From: Steve
To: [redacted]
Subject: Fwd: URGENT Bristol Airport/Southampton Airport
Date: 03 January 2022 14:17:52
Attachments: Untitled1.pdf
Untitled2.pdf
Southampton JR Order.pdf

Dear Joanna
Please could you pass this email to the inspectors for their urgent consideration.

As you may know, campaigners against the expansion of Southampton Airport were given permission in December 2021 by Mrs Justice Lang in the High Court to proceed with a judicial review against the recent decision allowing the airport to expand.

One of the grounds of challenge that the Judge found to be arguable ('Ground 3'), was that the environmental statement in support of the airport's application had unlawfully made no assessment of the cumulative effect of GHG emissions produced by the airport and other projects. The Environmental Statement put forward by Southampton airport made a very similar argument to that being deployed by BAL:

"...the significance of GHG emissions is assigned with reference to the magnitude of emissions, their context (in this case with reference to UK carbon budgets, UK aviation emissions forecasts, and emissions from the region of Eastleigh)"

Campaigners against Southampton Airport's expansion argued in their grounds of challenge that:

"The Defendant was required to consider the overall trends of UK emissions and/or UK aviation emissions, because it was required to consider cumulative impacts on the climate as a mandatory aspect of the EIA process, and/or because that context was obviously material to assessing the significance of the GHG impacts of the development. Accordingly, the EIA was manifestly inadequate in that it involved no assessment of the cumulative impact of the proposal whatsoever; and/or the decision to grant consent failed to take account of a consideration that was mandatory because it was obviously material."

The pdfs below ('Untitled 1 and 2') are extracts from the skeleton argument used by counsel for the campaigners in the renewal (i.e. permission) hearing to assess whether the Judicial Review should be allowed to proceed and on what grounds. They outline the relevant submissions put to the High Court in respect of Ground 3 (the cumulative impact point). The arguments cannot be reproduced in their entirety as we understand they contain confidential information shared between the parties.

We also attach below the Order granting the permission (with the confidential sections redacted).

The points that we would respectfully ask the inspectors to note are:
1. It would not be safe to rely on the approval of Southampton Airport's expansion plans given it is arguable the grant of planning permission was unlawful.
2. BAANCC have consistently argued both before and during the inquiry (see inter alia our closing submissions at Para 11(1)(c) and paras 29-31) that BAL have not discharged their legal duty in respect of a cumulative impact assessment and we now ask again that you

take due note of this point.

Best regards

Ground 3 – By making no assessment of the cumulative effects of GHG emissions in combination with other projects, the Defendant breached its duty under Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) ("the EIA Regulations"), and/or failed to take into account an obviously material consideration

Particular Legal Principles

58. Where environmental impact assessment ("**EIA**") of a project is required, the EIA process, including the preparation of an environmental statement, must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on various prescribed factors, including climate: see reg. 4(1) and 4(2)(c) of the EIA Regulations. By reg. 18(3), the environmental statement must include, at least, the information set out in reg. 18(3)(a) to (e) and by reg. 18(3)(f):

> "(f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected."

59. In turn, paragraph 5(e) of Schedule 4 to the EIA Regulations requires the environmental statement to include:

> "A description of the likely significant effects of the development on the environment resulting from, inter alia:
>
> […]
>
> (e) the cumulation of effects with other existing and/or approved projects […]"

60. A document which fails to describe the likely significant cumulative effects of a project cannot therefore be described as an Environmental Statement, and is thus liable to be quashed, see: ***R. (on the application of***

Blewett) v Derbyshire County Council [2004] Env LR 29 *per* Sullivan J at [41].

Submissions

61. The environmental statement presented with the application here assessed only the likely significant effect of the proposed development itself.[29] Paragraph 13.2.47 explains the methodology used for assessing significance: *'the significance of GHG emissions is assigned with reference to the magnitude of emissions, their context (in this case with reference to UK carbon budgets, UK aviation emissions forecasts, and emissions from the region of Eastleigh)'*. Section 13.6 then presented an assessment of the GHG emissions arising from the proposed development, presenting those emissions for the purposes of comparison with (i) the 3rd, 4th and 5th Carbon Budgets; (ii) DfT forecasts for aviation emissions and (iii) emissions from all activities in Eastleigh, and concluding at paragraph 13.6.9 that:

> *"Emissions from operation of the Proposed Development have been determined to be **moderate adverse** and **significant"***

62. That conclusion on significance was adopted in the OR.[30]

63. The environmental statement and the OR made no attempt to assess the significance of the cumulative impact of the proposed development together with the impact of other existing and/or approved projects, such as other UK airports or sources of GHG emissions. However, GHGs, by their nature, have a cumulative effect on the climate: it is the build-up of GHGs in the atmosphere that causes climate change, and therefore the cumulative impact of projects that is crucial in assessing the significance of any project in GHG terms.

---

[29] **[CB/26/200-233]**

[30] OR, paragraph 928 **[CB/37/312]**. The Environmental Statement Addendum 2, dated January 2021, used the same methodology (paragraph 13.2) **[CB/31/248]** and reached the same conclusion on the significance of GHG impacts (paragraph 13.8) **[CB/31/249]** as the main environmental statement.

64. For example, presenting emissions from the proposed development on its own as a fraction of the UK carbon budget overall obscures the true significance of those emissions: looked at in isolation, they appear to be a small percentage, but of course every contribution to GHG emissions needs to be addressed. It is only when the cumulative impact of emissions from the proposed development is considered together with emissions from other sources that their true significance is revealed. When emissions from all UK sources are considered, it can be seen that they must be reduced further than current projections for the period of the 5th Carbon Budget (2028-2032). The CCC advised in 2019 that Government "policy is not yet on track to meeting the 5th Carbon Budget" [31]. In addition, in its advice on the 6th Carbon Budget, the CCC made clear that the existing 5th Carbon budget is not in line with achieving the Net Zero Target, so that "outperformance of the fifth budget [is needed] if the UK is to be on track to the sixth budget"[32]. In this context, any additional increase in GHG emissions is problematic, even if it represents a small percentage of the UK budget overall, because what is required is a further decrease in UK GHG emissions relative to projections, not an increase. It is the cumulative impact of GHG emissions from both the proposed development and other sources that affects the climate, and it is only when (as the EIA Regulations require) this cumulative impact is considered against the UK's climate targets, that the true impact of the proposed development on the climate can be understood.

65. The cumulative significance on the climate of the proposed development can also be considered at a sectoral level, by analysing projected emissions from UK airports. The environmental statement acknowledged that UK aviation emissions are projected to exceed even the planning assumption of 37.5 MtCO2e, set by reference to a target of an 80% reduction.[33] Yet it went on to present just the GHG emissions from the proposed development

[31] *Net Zero – The UK's contribution to stopping global warming*, CCC, May 2019, p.161 **[CB/25/199]**
[32] *The Sixth Carbon Budget – the UK's path to Net Zero*, CCC, December 2020, p.430 **[CB/30/245]**
[33] ES, para 13.2.13 **[CB/26/204]**

alone, as a small fraction of total projected UK aviation emissions[34], again obscuring the fact that the cumulative impact of GHG emissions from the development and other UK aviation sources leads to even the out of date planning assumption being exceeded, and that the proposed development exacerbates this problem.

66. The Defendant was required to consider the overall trends of UK emissions and/or UK aviation emissions, because it was required to consider cumulative impacts on the climate as a mandatory aspect of the EIA process, and/or because that context was obviously material to assessing the significance of the GHG impacts of the development. Accordingly, the EIA was manifestly inadequate in that it involved no assessment of the cumulative impact of the proposal whatsoever; and/or the decision to grant consent failed to take account of a consideration that was mandatory because it was obviously material. Accordingly, the EIA was "so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations" (cf. ***Blewett***).

Ground 4 – The Defendant misunderstood the policy at paragraph 11 NPPF

Particular Legal Principles

67. By s.70(2) Town and Country Planning Act 1990, the Defendant was required to have regard to "other material considerations". The NPPF was plainly such a consideration, and the Defendant rightly treated it as such, including the policy at paragraph 11 NPPF.

68. However, to have regard to a consideration the Defendant was obliged properly to *understand* that consideration.

69. Paragraph 11(d) NPPF reads as follows:

[34] ES, Table 13.9 **[CB/26/226]**

23. Ground 1 is at the very least arguable.

Ground 3 - Failure to assess cumulative effects

24. There is no dispute that the EIA Regulations required an assessment of the likely significant effects of the development on the environment resulting from, amongst other things, *"the cumulation of effects with other existing and/or approved projects"* see" Regulation 18(3)(f) and paragraph 5(e) of Schedule 4 EIA Regulations 2017.

25. Here, it is common ground that the ES described the Green House Gas ("GCG") emissions from the proposed development and not those arising from other existing and approved projects, as other sources of GHG emissions.

26. The simple complaint is therefore that the ES was at least arguably defective because it failed to assess effects of those emissions together with other consented projects. Accordingly, that rendered the statement incapable of being described as an ES, see ***R(Blewett) v Derbyshire County Council*** [2003] EWHC 2775 (Admin) at [41].

27. The Council and IP say they did assess the cumulative effects by reference to the UK Carbon Budget and aviation forecasts, but that is no answer because that is merely a way of contextualising the emissions, not assessing them together with emissions from other projects.

28. However, on analysis, there is a clear difference between the contextualisation exercise actually conducted by the Council and IP, and that required by the EIA Regulations:

    a. The UK aviation forecast represents the maximum level of emissions that the UK Government regards as sustainable in the context of achieving the UK's overall climate change targets.[3] It is, in effect, a target as well as a

[3] Or, it did so at the time. As it happens, in a consultation launched after the Decision, the UK Government proposed a lower aggregate level of GHG emissions from UK aviation as being consistent with the Net Zero Target set by s.1 Climate Change Act 2008.

forecast: emissions must not exceed that level if aviation is to play its fair part in achieving the UK's climate goals.

b. The contextualisation exercise establishes that GHG emissions from the project will be approximately 1% of forecast UK aviation emissions in 2030, 2040 and 2050.

c. However, the contextualisation exercise does not establish whether or not, taking into account the effect of other projects, adding a further 1% to UK emissions is compatible with achieving the forecast level of emissions. If other airports are also pursuing development projects that, together the Southampton project, will lead to the forecast being exceeded, then the effect of GHG emissions from the Southampton project is very much more significant than if they are not. In the first scenario, the additional GHG emissions from the Southampton project will be exacerbating the problem of overshooting the limit, rather than sitting within a permissible limit.

d. In short, while the contextualisation exercise tells the decision-maker that GHG emissions from the project will be an additional 1% of UK aviation emissions in 2050, it does not tell the decision-maker whether the UK can afford an additional 1% of aviation emissions in 2050. That is a crucial aspect of the analysis required by the EIA Regulations, because without it there is no way of assessing the significance of project's GHG emissions, together with the relevant cumulative effects. A call-in inquiry would, of course, have provided the Secretary of State with the opportunity to assess the impacts of the various airport expansion projects in one go.

e. The Claimant avers that the UK cannot afford an additional 1% of aviation GHG emissions. Other current expansion projects at Bristol, Stansted and Leeds Bradford airports are likely to take total UK airport capacity beyond a level that will allow the forecasts to be achieved. The Council and IP may disagree, but the point for present purposes is that they have produced no

information on the basis of which the necessary assessment can be carried out.

f. In any event, there was no evidence before the Council that the Southampton airport expansion project had been factored in when the UK set the aviation forecast.

29. Accordingly, the lack of any information against which to assess the significance of the cumulative impact of GHG emission from this and other airport expansion proposals was, arguably at the very least, a flaw that wholly vitiated the ES.

30. At the very least, the ES fails to grapple with the obligation to assess the cumulative effects (i.e. of the project and those other emerging airport expansion projects) and supply reasons as to why that could not be done.

31. Ground 3 is at the very least arguable.

Ground 4 – Unlawful approach to Paragraph 11(d) NPPF

32. This ground concerns paragraph 11(d) NPPF, which establishes a tilt in favour of planning permission in certain circumstances, including *"where … the policies which are most important for determining the application are out-of-date, granting permission unless …"* **CB/381**. The issue here is the legality of the Council's approach to "*the policies which are most important …*".

33. It is seemingly common ground that it would have been an error of law had the Council concluded that, *simply* because Policy 115.E Local Plan was out of date, the "tilted balance" at paragraph 11(d) NPPF was *automatically* engaged. Indeed, that follows from ***Paul Newman Homes Ltd v SSHCLG*** [2021] PTSR 1054. Andrews LJ held at [43] that the proper interpretation of paragraph 11(d) requires the decision maker to evaluate whether, as a whole, the most important policies were out of date.

In the High Court of Justice
Queen's Bench Division
Planning Court

CO/2465/2021

Before the Honourable Mrs Justice Lang

On 9 December 2021

In the matter of an application for judicial review

THE QUEEN

on the application of

GOESA LIMITED — **Claimant**

-and-

EASTLEIGH BOROUGH COUNCIL — **Defendant**

SOUTHAMPTON INTERNATIONAL AIRPORT LIMITED — **Interested Party**

ORDER

UPON the Claimant's renewed application for permission to apply for judicial review;

AND UPON hearing Mr A. Bowes and Mr P. Lockley of Counsel on behalf of the Claimant, Mr P. Stinchcombe QC and Ms C. Dobson of Counsel on behalf of the Defendant, and Mr J. Strachan QC and Mr M. Westmoreland Smith of Counsel on behalf of the Interested Party;

IT IS ORDERED THAT:

1. The Claimant's application for permission to amend Ground 6, in the terms of the draft attached to the application dated 24 November 2021, is granted.

2. The application for permission to apply for judicial review is granted on Grounds 1, 3, 4 and 6 (as amended).

3. The application for permission to apply for judicial review is refused on Ground 2 (which was not renewed by the Claimant), and Grounds 5 and 7.

4. [redacted]

[redacted]

5. Any application by the Claimant to amend the Statement of Facts and Grounds, pursuant to paragraph 10 below, is reserved to Mrs Justice Lang.

6. The application for judicial review is to be listed for hearing with a time estimate of 2 days.

7. The costs order made by Dove J. on 19 October 2021 is set aside.

8. Costs in the case.

Case Management Directions

9. The period between 23 December 2021 and 5 January 2022 inclusive shall be disregarded for the purposes of calculating time in these directions.

10. The Claimant do file and serve any application for permission to amend its Statement of Facts and Grounds, in respect of the Secretary of State's standard procedure for handling requests to call in planning applications, no later than 21 days after service of a witness statement by the Secretary of State, pursuant to paragraph 4 above. The application is to be marked "Reserved to Mrs Justice Lang".

11. The Defendant and the Interested Party may file and serve any response to any application made by the Claimant pursuant to paragraph 10, within 14 days of service of the application.

12. The Defendant, the Interested Party and any other person served with the Claim Form who wishes to contest the claim or support it on additional grounds shall, within 35 days of the date of service of this Order, file and serve (a) Detailed Grounds for contesting the claim or supporting it on additional grounds, and (b) any written evidence that is to be relied on.

13. The Claimant may file and serve any Reply and any further evidence within 21 days of service of the Detailed Grounds and/or evidence.

14. The Claimant must file and serve an agreed hearing bundle, not less than 28 days before the date of the hearing. The electronic version of the bundle shall be prepared and lodged by the Claimant in accordance with the Guidance on the Administrative Court website. The Claimant

must also lodge a hard-copy version of the hearing bundle at the Administrative Court Office, not less than 28 days before the date of the hearing.

15. The Claimant must file and serve a Skeleton Argument not less than 21 days before the date of the hearing.

16. The Defendant and Interested Party must each file and serve a Skeleton Argument not less than 14 days before the date of the hearing.

17. The Claimant must file and serve an agreed authorities bundle, not less than 5 days before the date of the hearing. The electronic version of the bundle shall be prepared by the Claimant in accordance with the Guidance on the Administrative Court website. The Claimant must also lodge a hard-copy version of the authorities bundle at the Administrative Court Office, not less than 5 days before the date of the hearing.

Dated 9 December 2021

By the Court

Notes for the Claimant

To continue the proceedings a fee is payable.

For details of the current fee please refer to the Administrative Court fees table at https://www.gov.uk/court-fees-what-they-are.

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the Justice website https://www.gov.uk/get-help-with-court-fees

You are reminded of your obligation to reconsider the merits of your claim on receipt of the defendant's grounds of defence and evidence.