RE: LONDON LUTON AIRPORT

PLANNING APPLICATION 12/01400/FUL
&
NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECT
&
PLANNING ACT 2008

OPINION

Introduction

1. I am asked to advise Luton Borough Council concerning planning application 12/01400/FUL for the development of the Airport within the existing Airport boundary. I am in particular asked to advise concerning the application of various Sections of the Planning Act 2008 concerning whether or not the proposal should be considered to be a Nationally Significant Infrastructure Project.

Conclusion

2. There is no doubt that the proposed development does not constitute a Nationally Significant Infrastructure Project ("NSIP") within the meaning of Sections 14 and 23 of the Planning Act 2008.

3. Further, there is no point or purpose in the Secretary of State for Transport using his powers under Sections 35 and 35ZA of the Planning Act 2008 to require further information upon the matter. As there is only one conclusion that could reasonably be reached, namely that the increase is expected to be less than 10mppa, such a decision by the Secretary of State would

need justification and reasons which are not immediately apparent. However, this is a matter for him and not the Borough Council at this stage.

The Proposal

4. The scheme involves various works of development to be carried out within the existing Airport boundary. These include various road improvement works, improvements to the public transport hub adjacent to the terminal, the construction of a multi-storey car park and pedestrian link to the western side of the existing of the short-term car park, an extension to the mid-term car park and long-term car park, improvements to the terminal building involving internal reorganisation and minor extensions and building works, construction of a new pier (Pier B), construction of a new taxiway parallel to Taxiway Delta, and taxiway extensions and rationalisation of aircraft parking areas with new stands replacing and improving existing stands. London Luton Airport Operations Limited ("LLAOL"),

5. The application seeks to increase the capacity of London Luton Airport to 18 million passengers per annum (mppa) from a current capacity which has been estimated to be approximately 12 mppa. The current throughput of the Airport has been recorded by observation in 2012 as being approximately 9.6 mppa, and 10.2 mppa in 2008[1].

6. The Borough Council planning officers propose that for planning reasons a condition be imposed limiting the increase to and with a cap of 18mppa. It is understood that this has been accepted by the Applicant Developer, London Luton Airport Operations Limited ("LLAOL"). Unless the decision of the Borough Council is not to impose such a condition, the proposed development should be assessed as being subject to such control so that the maximum increase in capacity would be less than a 10mppa increase from the current observed throughput.

[1] See Planning Application/Planning Supporting Statement/Additional Capacity/para 5.41

Estimation of Current and Future Capacity

7. Information in addition to that provided by the Applicants was commissioned by Luton Borough Council as planning authority concerning the estimation of the current and future capacities of the Airport, the latter consequent upon the proposed development being carried out.

8. The reports were produced by Chris Smith Aviation Consultancy Limited ("CSACL") in, respectively, June and September 2013. CSACL is a specialist consultancy company specialising in the air transport industry and including the giving of consultancy advice on aviation matters including those relating to the development of airports. Although there has been criticism of the estimations produced, the principal of the consultancy, Chris Smith, has 35 years' experience in the aviation industry and his credentials and expertise in being able to give expert advice to the local planning authority on the current and future capacity of Luton Airport is neither disputed by other expert evidence nor open to dispute.

9. The contents of the reports set out the methodology and reasoning of the expert consultant. In particular in the absence of any reasoned expert evidence and advice to the contrary, it is reasonable for the Local Planning Authority to rely on the consultant's advice if it decides to do so.

10. The Borough Council's expert consultant's conclusion is that the annual throughput or capacity of the Airport currently would be 12 mppa, with its existing facilities and practices, in the medium term. It has been estimated by the Borough Council's consultant that, on balance, the maximum capacity of Luton Airport after the proposed developments the subject of the current planning application have been carried out, is likely to be between 18 mppa and 20 mppa. This

gives an estimated mean maximum capacity after the proposed development has been carried out of some 19mppa.

11. In addition to the above, the Applicant Developer LLAOL has separately concluded that the current capacity of the airport is 12.4 mppa, and that up to 18mppa could be accommodated within the planned improvements at the airport[2]. This effectively corroborates the conclusions of CSACL and in particular that the increase in capacity as a result of the proposed development would be less than 10 mppa.

Planning Condition Limit

12. As stated above it is proposed by the Borough Council planning officers that an upper limit by way of a planning condition would be imposed upon any planning permission granted limiting the throughput or capacity of the Airport to 18 mppa. The development should be assessed on this basis. As a consequence, any throughput in excess of 18 mppa would be in breach of planning control and liable to enforcement action as being unlawful.

13. By reason of the imposition of such a condition, there cannot therefore be any lawful increase in capacity of in excess of 10mppa even from the current actual (as opposed to assessed or theoretical) throughput.

Councillor Thake's Representations

14. County Councillor Richard Thake, Executive Member for Community Safety and Planning of Hertfordshire County Council, has made a number of representations in writing calling into question the lawfulness of the decision making by Luton Borough Council in relation to the application. These have concerned whether the development constitutes a Nationally

[2] See Planning Application/Planning Supporting Statement/Additional Capacity/para 5.40 and footnote 1.

Significant Infrastructure Project ("NSIP") within the meaning of the Planning Act 2008 and consequentially, whether the consequent NSIP procedure should be adopted if this is so.

15. The latest representations are those dated 18th November 2013, from Councillor Thake to the leader of Luton Borough Council, Councillor Hazel Simmons. By letter of the same date, Councillor Thake makes representations to the Secretary of State for Transport, the Rt. Hon. Patrick McLoughlin MP, urging him to consider intervening under the provisions of Sections 35(7) and 35(8) of the Planning Act 2008 (which have been superseded by amendments to s35 and the enacting of s 35 CSZ – see below and the Annexe to this Opinion). This is so as to prevent any further action being taken in relation to the application by Luton Borough Council before the Secretary of State has further information, so as to enable him to come to a decision as to whether he wishes to exercise his powers under the Planning Act 2008 to direct that the application be treated as an application for an order granting development consent and for which development consent is required.

16. It is to be noted that Councillor Thake has at no time alleged any error of law has actually taken place and does not allege that Luton Borough Council would be acting in error of law if it were to grant planning permission with the information currently before it. What he does, at most, is to assert that the legal position is "unclear" whether the planning application falls within the scope of Section 23 of the Planning Act 2008 and that the independent advice commissioned by Luton Borough Council on capacity matters (the CSACL reports) "may not provide the necessary level of certainty to enable LBC to move forward to determine the application".

17. The letters from Councillor Thake request that a legal Opinion be obtained by LBC as to how the 10 mppa threshold within the Planning Act 2008 should be interpreted and, within the context of that opinion, the extent to which the capacity reports provide LBC with the requisite level of

evidence that it would be procedurally correct to proceed to determine the planning application. He reiterates that Hertfordshire County Council has consistently identified the need for legal clarification. Councillor Thake says that he is "concerned that a decision is to be made without the necessary assurance that it would be procedurally correct to do so".

18. One matter that Councillor Thake raises which has been overtaken by events, concerns the officer recommendation that refers to referral by the Council of the application to the Secretary of State for Communities and Local Government. This was contained in the first officer report which has now been superseded. Since inclusion of the recommendation, I am instructed that the Secretary of State for Communities and Local Government has notified Luton Borough Council that he is yet to determine whether to call the application in for this own determination under Sections 76A and/or 77 of the Town and Country Planning Act 1990. Therefore the point concerning the reference of the planning application to the Secretary of State by the Council no longer arises. In any event, this is a matter for the Secretary of State.

The Planning Act 2008

19. For the purpose of completeness, the relevant parts of the Planning Act 2008 are set out in the Annexe to this Opinion.

20. By Sections 14(1)(i) and 23 of the Planning Act 2008, airport-related development is a "nationally significant infrastructure project" ("NSIP") only if the development is within the description within Section 23.

21. In the instant case, the proposed development is clearly airport-related development. It comprises and includes the construction, extension or alteration of a building at the airport (see

subsection (6)). It therefore potentially falls within the parameters of Section 23(1)(b). This is dependent upon the criteria within subsection (4) applying.

22. These criteria in subsection (4) only apply if the alteration is expected to have the effect specified in subsection (5). As the number of air transport movements of cargo aircraft is not expected to increase significantly and certainly well below 10,000 movements per year, subsection (5)(b) is not applicable. There has been no dispute as to this. The only question that therefore arises is whether the proposal comes within subsections (4)(b) and (5)(a). There is no dispute that the proposed works come within the definition of "alteration" within subsection (6)(b).

23. As a rider, it is relevant to note that a proposal which would result in increased capacity could fall potentially within Section 23(1)(c) and not within subsection (1)(b). Subsection (1)(c) relates to an increase in the *permitted* use of an airport in a case within subsection (7), namely an increase within subsection (8) which is one, here, (a) of at least 10 million per year in the number of passengers for whom the Airport is permitted to provide air passenger services. This is in turn defined in subsection (9) as "services for the carriage by air of passengers". "Permitted" means permitted by planning permission or development consent.

24. The focus of Councillor Thake's letter and representations has been upon the word "*capable*" in Section 23(5)(a), namely:

> *"(5) The effect is –*
> *(a) To increase by at least 10 million per year the number of passengers for whom the airport is **capable** of providing air passenger transport services."*

It is to be noted that the word "capable" qualifies the words "providing air passenger services" and not the word "increase". The focus should, however, not solely or primarily be upon the word "capable" in subsection (5), but also and in particular upon the word "*expected*" found

within subsection (4)(b). This is the first criterion or test to apply. It is also important to note that the subsection has an exclusory phrase applied, by use of the words "*only if*" in subsection (4). Bringing these points together, the gateway test in subsection (4) is as follows:

> *"(4) Alteration of an airport is within this subsection* ***only if*** *–*
>
> *(b)The alteration is* ***expected*** *to have the effect specified in subsection (5)."*

A gateway test, if not passed, precludes any further consideration of the matter.

25. In other words, putting the criteria together, the question to be asked is whether the proposed alteration to the airport is *expected* to result in an increase of at least 10 mppa, for whom the airport is capable of providing air passenger transport services. If the proposed airport development is not *expected* to result in at least a 10mppa increase, the test is failed, or if the airport is not capable of providing air transport services for at least a 10 mppa increase, the test is also failed. In either case, the development is not NSIP.

Discussion

26. There is no doubt that whether or not a development is *expected* to have an increase of 10 mppa is a matter of judgment for the decision maker, whose decision would be subject to review on *Wednesbury* grounds. If a matter of mixed fact and law, such as when a development is for legitimate planning reasons to be regulated by the imposition of a cap imposed by way of planning condition or s106 obligation, the decision maker's judgment may be limited accordingly. Secondly, whether or not the airport is "capable of providing air passenger transport services for such an increase" is again a matter of judgment which may be based upon mixed fact and law for the same reason.

27. As for matters of judgment such as this, see for example *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408 (Laws, L.J.; Dyson, L.J.; Carnwath, L.J.). This was a case

concerning whether EIA (Environmental Impact Assessment) was required. It was held that such an assessment would only have been needed under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 Reg.4(2) if the proposed development was *likely to have* significant effects on the environment, and that the likelihood of significant effects was properly to be determined by the local planning authority, whose decision would be subject to review on *Wednesbury* grounds. The Appellant Claimant contended that there was uncertainty over the development's impact on particular wildlife, so that the local authority could not lawfully have concluded that there were not likely to be significant impacts and therefore no need for an assessment. The Court of Appeal (it is to be noted that two of whose members in this case now sit in the Supreme Court) held that this type of decision involved an exercise of judgment or opinion and it was made clear by the Court that it did not require that all uncertainties had to be resolved or that a comprehensive assessment had to be carried out before a conclusion was reached that an environmental impact assessment was not necessary.

28. The parallels of the judgment in the *Mansfield* case to the tests to apply in the instant case concerning s23 of the Planning Act 2008 are apparent. The test in *Mansfield* and under the EIA Regs is whether the development is *likely to have* a specified effect; the test under s23 of the Planning Act is whether the development is *expected to have* a specified effect. The approach in law is the same. The case also answers one of the other points raised by Councillor Thake, namely that there is no requirement for all uncertainties to be resolved or for comprehensive assessment to be carried out before the decision is able properly to be made that the increase in throughput is not expected to be in excess of the threshold of 10mppa.

29. The expert consultant advice is that the current maximum throughput is 12mppa. There is no good reason on the evidence before me why this could not be taken by the Local Planning Authority or Secretary of State as the base figure from which to consider the increase for the

purposes of s23 of the Planning Act 2008. A current worst case scenario of existing throughput or capacity is that which has been observed and is found to exist in practice, namely a current throughput of 9.6 mppa, which was the 2012 actual figure.

30. The short answer to the matter before me is, however, that if the increase as a result of the proposed development will in any event be capped by planning condition limiting the increase from the existing throughput to less than a 10mppa increase, then the conclusion must inevitably be that the proposed development is not NSIP.

31. If the increase is limited to or capped at 18 mppa by planning condition, the proposed development necessarily cannot either be *expected* to have an increase of at least 10 mppa from the current figure (the s23(4) test), nor, assuming the s23 (5) test to be applicable, one which is *capable* lawfully of being provided.

32. On the basis of judgment and increase from the base figure, whether the judgment is based on the Borough Council's expert consultant's opinion that the increase would be from a base figure of 12 mppa to a maximum of 18-20 mppa with a mean maximum of 19mppa, or from the current observed throughput figure of 9.6 mppa (2012) or 10.2 mppa (2008) to a cap of 18mppa, the increase is less than 10mppa.

33. There must be considered to be interpolated within the s23 criteria the assumption that the 'at least 10mppa' increase must be lawful. The whole purpose of a planning condition of this sort is to limit what otherwise might be capable of being provided and ensure that it is not provided. Therefore in those circumstances, not only does the condition control and limit the traffic, noise and other environmental and planning effects of the development, the condition also has the effect of ensuring that the proposed airport-related development is not NSIP.

34. In addition to the planning control by way of condition ensuring that the increase is limited to less than 10mppa, which is a full answer to the question in any event, the Borough Council's expert aviation consultant's advice concerning current and future capacity reaches the same conclusion, corroborated by the Applicant LLAOL. It is open to the Local Planning Authority to rely upon such reports and advice if it wishes to do so.

Exercise by Secretary of State for Transport of Powers under Planning Act 2008

35. Councillor Thake in his representations both to the Council and the Secretary of State for Transport dated 18th November 2008 urges the Secretary of State to require further information concerning the proposed increase in capacity. This is on the basis that such further information should be provided to the Secretary of State under Sections 35 and 35ZA of the Planning Act 2008 (the replacement sections of the former s35 since April 2013) prior to deciding whether or not to exercise his powers to direct that the application be treated as an application for an order granting development consent and for which development consent is required.

36. It is open to the Secretary of State to consider exercising such powers, but there is no point or purpose in his doing so as there is only one conclusion that could reasonably be reached, namely that the increase is expected to be less than 10mppa. Such a decision by the Secretary of State would need justification and reasons which are not immediately apparent. However, this is a matter for the Secretary of State and not the Borough Council at this stage.

JOHN STEEL Q.C.

27th November 2013

Thirty Nine Essex Street
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Annexe

Planning Act 2008 c. 29
Part 3 NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS
General

14 Nationally significant infrastructure projects: general

(1) In this Act "nationally significant infrastructure project" means a project which consists of any of the following—

…

(i) airport-related development;

…

23 Airports

(1) Airport-related development is within section 14(1)(i) only if the development is—

(a) the construction of an airport in a case within subsection (2),

(b) the alteration of an airport in a case within subsection (4), or

(c) an increase in the permitted use of an airport in a case within subsection (7).

(2) Construction of an airport is within this subsection only if (when constructed) the airport—

(a) will be in England or in English waters, and

(b) is expected to be capable of providing services which meet the requirements of subsection (3).

(3) Services meet the requirements of this subsection if they are—

(a) air passenger transport services for at least 10 million passengers per year, or

(b) air cargo transport services for at least 10,000 air transport movements of cargo aircraft per year.

(4) Alteration of an airport is within this subsection only if—

(a) the airport is in England or in English waters, and

(b) the alteration is expected to have the effect specified in subsection (5).

(5) The effect is—

(a) to increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services, or

(b) to increase by at least 10,000 per year the number of air transport movements of cargo aircraft for which the airport is capable of providing air cargo transport services.

(6) "Alteration", in relation to an airport, includes the construction, extension or alteration of—

(a) a runway at the airport,

(b) a building at the airport, or

(c) a radar or radio mast, antenna or other apparatus at the airport.

(7) An increase in the permitted use of an airport is within this subsection only if—

(a) the airport is in England or in English waters, and

(b) the increase is within subsection (8).

(8) An increase is within this subsection if—

(a) it is an increase of at least 10 million per year in the number of passengers for whom the airport is permitted to provide air passenger transport services, or

(b) it is an increase of at least 10,000 per year in the number of air transport movements of cargo aircraft for which the airport is permitted to provide air cargo transport services.

(9) In this section—

"air cargo transport services" means services for the carriage by air of cargo;

"air passenger transport services" means services for the carriage by air of passengers;

"air transport movement" means a landing or take-off of an aircraft;

"cargo" includes mail;

"cargo aircraft" means an aircraft which is—

(a) designed to transport cargo but not passengers, and

(b) engaged in the transport of cargo on commercial terms;

"English waters" means waters adjacent to England up to the seaward limits of the territorial sea;

"permitted" means permitted by planning permission or development consent.

31 When development consent is required

Consent under this Act ("development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project.

32 Meaning of "development"

(1) In this Act (except in Part 11) "development" has the same meaning as it has in TCPA 1990.

This is subject to subsections (2) and (3).

(2) For the purposes of this Act (except Part 11)—

…

(c) an increase in the permitted use of an airport is treated as a material change in the use of the airport.

33 Effect of requirement for development consent on other consent regimes

(1) To the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it—

(a) planning permission;

…

35 Directions in relation to projects of national significance

(1) The Secretary of State may give a direction for development to be treated as development for which development consent is required.

This is subject to the following provisions of this section and section 35ZA.

(2) The Secretary of State may give a direction under subsection (1) only if—

(a) the development is or forms part of—

(i) a project (or proposed project) in the field of energy, transport, water, waste water or waste, or

(ii) a business or commercial project (or proposed project) of a prescribed description,

(b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and

(c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with—

(i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;

(ii) in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii).

(3) The areas are—

(a) England or waters adjacent to England up to the seaward limits of the territorial sea;

(b) in the case of a project for the carrying out of works in the field of energy, a Renewable Energy Zone, except any part of a Renewable Energy Zone in relation to which the Scottish Ministers have functions.

(4) The Secretary of State may give a direction under subsection (1) only with the consent of the Mayor of London if—

(a) all or part of the development is or will be in Greater London, and

(b) the development is or forms part of a business or commercial project (or proposed project) of a description prescribed under subsection (2)(a)(ii).

(5) Regulations under subsection (2)(a)(ii) may not prescribe a description of project which includes the construction of one or more dwellings.

35ZA Directions under sections 35: procedural matters

(1) The power in section 35(1) to give a direction in a case within section 35(2)(a)(i) (projects in the field of energy etc) is exercisable only in response to a qualifying request if no application for a consent or authorisation mentioned in section 33(1) or (2) has been made in relation to the development to which the request relates.

(2) The power in section 35(1) to give a direction in a case within section 35(2)(a)(ii) (business or commercial projects of prescribed description) is exercisable only in response to a qualifying request made by one or more of the following—

(a) a person who proposes to carry out any of the development to which the request relates;

(b) a person who has applied, or proposes to apply, for a consent or authorisation mentioned in section 33(1) or (2) in relation to any of that development;

(c) a person who, if a direction under section 35(1) is given in relation to that development, proposes to apply for an order granting development consent for any of that development.

(3) If the Secretary of State gives a direction under section 35(1) in relation to development, the Secretary of State may—

(a) if an application for a consent or authorisation mentioned in section 33(1) or (2) has been made in relation to the development, direct the application to be treated as an application for an order granting development consent;

(b) if a person proposes to make an application for such a consent or authorisation in relation to the development, direct the proposed application to be treated as a proposed application for development consent.

(4) A direction under section 35(1), or subsection (3) of this section, may be given so as to apply for specified purposes or generally.

(5) A direction under subsection (3) may provide for specified provisions of or made under this or any other Act—

(a) to have effect in relation to the application, or proposed application, with any specified modifications, or

(b) to be treated as having been complied with in relation to the application or proposed application.

(6) If the Secretary of State gives a direction under subsection (3), the relevant authority must refer the application, or proposed application, to the Secretary of State instead of dealing with it themselves.

(7) If the Secretary of State is considering whether to give a direction under subsection (3), the Secretary of State may direct the relevant authority to take no further action in relation to the application, or proposed application, until the Secretary of State has decided whether to give the direction.

(8) The Secretary of State may require an authority within subsection (9) to provide any information required by the Secretary of State for the purpose of enabling the Secretary of State to decide—

(a) whether to give a direction under section 35(1), and

(b) the terms in which such a direction should be given.

(9) An authority is within this subsection if an application for a consent or authorisation mentioned in section 33(1) or (2) in relation to the development has been, or may be, made to it.

(10) If the Secretary of State decides to give a direction under section 35(1), the Secretary of State must give reasons for the decision.

(11) In this section—

"qualifying request" means a written request, for a direction under section 35(1) or subsection (3) of this section, that—

(a) specifies the development to which it relates, and

(b) explains why the conditions in section 35(2)(a) and (b) are met in relation to the development;

"relevant authority"—

(a) in relation to an application for a consent or authorisation mentioned in section 33(1) or (2) that has been made, means the authority to which the application was made, and

(b) in relation to such an application that a person proposes to make, means the authority to which the person proposes to make the application.

[Ss 35 and 35ZA substituted for s.35 by Growth and Infrastructure Act 2013 c. 27 s.26(2) (April 25, 2013)]

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NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECT

PLANNING ACT 2008

OPINION

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