

Report No.
CSD21048

London Borough of Bromley

PART 1

Decision Maker: **EXECUTIVE**

Date: **26 May 2021**

Decision Type: Non-Urgent Executive Key

Title: **Biggin Hill Airport Limited (BHAL) Request To Vary The User Clause Of The Airport Lease Between The Council And BHAL.**

Contact Officer: Michael Watkins, Assistant Director Strategic Property

Chief Officer: Director of Housing, Planning, Property and Regeneration

Ward: All Wards

1. Reason for report: BHAL have formally requested their intention to seek to modify the definition of “Permitted User” in clause 1.8 of the Lease. They have requested that the Council approves the modification, but should the Council not decide to approve it then pursuant to their rights under section 84 of the Law of Property Act 1925 (“LPA 1925”) they will apply to the Upper Tribunal (Lands Chamber) to determine such a change.
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2. **RECOMMENDATION(S)**

Members are invited to provide their views as to the options contained within the Report.

Impact on Vulnerable Adults and Children

1. Summary of Impact: N/A
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Corporate Policy

1. Policy Status: Existing Policy
2. BBB Priority: Excellent Council

Financial

1. Cost of proposal:
 2. Ongoing costs:
 3. Budget head/performance centre:
 4. Total current budget for this head:
 5. Source of funding:
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Personnel

1. Number of staff (current and additional): Not applicable
 2. If from existing staff resources, number of staff hours: Not applicable
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Legal

1. Legal Requirement: Statutory Requirement
 2. Call-in: Applicable
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Procurement

1. Summary of Procurement Implications: Not applicable
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Not Applicable
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? As this is a Borough Asset individual Wards have not been consulted, however this report was circulated to all Councillors prior to publication.
2. Summary of Ward Councillors comments: N/A

Background

- 3.1 Biggin Hill Airport Ltd (BHAL) hold a Lease granted by the Council for a term of 125 years commencing in 1994 for Biggin Hill Airport. The Council owns the freehold of the Airport.
- 3.2 BHAL have formally requested their intention to seek to modify the definition of “Permitted User” in clause 1.8 of the Lease. They have requested that the Council approves the modification, but should the Council not decide to approve it then pursuant to their rights under section 84 of the Law of Property Act 1925 (“LPA 1925”) they will apply to the Upper Tribunal (Lands Chamber) to determine such a change.
- 3.3 The letter from the Airport’s solicitors detailing the request is attached at Appendix 1 of the Part 2 Report of the same title together with a subsequent letter dated 14 April 2021 at Appendix 2 of the aforementioned Part 2 Report. The letter details BHAL’s legal justification for their proposal to which the Council has obtained Counsel’s opinion on. The letter received on 14 April 2021 states that should the Council not agree to their proposal by 2 June 2021 then they will prepare their application to the Upper Tribunal (Lands Chamber) to determine such a change.
- 3.4 If such an application were made the Council, as Landlord, would have the opportunity to make representations to the Tribunal to contest BHAL’s application.
- 3.5 Clause 5.9:1 of the Lease includes a covenant by BHAL not use the Airport otherwise than for the Permitted User. The definition of Permitted User in clause 1.8 of the Lease is as follows:
- 3.7 *“Airport providing facilities for business aviation flight training and private flying and other airport and aviation related uses (including one air fair or one air display in each year of the Term or such greater number as may have been previously approved in writing by the Landlord (such approval not to be unreasonably withheld))”*
- 3.8 Under clause 5.21 of the Lease, BHAL also covenanted to observe and perform the “Operating Criteria” in Schedule 3 to the Lease or such variations or amendments thereto as may from time to time be agreed by the Council (such agreement not to be unreasonably withheld).
- 3.9 BHAL have stated that they are not seeking to any variation to the Operating Criteria. These criteria limit the types of aircraft that may use the Airport and the total number of flight movements to 125,000 annually (in reality, the number of movements is much lower). They also permit a scheduled BHAL to operate a scheduled passenger service to France.
- 3.10 Members will be aware, the Operating Criteria were substantially strengthened and expanded in 2016 when BHAL agreed to comply with a Noise Action Plan (“NAP”) to facilitate extended operating hours at the Airport (with an automatic review mechanism in the event that the total number of movements exceeded 50,000 in the first five years). A separate report will be prepared regarding BHAL’s proposals to review the NAP and to review its performance over the last five years.
- 3.11 BHAL has requested that Council agree to modify the definition of Permitted User in the Lease as follows:
- 3.12 *“Airport providing facilities for business aviation flight training non-scheduled commercial flights and private flying including by accepting individual farepaying passengers and other airport and aviation related uses (including one air fair or one air display in each year of the Term or such greater number as may have been previously approved in writing by the Landlord (such approval not to be unreasonably withheld))”*.
- 3.13 BHAL have stated that the proposed modification is intended to allow for non-scheduled flights for the carriage of individually ticketed or individually way-billed traffic, in addition to the different types of business and general aviation flights currently operating from the Airport.

BHAL Rationale

- 3.14 The following paragraphs (3.15 to 3.31) are in essence the rationale behind BHAL's request as stated by the Airport.
- 3.15 BHAL argue that, the Lease terms were agreed some 27 years ago. Since then the aviation industry has continuously changed and developed in the intervening time but the Lease has remained static. This is now creating a substantial drag on BHAL's business at the Airport, to the detriment not only of BHAL as leaseholder but also to the Council as freeholder benefiting from turnover based rents and profit-sharing provisions under the Lease.
- 3.16 The restricted scope of the Permitted User definition was considered by the Court of Appeal in 2002 in the case of Biggin Hill Airport Ltd v London Borough of Bromley. Giving judgment in that case, Lady Justice Arden confirmed that "business aviation" in this context was limited to the operation of aircraft owned or chartered by a company or other business, and undertaken for business purposes, provided individual fare-paying passengers were not accepted. It also included air taxis and helicopters.
- 3.17 The Court did not decide upon the meaning of "private flying". However, BHAL state that the Council maintains that this has a narrow meaning concerned only with flying which is for the pilot's own recreational purposes and such flights must not involve the carriage of paying passengers.
- 3.18 The restrictions in the Lease around the types of flight permitted at the Airport have prevented BHAL from being able to accommodate any kind of non-scheduled flights from the Airport that nevertheless involve an element of fare paying. This has led to the exclusion of new and emerging non-scheduled passenger flying concepts like ridesharing and private members' clubs such as those operated by Air Uber, Club Air and Surf Air.
- 3.19 The non-scheduled sector of aviation is a growing one undergoing much development and innovation. It is generally accepted that it will become an important connectivity benefit in the aviation industry going forward. The sector is important for a general aviation airport such as the Airport, which has relatively limited capacity in terms of airport infrastructure and highway/train access as compared with major public airports.
- 3.20 Currently, the Airport accommodates both fixed wing and rotary flights that comply with the definition of Permitted User broadly as follows:
- (a) Business aviation: The Airport has commercial flights available for both hire or charter, provided by a wide range of small to medium-sized companies based all over the world, together with corporate or privately owned aircraft registered in many countries from around the world.
- (b) Private flights: Private flying currently takes place when whole aircraft are owned or chartered by companies, individuals or groups of individuals. Flights can range from small four seater aircraft to e.g. the much more substantial 75 seat aircraft owned by Formula 1. Private charters can include wedding parties, product launches, football teams and so on.
- (c) Flying Training: The Airport has much reduced flying training because the growing fast jet traffic does not mix well with slower learner aircraft. However, some flying training schools operate and flying training takes place in all sizes of aircraft in order for pilots to maintain their licenses.
- 3.21 These uses have also in the past included an element of fare paying passenger flights in the form of a scheduled passenger service to France expressly permitted by paragraph (c)(ii) of the Operating Criteria).

- 3.22 In BHAL's view, the natural next step in the development of business at the Airport is to accommodate non-scheduled flights with individual fare paying passengers. The Airport is very well located in South East London with a very substantial and wealthy catchment area within one hour of travel. It is, therefore, ideally suited for such high value, low volume aviation business.
- 3.23 For the consumer, the range and flexibility of the non-scheduled aviation sector is, in BHAL's view, invaluable. For some users it is a one-off demand, while others are more frequent users. The permutations are potentially limitless and the use of this wide range of aircraft helps to drive the national and economy by improving flexibility and connectivity.
- 3.24 BHAL state that local residents who may have concerns about potential noise disturbance, frequency of flights and possible congestion on local roads and services should be reassured by the fact that all business at the Airport remains strictly controlled by the Operating Criteria and NAP. The number of flight movements will not be significantly impacted as a result of non-scheduled flights (and may even reduce as a result of private passengers sharing flights). Residents are not, BHAL would submit, in the least concerned whether any passenger on an aircraft has paid for their own seat.
- 3.25 BHAL does not wish to operate high volume scheduled passenger flights from the Airport. BHAL have stated that the Airport is not remotely suited to such business – it does not have large car parks, any retail or a significant food and beverage offering. It would not be feasible to operate scheduled public flights from the Airport with high volumes of passengers, even if it's client base were interested in such business - which it is not.
- 3.26 BHAL have also highlighted the decision of judge, Nicholas Strauss QC, in the first instance decision of Biggin Hill Airport Ltd v London Borough of Bromley in 2000:
- “...road and rail connections to [the Airport] are not particularly good. It has some 465 acres of operational land, which is relatively small, and its main runway at 1,800 metres is shorter than all the others [in London] except for London City and Southend. The runway and taxiways of are of light construction with a low aircraft bearing strength, sufficient only for small aircraft... There is no question... of Biggin Hill attracting mass holiday traffic. This is both because of the size and light construction of the runway, and because of operating restrictions in the lease... It is much more suitable for “niche” scheduled services for passengers prepared to pay relatively high fares”.
- 3.27 They further state that by contrast, the Airport can be (and has been) used for almost every other type of aviation. Unlike a high volume airport which broadly offers just one type of air transport service, i.e. scheduled public transport flights, and often a limited choice of operators, the Airport accommodates a wide range of owners, operators and businesses.
- 3.28 BHAL considers that the proposed modification set out above, would be beneficial to the Council, as well as the local economy for the following reasons:
- 3.29 First, and most immediately, the Council would directly benefit from any increased revenue at the Airport through the turnover rent payable under the Lease. This is calculated as the amount by which 3% of gross turnover exceeds the base rent payable under the Lease from time to time. Such gross turnover expressly includes “All amounts receivable... whether directly or indirectly of or in connection with the... landing or take-off of aircraft passengers” and “All fees charges and/or surcharges of or in connection with passengers utilising (in whatever way) the Premises including all passengers and passenger service charges”.
- 3.30 Secondly, the rent payable by BHAL under the Lease is the higher of the above turnover rent and a profit share rent calculated at the amount by which 12.5% of net profits before tax exceed

the base rent. For the purposes of calculating such net profits before tax, BHAL's turnover includes the express amounts, fees, charges and surcharges mentioned above.

- 3.31 More generally, opening up the Airport to non-scheduled flights with individual fare-paying passengers would provide an important opportunity to improve the financial viability of the Airport. This is necessary in order to justify significant further investment into the Airport by BHAL, including, for example, significant improvement works to the runway at the Airport, and attract more companies and aircraft to be based at the Airport. The greater flexibility that would be afforded by the proposed modification would, in BHAL's opinion, also increase the opportunities for external investment at the Airport, which would be likely to result in additional opportunities for employment in the local area.

Section 84 of the LPA 1925

- 3.32 Should Members decide not to approve the modification to the user clause as put forward by BHAL, then BHAL is entitled to apply to the Upper Tribunal (Lands Chamber), pursuant to its rights under section 84 of the LPA 1925.
- 3.33 In particular, section 84(12) of the LPA 1925 provides that where a lease is for a term of more than 40 years and the first 25 years of the term have expired, the leaseholder may make an application to the Upper Tribunal (Lands Chamber) wholly or partially to modify or discharge a restrictive covenant in the lease.
- 3.34 As the Lease is for a term of 125 years and more than 26 years of the term have expired, BHAL is now entitled to make an application under section 84 of the LPA 1925.
- 3.35 BHAL would look to make an application under section 84 of the LPA 1925 to the Upper Tribunal for a modification that would maximise its flexibility and help to avoid further applications having to be made in the future. The modified definition of Permitted User that BHAL would seek is as follows:
- 3.36 *“Airport providing facilities for business aviation scheduled and non-scheduled commercial flights flight training and private flying including by accepting individual fare-paying passengers and other airport and aviation related uses (including one air fair or one air display in each year of the Term or such greater number as may have been previously approved in writing by the Landlord (such approval not to be unreasonably withheld))”.*
- 3.37 As Members will observe this proposed modification goes further than that requested by BHAL in that it would permit scheduled as well as non-scheduled flights with individual fare-paying passengers.
- 3.38 Should BHAL be required to make an application to the Upper Tribunal to modify the definition of Permitted User in the Lease then it will do so on the following statutory grounds:
- (a) The continued existence of the definition of Permitted User in the Lease in its current form would impede a reasonable user of the Airport (section 84(1)(aa) of the LPA 1925). In order to establish this ground, BHAL must also show that the restriction impeding that user does not secure any practical benefits of substantial value or advantage to the persons entitled to the benefit of the restriction (or it is contrary to the public interest); and
- (b) The proposed modification of the definition of Permitted User in the Lease would not injure the Council as the persons entitled to the benefit of the restriction (section 84(1)(c) of the LPA 1925).

Counsels Opinion

- 3.39 The Council has instructed Counsel for a view on the merits of the proposition submitted by BHAL.
- 3.40 Counsel's opinion is attached at Appendix 2 of the Part 2 Report of the same title as the request and potential legal response to it is considered commercially confidential at this stage.
- 3.41 However, Counsel of the opinion that there are good grounds for taking the view that there is a strong case to preclude BHAL from obtaining any modification to the Permitted User Clause upon an application to the Upper Tribunal.
- 3.42 Members will appreciate that BHAL will have taken a view that they also have a strong argument in pursuing this matter.

Local Opinion

- 3.43 Whilst BHAL have put forward their rationale for a change in the user clause, Members will no doubt be aware that the operation of the airport is of great concern to many residents in the Borough, especially in those wards where air traffic is routed.
- 3.44 Since July 2020, the Airport Monitoring Officer has corresponded directly with around 30 Bromley residents about matters concerning Biggin Hill Airport. Most complainants take their enquiries directly to the Airport without contacting Bromley Council. Of the 30 residents who have been in contact, three have voiced their concerns as representatives of larger residents' groups covering either specific areas of the borough or residents specifically concerned with issues surrounding the airport.
- 3.45 Flightpath Watch is a local community group who monitor the commitments by BHAL and have raised on numerous occasions their concerns as to the airport's performance against such commitments. They are of the opinion that the Council's earlier decision to increase operating hours at the airport has made residents' lives more stressful and made their properties less desirable.
- 3.46 For Members benefit a brief overview of the concerns raised by residents is provided below so as to give a balanced view of the current situation.
- 3.47 Local residents who have complained to the Council argue that the 50% reduction in the agreed noise footprints by the Airport as part of the NAP was misunderstood - everybody took that to mean a 50% reduction in noise generically and that the noise-abatement routes contemplated in the Lease and represented in maps that have been in the public domain since the Lease was signed and on the Airport's website when it was built;
- 3.48 They further cite that the duty of the Airport to issue warnings, impose sanctions and even ban offenders, as contemplated in both the Lease and the NAP is questionable and that the enforcement by the Airport of the undertaking by pilots of light aircraft and most importantly helicopters to adhere to the Code of Conduct contained in Appendix 3 of the MIL is not taking place frequently enough to have the desired effect.

Options

- 3.49 Members are invited as to provide their views as to the following options:
- 1) To agree to the proposal from BHAL to amend the user clause.
 - 2) To not agree to the proposal from BHAL to amend the user clause and should BHAL then decide to apply to the Upper Tribunal (Lands Chamber) to determine such a change then to contest such an application.

4.0 IMPACT ON VULNERABLE ADULTS AND CHILDREN

4.1 There is not considered to be an impact on Vulnerable Adults and Children as a consequence of this decision.

4 POLICY IMPLICATIONS

5.1 It is essential that the Council manages its assets so as to meet the Council's aims and objectives.

LEGAL IMPLICATIONS

6.1 The legal implications are detailed above are expanded further in the Part 2 Report of the same title.

Non-Applicable Sections:	HR, Procurement and Finance
Background Documents: (Access via Contact Officer)	