

General Submission Winter 2024 Coordination Parameters at Dublin Airport



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Submission by:
Sabrina Joyce-Kemper



Date of Submission : 24th April 2024

Submission

1. Planning Condition Issues

- 1.1 Sabrina Joyce-Kemper has been a resident of Portmarnock for over twenty years and has actively made submissions on planning permissions, plans, policy and programs in relation to Dublin Airport. She makes this submission for a number of members of her local community and for herself and her family.
- 1.2 This draft decision has shown that the coordination committee have again actively, intentionally and with full knowledge of their legal obligations, decided to potentially breach planning and environmental regulations in relation to the operating conditions, attached to the grant of planning permission for the North Runway. They have done so after full discussions and risk assessments, when deciding previous co-ordination parameters for Summer 2024 and Winter 2023 slots, decisions which have been carried forward into this draft decision. These conditions are:
- 1.3 **3(d) of the North Runway Planning Permission** (Fingal County Council Reg. Ref. No. F04A/1755; ABP Ref. No.: PL06F.217429 as amended by Fingal County Council F19A/0023, ABP Ref. No. ABP-305289-19). Condition 3(d) and the exceptions at the end of Condition 3 state the following:
- 3(d). Runway 10L-28R shall not be used for take-off or landing between 2300 hours and 0700 hours except in cases of safety, maintenance considerations, exceptional air traffic conditions, adverse weather, technical faults in air traffic control systems or declared emergencies at other airports.'*
- 1.4 **Condition no. 5 of the North Runway Planning Permission** (Fingal County Council Reg. Ref. No. F04A/1755; ABP Ref. No.: PL06F.217429 as amended by Fingal County Council F19A/0023, ABP Ref. No. ABP-305289-19) which provides as follows:
- On completion of construction of the runway hereby permitted, the average number of night time aircraft movements at the airport shall not exceed 65/night (between 2300 hours and 0700 hours) when measured over the 92 day modelling period as set out in the reply to the further information request received by An Bord Pleanála on the 5th day of March, 2007. Reason: To control the frequency of night flights at the airport so as to protect residential amenity having regard to the information submitted concerning future night time use of the existing parallel runway'*
- 1.5 The net effect of the proposed decision, encompassing previous decisions (S23/ W23 & S24) is, if implemented, it would continue to be an intentional potential breach of the planning permission operating conditions. In fact, the committee and the IAA may be seen to have acted with apparent intent to breach Planning conditions, will not sit well with competent authorities for planning and or Courts when this fact is raised in submission to any future planning

applications/ judicial reviews. The Courts expect parties to have “clean hands” / not to have partaken in unfair conduct. Actively assessing the risk of adhering to planning conditions 3(b) and 5, when deciding the S23 slot parameters and voting to potentially breach them anyway in favour of economic market concerns, then carrying those decisions through to S24 and this decision W24 raises the legal violation of “the clean hands doctrine”.

1.6 The representatives that make up the Committee must be aware that they have a fiduciary duty to not act in a manner that may put their company legally at risk. This may include intentionally potentially breaching Planning and Development regulations at national and EU level. As such I ask that the committee comply with the operating conditions of the planning permission at the time of making the decision (as is required by law). If An Bord Pleanála uphold Fingal County Council decision in relation to the relevant action amending the permission then the potentially illegal slots can be re-instated.

1.7 Section 6.2.2. of the Worldwide Airport Slot Guidelines (WASG)¹ states;

6.2.2 The coordination parameters represent the maximum capacity available for allocation considering the **functional limitations** at the airport such as runway, apron, terminal, airspace, and **environmental restrictions** (emphasis added)

In the document the co-ordination parameters are described as follows:

Coordination Parameters: the maximum capacity available for allocation at an airport considering the functional limitations at the airport such as runway, apron, terminal, airspace, and environmental restrictions declared by the airport or **other competent body**. (emphasis in bold added)

1.8 The industry guidelines therefore state that the parameters considered must be within the constraints to capacity and include limitations and restrictions declared by any other competent body, in this case the local authority and an Bord Pleanála. The parameters considered are not within the remit of the committee to consider as they exclude the restrictions imposed on them by a planning competent authority. Therefore the planning conditions must be factored into the capacity parameters to comply with guidelines.

1.9 In the letter to Adrian Corcoran dated 4th April 2024 Re: Coordination Parameters for Winter 24/25 Declaration, from Leon Ronan, Secretary to the Coordination committee, it is clear that the decisions and voting were carried out on the basis of needing to comply with the 32 million mppa cap despite the “ambiguity” over the transfer passengers inclusion that the daa have suggested. I wish to definitively settle the ambiguity with the attached ABP 146 A decision (Appendix 1) which clearly states that transfer passengers are included in the 32 million mppa, which is reflected in how the CSO calculates passenger figures per year. This means that Dublin airport was in breach of its 32 million mppa in 2019 and 2023. See fig 1 below an extract from CSO data²

1 <https://www.iata.org/contentassets/4ede2aabfcc14a55919e468054d714fe/wasg-edition-2-english-version.pdf>

2 <https://www.cso.ie/en/releasesandpublications/ep/p-as/aviationstatisticsquarter4andyear2023/>

Table 2 Number of passengers handled by main airports, Quarter 4 and Year 2019-2023

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Quarter 4						
Airport	2019	2020	2021	2022 ²	2023	% change 2022-2023
Dublin	7,385,982	702,109	4,103,576	7,073,346	7,684,724	9%
Cork	550,423	31,461	87,348	537,111	640,341	19%
Shannon	341,416	12,081	184,257	367,771	421,295	15%
Knock	180,453	7,048	102,186	170,536	182,254	7%
Kerry	82,678	6,420	63,683	90,045	90,887	1%
Total	8,540,952	759,119	4,541,050	8,238,809	9,019,501	9%
January to December						
Airport	2019	2020	2021	2022 ²	2023	% change 2022-2023
Dublin	32,676,251	7,267,240	8,266,271	27,793,345	33,259,959	20%
Cork	2,585,466	527,014	255,014	2,238,455	2,797,844	25%
Shannon	1,616,422	273,934	322,162	1,421,957	1,897,599	33%
Knock	805,443	142,532	174,027	709,540	813,266	15%
Kerry	369,836	82,959	115,398	355,043	414,571	17%
Total	38,053,418	8,293,679	9,132,872	32,518,340	39,183,239	20%

¹ Passenger numbers refer to commercial passengers only. Transit passengers are included and are counted twice (i.e. both as arriving and departing passengers).

² Minor revisions to data

Fig. 1 see breach of 32 million cap in 2019 and 2023

- 1.10** In the decision there is some discussion about the IAA not being the holder of the permission or in control of seat capacity. In Section 4.18 of the draft decision its states:

We propose a full-season PATM seat capacity parameter of 14,405,737 for the W24 season, which is necessary to properly take account of the capacity constraint provided for by the 32mppa Conditions. We note that the total incoming historic seat count from W23 is just under 14.3m seats. Consequently, this seat cap of 14.4m seats would be sufficient to allow the full allocation of historic slot entitlements arising from W23.

I wish to point out that the breach of cap takes place in the Winter period and that the decision to match the W24 parameters with W23 when it is clear that in 2023 that resulted in a breach of planning condition is irrational and unacceptable.

- 1.11** I would like to point out that the decision on Slot Co-ordination is a plan or program as per the Habitats Directive, which states:

The Habitats Directive Article 6(3) requires that “any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either

individual or in combination with other plans or projects, shall be subject to appropriate assessment.

As this plan has an impact on capacity at Dublin Airport which in turn has an impact on increased pressures on infrastructure which may impact NATURA2000 sites, it is highly likely that this plan will require AA screening.

2. Competition Law.

- 2.1 As a member state of the EU, Ireland and its competent authorities required to comply with EU law particularly in relation to the single market. In order to ensure a level playing field, the legislation on State aid (Article 107 and 108 of the Treaty on the Functioning of the European Union (TFEU)) and competition (Articles 101 to 109 TFEU — mergers, alliances, price-fixing, etc.) applies to the air transport sector.
- 2.2 EU rules ensure that all carriers, European and non-European, are granted the same rights and same opportunities to access air-transport-related services. This may not, however, be the case in some third countries where discriminatory practices and subsidies may give unfair competitive advantages to air carriers from those third countries. Competition law is in place in order to regulate anti competitive conduct within the single market.
- 2.2 By unilaterally voting to potentially breach planning and environmental regulations that apply to all member states equally, the committee and by extension the IAA if they adopt the decision, may be seen to be breaching EU internal market competition law. Other airports in EU member states must comply with regulations and the terms of their planning permission and operating licenses. In Dublin Airport by refusing to apply the same rules that other Airports in EU member states must adhere to they could be gaining an unfair advantage in enticing airlines to use Dublin Airport. For this reason the decision must comply with the planning conditions, as implemented under EU planning and environmental law.

3. State Aid Issues

- 3.1 DAA are a semi state company (albeit commercial), but have recently received substantial state aid and subsidies from the state particularly during and after the covid restrictions had an economic impact on the airport. Recent judgments from the European Courts in Luxembourg have confirmed that the construction and operation of an airport may constitute an economic activity, which are subject to the TFEU rules on State aid.
- 3.2 As a semi-state body if the IAA allow or facilitate the Committee to make a decision that may be in breach of Planning and Environmental law and may be in breach of competition law, and subsequently adopt that decision, allowing the DAA (another semi state body) and the airlines to benefit economically from non compliance with an EU regulatory regime, could this be seen as giving state aid to the airport? And is the form of state aid illegal under the TFEU?
- 3.3 We know that the airport was given tens of millions in State aid under the COVID 19 Temporary Framework and may have benefited from state aid via the adoption of co-ordination slots that may have breached planning and environmental law. But there are conditional provisions placed on State aid by the EU. While the focus of State aid control is the protection of the internal

market against distortions of competition, as a general matter of coherence within the EU legal order, the Commission must also ensure that State aid is not contrary to other provisions of EU law, including EU environmental law. In a nutshell to receive State aid the DAA must be in compliance with EU legislation/ regulations.

- 3.4 The DAA operations at Dublin Airport may have been in breach of the Environmental and Planning regulations that govern the planning conditions, since the opening of the North Runway in 2022. Also based on the discussion in S23/ W23 /S24 & W24 draft decision(s), those breaches appear to have been intentional, this therefore may trigger a claw back on previous subsidies or a ban on any future state aid or subsidies while the Airport is in non compliance with its planning conditions, under EU State Aid rules. Something the Committee need to consider.

Conclusion.

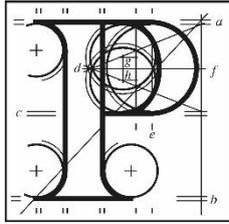
I ask that the committee and the IAA ensure that the Winter slot co-ordination parameters 2024 comply with the planning conditions referred to in section 1 at the time of making the decision. I also ask that the Committee and IAA consider revisiting its decision in S24 in light of the serious issues of compliance with EU and National legislation and taking into consideration fiduciary duty of committee members to their company's and to the public in terms of complying with those same laws. I also ask that the committee be cognisant of the associated offenses under the Planning and Development act of breaching planning conditions.

In essence I and the communities I represent are asking the committee and the IAA to comply with the law.

Yours sincerely

Sabrina Joyce-Kemper & Family.

Appendix 1 - An Bord Pleanála Inspector's Report PL06F.220670 Section 146A



An
Bord
Pleanála

Inspector's Report PL06F.220670 Section 146A

Development

Amendment to the terms of the grant of permission for Terminal two at Dublin Airport.

Location

Dublin Airport

Planning Authority

Fingal County Council

Inspector

Pauline Fitzpatrick

1.0 Introduction and Background

The Board granted permission for Terminal 2 at Dublin Airport under reference number PL06F.220670 (F06A/1248) on the 29th day of August 2007.

The current application, under Section 146A, is a request for an amendment to the terms of the grant of planning permission.

2.0 Planning History

PL06F.220670 (F06A/1248) – split decision issued on appeal in 2007. Permission was granted for phase 1 of the new passenger terminal and permission refused for phase 2 of the passenger terminal.

30 conditions were attached to the grant of permission for Phase 1 of the passenger terminal. With specific regard to this Section 146A request the following is noted:

Condition 3: The combined capacity of Terminal 2 as permitted with Terminal 1 shall not exceed 32 million passengers per annum unless otherwise authorised by a further grant of planning permission.

Reason: Having regard to the policies and objectives of the Dublin Airport Local Area Plan and capacity constraints (transportation) at the eastern campus.

3.0 Applicant's Case

The request, seeking an amendment of condition 3, was received by the Board on the 29th June, 2018.

The applicant is of the view that it was not the intent of condition 3 to apply to transfer passengers. The recommended amendment by way of insertion is as follows:

*The combined capacity of Terminal 2 as permitted together with Terminal 1 shall not exceed 32 million **origin-destination** passengers per annum unless otherwise authorised by a further grant of planning permission.*

The request for the amendment is stated to be of a technical nature and would facilitate the operation of the permission. The applicant's reasoning for the amendment can be summarised as follows:

3.1. Context for attachment of condition

- The 1st portion of the reason for the condition references Dublin Airport LAP which is now expired. There was no express policy or objective within the LAP which actively limited the capacity of the eastern campus. Whilst reference was made in the plan to the provision of 30mppa capacity, no upper limit was provided for.
- The main reasoning for condition no.3 appears to relate to transportation capacity constraints. Connecting passengers have no impact on the transportation network as they do not leave the security restricted airside area of the airport. It is not envisaged that it was the intention of this condition to apply to connecting passengers.

3.2. Clarification of Passenger Types

- At the time of the grant of permission for Terminal 2 99% of passengers were origin-destination passengers.
- Connecting passengers are passengers who may travel through Dublin Airport, but Dublin is not their final destination. The vast majority of connecting passengers are transfer passengers. These passengers remain airside and have no impact on transportation requirements at the airport. In line with international aviation convention such passengers are counted twice, once as an arriving passenger and secondly as a departing passenger eg. 1000 transfer passengers are actually 500 people travelling through the airport. A 2nd type of connecting passenger is a transit passenger who remains on an aircraft during the transit stop (ie. for refuelling).
- The Department of Transport, Tourism and Sport adopted A National Aviation Policy for Ireland in 2015 which states that Dublin Airport will be promoted as a secondary hub airport. Since the adoption of the policy connecting passengers at Dublin Airport have grown to 6% of total traffic or 1.8m passengers in 2017. In 2007 prior to this policy connecting passengers accounted for 1% of total passengers.

3.3. Amendment to Condition 3

- The amendment is sought on the basis of subsections (ii) and (iii) of the Section 146A.
- The EIS accompanying the application for Terminal 2 assessed a 35mppa capacity airport. Transfer passengers were clearly contemplated in the application. At that time it was forecast that transfer traffic would hold at a stable rate of 3%.
- It is not practical for connecting passengers to be included within a cap for terminals. Passengers may transfer between any terminal (existing or any such future facilities regardless of location) and, therefore, the application of connecting passengers to particular terminals is impractical. The lapsed LAP did not put a restriction on connecting passengers.
- It is forecast that Dublin Airport may reach 32 mppa total passengers in 2019. It may not reach 32 mppa origin-destination passengers until around 2020.
- It is critical that this issue is addressed in the interests of clarity and in delivering on national policy set out in the National Planning Framework and the National Aviation Policy.

4.0 Legislative Provisions

Section 146A Planning and Development Act, 2000, as amended

(1) Subject to subsection (2)-

- (a) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or
- (b) the Board may amend any decision made by its in performance of a function under or transferred by this Act or under any other enactment,

for the purposes of –

- (i) correcting any clerical error therein,
- (ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or the decision or

the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or

(iii) otherwise facilitating the operation of the permission for the decision.

(2) A planning authority or the Board shall not exercise the powers under subsection (1) if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned.

(3) A planning authority or the Board, before it decided whether to exercise the powers under subsection (1) in a particular case, may invite submissions in relation to the matter to be made to it by any person who made submissions or observations to the planning authority or the Board in relation to the permission or other matter concerned, and shall have regard to any submissions made to it on foot of that invitation.

(4) In this section 'term' includes a condition.

5.0 **Assessment**

The DAA is requesting the Board, via Section 146A, to amend the wording of condition 3 attached to the permission for the 2nd terminal to specifically state that the 32 mppa limit refers to origin-destination passengers, only, thereby removing transfer passengers from same. The case is made that the LAP which is now lapsed, did not set a cap of 30 mppa and that the reason for the condition relates primarily to transportation infrastructure constraints. It is argued that such transfer passengers were contemplated in the EIS and that it was not the intention that the condition be applied to such passengers who remain airside and who would not result in transportation demand.

In assessing the DAA's request for the proposed amendment I have had particular regard to the wording of subsections (ii) and (iii) of Section 146A. I do not consider that subsection (i) which allows for the correction of a clerical error is applicable in this instance.

Subsection (1)(a)(ii) allows for an amendment to a permission which would have been contemplated and provided for but which was not expressly provided for in the permission. Subsection (1)(a)(iii) allows for an amendment which would facilitate the

operation of the permission. Compliance with one of the two subsections is required. Subsection (2) precludes the making of such an amendment which would materially alter the terms of the development as permitted

The DAA in its submission states that the EIS accompanying the application clearly contemplated transfer passengers with specific reference made to an extract from the Mobility Management Plan where regard was had to transfer passengers.

It is noted that in 2007 only 1% of the total passenger numbers were transfer passengers. The mobility management plan, as referenced, set the figure at a constant 3%. The applicant in its submission states that the latest figures indicate that transfer passengers equate to 6% of the total passenger numbers, namely 1.8 million passengers in 2017. This is expected to increase further. In total 29.6 million trips were facilitated through Dublin Airport in 2017.

In a review of the documentation on the file and the Inspector's report I note that a detailed assessment was undertaken in terms of capacity. It was noted that the current trend at the airport was in the direction of increased low cost operation but that it has the potential to operate as a hub for long-haul operations. Whilst implied by reason of the function of a hub, the issue of transfer passengers does not appear to be specifically referred to and did not form a substantive issue in the applicant's case. I would therefore consider it reasonable to infer that the proposal and capacity was assessed primarily in terms of origin-destination passenger numbers and that the extent of transfer passenger numbers was not envisaged or accounted for.

The issue of capacity was considered relevant in terms of it being one of the determinants in the size of the terminal structure, its compliance with the policies and objectives of the LAP and in terms of traffic generation. The Inspector in her report stated that whilst the LAP did not cap passenger numbers at 30mppa it was a reasonable interpretation of the totality of the plan that it envisaged a capacity of approx. 30 mppa for the eastern campus thereby not undermining one of the main objectives of the LAP which seeks to achieve a balanced development between the east (existing campus) and a proposed western campus and in terms of optimal use of the terminal and pier facilities. She recommended that the combined capacity of

T1 and T2 should not exceed 32mppa unless specifically allowed for following an official review of the LAP. This recommendation is reflected in condition 3.

On this basis I would not concur with the applicant that the reason for condition 3 was primarily based on transportation constraints but was also to ensure that the main objectives of the LAP are not undermined.

The fact that the 2006 LAP may have lapsed does not negate the substance of the condition and the reason for same. I note that the plan is currently under review with no date for its publication available.

I note that during the assessment of the application for Terminal 2 due regard was had to the then applicable Aviation Action Plan 2005 in which the delivery of the terminal was stipulated. I do not consider that it is reasonable to retrospectively apply the provisions of the 2015 National Aviation Policy for Ireland document which now seeks to promote Dublin Airport as a secondary hub airport.

Whilst I accept that airside passengers do not have any impact on landside transportation their requirements in terms of airside facilities etc. is a relevant and material planning consideration. As noted above capacity is a determinant in the size of the terminal structure. How the increase in such transfer passenger numbers impacts on the space requirements and arrangement within both Terminals 1 and 2 and the knock-on impacts, if any, in terms of further development and space allocation etc. therein, are relevant and, in my opinion, material considerations. Whilst I also note DAA's view that the application of connecting passengers to particular terminals (existing or any such facility in the future regardless of location) is impractical I consider that due consideration is required in terms of the future implications for future airport development including the potential development of the western campus and a further terminal facility.

In this respect I would draw the Board's attention to the various requests for further incremental development at the airport (see schedule on file ref. ABP 300785-18), which may cumulatively allow for potential expanded passenger capacity including passenger transfer. In this regard the Board is advised of the decided cases which refer to airside provisions namely PC0053, PC0166, PC0205, PC0207 and ABP300667-18. I submit that these could be seen to support the view that this current request constitutes a material alteration of the terms of the development.

6.0 Conclusion

On the basis of the above assessment I conclude:

- the amendment as proposed to condition 3 entails an amendment which would not have been contemplated and provided for in the permission, therefore subsection (1)(a)(ii) is not applicable
- it would not facilitate the operation of the permission in that the terminal has been constructed and is operating, therefore subsection (1)(a)(iii) is not applicable.
- The amendment would materially alter the terms of the development as permitted and is therefore precluded by subsection (2).

I recommend that the DAA be notified accordingly.

Pauline Fitzpatrick

Senior Planning Inspector

July, 2018