

# Host Authorities' Response at Deadline 8 to DCO Matters

## 1. INTRODUCTION

- 1.1. This document has been prepared on behalf of the Central Bedfordshire Council, Dacorum Borough Council, Hertfordshire County Council, Luton Borough Council and North Hertfordshire Council (the '**Host Authorities**'). It responds to the submissions of the Applicant at Deadline 7 on matters pertaining to the draft DCO and to the Examining Authority's Proposed Changes to the DCO [PD-018]. Unless the context suggests otherwise references in this document to the "**ExA's consultation draft DCO**" are references to PD-018 and references to the "**Applicant's revised draft DCO**" are references to the Applicant's draft DCO submitted at Deadline 7 [REP7-003] and [REP7-004]
- 1.2. This document also incorporates comments on the Applicant's other DCO related submissions made at Deadline 7, including the following:
  - a) The Explanatory Memorandum ([REP7-005] and [REP7-006]);
  - b) The Consents and Agreements Position Statement ([REP7-007] and [REP7-008]);
  - c) The Applicant's Response to Written Questions – Draft Development Consent Order ([REP-053]); and
  - d) The Applicant's Response to Comments on the Draft Development Consent Order at Deadline 6 ([REP7-062]).
- 1.3. Rather than respond to each of the above documents individually, this response document is organised by the relevant provisions of the draft DCO and makes reference to those other documents where appropriate.
- 1.4. Where matters contained in the above referenced documents are not expressly addressed in this document, their omission should not be taken to reflect the agreement or acquiescence of the Host Authorities to the Applicant's position.

## 2. ARTICLE 2 (INTERPRETATION)

### *ExA's consultation Draft DCO*

- 2.1. The Host Authorities are content with the ExA's addition of "*including in relation to the strategic road network National Highways*", to the definition of "relevant highway authority" for clarity, albeit that it isn't strictly necessary as National Highways is a highway authority.

## 3. ARTICLE 8 (CONSENT TO TRANSFER BENEFIT OF ORDER)

### *ExA's consultation draft DCO*

- 3.1. Article 8(4)(j) could be further clarified by amending it to read "in relation to a transfer or a grant of any works within a highway, the relevant highway authority responsible for those works within the highway." This amendment would remove the need to directly reference National Highways on the face of this provision by incorporating the newly defined term.

## 4. ARTICLE 11 (POWERS TO ALTER LAYOUT, ETC., OF STREETS)

### *ExA's consultation draft DCO*

- 4.1. The Host Authorities note the position of the Applicant and the reasons given by the ExA for its suggested amendments in relation to the treatment of a "kerb" under this provision. The Host Authorities do not have any concerns with the ExA's suggested amendment.

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### **5. ARTICLE 14 (PERMANENT STOPPING UP OF PUBLIC RIGHTS OF WAY)**

*ExA's consultation draft DCO*

- 5.1. The Host Authorities note that the ExA suggest that "stopping up" is substituted with "closure" and the reason given refers to "stopping up" being considered to be an incorrect term. The Host Authorities disagree.
- 5.2. "Stopping up" in the context of public highways (such as public rights of way) is an established term with a clear and understood legislative meaning. See, for example, Part 8 (stopping up and diversion of highways and stopping up of means of access to highways) of the Highways Act 1980 and section 247 of the Town and Country Planning Act 1990. In addition to the benefit of the term "stopping up" being firmly established in highway law it is further undesirable to amend this term to "closure" as this introduces ambiguity; a "closure" could be a temporary or permanent state of affairs whereas "stopping up" is permanent.
- 5.3. Without prejudice to the Host Authorities earlier submissions on the breadth of these powers and the need to ensure that they are exercised appropriately; the Host Authorities consider the terminological division between article 13 (temporary closure and restriction of use of streets) which uses "closure", and article 14 (permanent stopping up of public rights of way) which uses "stopping up", to be appropriate.

### **6. ARTICLE 21 (AUTHORITY TO SURVEY AND INVESTIGATE THE LAND)**

*ExA's Consultation draft DCO*

- 6.1. The Host Authorities note the ExA considers that "no less than" to be clearer than "at least" in relation to the period of notice to be given under this article. The Host Authorities do not consider there to be any material difference between the terms and so they do not have any concerns with the ExA's proposed change.

### **7. ARTICLE 22 (FELLING OR LOPPING OF TREES AND REMOVAL HEDGEROWS)**

*ExA's Consultation draft DCO*

- 7.1. The Host Authorities generally welcome the amendments proposed by the Examining Authority to this article, which would ensure that there is greater oversight of, and justification for, works to trees and hedgerows.
- 7.2. The Host Authorities note the ExA's proposed changes would require the exercise of these powers to be subject to approval of the schemes required under requirements 8 and 9. By requiring approval under both requirements it would limit the exercise of the power to the narrowest of the two requirements i.e. requirement 8 which relates only to parts of the authorised development containing landscaping mitigation.
- 7.3. The Host Authorities consider that they would have sufficient oversight if the references to "paragraphs 8 and 9 of Schedule 2" were changed to "paragraphs 8 or 9 of Schedule 2".

### **8. ARTICLE 35 (SPECIAL CATEGORY LAND)**

*ExA's Consultation draft DCO and the Applicant's revised draft DCO*

- 8.1. The Host Authorities welcome the Applicant's correction of the typographical error contained in article 35(3) wherein an earlier reference to "special category land" has been replaced with "replacement land". This correction is of particular relevance to the ExA's proposed change to article 35(3).

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- 8.2. The Examining Authority's proposed changes to this article are aimed towards securing that the replacement land is (i) laid out in a timely fashion and (ii) is laid out so as to be "no less advantageous" to the public. The Host Authorities are supportive of these aims but remain concerned that the Examining Authority's proposed changes do not achieve this objective.
- 8.3. In terms of the proposed drafting changes, the Host Authorities refer back to their answer to the ExA's written question DCO.1.6 ([REP5-067]. In that response the Host Authorities outlined their concerns that as drafted article 35 merely requires certification of receipt of a scheme for the replacement land, and thereafter for the that scheme to be implemented by the undertaker. The concern with this approach is that it does not afford a clear discretion to the relevant planning authority to certify (i) that the replacement land scheme is appropriate (i.e. it achieves its aims in terms of being no less advantageous) and (ii) that the replacement has as a matter of fact been laid out so as to be no less advantageous.
- 8.4. The Examining Authority propose two changes to this article. The first is to introduce an obligation on the undertaker to ensure that the replacement land scheme is to include a "clear statement of when the replacement land will have been laid out to the extent that it is no less advantageous to the public.". This formulation is a little unclear in that it seeks to relate to both the timing and the quality of the replacement land. The more concerning issue is that it continues to leave limited discretion to the relevant planning authority to apply its judgement and local expertise to determine whether in fact the replacement land scheme would achieve that end satisfactorily and in an appropriate timescale.
- 8.5. In the face of a simple statement to that end included in the replacement land scheme, however unrealistic, the relevant planning authority would potentially be bound to certify that it has "received" such a document. It must be born in mind that it is on the certification of receipt of such a scheme, however unsatisfactory it may be, that the existing rights, trusts and incidents over the special category are extinguished. That is to say, the public harm of the loss of the open space occurs on receipt of a scheme. This public loss is effectively traded for the undertaker's promise to layout the replacement land in accordance with that scheme. In that vein it is critical that the relevant planning authority is in a position to certify "its satisfaction" with replacement land scheme.
- 8.6. The second change seeks to amend article 35(3), the provision that would transfer the "rights, trusts and incidents" that previously resided in the special category to the replacement land (now that it has been corrected by the Applicant). It does so by qualifying the date that the rights, trusts and incidents that previously existed over the special category land will vest in the replacement land. The Host Authorities note that the effect of this drafting, should the laying out of the replacement land not prove to be "no less advantageous" is that the rights, trust and incidents would not vest; further disadvantaging those persons previously entitled to exercise them.
- 8.7. The Host Authorities remain of the view, as set out in its response to the Applicant's answer to written question DCO.1.6. ([REP5-067]) that article 35(1) ought to be amended such that the relevant planning authority is to certify that it is "satisfied" with the replacement land scheme it has received. This could be achieved by amending article 35(1) as follows:

"On the exercise by the undertaker of the Order rights, the special category land is not to vest in the undertaker (or any specified person), and the undertaker may not acquire any rights over the special category land, until the replacement land has been acquired in the undertaker's name or is otherwise in the name of persons who owned the special category land on the date those powers are exercised and the relevant planning authority has certified that a satisfactory scheme for the provision in a manner that is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public, of the replacement land including a timetable for the implementation of the scheme has been received from the undertaker.

- 8.8. With the above amendment in place, there would be no need to amend article 35(3).

## 9. ARTICLE 43 (DISAPPLICATION OF LEGISLATIVE PROVISIONS)

## Host Authorities' Response at Deadline 8 to DCO Matters

### *Applicant's revised draft DCO*

- 9.1. The Host Authorities refer back to and re-emphasise their Post Hearing Submissions (including written summary of oral case) for Issue Specific Hearing 10 [REP6-095] on page 7, in response to Action Point 3, that there are no ordinary watercourses within the Order limits and therefore the disapplication of the provisions of the Land Drainage Act 1991 referred to in article 43(1) are wholly unnecessary, cannot be justified and therefore ought to be removed from the draft DCO.
- 9.2. In any event, section 23 of the Land Drainage Act 1991 is a consent prescribed for the purposes of section 150 of the Planning Act 2008 (see Part 1 of Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 and as such may only be disapplied with the consent of the relevant bodies.
- 9.3. Given that the disapplications are manifestly unnecessary, the Host Authorities that are lead local flood authorities **will not** grant their consent to disapplication and it would therefore be ultra vires for the DCO to include such a disapplication in these circumstances.

## **10. ARTICLE 44 (INTERACTION WITH LLAOL PLANNING PERMISSION)**

### *Applicant's revised draft DCO*

- 10.1. The Host Authorities welcome the addition by the Applicant of new paragraph (2) which obliges the undertaker to inform Central Bedfordshire Council, Dacorum Borough Council, Hertfordshire County Council and North Hertfordshire District Council, of the service of article 44(1) notice on Luton Borough Council.
- 10.2. The Host Authorities welcome the amendments the Applicant has made to paragraphs (3) to (5) and (7) insofar as the amendments do make clear that important provisions of the LLAOL planning permission will survive the service of article 44(1) notice.

## **11. ARTICLE 45 (APPLICATION OF THE 1990 ACT)**

### *Applicant's revised draft DCO*

- 11.1. The Host Authorities note that they were previously content with the form of article 45(1) in relation to operational land, and similarly have no concerns with the Applicant's revised paragraph (1) which clarifies by reference to a new plan showing the extent by which land is to be treated as being benefitting from a specific planning permission for the purposes of section 264(3) of the Town and Country Planning Act 1990 and thereby potentially benefitting from permitted development.
- 11.2. The Host Authorities also welcome the addition by the Applicant of the new paragraph (5) and the amendment to paragraph (2)(c). When taken together these amendments ensure that the provisions of this article operate on 'inconsistencies' only when they arise and not when the authorised development has 'begun' and places an obligation on the undertaker when it identifies an 'inconsistency' to notify the relevant planning authority. Paragraph (5) could be improved by requiring that notice to expressly set out the undertaker's view as to which consenting regime ought to apply in the circumstances.
- 11.3. However, despite these improvements the Host Authorities do continue to have some reservations with the drafting of article 45. These concerns were set out in detail in Luton Borough Council's response to the ExA Question DCO.2.2 [REP7-090]. In summary, the Host Authorities are concerned that the technical meaning which the Applicant is using the term "inconsistent" is not clearly defined in article 45 which risks it applying in a wider range of circumstances than would be the case were the *Hillside* rule to be applied. As such, it would benefit from being defined in more narrow terms. The second area of concern is the breadth of the 'yardstick' by which inconsistency is to be measured i.e. the references to "any power or right exercised under this

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Order". Given that the rule in *Hillside* is concerned with overlapping planning permissions applying the provisions of article 45 to the far wide "any power or right exercised under this Order", which can include the exercise of general powers or the acquisition of rights, should not factor in the determination inconsistency. Ultimately, article 45 ought to be restricted to interaction between "the authorised development" and another planning permission.

*ExA's consultation draft DCO*

- 11.4. The ExA proposes to delete paragraphs (2) to (6). The Host Authorities do have some concerns that this approach, while it would resolve the Host Authorities concerns articulated above in relation to the Applicant's revised draft DCO, it may give rise to other issues. In particular, it is likely to give rise to a degree of uncertainty in terms of how the authorised development and other planning permissions, in particular the Green Horizons Park permission, are to co-exist.

### 12. **ARTICLE 47 (DEFENCE TO PROCEEDINGS IN STATUTORY NUISANCE)**

*ExA's consultation draft DCO*

- 12.1. The Host Authorities welcome the ExA's proposed amendments which would bring the provisions of this article in line with the case stated in the Applicant's Statement of Statutory Nuisance [APP-169].

### 13. **ARTICLE 52 (ARBITRATION) AND PROPOSED SCHEDULE**

*ExA's consultation draft DCO*

- 13.1. The Host Authorities note that the ExA has previously queried in its written question DCO 1.11 whether article 52 (arbitration) ought to be accompanied by a schedule setting out in more detail the procedure for arbitration.
- 13.2. In response, both the Host Authorities and the Applicant concurred that such provision would be unnecessary ([REP4-126] and [REP4-057] respectively) and that it was preferable not to prescribe procedural details.
- 13.3. The Host Authorities re-iterate that view and object to the inclusion in the Order of the proposed Schedule.
- 13.4. It must be born in mind that such prescription goes to the authority of the arbitrator to resolve the issues in dispute. Departures from those timescales and procedures are potentially grounds for the arbitrator's settlement to be set aside; the provisions of the Schedule may therefore have the unintended consequences of (i) making disputes more challenging to resolve than they would otherwise be through the imposition of timescales and procedural hurdles and (ii) risk undermining the robustness of the any settlement awarded by the arbitrator.
- 13.5. In view of the nature of this Applicant's proposed development, which is likely to be implemented over a long time horizon, it is unwise at this stage to seek to impose a "one size fits all" procedure for resolving disputes.
- 13.6. The far better approach is that originally adopted; to impose duties in terms of the appointment of the arbitrator and thereafter to leave it to the parties and the arbitrator to manage proceedings.

### 14. **NEW ARTICLE 53 (FUNDING)**

*ExA's consultation draft DCO*

- 14.1. The Host Authorities observe that provisions of the kind envisaged here are generally included in DCOs only where there is some question as to the undertaker's ability to fund its liabilities for the

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compulsory purchase of land. The Applicant's ability to fund the proposed development has not formed a significant part of the Host Authority's submissions and so the Host Authorities do not have a view, one way or the other, on the inclusion within the Order of this provision.

### **15. SCHEDULE 1 (AUTHORISED DEVELOPMENT) – WORK NO. 5B(01) AND WORK NO. 6A (01)**

*ExA's consultation draft DCO*

- 15.1. The Host Authorities welcome the addition of "(g) play facilities and skate park." to the description of this numbered work, ensuring that the undertaker has development consent for those aspects of the Strategic Landscape Masterplan [APP-172]. The Host Authorities also welcome the correction of the typographical error contained in Work No. 6a(01).

### **16. SCHEDULE 1 (AUTHORISED DEVELOPMENT) – WORK NO.6E**

*ExA's consultation draft DCO*

- 16.1. The Host Authorities note the proposed deletion of paragraphs (d) (Eaton Green Road and Lalleford Road, (e) Wigmore Lane and Crawley Green Road, (f) (Eaton Green Road and Wigmore Lane), (j) Crawley Green Road and Lalleford Road) with some concern.
- 16.2. While concerns have been raised with the form that the deleted works would take; it is clear that the authorised development will require some form of works to mitigate its effects on the highway network and removing the ability of the Applicant to undertake such works calls into question the degree by which its transport modelling can be relied upon.
- 16.3. The better response to such an issue would be to retain the works in question but ensure that they are subject to a closer degree of relevant planning authority and relevant highway authority oversight, together with stronger provision in the Outline Traffic Related Impacts Monitoring and Mitigation Approach that ensures that appropriate works are brought forward, or funded so that they can be brought forward by the highway authority, when required.
- 16.4. Luton Borough Council and Central Bedfordshire Council in particular, have concerns with the proposed deletion and are responding separately to the other Host Authorities in relation to the proposed deletion of these works.

### **17. SCHEDULE 1 (AUTHORISED DEVELOPMENT) – ANCILLARY WORKS**

- 17.1. The Host Authorities do not have concerns with the deletion of "kerb" from the list of ancillary works.

### **18. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 1(1) (INTERPRETATION)**

*ExA consultation draft DCO*

- 18.1. With one exception, the Host Authorities do not have any concerns with the ExA's proposed changes to requirement 1.
- 18.2. That one exception relates to the provision of a definition of "substantially in accordance with". The Host Authorities consider that the ordinary and natural meaning of the phrase is sufficiently clear to not require any additional gloss. Furthermore, the definition provided to some extent lessens the degree of compliance than what could be expected from the ordinary and natural meaning of the words. "Substantial" would mean that all matters of substance must accord with the outline document, whereas the proposed definition "in the main" would permit a greater degree of departure.

*Applicant's revised draft DCO*

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18.3. The Host Authorities have no specific comments on the Applicant's amendments to requirement 1 and where the drafting is relevant to other requirements, this is addressed below in the context of those requirements.

### 19. Schedule 2 (Requirements) - Paragraph 2 (Amendments to Approved Details)

*ExA's consultation draft DCO*

19.1. The Host Authorities welcome the Examining Authority's proposed changes which clarify that the relevant planning authorities may approve amended details of any matter in relation to which it has previously approved under the requirements.

### 20. Schedule 2 (Requirements) – Paragraph 5 (Detailed Design, Phasing and Implementation)

*ExA's consultation draft DCO*

20.1. The Host Authorities do not have 'in principle' concerns with splitting out of "phasing and implementation" from this requirement in order to support a new requirement dealing only with "phasing and implementation".

20.2. In relation to what remains of this requirement pertaining to detailed design the Host Authorities welcome the securing of a detailed Glint and Glare assessment for elements of the authorised works comprising solar energy production and the provisions that would secure the design review process for Work Nos. 3b(01), 3b(02), 3f and 4a.

20.3. In relation to the references to "Schedule []", the Host Authorities would support the inclusion of Schedule 11 to the draft section 106 agreement on the face of the Order. However, it should be noted that Schedule 11 to the draft section 106 agreement would require some drafting amendments for it to be in a form suitable for inclusion in a statutory instrument and which complies with statutory instrument drafting conventions.

20.4. Were this approach adopted it would be important to include drafting in the DCO Schedule that permits the parties to depart from its provisions where agreed in writing. As it remains the Host Authorities' hope that a section 106 agreement can be concluded, it is important to ensure that the addition of this Schedule does not conflict with the terms of a section 106 agreement.

*Applicant's revised draft DCO*

20.5. The Host Authorities welcome the Applicant's amendments to this requirement and to the design principles to secure a design review process as part of the discharge of this requirement.

20.6. In relation to the Applicant's new sub-paragraph (6), the Host Authorities welcome the inclusion of a requirement for the provision of information concerning the expected programme of works. However, it remains the view of the Host Authorities that a provision which tied the "parts" of the authorised development brought forward for approval to the other pre-commencement requirements in Part 1 would be beneficial, as discussed at ISH10 and recorded in the Host Authorities Post Hearing Submission (including written summary of oral case) under agenda item 5 [REP6-095].

### 21. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 7 (CODE OF CONSTRUCTION PRACTICE)

*ExA's consultation draft DCO*

21.1. The Host Authorities welcome the ExA's proposal to make Luton Borough Council the planning authority responsible for determining whether to approve a Code of Construction Practice under this requirement, following consultation with all of the other Host Authorities.

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- 21.2. In relation to the inclusion of the words “and other relevant consultees”, the Host Authorities would note that the Applicant has made provision for discretionary consultation. As such it would be preferable to either (i) name those “other relevant consultees” on the face of the provision so it is clear who *must* be consulted, or delete “other relevant consultees” such that it remains in the discretion of Luton Borough Council as to the identity of any other relevant bodies it considers it appropriate to consult.
- 21.3. In relation to the sub-paragraph (3); it appears as though the only substantive change would be the addition of the “outline strategy report for groundwater, ground gas and leachate monitoring”. That being the case it would be normal practice to simply add that as a new sub-paragraph (2)(k) to the existing list in sub-paragraph (2), which would remove the need for the new (3).

### **22. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 8 (LANDSCAPE DESIGN)**

#### *ExA's consultation draft DCO*

- 22.1. The Host Authorities welcome the ExA's proposed amendments to requirement 8(5) which would, among other matters, require the approval of details of boundary treatments and levels.
- 22.2. While the Host Authorities welcome the intention underlying the addition of proposed new sub-paragraph (2)(g) to require the landscaping scheme to include a statement setting out how the landscape design would ensure that the replacement land would be no less advantageous than the land that it is replacing, the Host Authorities consider that it would be more appropriate to amend article 35 so as to require the relevant planning authority's *satisfaction* at the replacement land scheme and its timetable, see the comments on that article above.
- 22.3. The Host Authorities consider it to be preferable to address the quality of the replacement land in the article that deals with its replacement, rather than it being subject to a requirement elsewhere in the draft Order. This would also ensure that there is no potential for the two “schemes” (under article 35 and under this requirement) to differ from one another, and ties to the satisfaction with the quality of the replacement land scheme to the provisions that would transfer the interests.
- 22.4. The Host Authorities welcome the intention behind the addition to sub-paragraph (4) that would require the landscaping to be maintained in accordance with the relevant landscape and biodiversity management plan under requirement 9. However, that proviso would more appropriately sit in requirement 9 rather than requirement 8 (see comments below). While the desire to provide a link between the two is noted the Host Authorities consider the relationship between the two requirements to be clear.

#### *Applicant's revised draft DCO*

- 22.5. The Host Authorities are content with the addition to sub-paragraph (3) of language requiring landscaping works to be carried out in line with the requirements of any environmental permit applicable to the works.

### **23. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 9 (LANDSCAPE AND BIODIVERSITY MANAGEMENT PLAN)**

#### *ExA's consultation draft DCO*

- 23.1. As noted in relation to the ExA's proposed changes to article 22 (felling or lopping of trees and hedgerow removal) the Host Authorities welcome the ExA's proposed changes to article.
- 23.2. As noted above, to ensure landscaping is appropriately maintained the Examining Authority and the Applicant may wish to consider amending requirement 9(3) so that it reads “The authorised development must be carried out and maintained in accordance with the landscaping and biodiversity management plan referred to in sub-paragraph (1).”



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23.3. The Host Authorities welcome the suggested amendments to requirement 9(2) to secure the achievement a minimum 10% biodiversity net gain and the amendments to sub-paragraph (4) to include references to planting that is uprooted or destroyed being replaced, and to the definition of "specified period" in sub-paragraph (5) to secure maintenance of landscape for a minimum of 5 years, or 30 years in the case of the Work Nos. 5b(01), 5c(01), 5c(02), 5d(01), 5d(02) and 5e. The Host Authorities agree that a development consent obligation under section 106 of the Town and Country Planning Act 1990 is the most appropriate way of making provision for the maintenance of the landscaping for the replacement land.

### **24. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 10 (PROTECTED SPECIES)**

*ExA's consultation draft DCO*

24.1. The Host Authorities welcome the addition of the express reference to consultation with Natural England where a scheme of mitigation is required to be approved under this requirement.

### **25. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 11 (CONTAMINATED LAND AND GROUNDWATER)**

*ExA's consultation draft DCO*

25.1. The Host Authorities welcome the ExA's proposed changes to this requirement, including the "occupied" trigger being changed to "being brought into use".

*Applicant's revised draft DCO*

25.2. The Host Authorities are content with the addition of the "relevant water undertaker" as a consultee under this requirement.

### **26. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 12 (SURFACE AND FOUL WATER DRAINAGE)**

*ExA's consultation draft DCO*

26.1. The Host Authorities note the ExA indicates its suggested changes to this requirement are intended to secure compliance with the "drainage design statement as a whole" and the Host Authorities are supportive of that approach. The Host Authorities consider this would be better achieved by substituting the first instance in paragraph (2) of "drainage principles" with "drainage design statement" which would enable the deletion of the suggested new paragraph (a).

*Applicant's revised draft DCO*

26.2. The Host Authorities welcome the Applicant's addition of the requirement for the surface and foul water drainage plan to include performance specifications for discharge levels and details on the means of long term monitoring and details of mitigation measures to address any deficiencies in observed performance.

### **27. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 13 (CONSTRUCTION TRAFFIC MANAGEMENT)**

*ExA's consultation draft DCO*

27.1. The Host Authorities welcome the suggested changes that would see Luton Borough Council being responsible for determining whether to approve the construction traffic management plan, following consultation with the other Host Authorities.

### **28. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 14 (CONSTRUCTION WORKERS)**

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### *ExA's consultation draft DCO*

- 28.1. The Host Authorities welcome the suggested changes that would see Luton Borough Council being responsible for determining whether to approve the construction worker travel plan, following consultation with the other Host Authorities.

### **29. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 15 (ARCHAEOLOGICAL REMAINS)**

#### *ExA's consultation draft DCO*

- 29.1. The Host Authorities welcome the suggested changes, including the references to site specific written schemes of investigation.

### **30. SCHEDULE 2 (REQUIREMENTS) - PARAGRAPH 16 (REMEDICATION OF FORMER EATON GREEN LANDFILL)**

#### *ExA's consultation draft DCO and the Applicant's revised draft DCO*

- 30.1. The Host Authorities have no comments on the ExA's and the Applicant's proposed amendments to this requirement.

### **31. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 17 (INTERPRETATION)**

#### *ExA's consultation draft DCO*

- 31.1. The Host Authorities have no specific concerns with the ExA's proposed changes to this requirement.

### **32. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 18 (EXCEEDANCE OF AIR QUALITY LEVEL 2 THRESHOLD OR LIMIT)**

#### *ExA's consultation draft DCO*

- 32.1. The Host Authorities note the ExA's proposed deletion of this requirement. The effect of which would be to increase the likelihood that emissions to air would trigger exceedances of the Level 2 Threshold or a Limit, triggering the related provisions.

### **33. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 19 (ENVIRONMENTAL SCRUTINY GROUP)**

#### *ExA's consultation draft DCO*

- 33.1. The Host Authorities welcome the ExA's proposed addition of Dacorum Borough Council to the list of local authorities represented on the Environmental Scrutiny Group ('**ESG**'), the proposed changes to requirement 19(3) and 19(7) that would enhance the Host Authorities ability to ensure an appropriate person can be appointed to represent the interests of the communities the Host Authorities represent.

- 33.2. The Host Authorities also welcome the proposed new sub-paragraph and amendments to the ESG Terms of Reference to reflect ESG being quorate when at least 50% of local authority representatives are present, alongside the independent chair, independent aviation specialist and slot allocation expert.

- 33.3. The Host Authorities welcome the ExA's proposed new sub-paragraph that would require at least 50% of the technical representatives to be present for a technical group to quorate. The Host Authorities would add that the role of the Technical panels is to provide advice to the ESG and so

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it would not be appropriate to use the phrase "for the purposes of decision making" in that new paragraph.

### **34. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 20 (MONITORING OF PERMITTED OPERATIONS)**

*ExA's consultation draft DCO*

- 34.1. The Host Authorities welcome the ExA's proposed amendments to this article which would ensure that across each of the four GCG monitoring topics at least one year of baseline data would be available prior to the service of article 44(1) notice ensuring an accurate baseline for the operational regime under the DCO.

*Applicant's revised draft DCO*

- 34.2. The Host Authorities welcome the Applicant's clarification to the drafting in this requirement.

### **35. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 22 (EXCEEDANCE OF A LEVEL 2 THRESHOLD)**

*ExA's consultation draft DCO*

- 35.1. The Host Authorities welcome the ExA's proposed changes sub-paragraph (3) to require noise monitoring reports to include details of the dispensations that have been applied and which would ensure that such dispensations are appropriately managed.

- 35.2. The Host Authorities also welcome the removal of the provisions in paragraph (6) that would limit the grounds on which the ESG could refuse to approve a Level 2 Plan and the removal of the deemed approval provisions in sub-paragraph (8).

*Applicant's revised draft DCO*

- 35.3. The Host Authorities welcome the Applicant's addition to paragraph (1) which makes it clear that the undertaker is under a duty to consult the ESG on a draft Level 2 Plan.

### **36. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 23 (EXCEEDANCE OF A LIMIT)**

*ExA's consultation draft DCO*

- 36.1. The Host Authorities welcome the ExA's proposed deletion of the deemed approval provisions contained in sub-paragraph (8) and welcomes the shortening of the time period for a Monitoring Report to be submitted following the approval of a Mitigation Plan from two years to one year. This would assist in giving confidence that the Mitigation Plan was having its desired effect, or, where it is not doing so, provide a timely opportunity for further intervention.

- 36.2. The Host Authorities again welcome the removal of the deemed consent provision in sub-paragraph (13).

- 36.3. The Host Authorities welcome the new drafting in sub-paragraph (15) that would introduce a financial penalty on the operator for operating in breach of a Limit. It is important that there is a sanction available where Limits are not being observed and it is appropriate that any penalty is paid into the Community First Fund so that the affected community is compensated for the local harm arising from such a breach.

- 36.4. The Host Authorities consider that the Order ought to contain on its face some guidance as to the level of payment that would be required to ensure that the provisions operate properly as a disincentive to operating in breach of the Limits and to provide the Secretary of State with some

## **Host Authorities' Response at Deadline 8 to DCO Matters**

guidance if ever called upon to make a determination under this provision. This could, for example, include a "starting point" by reference to an appropriate percentage of annual turnover.

- 36.5. The Host Authorities note that the term "airport operator" is defined in article 2(1) and so that term ought to be used in preference to "Operator".

### **37. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 24 (REVIEW OF IMPLEMENTATION OF THIS PART)**

*ExA's consultation draft DCO*

- 37.1. The Host Authorities welcome the proposed addition to sub-paragraph (1) of provisions requiring the review of the operation of GCG to include an analysis of extant policies in relation to the control of greenhouse gas emissions to ensure that the proposed development continues to operate in accordance with policy in this frequently evolving and important aspect. The Host Authorities also welcome the removal of the deemed consent provision.

### **38. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 26 (AIR NOISE MANAGEMENT PLAN)**

*ExA's consultation draft DCO*

- 38.1. The Host Authorities welcome the ExA's proposed changes that would see both (i) the reinstatement of the express reference to the 9,650 scheduled movements quota to this paragraph as well as (ii) the introduction of additional drafting that would put on the face of the Order the process for the review of the Air Noise Management Plan, together with the duty for approving such reviews falling to Luton Borough Council, in consultation with the other Host Authorities.

### **39. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPHS 29 (OFFSITE HIGHWAY WORKS) AND 30 (TRAVEL PLANS)**

*ExA's consultation draft DCO*

- 39.1. While in other areas the Host Authorities are supportive of the ExA's proposed streamlining of the discharge process which would see Luton Borough Council having the role of determining whether to approve submissions under this article in consultation with the other Host Authorities; in relation to this requirement the Host Authorities consider that approach would not be appropriate.
- 39.2. Ultimately, the relevant highway authority will become responsible for operating and maintaining works to their network and so it is important that any discharge approval remains within the tried and tested approach that would apply under the Town and Country Planning Act 1990 regime. Which is to say it ought be for the approval of the relevant planning authority in consultation with the relevant highway authority, and not solely for the approval of Luton Borough Council in consultation with the other authorities.

### **40. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 34 (INTERPRETATION)**

*Applicant's revised draft DCO*

- 40.1. The Host Authority's welcome the Applicant's extension of time for the determination of the applications relating to approval under requirement 5 for the key "gateway" aspects of the authorised development. However, they retain concerns at the overall brevity of the determination periods for other requirements.

### **41. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 35 (APPLICATIONS MADE UNDER REQUIREMENTS)**

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### *ExA's consultation draft DCO and the Applicant's revised draft DCO*

- 41.1. As set out in their response to Action Point 1 contained in the Host Authorities Post Hearing Submission (including written summary of oral submissions) [REP6-095], the Host Authorities do not consider the Environment Agency's proposed changes to this provision, which are reflected in the Examining Authority's proposed changes, to be appropriate.
- 41.2. 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 bodies that are not named as a consultee in relation to any particular requirement.
- 41.3. However, the Host Authorities welcome the addition of the drafting that would require an application under requirement to be "valid" before the time begins to run on the "specified period" within which it must be determined. The Host Authorities also welcome the ExA's proposed new sub-paragraph (3) that confirms that it may approve, approve subject to reasonable conditions or refuse an application made under a requirement.
- 41.4. The Host Authorities welcome the removal of the deemed approval provision in sub-paragraph (3) and are content with the ExA's proposed changes to sub-paragraph (5) to bring the language on the refund of application fees in line with the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012.

#### **42. SCHEDULE 2 (REQUIREMENTS) – PARAGRAPH 36 (FURTHER INFORMATION)**

### *ExA's consultation draft DCO and the Applicant's revised draft DCO*

- 42.1. The Host Authorities also welcome the extension of the periods for consultation and for responses to be issued by consultees proposed by the ExA.
- 42.2. However, the Host Authorities continue to be concerned by the provision in sub-paragraph (4) that states that the discharging authority "is deemed to have sufficient information". The Host Authorities concerns were articulated in their Post Hearing Submission (including written summary of oral submissions) [REP6-095] in relation to Action Point 14. In summary, the concern is that this deeming language could have adverse cost implications where the discharging authority is deemed to possess information that it does not in fact possess. While the increase to the periods for consultation appreciably reduce the risk, the issue could be addressed entirely by removing the "is deemed to have sufficient information" wording.
- 42.3. The Host Authorities also remain concerned at the overall brevity of the periods permitted for determination of applications under requirement remaining at 8 weeks for most applications. While to some extent the removal of the deemed approval provision alleviates this concern to a small degree, the time periods remain challenging for what is a complex development.

#### **43. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 1 (WATER CONSUMPTION)**

### *ExA's consultation draft DCO and the Applicant's revised draft DCO*

- 43.1. The Host Authorities do not have any substantive concern with the proposed new requirement that would prevent the increase of demand for water resources over the 2019 consumption baseline unless otherwise agreed with the utility undertaker. The Host Authorities note that the Applicant's revised draft DCO includes a definition for "relevant water undertaker" which should be used in preference to the undefined term "utility undertaker".

#### **44. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 2 (PHASES OF AUTHORISED DEVELOPMENT)**

## Host Authorities' Response at Deadline 8 to DCO Matters

### *ExA's consultation draft DCO*

- 44.1. The Host Authorities welcome a form of requirement that would provide for the phasing of the construction of the authorised development and agree that it is appropriate to retain a degree of flexibility to adjust to the prevailing circumstances.
- 44.2. The Host Authorities would note that in sub-paragraph (1) "authorised project" should read "authorised development" and that in sub-paragraph (3) "from the date the development is commenced" should instead read "from the date the authorised development begins".
- 44.3. The requirement should be tied to when the authorised development "begins" rather than when it is "commenced" because it is the act of the authorised development "beginning" that stops the clock on the 5 year time limit in requirement 4, not the "commencement". This change would ensure that once the authorised development 'begins' the undertaker would be under an ongoing obligation to keep the relevant planning authority up to date in relation to its proposals to implement the development consent.

### **45. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 3 (LIGHTING PLAN)**

#### *ExA's consultation draft DCO*

- 45.1. The Host Authorities welcome the proposed construction and operation lighting requirement and are content for the determination of this requirement to fall to Luton Borough Council in consultation with the Host Authorities.

### **46. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 4 (NOISE CONTOUR LIMITS AND QUOTA COUNT POINT LIMITS)**

#### *ExA's consultation draft DCO*

- 46.1. The Host Authorities welcome the inclusion on the face of the Order of the noise contour limits reflecting the core growth scenario. The Host Authorities note that from 2039 the noise contours should not be any greater than preceding years and indeed, ought to reduce.
- 46.2. In relation to the provision that would permit the Secretary of State to approve changes to the noise contour thresholds and limits the Host Authorities would suggest that the "specified authorities" are also named as a consultee and not just Luton Borough Council.

### **47. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 5 (RESTRICTIONS ON AIRCRAFT QUOTA COUNT)**

#### *ExA's consultation draft DCO*

- 47.1. The Host Authorities note the inclusion of this provision and note that the Host Authorities were previously content for it to be contained in the Air Noise Management Plan.

### **48. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 6 (ANNUAL AIR TRAFFIC MOVEMENT CAP FOR THE AUTHORISED DEVELOPMENT)**

#### *ExA's consultation draft DCO*

- 48.1. The Host Authorities are content with the proposed annual air traffic movement cap being included on the face of the Order, in particular the suggested cap of 209,410. The Host Authorities do not recognise how the 13,000 ATM cap for the shoulder periods has been derived.

### **49. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 7 (NOISE INSULTATION POLICY)**

## Host Authorities' Response at Deadline 8 to DCO Matters

### *ExA's consultation draft DCO*

- 49.1. The Host Authorities welcome the principle of securing the compensation policies on the face of the Order pending completion of the associated development consent obligations. The Host Authorities note that to properly give effect to this provision it would be necessary to define "compensation policies, measures and community first document", for that definition to include a reference to the certification schedule (Schedule 9) and for this document to be added to the list of certified documents.
- 49.2. The final sentence of the provision should also clarify that it is Luton Borough Council that may approve a departure from the previously approved document, following consultation with the Host Authorities, and this would prove a helpful mechanism to allow this provision to instead be addressed by way of a section 106 agreement without giving rise to a conflict between the agreement and the provisions of the DCO.

### **50. SCHEDULE 2 REQUIREMENTS – NEW REQUIREMENT 8 (NOISE INSULTATION PLAN AND PROGRAMME)**

#### *ExA's consultation draft DCO*

- 50.1. The Host Authorities welcome the ExA's proposed requirement which would secure the Applicant's noise insulation proposals on the face of the DCO.
- 50.2. For further clarity it would assist if sub-paragraph (1) was amended to read "Notice in accordance with article 44(1) interaction LLOAL planning permission of this Order must not be served until..." so as to be consistent with other requirements that relate to increases in the capacity of the airport.

### **51. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 9 (NOISE VIOLATION LIMITS)**

#### *ExA's consultation draft DCO*

- 51.1. The Host Authorities welcome the inclusion on the face of the Order of the noise violation limits. For clarity the provision would benefit from a reference to article 44(1) to make it clear that it applies only following the service of that notice in the same way as is suggested in paragraph 50.2 above.

### **52. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 10 (TRACK VIOLATION)**

#### *ExA's consultation draft DCO*

- 52.1. The Host Authorities welcome the securing of the track violation regime on the face of the Order but note that this could readily be combined with requirement 25 to ensure that provisions addressing aircraft noise are addressed in the same place in the Order.

### **53. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 11 (AIR QUALITY MANAGEMENT PLAN)**

#### *ExA's consultation draft DCO*

- 53.1. The Host Authorities welcome the inclusion of this provision to address the ongoing uncertainties in relation to how such technical details will be managed. The Host Authorities would anticipate that such a provision would be best located in Part 3 of Schedule 2 (green controlled growth) and that the trigger wording "No increase in passenger capacity may occur until..." ought to be replaced with wording that would ensure that the detail of monitoring is to be approved prior to that monitoring being carried out and that it is clarified that the air quality monitoring in question is that required to be carried out under requirement 20.

## **Host Authorities' Response at Deadline 8 to DCO Matters**

### **54. SCHEDULE 2 (REQUIREMENTS) – NEW REQUIREMENT 12 (EMPLOYMENT AND TRAINING STRATEGY)**

*ExA's consultation draft DCO*

- 54.1. The Host Authorities remain of the view that it would be appropriate for the subject matter of this requirement to be addressed by way of a section 106 agreement, but, pending the completion of such an agreement it is appropriate for it to be secured on the face of the Order and that the provision for reaching a contrary agreement would provide the mechanism for a section 106 agreement to take precedence over this provision.

### **55. SCHEDULE 7 (LAND OF WHICH TEMPORARION POSSESSION MAY BE TAKEN)**

*ExA's consultation draft DCO*

- 55.1. The Host Authorities refer to their submissions in relation to the proposed removal of certain offsite highways works from the development consent.

### **56. PARTS 6 SCHEDULE 8 (PROTECTIVE PROVISIONS)**

*Applicant's revised draft DCO*

- 56.1. The Host Authorities that are also local highway authorities are particularly disappointed that the Applicant has not meaningfully engaged with the issues with the local highway authority protective provisions set out in the Host Authorities Post Hearing Submission (including written summary of oral case) for ISH 10 [REP6-095]. No changes have been made to the protective provisions in Part 6 of Schedule 8 to the Applicant's revised draft DCO. The Applicant's response to the Host Authorities detailed submissions on this topic, contained in [REP7-062] (paragraphs 25 to 32), do not meaningfully engage with the issues raised and largely amount to bare assertions that the proposed provisions are "precedented and proportionate".
- 56.2. The Host Authorities do not understand how the Applicant has arrived at that conclusion, particularly when it is born in mind that in essence all that the local highway authorities are seeking are provisions equivalent to what the Applicant has included in the DCO for another highway authority (National Highways) and which align with what would be expected of any other private developer proceeding under conventional consenting regimes for aspects of projects that seek to interfere with the public highway and affect a public authority's financial and safety liabilities.

### **57. SCHEDULE 9 (DOCUMENTS TO BE CERTIFIED)**

*ExA's consultation draft DCO*

- 57.1. The Host Authorities would note that, absent a provision in the DCO, mere certification of a document has no effect. As such, it is not clear why the "Water Cycle Strategy" ought to become a certified document as it does not appear to be referenced explicitly in the Examining Authority's proposed changes to the DCO.
- 57.2. As noted by the Host Authorities in relation to the Examining Authority's proposed new requirement 7 (noise insulation plan and programme); that new requirement refers to the "compensation policies, measures and community first document" ([REP7-037]). For this to properly take effect it will need to be defined in an appropriate place in Schedule 2 by reference to the document of that description to be certified and as listed in Schedule 9. It will then be necessary to add it to the list of documents to be certified in Schedule 9.

### **58. SCHEDULE [ ] (ARBITRATION)**

*ExA's consultation draft DCO*



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- 58.1. For the reasons articulated above in relation to article 52 (arbitration), the Host Authorities are opposed to the inclusion in the Order of a detailed arbitration Schedule as it would impair the capacity of the parties to the dispute, together with the appointed arbitrator, to settle a procedure that is proportionate to the dispute in question.