

**IN THE MATTER OF SECTION 70 OF THE TOWN AND COUNTRY PLANNING ACT 1990;  
SECTION 38(6) OF THE PLANNING AND COMPULSORY PURCHASE ACT 2004 AND  
REGULATIONS 3, 4 & 26 OF THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL  
IMPACT ASSESSMENT) REGULATIONS 2017**

**Re: Opinion concerning the correct legal approach to climate change in determining Planning Application 20/02559/FU**

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**LEGAL OPINION**

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**Summary**

1. This opinion concerns a planning application by Leeds Bradford Airport (“**LBA**”), 20/02559/FU, for demolition of an existing passenger pier, construction of a new terminal building, passenger piers and associated infrastructure, construction of new vehicular access and modifications to flight time controls to extend the daytime flight period (“**the Proposed Development**”). I am asked by Group for Action on Leeds Bradford Airport (“**GALBA**”) to provide an opinion on the correct approach to the issue of climate change in determining LBA’s application.
  
2. For the reasons set out in detail below, the Council is under two legal obligations relating to the climate change impact of the proposal:
  - (1) The first stems from regulations 3, 4 and 26 of the Town and Country Planning (Environmental Impact Assessment Regulations) 2017 (“**EIA Regulations 2017**”), which prohibit the grant of planning permission unless the Council:
    - i. understands whether the proposal will have a likely significant impact on the environment by contributing to climate change and
    - ii. takes that impact into account in making its decision on planning permission.
  - (2) The second stems from section 38(6) of the Planning and Compulsory Purchase Act 2004, by virtue of which the Council is obliged to determine the application in accordance with the development plan unless material considerations indicate otherwise. The key development plan policy is Core Strategy policy SP12, which explicitly requires consideration of the adverse environmental effects of development at the airport. An obvious material consideration is paragraph 148 of the National Planning Policy Framework (“**NPPF**”), which requires planning decisions to “shape places in ways that contribute to a radical reduction in greenhouse gas emissions”.

3. It would accordingly be unlawful for the Council to ignore the climate change impact of the proposal, or to assume that the impact can be accommodated (for example, by assuming that national carbon budgets can absorb any extra emissions; or by assuming any international carbon reduction schemes will reduce or neutralise extra emissions). If the Council made these assumptions, it would be doing the opposite of what the EIA Regulations require. Ignoring the climate change impact would also fail to understand policy SP12 and paragraph 148 of the NPPF.

### **DETAILED REASONS**

#### **Legal Obligation 1 – the EIA Regulations 2017**

4. In light of the nature and scale of the Proposed Development, both the Council and LBA accept that the Proposed Development was required to be subject to environmental impact assessment (“EIA”) under Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (as amended) (the “EIA Directive”) and the EIA Regulations 2017.
5. It is notable that when the EIA Directive was amended and updated in 2014, the following recital was added:

“Over the last decade, environmental issues, such as resource efficiency and sustainability, biodiversity protection, climate change, and risks of accidents and disasters, have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes.”
6. AG Kokott’s opinion in *Abraham v Wallonia* [2008] Env LR 32 (“*Abraham*”) explains the aim of EIA as follows at §75:

“The aim of environmental impact assessment is for the decision on a project to be taken with knowledge of its effects on the environment and on the basis of public participation. Investigation of the environmental effects makes it possible, in accordance with the first recital in the preamble to the EIA directive and the precautionary principle under Art.174(2) of the Treaty, to prevent the creation of pollution or nuisances where possible, rather than subsequently trying to counteract

them. The requirement of public participation implies that the participation can still influence the decision on the project.”

7. Accordingly, three key principles of EIA are:
  - a. to “protect the environment by ensuring that a local planning authority when deciding whether to grant planning permission for a project, which is likely to have significant effects on the environment, does so in the full knowledge of the likely significant effects, and takes this into account in the decision making process”;<sup>1</sup>
  - b. to “ensure that the public are given early and effective opportunities to participate in the decision making procedures”;<sup>2</sup> and
  - c. to apply the precautionary principle, which the Court of Appeal described as follows in the Heathrow Third Runway judgment: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>3</sup>
  
8. Regulation 3 of the EIA Regulations 2017 provides that the “relevant planning authority... must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development.”
  
9. Regulation 4 defines the EIA process as the preparation of an environmental statement (“**ES**”); a process of public consultation on that development and consideration under regulation 26 of whether planning permission should be granted. Regulation 26 requires the relevant planning authority to:
  - a. “examine the environmental information;”
  - b. “reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;”

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<sup>1</sup> National Planning Practice Guidance (“**NPPG**”) Ref id 4-002-20140306  
<https://www.gov.uk/guidance/environmental-impact-assessment>.

<sup>2</sup> Ibid.

<sup>3</sup> *R (Plan B Earth) v SST* [2020] EWCA Civ 214 (“**Plan B Earth**”) at §§258-261.

- c. “integrate that conclusion into the decision as to whether planning permission ... is to be granted; and”
  - d. “if planning permission ...is to be granted, consider whether it is appropriate to impose monitoring measures.”
10. Schedule 4 of the EIA Regulations 2017 sets out the information that must be contained in the ES. Paragraph 5 requires that the ES includes:
- “A description of the likely significant effects of the development on the environment resulting from, inter alia:
- (a) the construction and existence of the development...
  - (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change...”
- The description of the likely significant effects on the factors specified in regulation 4(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project, including in particular those established under Council Directive 92/43/EEC and Directive 2009/147/EC.”
11. The CJEU has held that the term “indirect effects” is to be “construed broadly”: §31 of AG Kokott’s opinion in *Abraham*. This includes the environmental impacts “liable to result from the use and exploitation of the end product of works”: *Abraham* Judgment at §43.
12. The Council is thus legally obliged under the EIA Regulations to understand whether the proposal will have a likely significant impact on the environment by contributing to climate change. This breaks down as follows:
- a. “Likely” means “possible”;<sup>4</sup>

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<sup>4</sup> *R(Bateman) v South Cambs DC* [2011] EWCA Civ 157 (“*Bateman*”) at §17: “In my view something more than a bare possibility is probably required, though any serious possibility would suffice.”

- b. “Significant” means “more than trivial,” depending on the circumstances of the proposal;<sup>5</sup>
  - c. Significance has to be judged against the relevant “environmental protection objectives”, which include the UK’s statutory obligation to achieve net zero by 2050<sup>6</sup> and the UK’s obligations under the Paris Agreement to limit emissions in order to avoid more than 2 degrees of global warming.<sup>7</sup> They also include regional and local objectives: the West Yorkshire Combined Authority’s target of net zero by 2038; Leeds’ own target of net zero by 2030.
13. The courts have stated that “likely significant impact” is designed to be quite a low threshold.<sup>8</sup> This is because of how important it is that environmental impacts are fully considered before any decision is made whether to permit the development.
14. The climate change impact of a proposal means the impact of any additional emissions that it will cause which contribute to global warming or global heating: most commonly greenhouse gas emissions (“GHG” emissions, sometimes referred to as CO<sub>2</sub> or CO<sub>2</sub>e), but also the water vapour contrails caused by aeroplanes, because they create warming by trapping more radiation in the atmosphere (known as “radiative forcing”). The Court of Appeal in *Plan B Earth* at §§254-261 held that, in light of the precautionary principle, the non-CO<sub>2</sub> effects of air travel are relevant planning considerations. While this was in the context of national infrastructure policy, the Court of Appeal’s reasoning, based on the precautionary principle, applies equally to assessment of the environmental impact of airport development under EIA.
15. The need to assess the non-CO<sub>2</sub> effects caused by the Proposed Development also reflects the advice given by the Committee on Climate Change (“CCC”) – the independent statutory body tasked with advising the government under the Climate Change Act 2008 – in its reports published in May 2019 concerning net zero. These reports are of themselves material considerations relevant to planning

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<sup>5</sup> *Bateman* at §19.

<sup>6</sup> Section 1 of the Climate Change Act 2008, as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (26 June 2019).

<sup>7</sup> *Plan B Earth* at §§242-246 (note this concerned Strategic Environmental Assessment, but the High Court in *R(Spurrier) v SST* [2019] EWHC 1070 (Admin) held at §434 that this is analogous with EIA).

<sup>8</sup> *R(Bateman) v South Cambs DC* [2011] EWCA Civ 157 (“*Bateman*”) at §17: “In my view something more than a bare possibility is probably required, though any serious possibility would suffice.”

decision-making. They provided the advice to Government that led to the amendment of the Climate Change Act 2008 in June 2019 to impose a statutory duty to achieve net zero by 2050. In the Technical Report,<sup>9</sup> the CCC states:

“Planes can also create contrails (long trails of cloud caused by aircraft flying through supersaturated air) depending on the atmospheric conditions. As these clouds are high in the atmosphere, they have a relatively large warming effect on the climate. Overall, non- CO2 effects from aviation warm the climate and approximately double the warming effect from past and present aviation CO2 emissions” (pg 168).

16. In light of paragraph 5 of schedule 4 of the EIA Regulations 2017 and Articles 3 and Annex IV of the EIA Directive, the Council is required to consider the GHG emissions and non-CO<sub>2</sub> emissions that the Proposed Development will cause:
  - a. directly (eg emissions from the building; emissions from construction);
  - b. indirectly (eg emissions it facilitates, by allowing more planes to fly);
  - c. cumulatively (eg emissions that accumulate over time); and
  - d. in combination (eg in combination with emissions from other similar proposals likely to come forward).

In the context of airport development, the main emissions are those caused by increasing domestic and international flights. EIA should consider the worst case scenario in relation to these emissions, in order to approach the assessment on a precautionary basis.

17. Once any emissions are released into the atmosphere, they will cause warming. This will have an impact on whether the relevant “environmental protection objectives”, set out above, can be met, and so on whether planning permission can be granted.

#### Relevance of the UK Carbon Budgets

18. The UK has put in place carbon budgets under the Climate Change Act 2008. While these budgets are relevant to the EIA assessment as they are one of the factors relevant to the UK’s environmental protection objectives, they cannot lawfully be used as a reason to exclude assessment of the climate change impact of the Proposed Development, nor can they lawfully be used to exclude emissions sources

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<sup>9</sup> <https://www.theccc.org.uk/publication/net-zero-technical-report/>

from assessment. This is clear in light of paragraph 5 of schedule 4 of the EIA Regulations 2017 and Articles 3 and Annex IV of the EIA Directive.

19. Accordingly, the fact that certain emissions are not presently included within the calculation of the Fourth and Fifth Carbon Budgets is not a legally valid reason for those emissions to be excluded from the EIA process or left out of assessment:
  - a. Non-CO<sub>2</sub> impacts: The CCC's advice in the Net Zero Technical Report was that the non-CO<sub>2</sub> impacts of aviation should not be included within the current carbon budgets, but that "the Government should develop a strategy to ensure that these effects can be mitigated over the coming decades (e.g. by 2050-70 for pathways that meet the Paris Agreement) without increasing CO<sub>2</sub> emissions" (pg 182). In any event, the Heathrow Third Runway judgment referred to above makes it clear that aviation's non- CO<sub>2</sub> effects are an "obviously relevant factor" in light of the precautionary principle. It would be an error of law to exclude them from EIA;
  - b. International aviation: the same applies to international aviation. It is presently excluded from the UK's Fourth and Fifth carbon budgets (although it is unclear whether that advice may change when the CCC reports on the Sixth Carbon Budget in December 2020). In any event, the EIA Directive and the EIA Regulations 2017 require an assessment of all direct and indirect effects of the project, regardless of where these occur. Under the Paris Agreement, it would not be legally sufficient for the UK to achieve net-zero by 2050 (which is the minimum requirement under the Climate Change Act 2008) by excluding impacts from international aviation emissions. The Paris Agreement is another source of the UK's environmental protection objectives and is part of Government policy.<sup>10</sup>
20. Furthermore, the existence of these national budgets does not mean the Council can avoid determining the likely significant climate change impacts of the proposal, nor

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<sup>10</sup> *Plan B Earth* at §§209-228. Note this concerned the question of what amounted to Government policy under the Planning Act 2008. However, the Court of Appeal set out and considered the Government's own general statements of its policy commitments and concluded: "It is clear, therefore, that it was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C." That conclusion is equally relevant to EIA and to what amounts to and "environmental protection objective" in the EIA Directive and the EIA Regulations 2017.

can the Council just assume that the national government can absorb the extra emissions from the proposal into the budgets. This would be unlawful, for four main reasons:

- a. The UK carbon budgets are country-wide and include emissions from numerous different sectors (eg power stations; the gas network; ground-based transport; all industry; all agriculture and food production; and all users, from hospitals to schools to universities). Almost all single developments appear to have very small impacts when compared to the whole of the UK's carbon budget.
  - b. The overall purpose of the carbon budgets is to limit emissions, so using them as a reason to justify more emissions and assuming those emissions can be accommodated is the opposite of how the budgets are supposed to influence decisions.
  - c. As set out above, the carbon budgets are one aspect of only one of the UK's environmental protection obligations.
  - d. The EIA process is designed to avoid reliance on assumptions. The Court of Appeal has held that lawful environmental assessment is required to go "beyond generalities": *R(Squire) v Shropshire Council* [2019] EWCA Civ 888 ("**Squire**") at §73. Proper assessment cannot be based on unevidenced assumptions.
21. Finally, it bears reiterating that the responsibility for assessing the environmental impacts of regional airport development and of deciding whether or not to grant planning permission for such development is squarely that of local authorities. The legal obligations under the EIA Regulations 2017 in relation to the Proposed Development fall on this Council. It is neither a cogent nor a lawful response for this Council to treat climate change impact as a matter for central government or as only the responsibility of central government.
22. The Council has in fact recognised that the obligation to achieve net zero by 2050 falls on all public bodies. This is reflected in Leeds City Council's Climate Emergency Declaration (27 March 2019), the Leeds Carbon Roadmap and the Best Council Plan for 2020-2024, which makes the Climate Emergency' one of the three 'pillars' of Council's overarching strategy. These form part of the environmental protection

objectives against which the Council is obliged to consider the GHG and non-CO2 impacts of the Proposed Development.

### Relevance of International Offsetting Schemes

23. Focusing on emissions from international flights, it would also be unlawful for the Panel to assume that any extra emissions would be absorbed by CORSIA (the Carbon Offsetting and Reduction Scheme for International Aviation). This is for two reasons:
- a. CORSIA has not in fact begun to operate as a carbon offset regime. It begins with a pilot phase in 2021 and a voluntary phase in 2024, and the details of the scheme are yet to be determined (for example, it is not yet decided what will count as a valid 'offset'). The scheme is also designed to end in 2035 and will, even if it operates with the best anticipated efficiency, only cover 6%<sup>11</sup> of projected CO<sub>2</sub> emissions from all international aviation between 2015 and 2050. The scheme is thus too uncertain to justify any assumption by the Council that it will operate to offset all, or even most, of the additional emissions from international aviation caused by the proposal. In light of *Squire*, such an assumption would be unlawful.
  - b. The CCC addressed CORSIA in its Net-Zero Report (May 2019). It stated specifically that, because CORSIA is designed to limit aviation emissions to 2020 levels and only run until 2035, it "is not compatible with achieving net-zero emissions globally" (pg 116, emphasis added). In the CCC's 2019 Progress Report to Parliament, "Reducing UK emissions" (July 2019), the CCC again referred to CORSIA and stated: "It is essential that these internationally-focused efforts are additional to putting in place robust and effective policies to achieve net-zero GHG emissions domestically in the UK and are not an alternative for doing so." (pg 47, emphasis added). The result of the CCC's advice is that efforts like CORSIA cannot be used to justify emissions from international aviation or to assume that such emissions will comply with the net zero obligation.

### Conclusion on the Council's Legal Obligations Arising from EIA

24. The Council cannot lawfully decide whether to grant or refuse planning permission unless it takes the impact on climate change into account. It cannot

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<sup>11</sup> <https://www.icsa-aviation.org/wp-content/uploads/2018/06/ICSA-views-LTG-June-2018.pdf>.

lawfully discount that impact or assume the impact will not arise by relying on the UK's carbon budgets or CORSIA.

25. The EIA Directive and the EIA Regulations 2017 require the Council to consider the evidence before it on the likely significant impact of the Proposed Development on climate change. That evidence includes credible information provided by objectors, because one of the goals of the EIA Regulations is to ensure the public are able to contribute to the environmental information before the decision-maker (see the NPPG set out above and the Advocate General in *Abraham*).
26. I have seen the environmental information currently before the Council and available on the planning portal, including LBA's ES and Further Information Report; information provided by Professor Steinberger, Professor Chatterton, Dr Finney and Mr Vogel in their objection;<sup>12</sup> information provided by GALBA in its objection and information provided by GALBA in its consultation response on the Further Information Report. In light of this information, it would in my view be lawful for the Council to determine that the emissions from the proposal would cause a likely significant adverse impact on climate change.

### **Legal Obligation 2: Planning Considerations under Local and National Policy**

27. There is a further overarching legal obligation on the Council to consider the climate change impacts of the Proposed Development. Section 38(6) of the Planning and Compulsory Purchase Act 2004 obliges the Council to determine the application in accordance with the development plan unless material considerations indicate otherwise. The most important development plan policy in determining the application is Core Strategy policy SP12.
28. The correct interpretation of planning policy is ultimately a question of law: see the judgment of Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] PTSR

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<sup>12</sup> These four academics are true experts on climate change. Prof Steinberger's work focuses on quantifying impacts and investigating how human well-being can be achieved within planetary boundaries, and she is lead author for the IPCC's 6<sup>th</sup> Assessment Report. Prof Chatterton is an expert in sustainability and carbon vs post-carbon infrastructure; Dr Finney is a researcher within the Institute for Climate and Atmospheric Science (ICAS) at the University of Leeds and is an expert in atmospheric science; Mr Vogel has an MSc in Climate Dynamics (Meteorology and Oceanography) from the University of Bergen and is working on sustainability and climate change.

983 at §§17 to 19, and the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] 1 WLR 1865 at §22. If a decision-maker wrongly interprets a policy, any subsequent decision that relies on that incorrect interpretation is vulnerable to legal challenge.

29. Policy SP12 only allows support for development at the airport if any adverse environmental effects are properly mitigated. Accordingly, in order to determine whether this policy is complied with, the Council is obliged to understand and take into account the adverse environmental effects of the Proposed Development and whether they can be mitigated. The climate change impacts of the Proposed Development are thus obviously material to the application of Policy SP12 and it would amount to a misunderstanding of that policy for the Council to ignore the climate change impacts or to fail to take them into account.
30. It is important to note that, unless a carbon capture and storage system is in place, GHG emissions and non-CO<sub>2</sub> emissions cannot be mitigated once they have been emitted. This is because once the emissions are released into the atmosphere, they will have a warming effect and the GHG emissions will persist in the atmosphere for a very long period of time, meaning their warming effect is cumulative. At present there is no proven system of removing GHG emission from the atmosphere.<sup>13</sup> As explained above, the Council cannot simply assume that the existence of the UK carbon budgets and CORSIA will mitigate the GHG emissions or the warming impact of contrails.
31. Alongside the impacts of the Proposed Development from GHG emissions and non-CO<sub>2</sub> emissions, the environmental costs of the development are also relevant to compliance with SP12. Accordingly, the Council is required to take into account the evidence provided by the New Economics Foundation in its Report, which sets out economic modelling based on the monetised cost of carbon emissions.

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<sup>13</sup> While initiatives such as tree-planting or peat-bog remediation will assist to reduce GHG in the atmosphere, they are long-term processes and, as yet, there is no metric for assessing with any accuracy how much GHG these initiatives could remove from the atmosphere or how long that process might take.

32. In my view, in light of the evidence currently submitted to the Council and available on the planning portal, it would be lawful for the Panel to determine that the proposal does not comply with policy SP12.
33. Finally, climate change impact is also an obvious material consideration separate from the development plan. The Council is obliged to consider whether the proposal complies with paragraph 148 of the NPPF, which requires planning decisions to “shape places in ways that contribute to a radical reduction in greenhouse gas emissions”. In my view, in light of the evidence currently submitted to the Council and available on the planning portal, it would be lawful for the Panel to determine that the proposal does not comply with this national policy.

### **Conclusion**

34. I have separately provided a four-page “Plain Language Summary” of this advice. In short, the legal obligations in regulations 3, 4 and 26 of the Environmental Impact Assessment Regulations 2017, the statutory duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 and the obligation in national policy to secure a radical reduction in GHG emissions mean that it would be unlawful for the Council to ignore the climate change impact of the proposal, or to assume that the impact can be accommodated.
35. The Council cannot lawfully decide whether to grant or refuse planning permission unless it takes the impact of the Proposed Development on climate change into account. Ignoring the climate change impact would also fail to understand policy SP12 and paragraph 148 of the NPPF.

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ESTELLE DEHON  
CORNERSTONE BARRISTERS  
2-3 GRAY'S INN SQUARE, LONDON, WC1R 5JH  
estelled@cornerstonebarristers.com  
<https://cornerstonebarristers.com/barrister/estelle-dehon/>