



Havering
LONDON BOROUGH

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London Borough of Havering (20035775) – Written summary of oral comments made at Issue Specific Hearings 12 and 14

Dear Sir,

Thank you for the opportunity to submit a written summary of the oral comments LB Havering delivered at Issue Specific Hearings 12 and 14.

Written summary of oral comments made at Issue Specific Hearing 12

These post hearing submissions deal with the principal issues commented upon by LB Havering at ISH 12 during Part 1 and 2. Where there is overlap the matter is only mentioned once. The submissions are as follows:

1. Agenda Item 3 a) ii – Non-Motorised User access to Hole Farm;
2. Agenda Item 3 b) iii – S106 – current terms and omissions;
3. Agenda Item 3 b) i – Community Fund;
4. Agenda Item 4 - Control Documents; and
5. Requirements 10 and 11.

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Agenda Item 3 a) ii – Hole Farm – Access for Non-Motorised Users

The Council accepts that there is an overall net-gain of Open Space for the borough compared to what is being taken for the project. The Council is also satisfied with the quality of open space that is being provided.

The Council continues to have concerns about the access arrangements for the Open Space replacement that is being provided at Hole Farm in the borough of Brentwood, for the loss of Open Space at Folkes Lane Woodland within Havering. Whilst it may be of sufficient quality, Havering residents need to be able to access it safely.

With regards to policy compliance with the NPS, in addition to the references provided by Thurrock Council, LB Havering would also refer the ExA to paragraph 5.184 which states, *“public rights of way, national trails and other rights of access land (e.g. open access land) are important recreational facilities for walkers, cyclists, equestrians. Applicants are expected to take appropriate mitigation measures to address the adverse effects on coastal access, national trails and other public rights of way and open access land, and where appropriate, to consider what opportunities there may be to improve access”*.

Overall, LB Havering is satisfied with the timing and form of Open Space that has been provided by the Applicant.

Agenda Item 3 b) iii – S106 – current terms and omissions

Community Fund and SEE Strategy movement to SAC-R

The movement of elements of the s.106 agreement to Parts 2 and 3 of the SAC-R is explained in the response at D7 of Havering to the Consents and Agreements Position Statement submitted by the Applicant at D6 (REP7-213).

Belatedly the Applicant realised that it could not include obligations in relation to the SEE Strategy and Community Fund in a section 106 agreement since they did not comply with s.106 (1)¹. The obligations could have remained in the s.106² but they would not have bound a future, different, undertaker. This could have been resolved by the inclusion of a provision in Article 8 of the DCO applying all the obligations to any subsequent undertaker. This was the case at Sizewell C, where obligations were contained in a Deed of Obligation entered into between the LPA and the undertaker pursuant to the Local Government Act and Localism Act, and then applied to any subsequent undertaker through a provision in the DCO.

In the event, instead of a small addition to Article 8, the Applicant elected to remove the SEE Strategy and Community Fund from the s.106 obligation.

The addition to Article 8 is, nonetheless, required since land to be bound by the s.106 agreement within the Borough of Havering is a very small part of the scheme. There is no obligation on a subsequent undertaker to comply with the s.106 obligation. Whilst the draft s.106 agreement includes a provision committing the Applicant to require any transferee of the land to complete a Deed of Covenant, there is no requirement to transfer the land to a future undertaker and there is no effective remedy if such a Deed of Covenant is not

¹ As distinct from the tests in paragraph 4.10 NPSNN

² As commitments entered into pursuant to s.111 of the Local Government Act 1972 and s.1 of the Localism Act 2011

procured. If the land is transferred without that Deed of Covenant, then the obligations fall away in respect of any subsequent undertaker.

The need for a Deed of Covenant and the risk of no Deed of Covenant can all be overcome by simply including two paragraphs in Article 8 of the dDCO, as set out in the commentary on Article 8 and Appendix 1 of the LB Havering response to the dDCO which it submitted at D7 (REP7-206).

Remaining S.106 Issues

The only obligations left in the LBH s.106 are officer contributions.

This has been subject to discussions over several weeks and the Applicant has been repeatedly asked for a breakdown of the payments being offered by the Applicant without any substantive response. [Post hearing note: this has now been supplied].

In addition to the quantum of the monies offered, LBH is concerned that no payments for officer time for engagement in the preliminary works is provided for. This represents an artificial distinction between the preliminary works and the remainder of the works since it cannot be certain that officers will not need to be engaged in respect of matters arising from the preliminary works. If there is minimal officer involvement then the monies will be returned – the Applicant will only pay for the time involved.

The Applicant submitted a draft s.106 agreement at D7 which was sent to LB Havering on 17 November 2023. Subsequently a “final offer” draft was sent to LBH on 22 November which deleted, without explanation, provisions added into the 17 November draft by the Applicant which were to the advantage of LB Havering.

A meeting has been requested with the Applicant to discuss this. [Post hearing note: a meeting has been held and agreement has been reached on quantum with the Applicant. The S106 Agreement has been agreed subject to very minor drafting issues].

Timing

There is concern that, with a draft s.106 agreement not being produced by the Applicant until half way through the Examination, pressure is put on the local authorities to compromise on legitimate obligations.

Whilst LB Havering will make every effort to agree a final version of the s.106 agreement as soon as possible, it is the case that agreement may not be reached by the end of the Examination.

The position whereby parties are not agreed on s.106 obligations at a point when Inspectors need to make decisions or report to the Secretary of State is not a novel position and there is a mechanism available to deal with such a situation. That mechanism, used in respect of planning appeals, could equally be used here. Colloquially termed blue pencil clauses could be employed to indicate the disagreement within the s.106 agreement and the final obligations determined by the decision maker making it clear which version should prevail.

Agenda Item 3 b) i – Community Fund

The Community Fund is now contained in Part 3 of the SAC-R.

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The amendment made by the Applicant to Article 61 of the dDCO submitted at D7 (REP7-091)³ to a commitment to “implement” does not secure absolute commitments in respect of Parts 2 and 3 of the SAC-R, as asserted by the Applicant. It secures commitments to implement Parts 2 and 3, but within Parts 2 and 3 the commitments are less than absolute.

Another consequence of the move of the Community Fund (and SEE Strategy) from the s.106 agreement to Article 61 means that those obligations are no longer under the control of the planning authorities but are under the control of the Secretary of State for Transport who grants the Applicant its licence. Under Article 61 an application can be made to revoke, suspend or vary a measure in the SAC-R which, if in a s.106, would have needed the agreement of the local planning authority⁴.

Under Article 61 the local authorities are merely consultees. LB Havering’s suggested amendments to Article 61 will be submitted at D8 in its response to the ExA Commentary on the dDCO.

The position of LB Havering in relation to the quantum of the fund and its split between authorities is set out in the submission made by Thurrock Council at Deadline 1 (REP1-288 at page 289).

The fund should be indexed in order for its value to be retained throughout the construction period.

The Council remains of the view that a Community Fund for Havering of £27,000 per annum is going to put off a large number of Community groups and organisations from preparing and submitting funding applications. An overall larger funding pot with local authorities each getting more funding would make it a more attractive proposition for community groups.

The fund is intended to address construction impacts. Accordingly, it should be an annual amount payable throughout the construction period and not fixed for a period of 7 years when the construction period could be longer.

The fund in respect of LB Havering is intended to be operated by Essex Community Foundation. This is to be done through the entering into of an Administration Agreement and Transfer Agreement. No such agreements exist and no obligations are, or can be, imposed upon the Community Foundation to enter into such agreements. If there is no agreement then the fall-back position included in the provisions by the Applicant is that the Applicant itself operates the fund, including having a casting vote on decisions. Given that it is not in the Applicant’s interest to spend the fund, because it is repaid if not spent, this is clearly unacceptable.

LB Havering suggested that in default of agreements with the Community Foundation the monies should be paid to the LPA in accordance with the pre-ordained split for it to distribute for schemes which promote economic, social or environmental wellbeing of the affected wards.

It is also considered that representatives of local authorities should have a greater say in the decision as to how monies are spent in their authority’s area with them being provided

³ A change from “to take all reasonable steps”

⁴ If within 5 years

with a weighted vote. This is especially of concern to LB Havering given that the Essex Community Foundation is very much focussed on the “Shire County” rather than the London Borough.

The drafting of the above amendments which were sought when the Community Fund was included in the s.106 has been previously supplied to the Applicant.

It is hoped that Word versions of Part 2 and 3 of the SAC-R will be made available by the Applicant (who have thus far refused a request) so that the amendments sought by LB Havering can be submitted at D8 and easily understood.

Agenda Item 4 – Control Documents

Code of Construction Practice

The Council welcomes the mitigation road map that is included within the Code of Construction Practice (CoCP). The Council would like to bring it to the ExA’s attention that Havering had a situation with another DCO where the Applicant was the promoter (M25/J28) and the Applicant attempted to deliver a completely different traffic management scheme post consent and post approval of final Control Documents. Indeed, this was demonstrated by Havering Council and others not to have been fully assessed at the time of consent. That matter was quickly resolved; however, it does show the problems that can occur if Control Documents aren’t rigorously followed.

Whilst the Council accepts that “office” conversations will inevitably take place between key parties, such as the Traffic Manager and Travel Plan Coordinator, these discussions need to take place within the parameters of the Control Documents, which is why it is important that the need for formal interaction is clearly stated within them.

LB Havering has previously raised concerns with the phrase “substantially in accordance with” in relation to the final iteration of the CoCP, and these concerns remain.

LB Havering would like to see the REAC as a standalone Control Document, so that it is not buried within the EMP framework. This is considered important from a visibility perspective and the complex nature of any DCO permitted. The time lag between a DCO being made, the start of construction and opening of scheme added strong weight to the need for absolute clarity on the control framework. Providing a free-standing REAC will, in part, ensure this.

As a general point there are a number of Control Documents that, as they stand at the moment, do not include targets for the activities they are designed to control.

Framework Construction Travel Plan

The Council is concerned about the lack of targets contained within the Framework Construction Travel Plan (FCTP). Whilst there is a single over- arching target, there is no breakdown beyond this which is disappointing and leads to uncertainty as to whether the second-tier travel plans for each construction compound will have the necessary force to deliver meaningful changes in construction worker travel habits.

Whilst it is welcome that the document includes all compounds, there is very little commentary concerning the type and levels of inter compound workforce travel.

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There appears to be no requirement for the Traffic Manager and the Travel Plan Coordinator to talk to each other until the level of the Joint Operations Forum is reached. Our written comments in relation to this issue regarding the oTMPfC apply equally here. LB Havering would suggest that the document should make a clear requirement for the Traffic Manager and Travel Plan Coordinator to be talking to each other at regular intervals.

Archaeological Mitigation Strategy – Outline Written Scheme of Investigation

The Council is broadly content with the document, however, there remains some outstanding issues. The Council set out these matters in its Deadline 7 submission [REP7-204] and the Council is continuing to discuss these with the Applicant.

The Council understands that there will be an addendum to the archaeological mitigation strategy covering Palaeolithic investigations, and that's not something that has been included as an addendum to the latest iteration of that document. Once this addendum has been submitted by Applicant, the Council will provide comments at a future deadline.

Agenda Item 4 c) and d) oTMPfC and FCTP

The drafting of requirements 10 and 12 is flawed in that, even though the traffic management plans and the construction travel plans are to be updated, the requirements only impose a requirement to carry out development in accordance with the first plan approved. Please see paragraph 9.4 of the LB Havering's response to ExA Commentary on the dDCO to be submitted at D8.

Written summary of oral comments made at Issue Specific Hearing 14

Agenda Item 3 a) i – Matters flagged by IPs as being unclear or in dispute

LB Havering summarised some of the outstanding issues it had in relation to the drafting of the DCO, as follows:

- The need for an amendment to Article 8 to ensure that the s.106 obligations are enforceable against any undertaker to whom the benefit of the Order is passed under Article 8. The justification for this being set out in LB Havering's response to the dDCO submitted by LB Havering at Deadline 7 (REP7-206, page 5 and 6). The proposed amendment is set out at Appendix A of that document on page 75.
- The objection to the inclusion of Article 62 relating to the correction of plans, for the reasons set out in LB Havering's response to the dDCO submitted by Havering at Deadline 7 (REP7-206, page 21- 28).
- The inadequate response times included in Article 65 (2) (d) and Paragraph 9 of Schedule 2.
- The objection to the use of the words "substantially in accordance with" throughout the requirements in Schedule 2, as explained in LB Havering's response to the dDCO submitted by the Council at Deadline 7 (REP7-206, pages 51 - 56).
- The need for a "Silvertown Tunnel" type requirement as set out in the LB Havering's Response to Wider Network Impacts Position Paper (REP7 – 207).

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- The need for amendments to Parts 2 and 3 of the SAC-R introduced at D7 (Community Fund and SEE Strategy) to ensure appropriate drafting for the transition from s.106 to SAC-R and appropriately secure the commitments. LB Havering drafting to be provided at D8.
- The need for amendments to the Protective Provisions for the Local Highway Authorities.
- The changes to the dDCO (and Parts 2 and 3 of the SAC-R) requested by LB Havering and their justification is set out in the Council's response to the ExA Commentary on the dDCO to be submitted at D8.

Agenda Item 5 b) i – Content and effect of Requirements with traffic and transport effects

Although not the intention, the drafting of requirements 10 and 11 has the effect of requiring the undertaker to comply only with the first plan to be approved, notwithstanding that the plans will be updated from time to time. It is not clear that Paragraph 19 applies to plans which are updated from time to time without the express approval of the Secretary of State.

Yours faithfully,

Daniel Douglas

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