

Report No.

London Borough of Bromley

PART ONE - PUBLIC

Decision Maker: EXECUTIVE

Date: 30th November 2022

Decision Type: Non-Urgent Executive Key Non-Key

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

Contact Officer: Matthew Amer, Airport Monitoring Officer
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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.

2. **RECOMMENDATION(S)**

2.1 **To refuse BHAL's application to amend the Permitted User Clause in the Lease.**

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 Vibrant, Thriving Town Centres Regeneration
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Financial

1. Cost of proposal: Not Applicable
 2. Ongoing costs: Not Applicable
 3. Budget head/performance centre: N/A
 4. Total current budget for this head: £N/A
 5. Source of funding: N/A
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Personnel

1. Number of staff (current and additional): N/A
 2. If from existing staff resources, number of staff hours: N/A
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Legal

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

1. Summary of Procurement Implications: N/A
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): N/A
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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 has been circulated to all Councillors.
2. Summary of Ward Councillors comments: N/A

3. COMMENTARY

Table of Attachments

Attachment Number	Title
1	Letter from BHAL dated 24 October 2022
2	Letter from Biggin Hill Airport Consultative Committee dated 20 July 2022

Background

- 3.1 Biggin Hill Airport Ltd (BHAL) was granted a lease made between the Mayor and Burgesses of the London Borough of Bromley (1) and Biggin Hill Airport Limited (2) for a term of 125 years at a turnover rent (“ the Lease”). 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, or “fail to properly engage with 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 Members may recall a similar request was made in May 2021 with the application being refused at the Executive Committee on 26 May 2021.
- 3.4 This application does differ from the previous application in its wording and the specificity of its request, so bears consideration by Members.
- 3.5 This report should be read in conjunction with Report CSD21048, which accompanied the initial application from BHAL which was brought to the Executive Committee in May 2021 and gives further rational behind the request.
- 3.6 This application differs from the May 2021 application in that the requested alteration is more specific. It no longer includes the requirement to accept fare-paying passengers, as in the previous application, but now requests that Council agree to modify the definition of Permitted User in the Lease as follows:

Airport providing facilities for:

(a) business aviation;

(b) flight training;

(c) private flying; and

(d) other air transport operations including passenger services operated by aircraft carrying no more than 19 passengers, provided that seats are only made available to individuals who by reason of club membership, shared ownership or some other private arrangement with the owner or operator of the aircraft are able to secure a seat on such a flight

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)).

- 3.7 The current lease wording reads: “*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 The key difference in BHAL’s proposal, in addition to clarification by way of bullet points, is the addition of paragraph (d).
- 3.9 The rationale for BHAL’s request is laid out in BHAL’s letter dated 24 October 2022, attached to this report marked as **Attachment 1**. BHAL also refer to Executive Report CSD21048. The alteration to the initial request is the specificity of the newly suggested paragraph (d) of the User Clause.
- 3.10 In their letter dated 24 October 2022, BHAL state that this more specific change comes as a direct response to the Council’s concerns about the previous wording, and no longer refers to fare-paying passengers.

Challenges with the application

- 3.11 BHAL states in its letter of 24 October 2022: “*The proposed modification would not involve a greatly significant increase in the number of air movements, which would still be well within the numbers permitted by the Operating Criteria and well within the agreed noise limitations set down in the NAP.*”
- 3.12 The term “greatly significant” is not quantified or quantifiable as BHAL has not submitted any forecast of how many additional movements this alteration to the lease could bring to the airport. It is not known how much appetite there is for such shared flights from Biggin Hill Airport that might allow an estimate of the number of additional flights this alteration might enable.
- 3.13 As the lease sets a cap of 125,000 movements per year, and BHAL predicted 54,750 movements per year in their recent NAP Review 2015-2020, it is probably fair to state that any increase would still be within the numbers permitted by the Operating Criteria. However, many Bromley residents living in wards affected by the flight of aircraft using Biggin Hill Airport have expressed their concern that even the move towards 54,750 would cause serious disruption to their lives without progressing further towards the 125,000 movement limit of the lease signed in 1994.
- 3.14 Without a prediction for the number of flights an alteration to the User Clause might provoke, it is not possible to quantify how this would affect adherence to the noise limitations included within the Noise Action Plan. While commitment to maintain the noise envelopes previously agreed is admirable, it does not take into account that any increase in individual flights has the potential to increase the disruption caused to residents of the borough already suffering from overflight.
- 3.15 While the NAP does impose a noise envelope on the amount of noise that can be created by the airport, and further noise could be created by aircraft using Biggin Hill Airport before the areas of the noise envelope was exceeded, this increase in noise would still likely have a detrimental effect on those residents who are already regularly disrupted by services to and from the airport.
- 3.16 The concerned outlined needs to be considered in the context that both the Council and residents wish to see improvements on the current NAP as part of the review process, which is yet to be concluded. These issues of further improvements have not been resolved and its significance cannot be underestimated.
- 3.17 In addition to a lack of quantifiable assessment of movement numbers, the application is made without any environmental impact assessment or equality impact assessment, which would have aided well-informed decision making.

- 3.18 When the Court of Appeal made its ruling on the Permitted User Clause in 2002, LBB's concern was to protect Bromley residents from unfettered consumer travel taking place at Biggin Hill Airport. Biggin Hill Airport was considered an airport for general aviation and business travel, not for 'public' use. The proposed alteration to the User Clause moves the Airport away from the business-to-business model supported by that ruling and towards a 'consumer' airport.
- 3.19 If it could be proven that any such "club" created for the purpose of flight sharing to and from Biggin Hill Airport was for the sole purpose of serving business customers flying for the reason of business, this may be seen as fitting the remit of a business-to-business transaction. Such a club system would allow transactions to be identifiable and traceable through business accounts to ensure adherence to the principal. However, no such consideration is included within the current proposal, which is open to more commercial operations not fitting with the previous ruling on the Permitted User Clause.
- 3.20 By way of example, in making the application BHAL have presented the example of Aero Technologies, which offers flights on 16-seat aircraft flying from Farnborough Airport. They describe this operation as "semi-private".
- 3.21 It does appear that it is possible for anyone to book a ticket on an Aero flight from Farnborough. Such flights will be flown provided more than one person reserves a seat for a specific date and time. Rather than being part of a club, it appears the trigger for such a flight is simply whether enough tickets are sold.
- 3.22 If the nature of business flight operations is to support businesses, rather than to create commercial opportunities, the alteration to the Permitted User Clause opens the door for a move into this more commercial arena which is at odds with the core business purpose as dictated by the courts.
- 3.23 There is much concern about the alteration of the User Clause from residents within the borough. This was expressed in the form of emails received by both Members and Officers, both when the original application was entered in May 2021 and during the period of the recent Noise Action Plan review. In recent weeks the Airport Monitoring Officer has received more than 30 emails from residents voicing their support of retaining the Permitted User Clause in its current form. Members have also reported receiving many such emails.
- 3.24 The Biggin Hill Airport Consultative Committee, which does include representatives from a number of community groups and residents' associations, has been consulted about the proposal and supplied the Council with a letter stating its support (**Attachment 2**).
- 3.25 The suggestion of booking tickets on shared flights does have the possibility of creating a way for customers to share flights rather than chartering individual aircraft, and if so, it may be possible to reduce the number of flights to and from Biggin Hill Airport in total. However, the shared flights may also be in larger aircraft that may create greater individual moments of disruption.
- 3.26 BHAL's proposed alteration includes the phrase "*passenger services operated by aircraft carrying no more than 19 passengers*". While this dictates the number of passengers on the aircraft, it does not actually limit the size of aircraft; 19 passengers could travel on an aircraft with 100 seats. The suggested wording does not exclude such practices and could encourage greater flight by larger aircraft that may cause greater disruption to the local residents.
- 3.27 Similarly, the statement "*seats are only made available to individuals who by reason of club membership, shared ownership or some other private arrangement with the owner or operator of the aircraft are able to secure a seat on such a flight*" contains enough ambiguity so as to allow for the possibility of multiple ways of purchasing tickets for flights with minimal restriction.
- 3.28 In its previous application, among the rationale for altering the Permitted User Clause, BHAL stated it was 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.

- 3.29 Without the alteration to the Permitted User Clause, BHAL appears to have gone from strength to strength, announcing the expansion of Bombardier and Castle Air operations at the Airport among other improvements and ongoing success. The alteration to the lease was not necessary to attract that impressive inward investment.
- 3.30 The Council has sought King's Counsel's advice on this matter, which is included in a Part 2 report.
- 3.31 Given the lack of supporting information necessary to assess the possible impact of this alteration to the Permitted User Clause and the ambiguity within the suggested wording of the alteration, officers would not recommend accepting the proposal at this time.

4. IMPACT ON VULNERABLE ADULTS AND CHILDREN

There is no impact to Vulnerable Adults and Children in respect of the services the Council delivers in this regard.

5. POLICY IMPLICATIONS

An Authority that manages its Assets well.

6. FINANCIAL IMPLICATIONS

Non Applicable

7. PERSONNEL IMPLICATIONS

Non Applicable

8. LEGAL IMPLICATIONS

- 8.1 The Council have sought external legal advice from leading Counsel, which advice is set out in part 2 of this report.
- 8.2 However, Counsel is 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.
- 8.3 These grounds include jurisdictional issues as well as substantive grounds for refusal. BHAL may well take a different view and seek determination from the Upper Tribunal. However, the Council should have strong grounds to resist such application.

Non-Applicable Sections:	Financial, Personnel, Procurement and Property
Background Documents: (Access via Contact Officer)	[Title of document and date]