC's advice will be taken into account when it sets out its policy in the Aviation Strategy <https://www.gov.uk/government/publications/committee-on-climate-changes-2019-progress-reports-government-responses> .(See Chapter 5 pages 79-82 and page 90).
41. It is not open to a local planning authority in determining a planning application to seek to anticipate what national policy choices the government may, or should, take. Nor is it appropriate to assume that the government will seek to manage air noise impacts or carbon emissions mainly through land use decisions. It has other available mechanisms to control, influence or incentivise the behaviour of individuals and corporate bodies. It is notable that in deferring policy decisions to the forthcoming Aviation Strategy, it has not withdrawn Beyond the Horizon (June 2018), or issued a policy statement caveating the weight to be attached to it in the interim.
42. There is recent case law from an Appeal Court judgement which in part dealt with the matter of whether the High Court was wrong to have found that a Planning Inspector could not reach a view on the likely effectiveness of measures to improve air quality in the national air quality plan; and that the inspector should have seen the relevance to his decision of the proposed measures to bring air quality within limit values (*Gladman Developments, SSCLG, Swale Borough Council, CPRE Kent Case No: C1/2017/3476*). The Appeal Court did not agree with appellant on these points.
43. This Council faces an analogous issue in considering representations made to it. In law, the council needs to focus on the evidence presented to it as to the effects of the proposed development. It is not obliged to embark on predictive judgements as to the timing and likely effectiveness of government decisions on achieving the statutory net zero carbon emissions target.
44. The council has to form its own judgement on the effects of the specific development. It cannot reasonably know at present how measures taken at

national level will translate into measures that may be imposed on a particular airport.

45. The sensitivity evidence in the Environmental Statement for the planning application does not suggest that there would be national consequences resulting from planning permission being issued, one factor leading to the Secretary of State's decision not to call the planning application in for his own determination. As a matter of essential principle, the planning system should not seek to duplicate other regulatory controls, and should generally assume they will operate effectively.
46. Underlying the Environmental Statement's assessment of noise, carbon emissions and air quality effects are assumptions about aircraft fleet mix for air transport movements at Stansted in 2028 under the Development Case with 43 mppa and 274,000 total movements. Attention has been drawn in representations to the number of Boeing 737 MAX aircraft in the fleet assumed by 2028. As Members will be aware, currently regulatory authorities have withdrawn airworthiness certification from the aircraft in the 737 MAX series.
47. In an official media statement issued on 11 November 2019, Boeing acknowledges that the FAA and other regulatory authorities will determine the timing of certification and return to commercial service, however it continues to target FAA certification of the MAX flight control software updates during Q4 2019. It says: "based on this schedule, it is possible that the resumption of MAX deliveries to airline customers could begin in December, after certification, when the FAA issues an Airworthiness Directive rescinding the grounding order. In parallel, we are working towards final validation of the updated training requirements, which must occur before the MAX returns to commercial service, and which we now expect to begin in January". The first of five key milestones on return to service had been completed as at 11 November.
48. That statement proved to be optimistic, Airlines are taking a cautious view as to when they will receive deliveries and when they will be able to bring their ordered aircraft into service but they still expect to be able to do so during 2020. Ryanair, which is one of Boeing biggest customers for the 737 MAX with 210 on order, accepts that there is a real risk that it will have none of these aircraft in service in summer 2020 and that it expects to fly 157 million passengers in the financial year to the end of March 2021, up only 2.6% on its target outturn for 2020 but its chief financial officer has said that there is "no risk at all" that the airline would fail to meet its target of flying 200 million passengers by March 2024. It would be a matter of speculation to assert that fleet mix assumptions for 2028 will turn out to be materially incorrect.
49. The Environmental Assessment supporting the planning application included a sensitivity test in which there were 10% fewer aircraft reaching the noise and emissions performance standards of the 737 MAX series. This did not show any significant deterioration in effects. There are competitor manufacturers

with equivalent aircraft, and the fleet mix assumptions in the Assessment were also cautious in so far as they were based on a slower rate of take up than was viewed as likely. From the council's perspective as the local planning authority, there is a further safeguard in the noise contour condition. Not only would it potentially limit the number of aircraft movements, if the fleet is not modernised as anticipated, to stay within the noise cap, but it would also address the carbon reduction point, because older noisier aircraft are also less fuel efficient.

50. In November 2018, officers' advice was that little weight could be attached to the emerging local plan. It was, and is a material consideration, but little weight can be attached to the detailed wording of Policy SP 11 Stansted Airport in the plan as submitted for examination. The first set of hearing sessions on the development strategy and strategic policies including that dealing with the Airport have been concluded, but the council is still awaiting a letter from the examining inspectors giving feedback.
51. It is clear from the hearing sessions and their requests for dialogue between parties before the next set of hearing sessions that the Inspectors may potentially be looking to recommend major modifications to Policy SP11. However, employment growth at the Airport is an integral part of the development strategy set out in the submitted plan, and airport development on the scale proposed in the planning application is included within the preferred scenario for employment growth in the evidence supporting the Local Plan. There are no compelling grounds to support an argument that issuing the planning permission for the development would prejudice the outcome of the plan making process.

### **Conclusion**

52. There are no grounds for deeming the S106 Agreement to be inadequate. Further work to review the obligations has been concluded and it has been amended where possible within the legal constraints.
53. There are no new material considerations that would justify a different decision to that resolved by the Planning Committee on 14 November 2018.
54. The development plan framework position has not changed materially since 2018.
55. The decision notice should be issued granting planning permission for the development as proposed in the application subject to the revised planning conditions recommended to the Committee on 14 November 2018, as soon as the appended amended planning obligations have been signed by all parties.

### **Risk Analysis**

Risk	Likelihood	Impact	Mitigating actions
Planning permission is challenged in the Courts	2 Action at least to delay an unchallenged permission date would be unsurprising	2 Any such challenge would need to be defended in the Courts	Advice at QC level has been sought
Planning permission is refused, notwithstanding the resolution to grant in November 2018	2 The application is controversial and has attracted significant objection from local residents	3 A major planning inquiry would require significant reallocation of resources and the use of reserves	

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.