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# London Luton Airport Expansion

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Volume 2 Draft Development Consent Order and Consents  
**2.02 Explanatory Memorandum**

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APFP Regulation 5(2)(c)

## The Planning Act 2008

### The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

## London Luton Airport Expansion Development Consent Order 202x

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### 2.02 EXPLANATORY MEMORANDUM

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**Infrastructure Planning  
Planning Act 2008  
The Infrastructure Planning  
(Applications: Prescribed Forms and Procedure) Regulations 2009  
(as amended)**

**London Luton Airport Limited  
The London Luton Airport Expansion Development  
Consent Order 202[ ]**

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**EXPLANATORY MEMORANDUM**

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## 1 Summary

- 1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft **The London Luton Airport Expansion Development Consent Order [TR020001/APP/2.01]** (the Order), as required by regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009<sup>1</sup>.

## 2 Purpose of the Order

### *Nationally Significant Infrastructure Project and associated development*

- 2.1 This application is made by London Luton Airport Limited (now trading as Luton Rising), owners of London Luton Airport (the Applicant). The Applicant has identified an opportunity to further expand the offering at London Luton Airport (the airport) to continue meeting the growing demand for air travel in the south-east of England, in turn helping the Government to meet its ambitions to increase airport capacity to allow demand for air transport to be met, subject to environmental considerations.
- 2.2 The Applicant is seeking to obtain consent through a development consent order (DCO) under the Planning Act 2008<sup>2</sup> (the 2008 Act) to increase the capacity of the airport to 32 million passengers per annum (mppa), facilitated by changes to its landside and airside infrastructure, including the following works (the Proposed Development):-
- (a) extension and remodelling of the existing passenger terminal (Terminal 1) to increase the capacity;
  - (b) new passenger terminal building and boarding piers (Terminal 2);
  - (c) earthworks to create an extension to the current airfield platform, the vast majority of material for these earthworks would be generated on site;
  - (d) airside facilities including new taxiways and aprons, together with relocated engine run-up bay and fire training facility;
  - (e) landside facilities, including buildings which support the operational, energy and servicing needs of the airport;
  - (f) enhancement of the existing surface access network including a new dual carriageway road accessed via a new junction on the existing

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<sup>1</sup> S.I. 2009/2264

<sup>2</sup> c.29

New Airport Way (A1081) to the new passenger terminal along with the provision of forecourt and car parking facilities;

- (g) extension of the Luton Direct Air to Rail Transit (Luton DART) with a station serving the new passenger terminal; and
  - (h) landscaping and ecology improvements, including the replacement of existing and planned public open space and amenities.
- 2.3 The Applicant is applying to the Secretary of State for an Order to increase the capacity of the airport. The Proposed Development is a nationally significant infrastructure project (NSIP) for the purposes of the 2008 Act. This is because the Proposed Development relates to airport development (section 14(1)(i) of the Act), specifically either the alteration of an airport in England or an increase in the permitted use of an airport (section 23(1)(b), (c) and (4)(a) of the Act).
- 2.4 Development involving such an alteration is only an NSIP if it is expected to have the effect specified in section 23(5) (in the case of an alteration to an airport) and section 23(8) (in the case of an increase in the permitted use of an airport) of the Act. The relevant effect for this development is that it increases by at least 10 million per year the number of passengers for whom the airport is capable of providing passenger transport services. The Proposed Development will result in a development in excess of that threshold. Therefore, the Proposed Development is an NSIP.
- 2.5 At the time of DCO application, the existing permitted use of the airport was capped at 18 mppa. On 1 December 2021, the local planning authority (Luton Borough Council) resolved to grant permission for the current airport operator London Luton Airport Operations Limited (LLAOL) to grow the airport up to 19 mppa, from its previous permitted cap of 18 mppa. However, the application was then called-in and referred to the Secretary of State for determination instead of being dealt with by the local planning authority, and an inquiry to consider the called-in application took place between Tuesday 27 September 2022 and Friday 18 November 2022.
- 2.6 At the time the application for development consent was submitted, the outcome of the inquiry was still unknown and, therefore, all of the core assessment work undertaken for the application used a “*baseline*” of 18 mppa. The Application by LLAOL has however since been approved, with a joint decision to grant planning permission issued by the Secretary of State for Transport and Secretary of State for Levelling Up, Housing and Communities on 13 October 2023. Nonetheless, in anticipation of this, the Applicant’s environmental assessments included sensitivity analysis of the implications of the permitted cap increasing to 19 mppa.
- 2.7 As a result, the Applicant believes that the environmental assessments are sufficiently representative of the likely significant effects of expansion, whether the baseline is 18 mppa or 19 mppa. Where the change of the baseline does affect an assessment topic, in most cases it means that the “*core*” assessments (using an 18 mppa baseline) report a marginally greater change than would be

the case with a 19 mppa baseline. The findings of this assessment are presented in the **Environmental Statement** ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03]) submitted with the application for development consent.

- 2.8 As the Proposed Development is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a DCO must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the Act.
- 2.9 Schedule 1 to the Order contains a list of numbered works comprising the authorised development.
- 2.10 As well as the NSIP itself, the authorised development also includes associated development, as defined in section 115(2) of the 2008 Act.
- 2.11 Guidance<sup>3</sup> on associated development has been issued by the Secretary of State for Communities and Local Government. In this guidance associated development is described as being "*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*" (paragraph 6) and "*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*" (paragraph 5).
- 2.12 In some cases there may be some overlap or the absence of a clear boundary between associated development and works which form part of the NSIP. There is a danger that separating the two out in the Order could potentially lead to an error in defining them one way or another, given this potential for overlap between the two categories.
- 2.13 For this reason, and as there is no requirement for a DCO to distinguish between these two categories, the Applicant has chosen not to differentiate the NSIP and the associated development works in Schedule 1 to the Order. Ultimately, all elements of the 'authorised development' in Schedule 1 either constitute part of the NSIP or are 'associated development' to the NSIP within the meaning of section 115(2) of the Act and so can properly be authorised by the Order.
- 2.14 For the avoidance of doubt, the highways works and diversions of statutory undertakers' equipment and apparatus required for the Proposed Development do not constitute an NSIP in their own right.
- 2.15 In order to ensure that the numbered works comprising the authorised development in Schedule 1 may be constructed efficiently and without impediment, the Order includes 'ancillary works' listed (a) to (n) in Schedule 1. This is a widely precedented approach and has been approved by the Secretary

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<sup>3</sup> Guidance on associated development applications for major infrastructure projects

of State in other made DCOs, such as The M42 Junction 6 Development Consent Order 2020, The A1 Birtley to Coal House Development Consent Order 2021 and The M25 Junction 28 Development Consent Order 2022.

### *Ancillary matters*

- 2.16 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 2.17 An important ancillary matter is a power to acquire land or rights over land compulsorily or by agreement, in accordance with section 120(3) of the Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the Act. A justification for these powers is set out in the **Statement of Reasons [TR020001/APP/3.01]** that accompanies the application.
- 2.18 Further to providing these powers, the Order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the Act, an order containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.
- 2.19 Other ancillary matters include the stopping up of lengths of existing highways and public rights of way as well as traffic regulation.

## **3 Draft Order**

- 3.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. While the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) (the Model Provisions) has formally lapsed, the draft Order draws on the Model Provisions (general and railway), as well as precedent set by DCOs that have been made to date. The Order also includes a number of bespoke provisions as necessary to reflect the circumstances of the Proposed Development.

### **Part 1 – Preliminary**

#### *Article 1 – Citation and commencement*

- 3.2 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It also gives the date on which the Order comes into force.

#### *Article 2 – Interpretation*

- 3.3 The purpose of article 2(1) is to define terms used in the remainder of the Order.
- 3.4 Definitions of particular note include:



- (a) “*maintain*” which provides a non-exclusive list of those actions that comprise the maintenance of the authorised development, provided such works do not give rise to any materially new or materially different environmental effects in comparison to those reported in the **Environmental Statement** ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03]) that are considered to be maintenance for the purposes of the Order. In the context of the airport it is important for the Applicant to be able to undertake all the elements of maintenance that are included within this definition. This approach has been taken in other made DCOs (see for example The M42 Junction 6 Development Consent Order 2020, The Southampton to London Pipeline Development Consent Order 2020, The A1 Birtley to Coal House Development Consent Order 2021, The Manston Airport Development Consent Order 2022, The Sizewell C (Nuclear Generating Station) Order 2022 and The M25 Junction 28 Development Consent Order 2022,
- (b) “*the Order land*”, which comprises the land shown on the land plans which is within the limits of land to be acquired or used permanently or temporarily, and described in the **Book of Reference** [TR020001/APP/3.02]; and
- (c) “*the Order limits*”, which means Order limits shown on works plans.

3.5 Article 2(2) provides that a broad definition of ‘rights over land’ applies to the Order. This approach has been taken in other made DCOs including The Southampton to London Pipeline Development Consent Order 2020, The A1 Birtley to Coal House Development Consent Order 2021 and The M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

3.6 Article 2(3) provides that measurements are approximate save for the dimensions specified in paragraph 6 (parameters) of Part 2 of Schedule 2 to the Order. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the works are permitted by the Order. This provision allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is common-place to include such provision in an Act or instrument authorising infrastructure.

3.7 Article 2(4) provides that references to the acquisition and creation of rights over land are to include the rights to oblige a party having an interest in land to grant those rights in favour of third parties directly, and to any statutory undertaker for the purpose of their undertaking. This ensures that those who are intended to benefit from any compulsory acquisition of rights over land (such as statutory undertakers in respect of their apparatus, or landowners who are intended to have the benefit of replacement land or new accesses) are able to benefit from such acquisition directly. This provision is included in the M42 Junction 6 Development Consent Order 2020 (article 2(3)), the Great Yarmouth

Third River Crossing Development Consent Order 2020 (article 2(3)) and The M25 Junction 28 Development Consent Order 2022 (article 2(3)).

- 3.8 Article 2(5) provides that areas given in the **Book of Reference [TR020001/APP/3.02]** are approximate as these are not covered by article 2(3). This is intended to clarify the position of the areas in the Book of Reference, the purpose and effect is the same as set out in the previous paragraph.
- 3.9 Article 2(6) ties references to lettered/numbered points and numbered works in the Order to the rights of way plans.
- 3.10 Article 2(7) clarifies that references to any body or company includes that body's successors from time to time.
- 3.11 Article 2(8) confirms that references in the Order to numbered works are references to works numbered in Schedule 1 (authorised development).
- 3.12 Article 2(9) clarifies that any references to materially new or materially different environmental effects in comparison with those reported in the **Environmental Statement ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03])** must not be construed so as to include the avoidance, removal or reduction of an adverse environmental effect that was reported in the Environmental Statement as a result of the authorised development. There are a number of provisions in the Order where activities are constrained to those which do not give rise to materially new or materially different environmental effects or where variations are permissible provided they do not give rise to such effects (e.g. the definition of maintain, article 6(3), paragraph 2(2) of Schedule 2 to the Order). The explanation and justification for the ability to make these variations is set out in the commentary on the relevant provision.
- 3.13 The Applicant notes that the A57 TransPennine Upgrade Development Consent Order 2022, uses the phrase "*materially new or materially worse*" environmental effects. Whilst the Applicant has not sought to replicate the drafting in that Order, following a review of that decision article 2(10) has been added to the Order to make clear what the scope of "*materially new and materially different*" environmental effects includes. The Applicant is mindful that the precedented "*materially new or materially different*" drafting reflects "*wording preferred by the Secretary of State*" as confirmed in the decision letter on Great Yarmouth Third River Crossing. Accordingly, the Applicant does not wish to modify this preferred drafting (notwithstanding the A57 decision) but instead wishes to provide the interpretive and clarificatory provision for the following reasons:
- (a) The drafting confirms that where a proposed change or activity avoids, removed or reduces adverse environmental effects that were reported in the **Environmental Statement ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03])**, a material or non-material amendment to the Order is not required. Requiring a material or non-material amendment to the Order would introduce significant delay and therefore disincentivises appointed contractors from

delivering the Proposed Development in a manner with environmentally better outcomes. The Applicant does not consider it is the Secretary of State's intention to place barriers to delivering improved environmental outcomes. It is to be noted that the Secretary of State confirmed that it was not the intention to avoid environmentally better outcomes in the correction notice issued in connection with the A19/A184 Testo's Junction Alternation Development Consent Order. In particular, the Secretary of State confirmed that:

*"It is the Secretary of State's view that the recommended wording would allow the necessary scope for changes that are better for the environment providing such changes do not result in significant effects that have not already been previously identified and assessed in the Environmental Statement."*

- (b) The Applicant has necessarily undertaken an environmental assessment which conforms to the "*Rochdale envelope*" approach (as explained in the Planning Inspectorate's Advice Note 9 and *R. v Rochdale MBC ex parte Milne* (No. 1) and *R. v Rochdale MBC ex parte Tew* [1999] and *R. v Rochdale MBC ex parte Milne* (No. 2) [2000]). The purpose of such an assessment is to ensure that a reasonable worst case scenario is adopted so that mitigation measures which protect the environment on that basis are incorporated. The proposed provision (article 2(9)) in the Order is consistent with that approach; and the requirement to ensure an appropriately precautionary assessment should not be read as requiring the delivery of that worst case scenario. Instead, that requirement is properly understood as setting an envelope in which activity and works can be carried out.

- 3.14 Article 2(10) confirms that the expression "*includes*", when used in the Order, is to be construed without limitation.

## **Part 2 – Principal powers**

### *Article 3 – Development consent etc. granted by the Order*

- 3.15 Article 3(1) grants the development consent by giving the Applicant the power to construct the authorised development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2. The provision differs from some made Orders since it does not refer to development consent being granted "*within the Order limits*". This is because the Order provides for certain activities to be carried out beyond the Order limits (e.g. articles 18 (protective work to buildings) and 19 (authority to survey and investigate land)). These articles are routinely included in DCOs, are necessary to support the delivery of the authorised development and also serve to reduce in scope the amount of land required for temporary powers of possession and/or compulsory acquisition, since the land would otherwise need to be included within the Order limits. This approach therefore reflects the clear intention that such activities should benefit from development consent and should not be subject to a requirement for further planning approval outside the

DCO process. The Applicant notes that the Secretary of State has explicitly endorsed the removal of the phrase “*within the Order limits*” in the A303 Amesbury to Berwick Down Correction Order “*in recognition that the Order provides powers to carry out limited activities beyond the Order limits*”. This drafting approach does not affect the limits of the authorised development which are controlled under article 6.

- 3.16 Article 3(2) provides that any enactment applying to land within, adjoining or sharing a common boundary with the Order limits has effect subject to the provisions of the Order. This provision has been included and is necessary in order to ensure there are no Acts of a local or other nature that would hinder the construction and operation of the authorised development. It ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more generally. As a result, the construction and operation of the authorised development are not jeopardised by any incompatible statutory provisions which might exist. The Applicant has undertaken a proportionate search of existing enactments, including private Acts of Parliament and byelaws, which apply to land within or in close proximity to the Order limits and has not identified by specific existing enactments which require disapplication. However, no search can be completely exhaustive and there remains the possibility that a local Act or provision may have been overlooked. Article 3(2) has been included to address this issue, ensuring that the delivery of the Proposed Development is not comprised by unknown enactments i.e. a provision which would be an absolute restriction that could not be dealt with unless by statutory amendment, despite the Applicant’s best efforts to identify those enactments in advance of the application for development consent. This provision would prevent delay in this situation by ensuring that the Proposed Development could be constructed without impediment. There is precedent for such a provision, for example the Secretary of State approved the same drafting in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 5(2)), the Silvertown Tunnel Order 2018 (see article 4(2)), A19/A184 Testo’s Junction Alteration Development Consent Order 2018 (see article 3(2)), The M42 Junction 6 Development Consent Order 2020 (see article 3(2)), the Great Yarmouth Third River Crossing Development Consent Order 2020 (see article 4(2)) and The Manston Airport Development Consent Order 2022 (see article 3(2)).

#### *Article 4 – Maintenance of authorised development*

- 3.17 This article empowers the Applicant to maintain the development. “*Maintain*” is defined in article 2(1). This is a broad definition to ensure that the Applicant has the necessary powers to maintain the airport. The proper maintenance of the airport is an essential part of ensuring the safety of users of the airport. It is therefore appropriate for ‘maintain’ to have a reasonably broad definition. Paragraph 3.4 (a) above provides further justification for this definition.
- 3.18 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 12, which makes provision in relation to maintenance of streets by the local highway authority

### *Article 5 – Maintenance of drainage works*

- 3.19 The purpose of this article is to make it clear that any realignment of award drains or other works to them that are carried out as part of the Proposed Development do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between the Applicant and the responsible party. The provision gives certainty to both the Applicant and to those that possess that responsibility. It also enables agreement on reallocation of responsibilities to be reached where it is appropriate.
- 3.20 The provision is well precedented (see article 5 of The A1 Birtley to Coal House Development Consent Order 2020, article 3 of The A30 Chiverton to Carland Cross Development Consent Order 2020, article 5 of The Southampton to London Pipeline Development Consent Order 2020, article 6 of The M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 and article 5 of The M25 Junction 28 Development Consent Order 2022) and the Applicant considers that it is a sensible inclusion to clarify who has responsibility for such works.

### *Article 6 - Limits of works*

- 3.21 Article 6(1) provides that each numbered work must be situated within the limits of the corresponding numbered area shown on the works plans.
- 3.22 Vertical deviation upwards or downwards is permitted in respect of the Airport Access Road comprised in Work Nos. 6a(01), 6a(02) and 6a(03) to a maximum deviation of 2.0 metres and in respect of the Luton DART works comprised in Works No. 3g to a maximum of 0.5 metres upwards and 1.0 metres downwards metres. The levels relevant to these vertical limits of vertical deviation are shown on the **Airport Access Road and Luton DART Long Section Plans [TR020001/APP/4.11]**. These limits of deviation have been developed through the design and Environmental Impact Assessment process for the authorised development.
- 3.23 The ability to deviate within the prescribed limits of deviation is necessary as further detailed design will take place. The limits of deviation ensure that the Applicant (or, where any powers are transferred, other statutory undertakers or persons) have sufficient flexibility to design and construct the authorised development post-consent.
- 3.24 Paragraph (3) clarifies that the limits can be exceeded where it is demonstrated to the relevant planning authority's satisfaction (and the relevant planning authority has certified accordingly) that such works would not give rise to any materially new or materially different environmental effects from those reported in the **Environmental Statement ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03])**. The Applicant emphasises that this paragraph links any such change to the limits set out in paragraphs (1) and (2) of the article to the environmental effects and so can be distinguished from the provisions concerning "*tailpiece*" provisions in paragraphs 17.3 to 17.6 of Advice Note Fifteen. There is precedent for such provision in The

Southampton to London Pipeline Development Consent Order 2020 (see article 6(2)), The M25 Junction 28 Development Consent Order 2022 (see article 7(1)) and The M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 (see article 7).

- 3.25 The purpose of this provision is to provide the Applicant with a proportionate degree of flexibility when constructing the Proposed Development, reducing the risk that it cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects.
- 3.26 Paragraph (4) clarifies that the procedure for the discharge of requirements set out in Part 4 of Schedule 2 to the Order, will also apply to any application to the relevant planning authority for certification under paragraph (3), as though it were an application for approval under the requirements. This ensures there is a clear, defined process in place for applications to the relevant planning authority under this article. This paragraph has precedence in article 6(2) of the A19 Downhill Lane Junction Development Consent Order 2020 and article 7(2) of The M25 Junction 28 Development Consent Order 2022.

#### *Article 7 – Benefit of Order*

- 3.27 Article 7 overrides section 156(1) of the Act (as permitted by section 156(2)) to give the benefit of the Order to the Applicant rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if the provisions of section 156(1) of the Act were to remain unmodified.
- 3.28 The same drafting was accepted and approved by the Secretary of State in The A63 (Castle Street Improvement, Hull) Development Consent Order 2020 (see article 7(2)), The M25 Junction 28 Development Consent Order 2022 (see article 8(2)) and The Sizewell C (Nuclear Generating Station) Order 2022 (see article 8(2)).

#### *Article 8 – Consent to transfer benefit of Order*

- 3.29 This article allows the benefit of the Order to be transferred or granted (for a time limited period) to others by the Applicant. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were executed by the Applicant. The consent of the Secretary of State is required for a transfer or grant, except where it is made to LLAOL or the airport operator, where it is different from LLAOL, particular highways authorities or companies in relation to certain utility diversion works in accordance with paragraph (4).
- 3.30 The removal of the need for later consent by the Secretary of State under paragraph (4) is justified by the fact that such consent is sought for the purposes of this application for development consent; thus interested parties, the Examining Authority and ultimately the Secretary of State will have an

opportunity to consider the appropriateness of this power as part of this application.

- 3.31 This article is based on article 5 of the Model Provisions. It differs in that it allows as noted a transfer or grant to certain specified bodies or companies to take place without the Secretary of State's consent, on the basis that it is appropriate for those bodies or companies to be able to carry out those works without the Secretary of State needing to consider later on whether or not consent for them to do so should be given.

### **Part 3 – Streets**

#### *Article 9 – Application of the 1991 Act*

- 3.32 Article 9 modifies the application of the New Roads and Street Works Act 1991<sup>4</sup> (the 1991 Act) to works carried out under the powers of the Order. This is required because street works will be carried out under Order powers subject to the provisions and requirements of the Order and not, for instance, under Highways Act 1980 powers.
- 3.33 Paragraph (1) provides that works carried out under the powers of the Order which match the description of "*major highway works*" in the 1991 Act will be treated as major highways works for the purposes of the 1991 Act. The effect of this is to clarify that the provisions for sharing the burden of dealing with apparatus in the street (under sections 84 and 85 of the 1991 Act), which would normally apply only to major works carried out by the highway authority, will apply in respect of the works authorised by the Order irrespective of who in fact carries them out.
- 3.34 "*Major Highways Works*" are defined at section 86 of the 1991 Act. The definition includes, at sub-sections 86(3)(b) and (f), works undertaken under powers conferred by sections 64 and 184 the Highways Act 1980. As that would not be relevant in this context (where the works will be undertaken under the powers of the Order), these sub-sections are omitted from paragraph (1)(a). Works equivalent to works undertaken under those sections of the Highways Act 1980, but carried out under powers conferred by the Order, are included through paragraph 1(b). The effect is that any works which would be "*major highway works*" under the 1991 Act if carried out by a highway authority in relation to one of its streets are also "*major highway works*" if carried out under the powers of the Order regardless of who carries them out.
- 3.35 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order (particularly article 3 and Schedule 1), and the provisions in the Order

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<sup>4</sup> c.22

(including the requirements) which would regulate the carrying out of the Order works.

- 3.36 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to any streets which are temporarily stopped up under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily stopped-up street are "*street works*" for the purposes of the 1991 Act and, secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 3.37 Paragraph (7)(a) of article 9 provides that nothing in article 12 shall affect the ability of the local highway authority (under section 87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street.
- 3.38 Paragraph (7)(b) provides that the Applicant will not be under the duties that apply to a "*street authority*" for the purposes of the 1991 Act by virtue of being responsible for the maintenance of a street under article 12.
- 3.39 Paragraph (7)(c) makes it clear that the maintenance obligations imposed by article 12 do not override the provisions of the 1991 Act that govern procedures for street works, i.e. works in streets involving the placing of or alteration to apparatus in the street. After the implementation of the Order it is appropriate that the 1991 Act should govern such works as it is specifically designed to ensure a fair and efficient procedure for the various parties affected by such works.
- 3.40 The article has been amended to deal with the relationship between the Order powers and the East of England Permit Scheme operated by Hertfordshire County Council and Luton Borough Council. Paragraph (8) confirms that the Permit Scheme applies and will be used by the Applicant in connection with the construction and maintenance of the authorised development, subject to the qualifications in paragraphs (9) and (10).
- 3.41 Paragraph (11) clarifies that the procedure for appeals in Part 6 of Schedule 2 of the Order is capable of applying to any refusal to grant a permit, or to any decision to grant a permit subject to conditions, but not so as to limit any other appeal mechanism available to the Applicant under the permit schemes or otherwise.
- 3.42 These modifications reflect those made in other DCOs affecting highways, for example The A63 (Castle Street Improvement, Hull) Development Consent Order 2020 and The M42 Junction 6 Development Consent Order 2020, The M25 Junction 28 Development Consent Order 2022 and The Sizewell C (Nuclear Generating Station) Order 2022.



### *Article 10 – Street works*

- 3.43 Article 10 allows the Applicant to interfere with and execute works in or under the streets within the Order limits for the purposes of the Proposed Development. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the 1991 Act. Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 9 (application of the 1991 Act).
- 3.44 Article 10 is based on article 8 of the Model Provisions.. It departs from the Model Provisions in that it authorises interference with any street within the Order limits, rather than just those specified in a schedule. This approach has precedence in The Thurrock Flexible Generation Plant Development Consent Order 2022. The application of sections 54 to 106 of the 1991 Act is also expressed to be subject to article 9, which applies and modifies that Act. The definition of ‘apparatus’ that was included as paragraph (4) in the Model Provisions is omitted because that term is already defined in article 2.

### *Article 11 – Power to alter layout, etc., of streets*

- 3.45 This article is not contained in the Model Provisions but is based upon an article that has precedent in other approved DCOs, including The Heysham to M6 Link Road Development Consent Order 2013, The Network Rail (North Doncaster Chord) Order 2012, The Keuper Underground Gas Storage Facility Order 2017, The Riverside Energy Park Order 2020 and The West Midlands Rail Freight Interchange Order 2020. The article is authorised pursuant to section 120(3) of the 2008 Act since any necessary works are related to the authorised development, as well as section 120(4) and specifically paragraph 15 of Part 1 of Schedule 5 to the 2008 Act (i.e. the carrying out of civil engineering or other works). The provision is also authorised by section 120(c), given that it is necessary and expedient to give full effect to the development consent granted by the Order (article 3) in order to authorise the development detailed in Schedule 1.
- 3.46 This article allows for the alteration of the layout of any street for the purposes of construction, operation or maintenance, subject to obtaining the written consent of the street authority and to the restoration of such streets to the reasonable satisfaction of the street authority. A deemed consent provision has been included to ensure there is a timely route to a decision. This deemed consent approach was incorporated in The National Grid (Hinkley Point C Connection Project) Order 2016.
- 3.47 Paragraph (6) includes bespoke drafting to provide that an application for consent under paragraph (3) of the article is deemed advance notice under section 54 of the 1991 Act where advanced notice is required. This has been added to aid the implementation of the Proposed Development and remove overlapping obligations between the Order and the 1991 Act.

*Article 12 – Construction and maintenance of new, altered or diverted streets*

- 3.48 The standard position in respect of maintenance of streets is that National Highways (as strategic highways company) is responsible for maintaining motorways and trunk roads and other highways are to be maintained by the local highway authority in respect of highways maintainable at the public expense, or whichever body is responsible for the maintenance of the street in respect of streets which are not maintainable at the public expense. This is reflected in paragraphs (1) to (3). These provisions are subject to any written agreement to the contrary between the Applicant and the relevant street or highway authority.
- 3.49 The effect of paragraphs (4) and (5) are that in any action for damages against the Applicant alleging failure to maintain a street, it will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic. This extends the provision in section 58 of the Highways Act 1980 to the Applicant and draws on the approach taken in article 14 of The M42 Junction 6 Development Consent Order 2020, article 10 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 12 of The A47 Blofield to North Burlingham Development Consent Order 2022 and in article 11 of The M25 Junction 28 Development Consent Order 2022. This article is needed to ensure the Applicant is covered by this defence in respect of all the roads that are comprised in the Proposed Development.

*Article 13 – Temporary closure and restriction of use of streets*

- 3.50 This article allows for the temporary closure, alteration, diversion or restriction of streets for the purposes of the Proposed Development. It is required because the use of certain streets will become incompatible with the construction of the authorised development at certain stages.
- 3.51 Access for pedestrians must be provided, and consent to any such stopping up or restriction must be sought from the street authority.
- 3.52 Paragraph (2) differs from the Model Provisions and confers a power on the Applicant where the use of a street has been temporarily closed under this article to use it as a temporary working site. This provision has precedent in a number of DCOs including the A19/A184 Testo's Junction Alteration Order 2018 and The A30 Chiverton to Carland Cross Development Consent Order 2020, The Great Yarmouth Third River Crossing Development Consent Order 2020 and The M25 Junction 28 Development Consent Order 2022.
- 3.53 Paragraph (3) requires the Applicant to provide reasonable access to pedestrians going to or from premises abutting a street affected by the exercise of powers under paragraph (1) of this article where there would otherwise be no such access.
- 3.54 Paragraph (4) provides that the consent of the street authority is required before the power conferred by paragraph (1) of this article may be exercised. The

street authority may attach reasonable conditions to its consent but may not unreasonably withhold or delay consent.

- 3.55 Paragraph (5) provides that a person who suffers loss as a result of the suspension of any private right of way under the power conferred by paragraph (1) of this article is entitled to compensation.
- 3.56 Paragraph (6) states that where a street authority which fails to notify the Applicant of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the Applicant in a timely fashion. The article is a standard provision in DCOs (see for example, article 12 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 12 of The A585 Windy Harbour to Skippool Highway Development Consent Order 2020 and article 15 of The A303 Sparkford to Ilchester Dualling Development Consent Order 2021).

#### *Article 14 – Permanent stopping up of public rights of way*

- 3.57 This article authorises the public rights of way named in Schedule 3 to be stopped-up (i.e. the legal right of way along them to be extinguished).
- 3.58 Paragraph (2) provides that all rights of way over or along a street are extinguished where a street has been stopped up under this article.
- 3.59 The drafting is based on numerous DCOs, including for example, article 17 of The M42 Junction 6 Development Consent Order 2020, article 16 of The A1 Birtley to Coal House Development Consent Order 2021 and article 13 of The M54 to M6 Link Road Development Consent Order 2022.

#### *.Article 15 – Access to works*

- 3.60 This article allows works accesses to public highways to be created. It provides the Applicant with a general power to form means of access rather than accesses set out in a schedule, to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at later stage in the implementation of the authorised development. The use of this power is subject to the consent of the street authority. This drafting is based on a number of made DCOs, including article 14 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 12 of The M25 Junction 28 Development Consent Order 2022 and article 21 of The Sizewell C (Nuclear Generating Station) Order 2022.

#### *Article 16 – Traffic regulation*

- 3.61 The purpose of this article is to provide the Applicant with powers to make traffic regulation orders so that it can implement traffic management measures (e.g. restrictions on the use of roads) necessary to construct the authorised development. The traffic management measures are required to ensure the safe and efficient construction of the authorised development. The article draws

on the approach taken in article 16 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 18 of The M25 Junction 28 Development Consent Order 2022 and article 24 of The Sizewell C (Nuclear Generating Station) Order 2022.

3.62 This article would allow the Applicant, in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the authorised development, to:

- (a) revoke, amend or suspend in whole or in part any order made under the Road Traffic Regulation Act 1984;
- (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
- (c) authorise the use as a parking place of any road;
- (d) make provision as to the direction or priority of vehicular traffic; and
- (e) permit or prohibit vehicular access to any road.

3.63 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. There is also a requirement for the chief officer of police and the relevant traffic authority to be notified in advance. This complies with the consultation and publicity requirements for Traffic Regulation Orders under the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990/1656.

#### *Article 17 - Agreements with street authorities*

3.64 This article is a provision relating to, or to matters ancillary to, the Proposed Development under section 120(3) of the 2008 Act and provides that the Applicant and street authorities may enter into agreements relating to:

- (a) the construction of new streets (including any structures carrying those streets) under the Order;
- (b) the strengthening, improvement, repair or reconstruction of any street, including any structure carrying the street over any part of the authorised development;
- (c) the maintenance of the structure of any bridge or tunnel carrying a street over or under any part of the Proposed Development;
- (d) the strengthening, improvement, repair or reconstruction of any street under the Order;
- (e) any stopping up, closure alteration or diversion of a street under the Order;

- (f) the carrying out in the street of any works referred to in article 10 (street works) and article 11 (power to alter layout etc. of streets); and
- (g) such other works as the parties may agree.

3.65 This list reflects article 14(1) of the Model Provisions, save that sub-paragraph (1)(b) has been added to clarify that, as well as providing for the construction of streets (including any structures carrying those streets) an agreement may relate to strengthening, improving, repairing or reconstructing streets (or structures). This provision has been included in a number of made DCOs including article 15 of The Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015, article 17 of The Southampton to London Pipeline Development Consent Order 2020, article 17 of The Great Yarmouth Third River Crossing Development Consent Order 2020 and article 23 of The Sizewell C (Nuclear Generating Station) Order 2022.

#### *Article 18 – Designation of highways*

3.66 The purpose of this article is to clarify the designation of each of the local highways created under the Order as specific in Schedule 4. This is bespoke drafting but provisions with a similar effect are included on a number of highways DCOs (for example article 16 of The M25 Junction 28 Development Consent Order 2022 and in article 17 of The Sizewell C (Nuclear Generating Station) Order 2022).

### **Part 4 – Supplemental powers**

#### *Article 19 – Discharge of water*

3.67 This article is standard across DCOs and reflects the approach adopted in article 14 of the Model Provisions. It establishes statutory authority for the Applicant to discharge water and trade effluent into a sewer, watercourse or drain in connection with the carrying out or maintenance of the Proposed Development.

3.68 This statutory authority is subject to the Applicant obtaining the consent of the owner of the sewer, watercourse or drain, but that consent cannot be withheld unreasonably.

3.69 Paragraph 7 clarifies that this article does not authorise a groundwater activity or water discharge activity which would require an environmental permit from the Environment Agency.

3.70 Paragraph 9 states that a person who fails to notify the undertaker of their decision in respect of an application for consent within 28 days of the application being made is deemed to have given consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As an NSIP, the authorised development should not be at risk of being held up due to a failure to respond to an application for consent.

- 3.71 This article has been included in made DCOs including The M42 Junction 6 Development Consent Order 2020, The Southampton to London Pipeline Development Consent Order 2020, The Sizewell C (Nuclear Generating Station) Order 2022 and The Manston Airport Development Consent Order 2022.
- 3.72 Paragraph 10 is a bespoke provision added to state that the Environment Agency is deemed to have granted consent under paragraph 3 where the watercourse, public sewer or drain belongs to the Environment Agency an Environmental Permit has been granted for the discharge, rather than having to obtain the additional landowner consent. This has been added to streamline this process where an Environmental Permit is required.
- 3.73 Similarly, paragraph 11 provides that sewerage undertake is deemed to have granted consent under paragraph (3) where the watercourse, public sewer or drain belongs to the sewerage undertaker and consent under section 118 of the Water Industry Act 1991 has been granted in respect of the discharge, rather than having to obtain additional landowner consent. Again this is designed to streamline the process when a trade effluent consent is required.

#### *Article 20 – Protective work to buildings*

- 3.74 The purpose of this article is to allow the Applicant to undertake protective works (as defined in paragraph 12) to buildings affected by the authorised development. This power applies both inside and outside the Order limits The article is included for the benefit of landowners and ensures that, in the unlikely event that any works to buildings are required to rectify the impact of the authorised development, these can be carried out under Order powers and that such works are not limited to those buildings with the Order limits. The article provides for notice to be given to owners and occupiers prior to exercising the rights under the article and provides for compensation for loss or damage arising by reason of the exercise of those rights.
- 3.75 The drafting has broad precedent (see article 22 of the M42 Junction 6 Development Consent Order 2020 article 18 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 19 of The Southampton to London Pipeline Development Consent Order 2020, article 21 of The M25 Junction 28 Development Consent Order 2022 and article 26 of The Sizewell C (Nuclear Generating Station) Order 2022.

#### *Article 21 – Authority to survey and investigate the land*

- 3.76 This article gives the Applicant the power to enter certain land for the purpose of surveying and investigating. This enables the Applicant to assess the effects of the authorised development on land outside the Order Limits and also assess the effects of land outside the Order Limits on the authorised development. The effect of providing such a power over land outside of the Order is to remove the necessity to compulsorily acquire that land or rights over that land and thus reduce the land brought within the Order limits.

- 3.77 Protection is given in the article to rights of landowners. The article provides that the Applicant must give no less than 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage. Paragraph (7) clarifies that the provisions of the Compulsory Purchase Act 1965 will apply to the refusal by the owner of the land to grant the Applicant access to enter land for the purpose of surveying and investigating it.
- 3.78 This is another standard provision with broad precedent such as article 19 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 23 of the M42 Junction 6 Development Consent Order 2020, article 20 of The Southampton to London Pipeline Development Consent Order 2020, article 27 of The Sizewell C (Nuclear Generating Station) Order 2022 and article 22 of The M25 Junction 28 Development Consent Order 2022.

*Article 22 – Felling lopping and removal of trees, shrubs and hedgerows*

- 3.79 Paragraph (1) of this article permits any tree, shrub or hedgerow within or overhanging land within the Order limits to be felled, lopped or removed, or the roots of trees, shrubs or hedgerows which extend into the Order limits to be cut back, if the Applicant reasonably believes it to be necessary to prevent the tree, shrub or hedgerow from obstructing the construction, operation or maintenance of the Proposed Development or from endangering anyone using it. This article is qualified by reference to paragraph 9 and 10 of Schedule 2 which mandates that the authorised development must be carried out in accordance with a landscaping scheme, and a landscaping and biodiversity management plan. This article also allows for the removal of hedgerows including hedgerows to which the Hedgerows Regulations 1997 apply.
- 3.80 This drafting is based on article 39 of the Model Provisions.
- 3.81 Paragraph (2) limits the exercise of the powers in paragraph (1) by clarifying that they may not be exercised in relation to any tree, shrub or hedgerow which is situated within a conservation area or which is subject to a Tree Preservation Order, unless that tree, shrub or hedgerow has been identified in either of the schemes submitted under paragraph 9 or 10 of Schedule 2 to the Order.
- 3.82 The exercise of the any of the powers in paragraphs (1) and (2) is in each case subject to paragraph (3), which confirms that the Applicant must not cause unnecessary damage to any tree, shrub or hedgerow and that the Applicant must pay compensation to any person who sustains any loss or damage from the exercise of those powers.
- 3.83 The power in article 22 is provided for under sections 120(3) and (4), together with paragraph 13 of Schedule 5 to the 2008 Act. In addition, the power to disapply the consent requirements under the Hedgerow Regulations 1997 is provided for under section 120(5)(a) of the 2008 Act.

*Article 23 – Removal of human remains*

- 3.84 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and replace it with an alternative procedure for managing the removal of

any human remains disturbed during the course of carrying out the proposed development. Article 23 is based on article 17 of the Model Provisions and is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act, as it relates to the construction of the proposed development, and is also provided for under section 120(5)(a) of the 2008 Act.

- 3.85 Article 23 departs from the Model Provisions in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. Paragraph 12 has precedent in article 48 of the M42 Junction 6 Development Consent Order 2020, article 37 of The Southampton to London Pipeline Development Consent Order 2020 and article 55 of The Great Yarmouth Third River Crossing Development Consent Order 2020.
- 3.86 Taken together, the effect of article 23 is to replace the existing and disparate regimes regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required by the Applicant to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project. Similar provision is made in a number of DCOs, including the River Humber Gas Pipeline Replacement Order 2016 (article 20), the Thorpe Marsh Gas Pipeline Order 2016 (article 19), The M42 Junction 6 Development Consent Order 2020 (article 48), The Southampton to London Pipeline Development Consent Order 2020 (article 37), article 78 of The Sizewell C (Nuclear Generating Station) Order 2022 and article 55 of The Great Yarmouth Third River Crossing Development Consent Order 2020.

## **Part 5 – Powers of acquisition**

### *Article 24 – Compulsory acquisition of land*

- 3.87 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire such of that land as is required for the Proposed Development. The power of acquisition over the Order land is qualified and restricted by sub-paragraph (2), in the case of parcels of land specified in the Order where only rights are required (article 27), where possession of land parcels as specified in the Order may be taken temporarily only (article 33(9)), or where Crown rights apply (article 39). It is also qualified and restricted by reference to article 26 (Time limit for exercise of authority to acquire land compulsorily).
- 3.88 The provision is necessary to secure the delivery of the Proposed Development as explained in more detail in the **Statement of Reasons [TR020001/APP/3.01]** accompanying the application.

### *Article 25 – Compulsory acquisition of land – incorporation of the mineral code*

- 3.89 This article incorporates Part 2 of Schedule 2 of the Acquisition of Land Act 1981. This means that where the Applicant acquires land under the powers of



the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance.

*Article 26 – Time limit for exercise of authority to acquire land compulsorily*

- 3.90 Section 154(3) of the Act provides that where a DCO authorises the compulsory acquisition of land, steps of a prescribed description must be taken in relation to the compulsory acquisition before the end of the ‘prescribed period’, unless another period is ‘specified’. Regulation 6(2) of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 provides that any notice to treat must be served before the end of five years from the date on which the Order is made. Article 25 specifies an ‘other period’ within which the prescribed steps may be taken for the purposes of section 154(3)(b) and modifies the prescribed steps pursuant to section 120(5) of the Act.
- 3.91 This article gives the Applicant 10 years to serve ‘notices to treat’ or to execute a ‘general vesting declaration’ to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 3.92 The article also sets a 10 year time limit on the power of the Applicant to take temporary possession of land, although it does not prevent the Applicant from remaining in possession of land after that time if it took possession within the 10 year limit.
- 3.93 This article differs from other DCOs as it sets out that the 10 year period starts to run from the later of the expiry of the legal challenge period under section 118 of the 2008 Act, or the final determination of any legal challenge under that provision. This is necessary following recent experience of recent legal challenges to made DCOs, which may delay the exercise of compulsory acquisition powers and in so doing, reduce the length of time within which those powers may be exercised, if the period relates (as it does usually) to the date on which the Order is made.
- 3.94 This has been preceded in other DCOs including The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (10 years – see article 45) and The National Grid (Hinkley Point C Connection Project) Order 2016 (effectively eight years –see article 21).
- 3.95 The 10 year period is necessary due to the complex nature and large scale of the Proposed Development. It also reflects the required and necessary prolonged construction programme which includes a significant period of necessary earthworks to be carried out (including allowing time for the earthworks to settle) before subsequent construction works can commence which means that it may not be possible or desirable to exercise the powers of compulsory acquisition within five years of the Order being made.

- 3.96 The Proposed Development can only be constructed over a length of time and the Applicant is only seeking to acquire land when actually required for the relevant works. This will allow existing landowners to remain in possession of their land longer than would otherwise be possible. The Proposed Development would deliver additional capacity incrementally in response to the forecast growth in demand and assets and facilities would be delivered only when they are required. The long project timeline means that exact construction sequencing and timing of delivery of individual works could change to meet requirements in the future. Such changes could impact when the Applicant needs to exercise compulsory acquisition powers. The Applicant therefore requires flexibility so as not to inhibit its ability to implement the Order, and to avoid the need change or to seek further powers at a later date.
- 3.97 For the reasons stated above and explained in more detail in the **Statement of Reasons [TR020001/APP/3.01]** accompanying the application the Applicant believes that it is proportionate and reasonable to extend the period for exercise of powers of compulsory acquisition.

*Article 27 – Compulsory acquisition of rights and imposition of restrictive covenants*

- 3.98 This article provides for the undertaker to acquire such rights over the Order land, or impose restrictive covenants affecting the Order land, including rights and restrictive covenants for the benefit of a statutory undertaker or any other person, as may be required for any purpose for which that land may be acquired under article 24 by creating them as well as acquiring rights already in existence. This would allow the Applicant, where appropriate, to reduce the area of outright acquisition and rely on the creation and acquisition of rights/restrictive covenants instead. A provision of this kind is usual in Transport and Works Act orders and Hybrid Bills, and has been followed in a number of DCOs for example article 23 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020 and article 28 of The M25 Junction 28 Development Consent Order 2022.
- 3.99 Paragraph (1) allows the Applicant to acquire existing rights and create new rights over any of the Order land. Although the Applicant has sought to identify all of the plots which are to be subject to the acquisition or creation of rights and has set these out in the **Book of Reference [TR020001/APP/3.02]**, **Land Plans [TR020001/APP/4.03]** and Schedule 5 of the Order, this provision ensures that the Applicant retains the flexibility to acquire or create rights/restrictive covenants over land where that land might otherwise have to be acquired outright. Without the inclusion of this article, the Applicant would have no alternative but to acquire the land outright if an alternative agreement could not be reached by private agreement.
- 3.100 Paragraph (1) is also justified where the power to acquire rights may arise before the acquisition of the land. For example, if the Applicant has taken temporary possession of land under article 33, there may be a need to acquire a right (e.g. for a statutory undertaker) prior to the acquisition of the land.

- 3.101 Paragraph (2) provides that for the land described in Schedule 5, the Applicant's powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as may be required for or in connection with the authorised development for the purposes set out in Schedule 5.
- 3.102 Paragraph (3) provides that powers under paragraph (1) to acquire the rights and to impose the restrictive covenants for the benefit of statutory undertakers or for the benefit of any other person do not preclude the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land. This particular provision is based on article 26(3) of the Lake Lothing (Lowestoft) Third Crossing Order 2020.
- 3.103 Paragraph (4) introduces Schedule 5, which modifies the compulsory purchase and compensation provisions under general legislation. The modifications do not affect the entitlement to compensation, but generally ensure that the compensation code applies equally to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories and is commonplace in Transport and Works Act orders and DCOs, such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. The schedule is heavily precedented and reflects the drafting in the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (Schedule 6), as well as the more recent M42 Junction 6 Development Consent Order 2020 (Schedule 9) with the exception of the final paragraph which amends the Compulsory Purchase of Land (Vesting Declarations) (England) Regulations 2017 (the 2017 Regulations) (see further article 29 below).
- 3.104 Paragraph (5) provides that, where the Applicant needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land.

*Article 28 – Private rights over land*

- 3.105 In order for it to be possible to implement the proposed development, provision is needed for the extinguishment of private rights and restrictions in the Order land that would be incompatible with that implementation. Article 28 supplies that provision.
- 3.106 Paragraph (1) provides for the extinguishment of private rights and restrictions over Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 3.107 Paragraph (2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights (but where the underlying land is not subject to powers of compulsory acquisition), if the

exercise of those existing rights is inconsistent with the implementation of the Proposed Development, from the date of acquisition of the right or occupation of the underlying land.

- 3.108 Paragraph (3) provides that rights and restrictions over Order land that is already owned by the Applicant are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 3.109 Paragraph (4) provides for the temporary suspension of private rights and restrictions over Order land that is not acquired but is occupied temporarily by the Applicant in order to construct the proposed development. The suspension is for the duration of the occupation.
- 3.110 Paragraphs (5) to (8) of article 28 make provision for compensation and for circumstances where rights are preserved.
- 3.111 Paragraph (9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the proposed development can be extinguished. A similar list appears in article 29 of the M42 Junction 6 Development Consent Order 2020 and article 25 of The Southampton to London Pipeline Development Consent Order 2020 and article 29 of The M25 Junction 28 Development Consent Order 2022.

#### *Article 29- Modification of the 1965 Act*

- 3.112 The purpose of this article is to ensure consistency between the standard terms of DCOs orders and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017, article 29 of The M42 Junction 6 Development Consent Order 2020, article 26 of The Southampton to London Pipeline Development Consent Order 2020, article 30 of The M25 Junction 28 Development Consent Order 2022 and article 37 of The Sizewell C (Nuclear Generating Station) Order 2022.

#### *Article 30 – Application of the 1981 Act and modification of the 2017 Regulations*

- 3.113 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a DCO) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 (the 1981 Act) to compulsory acquisition under the Order so that the Applicant has the option of acquiring Order land that is subject to the powers of compulsory acquisition by vesting declaration.
- 3.114 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the land owner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.

- 3.115 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations, therefore, allow title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 3.116 The modifications ensure consistency with the 10 year period sought under the Order for acquisition of rights. It further ensures that the appropriate references are made to the Act. The modifications are based in large part on previous DCOs, and following amendments to the 1981 Act in the Housing and Planning Act 2016, the High Speed Rail (London - West Midlands) Act 2017.
- 3.117 Paragraphs (3), (5) (10), (11) and (12) are intended to facilitate the compulsory acquisition of rights for the benefit of a third party such as a statutory undertaker which is provided for by article 27(1). These provisions are not contained in the Model Provisions but are simply consequential amendments intended to clarify that the power in article 27(1) to acquire rights for the benefit of third parties can be implemented in practice by way of the general vesting declaration procedure. In particular these amendments clarify that the 1981 Act can be used to acquire rights and land on behalf of third parties, without the need to acquire the land or rights in favour of the Applicant and then transfer such land or rights to a third party, thereby causing a delay to any transfers of land or rights to those who are intended to benefit from such acquisition.
- 3.118 Paragraphs (16) to (19) modify the Compulsory Purchase of Land (Vesting Declaration) (England) Regulations 2017 to ensure that the interests and rights in land which are intended to benefit a third party, such as a statutory undertaker whose apparatus may be re-located in order to construct the Proposed Development, will vest in that third party instead of the Applicant, which would otherwise be the acquiring authority in respect of those interests and rights.

#### *Article 31 - Acquisition of subsoil or airspace only*

- 3.119 This article allows the Applicant to acquire land below the surface or above the surface, rather than having to acquire all of the land.
- 3.120 The purpose of this article is to give the Applicant the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on affected landowners, and lower payments of compensation. This too is a standard provision used in many DCOs (see for example article 31 of the M42 Junction 6 Development Consent Order 2020, article 32 of The M25 Junction 28 Development Consent Order 2022 and article 35 of The Sizewell C (Nuclear Generating Station) Order 2022)).

#### *Article 32 - Rights under or over streets*

- 3.121 The purpose of this article is to allow the Applicant to appropriate and use land above or below streets within the Order land, without having to acquire the

street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

*Article 33 – Temporary use of land for carrying out the authorised development*

- 3.122 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Proposed Development but is not required permanently. This article also allows for the temporary possession on any other Order land in respect of which notice to treat has been served or vesting declaration made.
- 3.123 Paragraph 1(a)(i) allows the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Proposed Development but which is not to be acquired permanently, and includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus). Paragraph (9) prevents this land from being acquired permanently, although confirms that acquisition of rights over this land, or of subsoil/airspace only, is not prevented and is required in respect of certain parcels. Likewise some land taken temporarily will have permanent works undertaken on it, e.g. accommodation works (see further paragraph (4)(b), and Schedule 6).
- 3.124 Paragraph 1(a)(ii) allows for the temporary occupation of any of the other Order land that is subject to the powers of permanent acquisition, but in respect of which steps to acquire the land has yet been taken. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus article 24 with article 33(1)(a)(ii) makes it possible for the Applicant to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the Proposed Development as constructed. The benefits of this are reduced impacts on landowners and lower costs to the Applicant, which is in the public interest. In line with this, paragraph (1)(e) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.
- 3.125 Paragraph (2) requires the Applicant to give at least 28 days' notice prior to entering on and taking temporary possession of land under paragraph (1). Notice under paragraph (2) must explain the purpose for which temporary possession of that land is taken.
- 3.126 Paragraph (3) provides that the Applicant may not (without the agreement of the owner of the land) remain in possession of the land after the end of a period of one year beginning on either: (i) the date of completion of the part of the Proposed Development for which take temporary possession of that land was taken under Schedule 7 (in cases where the Applicant may take temporary possession only of the land) or (ii) the date of the completion of the part of the Proposed Development for which temporary possession of that was taken

unless the Applicant has acquired that land permanently (in cases where the Applicant may take temporary possession of land and subsequently acquire it permanently under article 24).

- 3.127 Paragraph (4) provides that, subject to certain exceptions, the Applicant will be required to remove temporary works from land subject to temporary possession and restore that land to the reasonable satisfaction of the owner of the land before giving up possession of the land. Paragraph (7) clarifies that any dispute between the Applicant and the owner of the land as to the satisfactory removal of temporary works or restoration of land under paragraph (4) does not prevent the Applicant from giving up possession of the land.
- 3.128 Paragraph (5) provides that the Applicant must pay compensation to the owners and occupiers of land of which temporary possession has been taken for any loss or damages arising from the temporary possession. Paragraph (6) provides that disputes in relation to compensation are to be determined under Part 1 of the Land Compensation Act 1961.
- 3.129 Paragraph (9) clarifies that, whilst the Applicant is precluded from exercising its powers under article 24 to acquire the land specified in Schedule 8, it is not precluded from acquiring new rights over any part of that land under article 27 to the extent that such land is listed in column (1) of Schedule 5. Paragraph (10) clarifies that the Applicant is not required to acquire any land, or interest in land, that it takes temporary possession of under article 33.
- 3.130 Paragraph (11) provides that the provisions of the Compulsory Purchase Act 1965 will apply to the refusal by the owner of the land to give possession of the land to the Applicant under article 33.
- 3.131 Lastly, paragraph (12) clarifies that the power to take temporary possession of land under paragraph (1) may be exercised more than once in relation to the same parcel of land.
- 3.132 Similar temporary possession provisions have been included in a large number of made DCOs, including (most recently) the Southampton to London Pipeline Development Consent Order 2020 (article 30), The Great Yarmouth Third River Crossing Development Consent Order 2020 (article 35) and The Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 33), The M25 Junction 28 Development Consent Order 2022 (article 34) and article 39 of The Sizewell C (Nuclear Generating Station) Order 2022.

#### *Article 34 – Temporary use of land for maintaining the authorised development*

- 3.133 This article provides that the Applicant may take temporary possession of land within the Order land required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose for a period of five years from the date on which that part of the authorised development is first used. Provision is made for notice and compensation.

- 3.134 This power does not apply with respect to houses, gardens or any other buildings for the time being occupied. The article helps to limit the requirement for compulsory acquisition of land, and therefore the effect on landowners, as much as the requirements of the authorised development will allow.
- 3.135 The definition of the maintenance period in paragraph (13) states that this means a period of 5 years, other than in relation to a landscaping scheme in case the maintenance period means such period as may be specified in a landscaping scheme in accordance with paragraph 10 of Schedule 2 to the Order. The extended definition of maintenance period is needed as there are longer maintenance periods for a number of landscaping elements.
- 3.136 Both the M42 Junction 6 Development Consent Order 2020 (see article 34) and The A63 (Castle Street Improvement, Hull) Development Consent Order 2020 (see article 30), The M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 (see article 33) reflect the drafting used in this article.

*Article 35 – Special category land*

- 3.137 This article deals with the replacement of special category land that is required for the Proposed Development.
- 3.138 Under section 131 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the relevant planning authority is satisfied that certain conditions under section 131(3) are met, including if replacement land has or will be given in exchange for the special category land. This is the case, for the reasons set out in the **Statement of Reasons [TR020001/APP/3.01]**.
- 3.139 Under section 132 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of a right over land to which section 132 applies (i.e. a common, open space or fuel or field garden allotments). The exception is if the relevant planning authority is satisfied that certain conditions under section 132(2) are met, including if the parcels of common, open space or fuel or field garden allotment comprised within the Order limits will, when burdened with the rights to be imposed under the Order, be no less advantageous than they were before to the owner of the land, other persons (if any) entitled to rights of common or other rights over the land and the public. This is the case, for the reasons set out in the **Statement of Reasons [TR020001/APP/3.01]**.
- 3.140 Paragraph (1) provides that the special category land and the rights to be acquired over the special category land may vest in the Applicant once the Applicant has acquired the replacement land or it is within the ownership of the owner of the special category land and the local planning authority has certified that a scheme for the provision of the replacement land has been received from the Applicant.



3.141 On the date on which the replacement land is laid out and provided in accordance with the scheme submitted to the local planning authority, the replacement land will vest in the person in whom the relevant special category land was previously vested and will be subject to the same rights, trusts and incidents as attached to that special category land. Similar provisions in respect of special category land have been included in a number of made DCOs, including The National Grid (Richborough Connection Project) Development Consent Order 2017 (article 31), The A30 Chiverton to Carland Cross Development Consent Order 2020 (article 38), The M20 Junction 10a Development Consent Order 2017 (article 36) and The M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 (article 38).

#### *Article 36 – Statutory undertakers*

3.142 This article provides the Applicant with statutory authority to acquire interests and rights over land owned by statutory undertakers (i.e. utilities such as electricity and gas companies).

3.143 It also allows the Applicant to extinguish rights or restrictions for the benefit of land that statutory undertakers have over the Order land, and to remove, relocate or reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the **Land Plans [TR020001/APP/4.03]** and described in the **Book of Reference [TR020001/APP/3.02]**. In practice it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.

3.144 Additionally, this article provides the Applicant with the power to construct the Proposed Development so as to cross under or over statutory undertakers' apparatus and to construct any necessary track or roadway, together with the right to maintain or remove the same, and to install service media under or over existing apparatus.

3.145 The drafting is based on article 31 of the Model Provisions but the article also seeks, in common with other DCOs (see, for example, article 31 of the Thorpe Marsh Gas Replacement Pipeline Order 2016), the power to:

- (a) construct the authorised development so as to cross under or over statutory undertakers' apparatus; and
- (b) construct over existing apparatus belonging to statutory undertakers any necessary track or roadway, together with the right to maintain and/or remove the same, and install such service media under or over the existing apparatus needed in connection with the authorised development. This power is sought to ensure that the Applicant is able to erect all necessary above ground installations, site compounds and storage areas in connection with the construction of the authorised development.

- 3.146 Diligent inquiries have been made to identify all relevant rights and statutory undertakers' apparatus. However, it is still possible that new rights or apparatus may be discovered during the course of the construction of the authorised development. On this basis, a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within the Order limits is required.
- 3.147 Paragraph (2) restricts the Applicant's power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street.
- 3.148 This article is subject to Schedule 8 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights/apparatus required to facilitate the Proposed Development.
- 3.149 This is also an article with broad precedent in the M42 Junction 6 Development Consent Order 2020 (see article 35) The A63 (Castle Street Improvement, Hull) Development Consent Order 2020 (see article 31), The Southampton to London Pipeline Development Consent Order 2020 (article 34) and The Sizewell C (Nuclear Generating Station) Order 2022 (see article 42).

*Article 37 – Apparatus and rights of statutory undertakers in stopped-up streets*

- 3.150 This article governs what happens to statutory undertakers' apparatus under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there will no longer be a right of way along the street. The statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so if it is reasonably requested by Secretary of State.
- 3.151 The statutory undertaker would receive compensation from the Applicant for any relocation works and associated costs. Paragraphs (4)-(5) discount from this compensation the cost associated with a higher specification in the replacement apparatus. Paragraph (6) discounts from this compensation the increase in value to the statutory undertaker for having new rather than old (i.e. older than seven and a half years) apparatus.
- 3.152 Paragraph (7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the project that constitute "*major highways works*", "*major bridge works*" or "*major transport works*" or, as defined in the 1991 Act, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 3.153 This article is standard for DCOs (see, for example, article 32 of The A63 (Castle Street Improvement, Hull) Development Consent Order 2020, article 38 of The M25 Junction 28 Development Consent Order 2022 and article 43 of The Sizewell C (Nuclear Generating Station) Order 2022).

*Article 38 – Recovery of costs of new connections*

3.154 This article provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone, then the cost of establishing a new service can be claimed from the Applicant.

*Article 39 – Crown rights*

3.155 This article provides that should any of the Order land be found to be Crown land, the powers conferred by the Order on the Applicant to compulsorily acquire such land are not exercisable over that land without the consent of the Crown. However, this article does not prevent the Applicant from exercising powers conferred by this Order to extinguish or interfere with any rights exercisable by any persons over that land. This article has precedent in the Port of Tilbury (Expansion) Order 2019 (article 56) and article 36 of The M25 Junction 28 Development Consent Order 2022 and article 87 of The Sizewell C (Nuclear Generating Station) Order 2022.

*Article 40 – Disregard of certain improvements etc*

3.156 This article provides for the Tribunal to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or the making of the enhancement was designed with a view to obtaining compensation or increased compensation.

3.157 It complies with section 126 of the 2008 Act as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation. The article has precedent in The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, The River Humber Gas Pipeline Replacement Order 2016, The Great Yarmouth Third River Crossing Development Consent Order 2020 and The Lake Lothing (Lowestoft) Third Crossing Order 2020, and The M25 Junction 28 Development Consent Order 2022 and Transport and Works Act Orders such as The London Underground (Northern Line Extension) Order 2014 and The Midland Metro (Wolverhampton City Centre Extension) Order 2016.

3.158 The wording of this article mirrors section 4 (assessment of compensation) of the 1981 Act. It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and the 2008 Act (nor standard Order provisions) does not apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 41 – Set off for enhancement in value of retained land*

3.159 This article provides that in assessing the compensation payable to any person in respect of the acquisition of any land, the Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land

belonging to that person arising out of construction of the authorised development.

- 3.160 This article complies with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase compensation. The article has precedent in The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, The Great Yarmouth Third River Crossing Development Consent Order 2020, The Lake Lothing (Lowestoft) Third Crossing Order 2020 and The M25 Junction 28 Development Consent Order 2022, and Transport and Works Act Orders such as The London Underground (Northern Line Extension) Order 2014 and The Midland Metro (Wolverhampton City Centre Extension) Order 2016.
- 3.161 The principle in this article is established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership), which needs to be applied. Sections 120(3) and 120(5)(a) of and Schedule 5 (by virtue of section 120(3)) to the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

## **Part 6 – Operations**

### *Article 42 – Power to operate the authorised development*

- 3.162 This article authorises the Applicant to operate and use the authorised development. It also makes it clear that this does not relieve the Applicant of the requirement to obtain any other permission, e.g. permit or licence, that may be required to operate the authorised development.

## **Part 7 – Miscellaneous and general**

### *Article 43 – Disapplication of legislative provisions*

- 3.163 This article provides (in reliance on section 120(5)(a) of the 2008 Act) for the disapplication in relation to the construction of the authorised development of certain requirements which would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.
- 3.164 Article 43 provides for the disapplication of various consents which the Applicant would otherwise be required to obtain under the Land Drainage Act 1991.
- 3.165 These are the requirements for the prohibition on placing obstructions in waterways which are not main rivers under the Land Drainage Act 1991, the requirement for Secretary of State consent to vary an award which affects the drainage of land, byelaws made under the Land Drainage Act 1991 regulating

the use and obstruction of watercourses. These are consents for activities which may be a necessary part of the Proposed Development.

- 3.166 As these provisions (other than section 32 of the Land Drainage Act 1991 and byelaws made under section 66 of the Land Drainage Act 1991) are prescribed under section 150 of the 2008 Act, the consent of the relevant drainage authorities to the inclusion of these provisions in the Order will be needed and these consents are being sought.
- 3.167 The Applicant has produced a **Consents and Agreements Position Statement [TR020001/APP/2.03]** as part of this application. This sets out in greater detail the Applicant's proposed approach to obtaining the other consents required for the Proposed Development.
- 3.168 In common with other recent DCOs, the Order disapplies the provisions relating to the temporary possession of land conferred by the Neighbourhood Planning Act 2017, which have not yet been commenced, subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. This is to ensure consistency and certainty that the temporary possession regime which will apply to the Order is that contained within articles 32 and 33 and not the regime provided for under the Neighbourhood Planning Act 2017, the date of commencement of which is uncertain. This approach reflects the approach taken by the Secretary of State in DCOs following the enactment of the Neighbourhood Planning Act 2017, such as the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 2(7)), The M42 Junction 6 Development Consent Order 2020 (see article 49), The A19 Downhill Lane Junction Development Consent Order 2020 (article 36) and The M25 Junction 28 Development Consent Order 2022 (article 47).
- 3.169 The Applicant considers that, in the context of the Proposed Development being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the Act is to ensure that DCOs provide a unified consent for NSIPs and the Applicant considers that disappling and amending certain legislative provisions, as set out in the Order, is proportionate in this context.

*Article 44 – Interaction with LLAOL planning permission*

- 3.170 This article contains bespoke provisions that relate to the interaction of LLAOL's existing planning permission for the airport (as defined in article 2) with the Order. Paragraph (1) provides that the undertaker may not, in accordance with this Order, operate the airport above the passenger cap permitted by the LLAOL planning permission until notice under this article has been served on Luton Borough Council by the undertaker. The purpose of this provision is ensure that when the undertaker wishes to operate above that cap it gives notice of this to the relevant planning authority.
- 3.171 Paragraph (2) provides that as soon as reasonably practicable following service of the notice under paragraph (1), the undertaker must notify the following host

local authorities that the notice has been served: Central Bedfordshire Council, Dacorum Borough Council, Hertfordshire County Council and North Hertfordshire District Council.

- 3.172 The effect of giving notice under paragraph (1) is set out in paragraph (3). From that date the undertaker must operate the airport in accordance with DCO operating regime, including as set out in Part 3 and 4 of Schedule 2 to the Order (i.e. the operation of the green controlled growth (GCG) regime and other operational requirements). Also from that date, the conditions of the LLAOL planning permission, and the associated LLAOL section 106 agreement, cease to have effect, subject to sub-paragraph (4).
- 3.173 Paragraph (4) “preserves” those conditions under the LLAOL planning permission which either require built development not completed at the point article 44(1) notice is served, or involve an ongoing monitoring / management regime for built development which should continue beyond service of that notice.
- 3.174 The specific conditions that paragraph (4) applies to are listed in new paragraph (7), and take account of whichever airport planning permission (i.e. 18 mppa vs 19 mppa) constitutes “the LLAOL planning permission” at the relevant time. Paragraph (4) provides that the condition will be “preserved” until it has been discharged, or Luton Borough Council certifies that an equivalent DCO obligation (e.g. in relation to surface water management) has superseded it. These conditions listed in paragraph (7) do not conflict with the operating regime for the airport under the DCO.
- 3.175 Paragraph (5) clarifies that upon service of the notice under paragraph (1), the LLAOL planning permission and the LLAOL section 106 agreement will cease to have effect except in relation to any breaches that occurred prior to the service of the notice under paragraph (1), or in relation to the matters “preserved” under paragraphs (4).
- 3.176 Paragraph (6) clarifies the undertaker to exercise other powers under the Order prior to or following the service of that notice. This provision has been included for clarification as it is likely the undertaker will wish to exercise other powers under the Order which do not relate to the operation of the airport prior to the notice being served.

#### *Article 45 – Application of the 1990 Act*

- 3.177 Paragraph (1) clarifies that development consent granted under the DCO is to be treated as “specific planning permission” for the purposes of section 264(3) of the Town and Country Planning Act 1990 where it relates to “land forming part of the airport” or where it “authorises works to apparatus of statutory undertakers on, under or over land”, and in either case the relevant development in question has been carried out. This ensures that, notwithstanding the works are authorised under the Planning Act 2008, the usual permitted development rights under the 1990 Act accrue in respect of these works.

- 3.178 The remainder of article 45 clarifies the application of planning permissions granted under Town and Country Act 1990 (1990 Act) and the powers and rights exercised under the Order and the authorised development approved under the Order. The drafting of this article is bespoke to the Order to address particular existing planning permissions which are relevant to the Proposed Development and to address any potential uncertainty that may result from the Supreme Court's recent decision in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30. That judgment relates to planning permissions granted under the Town and Country Planning Act 1990. It holds that, unless there is an express provision otherwise, where development has taken place under one permission, whether another planning permission may lawfully be implemented depends upon whether it remains physically possible to carry out the development authorised by the second permission in light of what has already been done under the first permission.
- 3.179 Paragraph (2) has been included to address any potential inconsistencies between the Order and two existing planning permissions within the Order limits, being LLAOL's existing planning permission for the existing airport and the planning permission for Green Horizons Park (planning permission ref. 17/02300/EIA) and confirms that these planning permissions can proceed without the risk of enforcement action being taken notwithstanding any incompatibility with development carried out under the Order. However it also confirms that any conditions on those planning permissions that are inconsistent with the carrying out of authorised development cease to have effect from the date the inconsistency arises. This provision is considered necessary to ensure that the development authorised by these planning permissions can be carried out despite any inconsistencies with any power or right excised under the Order or the authorised development but also to limit the effect of any inconsistent conditions of the planning permission.
- 3.180 Paragraph (3) has a more general application than paragraph (2) and again reflects the terminology used by the Supreme Court in the *Hillside* decision, and confirms that planning permissions which conflict with the Proposed Development can proceed without the risk of enforcement action being taken notwithstanding any incompatibility between the Proposed Development and the development authorised under a planning permission. It is considered this is necessary to confirm that developments are not prevented.
- 3.181 Paragraph (4) deals with the converse situation and confirms that development under a planning permission is not to prevent activity authorised under the Order.
- 3.182 Paragraph (5) has been added to require the undertaker, where it identifies an inconsistency between permissions referred to in paragraph (2)-(4), to notify the relevant local planning authority about the inconsistency and how it proposes to proceed. This ensures that the relevant planning authority has sufficient sight of article 45 being engaged, and should it disagree with the existence of an inconsistency it could engage with the matter accordingly (e.g. via discussions with the undertaker, and ultimately enforcement action).

3.183 Paragraph (5) sets out the definitions relevant to this article and in particular clarifies the definition of “*planning permission*” includes a planning permission granted under article 3 (permitted development) and Classes F, G, I, J, K, L, M and N of Part 8 (Transport related development) of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.

*Article 46 – Application of landlord and tenant law*

3.184 This article governs the leasing of land by the Applicant to any other person. It allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.

*Article 47 – Defence to proceedings in respect of statutory nuisance*

3.185 Section 158 of the Act confers statutory authority for the purposes of a defence in statutory nuisance generally, subject to any contrary provision made by a particular DCO. This article is such a contrary provision, amending the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by section 158).

3.186 The defence is available if the noise relates to:

- (a) the construction or maintenance of the Proposed Development, and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided; or
- (b) the use of the Proposed Development and cannot reasonably be avoided.

3.187 This is an article which has precedent in recent DCOs, for example article 43 of The M25 Junction 28 Development Consent Order 2022 and article 12 of The Sizewell C (Nuclear Generating Station) Order 2022.

*Article 48 – No double recovery*

3.188 This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In addition, the article provides that there is not to be double recovery under two or more different provisions of this Order.

3.189 The article follows the well-established principle of equivalence in compulsory purchase compensation, namely that a claimant is to be compensated for no more and no less than their loss.

3.190 This article has precedent in the National Grid (Richborough Connection Project) Development Consent Order 2017 (article 47), the North London Heat and Power Generating Station Order 2017 (article 35), the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (article 39), The M25 Junction 28 Development Consent Order 2022 (article 49) and The Sizewell C (Nuclear Generating Station) Order 2022 (article 46).



#### *Article 49 – Protection of interests*

3.191 This article simply gives effect to Schedule 8, which contains provisions protecting the interests of third parties. This schedule is based on the standard protective provisions approved by the Secretary of State in the M42 Junction 6 Development Consent Order 2020, The M25 Junction 28 Development Consent Order 2022 and The Sizewell C (Nuclear Generating Station) Order 2022.

3.192 The Applicant has sought the views of the undertakers who have interests affected by the authorised development and continues to negotiate with the undertakers to ensure any concerns are dealt with appropriately. The Applicant will provide a full update of the status of the negotiations throughout the examination.

#### *Article 50 – Certification of documents, etc.*

3.193 This article provides for various plans and other documents listed in Schedule 9 to the Order to be certified by the Secretary of State.

#### *Article 51 – Service of notices*

3.194 This article governs how any notices that may be served under the Order shall be deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

3.195 It is common to have such an article in an order authorising development such as this. The article has precedent in a number of DCOs including article 42 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, The Southampton to London Pipeline Development Consent Order 2020, The Sizewell C (Nuclear Generating Station) Order 2022 and The M25 Junction 28 Development Consent Order 2022.

3.196 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the Act apply to notices served *under* that Act rather than notices served *under* a DCO made under that Act.

#### *Article 52 – Arbitration*

3.197 This article governs what happens when two parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the Secretary of State. This article has precedence in The

*Article 53 – Funding*

- 3.198 This article provides that the undertaker must not exercise the powers in articles, 24, 27, 28, 31, 32, 33, 34 and 36 in relation to any land comprised in part of the authorised development unless it has first put in place for that land either a guarantee (the amount of which must be approved by the Secretary of State) in respect of liabilities of the undertaker to pay compensation under the Order, or an alternative form of security.

**4 Schedules**

**Schedule 1 – Authorised development**

- 4.1 This schedule specifies numbered works comprised in the Proposed Development for which development consent is sought, together with works comprising associated development. The Schedule also includes a list of so-called ‘lettered works’ which are listed at (a) to (n). The ‘lettered works’ are necessary in order to give proper effect to the Order and ensure that the Proposed Development may be constructed

**Schedule 2 – Requirements**

- 4.2 The requirements in Schedule 2 are the equivalents of planning conditions. The requirements are divided into three categories. Firstly, those that relate to the construction of the Proposed Development as set out in Part 2, secondly those that relate to the operation of the GCG regime as set out in Part 3 and separately those that relate to other operational matters as set out in Part 4.
- 4.3 Approvals under the requirements in Part 2 and Part 4 are to be sought from the relevant planning authority, following consultation with other specific bodies. It is appropriate that the relevant planning authority is the ‘discharging authority’ in respect of those requirements because it has the statutory responsibilities under the Town and Country Planning Act 1990 and is a representative of the local community. The Planning Inspectorate Advice Note 2 (The role of local authorities in the development consent process) also acknowledges that local authorities are likely to be responsible for the discharge of requirements under DCOs. The local planning authority also has statutory functions under Part 8 of the 2008 Act regarding the enforcement of DCOs. This approach is well precedented in DCOs including The Southampton to London Pipeline Development Consent Order 2020, The Reinforcement to the North Shropshire Electricity Distribution Network Order 2020, the Cleve Hill Solar Park Order 2020 and the Riverside Energy Park Order 2020, The M25 Junction 28 Development Consent Order 2022 and The Sizewell C (Nuclear Generating Station) Order 2022.

4.4 As set out in more detail below, requirement 20 establishes a body called the environmental scrutiny group or ESG which is responsible for granting approvals relating to the operation of the GCG process in Part 3 of Schedule 2. It is considered appropriate that the ESG is the discharging body for the approvals related to the operation of GCG given the cross-boundary nature of impacts addressed by the framework and the need to ensure that the regime is implemented in an independent and apolitical manner.

4.5 Schedule 2 is divided into six parts.

*Part 1 - General*

4.6 Requirement 1 (*Interpretation*) contains a number of definitions used in Schedule 2. The definition of “*commence*” is particularly important in the context of Schedule 2 and therefore merits explanation:

- (a) For the purposes of Schedule 2, the carrying out of a limited number of works that would constitute a “*material operation*” under the 2008 Act is not to be taken to mean that the development has “*commenced*”, in the context of activating the obligation to discharge pre-commencement requirements contained in Schedule 2. This enables the Applicant to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements.
- (b) The Applicant considers that this approach is reasonable and proportionate. The works that are excluded from the definition do not give rise to any materially new or materially different environmental effects to those assessed in the **Environmental Statement** ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03]), being either de minimis or have minimal potential for adverse effects, in line with the Planning Inspectorate’s Advice Note 15 (Drafting Development Consent Orders). The Applicant should be permitted to carry out low impact preparatory works following the grant of the Order, while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable.
- (c) This is a widely precedented approach in other made DCOs (see for example The M20 Junction 10a Development Consent Order 2017, The Silvertown Tunnel Development Consent Order 2018, A1 Birtley to Coal House Development Consent Order 2021, A303 (Amesbury to Berwick Down) Development Consent Order 2020 The Sizewell C (Nuclear Generating Station) Order 2022 and The M25 Junction 28 Development Consent Order 2022).
- (d) For the avoidance of doubt, the definition of commence relates to the discharge of the pre-commencement requirements in Schedule 2 and is independent of, and has no bearing upon, the issue of whether development has “*begun*” for the purposes of requirement 4.

- 4.7 Requirement 2 (*Amendments to approved details*) allows Luton Borough Council, following consultation with the specified authorities on the proposed amendment, to approve amendments to the **Air Noise Management Plan [TR020001/APP/8.125]**, **Airport Boundary Plan [TR020001/APP/4.12]**, **Design Principles [TR020001/APP/7.09]** **Code of Construction Practice (CoCP) [TR020001/APP/5.02]**, the **Cultural Heritage Management Plan [TR020001/APP/5.02]**, the **Fixed Plant Noise Management Plan [TR020001/APP/5.02]**, the parameters in requirement 7. It also allows amendments to any other plans, details or schemes referred to under Parts 2 and 4 of Schedule 2 to be approved by the relevant planning authority. This is to allow flexibility in the detailed design stage, however this flexibility is given strict parameters in that it only applies to the extent the subject matter of the approval is would not give rise to any materially new or materially different effects in comparison to those reported in the **Environmental Statement ([TR020001/APP/5.01], [TR020001/APP/5.02], [TR020001/APP/5.03])**. A similar requirement appeared in The Progress Power (Gas Fired Power Station) Order 2015 and The Riverside Energy Park Order 2020.
- 4.8 Requirement 3 (*Anticipatory steps towards compliance with any requirement*) provides that any steps taken before the Order comes into force that were intended to be steps towards compliance with any provision of Parts 2, 3 or Part 4 of this Schedule those steps may be taken into account for determining compliance with that provision as if they had been taken after the Order came into force. This departs from the Model Provisions, but the Applicant's intention is to be able to consult local authorities on draft control documents prior to the DCO being made. This has precedence in The Southampton to London Pipeline Development Consent Order 2020, The Thurrock Flexible Generation Plant Development Consent Order 2022 and The M25 Junction 28 Development Consent Order 2022.

#### *Part 2 – Requirements pertaining to commencement*

- 4.9 Requirement 4 (*Time limits*) provides that the authorised development must begin no later than 5 years from the date of the Order coming into force. Section 154(1) of the Act provides that development for which development consent is granted must be begun before (a) the prescribed period or (b) such other period (whether longer or shorter than that prescribed) as is specified in the order granting the consent. Requirement 4 uses the term 'begin', rather than 'commence', so that any material operation (as defined in section 155 of the 2008 Act) is sufficient for the purposes of satisfying this time limit including any "*material operation*" carried out under the activities referred to in subparagraphs (a) to (k) in the definition of commence in requirement 1.
- 4.10 Requirement 5 (*Phasing of authorised development*) provides that the authorised development must not commence until a written scheme setting out the planned phases for construction of the authorised development has been submitted to the "specified authorities"<sup>5</sup>, Buckinghamshire Council and National

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<sup>5</sup> "specified authorities" means Central Bedfordshire Council, Dacorum Borough Council, Hertfordshire County Council, Luton Borough Council and North Hertfordshire District Council, but excluding any of those authorities where they are the discharging authority.

Highways. Sub-paragraphs (2) to (5) provide further detail of what the written scheme under sub-paragraph (1) entails and also provides that the undertaker must review the written scheme no later than every five years until construction of the authorised development is completed.

- 4.11 Requirement 6 (*Detailed design*) provides that no part of the authorised development (excluding highway works) is to commence until an application containing the detailed design of that part has been submitted to and approved in writing by the relevant planning authority. The application for approval must:
- (a) include plans, sections and supporting information showing the detailed layout, siting, scale, levels and external appearance of any buildings, structure and other works;
  - (b) identify the specific Schedule 1 works which form that part (phase) of the development for which approval is being sought;
  - (c) in the case of any works within the airport, a plan identifying the location and extent of the specific Schedule 1 works in relation to the scheme layout plans, and identifying any other parts of the scheme layout plans for which an approval has already been obtained;;
  - (d) demonstrate compliance with the parameters in Requirement 6;
  - (e) in the case of Works Nos. 3b(01), 3b(02), 3d, 3f, 3g and 4a, a report setting out the design approach, how the design principles have been incorporated into the final design and how the output of the design review process has been taken into account in the design presented for approval;
  - (f) provide information about the effect of the phase on airport throughput;
  - (g) include an indicative programme of works;
  - (h) include an operational lighting scheme of any building, structure or other works for that part;
  - (i) include a Glint and Glare Assessment in respect of any part comprising solar energy production or canopies to support photovoltaic panels;
  - (j) be in accordance with the **Design Principles [TR020001/APP/7.09]** and subject to article 6(3) (limits of works) be within the limits shown on the works plans and any relevant parameters set out in requirement 6; and
  - (k) not give rise to materially new or materially different environmental effects in comparison with those reported in the environmental statement.

- 4.12 Under Requirement 6, the undertaker must also give notice to the relevant planning authority of the commencement and conclusion of that phase of the works.
- 4.13 Requirement 7 (*Parameters of authorised development*) provides that the elements of the authorised development listed must not exceed the maximum dimensions and levels set out in relation to that element.
- 4.14 Requirement 8 (*Code of construction practice*) provides that a CoCP must be put in place and management plans approved by the relevant planning authority. Further details of the management plans are set out in paragraph 2. The Proposed Development must be carried out in accordance with the **CoCP [TR020001/APP/5.02]**.
- 4.15 Requirement 9 (*landscaping design*) addresses the landscaping design and provides that no part of the authorised development containing landscaping may commence until a landscaping scheme for that part has been approved in writing by the relevant planning authority. The approved landscaping scheme must be in accordance with the principles set out in the **Strategic Landscape Masterplan [TR020001/APP/5.10]** and the **Design Principles [TR020001/APP/7.09]**, and include the details identified in paragraph 2.
- 4.16 Requirement 10 (*Landscape and biodiversity management plan*) secures the long-term management of landscaping and biodiversity mitigation and provides that no part of the authorised development may commence, nor may powers under article 22 be exercised in relation to that part, until a landscape and biodiversity management plan has been approved by the relevant planning authority. The plan approved must be substantially in accordance with the **Outline Landscape and Biodiversity Management Plan [TR020001/APP/5.02]**.
- 4.17 Requirement 11 (*Protected species*) provides that no part of the authorised development may commence until for that part final pre-construction survey work has been carried out to establish up to date information, in particular whether a European protected species or a nationally protected species is present on any of the land affected, or likely to be affected, by that part of the authorised development. Where a European protected species or nationally protected species is shown to be present following the pre-construction survey, the relevant part of the authorised development must not commence until a scheme of mitigation measures, substantially in accordance with the relevant ecological mitigation strategies (as defined in requirement 1), has been submitted to and approved by the relevant planning authority following consultation with Natural England or, where appropriate, a protected species licence has been granted by Natural England.
- 4.18 Requirement 12 (Previously unidentified land contamination and contaminated groundwater) makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority, the Environment Agency and the relevant water undertaker.

- 4.19 Requirement 13 (*Surface and foul water drainage*) provides that no part of the authorised development may commence until written details of a surface and foul water drainage system, and including means of pollution control and monitoring, have been submitted to, and approved in writing by, the relevant planning authority, following consultation with the Environment Agency, the lead local flood authority and the relevant water and sewerage undertakers. The details submitted must be in accordance with the principles set out in the **Design Principles [TR020001/APP/7.09]** and must include those matters specified in paragraph (2)
- 4.20 Requirement 14 (*Construction traffic management*) provides that no part of the authorised development may commence until a construction traffic management plan for that part has been prepared and approved by the relevant planning authority following consultation with the specified authorities and Buckinghamshire Council and National Highways. The construction traffic management plan submitted for approval must be substantially in accordance with the **Outline Construction Traffic Management Plan [TR020001/APP/5.02]**.
- 4.21 Requirement 15 (*Construction workers*) provides that no part of the authorised development may commence until a construction workers travel plan for the construction of that part has been submitted to and approved by the relevant planning authority, following consultation with the specified authorities and Buckinghamshire Council. The construction workers travel plan submitted for approval must be substantially in accordance with the **Outline Construction Workers Travel Plan [TR020001/APP/5.02]**.
- 4.22 Requirement 16 (*Archaeological remains*) provides that the authorised development must be carried out in accordance with the **Cultural Heritage Management Plan [TR020001/APP/5.02]** and any written scheme of investigation approved. Sub-paragraph (2) provides that where the cultural heritage management plan provides for the subsequent approval of the relevant planning authority of a written scheme of investigation for certain specified elements of the authorised development, such parts of the authorised development are not to commence until for the construction of that part a written scheme for the investigation of areas of archaeological interest, reflecting the cultural heritage management plan, has been submitted to and approved by the local planning authority following consultation with Historic England.
- 4.23 Requirement 17 (*Remediation of Former Eaton Green Landfill*) provides that no part of the authorised development comprising Work No. 1b (Landfill remediation works) may commence until a remediation strategy and a foundation works risk assessment for the Former Eaton Green Landfill has been approved in writing by the relevant planning authority, following consultation with the Environment Agency and the relevant water undertaker. The approved remediation strategy must be substantially in accordance with the **Outline Remediation Strategy (for the former Eaton Green Landfill site) [TR020001/APP/5.02]**. Similar provisions apply for the foundation works risk assessment.

*Part 3 – Requirements pertaining to green controlled growth*

- 4.24 The **Green Controlled Growth Explanatory Note [TR020001/APP/7.07]** provides further explanation for the GCG regime and how these provisions operate within that regime. Therefore this section only briefly summarises these provisions.
- 4.25 Requirement 18 (*Interpretation*) sets out the relevant definitions for Part 3.
- 4.26 Requirement 19 (*Exceedance of air quality Level 2 Threshold or Limit*) sets out the mechanism for determining an exceedance of an air quality Level 2 Threshold or Limit. As other pollution sources outside of the airport could contribute to an exceedance of an air quality it is considered necessary to have a specific process for determining whether there has been an air quality exceedance.
- 4.27 Requirement 20 (*Environmental Scrutiny Group*) requires the undertaker to establish the Environmental Scrutiny Group (ESG) as soon as reasonably practicable following service of the notice under article 44(1) and in any event no later than 56 days prior to due date for the submission of the first Monitoring Report under paragraph 21 of Schedule 2 to the Order. The undertaker must also establish Technical Panels which will provide technical support to the ESG in relation to air quality, greenhouse gas emissions, noise and surface access. This requirement sets out how the ESG and Technical Panels operate with further details set out in the terms of reference for the ESG and Technical Panels.
- 4.28 Requirement 21 (*Monitoring of permitted operations*) requires the undertaker to provide an annual Monitoring Report to the ESG concerning the operation of the Proposed Development in accordance with the provisions of the requirement. Monitoring Report refers to monitoring and assessments of whether a threshold or limit has been exceeded in respect of air quality, noise, greenhouse gas emissions or surface access as identified in the green controlled growth framework. Definitions of the thresholds, limit, green controlled growth framework and monitoring report can be found in requirement 17.
- 4.29 Requirement 22 (*Exceedance of a Level 1 Threshold*) provides that where a Monitoring Report submitted under paragraph 21 assesses that a Level 1 Threshold has been exceeded, the undertaker must include in the Monitoring Report commentary on the avoidance of the exceedance of a Limit.
- 4.30 Requirement 23 (*Exceedance of a Level 2 Threshold*) provides that where a Monitoring Report assesses that a Level 2 Threshold has been exceeded, the undertaker must prepare and submit a draft Level 2 Plan to the ESG no later than 28 days following the Monitoring Report being submitted to the ESG, unless the ESG certifies the exceedance was as a result of circumstances beyond the undertaker's control or there is already a Level 2 Plan for that period in place. The undertaker may address all exceedances which are reasonably considered to be related to one another in the same draft Level 2 plan or Level



2 plan. The Requirement also makes clear that if there is more than one Level 2 Threshold exceedance relating to the same matter as identified in Requirement 20(6), those exceedances may be addressed in the same draft Level 2 Plan.

- 4.31 The undertaker must consult the ESG and have regard to any representations made by the ESG on a draft plan during the consultation period and provide a written account of how any such representations were taken into account as part of its submission. Following consultation, a Level 2 Plan must be submitted to the ESG and approved or refused by the ESG and once approved implemented by the undertaker. Where a Level 2 Plan is refused, the undertaker must, no later than 42 days starting the day after the decision of the ESG, either lodge an appeal to the Secretary of State in accordance with Requirement 39, or resubmit a revised Level 2 Plan to the ESG. Where the ESG has not made a decision within the specified timeframe, the plan is deemed to be approved. It is considered this is appropriate to ensure that the ESG complies with the necessary timeframes. The timeframes in Part 3 have been specifically designed to align with the mechanisms of the Airports Slot Allocation Regulations 2006 and to ensure that exceedances are addressed in a timely manner.
- 4.32 Where a Level 2 Threshold has been exceeded, unless agreed otherwise by the ESG, the undertaker will ensure that any future airport capacity declaration does not increase from the existing capacity declaration until a Level 2 Plan has been approved by the ESG or Secretary of State.
- 4.33 Where a Monitoring Report assesses that there has been an exceedance of either one or more Level 2 Thresholds, and an Exceedance of or more Limits under Requirement 24, the undertaker may decide to address all of these exceedances in the same draft Mitigation Plan.
- 4.34 Requirement 24 (*Exceedance of a Limit*) provides that where a Monitoring Report assesses that a Limit has been exceeded, the undertaker must submit to the ESG and consult the ESG on a draft Mitigation Plan no later than 21 days from the date the Monitoring Report was submitted to the ESG, unless the ESG certifies exceedance was as a result of circumstances beyond the undertaker's control or there is already a Mitigation Plan for that period in place. The Requirement also makes clear that if there is more than one Limit exceedance that are reasonably considered as relating to the same matter as identified in Requirement 20(6), those exceedances may be addressed in the same draft Mitigation Plan. The undertaker must have regard to any representations made by the ESG on a draft plan during the consultation period and provide a written account of how any such representations were taken into account as part of its submission.
- 4.35 Following consultation, a Mitigation Plan must be submitted to the ESG and approved or refused by the ESG and once approved implemented by the undertaker. Where a Mitigation Plan is refused, the undertaker must, no later than 42 days starting the day after the decision of the ESG, either lodge an appeal to the Secretary of State in accordance with Requirement 39, or

resubmit a revised Mitigation Plan to the ESG. Where the ESG has not made a decision within the specified timeframe, the plan is deemed to be approved.

- 4.36 Sub-paragraphs (10) to (13) provides the process for submitting and approving updated Mitigation Plans, including identifying whether a local rule under the Airports Slot Allocation Regulations 2006 to reduce the existing number of allocated slots would reduce, avoid or prevent exceedances the Limit where other measures cannot ensure an impact falls below the relevant Limit as soon as reasonably practicable and a programme for seeking the introduction of a local rule.
- 4.37 Sub-paragraph (15) provides that from the date a Monitoring Report assesses that a Limit has been exceeded, unless otherwise agreed by the ESG, the undertaker will ensure that until monitoring carried out in accordance with a Mitigation Plan or a Monitoring Report confirms the relevant environmental effect has fallen below the relevant Limit any future airport capacity declaration does not increase from the existing capacity declaration; and includes criteria to ensure that the total number of allocated slots (excluding any emergency flights) does not exceed the existing number of allocated slots.
- 4.38 Requirement 25 (*Review of implementation of this Part*) provides for the review of the implementation of Part 3, the review of any Monitoring Plans, and arrangements for funding, and the ability for the undertaker to submit an application to the ESG to change any of the specified time periods in the part. It also provides the ability for the undertaker following a review carried out in accordance with the **GCG Framework [TR020001/APP/7.08]** to submit an application to the ESG to modify the definition of a Level 1 Threshold, Level 2 Threshold and Limit.

#### *Part 4 – Requirements pertaining to other operational matters*

- 4.39 Requirement 26 (*Passenger cap for the authorised development*) provides that the undertaker may operate the airport under the Order so that it permits up to 32 mppa.
- 4.40 Requirement 27 (*Air noise management plan*) provides that from the date that the notice is served in accordance with article 44(1), the airport must be operated in accordance with the **Air Noise Management Plan [TR020001/APP/8.125]**.
- 4.41 Requirement 28 (*Fixed Plant Noise Management Plan*) provides that from the date that notice is served in accordance with article 44(1), the airport must be operated in accordance with the **Fixed Plant Noise Management Plan [TR020001/APP/5.02]**.
- 4.42 Requirement 29 (*Ground Noise Management Plan*) provides that notice in accordance with article 44(1) must not be served until a ground noise management plan for the operation of the airport above the passenger cap permitted by the LLAOL planning permission has been submitted to an approved in writing by Luton Borough Council. It further provides that from the

date the notice is served in accordance with article 44(1), the airport must be operated in accordance with that plan. This general approach is followed in Requirements 29 – 34 inclusive, subject to the individual plans referred to therein.

- 4.43 Requirement 30 (*Offsite highway works*) provides the process for undertaking monitoring of transport related impacts in accordance with an approved transport related impacts monitoring and mitigation approach and the approval of a mitigation scheme to address those impacts where required. The approach submitted for approval must be substantially in accordance with the **Outline Transport Related Impacts Monitoring and Mitigation Approach [TR020001/APP/7.02]**.
- 4.44 Requirement 31 (*Travel plans*) sets out the approval of travel plans by Luton Borough Council, following consultation with the specified authorities, Buckinghamshire Council and National Highways, which must be updated every five years. The travel plan submitted for approval must be substantially in accordance with the **Framework Travel Plan [TR020001/APP/7.13]** and prepared in accordance with the process set out in Figure 8.1 of the **Framework Travel Plan**.
- 4.45 Requirement 32 (*Operational air quality plan*) provides for the approval of an operational air quality plan by Luton Borough Council. The plan submitted for approval must be substantially in accordance with the **Outline Operational Air Quality Plan [TR020001/APP/5.02]**.
- 4.46 Requirement 33 (*Greenhouse gas action plan*) provides for the approval of a greenhouse gas action plan by Luton Borough Council. The plan submitted for approval must be substantially in accordance with the **Outline Greenhouse Gas Action Plan [TR020001/APP/5.02]**.
- 4.47 Requirement 34 (*Operational waste management plan*) provides for the approval of an operational waste management plan by Luton Borough Council. The plan submitted for approval must be substantially in accordance with the **Outline Operational Waste Management Plan [TR020001/APP/5.02]**.

#### *Part 5 – Procedure for discharge of requirements*

- 4.48 Requirements 35, 36 and 37 provide a clear procedure for the discharge of requirements in Part 1, Part 2 and Part 4 of Schedule 2 by the discharging authority. It sets out clear time limits for decisions to be made and makes provision for circumstances where the discharging authority may undertake consultation with specified bodies, and may require further information to be provided in relation to an application for the discharge of a requirement. These time limits are considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As an NSIP, the authorised development should not be at risk of being held up due to a failure to respond to an application for consent/approval. Part 5 of Schedule 2 as drafted reflects the discharge of requirements provisions approved in a range of recent made DCOs, including

The Southampton to London Pipeline Development Consent Order 2020, The Reinforcement to the North Shropshire Electricity Distribution Network Order 2020, the Cleve Hill Solar Park Order 2020 and the Riverside Energy Park Order 2020.

- 4.49 Requirement 38 (*Register of requirements*) provides that the undertaker must establish and maintain in an electronic form suitable for public inspection a register of the requirements approved within Parts 1, 2 and 4 of Schedule 2.

#### *Part 6 - Appeals*

- 4.50 Requirement 39 (*Appeals to the Secretary of State*) provides an appeals procedure which entitles the undertaker to appeal to the Secretary of State in the event that certain applications for approval under the requirements are refused or granted subject to conditions or requests for further information under requirement 36. Appeals provisions of this nature are well precedented in DCOs including The Southampton to London Pipeline Development Consent Order 2020, The Manston Airport Development Consent Order 2022 and The Little Crow Solar Park Order 2022.
- 4.51 Requirement 40 (*Matters to be considered in an appeal to the Secretary of State*) contains matters which the appointed person must have regard to when determining an appeal to the Secretary of State.
- 4.52 Requirement 41 (*Application of Part 8 of the Planning Act 2008*) provides that a designated local authority (Central Bedfordshire Council, Hertfordshire County Council, North Hertfordshire District Council and Dacorum Borough Council) can submit representations to the relevant planning authority requesting it considers the need to pursue enforcement action where the ESG, following an attempt to resolve the matter directly with the undertaker, determines that a Monitoring Report has not been produced in accordance with the Monitoring Plan, or, that a Level 2 Plan or a Mitigation Plan has not been implemented, or that a draft Level 2 Plan or a draft Mitigation Plan has not been consulted upon or submitted in the time period required. The local planning authority then has to provide a written notice to the designated local authority, the ESG and the undertaker setting out its decision on whether enforcement action will be undertaken and the reasons for that decision.

### **Schedule 3 – Permanent stopping up of public rights of way**

This schedule sets out the public rights of way which are to be stopped up pursuant to the Order in accordance with article 14, including those public rights of way for which a substitute is to be provided.

### **Schedule 4 – Designation of highways**

This schedule sets out the designation of each of the highways created or upgraded as part of the authorised development.

## **Schedule 5 – Land in which only new rights etc. may be acquired**

This schedule identifies the parcels of land (by reference to the corresponding plot number in the **Book of Reference [TR020001/APP/3.02]**) in respect of which the Applicant's compulsory acquisition powers are limited to the compulsory acquisition of rights, in accordance with article 27.

## **Schedule 6 – Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of restrictive covenants**

This schedule sets out various amendments to legislation pertaining to compulsory purchase and compensation for the purposes of the Order.

## **Schedule 7 – Land of which temporary possession may be taken**

This schedule identifies the parcels of land (by reference to the corresponding plot number in the **Book of Reference [TR020001/APP/3.02]**) in respect of which the Applicant's compulsory acquisition powers are limited to temporary possession only, in accordance with article 33 (but subject to article 33(9)).

## **Schedule 8 – Protective provisions**

This schedule contains various provisions for the benefit of different types of statutory undertakers. Part 1 of Schedule 8 contains protective provisions for the benefit of electricity, gas, water and sewerage undertakers. Part 2 of Schedule 8 contains protective provisions for the benefit of operators of electronic communications code networks. Part 3 contains protective provisions for the benefit of London Luton Airport Operations Limited. Part 4 of Schedule 8 contains protective provisions for the benefit of Cadent Gas Limited. Part 5 of Schedule 8 contains protective provisions for the benefit of National Highways Limited. Part 6 of Schedule 8 contains protective provisions for the benefit of local highway authorities. Part 7 of Schedule 8 contains protective provisions for the benefit of drainage authorities. Part 8 of Schedule 8 contains protective provisions for the benefit of Network Rail Infrastructure Limited.

## **Schedule 9 – Documents to be certified**

This schedule identifies the plans and other documents by application document reference number and revision which are to be certified by the Secretary of State in accordance with article 50.