

GREATER LONDON AUTHORITY

REQUEST FOR MAYORAL DECISION – MD2348

Title: Legally challenging a third runway at Heathrow

Executive Summary:

On 26 June 2018, the Secretary of State for Transport formally designated the Airports National Policy Statement (ANPS). The statement sets out the Government's policy in respect of achieving increased airport capacity in the South East of England and identifies a third runway at Heathrow Airport as the preferred location and scheme for delivering such capacity.

The Mayor considers that the ANPS fails to adequately address a number of fundamental environmental and social problems which will arise from a third runway. These include the significant health impacts of the proposal in terms of air quality and noise, the adverse impact on surface transport infrastructure which will result from the huge increase in staff, passenger and freight movements and the implications for the UK's obligations in respect of climate change. The Mayor has joined with the London boroughs of Hammersmith and Fulham, Hillingdon, Richmond and Wandsworth, the Royal Borough of Windsor and Maidenhead and Greenpeace in bringing a legal challenge against the designation of the ANPS by way of judicial review. Transport for London (TfL) is an interested party in the proceedings.

TfL Legal provides legal services to the GLA under a shared services arrangement. This decision invites the Mayor to direct TfL to pay the Mayor's legal costs of bringing the legal challenge. The Mayor also delegates to TfL any additional powers that are needed to comply with the direction.

Decision:

The Mayor:

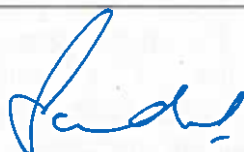
1. Directs TfL under s 155(1)(c) of the Greater London Authority Act 1999 ('GLA Act') in the terms of the attached Direction (Appendix 1);
2. Authorises TfL under s 38(1) of the GLA Act to exercise the Mayor's powers under sections 30 and 34 of the GLA Act to undertake the activities required by the attached Direction in accordance with the terms of the attached delegation (Appendix 1); and
3. Notes that if the legal challenge is unsuccessful in whole or part, the Mayor may be liable for a proportion of the Secretary of State's costs if an adverse costs order is made by the Court.

Mayor of London

I confirm that I do not have any disclosable pecuniary interests in the proposed decision and take the decision in compliance with the Code of Conduct for elected Members of the Authority.

The above request has my approval.

Signature:



Date:

30/11/18

PART I - NON-CONFIDENTIAL FACTS AND ADVICE TO THE MAYOR

Decision required – supporting report

1. Introduction and background

- 1.1. The issue of airport capacity is one of national significance but is of particular importance to Greater London not only because of the relationship between aviation and London's prosperity but because Heathrow, the UK's main airport, is situated in Greater London. Residents of Greater London stand to gain from expanded airport capacity but will suffer the greatest impact if that additional capacity is realised through expansion of Heathrow.
- 1.2. The Airports Commission recommended in its final report of 1 July 2015 that a third runway be constructed at Heathrow Airport in preference to two other shortlisted options (extension of an existing Heathrow runway and a second runway at Gatwick). The Government adopted this recommendation on 25 October 2016 and started preparing a National Policy Statement.
- 1.3. Under Mayoral Decision 2048 the Mayor requested that TfL fully engage with the Government process of drawing up a National Policy Statement and work to ensure that it addressed his significant concerns about the noise, air pollution and surface access impacts of expansion at Heathrow. This involved TfL continuing the work it has already undertaken at the policy development stage and further to the Airports Commission's final report.
- 1.4. On 5 June 2018 the proposed Airports National Policy Statement ('ANPS') was laid before Parliament. It sets out that increased airport capacity in the UK should be achieved by building a third runway at Heathrow. On 25 June 2018 the House of Commons voted in favour of adopting the ANPS and on 26 June 2018 it was formally designated by the Secretary of State for Transport.
- 1.5. The Mayor has joined with the local borough councils of Hammersmith and Fulham, Hillingdon, Richmond, Wandsworth, Windsor and Maidenhead, and Greenpeace to bring a legal challenge to the Secretary of State's designation of the ANPS by way of a judicial review of the decision. TfL is an interested party. The overarching grounds for the legal challenge are that the Secretary of State predetermined that a third runway is the preferred option for achieving increased airport capacity and accordingly failed to adequately address a number of fundamental environmental and social problems that it presents including the massive health and social impacts in terms of air quality and noise, the adverse impacts on surface transport infrastructure caused by the increase in staff, passenger and freight movements and the implications for the UK's climate change obligations. Five other claims have been brought by other parties although one of them has since been struck out by the Court leaving the Government to defend five claims in total.
- 1.6. Expansion at Heathrow would mean the intolerable prospect of an extra 200,000 Londoners, including 124 schools and 43,200 schoolchildren, being exposed to an unacceptable level of noise every day. It would delay improvements to air quality in an area where pollution is already well above legal levels for NO2 emissions and would prevent UK compliance as soon as possible with EU air quality limit values. Further, it would add an additional 170,000 passenger and staff trips and 20,000 freight journeys onto the network every day which will increase congestion. The ANPS either ignores, downplays or inadequately addresses these impacts.
- 1.7. Mayoral Decision 2048 raised the possibility of the Mayor bringing a legal challenge to the Government's policy on airport expansion either directly or by TfL. TfL provides legal services to the Mayor under a shared services arrangement. Pursuant to that agreement, TfL will undertake any activity relating to the Mayor and TfL's participation in the legal challenge to the designation of the ANPS and any associated legal actions and work collaboratively with the co-claimants to progress the legal challenge.

- 1.8. This Mayoral Decision invites the Mayor to direct TfL to pay all of the Mayor's legal fees and disbursements which are incurred as a consequence of the Mayor being a claimant in the proceedings. The Mayor and TfL are represented by Queen's Counsel and a junior barrister instructed by TfL Legal. The co-claimants are separately represented by counsel and the law firm, Harrison Grant. Disbursements will include transcript fees and bundle copying.
- 1.9. It is anticipated that the financial implications for TfL of complying with the direction will not exceed the £1 million budget that was allocated for work which has and continues to be undertaken pursuant to Mayoral Decision 2048. If it does then further authority will need to be sought from the Mayor to continue with the activity required by the direction.
- 1.10. Should the legal challenge be unsuccessful, an adverse costs order may be made against the claimants and, in addition to his own legal costs, the Mayor will be liable to pay a proportion of those costs. Conversely, should the legal challenge be successful then the Mayor may benefit from a costs order in favour of the claimants. As an interested party, TfL is unlikely to be subject to a costs order either made adversely or in favour of it.

2. Objectives and expected outcomes

- 2.1. The objective of directing TfL to fund the Mayor's participation in the legal challenge of the ANPS is to ensure the interests of Londoners are fully and fairly represented. Given the considerable expertise already developed by TfL in these matters, it has an important role to play in progressing the legal case.

3. Equality comments

- 3.1. Under s 149 of the Equality Act 2010 ('the Equality Act'), as public authorities, the Mayor and TfL must have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between people who share a protected characteristic and those who do not. Protected characteristics under the Equality Act are age, disability, gender re-assignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and marriage or civil partnership status (the duty in respect of this last characteristic is to eliminate unlawful discrimination only).
- 3.2. The detrimental impact on air quality that will result from an additional runway at Heathrow will be of concern to people who suffer respiratory and other illnesses associated with poor air quality now and in the future and who may, consequently, be classed as disabled. A recent report commissioned by the GLA also found that people living in places with high proportions of black, mixed or "other" ethnic groups are more likely to be exposed to above EU NO2 limit value concentrations than those in areas with a high proportion of white people, although the association was deemed not to be strong. Facilitating and participating in the challenge to the ANPS may, if successful, have a positive impact on all those who work, live or visit Greater London which may be of significance to people disabled by air quality associated illnesses and conditions and black, mixed or "other" ethnic groups who live in the worst affected areas for air quality.

4. Other considerations

a) Key risks and issues

- 4.1. If TfL does not provide support to the Mayor and other claimants to the legal action, the challenge will be weakened, and the issues may not be fully considered by the courts. The ultimate risk is that the action will not succeed and the third runway at Heathrow will be able to be built at the expense of London's environment and the health of its residents.

b) Links to Mayoral Strategies and priorities

The London Plan

- 4.2. The London Plan, published in July 2011 refers to aviation capacity. Policy 6.6A states:

Adequate airport capacity serving a wide range of destinations is critical to the competitive position of London in a global economy. Airport capacity serving the capital and wider south east of England must be sufficient to sustain London's competitive position.

The draft new London Plan

- 4.3. The draft new London Plan was published by the Mayor for consultation in December 2017. Policy T8 relates to aviation with a focus on managing the noise, air quality and surface transport impacts of aviation expansion. T8 (D) states:

The Mayor will oppose Heathrow expansion unless it can be shown that no additional noise or air quality harm would result.

Mayor's Transport Strategy

- 4.4. The Mayor's Transport Strategy published in March 2018 refers to airport capacity and surface access to airports. Policy 22 states:

The Mayor will continue to oppose expansion of Heathrow airport unless it can be shown that no new noise or air quality harm would result and the benefits of future regulatory and technology improvements would be fairly shared with affected communities. Any such expansion must also demonstrate how the surface access networks will be invested in to accommodate the resultant additional demand alongside background growth.

Draft Economic Development Strategy

- 4.5. The Mayor's draft Economic Development Strategy, published in December 2017 for consultation, recognises the role airport capacity plays in supporting London's global economic success. Paragraph 4.2 states:

The Mayor recognises the need for additional runway capacity in the south-east of England, but this should not be at the expense of London's environment or the health of its residents and Airport expansion should only be taken forward where it meets the needs of London and the UK, the environmental impacts are fully acknowledged and the aviation industry fully meets its external and environmental costs, particularly in respect of noise, air quality and climate change.

London Environmental Strategy

- 4.6. The Mayor's London Environment Strategy was published in May 2018 and recognises the air quality, noise and climate change impacts of aviation.

- 4.7. Proposal 4.2.2.b states:

The Mayor opposes any airport expansion in London unless it can show that there is no unacceptable impact on air quality and that GHG emissions are minimised.

- 4.8. Proposal 9.1.2.c states:

The Mayor will oppose expansion of Heathrow Airport unless it can be shown that no new noise harm will result, and the benefits of future regulatory and technological improvements would be fairly shared with affected communities.

5. Financial comments

- 5.1. The direct financial implications for the GLA arising from this decision are mainly limited to staffing resources. The Deputy Mayors for Transport and the Environment and various GLA officers have been involved in compiling the evidence filed in support of the legal challenge. The complexity of the challenge has required considerable staff time and further input will be required at critical points in the Court's timetable.
- 5.2. However, if the legal challenge is unsuccessful, the Mayor is likely to be liable for a proportion of the Secretary of State's costs if an adverse costs order is made by the Court. Any costs which do arise would be met by the contingencies available within the GLA budget.
- 5.3. As stated above, this MD provides for the Mayor's directly incurred legal costs arising out of this claim to be paid for by TfL.

6. Legal comments

Direction to TfL

- 6.1. The Mayor may issue general and specific directions to TfL as to the manner in which it is to exercise its functions pursuant to section 155(1) of the GLA Act.
- 6.2. Section 155(4) provides that any directions issued under section 155(1) must be issued in writing and notified to such officer of TfL as it may from time to time nominate to the Mayor for this purpose.
- 6.3. The proposed direction by the Mayor to TfL is to be made under section 155(1)(c) of the GLA Act. It is attached at Appendix 1 and will be sent to the Commissioner of TfL.

Delegation of Mayoral powers

- 6.4. To provide TfL with all of the necessary powers in order to comply with the direction, it is proposed that the Mayor further delegates such powers under sections 30 and 34 of the GLA Act as are required. Section 38 of the GLA Act provides that the Mayor may authorise TfL to exercise his functions.
- 6.5. Section 30 of the GLA Act gives the Mayor a general power to do anything which he considers will further one or more of the principal purposes of the GLA. The principal purposes, as set out in section 30(2), are:
 - Promoting economic development and wealth creation in Greater London;
 - Promoting social development in Greater London; and
 - Promoting the improvement of the environment in Greater London.
- 6.6. Further, section 34 of the GLA Act allows the Mayor to do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of any of his functions (including his functions under section 30).
- 6.7. The bringing of the challenge is consistent with the furthering of one or more of the principal purposes in s 30.

- 6.8. Section 38(7) of the GLA Act gives TfL the power to exercise any functions delegated to it by the Mayor pursuant to section 38, whether or not TfL would otherwise have had that power and irrespective of the nature of the function.
- 6.9. The Mayor may impose conditions on any delegations under section 38(1). A number of conditions are set out in the delegation annexed to this report. These include requirements to provide progress reports to the Mayor and to the TfL Board on request, comply with any instructions or guidance issued by the Mayor and co-operate with the GLA Monitoring Officer (who has a duty under section 5(2) of the Local Government and Housing Act 1989 to monitor TfL's activities when it is exercising functions delegated by the Mayor).
- 6.10. Section 38(10) of the GLA Act requires the section 38 delegation to be in writing. The proposed delegation is attached at Appendix 1. TfL has been consulted on the proposed direction.

7. Milestones and next steps

- 7.1. TfL and GLA officers are working closely with their counterparts at the five boroughs and Greenpeace who are joint claimants.
- 7.2. On 6 August 2018 the claim, detailed facts and grounds and witness statements of Lucy Owen, the Greater London Authority's Interim Director of Development, Enterprise and the Environment, Alex Williams, TfL's Director of City Planning and Dr Holman, an expert witness in air quality matters, were filed. The Secretary of State responded with his acknowledgement of service and summary grounds of defence on 4 September. Five other claims were also filed within the permitted six week deadline with one claim subsequently struck out.
- 7.3. Given the complexity and volume of materials and the multitude of claims, a hearing took place on 4 October at which the Court determined various matters and set a timetable for the procedural stages and hearing of the claims. The Court has ordered that the two stages of judicial review (permission and substantive hearing of the issues) will be "rolled up" with four claims including the Mayor's challenge and heard together with a fifth claim to be heard immediately following these claims. The hearing will take place before a divisional court (a court of at least two judges) on 11 March 2019 with an estimated hearing time of seven and a half days with a further two days allocated to the separate hearing of the fifth claim. A pre-trial review will take place on 15 January 2019.
- 7.4. The claimants have been ordered to file amended grounds of claim within a required page limit (40 pages in the case of the Mayor's joint claim with the boroughs and Greenpeace) by 1 November 2018. While this is a significant curtailment of the length of the original grounds, the exercise is helped by the requirement on the parties (including the Secretary of State) to file a statement of common ground by 25 October 2018 which will include a chronology of events, including a history of relevant policy documents and the procedures followed, the statutory framework and legal principles. The grounds of claim of each of the five claims must be reduced to avoid duplication and the Court has ordered that the Mayor's joint challenge with the boroughs and Greenpeace is to be the leading claim in respect of all the issues raised except for climate change. Revised evidence must also be filed.
- 7.5. The Government and interested parties are required to provide their detailed grounds of defence and witness evidence by 29 November 2018. They too are subject to a page limit commensurate with the limit imposed on the claimants' grounds. The claimants may make applications for disclosure of documents and submission of evidence in reply with such applications to be determined at the pre-trial hearing in January 2019.

Appendices and supporting papers:

Appendix 1 – Mayoral Direction and Delegation

Public access to information

Information in this form (Part 1) is subject to the Freedom of Information Act 2000 (FoIA) and will be made available on the GLA website within one working day of approval.

If immediate publication risks compromising the implementation of the decision (for example, to complete a procurement process), it can be deferred until a specific date. Deferral periods should be kept to the shortest length strictly necessary. **Note:** This form (Part 1) will either be published within one working day after it has been approved or on the defer date.

Part 1 - Deferral

Is the publication of Part 1 of this approval to be deferred? NO

Part 2 - Sensitive information

Only the facts or advice that would be exempt from disclosure under FoIA should be included in the separate Part 2 form, together with the legal rationale for non-publication.

Is there a part 2 form - YES

ORIGINATING OFFICER DECLARATION:

Drafting officer to confirm the following (✓)

Drafting officer:

Tim Aldham has drafted this report in accordance with GLA procedures and confirms the following:

✓

Sponsoring Director:

Lucy Owen has reviewed the request and is satisfied it is correct and consistent with the Mayor's plans and priorities.

✓

Mayoral Adviser:

Heidi Alexander has been consulted about the proposal and agrees the recommendations.

✓

Advice:

The Finance and Legal teams have commented on this proposal.

✓

Corporate Investment Board

This decision was agreed by the Corporate Investment Board on 29 October 2018.

EXECUTIVE DIRECTOR, RESOURCES:

I confirm that financial and legal implications have been appropriately considered in the preparation of this report.

Signature

M. D. Allge

Date

29.10.18

CHIEF OF STAFF:

I am satisfied that this is an appropriate request to be submitted to the Mayor

Signature

D. Bellamy

Date

29/10/2018.

