Luton Rising
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London Luton Airport Expansion

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8.187 Applicant's Position Paper on Financial Penalties

Infrastructure Planning (Examination Procedure) Rules 2010

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The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

London Luton Airport Expansion Development Consent Order 202x

8.187 FINANCIAL PENALTIES POSITION PAPER

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1 INTRODUCTION

1.1.1 This position statement has been developed by Luton Rising (a trading name of London Luton Airport Limited) ('the Applicant') to support the application for a Development Consent Order (DCO) for the expansion of the airport to 32 million passengers per annum (mppa) (the Proposed Development).

1.1.2 The Host Authorities[1] have suggested that sanctions should apply where there is a repeated and prolonged exceedance of a Limit in the context of the Green Controlled Growth (GCG) Framework. The Host Authorities have set out that *"any mechanism put in place needs to, as previously submitted, act as a proportionate incentive for the Applicant to pursue growth on a precautionary basis, whilst equally acknowledging that growth should not be constrained where it can be achieved sustainably."*

1.1.3 The Examining Authority (ExA) in its commentary on the Draft DCO suggested that financial penalties should apply *"where a prolonged or repeated exceedance of the consented limits occurs"* so that *"the breach is addressed in a timely fashion and that the operator is disincentivised from continuing to breach limits."*

1.1.4 This document has been prepared to express the Applicant's objection in the strongest possible terms to the imposition of a financial penalty regime. In short, the Applicant considers that the imposition of financial penalties:

a. is unnecessary and wholly unjustified in light of the robust and comprehensive GCG Framework the Applicant has put forward, which includes an implicit financial cost for failing to meet Limits through the direct linkage that GCG creates between environmental performance and ongoing growth until the breach had been resolved, irrespective of how many years this took to address the root cause;

b. is inappropriate given the existing enforcement mechanism endorsed by Parliament in the context of breaches of the DCO;

c. does not meet the planning policy tests;

d. does not meet the specific tests which are relevant to the imposition of conditions;

e. is being proposed without a clear legal basis;

f. is unprecedented;

g. is being sought to be justified by reference to precedents which are wholly irrelevant;

h. assumes a function for the Department for Transport which it has hitherto not accepted or been consulted upon; and

[1] Luton Borough Council, Central Bedfordshire Council, Hertfordshire County Council, North Hertfordshire District Council and Dacorum Borough Council

i. is not appropriate in the context of a single decision on a DCO application. This is because there is a likelihood of setting a precedent for future airport development, and this would require careful consideration and development of a proportionate framework for penalties which is not possible to achieve in the time left in the examination or by reference to a single airport. Such a regime is more appropriate to be made on a national level, subject to its own consultation.

2 APPLICANT'S POSITION

2.1 Financial penalties are unnecessary

2.1.1 As set out in Section 2.7 of the **Green Controlled Growth Explanatory Note [TR020001/APP/7.07]**, from the outset the intention of the **Green Controlled Growth Framework [TR020001/APP/7.08]** has been to provide a clear, transparent, legally-binding set of processes and procedures which must be followed and measurable Thresholds and Limits at which defined actions must be taken. The intention was deliberately seeking to go further than conventional planning controls, which have frequently not been successful in avoiding adverse effects on local communities, by focusing on controlling the outputs (effects) rather than inputs as per the current system (which cannot guarantee a required output).

2.1.2 Through these processes and a system of Thresholds and Limits, the GCG Framework will be self-enforcing in respect of mitigating environmental effects above Limits, with the process designed to require action by the airport operator both to take early action with the intention of avoiding an exceedance of a Limit, and in the unlikely event that this occurs, to address this exceedance as soon as is reasonably practicable.

2.1.3 This approach is secured through the requirement to consult the Environmental Scrutiny Group (ESG) and seek their approval of a Mitigation Plan, meaning that any mitigation brought forward will be agreed by the airport operator, local authorities and independent experts to be the most appropriate way of mitigating the relevant impact. For there to be a continued breach, this would mean that not only would the early action secured by the GCG Framework at a Level 1 and Level 2 Threshold have been unsuccessful, but the Mitigation Plan approved by the ESG would also need to have been unsuccessful. This is considered to be an unlikely scenario, and it is unclear how the prospect of an additional sanction would mean that an environmental impact would be addressed and reduced below the Limit any sooner than via the proposed GCG process, which is what all parties are agreed is the required outcome.

2.1.4 The Applicant stresses that ESG (and therefore the Host Authorities themselves) will have approved the plan which failed. To ask for sanctions for something that the ESG themselves have approved, is inappropriate in a circumstance where all parties (including the ESG) will have agreed to a plan. This form of independent scrutiny and approval over environmental and transport outcomes is unprecedented and unparallelled in the level of control it provides.

2.1.5 Any continued breach of Limits that is caused by the airport operator not taking action as required by the GCG Framework (including the requirement to prepare, agree and implement a Mitigation Plan) would be a breach of the DCO and would be enforceable under the Planning Act 2008. The enforcement action could include the requirement to pay a fine, in accordance with the established framework under the Planning Act 2008 (see below).

2.1.6 This approach as currently set out is considered to be a significant enhancement when compared to the historic approach to securing binary planning conditions ('impact X shall not exceed Y') as it provides early warnings and action to prevent Limits from being exceeded as well as transparency around when a Limit has been exceeded, what actions are being taken by the airport operator to mitigate impacts where these exceed Limits, and the timescales over which these actions are planned to take effect, all supported by independent expert analysis and agreed by multiple local authorities. None of these measures are secured by traditional planning conditions or obligations. The Applicant has also submitted evidence to show how GCG would work and would have avoided the historic noise breaches where the current system has failed (please see Noise Envelope – Improvements and worked example [REP2-032] and cf. Comparison of consented and proposed operational noise controls document [AS-121]).

2.1.7 Notwithstanding this, the GCG Framework also already includes an explicit link between environmental Limits and commercial benefit. If a Limit is exceeded, the airport will not be able to grow. Indeed, even before a Limit is exceeded, and a Level 2 Threshold is exceeded, growth would be slowed. Any such constraint on airport growth by itself means there is an implicit (and significant) financial impact associated with the breach of a Limit. By contrast, the Applicant is not aware of any other airport Noise Envelope that has financial implications (either implicit or explicit) associated with a breach. Indeed, the prospect of financial penalties for breaches of noise contour conditions was raised in connection with the proposal to expand the airport to 19 mppa and was rejected by the planning inspector and two Secretaries of State.

2.1.8 The proposal is therefore entirely unprecedented and puts London Luton Airport in a disadvantageous position despite the Applicant having taken significant, innovative and pro-active steps with substantial inbuilt commercial consequences in voluntarily developing and proposing the pioneering GCG Framework.

2.2 Financial penalties are inappropriate

2.2.1 The Applicant notes that the appropriate enforcement regime for DCOs under the Planning Act 2008 was set out by Parliament, and the imposition of financial penalties seeks to go well above and beyond those proposals. It should be noted under section 161 (which makes it a criminal offence to breach a DCO), *"A person guilty of an offence… is liable on summary conviction, or on conviction on indictment, to a fine."*

2.2.2 A failure to produce a Mitigation Plan which secures measures which remove an exceedance as soon as reasonably practicable (which would be subject to independent scrutiny and approval from the ESG and Secretary of State) would therefore already lead to a breach of the DCO. This would attract the ability for a court to determine a fine was payable. The Applicant notes that the established enforcement regime is subject to due process and would therefore allow the operator to put its case forward in Court that a continued breach was due to circumstances beyond its control. For example, where a circumstance beyond the operator's control arose between the approval of a Level 2 Plan or a

Mitigation Plan, this would not carry any weight in the ExA's proposed wording where a sanction is levied automatically. The absence of such due process with potentially significant penalties is, in the Applicant's view, contrary to natural justice.

2.2.3 The Applicant does not consider it appropriate for a DCO to seek to supplement or usurp this well-established process legislated by Parliament by seeking to impose additional financial penalties. As noted below, there is no comparable precedent, for the imposition of penalties in either a UK (or, indeed, European) airport nor a DCO project.

2.2.4 The Applicant again notes the Secretary of State's decision and the accompanying Inspector's Report on the P19 decision which rejected calls for a financial penalty regime noting (Ref 1):

"The Town and Country Planning Act 1990 (TCPA) includes a raft of statutory measures which can be used to address a breach of condition (including enforcement notices, stop notices and breach of condition notices). Breaches of those notices can end up with criminal sanctions and fines. LADACAN's planning witness accepted that it was not necessary for a condition to include a penalty regime because the regime to ensure compliance is in the TCPA.

…It is neither necessary nor reasonable to set out the penalties for breaching a particular condition within its wording as there are powers under the TCPA for LPAs to seek to remedy or take enforcement action against any breaches of condition. It is not the purpose of planning conditions to be any more onerous than is strictly necessary to ensure that otherwise unacceptable aspects of the proposal can be made acceptable."

2.2.5 Fundamentally, the Applicant considers the same principle applies here. The Requirements of the Draft DCO *require* putting forward plans which remove an exceedance as soon as reasonably practicably, and there is an enforcement regime – enshrined by Parliament – which secures compliance with that condition. The Applicant has in fact gone further in implementing an early warning system, backed by independent decision making, in securing compliance with the Limits.

2.2.6 Given the submissions above, the Applicant considers there is no sound legal basis for the inclusion of a requirement which would impose financial penalties under a DCO, and any such provision would fail to meet the usual tests of necessity and justification required under section 120 of the Planning Act 2008.

2.3 Relevant planning policy / Government policy on use of conditions

2.3.1 There is no positive support for the use of financial penalties in the Airports National Policy Statement (ANPS) (Ref 2), the National Planning Policy Framework (NPPF) (Ref 3) nor the Luton Local Plan (Ref 4). In the Applicant's view, the omission of such a reference is not a mere coincidence but a clear expression that there is no planning policy support for such penalties. The Applicant notes that the ANPS (paragraph 4.9) sets out that:

"The Examining Authority should only recommend, and the Secretary of State will only impose, requirements in relation to a development consent, that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects."

2.3.2 The proposed imposition of financial penalties fails to meet these tests as set out in the table below.

Table 2-1 The Applicant's position on why the proposed imposition of financial penalties fails to meet the ANPS tests relating to Requirements

Test	Applicant's position on the failure to meet that test
"Necessary"	For the reasons set out in section 2.1.1 to 2.1.6 above, financial penalties are not necessary in order to ensure that the airport remains within the Limits. As noted, GCG seeks to go beyond the conventional approach of assessments requiring specified mitigation (and that mitigation being 'secured') by putting the impacts reported as part of its assessments at the heart of the controls which must be implemented.
"Reasonable"	The Applicant considers the imposition of financial penalties as proposed to be manifestly unreasonable for the following reasons: 1. The GCG Framework ensures that there is a process in place with early warnings through monitoring, thresholds to act as 'amber flags' before a breach has occurred. There is no reasonable basis for the inclusion given the robust controls to ensure Limits are not exceeded are baked into the GCG Framework. 2. The purported justification is that there has been a "prolonged" or "repeated" breach of a Limit and yet it is imposed 12 months following any breach. Impacts are measured over periods of time (either the 92-day summertime period for noise, or annually in other areas) and reported each year. As such any action taken after 12 months would not be action taken to address a prolonged or repeated breach. The annual GCG process means that 12 months is the minimum time period that would be required to determine whether a Mitigation Plan has been effective, and GCG allows for Mitigation Plans to be effective over longer time periods if all parties agree that this is the most appropriate way of mitigating an impact. 3. In addition, The GCG Framework already includes provision for what happens when a Mitigation Plan fails (i.e., the production of a further Mitigation Plan which includes explicit consideration of local rules under the slots regulations). Rather than allowing this process to work, financial penalties would be shoehorned in.

Test	Applicant's position on the failure to meet that test
	4. Where the airport already faces an implicit financial penalty because it cannot grow, it is not reasonable to impose further financial penalties. Whilst it may be suggested that a financial penalty regime which kicked in when the airport was at full operational capacity (above 31.5mppa) would potentially avoid this pitfall, the Applicant's view is it would still be unreasonable for the reasons set out above. 5. The Applicant notes that the payment of financial penalties may in fact hinder the ability to mitigate an impact above a Limit. In particular, as the Draft DCO requires the production of plans which require removing an exceedance of a Limit, the operator would likely be expending significant sums in avoiding an exceedance. The imposition of a penalty may have the effect of reducing the available sums to ensure such measures could be taken to ensure such exceedances were removed as soon as reasonably practicable.
"Precise"	The proposed drafting does not define the extent of the financial penalties which could have significant and severe impacts on the commercial operations of the airport. There is no precision in an open-ended provision for a potentially unlimited financial penalty to be determined at some later point by the Secretary of State. The Applicant also highlights that there has been no attempt to provide any sort of framework to contextualise any potential future Limit breaches and allow for a level of sanction that is proportionate to that breach, for example through consideration of the nature and magnitude of the breach or the population affected by it. It is also not considered likely that such a framework to allow a greater degree of precision is achievable within the remaining examination programme.
"Relevant to planning", "relevant to the development to be consented"	The imposition of financial penalties is tangentially related to planning given the GCG Framework is based on controlling environmental and surface access related matters, but it cannot be deemed to be relevant to the development as consented in the specific context of the controls already secured. Moreover, in circumstances where – for example – a Mitigation Plan is successful in achieving the desired outcome but there are circumstances outside of the operator's control which arise *after* the Mitigation Plan, the ExA's propose drafting would impose a financial penalty whether or not an exceedance was caused by the airport or not. There is no process secured to determine, for example, whether all reasonable steps had in fact been taken before a fine was imposed.

2.3.3 The Applicant notes in this context that the ANPS is clear that the Planning Practice Guidance (PPG) (Ref 5) should be adhered to in this context (see paragraph 4.9 which states "*Guidance on the use of planning conditions or any successor to it should be taken into account where requirements are proposed*."). The PPG not only does not support the imposition of financial penalties, it actively counsels against them:

a. The PPG also sets out "*No payment of money or other consideration can be positively required when granting planning permission*." The ExA's proposed drafting falls foul of this clear Government guidance. The proposed drafting is positively drafted requiring a "payment of money".

b. The PPG is clear that "*Conditions which place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness*." The Applicant notes that no amounts have been specified, and this in and of itself is problematic (see above) but nonetheless has the potential to impose severe burdens – over and above any other airport in the UK and in so doing present an unfair commercial disadvantage, compared to other UK airports, which would be detrimental to the future commercial operation of the airport.

2.3.4 The Applicant further notes that the Government explicitly rejected the inclusion of financial penalties in the context of the ANPS. The Government's response to consultation on the ANPS noted that *"respondents support the use of fines and penalties in the event of breaches".* The Government then (at paragraph 7.59) signposts to its response section 10 of that document.

2.3.5 In that section the Government makes clear its views that the enforcement provisions of the Planning Act 2008 are the appropriate route. The Government states (having noted there were suggestions for fines) as follows:

"Mitigations would be imposed on the applicant as legally enforceable Planning Requirements and Planning Obligations, as appropriate. A breach of any Planning Requirement without reasonable excuse would be a criminal offence, and there are wide-ranging powers for the relevant planning authority to investigate and intervene should this occur. This includes criminal proceedings, fines or even court injunctions that limit the airport's operations or prevent runway use in order to stop or restrain a breach"

2.3.6 It is clear that the ability to impose fines under the Planning Act 2008 – not any other provision – would be the appropriate mechanism for enforcing obligations in tandem with powers already in place relating to injunctions and criminal prosecutions.

2.3.7 In the Applicant's view, such a seismic change in aviation policy to impose penalties for exceeding the outputs of environmental assessments is not appropriate in the context of a single decision on a DCO application. This is because there is a likelihood of setting a precedent for future airport development, and indeed other forms of development under the Planning Act 2008 regime.

2.3.8 Any such change in approach to the enforcement of DCO requirements would require careful consideration and the development of a proportionate framework for penalties. This is simply not possible in the context of an application for an individual infrastructure development, in this case an airport. Any such fundamental change to the Planning Act 2008 regime could only properly and equitably be brought forward by Government on a national level, subject to its own consultation. As noted from the Government policy and guidance above, there is no indication that the Government intends to promote such a policy.

2.4 A complete lack of precedents to support financial penalties

2.4.1 The Applicant is aware of no airport or any major infrastructure project which is subject to such financial penalties in the UK (and the attempt to include such a regime was rejected in the P19 planning permission granted by the Secretary of State).

2.4.2 The Applicant considers it telling that the Host Authorities have referred to sanctions in the context of:

a. The Data Protection Act 2018;

b. New Roads and Street Works Act 1991; and

c. Brussels Airport.

2.4.3 The Applicant sets out below why such examples have no relevance to the imposition of financial penalties or sanctions below.

2.4.4 The fine imposed on the Belgian Government in relation to the use of Runway 01 causing unacceptable noise impacts to local residents is, by definition, a penalty that has been imposed under the legal framework of a different country and is considered of limited relevance to a UK context. The Applicant has had limited time between Deadlines 8 (when this example was highlighted) and 9 to consider this example, particularly as much of the information in the public domain on the issue requires translation. Notwithstanding this, it is understood that:

a. The fine referenced by the Host Authorities is not a sanction that was imposed as part of a planning permission or a permit to operate, but were damages awarded by a court against the Belgian Government following action taken under Article 1382 of the Belgian Civil Code, which concerns negligence-based liability.

b. The damages were awarded as a result of deliberate use of the airport's Runway 01 more frequently than permitted under international wind regulations, with regular use by 200 to 300 landings per day when the runway is only meant to be used during particular weather conditions (when tailwinds above a certain speed mean that noise preferential runways are not available for use). The Court found the Belgian Government at fault for *"not clarifying wind standards related to the use of this runway".*

c. Local residents were exposed to noise levels of up to 80 decibels as a result of the use of this runway, well in excess of the proposed GCG Limits and also World Health Organisation recommendations on exposure to aircraft noise.

d. The regular use of this runway has been ongoing for around 20 years, and the Belgian Government were instructed to stop its regular use in 2013 but no action has been taken to change the use of the runway or mitigate noise impacts.

2.4.5 Given the above, it is considered that apart from relating to noise impacts at an airport, there is no relevance to the damages awarded by a Belgian court to the proposed functioning of GCG.

2.4.6 This example also highlights the need to consider the proportionality of any sanction, as clearly it is proportionate for a breach that involved a deliberate act, had been ongoing for 20 years, where a party had not taken action earlier when instructed to do so, and which as a result exposed people across a dense urban area to noise exposure well in excess of recommended maximums to attract a significant penalty. However, this is an extremely unlikely scenario in the context of the GCG Framework which has been set up to require the airport operator to mitigate impacts as soon as reasonably practicable (and where they do not do so, in breach of DCO requirements, enforcement via the Planning Act 2008 is available).

2.4.7 The New Roads and Street Works Act 1991 is seeking to regulate a general power granted to utility undertakers in respect of street works. There are limited controls on the requirements for reinstatement and carrying out works to an acceptable standard because reliance is placed on that general power. In those circumstances, it is understandable for a fine to be imposed. The Data Protection Act 2018 is also wholly inappropriate because the financial sanctions are the primary remedy for ensuring compliance.

2.4.8 Such an approach – whether in relation to the "in principle" precedent, or in relation to quantum – is not appropriate where, as is the case here, a specific planning consent, subject to robust controls, and its own enforcement regime is in place.

2.4.9 The Applicant notes that a number of Appeal Decisions under the Town and Country Planning Act 1990 support its conclusions and position and militate against the imposition of financial penalties in the more specific context of development planning.

2.4.10 In APP/A5840/W/19/3225548 (Ref 6), the Inspector noted that a local Supplementary Planning Document highlighted that "penalties" would only be payable in exceptional circumstances (such a policy does not exist in the Luton Local Plan, nor the Luton Council s105 Supplementary Planning Document). The Inspector noted as follows in relation to the proposed application of penalties: "*If all reasonable endeavours are made to meet [targets] but fail to result in a positive outcome, that would not justify penalty charges*." As noted above, the intention and effect of the GCG Framework is to legally require –

subject to independent scrutiny and approval – that all measures which secure the removal of an exceedance as soon as reasonably practicable.

2.4.11 The Applicant would stress that in circumstances where a financial penalty is imposed, it would disincentivise other airport development from including the robust set of controls that are proposed by the Applicant at London Luton Airport.

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