

**IN THE MATTER OF SECTION 70 TOWN AND COUNTRY PLANNING ACT 1990 AND
SECTION 38(6) PLANNING AND COMPULSORY PURCHASE ACT 2004**

Re: Opinion concerning a planning application for the expansion of Bristol airport

OPINION

Summary

1. This opinion concerns an outline planning application by Bristol Airport Limited (“**BAL**”), 18/P/5118/OUT, for the development of Bristol Airport to enable a throughput of 12 million terminal passengers in any 12 month calendar period (“**the Proposal**”). On 29 February 2020, an Officer’s Report (“**OR**”) recommending approval was published on the Council’s website. I am asked by the Parish Councils Airport Association and Bristol Airport Action Network to provide a short opinion on the options lawfully open to North Somerset Council’s Planning and Regulatory Committee (“**the Planning Committee**”) in respect of its consideration of the planning application, in light of the OR.
2. The purpose of the OR is not to decide the issues, but to inform the Members of the relevant considerations relating to the application, including the applicable planning policies. The Supreme Court has confirmed that Members are entitled to depart from a planning officer’s recommendation, so long as they identify and articulate clear planning reasons for doing so. I address below the rules on costs if BAL were to appeal against a refusal of planning permission or if a grant of planning permission were to be subject to challenge via judicial review .
3. When making their decision, Members are obliged by legislation to consider first whether the Proposal complies with the recently adopted development plan (“**the Development Plan**”). If it does not, then planning permission must be refused unless “material considerations” indicate that permission should nevertheless be granted. A “material consideration” is a relevant factor that, when placed in the decision-maker’s “scales”, would tip the balance one way or the other.
4. For the reasons outlined below, my view is that it would be lawful for the Planning Committee to depart from the officer’s recommendation and to refuse to grant planning permission. The environmental impacts of the Proposal, including the greenhouse gas (“**GHG**”) impact; Green Belt harm; biodiversity impact and impact on habitat of protected species, mean that the Proposal does not comply the Development Plan, in particular policies CS1, CS4, CS6, DM8, DM12 and DM50. Material considerations do not indicate permission should nevertheless be granted. There is mixed evidence on need for the development and BAL has overstated the economic benefits of the Proposal.

REASONS

The Proposal is Contrary to the Development Plan

5. Under section 38(6) of the Planning and Compulsory Purchase Act 2004, the Planning Committee is obliged to consider first whether the Proposal complies with the Council's Development Plan, which is recently adopted and is up to date.
6. When the Council re-publicised BAL's application in November 2019, it described the Proposal as a major application which "does not accord with the provisions of the development plan". It thus appeared that the Council accepted lack of compliance with the Development Plan.
7. The OR sets out a number of relevant Development Plan policies, explains them and indicates compliance with some of them. But it does not state whether the officer's view is that the Proposal is in overall compliance with the Development Plan. Notably, it does not state whether the Proposal complies with policies CS23 and DM50, which are the main policies specific to Bristol Airport. This is a serious omission. Members of the Committee need to know whether they are being advised to grant permission contrary to the Development Plan but because material considerations indicate permission should be granted.
8. In my view, the Council's position was correct when it indicated in November 2019 that the Proposal did not accord with the Development Plan. There are cogent reasons for the Committee to conclude that the Proposal does not comply with a number of relevant Development Plan policies. I will focus on four sets of policies that are key to considering the application:
 - a. Policies CS23 and DM50, which are specific to Bristol Airport;
 - b. Policy CS1 on addressing climate change;
 - c. Policies CS4 and DM8 on nature conservation; and
 - d. Policies CS6 and DM12 on the Green Belt.
9. Policy CS23 requires that proposals for the development of Bristol Airport "demonstrate satisfactory resolution of environmental issues". Policy DM50 also emphasises this. One of the main environmental issues is climate change impact, which impacts on both people and the planet. This is also the focus of Policy CS1, which prioritises reducing carbon emissions and tackling climate change, committing the Council to action in this regard. Another main environmental impact is on biodiversity, which Policy CS4 requires to be maintained and enhanced. Green Belt harm is also an important environmental impact.
10. It is notable that the Development Plan policies – in particular the airport-specific policies CS23 and DM50 – do not prioritise the growth of the airport at all costs. In fact they do the opposite. CS23 prioritises the requirement that the Council to be satisfied that the impact environmental impacts of airport growth are resolved. This fits with the

spatial vision for North Somerset, set out in the Development Plan in “Vision 1” of the Core Strategy, which specifically states that, when considering the future planning of the airport, there needs to be a balance between any advantages of economic growth and the impacts on the region, on the health and amenity of individuals and on the natural environment.

11. One of the main arguments made by BAL and others in favour of the Proposal is claimed economic benefit. The OR recognises, albeit in muted terms, that BAL has overstated the economic argument in support of both the need for airport expansion and regarding the projected economic benefits. There are a number of documents before the Committee that set out clearly why this is the case (see, eg, the documents produced by NEF Consulting on behalf of the CPRE Avonside). Furthermore, a number of costs of expansion, including those flowing from climate change, have not been factored into the analysis. It is therefore open to the Committee to come to a different conclusion than the OR and to decide that the need for expansion has not been established and that it is unclear whether the economic benefits will in fact be substantial.

Climate Change

12. The greenhouse gas (“**GHG**”) impact of the Proposal is relevant to whether it complies with policies CS1, CS23 and DM50. In the same way that the noise impact of the flights and the impact on the roads of increased traffic have to be taken into account, so too does the GHG impact (including the impact of increased flights resulting from the airport expansion). BAL accepts this and has provided environmental information about the GHG impact of the Proposal. The OR also accepts this.
13. BAL’s Environmental Statement (“**ES**”) states that the Proposal would result in an additional 154.30 kilotonnes of CO₂ per annum (ie 154,300 tonnes a year). There is therefore an accepted net increase in GHG emissions caused by the Proposal, which will inevitably remain in the atmosphere for a long period of time and will contribute to harmful climate change.
14. In planning terms, this GHG impact is very important. On 27 June 2019, the government amended the Climate Change Act 2008 to impose a statutory obligation that, by 2050, there will be a 100% reduction in GHG emissions from 1990 levels (“**the Net-Zero Obligation**”). Previously an 80% reduction was required. While the OR mentions the Net-Zero Obligation, it side-lines that obligation by asserting that it has not yet been “translated” into policy.
15. This advice in the OR is incorrect. The Committee is required to take the Net-Zero obligation into account for two important planning reasons:
 - a. First, it is relevant to Policy CS1, which must be understood in light of the main statutory duty under the Climate Change Act 2008 (see §3.7 of the Core Strategy) and which must take into account the most up-to-date relevant evidence on climate change.

- b. Second, the Environmental Impact Regulations 2017 require that impacts are assessed against the “environmental protection objectives” established by the United Kingdom which are relevant to the project. The Net-Zero Obligation is the key GHG “environmental protection objective”. The GHG impact of the Proposal should have been measured and assessed against the urgent need to address the climate crisis and the requirement to reduce GHG emissions by at least 100% below the 1990 baseline. Neither the ES nor the OR do this. The Committee is required to take the correct approach, and make its assessment of the impact using the proper metric – the Net-Zero Obligation. The Committee should note that a failure properly to carry out an environmental impact assessment, using the relevant metric, is a basis for judicial review of a grant of planning permission.
- 16. When adopting the Net-Zero Obligation, the Government relied on the recommendations of the Committee on Climate Change (“CCC”) – the independent statutory body tasked with advising the government under the Climate Change Act – in its Net-Zero Report (May 2019). This report and its accompanying technical report are part of the evidence base for assessing compliance with Policies CS23, DM50 and CS1 and are also relevant to assessing the environmental impact of the admitted additional 154.30 kilotonnes of CO₂ per annum caused by the Proposal.
- 17. The Net-Zero Report set out the need for rapid and significant steps to be taken immediately to achieve net-zero. It advised that these steps include reduction in domestic aviation emissions and international aviation emissions. On 24 September 2019 the CCC published its recommendations to the Government for dealing with aviation emissions consistent with the Net Zero target. The key tool for achieving this, highlighted a number of times, is the need to limit passenger growth to 25% from 2018-2050, compared to the forecast 49% growth. This is crucial, given that carbon reducing technology is uncertain and will require lead-time to be developed. Assertions that, despite an increase in passenger numbers, the GHG impact of flying will be reduced through innovations around fuel or new aeroplanes or carbon offsetting are untested, whereas the CCC’s advice is based on scientific analysis and understanding of the true potential for technology to assist in addressing the carbon impact of flying.
- 18. The ES and the OR both downplay that GHG impact of the Proposal because they assess it by comparing the additional 154.30 kilotonnes of CO₂ per annum to the whole of the “carbon budget” for all of the United Kingdom. This compares the Proposal’s emissions to the budget for all GHG emissions from every emission source (including power generation; agriculture; road transport and service provision from eg hospitals and schools). It is the wrong approach, because it means even very large emitting individual projects (such as this) seem to have a small relative impact.

19. The evidence of the CCC Reports establishes that any GHG emission caused by humans contributes to an increase in CO2 levels in the atmosphere and therefore to hazardous climate change. The correct question to ask is whether an additional 154.30 kilotonnes of CO2 per annum makes a meaningful contribution to increasing GHG emissions. The short answer is that it does.
20. There is no sensible way to mitigate the increased emissions. BAL's Carbon Emissions Reduction Plan only focuses on the GHG that it specifically produces (eg from the construction methods or the airport buildings). It excludes the aviation emissions, which are the majority of the emissions.
21. In light of all this evidence, it is in my view open to the Committee to find that the Proposal's GHG emissions would have a significant adverse impact and that this means the Proposal fails to comply with Policies CS1, CS23 and DM50 of the Development Plan.

Green Belt, Habitats and Biodiversity

22. A significant amount of parking development is proposed on the Green Belt. It is also clear from the ES that the proposed extension to the silver car parking zone will have significant effects on the foraging habitats of bats that roost in the vicinity of the site and within the adjacent North Somerset and Mendip Bats SAC ("**the SAC**"). Mitigation through replacement habitat is proposed, which the ES and OR conclude would compensate for habitat loss. Three issues arise from this.
23. First, there is a serious legal issue. Case law in 2019, known as the *Dutch Nitrogen* cases, made it clear that authorities cannot take into account any mitigation measures that are "uncertain" at the time they are assessed, either because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified and quantified with certainty. There is cogent evidence before the Committee questioning whether the replacement habitat would in fact mitigate the impact. The OR does conclude that it is certain that they will mitigate the impact. In my view it would arguably not be lawful to grant permission on this basis and the Council is vulnerable to judicial review on this point. Furthermore, as things presently stand, it appears the Proposal does not comply with Policy CS4.
24. I am aware that Natural England, the statutory consultee, has indicated it is satisfied with the habitats assessment and the mitigation measures. However, Natural England does not appear to have taken the *Dutch Nitrogen* case law into account. In the circumstances, the Planning Committee is justified in reaching a different view.
25. Second, the Proposal is required under statute, national policy and the Development Plan to ensure no net loss of, and instead net gain of, biodiversity. The only "likely" net gain identified in the OR is that of "ecologically-valuable" bat habitat. In my view the Committee can cogently take the view that this does not fulfil the requirements, given

the size and range of impacts of the Proposal and given the lack of certainty that the replacement habitat will in fact mitigate the impact (let alone represent a net gain).

26. Third, the OR accepts that the car parking in the Green Belt will harm the openness of the Green Belt. In light of recent case law, the OR should clearly explain that substantial weight should be given to any harm to the Green Belt, because that is what paragraph 144 of the National Planning Policy Framework required. Instead, the OR does not mention that part of paragraph 144 at all. The OR focuses on what it contends are the “very special circumstances” that justify the development in the Green Belt. These are said to be the combination of the need for additional parking and the lack of any sites outside the Green Belt. The OR simply asserts that these “clearly outweigh” the harm to the Green Belt. I consider it is open to the Committee to take a different view, because:
- a. The OR does not anywhere actually factor in the substantial weight that should be given to the permanent harm that will be caused to the Green Belt, nor is it explained why the “very special circumstances” clearly outweigh that harm;
 - b. The need for parking is contingent on the overall need case, which, as already mentioned above, is undermined by evidence before the Committee.

Conclusion on the Development Plan

27. The above analysis shows that it is open to the Committee to decide that the Proposal does not comply with policies CS1, CS4, CS6, DM8, DM12 and DM50 of the Development Plan. It should be noted that there are a number of other areas of concern, including noise impact, air quality impact, traffic impact and landscape impact (including on the Mendip Hills AONB), but I have not covered them in this short advice.
28. Lack of compliance with the Development Plan imposes a statutory duty on the Committee to refuse planning permission unless “material considerations” indicate that permission should be granted.

Material Considerations

29. BAL relies on two key material considerations in favour of a grant of planning permission: (1) alleged need for the development and (2) purported economic benefits deriving from the Proposal.
30. As set out above, there is clear evidence before the Planning Committee that neither of these material considerations justifies the grant of planning permission despite lack of compliance with the Development Plan. The OR accepts that the experts disagree over the scale of economic benefit. Objections by the CPRE, the Welsh Government and the Parish Council’s Airport Association, as well as the assessment by the New Economics Foundation, show that BAL’s need case is undermined by a number of errors and that the economic benefits have been significantly overstated.

31. The Planning Committee may be satisfied that some economic benefits will flow from the Proposal, and may be satisfied that some weight (or even significant weight) should be given to those benefits. However, the Committee must exercise its planning judgment to determine whether this material consideration is sufficiently strong to justify the grant of planning permission despite the environmental harms that will be caused by the Proposal. Given the nature of those harms, and the evidence before the Planning Committee, it is rationally open to the Committee to decide that material considerations do not indicate that planning permission should be granted, despite lack of compliance with the Development Plan.

Appeal to the Secretary of State and Costs

32. If the Committee were to refuse planning permission, BAL could appeal to the Secretary of State and that appeal would be heard by a Planning Inspector. Parties in planning appeals normally meet their own expenses. The Council would only be at risk of paying BAL's costs if the Council behaved unreasonably and that behaviour directly caused BAL unnecessary or wasted costs. "Substantive unreasonable behaviour" includes failing to produce evidence to substantiate each reason for refusal on appeal and preventing development which should clearly be permitted, having regard to accordance with the Development Plan, national policy and any other material considerations. So long as the Committee provides cogent reasons for refusal, which are capable of being substantiated by evidence at an appeal, there is a vanishingly low risk of an adverse costs award for substantive unreasonableness.

Judicial Review and Costs

33. If the Committee were to grant planning permission, any person or group with a sufficient interest in the decision (for example, individuals or groups who commented on the application or will be affected by the decision) may apply to the High Court for judicial review of the grant. Permission will only be given for such a claim if it identifies arguable legal errors (ie misunderstanding of the law or policy; failing to take into account a material consideration). If permission is given, the case proceeds to a substantive hearing. In judicial review proceedings, the unsuccessful party usually pays the successful party's costs. However, if the case is brought on the basis of a contravention of the provisions of national law relating to the environment, then a costs cap is usually applied. In most cases limits the costs that the unsuccessful Claimant would pay to the Council to £5,000 (for an individual claiming) and £10,000 (for a group or organisation), and the costs of an unsuccessful Council to £35,000.

Conclusion

34. A summary of my opinion is given in §§2-4 above. In my view, it is open lawfully to the Planning Committee to refuse permission for the Proposal.
35. I address the GHG impact of the Proposal in §§12-21 above. Should the Planning Committee decide, in the exercise of its planning judgment, that GHG impact constitutes a reason for refusal of the Proposal, that reason could be recorded as follows:

The proposed development does not demonstrate the satisfactory resolution of the environmental impact which would be caused by virtue of the increase in greenhouse gas emissions that it would produce. The proposal is therefore contrary to policies CS23 of the North Somerset Core Strategy and DM50 of the North Somerset Sites and Policies Plan (Part 1). The increased greenhouse gas emissions caused by the proposal would have a significant adverse environmental impact through their contribution to hazardous climate change, contrary to policies CS1 and CS23 of the North Somerset Core Strategy and paragraph 148 of the National Planning Policy Framework, and in light of the statutory duty in the Climate Change Act 2008 to achieve net-zero by 2050.

36. I address the impacts of the Proposal in relation to the Green Belt, habitats and biodiversity in §§22-25 above. Should the Planning Committee decide, in the exercise of its planning judgment, that these impacts constitute reasons for refusal of the Proposal, those reasons could be recorded as follows:

The proposed development does not demonstrate satisfactory resolution of the impact of the proposed extension to the Silver Zone car park on lesser horseshoe bats and greater horseshoe bats, contrary to policies CS4 and CS23 of the North Somerset Core Strategy and DM8 and DM50 of the North Somerset Sites and Policies Plan (Part 1). The Local Planning Authority cannot be satisfied that the proposal will not adversely affect the integrity of the North Somerset and Mendip Bat Special Area of Conservation, contrary to the Conservation of Habitats and Species Regulations 2017.

The proposed development does not demonstrate that it is designed to maximise benefits to biodiversity or that biodiversity net loss will be avoided and a net gain achieved, contrary to policies CS4 and CS23 of the North Somerset Core Strategy and DM8 and DM50 of the North Somerset Sites and Policies Plan (Part 1), paragraphs 174b and 175 of the National Planning Policy Framework and the NERC Act 2006.

The proposed development will cause harm to land which is adopted Green Belt, by virtue of permanent harm to its openness, and is therefore inappropriate in the Green Belt. Very special circumstances have not been demonstrated that outweigh the harm to the Green Belt by virtue of inappropriateness. The proposed development is therefore contrary to policies CS6 and CS23 of the North Somerset Core Strategy and DM12 and DM50 of the North Somerset Sites and Policies Plan (Part 1) and paragraph 144 of the National Planning Policy Framework.

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