

Southend-on-Sea Borough Council - Airport Lease Advice

Review of the Section 106 Planning Obligations Associated with the Approved Development of Southend Airport

09 March 2011

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Glossary

ACC	Southend Airport Consultative Committee
AIP	UK Aeronautical Information publication (produced and published by NATS Ltd)
ATM	Air Transport Movement
CAA	Civil Aviation Act 1982
ICAO	International Civil Aviation Organization
ILS	Instrument Landing System
JAAP	Joint Area Action Plan
PPG24	Planning Policy Guidance 24
RESA	Runway End Safety Area
RDC	Rochford District Council
s106	Section 106 of the Town and Country Planning Act
SBC	Southend-on-Sea Borough Council
SSR	Secondary Surveillance Radar
TCPA	Town and Country Planning Act

Executive Summary

Context and Objectives

Southend Airport is owned by Southend-on-Sea Borough Council (SBC) and is leased to the London Southend Airport Company Ltd (Airport Operator) by way of 3 long term leases. As part of a recent planning application by the Airport Operator to extend the runway, SBC, the Airport Operator, Rochford District Council (RDC) and Essex County Council agreed a “Planning Obligation by Agreement” pursuant to Section 106 (s106) of the Town and Country Planning Act (TCPA) 1990 (hereafter referred to as the s106 Agreement).

SBC are now in the process of considering variations to the Airport leases which has prompted a review of the controls on the operation of the Airport. In this regard SBC have appointed Atkins to provide expert advice in relation to whether the s106 Agreement obligations, together with a requirement for the provision of a secondary surveillance radar (SSR) service should be incorporated in the new lease arrangements, and whether it would be reasonable for SBC (as land owner) to impose additional controls on the Airport.

This report is presented in two major sections one that looks at the s106 obligations from a TCPA and Tenant and Landlord Lease Terms perspective; whilst the other reviews the obligations from an aviation industry stance.

Land and Planning Advice

The scope of Section 106

Planning obligations are an entirely appropriate and common means by which controls may be imposed on the Airport Operator. They may lawfully restrict the development or use of the land in the way specified in the s106 Agreement. The Airport Operator has agreed to the measures within the Second Schedule of the s106 Agreement being applied to the terms of the Airport Leases as varied subject to proper incorporation that respects the limits that can be applied to landlord and tenant covenants, which prevail in commercial leases. A few modifications regarding the s106 Agreement provisions will be required if they are to be transposed into the revised Leases successfully.

Enforcement through the S106 and Lease

The s106 Agreement is governed by planning and contract law and is enforceable by injunction. In summary, if the Airport Operator breached the terms of the s106 Agreement, then SBC (as local planning authority) could seek an injunction from the High Court requiring specific performance of the planning obligations and (depending on the precise terms of the planning obligation) requiring the Airport to cease operations until the breach is remedied.

The s106 Agreement is also binding and enforceable against successors in title, so if the Airport Operator sold the Airport, the planning obligations would continue to bind the land and the operation of the Airport, regardless of the terms of the Airport Lease. Therefore, the s106 Agreement provides a very effective means of controlling the Airport.

In contrast, lease terms are subject to the legal regime of commercial tenancies and can bind signatory parties and their successors in title but would not bind third parties. Even so, for added security, it would be prudent for the planning obligations in the s106 Agreement to be incorporated into the revised terms of the Airport Lease, albeit modified as necessary to comply with landlord and tenant law.

Aviation Industry Advice

Atkins has considered each of the s106 Agreement obligations, which are related to the operation of the Airport in respect as to whether the obligation is considered to be reasonable from an aviation perspective. Atkins considers an obligation to be reasonable if similar obligations have been implemented at other UK airports, and / or compliance with the obligation does not have a disproportionate impact on the day to day viability of the Airport operation, and / or it limits the future impact of the Airport on the local communities. Atkins considers a s106 obligation to be enforceable if it is possible to present evidence as to whether the obligation has or has not been implemented as required by the s106 Agreement. By being able to provide evidence as to the status of implementation, SBC can monitor compliance with the s106 obligations and if necessary take steps to enforce the Airport Operator to comply with the obligations (as summarised above).

Atkins considers all of the obligations within the Second Schedule of the s106 Agreement to be reasonable and enforceable. Recommendations have been made in relation to some controls for the purpose of incorporation into the revised Lease. These are detailed in this report and summarised in the table below. It should be recognised that the sanctions or “implications” suggested should be in addition to the controls in the s106 Agreement, and in some cases would offer more flexibility to SBC in terms of enforcement. For example, if night time quotas of flights are exceeded, rather than seek an injunction from the High Court to stop these, SBC could rely on our recommended sanctions (if incorporated into the Lease) to enforce a lower quota in night time flights in the subsequent reporting period. Measures such as these would facilitate proper management of the Airport, whilst not reducing the control available to SBC.

s106 Agreement Obligation	Conclusion / Recommendation	Proposed "Implication"
<p>Accountability and Promulgation of the Quiet Operations Policy</p> <p>Public Noise Complaints Handling Service</p> <p>Noise Monitoring System</p> <p>Ground Noise</p> <p>Noise Preferential Routes</p> <p>Air Quality Monitoring</p> <p>Instrument Landing System</p> <p>Wake Vortex Scheme</p>	<p>No additional controls are required over and above those included in the s106 Agreement.</p>	<p>Not Applicable</p>
<p>Property Acquisition and the Sound and Thermal Insulation Grants Scheme</p>	<p>SBC to agree a condition with the Airport Operator that either the Airport Operator has the noise contour maps (defined in s106 Agreement, Second Schedule, Para 3.12) for Southend Airport prepared by an independent provider or if they are prepared by the Airport Operator they are validated by an independent provider.</p>	<p>Not Applicable</p>

s106 Agreement Obligation	Conclusion / Recommendation	Proposed "Implication"
Night Noise Provision including the Quota Count Scheme	SBC and RDC to agree with the Airport Operator a set of "implications" for if the night noise quotas are exceeded.	<p>If the number of qualifying flight movements in a night quota period exceeds the quota number of movements by 10% or less (rounded down to the nearest whole movement) the night quota limit for the following night quota period will be reduced by the same amount.</p> <p>If the number of qualifying flight movements in a night quota period exceeds the quota number of movements by greater than 10% (rounded down to the nearest whole movement) the night quota limit for the following night quota period will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.</p> <p>If a non exempt flight movement is undertaken by an aircraft with a noise Quota Count greater than 1 or a helicopter then the licensed operator of the aircraft / helicopter is subject to an appropriate financial sanction to be agreed and administered by the Southend Airport Consultative Committee (ACC). The Airport Operator will use all reasonable endeavours to recover the financial sanction.</p> <p>Example 1: Less than a 10% overage of the monthly night noise quota:</p> <p>Night Quota Limit in Month 1 = 120 10% Limit = 120 * 10% = 12 movements Actual number of qualifying night quota movements recorded = 125 Hence 5 movement overage which is less than 10% of the quota Night Quota Limit in Month 2 = 120 – 5 = 115 10% Limit for month 2 = 115 * 10% = 11.5 movement rounded to 11.</p> <p>Example 2 Greater than a 10% overage of the monthly night noise quota:</p> <p>Night Quota Limit in Month 1 = 120 10% Limit = 120 * 10% = 12 movements Actual number of qualifying night quota movements recorded = 136 Hence 16 movement overage which is greater than 10% of the quota There are 4 movements over the 10% limit which therefore incurs a reduction of twice the number of movements, i.e. 8.</p>

s106 Agreement Obligation	Conclusion / Recommendation	Proposed "Implication"
		<p>Night Quota Limit in Month 2 = $120 - 20 = 100$</p> <p>10% Limit for month 2 = $100 * 10\% = 10$ movements.</p>
Aircraft Restrictions	SBC and RDC to agree with the Airport Operator a set of "implications" for if the aircraft restrictions are breached.	<p>If the number of movements by aircraft with a Quota Count of more than 2 but up to (and including) 4 exceed 60 in a Quota Year by 10% or less (rounded down to the nearest whole movement) the equivalent quota for the following Quota Year will be reduced by the same amount.</p> <p>If the number of movements by aircraft with a Quota Count of more than 2 but up to (and including) 4 exceed 60 in a Quota Year by greater than 10% (rounded down to the nearest whole movement) the equivalent quota limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.</p>
Runway Take Off & Landing Preferences during the Night Quota	SBC and RDC to require the Airport Operator to maintain records and report on the occasions when a flight does not use the preferred runway and be able to provide details as to the reason the non-preferred runway was selected.	The Airport Operator to report on exceptions to the night period preferred runway operations on a quarterly basis to the ACC, as part of the Annual Report required by the s106 Agreement and as requested by SBC on an ad-hoc basis.
Preferred Runway Take Off & Landing Procedures during the Daytime	SBC and RDC agree with the Airport Operator a set of additional "implications" for if the night period runway preferences are breached without due reason.	A breach of the night period runway preferences should result in an appropriate financial penalty and should be included within the scheme to be defined by the Airport Operator and agreed by the ACC for infringement of Noise Preferential Routes as required by the Second Schedule of the s106 Agreement paragraph 3.51.
	For clarity the Airport Operator should define and agree with SBC and RDC the exact coordinates of the "south west" area to be monitored referred to in paragraph 3.4 of the Second Schedule.	It is proposed that the co-ordinates for the "south west" area should be at least equal to the area shaded green within Plan 3 of the Sixth Schedule of the s106 Agreement.

s106 Agreement Obligation	Conclusion / Recommendation	Proposed "Implication"
	<p>SBC to require the Noise Monitoring System being implemented by the Airport Operator to be able to:</p> <ul style="list-style-type: none"> a) Report on tracks flown by aircraft b) Have the functionality to report on the number of flights that have operated over a defined area (i.e. the south west area) within a fixed date period. 	<p>Not Applicable</p>
	<p>SBC and RDC to agree with the Airport Operator a set of additional "implications" for if the obligations defined in the s106 Agreement, Second Schedule, paragraph 3.40 are breached.</p>	<p>If the percentage of Daytime landings from the south west in a Quota Year exceeds 50% and is less than or equal to 60% the equivalent limit for the following Quota Year will be reduced by the same amount.</p> <p>If the percentage of Daytime landings from the South West in a Quota Year exceeds 60% the equivalent limit for the following Quota Year will be reduced by 10% plus twice the amount in excess of 60%.</p> <p>If the percentage of all movements operating over the area south west of the Airport in a Quota Year exceeds 50% and is less than or equal to 60% the equivalent limit for the following Quota Year will be reduced by the same amount.</p> <p>If the percentage of all movements operating over the area south west of the Airport in a Quota Year exceeds 60% the equivalent limit for the following Quota Year will be reduced by 10% plus twice the amount in excess of 60%.</p>

s106 Agreement Obligation	Conclusion / Recommendation	Proposed "Implication"
Additional Restrictions on Air Transport Movements (ATMs)	SBC, RDC and the Airport Operator to agree a set of additional "implications" to cover the situation of the Airport exceeding the annual movement limits.	<p>If the annual number of ATMs at the Airport exceeds the annual movement limit by 10% or less (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same amount.</p> <p>If the annual number of ATMs at the Airport exceeds the annual movement limit by greater than 10% (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.</p> <p>If the annual number of movements by Boeing 737-300 aircraft exceeds the annual Boeing 737-300 movement limit by 10% or less (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same amount.</p> <p>If the annual number of movements by Boeing 737-300 aircraft exceeds the annual Boeing 737-300 movement limit by greater than 10% (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.</p> <p>If the annual number of cargo movements exceeds the annual cargo movement limit by 10% or less (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same amount.</p> <p>If the annual number of cargo movements exceeds the annual cargo movement limit by greater than 10% (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.</p>
	For clarity SBC and the Airport Operator to agree and document a formal definition as to what constitutes a Cargo flight movement.	A cargo flight shall be defined as a flight whose primary purpose is the carriage of goods (freight, unaccompanied baggage and mail).
Engine Testing	SBC and RDC to agree with the Airport Operator what additional "implications" are appropriate for consistent breaches	If there are consistent breaches of the engine test policy then the company / organisation responsible for the engine test is subject to an appropriate financial sanction to be agreed and administered by the ACC. The Airport Operator will use all reasonable endeavours to recover the

s106 Agreement Obligation	Conclusion / Recommendation	Proposed "Implication"
	of the engine test policy.	financial sanction.
Secondary Surveillance Radar	The Airport Leases are varied to require the Airport Operator to install, operate and maintain a SSR or a service that provides a capability that is equivalent to or exceeds that of a SSR.	Not Applicable

In undertaking this review Atkins has considered if further obligations, unrelated to those discussed above, are necessary to control the impact of the Airport on local communities. Consideration has been given to requiring the Airport to close for a number of hours every night. The perceived benefit by local communities of having a total closure is the guaranteed period of time without aircraft noise. At this stage Atkins does not foresee it necessary to introduce any further controls over and above those contained within the s106 Agreement and the recommendations made above. It is Atkins view that the current s106 obligations will ensure no flight movements in significant periods of the night due to the very limited number of monthly night movements allowed. From a review of night operations at UK airports it is clear that there is not a blanket night closure across airports and it is the particular circumstances at each airport that is important. This supports Atkins view that a night closure period is not appropriate for Southend Airport and that the use of local night quota arrangements is the appropriate method to control night flights. Atkins believes that a night closure period would damage the economic and societal benefits that flow from the Airport.

Atkins believes that the recommendations set out in this report, if implemented, would complement the controls in the s106 Agreement. By agreeing a set of additional sanctions or implications Atkins believes it strengthens and increases the flexibility of SBC's enforcement powers and potentially reduces the need to resort to the Courts.

1. Context

Southend Airport is owned by Southend-on-Sea Borough Council (SBC) and is leased to the London Southend Airport Company Ltd on three long term leases. London Southend Airport Company Ltd, part of the Stobart Group, is the Airport Operator. The majority of the existing Airport falls within the administrative jurisdiction of Rochford District Council (RDC) in relation to Local Planning, whilst the land required for an expansion of the runway falls within the administrative jurisdiction of SBC. SBC have accountability for both Local Planning and management of highways that fall within Southend Borough. Essex County Council is responsible for the management of the highways around the Airport that fall within RDC. SBC, on the 30th April 2010, granted planning permission for the Airport Operator to (inter alia) extend the runway. As part of the planning process a number of interested parties (RDC, SBC, Essex County Council, London Southend Airport Company Ltd Bank of London and the Middle East Plc) agreed a “Planning Obligation by Agreement” pursuant to Section 106 (s106) of the Town and Country Planning Act (TCPA) 1990 (hereafter referred to as the s106 Agreement). The s106 Agreement sets out a number of obligations, the majority of which are related to how the Airport is operated. Predominately the obligations limit the impact of the future operation of the Airport on local communities and make the development acceptable in planning terms.

SBC are now in the process of varying the Airport leases which has prompted a review of the controls on the Airport.

2. Objectives

SBC have appointed Atkins to provide expert advice in relation to whether the s106 Agreement obligations, together with a requirement for the provision of a secondary surveillance radar (SSR) service should be incorporated in the new Lease arrangements, and whether it would be reasonable for SBC (as landowner) to impose additional controls on the Airport.

3. Approach

In carrying out this study Atkins has reviewed the s106 Agreement and the relevant Airport leases to identify, in our opinion, if each of the obligations is reasonable and whether we consider it to be enforceable. The key steps in completing this task have been:

- Identification of whether the proposed controls to be included within the lease are compatible with the existing s106 Agreement.
- Consultation with the Air Traffic Service (ATS) provider to understand the local operation of the airspace, runways and the strategic planning of arrival and departure routes.
- Identifying whether the proposed controls to be included within the lease are “reasonable and enforceable” from a landlord and tenant, and aviation operational point of view.

This report is presented in two major sections one that looks at the s106 obligations and whether they are enforceable from TCPA and Tenant and Landlord Lease Terms perspectives; whilst the other reviews the obligations from an aviation industry stance.

4. Land and Planning Advice

4.1 Introduction

4.1.1 Documentation Received

Atkins has received all the documentation that it has requested and believes it has seen the necessary information to deliver the advice necessary to meet the objectives set by SBC and defined in Section 2 above. The documentation received is as follows:

- A lease (the 'Main Lease') dated 30 March 1994 made between the SBC and the Airport Operator. This is the lease that the Council wishes to review with a view to negotiating a Deed of Variation to incorporate some amended terms and a larger demise. Atkins understands one of the purposes of the variation is to correctly reflect the enlarged land area of the Airport as a consequence of the runway extension and a second is to update the lease with the new obligations accepted by the Airport Operator as part of the s106 Agreement.
- A second lease made between SBC and the Airport Operator dated 12 December 2007 (the 'RESA 2007 Lease'). The RESA 2007 Lease is subordinate to the Main Lease, dated 1994.
- Copy of the s106 Agreement and planning permission (dated 30 April 2010 ref SOS/09/01960/FULM) for the extension of the existing runway and ancillary works dated. Informative 03 of this planning permission refers to the s106 Agreement. The obligations under this s106 Agreement replace the obligations under a predecessor s106 agreement dated 19 July 1999 relating to planning consents and reserved matters approvals granted in 1999, 2004 and 2008.
- A Note regarding Changes to the Operating Conditions with the Extended Runway (from Alastair Welch, Managing Director of Airport Operator) that has not been dated. This sets out the background to the requirement for new tighter night flying conditions and controls. These are in accordance with the Business Development announcement on SBC's website referring to the new control measures for the Airport.

The documentation is not accompanied by a comprehensive Schedule of Leases covering the Airport land. Although many Leases are listed in Schedules, within the documentation received, we have not investigated how the leased land matches with the parcels of land registered at HM Land Registry and to which reference is made in the First Schedule of the s106 Agreement. The Airport comprises various parts of land that are controlled by several leases and all of the land is controlled by SBC as freehold owner and landlord.

The plans and maps seen as part of this study include:

- An up to date plan prepared by Stobart which shows the consolidated land area for the Airport operations.
- The plans attached to the s106 Agreement.
- The Proposals Map for the proposed Joint Area Action Plan (JAAP).

Plan 1 appended to the Main Lease has not been seen.

The latest s106 Agreement (dated 30/04/2010) also refers to an 'Original Agreement' executed in 1999 which has not been seen.

4.2 Approach

The purpose of this Section of this report is to comment on the application of the obligations agreed in the s106 Agreement to the Airport operating land. The majority of the obligations are referred to in the Second Schedule of the s106 Agreement.

The Main Lease constitutes a business tenancy under the law of property. Atkins does not know the status of the other leases in property law. Atkins understand that the purpose of the reviewing exercise is to show what steps need to be taken to achieve a streamlining of the obligations contained in the leases governing the totality of the Airport land so that the new s106 Agreement obligations are correctly reflected in the leases for landlord and tenant purposes.

As part of this approach Atkins will consider:

- Obligations under Section 106 of the Town and Country Planning Act (TCPA) 1990;
- The operation of the s106 Agreement;
- The extent to which the Main Lease terms bind the parties and therefore the enforceability of the new controls in relation to the Landlord and Tenant business context;
- The relevance of the Development Plan and how it relates to the Section 106 TCPA 1990 (as amended); and
- Some recommendations (proposals) of an approach in terms of incorporating new terms into the proposals for the variation of the Main Lease.

4.3 Councils and relationships to the land

The majority of the Airport land falls within the administrative jurisdiction of RDC. SBC is the freehold owner of the Airport land including the land for the runway extension development. The land required for the runway extension falls within SBC's jurisdiction as planning authority. Essex County Council is the highway authority for those roads not falling within SBC's administrative jurisdiction. The noise control obligations within the s106 Agreement particularly protect the densely populated areas around the Airport in both SBC's and RDC's administrative areas. The land is within the exclusive control of the SBC. Some of the s106 Agreement obligations regulate other controls outside the context of the lease and are relevant to the functions of the other authorities named in the s106 Agreement. This means that it is necessary to distinguish the nature of the types of obligations appropriate to each legal mechanism. A Section 106 obligation is governed by planning and contract law and enforced through public law controls. In contrast lease terms are subject to the legal regime of a commercial tenancy and can only bind signatory parties and their successors in title so would not bind third parties. Thus third party Councils do not have any rights to enforce obligations in respect of a breach under the Lease terms, and in that case, it can only be enforced by the Council party to the Lease against the Tenant.

4.4 Obligations under Section 106 of the TCPA 1990

Any person "interested in land" in the area of a local planning authority may, by agreement or otherwise, enter into an obligation.

4.4.1 The scope of Section 106

Planning obligations are entered into voluntarily by the parties and operate as a mechanism to facilitate controls over the development of land where planning conditions cannot be imposed. Under such an Agreement a Developer may be subject to planning obligations:

- a) restricting the development or use of the land in any specified way;

- b) requiring specified operations or activities to be carried out in, on, under or over the land;
- c) requiring the land to be used in any specified way; or
- d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

A planning obligation may:

- a) be unconditional or subject to conditions;
- b) impose any restriction or requirement mentioned in subsection (a) to (c) above either indefinitely or for such period or periods as may be specified.

The s106 Agreement is an entirely appropriate device to impose controls on the Airport Operator in order to make the development acceptable.

4.4.2 The New Night Flight Limits and Other Measures – suitability for S106 and lease terms

The obligations within the Second Schedule of the s106 Agreement will require the Airport Operator to achieve a number of new measures that go beyond the previous obligations required for the control of night flights and other impacts associated with the operation of the Airport. The Second Schedule of the s106 Agreement incorporates provisions that are designed to implement the Quiet Operations Policy including provisions relating to Ground Noise, Night Noise, Aircraft restrictions, Runway Take Off and Landing Procedures (day and night), additional restrictions on Air Traffic Movements and Noise Preferential Routes. These terms are appropriate for inclusion in the revised lease terms. As stated above the s106 Agreement is an entirely appropriate device to impose all these obligations on the Airport Operator.

The Airport Operator since signing the s106 Agreement has volunteered to install and make operational an SSR. It is appropriate that such an obligation can be included within the Deed of Variation of the Main Lease.

4.5 Legal Regime Applying to Aircraft Noise

There is no fixed legal test for determining whether noise is a nuisance. Aircraft noise is specifically excluded from Section 79(6) of the Environmental Protection Act 1990 (EPA 1990). Immunity from action is contained in the Civil Aviation Act 1982 (CAA 1982). The effect of this exclusion has been challenged in the European Court of Human Rights in the cases of *Powell and Rayner* and *Hatton v UK*. These cases upheld the UK's approach to controlling aircraft noise. This is material to the way in which SBC wishes to manage complaints about aircraft noise that may be made to it by residents.

SBC may wish to consider the procedure it adopts for noise regulation of the Airport in the context of its own obligations as a landlord, and secondly as a public authority in terms of the procedures and decisions it adopts in relation to the Airport Operator. This is because there is very limited recourse and relief for airport neighbouring property owners to complain about aviation noise nuisance under the Civil Aviation Act 1982. That said, the measures proposed within the Second Schedule of the s106 Agreement offer protection and mitigation measures to neighbouring residents in adjoining properties.

4.6 Council remedies in Section 106 and in Landlord and Tenant Law

If there is any breach of the s106 Agreement and Tenant's covenants in the Main Lease SBC would have separate remedies in terms of enforcement under these two areas of law. The remedies are examined, in the following sub-sections, through:-

- General principles regarding enforcing mechanisms in a s106 Agreement.
- The scope and application of the s106 Agreement.
- The commercial tenancy created in the Main Lease.

4.6.1 General principles in the Town & Country Planning Act 1990 regarding enforcing mechanisms in a Section 106 Agreement

Section 106 of the TCPA states that a planning obligation is enforceable by the authority:

*(3)(a) against the person entering into the obligation; and
(b) against any person deriving title from that person.*

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which s/he no longer has an interest in the land.

(5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.

(6) If there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the authority by whom the obligation is enforceable may -

- a) enter the land and carry out the operations; and*
- b) recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so.*

(7) Before an authority exercise their power under subsection (6)(a) they shall give not less than 21 days' notice of their intention to do so to any person against whom the planning obligation is enforceable.

(8) Any person who wilfully obstructs a person acting in the exercise of a power under subsection (6)(a) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Obligations intended to be binding upon the local planning authority, cannot fetter the exercise of any of its statutory functions.

Planning obligations have the effect of creating a covenant, which is enforceable against successors in title. Planning obligations are registered as local land charges and binding as such.

Planning obligations are enforceable by the local planning authority through the Courts in civil proceedings, which includes the power to apply for an injunction. An injunction can require specific performance of the planning obligation and/or require in the use of the development to cease until the breach of the planning obligation has been remedied.

Section 106(6), enables the local authority in certain circumstances to enter the land, carry out the operations required by the obligation, and recover the costs from the person against whom the obligation is enforceable. This is a form of enforcement through the civil law, although there are criminal penalties in section 106(8) against persons obstructing the exercise of the power of entry who are liable on summary conviction to a fine not exceeding Level 3 on the standard scale.

4.6.2 The scope and application of the S106 Agreement

The scope of the s106 Agreement applies to a number of Airport operations and includes noise controls. The s106 Agreement defines the extent of the land to which the s106 Agreement relates in the Recitals and the First Schedule. Whilst the scope of this study did not include investigation of title, SBC's external solicitors, SNR Denton UK LLP, have confirmed that the registered titles referred to in the First Schedule of the s106 Agreement comprise SBC's freehold title and the Airport Operator's leasehold title, within the existing boundary of the Airport and the land required for the runway extension and associated works. In other words, the planning obligations are binding upon all that area of land shown edged red and green on Plan 1 of the Sixth Schedule of the s106 Agreement, including the interests held by SBC and the Airport Operator. As such the planning obligations would also be binding on any subsequent owner of the Airport. SBC wishes to ensure that the obligations within the s106 Agreement are incorporated in the revisions proposed to the Main Lease.

SBC is right to review the Main Lease /RESA 2007 Lease / s106 Agreement position with a view to consolidating the obligations and the triggers for enforcement, thereby also ensuring that the procedure for such enforcement is clear and flexible where possible. .

4.6.3 The scope of remedies in a commercial tenancy: enforcing noise controls through Lease Terms

For the s106 Agreement to apply, all parties who occupy the site they must have an "interest in land". The Parties to the Lease are the Landlord (SBC) and the Tenant (the Airport Operator). There are various sub-tenants who (assuming their interest pre-dates the s106 Agreement) will not be bound by its terms. Likewise they will not be bound by any variations of the lease unless the Airport operator is in a position to vary the sub-leases at the same time. There are controls which prevent the Tenant assigning its interest to third parties. It is not known whether SBC has any freehold interest in land outside the perimeter of the Airport land, for example whether it is a Council landlord in relation to any of the neighbouring properties nearby, but it is thought to be very likely that this is the case. Clearly SBC will have to consider its position in this regard as disputes with adjoining occupiers are to be determined with the Landlord (Council) – e.g. neighbouring residents with complaints about noise controls or air quality. The Council cannot fetter its discretion in this regard.

This is relevant to its duty to enforce obligations either under the s106 Agreement or Lease terms. SBC will be able to enforce through either mechanism. In the first instance it may be more likely to turn to the enforcement provisions under the s106 Agreement. These potentially offer more practical enforcement remedies as they can be more immediate and can be enforced more readily compared with the remedies under the Lease terms which may ultimately lead to the termination of the Lease agreement between the parties.

The fixed term of the Main Lease is currently not due to expire until 31 March 2144 and is a lease for 150 years. The RESA 2007 Lease is made between SBC and the Airport operator for a parcel of land on the edge of the Airport boundary. This Lease relates to additional land that will accommodate the runway extension given planning permission by the consent to which the s106 Agreement was attached. The Council is also the landlord under the RESA 2007 Lease so the Council can enforce provisions relating to the land demised by the RESA 2007 Lease both under the s106 Agreement and as landlord.

4.6.3.1 Relationship of S106 and the Lease

The s106 Agreement terms can be incorporated within the Main Lease and the RESA 2007 Lease through a variation of the terms of both leases (as proposed).

It would be possible within the deed(s) of variation to include a simple covenant within the Airport leases as amended obliging the tenant to comply with the provisions of the s106 Agreement. However, given the length of term of the lease and the possibility of the Airport operator being able to vary the s106 provisions in the future through the Planning process, it is felt that imposing controls as specific obligations within the varied leases as well as through the s106 Agreement will both give the Council more flexibility and also more certainty that they will remain in place unless SBC as the landlord agrees to vary them.

4.6.3.2 The Main Lease

The Main Lease is a business tenancy which is regulated by the Landlord and Tenant Act 1954. This report does not include any advice regarding the operation of the 1954 Act. It does not impact upon the ability of the landlord and the tenant to agree to vary the terms of the lease.

4.6.3.3 Land pertaining to the Main Lease

A variation of Lease terms can be executed by way of a Deed of Variation. The Main Lease applies obligations to the "Aerodrome". This is defined at 1.2 and 1.3 of the Lease 'Definitions'. Definition 1.2 refers to "Adjoining Property" which means "any land and/or buildings adjoining or neighbouring the Aerodrome now or from time to time owned by the Landlord". It may be sensible to review these definitions as part of the process of negotiating the Deed of Variation to ensure they still work effectively.

4.6.3.4 Landlord's Covenants under the Main Lease

The Landlord's Covenants are in Paragraph 5 of the Main Lease. In particular:

Clause 5.2 covers the Landlord's Indemnity regarding the Development Land Site.

Clause 5.2.1 creates a covenant between the Landlord and the Tenant to cover the costs of Environmental Liabilities asserted against or sustained by the Tenant which arises out of any third party claim or action by a regulatory authority in connection with 'the Environment'. The definition of 'Environment' was clearly drafted in contemplation of contaminated land and water law regulations and makes no mention of noise. These provisions are therefore not impacted by the proposed variations.

In England aviation noise is not managed using the law of nuisance. The Air Navigation Act 1920 and the Civil Aviation Act 1982 (CAA 1982) has exempted aviation noise from common law nuisance sanctions. Breaches of aviation noise controls therefore cannot be enforced in the covenant binding the Tenant in Clause 4.26. If there is a breach under the CAA 1982 SBC may wish to have the benefit of an indemnity for any costs and damages that could potentially arise from such enforcement. It would be beneficial to include a specific obligation upon the tenant to comply with the CAA 1982 together with an indemnity for breach both of which could be added to the leases by way of the proposed Deed of Variation.

4.6.3.5 Tenant's Covenants

Section 4 of the Main Lease refers to the Tenant's Covenants and in particular:

Clause 4.23 (page 27) Night flying contains provisions regarding the permitted period for night flying and how they relate to different types of aircraft. This includes a Table at 4.23.8 setting out the Permitted Night Time Hours Movements. This clause (which is enforceable as one of the tenant's covenants under the lease) is one of the Clauses SBC proposes to vary to reflect the provisions of the s106 Agreement.

4.6.3.6 Enforcement of the Quiet Operations Policy in the Main Lease

The Main Lease cannot enforce the Quiet Operations Policy through the tenant's Covenants relating to Environmental Liabilities any Deed of Variation would need to incorporate a specific tenant's obligation to comply with the Quiet Operations Policy. In terms of enforcing Prohibited Flying Hours (Lease language) or Night Time Quotas (s106 Agreement language) the enforcement relates to the production of Night Flying Records (Lease: 4.23.6) and Quota Counts (s106 Agreement Quota Count System Clause 3.31 *et seq*). Similar provisions would need to be retained in any variation of the Lease and Atkins recommends adopting the new s106 terminology so that all the documentation is consistent.

The inclusion of the s106 Agreement obligations within a variation of the Main Lease is not considered to threaten the commercial viability of operations at the Airport. It is worth noting that future variations to the Airport's obligations arising from external factors (i.e. not where specifically agreed to by the tenant) could be considered by the Tenant to be a 'Causative Event' and give rise to a break clause should the financial viability of the Airport operations be threatened in a significant way.

The Main Lease provisions require the Tenant to comply with all the requirements and recommendations of the CAA 1982 (4.32.1). However note that at 7.17.1 the Tenant has a right to break the terms of the Lease in the event of a 'Causative Event'. This means "a significant change in either or both of:

- a) Any statutory requirements regulating the use and operation of the Aerodrome as an airport
- b) Any regulations made by the CAA regulating the use of the Aerodrome as an airport.

If the Tenant's business is rendered Commercially Unviable in accordance with the lease terms then the Tenant is entitled to determine the Lease and give notice. This report assumes that both parties wish to continue with the contractual basis of the agreement and that neither party wishes to terminate the lease on the basis of the variation to the Airport Operators obligations.

Recommendation: in terms of the Quiet Operations Policy giving rise to a potential breach of the existing Main Lease terms SBC should consider imposing its provisions within Deed(s) of Variation of the Airport leases as discussed above.

4.6.3.7 The s106 Agreement Second Schedule Obligations

In respect of the other obligations outside noise a high level review indicates that the position is as follows:-

- a) Economic Impact (s106 Agreement, Second Schedule, Section 2) - These obligations would be a little unusual in a commercial lease but there is no reason why they should not be incorporated in the leases by way of the Deed(s) of Variation if SBC require.
- b) Air Quality Monitoring (s106 Agreement, Second Schedule, Section 4) – The lease wording would need to adapt these provisions to reflect an obligation for the tenant to supply the requisite data to RDC but subject to that they could be incorporated in the leases by way of the Deed(s) of Variation.
- c) [Replacement of Land and Facilities (s106 Agreement, Second Schedule, Section 7) - this provision could be incorporated into the Lease but SNR Denton have confirmed that this will not be required since this section has already been covered in the building licence documentation in place between SBC and the Airport operator.
- d) Carbon and Environmental Management Plan (s106 Agreement, Second Schedule, Section 8). These provisions can be incorporated into the leases by way of the Deed(s) of Variation.

- e) Sustainable Procurement Policy (s106 Agreement, Second Schedule, Section 9). These provisions can be incorporated into the leases by way of the Deed(s) of Variation.
- f) Airport Transport Forums (ATF) and Airport Surface Access Strategies (ASAS) (s106 Agreement, Second Schedule, Sections 10 & 11) If SBC require these provisions can be incorporated into the leases by way of the Deed(s) of Variation.
- g) Railway Station - this provision can be incorporated into the leases by way of the Deed(s) of Variation.

4.7 Caveat

Section 4 of this document raises a number of legal issues (commercial tenancies, inter-lease obligations, noise aviation procedures) which require further examination and expert legal advice. Section 4 has been prepared by Liz Loughran Atkins Principal Planner. Although Liz Loughran remains on the Law Society's Roll of Solicitors she is not a practising solicitor so no reliance should be placed on the legal commentary she has provided. Atkins recommends that the Head of the Legal Department at SBC reviews the recommendations in order to confirm that the steps proposed are practical and possible in terms of the Council's willingness to act in this regard.

5. Aviation Industry Advice

The s106 Agreement sets out a number of obligations for the Airport Operator to achieve either before the start of the development to extend the runway or prior to commencing operations from the extended runway. This section of the report will focus on those conditions that are associated with airport and aircraft operations.

In Atkins opinion an obligation is considered to be reasonable if similar obligations have been implemented at other UK airports, and / or compliance with the obligation does not have a disproportionate impact on the day to day viability of the Airport operation, and / or limits the future impact of the Airport on the local communities. In this section a s106 obligation is considered to be enforceable if it is possible to present evidence as to whether the obligation has or has not been implemented as required by the s106 Agreement. By being able to provide evidence as to the status of implementation, SBC can monitor compliance with the s106 obligations and if necessary take steps to enforce the Airport Operator to comply with the obligations.

5.1 Additional Controls

In undertaking this review Atkins has considered if further obligations, unrelated to those discussed below in Section 5.2, are necessary to control the impact of the Airport on local communities. Consideration has been given to requiring the Airport to close for a number of hours every night. The perceived benefit, of a night closure period, by local communities is a guaranteed period without aircraft noise. Atkins believes there are a number of dis-benefits in having a closure period:

- Existing business based at the Airport potentially value the fact that the Airport is open 24 hours a day and may see a closure period as impacting their business and opt to relocate some or all of their operation elsewhere. This would damage the economic and social benefits delivered by the Airport to the local community.
- The Airport would not be available for use by the emergency services. In addition, the air traffic service provided to night operations by the emergency services in the Southend area could not be maintained. A reduction in the facilities and services available to the emergency services will have a dis-benefit on society.
- Flights are regularly subject to delays whilst on-route despite having departed on time. If a delayed flight arrived shortly after the Airport closed it would either have to divert to another airport or worse remain overhead in the Southend area awaiting the re-opening of the Airport. An aircraft holding over the Airport is likely to cause significant disturbance for the local communities. Diverting to another airfield is expensive and may result in the operator not choosing Southend in future.

Atkins has reviewed the night operations at a number of airports within the UK. The review has confirmed that the major airports, (London Heathrow, London Gatwick, London Luton, London Stansted, Birmingham International and Manchester) are open for operations 24 hours a day although there are local night quota conditions. Cardiff Airport, which has a significant aircraft maintenance operation, is also open 24 hours a day. The regional airports, Bournemouth Airport and Southampton Airport, are open to flights overnight, again with local night quota agreements. Some of the smaller airports, that predominately service executive aircraft traffic, are closed for periods of the night. London City closes at 22:30 (local time), although City is not a good comparison to Southend as it is purely a passenger orientated airport. From this review of night operations it is clear that there is not a blanket night closure across airports and it is the particular circumstances at each airport that is important. This supports Atkins view that a night closure period is not appropriate for Southend Airport and that the use of local night quota arrangements is the appropriate method to control night flights.

The night controls introduced by the s106 Agreement will on average limit the Airport to 4 night quota qualifying flights per night by aircraft that are between Quota Count 0.25 and Quota Count 1. Those aircraft that are quiet enough to be below Quota Count 0.25 are by definition extremely quiet and very unlikely to cause any disturbance. By only having an average of 4 qualifying flight per night and operations by the emergency services being occasional there will naturally be extended periods of the night without any flight movements. Atkins therefore concludes that the night flight obligations defined within the s106 Agreement are sufficient to provide a balance between the rights of the local communities and the needs of the Airport.

Data collected by the Airport in relation to noise complaints demonstrates that in the last quarter of 2010 there were a total of 153 noise complaints, of these 116 were attributed to aircraft operating to or from Southend. Of the 116 Southend Airport related complaints only 6 were in relation to night flights; this suggests that the recent impact of noise disturbance is limited. Within the scope and timescales of this study it has not been possible to identify which hours of the night these complaints relate to.

Conclusion: At this stage Atkins does not foresee it necessary to introduce any further controls in relation to night time operations over and above those contained within the s106 Agreement and the recommendations made above.

Conclusion: Atkins believes that a night closure period would adversely impact on the economic and societal benefits that flow from the Airport.

5.2 Quiet Operations Policy

The s106 Agreement requires the Airport to be operated in accordance with a Quiet Operations Policy. The s106 Agreement expands on the requirements of a Quiet Operations Policy under the following headings:

- Accountability and Promulgation;
- Public Noise Complaint Handling Service;
- Noise Monitoring System;
- Property Acquisition and the Sound and Thermal Insulation Grant Scheme;
- Ground Noise;
- Night Noise Provisions including the Quota Count System;
- Aircraft Restrictions;
- Runway Take Off & Landing Procedures during the Night Quota Period;
- Preferred Runway Take Off and Landing Procedures during the Daytime;
- Additional Restrictions on Air Transport Movements (ATM);
- Engine Testing; and
- Noise Preferential Routes.

5.2.1 Accountability and Promulgation

In relation to Accountability and Promulgation the s106 Agreement requires, in summary:

- The appointment of a Noise Manager [Second Schedule, Paragraph 3.2];
- The Airport Operator to communicate the requirement that those whose activities at the Airport have noise implications are required to adopt and observe the Quiet Operations Policy. Also to publish noise abatement procedures for the Airport aligned with the

International Civil Aviation Organization (ICAO) and UK Aeronautical Information publication (AIP) recommendations [Second Schedule, Paragraph 3.3]; and

- The Airport Operator to have done all it can to ensure that all Ground Operators at the Airport have adopted the Quiet Operations Policy and have published noise abatement procedures aligned with the recommendations of ICAO and UK AIP [Second Schedule, Paragraph 3.4].

It is Atkins view that the requirements identified in Clauses 3.2 – 3.4, inclusive, within the Second Schedule of the s106 Agreement are reasonable. It should be reasonably practicable for the Airport Operator to provide evidence to demonstrate that the requirements have been implemented.

Conclusion: No additional controls are required over and above those included in the s106 Agreement in relation to Accountability and Promulgation of the Quiet Operations Policy

5.2.2 Public Noise Complaints Handling Service

The Airport Operator is required to establish and maintain a Public Noise Complaints Handling Service in respect to the Airport [Schedule 2, Paragraph 3.5 – 3.6].

The provision of a Public Noise Complaint Handling Service is a common service provided by multiple airports across the UK; this is therefore considered to be a reasonable condition to require the Airport Operator to provide. The Airport Operator already provides a public service in this regard and produces monthly reports for the Southend Airport Consultative Committee (ACC).

Conclusion: No additional controls are required over and above those included in the s106 Agreement in relation to a Public Noise Complaints Handling Service.

5.2.3 Noise Monitoring System

In summary the Airport Operator is required to implement a Noise Monitoring System [Second Schedule, Paragraphs 3.7 – 3.11] that can support:

- The correlation of each noise event to a specific flight, so far as is reasonably practical;
- Regular reporting to SBC and RDC;
- The periodic production of noise contour maps for the Airport; and
- The identification of boundaries within which properties will qualify for acquisition or inclusion within the Sound and Thermal Insulation Grant Scheme.

The noise generated by aircraft, particularly as they arrive and depart from airports, has been a topic that has attracted much public debate and research over the last couple of decades. A number of airports have undertaken studies with, or implemented on a permanent basis, a Noise Monitoring System. Whilst in the past it has tended to be the larger airports that have implemented such systems on a permanent basis the implementation of noise monitoring systems at regional and business airports is becoming more prevalent. Atkins therefore believes that this requirement is reasonable, the Airport will easily be able to demonstrate compliance following installation of the system hence this requirement is enforceable.

Conclusion: No additional controls are required over and above those included in the s106 Agreement in relation to a Noise Monitoring System.

5.2.4 Property Acquisition and the Sound and Thermal Insulation Grants Scheme

The full details of the Property Acquisition and the Sound and Thermal Insulation Grants Scheme can be found in paragraphs 3.12 to 3.28 of the Second Schedule of the s106 Agreement. As soon as is reasonably practical the Airport Operator has to;

- Offer to purchase a property if it falls within the 69 dB LAeq 16 hour day noise contour; or
- Provide grants for noise and thermal insulation to properties falling within the 63 dB LAeq 16 hour day noise contour.

The issue of airport related noise is complex and affected by a number of interrelated factors including;

- The nature of construction and the existing level of insulation within a property;
- The types of aircraft using an airport;
- The surrounding topography;
- Weather conditions; and
- Other sources of noise (roads, railways etc).

A recent benchmarking exercise¹ indicates that many different types of noise mitigation schemes have been formed by airports across the UK; although there is no discussion of property acquisition schemes. The noise contour limits defined in the s106 Agreement and reproduced above are generally equal to, or more stringent than, the schemes at other UK airports.

Planning Policy Guidance 24 (PPG24) guides local authorities in England on the use of their planning powers to minimise the adverse impact of noise. It outlines the considerations to be taken into account in determining planning applications both for noise-sensitive developments and for those activities which generate noise. The noise levels defined within the s106 Agreement are within the limits for new dwellings in relation to aircraft noise defined within Annex 1 of PPG24.

Atkins has identified that the CAA produces the annual noise contours for London Heathrow, London Gatwick and London Stansted Airports and has prepared noise contours maps for a number of other UK airports (Manchester, Birmingham, Glasgow, Edinburgh, Aberdeen and Leeds Bradford). The Airport Operator, during the development of the runway extension scheme used an independent firm of noise specialists to prepare forecast noise contour maps for the Airport.

Recommendation: Atkins recommends that SBC agree a condition with the Airport Operator that either the Airport Operator has the noise contour maps (defined in Paragraph 3.12) for Southend Airport prepared by an independent provider or if they are prepared by the Airport Operator they need to be validated by an independent provider.

Atkins believes such a recommendation, if adopted and implemented, will provide a level of assurance and confidence to all stakeholders helping to mitigating future risks for the Airport Operator and local councils.

Atkins believes that the conditions within the s106 Agreement in relation to property acquisition and insulation are demanding yet reasonable and would be enhanced if the above recommendation is adopted.

5.2.5 Ground Noise

In relation to Ground Noise the s106 Agreement [Second Schedule, Paragraphs 3.29 – 3.30] requires the Airport Operator to develop, agree, implement and monitor a scheme to promote quiet ground operations at the Airport.

Atkins considers that this is a reasonable requirement.

Conclusion: No additional controls are required over and above those included in the s106 Agreement in relation to Ground Noise.

¹ BAA Airport Noise Consultation documents for their Scottish airports

5.2.6 Night Noise Provision including the Quota Count Scheme

The s106 Agreement has introduced a new set of Night Noise Provisions for the Airport and has increased the defined night period by one and half hours to 23:00 to 06:30 (local time). The full details of the Night Noise Provisions and Quota System are defined in Paragraphs 3.31 to 3.35 of the Second Schedule of the s106 Agreement. In summary the new requirements are:

- The introduction of a night noise quota scheme;
- No aircraft with a quota count greater than 1 shall be allowed to arrive or depart during the night period;
- No helicopter shall be allowed to operate during the night period;
- A maximum of 120 air transport movements in the night quota period per quota month;
- No passenger flights may be scheduled to operate during the night period except that up to 90 passenger flights may be scheduled to arrive between 23:00 and 23:30 (local) per quota month.

The detailed requirements provide some exceptions that allow specific types of flights or particularly quiet aircraft to be exempt from the night quota scheme.

Night Noise Quota schemes are a common method by which to manage the number of flights and or the type of aircraft that can operate in the defined night period. Different airports have different quota schemes with some based on the number of movements that are allowed whilst other are based on a points system linked to aircraft noise (one noisy flight is equivalent to multiple quieter flights). The approach adopted in the s106 Agreement is to limit both the number of flights per quota month and restrict the type of aircraft to the quieter types. Different stakeholders will have different views on the number of flights that should be allowed during the night period. The limit of 120 night movements per Quota Month strikes a fair balance between minimising the impact on the local communities and not adversely affecting the economics and societal benefits that flow from the Airport. Atkins believes that the introduction of a night quota scheme based on both the number of movements and the noise of the aircraft is reasonable and is relatively easy to monitor and report on; hence providing enforceability.

The s106 Agreement sets a prohibition on the night quota being exceeded, which is enforceable by injunction, but does not specifically provide any details as to what happens if the Airport Operator does so. For example if 122 night quota qualifying air transport movements operate within a quota month, the quota will have been exceeded by 2 movements yet the s106 does not define what the implications of such a situation would be. Currently the Council's only course of action would be to seek an injunction for breach of a planning obligation and requiring cessation of the unlawful movements.

Recommendation: that SBC and RDC agree with the Airport Operator a set of “implications” for if the night noise quotas are exceeded in order to provide SBC with additional and more flexible means of enforcement without having to resort to the Courts.

In addition to the enforcement powers under the s106 Agreement, a possible set of “implications” that SBC could adopt and include in the Deed of Variation of the Airport leases in relation to night noise provision and night quotas are:

- If the number of qualifying flight movements in a night quota period exceeds the quota number of movements by 10% or less (rounded down to the nearest whole movement) the night quota limit for the following night quota period will be reduced by the same amount.
- If the number of qualifying flight movements in a night quota period exceeds the quota number of movements by greater than 10% (rounded down to the nearest whole movement)

the night quota limit for the following night quota period will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.

- If a non exempt flight movement is undertaken by an aircraft with a noise Quota Count greater than 1 or a helicopter then the licensed operator of the aircraft / helicopter is subject to an appropriate financial sanction to be agreed and administered by the ACC. The Airport Operator will use all reasonable endeavours to recover the financial sanction.

Example 1: Less than a 10% overage of the monthly night noise quota:

Night Quota Limit in Month 1 = 120

10% Limit = $120 * 10\% = 12$ movements

Actual number of qualifying night quota movements recorded = 125

Hence 5 movement overage which is less than 10% of the quota

Night Quota Limit in Month 2 = $120 - 5 = 115$

10% Limit for month 2 = $115 * 10\% = 11.5$ movement rounded to 11.

Example 2 Greater than a 10% overage of the monthly night noise quota:

Night Quota Limit in Month 1 = 120

10% Limit = $120 * 10\% = 12$ movements

Actual number of qualifying night quota movements recorded = 136

Hence 16 movement overage which is greater than 10% of the quota

There are 4 movements over the 10% limit which therefore incurs a reduction of twice the number of movements, i.e. 8.

Night Quota Limit in Month 2 = $120 - 20 = 100$

10% Limit for month 2 = $100 * 10\% = 10$ movements.

5.2.7 Aircraft Restrictions

The s106 Agreement obligation imposes further controls on which aircraft can operate at the Airport in the Second Schedule, Paragraphs 3.35 – 3.37.

- No aircraft with a noise quota greater than 2 shall operate from the Airport, except if it is:
 - Operated by the Police, HM Customs, the Coastguard/Royal Navy or the Air Ambulance Service;
 - Delivering human blood or transplant organs;
 - On Government business;
 - An ATM which is made in an emergency consisting of imminent danger to the life or health of humans or animals; or
 - An unforeseen diversion from another airport.
- Aircraft with a Quota Count greater than 2 and less than or equal to 4 may use the Airport, during the daytime, for maintenance purposes as long as there are less than 60 such flights per quota year.

These terms under the s106 Agreement would be enforceable by injunction.

Recommendation: that SBC and RDC agree with the Airport Operator a set of “implications” for if the aircraft restrictions are exceeded in order to provide SBC with additional and more flexible means of enforcement without having to resort to the Courts.

In addition to the enforcement powers under the s106 Agreement, a possible set of “implications” that SBC could adopt and include in the Deed(s) of Variation of the Airport leases in relation to aircraft restrictions are:

- If the number of movements by aircraft with a Quota Count of more than 2 but up to (and including) 4 exceed 60 in a Quota Year by 10% or less (rounded down to the nearest whole movement) the equivalent quota for the following Quota Year will be reduced by the same amount.
- If the number of movements by aircraft with a Quota Count of more than 2 but up to (and including) 4 exceed 60 in a Quota Year by greater than 10% (rounded down to the nearest whole movement) the equivalent quota limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.

5.2.8 Runway Take Off & Landing Preferences during the Night Quota

In addition to the night quota the s106 Agreement requires the Airport, when safe to do so, to arrive aircraft from the north east, (using runway 24), and depart aircraft towards the north east, (using runway 06) during the night period [Second Schedule, paragraph 3.38].

This condition is considered reasonable; however enforcement of terms such as these is difficult because there are multiple inter-related factors that influence the choice of runway. The s106 Agreement requires the Airport Operator to report to the ACC on the effectiveness of the Quiet Operations Policy, which includes the controls relating to the Runway Preference Procedure, and also the performance of those procedures (see paragraph 1.1(cc) and (i) of the Second Schedule to the s106 Agreement). However, Atkins recommends that under the review mechanism at paragraph 1.1 (i) of the Second Schedule to the s106 Agreement the Airport Operator be required to report specifically on the occasions when a flight movement deviates from the preferred night period runway operation.

Recommendation: that SBC and RDC require the Airport Operator to maintain records and report on the occasions when a flight does not use the preferred runway and be able to justify why the non-preferred runway was selected. The Airport Operator should reports on a quarterly basis to the ACC, as part of the Annual Report required by the s106 Agreement and as requested by SBC on an ad-hoc basis.

By keeping records of flights that do not follow the preferred runway operation it is possible to ensure that this requirement has been implemented in accordance with the intention of the s106 Agreement.

Recommendation: that SBC and RDC agree with the Airport Operator a set of “implications” for if the night period runway preferences are breached without due reason.

In addition to the enforcement powers under the s106 Agreement, a possible set of “implications” that SBC could adopt and include in the Deed(s) of Variation of the Airport leases in relation to breaches of the preferred runway during the night period are:

- A breach of the night period runway preferences should result in an appropriate financial penalty and should be included within the scheme to be defined by the Airport Operator and agreed by the ACC for infringement of Noise Preferential Routes as required by the Second Schedule of the s106 Agreement paragraph 3.51.

5.2.9 Preferred Runway Take Off & Landing Procedures during the Daytime

In a similar fashion to Section 5.2.8 above the s106 Agreement states a preferred runway operation for use during the day:

- All aircraft will land from the north east (using runway 24) and take-off to the north east (using runway 06), where movement volumes allow and it is safe to do so [Second Schedule, paragraphs 3.39];
- Fewer than 50% of all daytime (06:30 to 23:00) landings, per quota year, will be from the south west (using runway 06) [Second Schedule, paragraphs 3.39]; and
- Less than 50% of all air transport movements will be over the area to the south west of the Airport, per quota year [Second Schedule, paragraphs 3.39].

These requirements are considered to be reasonable. The s106 Agreement defines what air space is included within the term “area to the south west of the Airport” by reference to the Second Schedule as the area over Leigh on Sea and Eastwood in paragraph 3.40. However, if felt to be necessary, this could be clarified further in the Deed(s) of Variation of the Airport leases by reference to specific co-ordinates.

Recommendation: The Airport Operator should define and agree with SBC and RDC the exact coordinates of the area to be monitored to the south west of the Airport and this should be expressed in the revised Lease. Atkins proposes that the coordinates of the “south west” area should be at least as per the green triangle shown on Plan 3 within the Sixth Schedule of the s106 Agreement.

Recommendation: SBC to require the Noise Monitoring System under paragraph 3.8 of the Second Schedule to the s106 Agreement being implemented by the Airport Operator to be able to:

- a) Report on tracks flown by aircraft;
- b) Have the functionality to report on the number of flights that have operated over a defined area (i.e. the south west area) within a fixed date period.

Atkins does not feel it reasonable to require the level of recording and reporting recommended in Section 5.2.8 as the number of flights not abiding by the daytime preferred runway operation could be significant in comparison to the night time runway preference.

Recommendation: that SBC and RDC agree with the Airport Operator a set of “implications” for if the obligations defined in the Second Schedule, paragraph 3.40 are breached in order to provide SBC with additional and more flexible means of enforcement without having to resort to the Courts.

In addition to the enforcement powers under the s106 Agreement, a possible set of “implications” that SBC could adopt and include in the Deed(s) of Variation of the Airport leases in relation to breaches of the preferred runway during the daytime period are:

- If the percentage of Daytime landings from the south west in a Quota Year exceeds 50% and is less than or equal to 60% the equivalent limit for the following Quota Year will be reduced by the same amount.
- If the percentage of Daytime landings from the south west in a Quota Year exceeds 60% the equivalent limit for the following Quota Year will be reduced by 10% plus twice the amount in excess of 60%.

- If the percentage of all movements operating over the area south west of the Airport in a Quota Year exceeds 50% and is less than or equal to 60% the equivalent limit for the following Quota Year will be reduced by the same amount.
- If the percentage of all movements operating over the area south west of the Airport in a Quota Year exceeds 60% the equivalent limit for the following Quota Year will be reduced by 10% plus twice the amount in excess of 60%.

5.2.10 Additional Restrictions on ATMs

The s106 Agreement [Second Schedule, paragraphs 3.41 – 3.44] requires that the total:

- ATMs at the Airport shall not exceed 53,300 in each quota year;
- ATMs operated by Boeing 737-300 aircraft at the Airport shall not exceed 2,150;
- Cargo related ATMs at the Airport shall not exceed 5,330 in each quota year or 10% of the total number of ATMs at the Airport in each quota year.

These terms under the s106 Agreement would be enforceable by injunction.

It is common practice for airports to be subject to movement limits, whilst the actual number of movements allowed by the limits varies between airports. The imposition of movement limits is therefore considered to be reasonable.

Within 2010 the Airport handled 30,636 movements, whilst back in 1989 the Airport handled 113,463 flight movements. Hence the Airport is capable of handling significantly more movements than the limit of 53,300. Atkins understands that the limit of 53,300 is based on a forecast that delivers 2 million passengers per annum at the Airport.

Recommendation: SBC, RDC and the Airport Operator to agree a set of “implications” to cover the situation of the Airport exceeding the annual movement limits in order to provide SBC with additional and more flexible means of enforcement without having to resort to the Courts.

In addition to the enforcement powers under the s106 Agreement, a possible set of “implications” that SBC could adopt and include in the Deed(s) of Variation of the Airport leases in relation to breaches of the movement limitations are:

- If the annual number of ATMs at the Airport exceeds the annual movement limit by 10% or less (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same amount.
- If the annual number of ATMs at the Airport exceeds the annual movement limit by greater than 10% (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.
- If the annual number of movements by Boeing 737-300 aircraft exceeds the annual Boeing 737-300 movement limit by 10% or less (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same amount.
- If the annual number of movements by Boeing 737-300 aircraft exceeds the annual Boeing 737-300 movement limit by greater than 10% (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.
- If the annual number of cargo movements exceeds the annual cargo movement limit by 10% or less (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same amount.

- If the annual number of cargo movements exceeds the annual cargo movement limit by greater than 10% (rounded down to the nearest whole movement) the equivalent limit for the following Quota Year will be reduced by the same number of movements up to 10% and by twice for the number of movements over 10%.

There is no definition of a Cargo movement contained within the s106 Agreement. Within the air transport industry there can be different interpretations of Cargo, Freight and Mail movements. Atkins understands that the intention of the s106 Agreement obligation was to refer to all Cargo, Freight and Mail flight movements and this is the reasonable interpretation of paragraph 3.43 of the Second Schedule to the s106 Agreement.

Recommendation: SBC and the Airport Operator to agree and document as part of the Deed(s) of Variation of the Airport leases a formal definition as to what constitutes a "Cargo" flight movement. Atkins proposes that a cargo flight shall be defined as: a flight whose primary purpose is the carriage of goods (freight, unaccompanied baggage and mail).

5.2.11 Engine Testing

It is not uncommon for airports to have noise abatement procedures that include requirements related to ground noise and engine running. Southend Airport already has a clause within their UK AIP entry that restricts when engines can be run for maintenance purposes; where on the Airport this can be undertaken; and that the permission of ATC must be gained in advance.

The s106 Agreement requirement [Second Schedule, paragraph 3.45 – 3.47] to develop, agree and implement best practice in relation to the management and conducting of engine testing is considered reasonable as are the stated restrictions as to when engine tests are to be allowed.

Recommendation: An agreement is reached between SBC, RDC and the Airport Operator as to what “implications” are appropriate for consistent breaches of the engine test policy in order to provide SBC with additional and more flexible means of enforcement without having to resort to the Courts.

In addition to the enforcement powers under the s106 Agreement, a possible set of “implications” that SBC could adopt and include in the Deed(s) of Variation of the Airport leases and the best practice plan to be agreed pursuant to the s106 Agreement in relation to breaches of an engine test policy are:

- If there are consistent breaches of the engine test policy then the company / organisation responsible for the engine test is subject to an appropriate financial sanction to be agreed and administered by the ACC. The Airport Operator will use all reasonable endeavours to recover the financial sanction.

5.2.12 Noise Preferential Routes

The definition and operation of preferential flight routes to reduce noise for local communities is common across airports. The s106 Agreement requires that if safe to do so, all departing aircraft greater than 5.7 tonnes, should follow the defined preferred routings. The s106 Agreement requires the Airport to implement a scheme to monitor the track keeping of aircraft to ensure compliance with the preferred routings. Where an aircraft operator consistently fails to follow the preferred routings the Airport Operator is required to levy fines [Second Schedule, paragraph 3.48 – 3.55]. Atkins understands that the definition of “consistently” and the scale of fines will be defined within the noise preferential routes fining scheme that the Airport Operator is required to produce and gain approval of from the ACC.

Atkins considers the s106 Agreement requirements in relation to Noise Preferential Routes to be reasonable and enforceable as breaches can be monitored and a mechanism of financial penalties for consistent offenders is to be defined and agreed.

Recommendation: No additional controls are required over and above those included in the s106 Agreement, in relation to Noise Preferential Routes.

5.3 Air Quality Monitoring

There is a general perception that airports and aircraft contribute significantly to the local air quality in and around an airport. For this reason a number of airports have implemented Air Quality Monitoring programmes to monitor and provide the evidence of the local air quality and the impact on local air quality from any growth in airport operations.

Atkins considers the requirement to implement an Air Quality Monitoring Programme [Second Schedule, paragraph 4.1 – 4.4] reasonable.

Recommendation: No additional controls are required over and above those included in the s106 Agreement, in relation to Air Quality Monitoring.

5.4 Instrument Landing System

The s106 Agreement requires the Airport Operator to install and maintain an Instrument Landing System (ILS) on runway 06; one is already installed on runway 24. The introduction of an ILS will provide benefits in relation to improved safety and greater reliability of operation (landings will be less dependent on local weather conditions).

With the Airport's objective being to increase its traffic, attracting greater scheduled passenger operations and persuading airlines to base aircraft at the Airport then the installation of an ILS is a reasonable and necessary requirement.

Recommendation: No additional controls are required over and above those included in the s106 Agreement, in relation to an Instrument Landing System.

5.5 Wake Vortex Scheme

It is a well understood and known fact planes generate turbulence in the air they fly through. The turbulence can generate vortices that can continue for some time and descend to the ground, especially if there is little wind to break them up. The occurrences of aircraft generated vortices damaging properties are rare but it is an accepted consequence of aircraft operations.

There is some debate as to whether an airport or aircraft operator should be liable for the damage caused by an aircraft wake vortex. Although a number of airports have set-up compensation schemes allowing property owners to gain swift compensation if there is evidence that their property has been damaged by an aircraft wake vortex.

Atkins considers the requirement to develop and implement a wake vortex scheme to be reasonable and enforceable.

Recommendation: No additional controls are required over and above those included in the s106 Agreement, in relation to a Wake Vortex Scheme.

5.6 Secondary Surveillance Radar

Atkins understands that since agreeing the s106 Agreement the Airport Operator has committed to installing an SSR at the Airport. The SSR will provide important safety benefits in relation to being able to mitigate issues generated by wind farms and it provides vital data to provide the aircraft track, height and identity, for a noise monitoring and track keeping system.

Atkins considered that this is a reasonable and necessary requirement for the Airport Operator to complement a number of the other obligations within the s106 Agreement.

Recommendation: The Deed(s) of Variation of the Airport Leases include an obligation to require the Airport Operator as tenant to install, operate and maintain a SSR or a service that provides a capability that is equivalent to or exceeds that of a SSR.

6. Conclusion and Recommendations

6.1 Land and Planning Advice

6.1.1 The scope of Section 106

Planning obligations are an entirely appropriate and common means of by which controls may be imposed on the Airport Operator. They may lawfully restrict the development or use of the land in the way specified in the s106 Agreement. The Airport Operator has agreed to the measures within the Second Schedule of the s106 Agreement being applied to the revised terms of the Airport Lease subject to proper incorporation that respects the limits that can be applied to landlord and tenant covenants, which prevail in commercial leases. A few modifications regarding the s106 Agreement provisions will be required if they are to be transposed into the revised Lease successfully.

6.1.2 Enforcement through the S106 mechanism

The s106 Agreement is governed by planning and contract law and is enforceable by injunction. In summary, if the Airport Operator breached the terms of the s106 Agreement, then SBC (as local planning authority) could seek an injunction from the High Court requiring specific performance of the planning obligations and (depending on the precise terms of the planning obligation) requiring the Airport to cease operations until the breach is remedied.

The s106 Agreement is also binding and enforceable against successors in title, so if the Airport Operator sold the Airport, the planning obligations would continue to bind the land and the operation of the Airport, regardless of the terms of the Airport Lease. Therefore, the s106 Agreement provides a very effective means of controlling the Airport.

In contrast, lease terms are subject to landlord and tenant law and can only bind signatory parties and their successors in title so would not bind third parties. Even so, for added security and greater flexibility, it would be prudent for the planning obligations in the s106 Agreement to be incorporated into the revised terms of the Airport Leases, albeit modified as necessary to comply with landlord and tenant law.

6.1.3 Enforcement through the Lease Terms

The recommendations which have been made in relation to imposing the s106 obligations through the leases can be implemented by agreeing Deed(s) of Variation of the Main Lease and the RESA 2007 Lease which the Airport operator has agreed to accept. This will give SBC the added flexibility of controlling the Airport operations through the lease mechanism as well as through the s106 Agreement.

6.2 Aviation Industry Advice

Atkins has considered each of the s106 Agreement obligations, which are related to the operation of the Airport in respect as to whether the obligation is considered to be reasonable from an aviation perspective. Atkins considers an obligation to be reasonable if similar obligations have been implemented at other UK airports, and / or compliance with the obligation does not have a disproportionate impact on the day to day viability of the Airport operation, and / or it limits the future impact of the Airport on the local communities. Atkins considers a s106 obligation to be enforceable if it is possible to present evidence as to whether the obligation has or has not been implemented as required by the s106 Agreement. By being able to provide evidence as to the

status of implementation, SBC can monitor compliance with the s106 obligations and if necessary take steps to enforce the Airport Operator to comply with the obligations.

Atkins considers all of the obligations within the Second Schedule of the s106 Agreement to be reasonable and enforceable. Recommendations have been made in relation to some controls for the purpose of incorporation into the Deed(s) of Variation of the Airport Leases. It should be recognised that the sanctions or “implications” suggested should be in addition to the controls in the s106 Agreement, and in some cases would offer more flexibility to SBC in terms of enforcement. For example, if night time quotas of flights are exceeded, rather than seek an injunction from the High Court to stop these, SBC could rely on our recommended sanctions (if incorporated into the Lease) to enforce a lower quota in night time flights in the subsequent reporting period. Measures such as these would facilitate proper management of the Airport, whilst not reducing the control available to SBC.

In undertaking this review Atkins has considered if further obligations, unrelated to those discussed above, are necessary to control the impact of the Airport on local communities. Consideration has been given to requiring the Airport to close for a number of hours every night. The perceived benefit by local communities of having a total closure is the guaranteed period of time without aircraft noise. At this stage Atkins does not foresee it necessary to introduce any further controls over and above those contained within the s106 Agreement and the recommendations made above. It is Atkins view that the current s106 obligations will ensure no flight movements in significant periods of the night due to the very limited number of monthly night movements allowed. From a review of night operations at UK airports it is clear that there is not a blanket night closure across airports and it is the particular circumstances at each airport that is important. This supports Atkins view that a night closure period is not appropriate for Southend Airport and that the use of local night quota arrangements is the appropriate method to control night flights. Atkins believes that a night closure period would damage the economic and societal benefits that flow from the Airport.

Atkins believes that the recommendations set out in this report, if implemented, would complement the controls in the s106 Agreement. By agreeing a set of additional sanctions or implications Atkins believes it strengthens and increases the flexibility of SBC’s enforcement powers and potentially reduces the need to resort to the Courts.