**LONDON LUTON AIRPORT EXPANSION DEVELOPMENT CONSENT ORDER APPLICATION**

**ISSUE SPECIFIC HEARING 10 (ISH10) - the draft Development Consent Order (DCO) 1 December 2023**

Friday 01 December 2023 at 09:30

Robbie Owen (Pinsent Masons) and Jonathan Leary (Pinsent Masons and attending virtually).

Representing Luton Borough Council, Hertfordshire County Council, North Hertfordshire District Council, Dacorum Borough Council, Central Bedfordshire Council ("the Host Authorities")

## 1. INTRODUCTION

1.1. This note summarises the oral submissions made on behalf of the Host Authorities at ISH10. It also contains "**post hearing notes**" that provide clarification or more detailed submissions on matters arising from ISH10 or on matters where it was indicated during the hearing that it would be desirable to have the Host Authorities' written submissions on certain matters.

1.2. In addition this document contains the Host Authorities' comments on the Applicant's draft DCO submitted at Deadline 5 [REP5-004]. Finally, it incorporates within it, as "**post hearing note and action point**" the following action points at the following locations:

- Action point 1 – Respond to the comments submitted by the Environment Agency in lieu of attending the hearing – please see the post hearing note and action point 1 under agenda item 1 below;
- Action point 3 – Lead Local Flood Authorities (LLFA) to highlight to the Applicant the watercourses of concern as part of their response on the dDCO at D6 – please see the post hearing note and action point 3 under agenda item 2 below;
- Action point 5 – Produce a document setting out the differences between the targets/actions required by conditions 8, 9 and 19 of the 19mppa consent and those that would be delivered by the Green Controlled Growth Framework – please see the post hearing note and action 5 under agenda item 4 below;
- Action point 8 – LBC to submit comments on Green Horizons Park (GHP) in writing and meet with GHP team to resolve issues of overlap between consents – please see the post hearing note and action point 8 under item 4 below;
- Action point 12 – LBC to provide comments in writing on the design review panel. Applicant to respond in writing on LBC comments on its potential attendance at a design review panel – please see agenda item 5 under the heading "Requirement 5";
- Action point 14 – Provide commentary on concerns regarding deemed consents – please see the post hearing note and action point 14 under agenda item 6 below; and

- Action point 19 – provide a summary of the s106 heads of terms. Local Authorities to provide a response on their current position on the s106 – please see the post hearing note and action point 19 under agenda item 8 below.

1.3. This document does not purport to summarise the oral submissions of parties other than the Hertfordshire Host Authorities and the Host Authorities, and summaries of submissions made by other parties are only included where necessary in order to give context to the Hertfordshire Host Authorities' and Host Authorities submissions in response.

1.4. The structure of this document generally follows the order of items as they were dealt with at ISH9 set out against the detailed agenda items published by the ExA on 14 November 2023.

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| **1. Introduction** | |
| Introduction | The Examining Authority drew to the attention of the attendees the Environment Agency's submission in lieu of attendance. Robbie Owen confirmed that the Host Authorities would respond to that submission in its post hearing submission.<br><br>**Post hearing note:** the Host Authorities have considered the Environment Agency's submission in lieu of attendance at ISH 10 [EV17-002]. With one exception the Host Authorities support the Environment Agency's submissions, in particular in relation to 'deemed consent' (please see the post hearing note responding to action point 14 under agenda item 6 below for further commentary on 'deemed consent').<br><br>The one exception where the Host Authorities do not support the submissions of the Environment Agency relates to the amendment proposed to paragraph 35(1)(a) of Schedule 2 to the draft DCO in relation to the "discretionary consultation" provisions. The Environment Agency proposes that the "may" ought to be replaced with a "must" rendering what was a discretion to consult into mandatory consultation. The Host Authorities remain of the view that the discharging authority is best placed to determine whether or not it is appropriate in the circumstances to consult. Making the consultation mandatory would only impose further burdens on the discharging authority and exacerbate concerns previously raised in relation to the shortness of time afforded to determine such applications before the "deemed consent" provisions kick in.<br><br>However, if there are specific requirements relating to the functions of the Environment Agency in relation to which the Environment Agency considers it ought to be named as a mandatory consultee, in relation to which it is not currently named, the Host Authorities would support their inclusion. |
| **2. Changes to the draft DCO** | |

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| Applicant will be asked to provide a brief overview of the major changes to the draft DCO. | No submissions were made on behalf of the Host Authorities under this agenda item. |
| The ExA will then seek responses to these changes where appropriate from Luton Borough Council (LBC), the joint Host Authorities, Buckinghamshire Council and other interested parties | Robbie Owen for the joint host local authorities confirmed that the Councils have not yet submitted written comments on the version of the draft DCO submitted by the Applicant at Deadline 5, noted that the changes made were welcome, but believed that the changes did not go far enough.<br><br>Mr Owen noted that the main changes of significance in the Deadline 5 DCO ([REP5-003]) were the amendments to the GCG provisions in Part 3 of Schedule 2 and the two sets of new protective provisions contained in Parts 6 and 7 of Schedule 8.<br><br>**Part 6 – Provisions for the protection of highway authorities**<br><br>Robbie Owen for the Host Authorities noted that the draft DCO included powers of wide application, e.g. article 9 modified the application of the New Roads and Street Works Act 1991 (both from the perspective of an "undertaker" carrying out street works and from the perspective of a "street authority" carrying out highway works), article 11 permitted alterations to any street within the Order limits with the consent of the street authority, and article 12 required streets constructed or altered to be adopted by the relevant highway authority. These provisions drew on established precedents, primarily those contained in National Highways (NH) DCOs. It was noted that National Highways is itself a highway authority with particular expertise in such matters. It was questioned if it was appropriate that the Applicant would also possess such powers without appropriate safeguards.<br><br>In general terms the local highway authorities welcomed the step of providing LHA PPs but noted that these are also modelled on those commonly included in NH DCOs, and for the same reasons, they did not provide appropriate protections. They very loosely followed the typical terms that would be included in an agreement under the Highways Act 1980 but were missing key protections.<br><br>It was noted that the terms of the PPs will be the subject of further discussion and negotiation but in headline terms the following provisions were identified as "missing" from the LHA PPs when compared with what would normally be secured, were the Applicant proceeding under the TCPA 1990, under a Highways Act 1980 agreement: |

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| | • Submission of road safety audits;<br>• Submission of detailed design *for approval* of the LHA;<br>• Provisions dealing with liabilities, e.g. indemnity, LHA reasonable costs, bond/guarantee;<br>• Provisions dealing with booking road space;<br>• Appropriate controls around the issue of certificates and for the works to be maintained by the undertaker during a maintenance period; and<br>• Commuted sum for the future maintenance of the highway works.<br><br>**Post hearing note:** to clarify and expand upon the concerns with the proposed protective provisions, noting that the protective provisions are modelled on those that feature in National Highways DCOs and further noting that the Applicant does not possess National Highways' functions as a highway authority, nor its expertise in highway design matters:<br><br>• Submission of road safety audits – while the draft protective provisions do make provision for road safety audits they do not do so in a way that accords with the authorities' road safety audit procedures or the nationally recognised guidance. For example, there is no mention of Stage 1/2 or Stage 2 road safety audits. Paragraph 56(3) in Part 6 of Schedule 8 to the draft DCO leaves the question of identifying the recommendations of the stage 3 and stage 4 safety audit to take forward to "the undertaker (acting reasonably)". A similar issue is found in paragraph 59(2)(a). This departs from the established approvals and exceptions procedure in GG19 under which the local highway authority would normally review and approve the Safety Audit Brief and the CVs of the team carrying out the audit. Under the normal procedures there is a process where the designer would respond to the road safety audit and it would be for the local highway authority to agree to any exceptions or non-compliances with the Road Safety Audit's recommendation. Ultimately, as the highway authority with expertise in this field and also being required to be responsible for such works, this determination ought to be made by the highway authority and not the undertaker, and road safety audits ought to be conducted in full compliance with the procedures established in GG19, with any exceptions approved by the local highway authority.<br><br>• Submission of detailed design *for approval* of the LHA – paragraph 55 makes provision for the submission of detailed design information to the local highway authority. However, the local highway authority is given no approval role. Instead the highway authority is given 14 days to make representations in relation to which the undertaker is only obliged to have "reasonable regard" to those representations. The time period of 14 days is too short, and if a time period is required to be specified it ought to be no less than 30 days. The undertaker is proposing to carry out changes to the roads in relation to which the local highway |

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| | authorities are responsible and would become liable to maintain under article 12 of the Order. The Applicant is not National Highways and does not possess the expertise in highway design that would make a provision such as this potentially acceptable. The highway authority must be in a position to refuse to accept a design that it considers to be unsuitable. The Host Authorities recognise that the Applicant may point to the design approval of the relevant planning authority under requirement 5 but as Mr Owen noted in the Hearing, it is clear that these two measures serve different functions. This is apparent on their own terms, contrast, for example, the "detailed information" listed in the definition of that term in paragraph 54 of the local highway authority protective provisions with the matters referred to in requirement 5. It is of paramount importance to public safety that the local highway authorities be afforded the capacity to approve the detailed technical information in relation to public highways.<br><br>• Provisions dealing with liabilities, e.g. indemnity, LHA reasonable costs, bond/guarantee – the local highway authority is funded by the taxpayers of its area. They should not be exposed to additional liabilities as a result of the Applicant's proposals. The protective provisions ought to make provision for the local highway authorities' reasonable costs in administering the procedures they prescribe, protect the relevant highway authority through a suitably worded indemnity and make provision for it to step in and remedy (with the protection of a bond or guarantee secured prior to the start of works) where works are not carried out correctly or are abandoned. These provisions are accepted as standard as part of all highway works carried out by developers on the local highway authorities' roads under Highways Act 1980 agreements.<br><br>• Provisions dealing with booking road space – the protective provisions make no mention of the requirement to book road space. This is important as it allows the local highway authority to co-ordinate when road and street works are taking place, to minimise disruption to road users.<br><br>• Appropriate controls around the issue of certificates and for the works to be maintained by the undertaker during a maintenance period - typically the first certificate (termed the "provisional certificate" in the draft protective provisions) is issued by the local highway authority following an inspection and the final certificate is issued by the local highway authority following a 12 month period where the works are maintained by the developer. While the proposed protective provisions contain elements of these procedures, they do not align with the standard terms of a Highways Act 1980 agreement and appear to conflict with article 12(1) which requires such works to be maintained by the local highway authority "on completion". The protective provisions need to make clear that their terms prevail over article 12(1). |

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| | • Commuted sum for the future maintenance of the highway works – under article 12 the local highway authority will become liable to maintain the highways works. This will impose a financial burden on the local highway authority. This is usually addressed under a Highways Act 1980 agreement by way of the payment of a commuted sum, based on the estimated costs of the works, but the protective provisions are silent on this topic and the Applicant appears to expect the taxpayer to shoulder this burden.<br><br>• In addition to the matters set out above that were referred to in the hearing, the protective provisions do not contain any drafting dealing with the following which would normally be included in Highways Act 1980 agreements:<br>o Requirements to comply with relevant design standards;<br>o Requirements to comply with the Construction (Design and Management) Regulations 2015; and<br>o Requirements to have in place appropriate insurance.<br><br>• Finally, it should be borne in mind that the highways works for which the Applicant seeks development consent are works required some considerable time in the future. There is no urgent or pressing need in the public interest to override the typical procedures and timescales that would apply to a developer wishing to carrying out works to the highway. While the Host Authorities will work with the Applicant to agree appropriate protective provisions, it should be noted that they could readily be replaced by a simple obligation on the undertaker not to carry out any of the works in a local highway, or works that would become a local highway, until the Applicant has entered into a Highways Act 1980 agreement with the relevant local highway authority for the relevant works. While the protective provisions do not preclude such agreements from being entered into and thereafter superseding the protective provisions, there is nothing to motivate the Applicant to agree to such terms when it could instead rely on the process set out in Part 6 of Schedule 8.<br><br>**Part 7 of Schedule 8 – Provisions for the protection of drainage authorities**<br><br>Robbie Owen for the Host Authorities noted that that consents under section 23 of the Land Drainage Act 1991 are prescribed for the purposes of section 150 of the Planning Act 2008, by virtue of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015. A DCO therefore cannot disapply that consent requirement unless the relevant consenting body agrees to its disapplication.<br><br>The normal approach is for protective provisions to effectively replace the consent requirement and so the provision of Part 7 of Schedule 8 is welcome, but the LLFAs must satisfy themselves that the protective provisions |

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| | are adequate before the section 150 consent is granted. The Host Authorities that are LLFAs are considering the contents of Part 7 of Schedule 8.<br><br>**Post Hearing Note and Action Point 3:** the Host Authorities that are lead local flood authorities were asked to identify to the Applicant ordinary watercourses that are of concern in relation to the proposed disapplication of section 23 of the Land Drainage Act 1991. Having carried out a review, the lead local flood authorities have not identified any ordinary watercourses within their areas of administrative responsibility that are also within the Order limits. As such, there does not appear to be any requirement for section 23 of the Land Drainage Act 1991 to be disapplied by the Applicant's draft DCO and therefore there is no requirement for these protective provisions. |
| **3. Article 44 (interaction with LLAOL planning permission) and the granting of consent to increase the passenger cap to 19 million passengers per annum (MPPA)** | |
| Applicant will be asked to provide an update on how the recent granting of consent to increase the passenger cap to 19 MPPA affects these articles. | No submissions were made on behalf of the Host Authorities under this agenda item. |
| The ExA to seek an update from the Joint Host Authorities and Buckinghamshire Council regarding the conditions and legal agreements attached to the new and existing consents, and whether these need to be captured by the draft DCO and any new section (s) 106 agreements | Robbie Owen for the joint host authorities noted that this was a key area of focus for the authorities.<br><br>An early draft of the document that became REP5-098 ("Applicant's Response to Issue Specific Hearing Actions 1, 8 and 11: Note on existing/previous planning conditions and S106 Obligations") was shared by the Applicant prior to its submission at deadline 5. That early draft focussed on section 106 matters and did not set out the Applicant's proposals in relation to planning conditions, which is a matter that was still being considered by the Host Authorities.<br><br>Robbie Owen noted that the Applicant had issued a programme for progressing the section 106 discussions, the Host Authorities submitted that this was challenging but achievable, and that the parties were all working with a view to concluding the section 106 Agreement for the DCO before the close of the examination.<br><br>Robbie Owen noted that per [REP5-098] (see paragraph 2.2.4) the Applicant was proceeding on the basis that the P19 planning permission will be implemented prior to the DCO being implemented. This revealed a key concern. The rticle 44 notice would cause both previous planning permissions and their related section 106 agreements to fall away and be replaced by the provisions of the DCO and the associated section 106. The Applicant was proceeding on the assumption that article 44 will only be triggered once the airport operates in excess of the P19 |

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| | limits. But there was nothing in article 44 that would prevent the Applicant from serving notice while it is operating below that threshold.<br><br>Jonathan Leary on behalf of the Host Authorities explained that this was a concern for the joint host authorities because the Draft Compensation Policies, Measures and Community First document [REP4-43] told us at paragraphs 8.1.7 to 8.1.8 that the section 106 for the DCO will contain an obligation to pay £1 per passenger over 19m contribution to the Community First fund.<br><br>This did not acknowledge that the P19 section 106 (see Schedule 6 of [REP5-077]) required a minimum payment of £100k per annum. This gave rise to two issues, first, the community funding will drop from £100k per annum to £1 per passenger over 19m which could lead to an immediate short fall. Secondly, if the article 44 notice were served early, the contribution could very well be £0 if passenger numbers were below 19m. It was noted that this was an example of one of the issues that needed to be worked through when looking at whether and how pre-existing conditions and obligations are to be carried over into the DCO and relevant development consent obligations. In this case the issue may be solved by making the Community First obligation in the section 106 agreement subject to a minimum contribution to avoid this sort of cliff edge effect.<br><br>The Host Authorities welcomed the Applicant's acknowledgement of the concern and confirmation that it would seek to address it. |
| The ExA will then seek responses to these changes and updates from the Applicant, LBC the joint Host Authorities, Buckinghamshire Council and other Interested Parties | No submissions were made by on behalf of the Host Authorities under this agenda item. |
| **4. Article 45 (Application of the 1990 Act)** | |
| ExA to seek further clarification regarding Article 45(1) regarding the extent of operational land, and to seek comment from LBC and joint Host Authorities regarding this. | Following a discussion on the effect of article 45(1) Robbie Owen for the Host Authorities noted that the drafting in article 45(1) is well precedented. Rather than addressing the concerns raised in respect of it being used to treat the replacement Wigmore Valley Park operational land subject to permitted development, he suggested this could alternatively be addressed by clearly "carving out" the replacement land from its scope. |

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| Applicant to provide a brief overview of the drafting of Article 45 including consideration of *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UK Supreme Court (UKSC 30) decision | No submissions were made on behalf of the Host Authorities under this agenda item. |
| The ExA will seek responses where appropriate from LBC and other Interested Parties | Robbie Owen for the joint Host Authorities submitted that they did not object to Article 45 in principle but wanted to make sure that there are no unintended consequences or gaps in enforcement. It is relatively novel drafting and it would be challenging to foresee precisely how it would work in practice.<br><br>Jonathan Leary outlined that article 45(2)(c) said that if the LLOAL or GHP permission is inconsistent with "any power or right exercised under this Order or the authorised development then… any conditions on that planning permission that are inconsistent with this Order or the authorised development cease to have effect <u>from the date the authorised development is begun</u>."<br><br>It was submitted that this is less of a concern as between the LLOAL permissions, as that is dealt with by article 44. In relation to GHP, this could render unenforceable any conditions that are inconsistent with the Order or the authorised development once *any part* of the authorised development is begun, whether or not the aspects of the authorised development or the Order giving rise to the inconsistency, have in fact begun.<br><br>Jonathan Leary noted that there was no definition for "begin" in article 2(1) of the Order, so section 155 of the Planning Act 2008 would apply. This would mean development would begin on the date a "material operation" is carried out. Very minor works indeed, that do not present an inconsistency, could inadvertently render unenforceable conditions of the GHP planning permission.<br><br>Robbie Owen outlined that it may be that these concerns could be addressed by way of introducing some procedural provisions requiring, for example, the undertaker to give notice to the relevant planning authority of any such inconsistencies and to confirm under which consent (i.e. the Order or the extant planning permissions) the relevant activities were being conducted under. This would ensure, that from an enforcement perspective, it remained clear which conditions apply to which activities.<br><br>**Post hearing note and action point 5:** LBC was asked by the ExA to produce a document setting out the differences between the targets/ actions required by conditions 8, 9 and 19 of the 19mppa consent and those that would be delivered by the Green Controlled Growth Framework. During ISH10 David Gurtler indicated that some |

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| | of the planning conditions attached to the 19mppa planning permission (LBC ref: 21:00031/VARCON) had targets/requirements that could be higher than those associated with the DCO.<br><br>For example, Condition 8 requires the development to be operated in accordance with sections 5 (noise control scheme), 6 (monitoring and reporting in connection with noise thresholds), 7 (noise control monitoring scheme) and 8 (ground noise control scheme) of the London Luton Airport 2022 Noise Management Plan Technical Document. Take for instance the quota cap for the night period, by 2028 this has to have fallen to 2,800, but upon serving notice under article 44, that cap would fall away and the 3,500 proposed in the DCO will immediately come in to play – reversing the noise benefits that the local community may have been experiencing. Likewise with the early morning shoulder period, under the 19mppa Noise Management Plan there is an absolute cap of 7,000 on the annual number of flights that can take off or land between 06:00 and 07:00, that will instantly fall away once notice under article 44 is served.<br><br>Condition 9 defines the noise contour areas for the 92 day summer period (both day and night), these contours reduce after the 31 December 2027 and again after 31 December 2030. Depending on when notice is served under article 44 of the DCO, there could be a significant relaxation of the summer noise contour ahead of the growth in passenger numbers/aircraft movements.<br><br>Condition 18 should also have been mentioned, since that requires the submission, approval and implementation of an updated Travel Plan before the airport exceeds 18mppa. The Travel Plan that was before the Inspectors at the public inquiry had a target for passenger travel by sustainable modes of 47%. The Green Controlled Growth Framework has a limit for Phase 1 for non-sustainable travel mode share of 62% for passengers (i.e. 38% sustainable mode share limit a significant reduction from the 47% under the 19mppa permission). As a result on service of the article 44 notice there could be an immediate relaxation of the mode share target, and a disincentive for the airport to pursue the stretching targets and measures that the Secretaries of State agreed were necessary.<br><br>Finally, condition 19 relates to the provision of a Carbon Reduction Strategy to again be submitted, approved and implemented before the airport exceeds 18mppa. The outline Carbon Reduction Plan (oCRP) had the aim of achieving the UK net zero target for 2050, with annual reviews aiming to achieve that target sooner. Additional measures were included in the oCRP targeted at achieving carbon neutrality for the airport by 2026, and net zero for the airport's direct operational emissions by 2040, with measures to support a reduction from third party emissions related to aviation and surface access. Again, upon service of the notice under article 44, this would fall away, and there would need to be assurances that the mechanisms associated with Green Controlled Growth were already in place to ensure that the achieved targets were not relaxed.<br><br>**Post hearing note and action point 8:** LBC was asked by the ExA to submit comments on the Green Horizons Park (GHP) planning permission (LBC ref: 17/02300/EIA) in writing and meet with the GHP team to resolve issues |

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| | of overlap between consents. The application was a hybrid application, a mixture between a full application and an outline application, and was EIA development, so was accompanied by an environmental statement. The application was approved on 29 June 2021 and is subject to a condition requiring development to commence within three years (i.e. by 28 June 2024).<br><br>The elements of the Green Horizons Park application that were approved in detail included the access road (and associated structures), the airport operator's Technical Services Building, some areas of car parking and the altered and extended Wigmore Valley Park.<br><br>The outline element of the development covered the business park which included, among other things: 13,000sqm of flexible office/industrial floorspace; circa 12,000sqm of general industrial and warehousing floorspace; circa 30,000sqm of office floor space; a 145 bedroom hotel; and an energy centre, recycling centre and ancillary retail (café).<br><br>All matters in the outline element of the application were reserved, namely: appearance; means of access within the business park; layout; scale; and landscaping. The application drawings included parameter plans that depicted the use of different areas within the business park together with the range of heights proposed for buildings within those areas.<br><br>There are quite a number of pre-commencement conditions attached to the permission, including requiring the submission and approval of: an unexploded ordnance site safety and emergency procedures plan; a Construction Environmental Management Plan; a contamination remediation strategy; and surface water drainage design. The Applicant is speaking to the Council about the submission of a Section 96A non-material amendment application in relation to some of the planning conditions, since they are quite restrictive, and the Applicant would like to provide the skate park and children's play area within the park early. These facilities would be on areas that have not previously been subject to development, consequently some of the pre-commencement conditions would not be relevant to that part of the development.<br><br>In addition, the Applicant must submit reserved matters for the first phase of the outline element of the development before 29 June 2024, and so this is currently being progressed by the Applicant, in order to ensure that the submission is made in a timely fashion.<br><br>In terms of resolving issues of overlap between the Green Horizons Park planning permission and the development proposed under the DCO, the Host Authorities are scheduled to meet with the Applicant following Deadline 6 to discuss these issues. |

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| **5. Schedules 1 and 2 – Authorised Development and requirements (Excluding Part 3 Requirements 18 to 25)** | |
| The ExA will ask questions in relation to Schedule 2, including but not limited to:<br><br>Requirement 5 (detailed design, phasing and implementation)<br><br>Deletion of Requirement 7 (notice of commencement of authorised development)<br><br>Use of 'substantially in accordance' in the drafting of a number of requirements | No submissions were made on behalf of the Host Authorities under this agenda item. |
| The ExA will seek responses where appropriate from the Applicant, LBC, the joint Host Authorities, Buckinghamshire Council and other Interested Parties | **<u>Requirement 5 (detailed design, phasing and implementation)</u>**<br><br>Robbie Owen noted that the Host Authorities commented at Deadline 5 in **[REP5-068],** broadly welcoming the amendments to requirement 5. Nonetheless, there remains some queries. For example, it isn't clear practice how the reference to the "scheme layout plans" in paragraph (2)(b)(ii) is intended to work.<br><br>Robbie Owen also commented that there is no link between the parts of the authorised development approved under this requirement, and the pre-commencement requirements that correspond to that approved detailed design. This approach is common in outline planning permissions. While a DCO is not an outline planning permission, it is clear that this draft Order does have many features in common with an outline planning permission.<br><br>Robbie Owen noted that the requirement 5 was only as effective at driving 'good design' as the "design principles" **[REP5-034]**. The Design Principles document appeared to be focussed on securing, in the main, embedded |

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| | mitigation relied upon in the assessment. While necessary, it did not contain much in the way of detail as to what the design vision is for the new buildings and structures. There was no indicative detail concerning matters such as a material palette, design codes for 'public realm' type environments and similar material that is commonly included in design principles documents.<br><br>David Gurtler outlined Luton Borough Council's concerns that the Design Principles did not explain the design intent in relation to two key buildings that would be authorised by the DCO, namely the new terminal building and the hotel. These are key 'gateway' buildings and while the Applicant may not currently be in a position to set out in greater detail its design intent, appropriate mechanisms, such as public consultation and design review panels, would give greater confidence that the evolving designs coming forward for approval under this requirement would exhibit 'good design' that has been independently verified. The Host Authorities and the Applicant have arranged a meeting to discuss design review to be held on Tuesday 12 December.<br><br>**Use of 'substantially in accordance with'**<br><br>Robbie Owen noted that the Host Authorities had previously raised concerns with apparently inconsistent standards of compliance. The Applicant has since explained that "in accordance with" is used where compliance with a finalised document is required and "substantially in accordance with" is used where an outline document is to be developed into finalised document.<br><br>Robbie Owen noted that there is a logic to the Applicant's approach with the two standards of compliance reflecting two distinct approaches to developing the details required to be approved under the relevant requirements. |
| The ExA will seek to explore whether there are any other requirements that should be included in the Order seeking responses where appropriate from the Applicant, LBC, the joint Host Authorities and other Interested Parties | **Lighting Strategy**<br><br>Robbie Owen noted that Central Bedfordshire Council has raised concerns regarding the impact of lighting to designated heritage assets and the Applicant responded in [REP2A-005] that it is considering securing a lighting strategy. The Host Authorities await further detail, but this could be addressed by way of a new requirement covering the design and planned operation of proposed lighting.<br><br>Robbie Owen noted that new requirements may be appropriate where concerns subsist in relation to a relevant outline document secured under a requirement. The Host Authorities are working hard to reach agreement with the Applicant on the contents of the outline documents with a view to avoiding the need to introduce additional requirements. |
| **6. Part 3, Requirements 18 to 25 (Green Controlled Growth)** | |

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| The Applicant will be asked to provide a very brief overview of the changes to the drafting of the Green Controlled Growth (GCG) requirements | No submissions were made on behalf of the Host Authorities under this agenda item. |
| The ExA will then ask questions on the drafting of these requirements in light of the submissions made at previous deadlines and the discussions at ISH9 on GCG, seeking responses from the Applicant, LBC and the joint Host Authorities and other Interested Parties | **Changes made in the Deadline 5 draft DCO**<br><br>Robbie Owen made the following submissions in relation to Part 3 of Schedule 2 to the deadline 5 version of the draft DCO **[REP5-003]**:<br><br>**Part 3 of Schedule 2 and related provisions (Green Controlled Growth)**<br><br>Robbie Owen noted the following points arising from the Deadline 5 draft DCO.<br><br>**Paragraph 17 (interpretation)**<br><br>The "consultation period" has been extended by the Applicant from 21 days to 28 days. Robbie Owen noted that the drafting in relation to the concept of "consultation" was not as clear as it could be. For example, none of the provisions in which the term "consultation period" appeared indicated the point at which "consultation" is to occur, nor who is to be consulted. The drafting only appeared in provisions that require the undertaker to have regard to comments received in the consultation period, but there did not appear to be, on the face of the Order, a positive obligation on the undertaker to consult in the first place. It may be set out in the various GCG documents, but it ought to be clear on the face of the Order, particularly where there are "deemed approval" provisions.<br><br>**Paragraph 19 (Environmental Scrutiny Group)**<br><br>Robbie Owen noted that this provision has been amended to require the ESG to be established as soon as reasonably practicable following service of article 44 notice. There did not seem to be a good reason why the ESG could not be required to be established *prior* to service of article 44 notice, in a similar fashion to the amendments to the pre-operational requirements contained in Part 4 of Schedule 2 to the draft DCO.<br><br>**Post Hearing Note:** the Host Authorities note that there is a considerable degree of overlap in relation to the matters discussed at ISH9 on Green Controlled Growth, and in relation to how it is implemented via the draft DCO. To avoid duplication, the Host Authorities' ISH9 post hearing note sets out the key concerns in relation to GCG. Without prejudice to those comments we set out in this post hearing note the Host Authorities' response to the changes made in the Deadline 5 DCO [REP5-004]. |

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| | <u>Removal of the 'transition period', deletion of paragraph 17(4) and amendments to paragraph 20 of Schedule 2 to the Draft DCO</u><br><br>The Host Authorities welcome the removal of the so-called transition period comprised in the deletion of paragraph 17(4) of Schedule 2. However, for the reasons set out in more detail in the Host Authorities' ISH9 Post Hearing Note, the Host Authorities remain concerned that there will nonetheless still be a 'gap between the service of the article 44 notice and the establishment of the full GCG framework. This 'gap' arises in terms of the monitoring of air quality, greenhouse gas emissions and surface access (see paragraph 20(1)(b) of Schedule 2) where monitoring is not required to start until 1 January in the calendar year following service of the article 44 notice. The Applicant is in control of when it chooses to trigger article 44 and so there is no reason in principle why monitoring could not start sooner so as to avoid this 'gap.'<br><br>**Changes made in earlier iterations of the draft DCO**<br><br>Robbie Owen noted that the Host Authorities had responded to the Examining Authority's questions directed to them in relation to the DCO in **[REP4-126]** and on the deadline 3 iteration of the draft DCO in **[REP4-162] and [REP5-068]** in relation to the deadline 4 iteration of the draft DCO. Rather than repeat those submissions, Robbie Owen noted that, in relation to the Examining Authority's question DCO.1.19, which related to Requirement 40 and the mechanism whereby other authorities may request Luton Borough Council to consider taking enforcement action, that the Hertfordshire Authorities had previously queried (in paras 9.1.79 to 9.1.80 of the LIR [**REP1A-003**]) why this provision does not permit a request to be made to LBC to take enforcement action where there has been a failure to produce a Level 2 Plan or Mitigation Plan (only for a failure to implement such a plan). The Hertfordshire Authorities have not yet received a response from the Applicant on this issue.<br><br>Robbie Owen referred to discussions held at ISH 9 in relation to the GCG mechanism where the Host Authorities have raised concerns that there did not appear to be a remedy if the authorised development is persistently in breach of a Limit. The sanction is that it can grow no further, but this risks persistent unacceptable effects without any clear mechanism to take further remedial action.<br><br>David Gurtler for Luton Borough Council commented on the Applicant's response to how condition 19 of the 19mppa permission is captured in the GCG framework, namely that the operational control document for the action plan at para 4.5.1 will be reviewed periodically in line with targets. The mechanism contained in the GCG framework is less rigorous than condition 19 of the 19mppa planning permission and Luton Borough Council would expect the framework to be reviewed in line with updates to law and policy, and not wait for a 5 year review. |

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| | **Post hearing note:** In relation to other changes made in the Deadline 5 DCO (other than in relation to Part 3 on Green Controlled Growth discussed in the post hearing note above), the Host Authorities welcome the amendments made to paragraph 37 (register of requirements) of Schedule 2 to the draft DCO.<br><br>**Post hearing note and Action Point 14 on 'deemed consents':** the issue of deemed consents manifests itself in two main ways in the draft DCO. First, many of the articles setting out the Applicant's proposed powers are expressed as being exercisable only with the consent of the relevant statutory body that would ordinarily exercise those powers. This is then coupled with a provision stating that if that body fails to notify the undertaker of its decision withing a specified time period, its consent is deemed to have been granted. Provisions of this nature appear in:<br><br>• Article 11(4) (power to alter layout etc., of streets) – this would authorise the undertaker to alter any highway within the Order limits for the purposes of constructing, operating or maintaining the authorised development.<br><br>• Article 13(6) (temporary closure and restriction of use of streets) – this would authorise the undertaker to temporarily close, alter, divert, or restrict the use of 'any street' (note all roads are 'streets' and this power is not restricted to streets within the Order limits) 'for the purposes of carrying out the authorised development'; again, this covers a broad temporal scope given the phased approach by which the Applicant has stated it intends to implement the project. While a 'street' is closed the applicant would be entitled to treat it as a 'temporary working site' and there is no provision in this article requiring the reinstatement of the street so used (paragraph (5) applies to 'private rights of way' and so would not afford a remedy to a highway authority).<br><br>• Article 15 (access to works) – this would authorise the Applicant 'for the purposes of the authorised development' which would cover construction, operation and maintenance of the authorised development, to form and layout or improve existing accesses anywhere within the Order Limits.<br><br>• Article 16 (traffic regulation) – this would authorise the Applicant to make a wide range of traffic regulation measures (the DCO equivalent to Traffic Regulation Orders made by a traffic authority under the Road Traffic Regulation Act 1984) which can revoke or amend existing TROs and make provision for things such as one way systems, prohibit vehicular use, authorise or prohibit on-street parking, on any 'road'. Again, this is not limited to the Order limits. |

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| | All of the powers outlined above require consent of the relevant body, but that consent is deemed to be granted if the request for consent is not determined within 28 days. While the drafting of these provisions is relatively 'standard' in DCO terms, it must be acknowledged that these are very wide and powerful functions that would, but for the DCO, generally not be available to the owner or operator of an airport. Their exercise has the potential to significantly impact the residents and businesses of the Host Authorities' areas. It is therefore of paramount importance that they are exercised properly and requiring the active consent of the relevant authority is a critical safeguard.<br><br>The second area that the 'deemed consent' provisions apply is in Part 5 of Schedule 2 to the draft DCO which deals with the procedures applying to the determination of approvals required under the requirements in Schedule 2. Paragraph 34 defines the "specified period" as being 8 weeks and paragraph 35(3) confirms that if the discharging authority does not determine the application within 8 weeks "the discharging authority is taken to have granted all parts of the application (without any condition or qualification at the end of that period)." Paragraph 36, which deals with requests for further information, tells us in sub-paragraph (2) that the discharging authority has only 10 business days to determine whether it requires further information. In relation to requirements where consultation with a consultee is expressly required, sub-paragraph (3) tells us that the consultee has only 5 days to review the information and ascertain whether or not further information is required. In either event sub-paragraph (4) tells us that no further information may be requested after this period of time and the discharging authority and any consultee is deemed to have all the information they need, whether or not that is in fact the case. In the context of a complex development such as that proposed by the Applicant and where there are overlapping EIA planning permissions (with the Green Horizons planning permission) and the distinct possibility of a large volume of requirements for which discharge is sought at the same time, with respect, these provisions impose wholly unrealistic obligations on the discharging authority and on the consultees.<br><br>The Applicant is likely to say in response, that if there is insufficient time to determine an application, or if a requirement for further information is identified by the discharging authority or a consultee after the time for making such requests, then it would be open to the discharging authority to either seek the agreement of the Applicant to extend the "specified period" or to seek the voluntary agreement for the provision of such further information, and failing that agreement, refuse to grant consent.<br><br>However, that is not an adequate response. In relation to both the consents required under the articles of the DCO and in relation to the discharge of requirements, Part 6 of Schedule 2 enables the undertaker to appeal to the Secretary of State. The circumstances in which an appeal may be made are set out in paragraph 38(1) and are very broad indeed. They include:<br><br>• Refusal to grant consent or grant consent subject to conditions; and |

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| | • On receipt of a request for further information under paragraph 36, the undertaker considers the information requested is not necessary for consideration of the application.<br><br>Importantly, paragraph 38(13) confirms that the 'appointed person' may give a direction as to costs. It is therefore no adequate answer to say that the discharging authority can just refuse an application; to do so would put it, and the taxpayer, at risk of costs. Similarly, it can readily be envisaged that a consultee identifies an important deficiency requiring further information after the short 5 working day deadline has expired. The discharging authority would be in a very weak position where it has refused an application because it in fact lacks the necessary information but it has been deemed, by virtue of paragraph 36(4), to possess that information.<br><br>Typically, the justification for imposing short determination periods backed up by 'deemed consent' provisions in DCOs is to avoid the potential for delay to the implementation of urgently needed Nationally Significant Infrastructure Projects.<br><br>However, in this instance, the Applicant's case is that it is seeking a framework within which its facility can grow over time. It does not have the same urgency as with many other NSIPs. With the grant of the 19 million passengers per annum planning consent it already has considerable 'headroom' to expand.<br><br>The inclusion of 'deemed consent' provisions, coupled with short determination and consultation periods, therefore risks important safeguards being removed and risks requests not being properly scrutinised by obtaining all of the information required or due to the shortness of time before hitting the 'deemed consent' deadline. |
| **7. Schedule 9 – Documents to be certified** | |
| To review the amended layout for documents to be certified and seek views as to how this is laid out, whether the list is complete and, if not, what additional documents should be included | Robbie Owen noted the role article 50 and Schedule 9 play as a mechanism to provide certainty that documents that sit outside of the DCO, but are referred to by it, are the correct version of those documents.<br><br>Absent any reference to an operative provision, such as, for example a reference in a requirement to an outline document in relation to which a further and more detailed submission must be approved – mere certification does not have any particular legal effect.<br><br>It was noted that it is important that all relevant documents are referred to appropriately and are listed in Schedule 9 where they are referred to.<br><br>Following discussion on the format of Schedule 9 which focussed on the importance of making this Schedule as "user-friendly" as possible, Robbie Owen asked the Applicant to consider adding a further column to that Schedule |

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| | to set out the operative provision to which the relevant certified document related. Robbie Owen also suggested that the Schedule could be re-organised to group similar documents together, for example, listing the component parts of the Environmental Statement separately. |
| **8. Consents, licences and other agreements** | |
| The Applicant will be asked to provide an overview of the s106 agreements that it is proposing to submit, what these will secure, an update on the indicative timescales for completion and, if the s106 cannot be completed by the close of the Examination, whether any of the measures could be secured by requirements | Robbie Owen submitted that it is the Host Authorities strong preference that the section 106 agreement is concluded prior to the close of the examination. The Host Authorities understood that the Applicant shares this ambition. The Applicant had earlier in the week provided a programme intending to achieve this which was being reviewed by the authorities and the Authorities said that every effort will be made to reach agreement within the time remaining.<br><br>Where this is not achieved one alternative is to secure relevant measures by way of requirement, or alternatively, the Applicant could seek to make unilateral development consent obligations.<br><br>There was some discussion around the use of a unilateral undertaking as an expedient where, for example, there are governance or procedural issues delaying the completion of an otherwise agreed multi-lateral section 106 agreement. Robbie Owen noted that, if the Applicant elects to submit a unilateral undertaking the Host Authorities will outline their position as to whether its terms are agreed, and, if not, the nature and basis of any disagreement.<br><br>**Post hearing note and action point 19**: the ExA requested that the Applicant and the Host Authorities provide a summary of the section 106 heads of terms and the local authorities to provide a response on their current position on the section 106 agreement.<br><br>The Applicant has prepared a document entitled “Applicant's Response to Issue Specific Hearing Action 10 Action 19 Summary of Section 106 Heads of Terms” which is intended for submission at Deadline 6.<br><br>This document was only provided to the Host Authorities during the evening of 6 December, and so the Host Authorities have not been able to consider it in detail. They can, however, confirm it is an accurate reflection of the principal areas that it is agreed the section 106 Agreement will need to cover, though there is still work to do on the drafting of the schedules to the Agreement.<br><br>In addition:<br><br>Currently CBC is discussing an appropriate mechanism with the Applicant to secure the following works, which all fall outside of the DCO limits and which are not considered to be covered by either current requirements or the OTRIMMA: |

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| | • Junction improvement works at the Junction of Chaul End Road with Luton Road, Caddington;<br>• Traffic Calming works in Caddington;<br>• Junction improvement works at the junction of Luton Road with Newlands Road;<br>• Measures to manage parking in Slip End; and<br>• Traffic monitoring at the junction of the B653 with West Hyde Road and at the junction of the B4540 with Front Street, Slip End.<br><br>In the event that no alternative and appropriate means of securing these works can be identified and agreed with the Applicant, then CBC will be seeking for these works to be referenced in and secured by the section 106 Agreement.<br><br>Discussions with the Applicant will also need to take place about the Agreement making provision for payment by the Applicant of costs incurred by the Host Authorities during implementation of the DCO. |
| **9. Action Points** | |
| | No submissions were made on behalf of the Host Authorities under this agenda item. |
| **10. Any other business** | |
| | No submissions were made on behalf of the Host Authorities under this agenda item. |
| **11. Close of hearing** | |
| | No submissions were made on behalf of the Host Authorities under this agenda item. |