

Cabinet – 16 September 2009

Proposed amendments to the Birmingham Airport Holdings Side Agreement

Portfolio: Councillor C. Towe, Finance and Personnel

Service: Legal and Constitutional Services

Wards: None

Key Decision: No

Forward Plan: No

1. Summary of Report

To approve propose amendments to the Birmingham Airport Holdings Side Agreement for regulating the exercise of the Councils shareholding in Birmingham Airport Holdings Limited.

2. Recommendations

- (1) That the proposed amendments to the side agreement regulating the exercise of the Council's shareholding in Birmingham Airport Holdings Limited, contained in the document attached at Appendix 1 be approved.
- (2) Delegate authority to the Chief Executive or his nominee in consultation with the designated member of cabinet, and following consultation with the Chair or Vice Chair of the Joint Committee to discharge all functions in relation to Birmingham Airport Holdings Limited as provided for at clause 5.4 of the appended agreement, and to sign and attest the fixing of the Common Seal of the Council to any documents in connection therewith.

3. Background Information

- 3.1 The Council is a shareholder in Birmingham International Airport, in conjunction with Birmingham City Council, Coventry City Council, Dudley, Metropolitan Borough Council, Sandwell Metropolitan Borough Council, Solihull Metropolitan Borough Council, and Wolverhampton City Council.

- 3.2 The district councils (the Councils) regulate the way they exercise their rights obligations and powers as shareholders through a side agreement entered into in 1997.
- 3.3 The side agreement, permits the Joint Committee to discharge the councils functions in relation to Birmingham Airport by each of the Districts Advisors acting in consultation with the Chair and Vice-Chair of the Joint Committee after liaison with the Chief Executives of each of the Councils .
- 3.4 Problems have arisen since all signatories need to be available as no alternatives have been provided for. In addition since the Councils have now appointed Sir Michael Hodgkinson from NIRAS as an advisor to the board, someone not directly employed by any Council will be involved as part of the decision making process.
- 3.5 All of the Councils have agreed that the procedure for taking decisions in relation to the functions of the Joint Committee should be amended . All functions in relation to Birmingham Airport will be discharged by each of the Chief Executives or their appointee acting in consultation with the Chair or Vice Chair of the Joint Committee. A draft copy of the 1997 Districts Side Agreement has been prepared to reflect this amendment.

4. Resource considerations

- 4.1 **Financial:** There are no financial implications arising from this report
- 4.2 **Legal:** Section 111 of the Local Government Act 1972 enables the Council to do anything which is calculated to facilitate or is conducive to the discharge of its functions.
- 4.3 **Staffing:** None.

5. Citizen Impact

None.

6. Community Safety

None.

7. Environmental Impact

None.

8. Performance and Risk Management Issues

8.1 **Risk:** If Cabinet agree to the proposal it will enhance the efficiency of decision making with regard to the management of the Council's shareholding in Birmingham International Airport.

8.2 **Performance Management::** None.

9. Equality Implications

None.

10. Consultation

None.

Background Papers:

Draft Agreement

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Rory Borealis
Executive Director

4 September 2009



Councillor C Towe
Portfolio Holder

4 September 2009

DATED

[2009]

BIRMINGHAM CITY COUNCIL	(1)
COUNCIL OF THE CITY OF COVENTRY	(2)
BOROUGH COUNCIL OF DUDLEY	(3)
BOROUGH COUNCIL OF SANDWELL	(4)
COUNCIL OF THE METROPOLITAN BOROUGH OF SOLIHULL	(5)
WALSALL METROPOLITAN BOROUGH COUNCIL	(6)
WOLVERHAMPTON CITY COUNCIL	(7)

AGREEMENT

for regulating the exercise of the above Councils'

shareholdings in

Birmingham Airport Holdings Limited

Philip Tart, LL.B, Solicitor
Acting Director of Law and Property
The Borough Council of Dudley
3 St James's Road
Dudley DY1 1HZ

THIS AGREEMENT is made on [] day of [] 2009 **BETWEEN BIRMINGHAM CITY COUNCIL** of the Council House, Birmingham, West Midlands B1 1BB ("Birmingham") (1) **THE COUNCIL OF THE CITY OF COVENTRY** of the Council House, Coventry, West Midlands CV1 5RR ("Coventry") (2) **THE BOROUGH COUNCIL OF DUDLEY** of the Council House, Priory Road, Dudley, West Midlands DY1 1HF ("Dudley") (3) **THE BOROUGH COUNCIL OF SANDWELL** of Sandwell Council House, Oldbury, Warley, West Midlands B69 3DE ("Sandwell") (4) **THE COUNCIL OF THE METROPOLITAN BOROUGH OF SOLIHULL** of the Council House, Solihull, West Midlands B91 3QS ("Solihull") (5) **WALSALL METROPOLITAN BOROUGH COUNCIL** of the Civic Centre, Walsall, West Midlands WS1 1TP ("Walsall") (6) and **WOLVERHAMPTON CITY COUNCIL** of the Civic Centre, St Peter's Square, Wolverhampton, West Midlands WV1 1RG ("Wolverhampton") (7) (herein collectively called "the Districts")

WHEREAS:-

- (1) The Districts each respectively hold the shareholdings in Birmingham Airport Holdings Limited ("the Company") set out in the Schedule.
- (2) The Districts enter into this Agreement for the purpose of regulating the manner in which they exercise their rights obligations and powers as shareholders.

IT IS HEREBY AGREED AND DECLARED as follows:-

1. DEFINITIONS

- 1.1 In this Agreement and the Recitals and Schedule to it the following terms shall unless the context otherwise requires have the following respective meanings

"Articles"	means the Articles of Association of the Company
"the Directors"	means the Directors (as defined in the Shareholders' Agreement) appointed by the Districts pursuant to the Shareholders' Agreement
"Districts' Advisers"	means the officers appointed from time to time by the Joint Committee to advise the Districts and Joint Committee on the Company, advise the Directors, and attend meeting of the Board
"Districts' Total Shareholding"	means the total number of ordinary shares set out in Part 1 of the Schedule hereto or in the event that the Districts' Shareholding changes the total number of Districts' Shares held by the Districts from time to time
"Financial Year"	means the period commencing on the 1 April and ending on 31 March in the year next following

"the Group"	as defined in the Shareholders' Agreement
"Joint Committee"	means the Committee of the Districts (including any appointed Sub-Committee) constituted in accordance with Section 102(1)(b) of the 1972 Act or such other joint committee as may subsist from time to time for the purpose of considering amongst other things the interests of the Districts in relation to the Company
"Regulated Company"	means a company or companies within the meaning of Part V of the 1989 Act and the Local Authorities (Companies) Order 1995
"Board"	as defined in the Shareholders' Agreement
"District Shares"	means the Ordinary Shares and Preference Shares in the capital of the Company as set out in the Schedule or from time to time held by the Districts
"Ordinary Shares"	as defined in the Shareholders' Agreement
"Preference Shares"	as defined in the Shareholders' Agreement
"Shares"	as defined in the Shareholders' Agreement
"Shareholders' Agreement"	the agreement dated 19 September 2007 between (1) The District Councils and (2) Airport Group Investments Limited
"the 1972 Act"	means the Local Government Act 1972
"the 1989 Act"	means the Local Government and Housing Act 1989

1.2 In this Agreement unless the context otherwise requires:-

- 1.2.1 where appropriate the singular includes the plural and *vice versa* and reference to any gender includes the other genders;
- 1.2.2 any reference to persons includes bodies corporate or unincorporated associations, partnerships and *vice versa*;
- 1.2.3 reference to "Clauses", "Recitals" or "Schedule" are to clauses or sub-clauses, recitals or the Schedule in this Agreement.

1.3 In this Agreement:-

- 1.3.1 any reference to any statute or statutory instrument or any section or part thereof includes any enactment replacing or amending it or any instrument or order or regulation made under it and also includes any past statutory

provisions (as from time to time modified or re-enacted) which such provision has directly or indirectly replaced;

1.3.2 headings are for reference purposes only and shall not affect the construction of anything in this Agreement;

1.3.3 references to any document or agreement include a reference to that document or agreement as varied, amended, supplemented, substituted, novated or assigned from time to time;

1.3.4 the Schedule shall be treated as an integral part of this Agreement and references to this Agreement shall include the Schedule.

2. Existing Shareholders' Agreement

2.1 The Districts hereby agree that the agreement between themselves and dated 26th March 1997 regulating the actions of the shareholders in the Company shall cease to have effect on the date hereof.

3. Effective Date

3.1 This Agreement shall be effective as from the date hereof.

3.2 This Agreement shall have effect until the 26th day of March 2012 and thereafter from year to year determinable in accordance with Clause 10.

4. Objectives

4.1 The Districts shall each exercise their powers as shareholders at general meetings of the Company and in accordance with this Agreement to ensure that as far as practicable the commitments and objectives of the parties as set out in the Shareholders' Agreement are achieved and in particular without limitation that the block voting arrangements pursuant to Clauses 4.1.9 and 4.6.6 of the Shareholders' Agreement are observed.

5. Joint Committee

5.1 Subject as herein provided and pursuant to section 101(5) of the 1972 Act the Districts shall delegate to the Joint Committee the discharge of their functions of making decisions on:-

5.1.1 the exercise of their powers and rights as shareholders of the Company including the manner in which the Districts' block shareholder vote is to be exercised pursuant to clause 4.6.6 of the Shareholders' Agreement;

5.1.2 the appointment and removal of Directors pursuant to clause 6;

5.1.3 the determination of the manner in which the block vote is to be cast by any of the Districts' Directors pursuant to clause 4.1.9 of the Shareholders' Agreement.

- 5.2 The delegation of powers by the Districts to the Joint Committee in clause 5.1 shall be subject to a condition that all resolutions of the Joint Committee or any Sub-Committee appointed by the Joint Committee shall be passed by a majority of the members present who between them represent Districts who hold at least 51% of the Districts' Total Shareholding.
- 5.3 The Joint Committee may arrange for the discharge of their functions by a Sub-Committee subject to the same condition set out in clause 5.2.
- 5.4 The Joint Committee may arrange for the discharge of their functions subject to the condition set out in clause 5.2 by each of the Districts' Chief Executives or anyone authorised by any District to act in the Chief Executive's absence acting in consultation with the Chair or Vice Chair of the Joint Committee

6. Directors and Nominees

- 6.1 For appointment of Directors to the Board each of the Districts other than Birmingham (who shall nominate four persons) shall nominate one person to the Joint Committee for appointment and the Joint Committee will in respect of each appointment and removal observe the wishes of each of the Districts and wherever practicable Directors shall be appointed for a period of 2 years.
- 6.2 The Joint Committee and the Districts shall use their reasonable endeavours to procure that each of the Directors respectively nominated by each District shall:-
- 6.2.1 in accordance with their fiduciary duties as Directors maintain confidentiality in accordance with the Shareholders' Agreement;
 - 6.2.2 subject to their fiduciary duties as Directors (and in particular their primary duty to act at all times in the best interests of the Company) act in accordance with the wishes of the Joint Committee;
 - 6.2.3 attend any necessary pre-meetings with the Districts' Advisers convened to take place prior to any meetings of the Board in order to consider together the business for that meeting;
 - 6.2.4 in the event that a formal vote is required at a meeting of the Board ensure that one of their number is appointed to exercise the voting rights of all of the Directors in accordance with clause 4.1.9 of the Shareholders' Agreement and the Articles.

7. Shareholdings

- 7.1 None of the Districts shall dispose of its District Shares prior to the 26th day of March 2012 other than as set out in clause 7.2.
- 7.2 Any of the Districts may dispose of some or all of its District Shares to one or more of the other Districts provided that the District or Districts to receive the same are willing to do so.

7.3 In the event that any of the Districts wish to dispose of any of its District Shares in the circumstances permitted under clauses 7.1 and 7.2 the District wishing to sell shall only do so by selling its shares of any class together with its shares of any other class in such a way that its percentage holding of shares of whatever class remains the same.

7.4 In the event that shares are offered to the Districts pursuant to any provision in clause 10 of the Shareholders' Agreement and in the event that any District does not wish to pursue its right to purchase thereunder any such District shall nominate such of the Districts which wish to acquire the shares to which it is entitled.

8. Local Authority Regulated Company

8.1 Each of the Districts agrees that they will not take any action which would result in the Company and/or a member of the Group becoming a Regulated Company.

8.2 Each of the Districts further agrees to take such action as is appropriate to prevent the Company and/or a member of the Group becoming a Regulated Company.

8.3 In the event that the Company and/or a member of the Group becomes a Regulated Company the extent of each District's involvement in the Company or the member of the Group as the case may be shall be reduced in proportion to the Districts' Total Shareholding.

9. Amendments to this Agreement

9.1 All amendments to this Agreement must in writing.

9.2 All amendments to this Agreement shall up to and including the 26th day of March 2012 require the unanimous approval of the parties hereto.

9.3 After the 26th day of March 2012 any amendments to this Agreement shall require the approval of Districts which between them hold at least 75% of the District Total Shareholding whereby such amendments shall be binding on all of the parties hereto.

10. Termination

10.1 Any of the Districts may withdraw from this Agreement on not less than 12 months prior written notice to the other Districts expiring on 31 March 2012 or on 31 March in any following year.

10.2 The rights and obligations of the Districts as set out in clause 7 shall survive the termination of this Agreement pursuant to clause 10 and the Districts shall remain bound thereby.

IN WITNESS WHEREOF the parties hereto agree to cause their Common Seals to be affixed the day and year first before written.

THE SCHEDULE

DISTRICT	NUMBER OF "A" ORDINARY SHARES	NUMBER OF PREFERENCE SHARES	% OF DISTRICTS' TOTAL SHAREHOLDING
Birmingham	60,535,200	586,680,000	38.13
Coventry	18,757,100	181,800,000	11.82
Dudley	18,089,000	175,170,000	11.39
Sandwell	18,216,800	176,610,000	11.47
Solihull	12,144,000	117,570,000	7.65
Walsall	15,801,100	153,090,000	9.95
Wolverhampton	15,213,100	147,440,000	9.58

THE COMMON SEAL of

BIRMINGHAM CITY COUNCIL

was hereunto affixed in the presence of:

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THE COMMON SEAL of

THE COUNCIL OF THE CITY OF COVENTRY

was hereunto affixed in the presence of:

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THE COMMON SEAL of

THE BOROUGH COUNCIL OF DUDLEY

was hereunto affixed in the presence of:

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THE COMMON SEAL of

THE BOROUGH COUNCIL OF SANDWELL

was hereunto affixed in the presence of:

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THE COMMON SEAL of

THE COUNCIL OF THE METROPOLITAN

BOROUGH OF SOLIHULL

was hereunto affixed in the presence of:

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THE COMMON SEAL of

WALSALL METROPOLITAN BOROUGH

COUNCIL

was hereunto affixed in the presence of:

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THE COMMON SEAL of

WOLVERHAMPTON CITY COUNCIL

was hereunto affixed in the presence of:

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