

By email - Colin.Smith@bromley.gov.uk

London Borough of Bromley
Civic Centre
Stockwell Close
Bromley BR1 3UH

FAO Colin Smith, Leader of the Council

24th October 2022

Dear Councillor Smith



Biggin Hill Airport Limited
Passenger Terminal
Main Road
Biggin Hill
Bromley
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bigginhillairport.com

Biggin Hill Airport (the "Airport")

Lease dated 6 May 1994 and made between The Mayor and Burgesses of the London Borough of Bromley (1) and Biggin Hill Airport Limited (2) (the "Lease")

As you are aware, Biggin Hill Airport Limited ("BHAL"), is the leasehold owner of the Airport pursuant to the Lease. The London Borough of Bromley (the "Council") is the freehold owner and landlord entitled to the reversion in the Lease upon expiry in 2119.

Following your reply to my letter of 31st August 2022, you wrote back on 5th September 2022 and I will take up the matter from there.

In my letter, I requested that the Council engage in discussions concerning the proposed modification of the User covenant in the Lease. In the light of Members comments in previous discussions I thought it would be helpful for you to have a better understanding of the practical limitations of the airport that contribute to the overall business and strategy of the management, and for us to understand the reasons you have such opposition to anyone paying for their seats, and/or sharing costs on these air taxi services. We have signed, implemented and complied with our obligations in the NAP, which sets out the environmental controls and restraints on future growth. Our proposal to allow some passengers to pay for their seats would neither breach nor require amendment to those conditions. These matters need to be discussed and better understood if the airport asset is to work for all stakeholders. In your email response you said "*this is not a matter that can be dealt with informally. Therefore, if you wish to proceed then you will need to submit a formal request under the provisions of the Lease*".

I am disappointed that you, as our landlord, see no merit in engaging in informal discussions with your tenant prior to us submitting a formal application, but we will take the course you have chosen.

BHAL's application

Accordingly, please treat this letter as BHAL's formal application for the Council's agreement to modify the definition of "Permitted User" in clause 1.8 of the Lease. The proposed modified wording is the same as that set out in my earlier letter to you as follows:

"Airport providing facilities for:

- (a) business aviation;*
- (b) flight training; **and***
- (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))”.

The words in bold and underlined or struck through are those which BHAL is proposing to add or delete from the existing wording in the Lease (the only other change being to separate the clause out into sub-clauses (a) to (d) for the sake of clarity).

As should be immediately apparent, this is a substantially narrower request than the one previously made by way of the letter from our solicitors, Hogan Lovells, dated 5 March 2021 in that it refers only to specific types of flight, not fare-paying passengers more generally. We have taken this approach in order to address the Council's public comments about the previously proposed wording, even though we consider those concerns to have been largely unfounded for the reasons set out below.

Legal basis of BHAL's application

I do not propose in this letter to repeat the full legal basis and grounds for the Application, which are set out in detail in Hogan Lovells' letter dated 5 March 2021. However, by way of summary:

1. Section 84(12) of the Law of Property Act 1925 (“**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, as is the case with the Lease, the leaseholder may make an application to the Upper Tribunal (Lands Chamber) (the “**Tribunal**”) wholly or partially to modify or discharge a restrictive covenant in the lease.
2. Should BHAL make an application to the Tribunal to modify the definition of Permitted User in the Lease then it would do so on the grounds that:
 - (a) the current definition of Permitted User in the Lease impedes 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).
3. As I say, the above proposed modification would allow a narrower user than that requested by way of Hogan Lovells' letter dated 5 March 2021.
4. Accepting individual passengers onto flights on the basis of club membership, shared ownership or some other similar private scheme (whether or not those passengers pay for their seats and whether or not the flight operates to a regular timetable) would clearly be a reasonable user at the Airport. Aero Technologies, for example, already operates such “semi-private” flights on 16-seat charter aircraft from Farnborough airport, one of our main competitors. This is a similar airport to Biggin and is limited to similar aircraft types to those that operate at Biggin. I understand that it is a successful operation, and is similar to many

other commercial arrangements on Business and General Aviation aircraft, around the world, carrying very small groups of travellers, usually less than 10 passengers.

5. The current definition of Permitted User in the Lease impedes that reasonable user, given the Court of Appeal's interpretation of Permitted User in *Biggin Hill Airport Limited v London Borough of Bromley* [2002].
6. The definition of Permitted User in the Lease without the proposed modification secures no practical benefit to the Council. In addition to the various matters set out in Hogan Lovells' letter dated 5 March 2021, BHAL's application now seeks to limit the proposed modification to services operated by aircraft carrying no more than 19 passengers. This, in addition to the Operating Criteria in the Lease and the structural limitations of the Airport, would render it impossible for us to operate any kind of mass holiday traffic operation from the Airport, even if we wanted to – and we don't.
7. Given that there are no practical benefits to the Council, it follows that there are no practical benefits of substantial value or advantage to the Council.
8. In light of the above, no loss or injury would be suffered by the Council as a result of the proposed modification of the Permitted User definition (but rather it would benefit from the proposed modification as freeholder benefiting from turnover based rents and profit sharing provisions under the Lease). 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.

BHAL's response to the Council Executive meeting

A number of criticisms were levelled at BHAL by members of the Council Executive at the meeting on 26 May 2021 when refusing BHAL's previous formal application to modify the user covenant in the Lease. By and large, we found these criticisms unfair, as was explained in detail in a letter to you from our Chief Executive Officer, David Winstanley, dated 14 July 2021.

Again, I do not propose for the purposes of this letter to repeat that explanation in full, save to point out the following:

1. As we have stressed many times, BHAL does not wish to operate high volume scheduled passenger flights from the Airport in the form of mass holiday traffic. Such use would, in any case, be impossible due to the infrastructure of the Airport and the constraints in the Operating Criteria in the Lease, including the Noise Action Plan ("NAP") agreed by BHAL and the Council in 2016.
2. The noise and environmental impact of the Airport is appropriately constrained by the Operating Criteria in the Lease, including the NAP. The proposed modification of 'Permitted User' would not cause a breach of the noise and environmental terms already agreed in the NAP.
3. BHAL is committed to operating the Airport in a sustainable manner that minimises environmental impact with a goal of achieving carbon neutral status in accordance with Airports Carbon Accreditation (ACA) Europe by 2029.
4. BHAL has never made any commitment not to rely upon its statutory rights under the LPA 1925. I and Mr Winstanley have on countless occasions during the course of discussions with the Council in recent years raised the fact that the Lease, now being more than 28 years old, is in urgent need of modernisation and that an application to the Tribunal would be our only recourse if no consensual agreement could be reached.

5. BHAL could have applied to the Tribunal as long ago as 2019 but we have refrained from doing so (for some three years) in the hope of reaching a consensual agreement through discussions with the Council, particularly following our long term and comprehensive agreement with the Council on future noise and environmental management, which would remain in place.
6. For the c.5 months prior to Hogan Lovells' letter dated 5 March 2021, BHAL engaged in positive discussions with the Chief Executive of the Council and its Director of Corporate Services in relation to its request to modify the definition of Permitted User. In the course of those meetings we were asked by the Council to make a formal request in writing and a draft of Hogan Lovells' letter was provided to the Council for comment and approval before it was sent. This makes it all the more strange that the letter was described as "threatening" or "bullying" at the meeting of the Council Executive on 26 May 2021.
7. It was queried at the Council Executive meeting why the requested modification of the user clause had not been raised with the Biggin Hill Airport Consultative Committee (BHACC). The answer to that is quite straightforward: discussions with the Chief Executive and Director of Corporate Services were, at their request, held on a private and confidential basis whereas BHACC is a public forum with published quarterly minutes.

Nevertheless, to address this final point, we have raised the matter of the proposed modification of the Permitted User definition with BHACC. As you know, BHACC is a well-established forum in which BHAL engages with key stakeholders in the local area and beyond. Its members include representatives of BHAL, the Council, other local authorities, Bromley Residents Federation, Airport users and businesses, the Noise and Safety Sub-Committee and local residents. I might point out that Members of the Council have no less than 3 seats on the Consultative Committee, but with the exception of the Biggin Hill Ward Member (not a member of the ruling party), the other Members seldom attend, which is not helpful.

I refer to the letter from Peter Greenyer, Chairman of BHACC, to you dated 20 July 2022 regarding the proposed modification. In the letter, Mr Greenyer said:

"I am pleased to advise you that over the course of the last few meetings we have discussed this matter with the Airport and then convened an Extraordinary Meeting of the Consultative Committee held on the 7th July 2022 at which a substantial majority of the members voted in favour of such an arrangement subject to the following important conditions:

- 1. Aircraft operating passenger flights with fare paying passengers should not exceed 19 occupied seats.*
- 2. All such flights must remain within the existing noise regulations.*
- 3. All such flights must remain within the existing opening hours*
- 4. All such Flights will not be open to direct booking by members of the public.*
- 5. The Airport must maintain its good neighbour undertakings."*

I confirm that BHAL's above proposed modified wording would comply with all such conditions and, indeed, this is the wording that was provided to BHACC prior to their Extraordinary Meeting on 7 July 2022.

Accordingly, BHAL has consulted with BHACC as directed by the Council and BHACC has confirmed its support of BHAL's proposal. However, according to the published minutes of the BHACC meeting on 28 July 2022, Mr Greenyer reported that "to date, he had only received an acknowledgement of receipt of his letter". I am not aware that he has yet received any substantive response.

Next steps

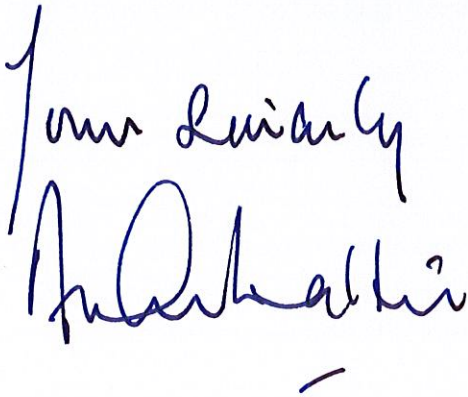
Please confirm that the Council agrees to BHAL's above proposed modification of the definition of Permitted User in the Lease. If agreed, Hogan Lovells will provide for your consideration a draft Deed of Variation to document this change.

Given that the Council has already deliberated upon BHAL's request to modify the definition of Permitted User and we have not only addressed the Council's concerns but also substantially narrowed the requested modification and consulted successfully with BHACC, I consider that the Council should now be able to confirm its agreement. We would welcome any questions that you have or an opportunity to discuss its proposal with the Council.

Should the Council refuse or fail properly to engage with this request then BHAL's only other option remains an application to the Tribunal under the LPA 1925. BHAL sincerely hopes that it will not have to do this, as is demonstrated by the lengths that it has so far gone to in order to avoid such an eventuality. However, having taken all of the above steps, if this still does not result in an agreement over the proposed modification then BHAL will have to make such an application and will refer the Tribunal to this correspondence.

BHAL is sincere in its submission that without modernisation the Airport is prevented from allowing aircraft operators to make best use of their aircraft and operating assets; from investing and modernising airport infrastructure; from promoting growth and trade, from enhancing inward investment and improving connectivity; and from maximising earnings as obliged to do under the terms of the Lease.

I look forward to hearing from you and in the absence of any substantial progress in this matter in the next 28 days, I will presume that I need to make alternative arrangements.

A handwritten signature in blue ink, appearing to read 'Andrew Walters', with a horizontal line underneath.

Andrew Walters
Chairman, Biggin Hill Airport Limited