

October 2023

London Luton Airport Expansion

Planning Inspectorate Scheme Ref: TR020001

Volume 8 Additional Submissions (Examination)

**8.47 Applicant's Post Hearing Submission - Issue Specific
Hearing 1 (ISH1)**

Infrastructure Planning (Examination Procedure) Rules 2010

Application Document Ref: TR020001/APP/8.47



The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

**London Luton Airport Expansion Development Consent
Order 202x**

**8.47 APPLICANT'S POST HEARING SUBMISSION - ISSUE SPECIFIC
HEARING 1 (ISH1)**

Deadline:	Deadline 3
Planning Inspectorate Scheme Reference:	TR020001
Document Reference:	TR020001/APP/8.47
Author:	Luton Rising

Version	Date	Status of Version
Issue 1	October 2023	Additional Submissions – Deadline 3

Contents

	Page
1. Introduction	1
2. AGENDA ITEM 1- INTRODUCTION, WELCOME, INTRODUCTIONS, ARRANGEMENTS FOR THE HEARING	1
3. AGENDA ITEM 2 - MATTERS ARISING FROM SUPPLEMENTARY AGENDA	1
4. AGENDA ITEM 3 - ARTICLES AND SCHEDULES OF THE DRAFT DCO (EXCLUDING SCHEDULES 1, 2, 8 AND 9)	1
4.1. Brief overview of Draft DCO	1
4.2. Article 2 (Interpretation)	3
4.3. Article 6 (Limits of works)	4
4.4. Article 10 (Street works), 13 (Temporary closure and restriction of use of streets), Article 14 (Permanent stopping up of public rights of way), Article 15 (Access to works)	4
4.5. Article 44 (Interaction with LLAOL planning permission)	5
4.6. Article 45 (Application of the Town and Country Planning Act 1990)	6
5. AGENDA ITEM 4 - SCHEDULES 1 AND 2: AUTHORISED DEVELOPMENT AND REQUIREMENTS (EXCLUDING PART 3, REQUIREMENTS 18 AND 25)	9
5.1. Requirement 1 (Interpretation)	9
5.2. Requirement 2 (Amendments to approved details)	10
5.3. Requirement 6 (Parameters of authorised development)	10
5.4. Phasing	10
5.5. Requirement 8 (Code of Construction Practice)	10
5.6. Requirement 16 (Archaeological remains)	11
5.7. Requirement 26 (Passenger cap for the authorised development)	11
5.8. Requirement 27 (Night quota cap)	11
5.9. Requirement 28 (Fixed Plant Noise Management Plan)	11
5.10. Requirement 38 (Matters to be in an appeal to the secretary of State)	11
5.11. Requirement 39 (Application of Part 8 of the Planning Act 2008)	11
6. AGENDA ITEM 5 – PART 3, REQUIREMENTS 18 TO 25 (GREEN CONTROLLED GROWTH (GCG))	12
6.1. Overview of the drafting of GCG requirements	12
6.2. Requirement 18 (Interpretation)	14
6.3. Requirement 20(12) (Environmental Scrutiny Group)	14
6.4. Requirement 22 (Exceedance of a Level 1 Threshold)	14
6.5. Requirement 23(2) (Exceedance of a Level 2 Threshold)	15
6.6. Requirement 23(8) (Exceedance of a Level 2 Threshold)	15
6.7. Requirement 24(8) (continued) (Exceedance of a Limit)	15

6.8.	Requirement 24(9)(a) (Exceedance of a Limit)	15
6.9.	Slots Regulations	16
6.10.	ESG Membership	17
7.	AGENDA ITEM 6 – SCHEDULE 9, DOCUMENTS TO BE CERTIFIED	18
8.	AGENDA ITEM 7 – CONSENTS, LICENCES AND OTHER AGREEMENTS	18
9.	AGENDA ITEM 8 - ACTION POINTS ARISING FROM THE HEARING	18
10.	AGENDA ITEM 9 - ANY OTHER BUSINESS	18
	Responses to Action Points from ISH1	19

1. INTRODUCTION

- 1.1.1. This document contains Luton Rising's (a trading name of London Luton Airport Limited) (the Applicant) oral summary of evidence and post hearing comments on submissions made by others at Issue Specific Hearing 1 (ISH1) held on 26 September 2023. Where the comment is a post-hearing comment submitted by the Applicant, this is indicated. The Applicant has also included tabulated responses to each of the action points raised by the Examining Authority (ExA) for ISH1 published on 04 October 2023.
- 1.1.2. The document uses the headings for each item in the agenda published for ISH1 by the Examining Authority (ExA) on 18 September 2023.

2. AGENDA ITEM 1- INTRODUCTION, WELCOME, INTRODUCTIONS, ARRANGEMENTS FOR THE HEARING

- 2.1.1. The Applicant, which is promoting a proposal to expand London Luton Airport (the Proposed Development), was represented at ISH1 by Tom Henderson, Partner at BDB Pitmans LLP and Mustafa Latif-Aramesh, Partner at BDB Pitmans.

3. AGENDA ITEM 2 - MATTERS ARISING FROM SUPPLEMENTARY AGENDA

- 3.1.1. The Applicant confirmed that it is considering the supplementary questions published by the ExA and will respond to the questions by Deadline 3.

4. AGENDA ITEM 3 - ARTICLES AND SCHEDULES OF THE DRAFT DCO (EXCLUDING SCHEDULES 1, 2, 8 AND 9)

4.1. Brief overview of Draft DCO

- 4.1.1. The Applicant outlined that the **Draft Development Consent Order (DCO) [REP2-003]** follows a heavily precedented structure and approach, containing seven parts comprising:
- a. **Part 1** – preliminary matters, including article 2 which sets out the definitions of terms which are used throughout the **Draft DCO [REP2-003]**.
 - b. **Part 2** – contains the 'principal powers', including the powers to carry out and maintain the authorised development, and the power to transfer the benefit of the **Draft DCO [REP2-003]**.
 - c. **Part 3** – contains powers and provisions relating to highways, including maintenance obligations and traffic regulation powers.
 - d. **Part 4** – supplemental powers, including discharge of water, protective works and surveying.
 - e. **Part 5** – powers relating to the compulsory acquisition of land and rights, and temporary possession.

- f. **Part 6** – operational provisions, including powers to operate and regulate the use of the airport.
- g. **Part 7** – miscellaneous provisions, including the disapplication of certain legislative provisions and interaction with the Town and Country Planning Act 1990 regime.

4.1.2. The Applicant explained that the main body of the **Draft DCO [REP2-003]** is then supported by a number of Schedules which are introduced by the relevant article. The layout and content of these are also heavily precedent and follow convention:

- a. **Schedule 1** – authorised development, comprising ‘numbered’ works supported by ancillary ‘lettered’ works.
- b. **Schedule 2** – contains Requirements, which secure the vast majority of the mitigation and commitments contained in the application, including provisions related to Green Controlled Growth (GCG).
- c. **Schedules 3 and 4** – contains provisions related to the stopping up of public rights of way and the designation of highways.
- d. **Schedule 5 to 7** – relates to compulsory acquisition and temporary possession.
- e. **Schedule 8** – details the protective provisions.
- f. **Schedule 9** – lists the documents to be certified if the **Draft DCO [REP2-003]** is made.

4.1.3. The Applicant confirmed it has had careful regard to Planning Inspectorate Advice Notes 13 and 15, as well as precedent set by other made Orders.

4.1.4. Provided that a power or provision was identified as necessary for the Proposed Development, the Applicant’s approach has been to draw on precedent as reflecting the Secretary of State’s preferred form of drafting for that provision. The **Draft DCO [REP2-003]** also includes a number of bespoke provisions to reflect the specific circumstances of the Proposed Development.

4.1.5. The Applicant confirmed that detailed explanations of each provision, and the justification for including them in the **Draft DCO [REP2-003]**, are contained in the **Explanatory Memorandum [AS-069]**.

4.1.6. Schedule 1 of the **Draft DCO [REP2-003]** sets out the works which constitute the Proposed Development. The works are split into six packages:

- a. Series 1 – Sitewide works to enable development.
- b. Series 2 – Airfield works.
- c. Series 3 – Terminal and associated works.
- d. Series 4 – Airport support facilities.
- e. Series 5 – Landscaping and mitigation.
- f. Series 6 – Airport Access Road and Offsite Highway Works.

- 4.1.7. The Applicant explained that the works are grouped together in work types with an alpha-numeric reference corresponding to the **Work Plans [AS-012 to AS-017]** with some works being further sub-divided and categorised by reference to a (01), (02) etc. suffix. This has been done to identify works which either relate to the same physical location or which are proposed to be delivered at different stages of the development, e.g. Work No.3b(01) and Work No.3b(02).
- 4.1.8. The Applicant confirmed its position that these works are described to an appropriate level of detail given the nature of the Proposed Development, the outline form of consent being sought, and when benchmarked against other Nationally Significant Infrastructure Projects (NSIPs).
- 4.1.9. Schedule 1 also permits ancillary works which are described by letter from (a) to (n). The ancillary works can be undertaken in connection with the numbered works. The ancillary works powers remain subject to all of the controls which the Applicant refers to in Schedule 2 of the v **Draft DCO [REP2-003]**, namely the various plans and control documents that would need to be adhered to in carrying out any of those lettered works.
- 4.1.10. The Applicant confirmed its view is that the ancillary works provisions provide an appropriate degree of flexibility to deliver the works, whilst operating within the framework of the extensive controls provided for by the **Draft DCO [REP2-003]**.

4.2. Article 2 (Interpretation)

- 4.2.1. The ExA asked for an explanation as to the long list of matters that fall under the definition of 'Maintain' and specifically queried the inclusion of 'improve and refurbish' and whether this was appropriate.
- 4.2.2. The Applicant noted the definition was appropriate in light of the **Draft DCO [REP2-003]** seeking to regulate matters over the long term, including the operation of the airport. It was necessary, therefore, to have the requisite maintenance powers, but the Applicant noted that these powers are controlled by being limited to the envelope of effects as assessed in the **Environmental Statement (ES)**.
- 4.2.3. The Applicant confirmed that it would provide a response to the use of 'refurbish' and 'improve' in writing at Deadline 3.
- 4.2.4. **Post Hearing Note:** the Applicant notes the following precedents that adopt the definition of 'maintain' as proposed by the Applicant – M42 Junction 6 Development Consent Order 2020, Southampton to London Pipeline Development Consent Order 2020, A1 Birtley to Coal House Development Consent Order 2021, Manston Airport Development Consent Order 2022, Sizewell C (Nuclear Generating Station) Order 2022 and the M25 J28 Development Consent Order 2022. These support the Applicant's position that, as a point of principle, 'refurbish' and 'improve' are considered acceptable by the Secretary of State in circumstances where the power is limited to the envelope of effects as assessed in the ES. Notwithstanding this general point, the Applicant considers the definition is relevant to the Proposed Development, given its long term development and operational regime. It is foreseeable that

elements of the Proposed Development will need to be refurbished over time, and improvements may be necessary in response to e.g. evolving technical or safety standards.

- 4.2.5. In response to comments from National Highways on the definition of the 'relevant highway authority', the ExA noted that the updated version of the **Draft DCO [REP2-003]** has redefined relevant highway authority and relevant planning authority.

4.3. Article 6 (Limits of works)

- 4.3.1. The ExA discussed the powers under paragraph (2) allowing the Applicant to vary the Airport Access Road (AAR) up or down by 2 meters and the Luton DART tunnel up by 0.5 meters and down by 1 meter. The ExA queried whether these works have been assessed in terms of any significant effects within the ES. The Applicant confirmed that Article 6(2) sets vertical limits of deviation (LoDs) for the AAR and Luton DART tunnel and these LoDs are proportionate and reasonable given the works that are entailed and that these above-mentioned works have been assessed as part of the ES.
- 4.3.2. **Post-hearing note:** the Applicant refers specifically to paragraph 5.4.11 to 5.3.13 of **ES Chapter 5 [AS-075]** which confirms these LoDs have been considered in the ES.
- 4.3.3. By way of further explanation for the necessity for article 6(3), the Applicant noted that this article provided a degree of flexibility beyond the above mentioned LoDs but only if the relevant planning authority confirms this deviation will not give rise to materially new or materially different effects. The purpose of this provision is to provide the Applicant with a proportionate degree of flexibility when constructing the Proposed Development, reducing the risk that it cannot later be implemented for unforeseen reasons.
- 4.3.4. **Post-hearing note:** The Applicant further clarifies that with regard to the scope of LoD, vertical LoDs are applied to specific linear works, but not to all works. This is because the vertical parameters within which buildings must be constructed are set by Requirement 6 of Schedule 2 of the **Draft DCO [REP2-003]**, with reference to AOD.

4.4. Article 10 (Street works), 13 (Temporary closure and restriction of use of streets), Article 14 (Permanent stopping up of public rights of way), Article 15 (Access to works)

- 4.4.1. In response to a query from the ExA as to why there were no schedules specifically setting out streets in respect of articles 10, 13 and 15, the Applicant clarified it was seeking an outline form of consent, and the level of design detail to determine which specific streets might need to be closed temporarily and when has not yet been undertaken.

4.5. Article 44 (Interaction with LLAOL planning permission)

- 4.5.1. The Applicant confirmed that the definition of 'LLAOL planning permission' [12/01400/FUL] as varied [15/00950/VAR] within article 44 of the **Draft DCO [REP2-003]** would extend to the consent for 19 mppa if granted.
- 4.5.2. The Applicant confirmed that this article is being used as the tool to serve the notice to disapply the existing planning permission ([12/01400/FUL] as varied by [15/00950/VAR]) rather than making a variation under the Town and Country Planning Act 1990 (TCPA) as the service of the notice is integrally linked to the **Draft DCO [REP2-003]** taking over as the primary planning consent controlling operations at the airport. Precedent for this approach can be found in article 4 of the Hinkley Point C Nuclear Power Station Order 2013.
- 4.5.3. On the subject of the interface between the existing airport planning permission ([12/01400/FUL] as varied by [15/00950/VAR]) and the **Draft DCO [REP2-003]**, the Applicant made two submissions:
- a. the Applicant has carried over into the **Draft DCO [REP2-003]** appropriate conditions, for example Requirement 27 relating to night-time movement cap; and
 - b. the inclusion of GCG within the **Draft DCO [REP2-003]** provides an enhanced level of control in comparison to the existing planning permission. The **Noise Envelope – Improvements and worked Example [REP2-032]** document submitted at Deadline 2 provides a worked example, relating to the existing noise condition and how GCG would specifically work in similar circumstances at appropriately controlling noise showing how the proposed Noise Envelope under GCG and its prevention and control measures, would have controlled noise at the airport had it been applied from 2014 when the current planning permission was granted.
- 4.5.4. Article 44(1) provides that the undertaker may not, in accordance with this **Draft DCO [REP2-003]**, operate the airport above the passenger cap permitted by the LLAOL planning permission ([12/01400/FUL] as varied [15/00950/VAR]) until notice under this article has been served on the relevant planning authority by the undertaker. LLAOL's existing planning permission (12/01400/FUL as varied by 15/00950/VAR) contains a cap of 18 million passengers per annum and the purpose of this provision is to ensure that when the undertaker wishes to operate above that cap it must give notice of this to the relevant planning authority.
- 4.5.5. The effect of this notice, as set out in paragraph (2) of article 44, is that the undertaker may no longer operate the airport under the LLAOL planning permission ([12/01400/FUL] as varied [15/00950/VAR]) and the conditions of that planning permission cease to have effect and will no longer be enforceable. Additionally, as set out in Part 3 and 4 of Schedule 2 to the **Draft DCO [REP2-003]** the service of this notice also triggers the operation of the GCG regime and other operational requirements.

- 4.5.6. In response to queries from the ExA on the effect on any existing section 106 obligations, the Applicant noted that the interface with existing section 106 obligations linked to the existing LLAOL planning permission ([12/01400/FUL] as varied [15/00950/VAR]) is proposed to be addressed as part of the revised section 106 agreement for the Proposed Development and, where appropriate, obligations could be carried over. The Applicant confirmed that it would consider whether there needs to be drafting to deal with the existing section 106 agreement (and any other licences and agreements) within the **Draft DCO [REP2-003]** or the section 106 agreement for the Proposed Development.
- 4.5.7. With regard to enforcement of the conditions during the transition period, the Applicant confirmed that prior to the notice being served, the relevant planning authority will have enforcement powers under the TCPA, and post-notice the relevant planning authority will have the enforcement powers provided for under Part 8 of the Planning Act 2008.
- 4.5.8. With regard to the section 106 agreement, the Applicant confirmed that it would pursue a combined response with the host authorities for Deadline 5, confirming which conditions and planning obligations attached to the current planning permission (12/01400/FUL as varied by 15/00950/VAR) would be carried forward into the consent for the Proposed Development.
- 4.5.9. On enforcement, the Applicant confirmed that local authorities have powers under the Planning Act 2008 with regard to enforcement and so there would be no 'gap' caused as a result of service of the article 44 notice.
- 4.5.10. With regard to the provisions in the **Draft DCO [REP2-003]** that relate to noise, the Applicant signposted their Deadline 2 submission, **Noise Envelope – Improvements and Worked Example [REP2 – 032]** that addresses this.

4.6. Article 45 (Application of the Town and Country Planning Act 1990)

Operational land

- 4.6.1. The Applicant noted the ExA's comments with regard to the need for article 45(1) and its application to the Order Limits.
- 4.6.2. **Post Hearing note:** by way of context, the Town and Country Planning (General Permitted Development) (England) Order 2015 (GDPO) provides for permitted development rights in respect of operational land. This includes land in relation to statutory undertaker's utility apparatus, but also operational land forming part of an airport (see Part F of Part 8 of Schedule 2 to that GDPO).
- 4.6.3. Land is not treated as "operational land" automatically. Section 264(1) of the TCPA confirms that, unless one of the exceptions in subsections (3) or (4) applies, land is to be treated as not being operational land, in circumstances where an interest in land is held by statutory undertakers for the purpose of carrying on their undertaking and (a) the interest was acquired by them on or after 6 December 1968; or (b) it was held by them immediately before that date but the circumstances were such that the land did not fall to be treated as operational land for the purposes of the Town and Country Planning Act 1962.

- 4.6.4. In principle, therefore, land in respect of which interests may be acquired in relation to the airport or to accommodate diverted or relocated apparatus as a result of works carried out in connection with the Proposed Development, would not be treated as operational land (see section 264(2) of the TCPA), since those interests would necessarily have been acquired after 6 December 1968 (i.e. caught by (a) above).
- 4.6.5. As noted, there are exceptions to the default position in the TCPA. Subsection (3) of the TCPA is the relevant provision for the purposes of Article 45(1) in the case of the **Draft DCO [REP2-003]**:
- (3) "Land falls within this section if– (a) there is, or at some time has been, in force with respect to it a specific planning permission for its development; and*
- (b) that development, if carried out, would involve or have involved its use for the purpose of carrying on of the statutory undertakers' undertaking."*
- 4.6.6. Subsection (5) confirms which types of planning permission are to be treated as a "specific planning permission" for the purpose of subsection (3)(a). Importantly, development consent conferred by an Order under the Planning Act 2008 does not fall within the ambit of that subsection.
- 4.6.7. It is precisely for this reason that article 45(1) clarifies that "*development consent granted by this Order is to be treated as specific planning permission for the purposes of section 264(3)(a) of the Town and Country Planning Act 1990*". The effect of this drafting is therefore that land in respect of which interests in relation to the airport or to accommodate diverted or relocated apparatus as a result of works carried out in connection with the Proposed Development are capable of constituting "operational land" for the purposes of the TCPA (subject also to the condition in subsection 3(b) being met, which the Applicant considers it would be). In the case of the Proposed Development, there are instances of diverted apparatus, and existing operational land. In the absence of this provision, there is a real risk that those permitted development rights would not be available.
- 4.6.8. In response to queries on whether article 45(1) should be spatially limited, the Applicant does not consider the effect of the provision to apply all of the potentially relevant permitted development rights to all of the Order limits as the land must also pass the test set out in section 264(3) of the TCPA and there must be a specific planning permission for the 'development' of the land in question. The terms of article 45 apply to the 'development' which is authorised under the **Draft DCO [REP2-003]**.

Interaction between Articles 44 and 45

- 4.6.9. Article 45 contains bespoke provisions that relate to the interaction of LLAOL's existing planning permission ([12/01400/FUL] as varied [15/00950/VAR]) for the airport (as defined in article 2) with the **Draft DCO [REP2-003]**. In short, this provision provides that the **Draft DCO [REP2-003]** will 'take over' from the existing planning permission ([12/01400/FUL] as varied [15/00950/VAR]) where it is proposed to go over the existing passenger cap. **Post-hearing note:** For

clarity, the **Draft DCO [REP2-003]** will 'take over' from the existing planning permission ([12/01400/FUL] as varied [15/00950/VAR]) whether the passenger cap is at 18mppa or 19mppa. The Applicant confirmed this aids certainty in ensuring there are not two separate permissions in place in respect of the operations at the airport.

- 4.6.10. The Applicant further noted that paragraph 1 of article 45 does not permit the Applicant to operate above the passenger cap of the existing LLAOL planning permission ([12/01400/FUL] as varied [15/00950/VAR]) without notice being served. The effect is that the undertaker may no longer operate the airport under the existing planning permission ([12/01400/FUL] as varied [15/00950/VAR]) and the attached conditions will no longer have effect.
- 4.6.11. The Applicant confirmed that the LLAOL planning permission is referred to in both article 44 and article 45, as article 44 deals with compliance of the requirements that are triggered once the passenger capacity is exceeded, while article 45 regulates the use of the site prior to the passenger cap being exceeded.
- 4.6.12. The Applicant noted that the GCG regime was triggered by the service of the notice, but that regime was specifically intended to take effect when the passenger cap was proposed to be exceeded. It is in those circumstances where it is appropriate for the **Draft DCO [REP2-003]** to 'take over'. Prior to the service of the notice, the provisions of article 45 would ensure there was no inadvertent risk of enforcement action being taken in respect of works authorised by the **Draft DCO [REP2-003]** .
- 4.6.13. With the exception of article 45 paragraph (1), the Applicant noted drafting of this article is bespoke to the **Draft DCO [REP2-003]** to address particular existing planning permissions which are relevant to the Proposed Development and to address any potential uncertainty that may result from the Supreme Court's recent decision in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30.
- 4.6.14. The Applicant clarified that article 45(2) covers the existing planning permission ([12/01400/FUL] as varied [15/00950/VAR]) and the Green Horizons Park planning permission [17/02300/EIA] , noting that its Deadline 1 submission, **Green Horizons Park Additional Information [REP1-005]**, details the interface between the **Draft DCO [REP2-003]** and Green Horizons Park planning permission [17/02300/EIA]. The Applicant noted the ExA's hearing action point 10 for further clarification on how the two developments would interact spatially and will respond at Deadline 4 in line with the ExA's request.
- 4.6.15. Article 45(3) is intended to deal with the issue that arose in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30 (Hillside) regarding overlapping planning permissions. The judgment found "*that unless there is an express provision otherwise, where development has taken place under one permission, whether another planning permission may lawfully be implemented depends upon whether it remains physically possible to carry out the development authorised by the second permission in light of what has already been done under the first permission.*" The Applicant is seeking to regulate two scenarios:

- a. Planning permissions which conflict with the **Draft DCO [REP2-003]** being able to proceed without the risk of enforcement action being taken, notwithstanding any incompatibility between the **Draft DCO [REP2-003]** and the development authorised under a planning permission.
- b. Planning permissions which conflict with the Proposed Development not preventing the exercise of a power under the **Draft DCO [REP2-003]**. The provisions in article 45 are included by reference to section 120(3) of the Planning Act 2008, which provides that an order granting development consent may make provision relating, or to matters ancillary to, the development for which consent is granted.

- 4.6.16. It is considered necessary to prevent the conflicts outlined above, but also to provide legal certainty to the Applicant in implementing the **Draft DCO [REP2-003]**, as well as developers who bring forward future planning applications inside the Order Limits. In this context, it should be noted that the new provisions articulate the heavily precedented provision contained in article 45(1) in the phraseology adopted by their Lordships in the Hillside judgment. The Applicant further notes that article 3(3) of the Lake Lothing (Lowestoft) Third Crossing Order 2020 has substantively the same effect.
- 4.6.17. Whilst it is correct that the judgment in Hillside concerned two local permissions, it is the Applicant's view that the case is of more general application. This is borne out by recent infrastructure experience: the Transport and Works Act Order (TWAO) granted for the Cambridge South Station development contains provisions that deal with a conflict between the TWAO and local permissions, for example (see article 35 of the Network Rail (Cambridge South Infrastructure Enhancements) Order 2022).
- 4.6.18. The Applicant confirmed that indicative plans detailing the relationship between the **Draft DCO [REP2-003]** and the Green Horizons Park planning permission [17/02300/EIA] has been provided in its Deadline 1 submission, **Green Horizons Park Additional Information [REP1-005 to REP1-011]**, but noted the ExA's request for the Applicant to provide additional plans to detail the interface between the Green Horizons Park planning permission [17/02300/EIA] and the Proposed Development.

5. AGENDA ITEM 4 - SCHEDULES 1 AND 2: AUTHORISED DEVELOPMENT AND REQUIREMENTS (EXCLUDING PART 3, REQUIREMENTS 18 AND 25)

5.1. Requirement 1 (Interpretation)

- 5.1.1. The Applicant explained its approach to defining both "begin" and "commence" in the **Draft DCO [REP2-003]**. The Applicant confirmed that the primary justification for those two separate definitions is to avoid the issues which arose in the Court of Appeal case *Tidal Lagoon (Swansea Bay) PLC v SSBEIS* [2022] EWCA Civ 1579. In the **Draft DCO [REP2-003]** "commence" is used in the context of facilitating pre-commencement activities, whereas the term "begin" is broader and links requirement 4 to any material operation (as defined in section

155 of the Planning Act 2008) forming part, or carried out for the purposes, of the Proposed Development.

- 5.1.2. **Post-hearing note:** a rationale and justification of this approach is contained in section 4.9 of the **Explanatory Memorandum [AS-069]**.

5.2. Requirement 2 (Amendments to approved details)

- 5.2.1. The Applicant noted the ExA's queries on whether the use of "in comparison to the environmental statement" is sufficiently clear, and enforceable especially with regard to making sure materially new or materially different effects do not arise. In response, the Applicant noted that similar Requirements appears in the Progress Power (Gas Fired Power Station) Order 2015 and the Riverside Energy Park Order 2020. The Applicant agreed to consider further drafting to provide more precision to this provision.

5.3. Requirement 6 (Parameters of authorised development)

- 5.3.1. The Applicant confirmed that any discrepancies raised with regard to the work areas (such as Work 4C02) will be investigated and updated at a subsequent deadline.

5.4. Phasing

- 5.4.1. The ExA queried whether Schedule 2 is missing a Requirement regarding phasing, noting there could be a lack of clarity for relevant planning authorities with regard to when each 'part' of the Proposed Development is being built out.
- 5.4.2. The Applicant noted that Requirement 1(2) contains a definition of 'part'. The intention of this is that, at a point in time where certain works are ready to be implemented, the works within that 'part' will be the subject of an application for approval from the relevant planning authority in line with the Requirements, and therefore the relevant planning authorities will be notified as to the extent of those works.
- 5.4.3. The Applicant agreed to consider further drafting to assist the LPAs to keep track of which "parts" of the Proposed Development were being discharged. An update on this will be provided at Deadline 4.

5.5. Requirement 8 (Code of Construction Practice)

- 5.5.1. The Applicant noted the ExA's concerns with regard to the clarity of "substantially in accordance with". **Post Hearing note:** this has now been amended to "in accordance with" in the Deadline 3 version of the **Draft DCO [REP2-003]**.
- 5.5.2. In terms of the approval of topic-specific management plans under the CoCP, the Applicant confirmed that the relevant planning authority would be the authority within whose administrative area the 'part' of the Proposed Development, to which the plan relates, is to be located. For example, the relevant planning authority for works within the airport boundary will be Luton

Borough Council. The Applicant's understanding is that this is the standard approach adopted for NSIPs.

5.6. Requirement 16 (Archaeological remains)

5.6.1. The Applicant noted that the ExA's questions with regard to Requirement 16 would be rolled over into Written Questions.

5.7. Requirement 26 (Passenger cap for the authorised development)

5.7.1. The Applicant confirmed that the use of the term "without prejudice to" within this Requirement is adopted to make clear that this Requirement is subject to the controls within other Requirements, in particular Requirements relating to GCG.

5.7.2. **Post hearing note:** The Applicant confirms the **Draft DCO [TR020001/APP/2.01]** submitted at Deadline 3 has been updated at Requirement 26 to refer to the 'airport', consistent with requirements 26, 27 and 28.

5.8. Requirement 27 (Night quota cap)

5.8.1. In response to the concerns regarding the ability of the Applicant to vary the night quota movement cap, the Applicant clarified that Requirement 27 provides a cap on the number of movements during the night quota period and a process to vary the cap only where the relevant planning authority, following consultation with the Environmental Scrutiny Group (ESG), is satisfied that the variation does not give rise to any materially new or materially different environmental effects in comparison with those reported in the ES.

5.8.2. The Applicant also clarified that this Requirement does not permit the Applicant to override any requirements of GCG, which provides an enhanced regime for controlling environmental impacts.

5.8.3. **Post hearing note:** The Applicant has also removed the 'tailpiece' which allows for a variation of the control in Requirement 27 in response to concerns raised by stakeholders.

5.9. Requirement 28 (Fixed Plant Noise Management Plan)

5.9.1. The Applicant noted that questions on Requirement 28 would be rolled over to Written Questions.

5.10. Requirement 38 (Matters to be in an appeal to the secretary of State)

5.10.1. The Applicant noted that questions on Requirement 16 would be rolled over to Written Questions.

5.11. Requirement 39 (Application of Part 8 of the Planning Act 2008)

5.11.1. The Applicant noted that questions on Requirement 39 would be rolled over to Written Questions.

6. AGENDA ITEM 5 – PART 3, REQUIREMENTS 18 TO 25 (GREEN CONTROLLED GROWTH (GCG))

6.1. Overview of the drafting of GCG requirements

6.1.0. The Applicant provided an explanation of the overarching framework of GCG, and went on to detail how this was secured under the terms of the **Draft DCO [REP2-003]**.

6.1.1. The Applicant recognised the importance of environmental limits being managed. The Applicant noted it is in their view this approach is breaking ground for the management of environmental effects, not just for airports, but for any NSIP to date.

6.1.2. In essence, GCG will ensure a proactive approach to managing environmental effects is secured, with Limits applying in four key areas: Noise, Air Quality, Surface Access and Greenhouse Gas Emissions.

6.1.3. The Applicant noted the Limits are set by reference to the ES. It differs from conventional mitigation in that it goes beyond what is embedded and fixed based on an assessment at the point of an application for development consent being made. Instead, it supplements that embedded mitigation, and lays out a framework for ensuring an escalating, and pre-emptive, process to monitor, and manage those impacts, to ensure that Limits are not breached.

6.1.4. The Applicant clarified, the process was innovated in response to requests from stakeholders that the environmental protections should be more ambitious. It is reinforced by two substantive elements: independent scrutiny which provides a 'carrot' to enable proactive mitigation, and restrictive 'sticks' to incentivise the production of plans to avoid the exceedance of Limits.

6.1.5. With regard to the detail of the substantive provisions, the Applicant explained:

- a. **Requirement 20 (Environmental Scrutiny Group)** requires the undertaker to establish the ESG no later than 56 days prior to the due date for the submission of the first Monitoring Report under paragraph 21 of Schedule 2 to the **Draft DCO [REP2-003]**. The undertaker must also establish Technical Panels which will provide technical support to the ESG. ESG membership includes a number of local authorities, as well as two independent members (approved by the Secretary of State). The membership is designed to balance between the need to capture a diversity of views, the relevance of views to the impacts arising from expansion that may be experienced around the airport, and the need for membership of ESG to be focused in support of its decision-making role and in the interests of managing the costs of administering GCG (both for the airport operator and for local authorities).

- b. **Requirement 21 (Monitoring of permitted operations)** requires the undertaker to provide an annual Monitoring Report to the ESG concerning the operation of the Proposed Development in accordance with the provisions of the Requirement. Monitoring Report refers to monitoring and assessments of whether a Threshold or Limit has been exceeded in respect of air quality, noise, greenhouse gas emissions or surface access as identified in the GCG Framework. Definitions of the Thresholds, Limit, Green Controlled Growth Framework and Monitoring Report can be found in Requirement 18.
- c. **Requirement 19 (Exceedance of air quality Level 2 Threshold or Limit)** sets out the mechanism for determining an exceedance of an air quality Level 2 Threshold or Limit. As other pollution sources outside of the airport could contribute to an exceedance of an air quality Threshold or Limit it is considered necessary to have a specific process for determining whether there has been an air quality exceedance.
- d. **Requirement 22 (Exceedance of a Level 1 Threshold)** provides that where a Monitoring Report submitted under paragraph 21 assesses that a Level 1 Threshold has been exceeded, the undertaker must include in the Monitoring Report commentary on the avoidance of the exceedance of a Limit. In effect, this acts as a 'early warning' to ensure that the Limit is not breached.
- e. **Requirement 23 (Exceedance of a Level 2 Threshold)** provides that where a Monitoring Report assesses that a Level 2 Threshold has been exceeded, the undertaker must prepare and submit a draft Level 2 Plan to the ESG no later than 28 days following the Monitoring Report being submitted to the ESG, unless the ESG certifies the exceedance was as a result of circumstances beyond the undertaker's control or there is already a Level 2 Plan for that period in place. Importantly, as an example of a 'stick' it prevents increases in declarations of further airport capacity unless a Level 2 Plan has been approved by the Independent ESG.
- f. **Requirement 24 (Exceedance of a Limit)** provides that where a Monitoring Report assesses that a Limit has been exceeded, the undertaker must prepare and submit a draft Mitigation Plan to the ESG no later than 28 days from the date the Monitoring Report was submitted to the ESG, unless the ESG certifies exceedance was as a result of circumstances beyond the undertaker's control or there is already a Mitigation Plan for that period in place. The undertaker must have regard to any representations made by the ESG on a draft plan during the consultation period and provide a written account of how any such representations were taken into account as part of its submission. Again, there is another 'stick' in requiring that there is both no increase in capacity but also ensures that *"the total number of allocated slots (excluding any emergency flights) does not exceed the existing number of allocated slots"* until the impact is brought back down below the Limit. This is different from the previous 'stick' as it requires measures within the terms of extant capacity declared, not just preventing future increases. In addition, if the Mitigation Plan fails, there is a requirement

to produce a further Mitigation Plan which identify whether the application of a local rule (under the Airports Slot Allocation Regulations 2006 (Slots Regulations) to reduce the existing number of allocated slots would reduce void or prevent exceedances of the Limit where other measures cannot ensure an impact falls below the relevant Limit as soon as reasonably practicable and include the proposed programme for seeking in accordance with the Slots Regulations the introduction of that local rule.

- g. **Requirement 25 (Review of implementation of this Part)** provides for the review of the implementation of Part 3 of the **Draft DCO [REP2-003]** and the ability for the undertaker to submit an application to the ESG to change any of the specified time periods in the part. It also provides the ability for the undertaker following a review carried out in accordance with the **GCG Framework [TR020001/APP/7.08]** to submit an application to the ESG to modify the definition of a Level 1 Threshold, Level 2 Threshold and Limit.

6.2. Requirement 18 (Interpretation)

- 6.2.1. The Applicant clarified that ESG is not set up at the outset of the Proposed Development as the provisions are currently drafted with a long stop date as to when the group has to be established so that it is in place at the first point at which their decision making functions start, being the point of the monitoring report.

6.3. Requirement 20(12) (Environmental Scrutiny Group)

- 6.3.1. When questioned over the reason for restricting public access to meetings and documents with regard to ESG, the Applicant confirmed this provision is based on the Silvertown Tunnel Order 2018. The Applicant confirmed it was not intended to exclude public participation, but prevent the specified procedure in the legislative provisions from applying to the proceedings of the ESG. The **Terms of Reference for the ESG and Technical Panels [TR020001/APP/7.08]** make clear the processes around the publication of documents, as well as providing for appropriate public participation.

6.4. Requirement 22 (Exceedance of a Level 1 Threshold)

- 6.4.1. The Applicant noted the ExA's query concerning consideration of the daytime quota count playing an important role in preventing a breach of a Threshold, and if it is considered important why it should not be included on the face of the **Draft DCO [REP2-003]**.
- 6.4.2. The Applicant confirmed it does not consider the use of daytime quota counts gives rise to the need to amend the **Draft DCO [REP2-003]**. Given the technical nature of the daytime quota counts, it sits better in the secured documents rather than in the **Draft DCO [REP2-003]**. The **GCG Framework** and its **Appendix C Aircraft Noise Monitoring Plan [APP-221]** and **Terms of Reference for the ESG and ESG Technical Panels** have been amended in the Deadline 3 versions of these documents **[TR020001/APP/7.08]** to secure

this. As the **Draft DCO [REP2-003]** requires the undertaker to implement GCG and monitoring in accordance with those plans, the Applicant considers this to be appropriately secured.

- 6.4.3. The Applicant confirmed that it would consider whether any change to Requirement 22 is required regarding implementation of a daytime quota count following exceedance of a level 1 threshold. **Post-hearing note:** the Applicant has provided a response at Table 1 of this hearing summary document.

6.5. Requirement 23(2) (Exceedance of a Level 2 Threshold)

- 6.5.1. The ExA raised concerns regarding the drafting of Requirement 23(2) noting that it would enable the undertaker not to comply with the requirements of GCG if a threshold exceedance was for reasons beyond its control.
- 6.5.2. The Applicant highlighted that sub-paragraph (2) requires ESG to certify circumstances outside of the Applicant's control that this is an appropriate and independent oversight meaning the above scenario would not take place. Additionally the Applicant noted that this was not the intention of the drafting of this Requirement.

6.6. Requirement 23(8) (Exceedance of a Level 2 Threshold)

- 6.6.1. The ExA queried how, if the ESG are not a regulatory body, they can 'certify' for the purposes of these provisions. **Post Hearing note:** the Applicant considers 'certification' is not confined to a regulatory body but that a specific power provided to them under the terms of the **Draft DCO [REP2-003]** will provide them with the appropriate power.
- 6.6.2. In response to the ExA's concern that once Level 2 plans are approved capacity increases can occur without a declaration being required, the Applicant noted that, because the ESG will have to approve the Level 2 plan, it provides independent oversight in terms of further measures. The Applicant further raised that it is aware of the differentiations when a Limit is being breached, which is why the drafting of Requirement 24 requires going below the relevant Limits rather than approval of the mitigation plan in that scenario.

6.7. Requirement 24(8) (continued) (Exceedance of a Limit)

- 6.7.1. The ExA queried why it was appropriate for a two-year period to have passed before an impact was brought below a Limit, particularly in circumstances where a local rule could take time to be brought in.
- 6.7.2. In response, the Applicant again noted that as the ESG has independent oversight over the mitigation plans submitted, this two-year period is considered appropriate. If the ESG did not consider that the Limit was being brought down as soon as reasonably practicable, then they could refuse the relevant Mitigation Plan. Additionally, sub-paragraph 8(b) allows for a programme to be included in the mitigation plan which can be shorter than two years.

6.8. Requirement 24(9)(a) (Exceedance of a Limit)

- 6.8.1. With regard to local rules and the removal of local slots, the Applicant confirmed this Requirement is drafted to identify whether a local rule can be implemented to bring the impact below the Limit. It does not require implementation of the local rule. The process for implementation of local rules is via the Slots Regulations which includes consultation with the airport slots coordinator and committee. This provision does not guarantee that a local rule will be implemented, instead it identifies *whether* a local rule can be implemented.
- 6.8.2. In terms of whether a slot can be removed once allocated, especially in light of a breach, the Applicant confirmed that slots with 'grandfather rights' have protection but this does not apply to all slots.
- 6.8.3. **Post-hearing note:** in response to the ExA's query on how long a typical local rule takes to be implemented, and then whether it is possible to remove a slot once it has grandparent rights, the Applicant notes this will be responded to at Deadline 4.

6.9. Slots Regulations

- 6.9.1. The ExA queried the mechanics of monitoring requirements within the transition period with regard to slot increases and capacity declaration. A particular concern was raised over the lack of ability to mitigate if raised during the monitoring period and the ability to substantially increase slots.
- 6.9.2. The Applicant confirmed that the ability to realise capacity is governed by the Slots Regulations which set maximum capacity, meaning it is not possible to have a sudden maximum increase on day one. In practice, the operator will only declare capacity in terms of what the real-time physical capacity is at the airport; capacity is not directly linked to demand, so even if declared the slot allocations take time to realise meaning in practice these are not reached straight away. The basis for the transition period is seeking to acknowledge that the structures around GCG may take time to put in place as this is a novel approach.
- 6.9.3. **Post hearing note:** At a very high level, the slot allocation process requires the airport operator to make a 'capacity declaration' for the airport twice a year for the following year's summer and winter seasons. This sets out the maximum capacity available to airlines based on a variety of functional parameters such as runway capacity or terminal capacity. This capacity declaration is made after consultation with the London Luton Airport Coordination Committee which includes representation from airlines, the air traffic control operator and the airport operator.
- 6.9.4. 'Slots' are then allocated to airlines by an independent co-ordinator up to the declared capacity of the airport. A slot gives an aircraft operator permission to take-off or land at a specific time and date. Where an airline has used a slot at least 80% of the time in the previous season, it is automatically allocated the same slot due to 'grandfather rights', which it is legally entitled to. Where grandfather rights do not apply, a slot is returned to the 'slot pool', along with any new slots created through additional airport capacity. Aircraft operators then apply for slots from the slot pool.

- 6.9.5. All equivalent airports worldwide follow this process and make capacity declarations at the same time. This process applies at the airport today and cannot be changed through GCG. It is therefore not possible to immediately reduce capacity at the airport in the unlikely event that a Limit is breached. Any changes to airport capacity need to be made through this process.
- 6.9.6. The slot co-ordination process is also not the only way, or necessarily the most effective way, for impacts to be mitigated – this could be through directly providing mitigation measures (new bus routes, Travel Plan measures for staff etc) or through separate commercial negotiations with airlines etc. It is for this reason that it is not considered appropriate for reductions in capacity to be automatically required as part of the GCG process (nor would it be feasible given the operation of grandfathered rights), although this can be proposed by the airport operator if it is felt to be the most effective way of reducing an impact as soon as reasonably practicable.
- 6.9.7. For similar reasons, it is not considered appropriate or necessary for the ESG to be able to impose a Mitigation Plan. The airport operator should have flexibility in the way that they approach mitigation, providing that they can satisfy the ESG that their chosen approach will avoid or prevent exceedances of the Limit as soon as reasonably practicable (as if they cannot, the ESG is able to refuse the Mitigation Plan). This process for ESG to scrutinise and ultimately approve or reject a Mitigation Plan is considered sufficiently robust.
- 6.9.8. The Applicant confirmed they will provide a response to the ExA's request for the maximum increase in slots that can occur during the transition period at Deadline 4.
- 6.9.9. The Applicant noted the concerns of LADACAN that there could be a situation where the airport may issue too many slots exceeding the current Limits, and that the GCG provisions are not ground-breaking. The Applicant noted that it does not agree with LADACAN and confirmed that it would provide commentary on how in the transition period the constraints in the Slots Regulations would work to prevent an exceedance of a limit.
- 6.9.10. The Applicant confirmed that it has responded to the host authorities comments on GCG as detailed in the Local Impact Reports at **[REP2A-005 to REP2A-007]** and continue to actively engage with the host authorities with regard to GCG.

6.10. ESG Membership

- 6.10.1. In response to National Highways' submission that they should be part of the ESG panel, the Applicant clarified that the ESG is supported by a number of technical panels, including a panel relating to surface access, and that National Highways is part of this panel.
- 6.10.2. The Applicant noted National Highways' position that being solely on the technical panel was not adequate, and clarified that Requirements 29 and 30 of the **Draft DCO [REP2-003]** secures monitoring and mitigation that is proposed outside of the GCG Framework, and which will include National Highways as a consultee for matters related the Strategic Road Network.

- 6.10.3. The Applicant further noted that it was appropriate for National Highways to be on the Technical Panel rather than the ESG because its functions are related to the operation of the Strategic Road Network, and not directly related to the other topics covered by the GCG regime. The Applicant highlighted that they are also engaging with National Highways with regard to the protective provisions.
- 6.10.4. In response to the ExA and interested party queries as to why Dacorum Borough Council and Buckinghamshire Council are not included in the ESG, the Applicant noted that this was based on the scale of environmental impacts that those two administrative areas are forecast to experience. Dacorum is forecast to experience adverse effects relating to noise only, and so it has been included on the proposed noise technical panel. Buckinghamshire Council is not forecast to experience any adverse effects from noise.
- 6.10.5. The Applicant clarified that the purpose of ESG is to look across the full breadth of the impacts that ESG is seeking to manage and regulate, as well as ensuring that there is diversity of opinion, whilst weighing up the cost associated with implementation. As such, the Applicant noted that it has the right balance of input from the authorities that will experience beyond de-minimis impacts.

7. AGENDA ITEM 6 – SCHEDULE 9, DOCUMENTS TO BE CERTIFIED

- 7.1.1. The Applicant noted the ExA's comments regarding the presentation of certified documents in Schedule 9 of the **Draft DCO [REP2-003]**, and committed to giving this further consideration. The Applicant will have regard to the approach taken for the Hornsea Three Offshore Windfarm Development Order 2020, as recommended by the ExA.

8. AGENDA ITEM 7 – CONSENTS, LICENCES AND OTHER AGREEMENTS

- 8.1.1. **Section 106 agreement:** The Applicant noted comments made by the ExA that the section 106 needs to be signed and agreed by Deadline 9 in order to be considered as part of the ExA's recommendation.

9. AGENDA ITEM 8 - ACTION POINTS ARISING FROM THE HEARING

- 9.1.1. Noted in Table 1.1 below.

10. AGENDA ITEM 9 - ANY OTHER BUSINESS

- 10.1.1. The Applicant had no further comments.

Responses to Action Points from ISH1

Table 1.1: Applicant's Responses to ISH1 Action Points

Action	Description	When	Applicant's response
1	Applicant to respond in writing to comments made in REP1-164/165 regarding DCO drafting if they haven't already done so. If they have responded signpost where this response can be found.	D3	The Applicant responded to these points in its responses to written representations (see Applicant's response to Written Representations made by Non-statutory Organisations at Deadline 1 (Part 4) [REP2-037]). However, for completeness the Applicant has provided further responses to these questions in its Deadline 3 submission: Applicant's Deadline 3 Updates to Comments in Written Representations and Local Impact Reports on Draft DCO Drafting .
2	Applicant to comment on reasons for including 'improve' and 'refurbish' under definition of maintain in Article 2.	D3	The Applicant has considered the use of 'improve' and 'refurbish' and considers its response in Section 4.2 of this document provides the necessary rationale for why the inclusion of those terms is appropriate.
5	Provide written notes in respect of the measurements provided in Article 6(2)(a) (Airport Access Road works) and 6(2)(b) (Luton DART works)	D3	The Applicant refers specifically to paragraph 5.4.11 to 5.3.13 of Chapter 5 of the ES [AS-075] which confirms the LoDs defined in article 6 of the DCO have been assessed in the ES.
8	Applicant to consider whether existing Section 106 planning obligations need to be disapplied when drafting the proposed Applicant D3 Action Description Action by When Section 106 planning obligation as part of the Authorised Development.	D5	The Applicant will provide a response at Deadline 5.

Action	Description	When	Applicant's response
9	Applicant to consider comments made regarding size of operational land and whether this needs to be narrowed down.	D3	<p>By way of context, the Town and Country Planning (General Permitted Development) (England) Order 2015 provides for permitted development rights in respect of operational land. This includes in relation to statutory undertaker's utility apparatus, but also operational land forming part of an airport (see Part F of Part 8 of Schedule 2 to that DCO).</p> <p>Land is not treated as "operational land" automatically. Section 264(1) TCPA confirms in terms that, unless one of the exceptions in subsections (3) or (4) applies, land is to be treated as not being operational land, in circumstances where an interest in land is held by statutory undertakers for the purpose of carrying on their undertaking and (a) the interest was acquired by them on or after 6 December 1968; or (b) it was held by them immediately before that date but the circumstances were then such that the land did not fall to be treated as operational land for the purposes of the Town and Country Planning Act 1962 .</p> <p>In principle, therefore, land in respect of which interests may be acquired in relation to the airport or to accommodate diverted or relocated apparatus as a result of works carried out in connection with this the Proposed Development, would not be treated as operational land (see section 264(2)), since those interests would necessarily have been acquired after 6 December 1968 (i.e. caught by (a) above).</p>

Action	Description	When	Applicant's response
			<p>As noted, there are exceptions to the default position in subsections. Subsection (3) is the relevant provision for the purposes of article 45(1) in the case of the DCO:</p> <p>(3) <i>“Land falls within this section if–</i></p> <p><i>(a) there is, or at some time has been, in force with respect to it a specific planning permission for its development; and</i></p> <p><i>(b) that development, if carried out, would involve or have involved its use for the purpose of carrying on of the statutory undertakers’ undertaking.”</i></p> <p>Subsection (5) confirms which forms of planning permission are to be treated as a <i>“specific planning permission”</i> for the purpose of subsection (3)(a). Importantly, development consent conferred by an Order under the Planning Act 2008 does not fall within the ambit of that subsection.</p> <p>It is precisely for this reason that article 45(1) clarifies that <i>“development consent granted by this Order is to be treated as specific planning permission for the purposes of section 264(3)(a) of the Town and Country Planning Act 1990”</i>. The effect of this drafting is therefore that land in respect of which interests in relation to the airport or to accommodate diverted or relocated apparatus as a result of works carried out in connection with the Proposed Development are capable of constituting <i>“operational land”</i> for the purposes of the TCPA (subject also to the</p>

Action	Description	When	Applicant's response
			<p>condition in subsection 3(b) being met, which the Applicant considers it would be). In the case of the Proposed Development, there are instances of diverted apparatus, and existing operational land. In the absence of this provision, there is a real risk that those permitted development rights would not be available.</p> <p>In response to queries on whether article 45(1) should be spatially limited, the Applicant does not consider the effect of the provision to be to apply all of the potentially relevant permitted development rights to all of the Order Limits as the land must also pass the test set out in section 264(3) TCPA and there must be a specific planning permission for the 'development' of the land in question. The terms of article 45 apply to the 'development' which is authorised under the DCO.</p>
10	Applicant to provide the information requested in Annex F part 13 in the Rule 6 letter in respect of a plan showing the Green Horizons Park (GHP) scheme overlaid with the relevant elements of the Proposed Development that would supersede/ replace those elements of the GHP consent and to provide further details on the comments made regarding the relationship between the Proposed Development and Green Horizons Park and the provisions sought in Article 45.	D4	The Applicant will provide a response at Deadline 4.

Action	Description	When	Applicant's response
11	Applicant to produce a combined submission with the Host Authorities on the previous planning conditions and planning obligations that are to carry forward to the Authorised Development.	D5	The Applicant will provide a response at Deadline 5.
13	Applicant to review Requirement 2 in more detail to look at current drafting and the flexibility sought.	D3	The Applicant is considering a wider ranging set of amendments to Requirements 2, 5 and 7, which are interlinked in terms of flexibility sought and the processes associated with discharging them. For that reason, the Applicant will provide an update at Deadline 4. This aligns with a similar hearing action agreed at ISH6 (action 34) for Deadline 4.
14	Applicant to review Requirement 6 to provide assurances on the accuracy of the parameters sought.	D4	The Applicant will provide a response at Deadline 4.
15	Applicant and Host Authorities to make written submission on the comments made regarding Requirement 7.	D4	The Applicant will provide a response at Deadline 4.
16	Applicant to review and provide further comments on the precision and enforceability of the terminology 'substantially in accordance with' in Requirement 8, following comments from the Host Authorities that this should be altered to state 'in accordance with', also noting the powers sought in Requirement 2.	D3	The DCO submitted at Deadline 3 [TR020001/APP/2.01] has been updated to reflect the comments noted by the host authorities. In particular, changes have been made to ensure that the Proposed Development has to be carried out 'in accordance with' the CoCP, rather than 'substantially in accordance'. In line with the submissions above, "in accordance" has been adopted where the document is "final" at the point of the DCO being made (if development consent is granted), and "substantially in accordance with" has been used where the relevant provision relates to an outline document.

Action	Description	When	Applicant's response
17	Host Authorities to confirm where they require consulting on the documents listed in Requirement 8(2) and for the Applicant to confirm which other bodies require consulting.	D3	The Applicant does not consider any further bodies other than the local highway authority and local planning authority require consultation under this provision where the relevant works are within their jurisdiction.
18	Applicant to advise on use of the term 'authorised development' in Requirements 26 and 27 and also why 'airport' is used in Requirement 27.	D3	The DCO submitted at Deadline 3 [TR020001/APP/2.01] has been updated to ensure consistency across Requirements 26, 27 and 28.
20	Applicant to confirm answer to the question from the ExA as to what is the maximum number of slots for the current airport could deliver.	D4	The Applicant will provide a response at Deadline 4.
21	Applicant to set out constraints in the slot allocation process through the transition period.	D4	The Applicant will provide a response at Deadline 4.
22	National Highways and the Applicant to agree an appropriate resolution to membership of the Environmental Scrutiny Group (ESG).	D3	The Applicant does not consider it appropriate for National Highways to be a member of the ESG as its functions relate to the Strategic Road Network only. National Highways is included as a member of the ESG Technical Panel for surface access.
24	Applicant to set out the steps in establishing the ESG.	D4	The Applicant will provide a response at Deadline 4.
25	Applicant to confirm whether any change to Requirement 22 is required regarding implementation of a daytime quota count following exceedance of a level 1 threshold.	D3	The Applicant confirms that no change to Requirement 22 is required. The Aircraft Noise Monitoring Plan submitted at Deadline 3 [previous reference APP-221] has been amended in [TR020001/APP/7.08] to require the day time quota count monitoring in respect of noise. This is

Action	Description	When	Applicant's response
			secured under Requirement 21 of Schedule 2 of the DCO which requires a Monitoring Report to be submitted to the ESG which has been prepared in accordance with the Monitoring Plan.
26	Applicant to advise on the timeline and process for implementation of a local rule (under the slots regulations) and then whether it is possible to remove a slot once it has grandparent rights.	D4	The Applicant will provide a response at Deadline 4.
27	The ExA suggests that Schedule 9 is reviewed in order to make identification of the relevant documents needed to discharge requirements or manage the development easier to identify. Applicant advised to look at Schedule 15 in the Hornsea 4 DCO which included the Examination Library reference, version and date of submission for the documents to be certified. At the request of the Host Authorities, the purpose for including the documents should be clarified	D4	The Applicant will provide a response at Deadline 4.

REFERENCES

Ref 1 The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009

Ref 2 Advice Note Thirteen: Preparation of a draft Development Consent Order and Explanatory Memorandum

Ref 3 Advice Note Fifteen: Drafting Development Consent Orders

Ref 4 M42 Junction 6 Development Consent Order 2020

Ref 5 Southampton to London Pipeline Development Consent Order 2020

Ref 6 A1 Birtley to Coal House Development Consent Order 2021

Ref 7 Manston Airport Development Consent Order 2022

Ref 8 Sizewell C (Nuclear Generating Station) Order 2022

Ref 9 M25 J28 Development Consent Order 2022

Ref 10 Town and Country Planning Act 1990

Ref 11 Town and Country Planning (General Permitted Development) (England) Order 2015

Ref 12 Network Rail (Cambridge South Infrastructure Enhancements) Order 2022

Ref 13 Progress Power (Gas Fired Power Station) Order 2015

Ref 14 Riverside Energy Park Order 2020

Ref 15 Airports Slot Allocation Regulations 2006

Ref 16 Silvertown Tunnel Order 2018

Ref 17 Hornsea Three Offshore Windfarm Development Order 2020