

Luton Airport Expansion DCO Application

Host Authorities Response to The Applicant's Position Paper on Financial Penalties [REP9-058]

1. The Applicant's Position Paper on Financial Penalties sets out the Applicant's objection to the proposal by the Host Authorities and the Examining Authority that financial sanctions should apply in the case of prolonged breach of a Limit under the Green Controlled Growth ("GCG") Framework.
2. The Host Authorities do not agree that the imposition of a financial sanction to compensate for breach of environmental Limits in such circumstances is unnecessary, unjustified, inappropriate, not in accordance with policy or specific tests for imposition of conditions, being proposed without a clear legal basis or is not appropriate in the context of a decision on a single DCO application.

Unnecessary and unjustified

- 2.1 The Host Authorities propose that a financial compensation payment to the Community Fund should apply where a Mitigation Plan has not been effective in removing a breach of a Limit within 12 months of its implementation (or within the relevant timetable contained within that Plan).
- 2.2 The Host Authorities do not agree that the fact that a Mitigation Plan has been approved by the ESG means that it is inappropriate to apply a financial compensation payment in the event that the Plan is not suitable to bring the airport back within the relevant Limit. It is for the Applicant to ensure that it is operating in compliance with the Limits in the GCG Framework. The ESG can only approve or not approve the plan put before it. A financial compensation payment would act as an incentive on the operator to ensure that Mitigation Plans genuinely put forward the best and most likely means of addressing the breach of a Limit within the timetable specified, whilst ensuring that the affected community is compensated in the event that this is not achieved.
- 2.3 The financial compensation payment could be payable periodically where a Limit is shown to remain breached (e.g. every 3 months) or annually on a pro rata basis – it would depend on the nature of the breach and the monitoring in place. This would clearly need to operate alongside the required revised Mitigation Plan – if that was able to correct the Limit breach within a reasonable timescale, the financial compensation payment would clearly be reduced. The quantum of financial compensation payment needs to be of sufficient level to act as a real incentive to operate the Airport in a way so as to encourage a precautionary approach to growth. In this context, the Host Authorities note that the Applicant will have benefited from increasing its capacity whilst not meeting the Limits in the GCG Framework, whilst the community will experience the effects of the Applicant not meeting the Limits.
- 2.4 The Host Authorities are aware of the Applicant's position that such a regime is not required due to the robustness of the GCG Framework. In response to that, the Host Authorities would submit that if that is correct, the risk of a financial compensation payment regime being triggered would be minimal, so putting one in place would be of low risk to the Applicant. In any event, an approach similar to the GCG Framework is unprecedented, as is any approach similar to it, so it is reasonable there is some residual doubt as to its effectiveness.

Inappropriate given the existing mechanism for DCO breaches

- 2.5 As currently drafted, where a Limit is breached the Applicant would be required to implement a Mitigation Plan, but there is no consideration of what might happen should that Mitigation Plan not reduce impacts below those which were assessed as part of EIA, beyond implementation of a further Mitigation Plan. As such, simply by breaching a Limit, a breach of the DCO does not occur, provided efforts are made to mitigate that breach. This means the enforcement regime under the Planning Act 2008 would not apply.

Does not meet planning policy tests / tests for conditions

- 2.6 The Applicant refers to paragraph 4.9 of the Airports National Policy Statement (“ANPS”), which states 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.”
- 2.7 The Host Authorities consider that:
- 2.7.1 A financial compensation payment regime is **necessary** in order to provide a clear disincentive for the Applicant to breach a Limit, and if it does for it to address the breach and bring operations back within the Limit as soon as possible. Whilst there is an incentive to remain within a Limit to continue to grow, it is clear that the Applicant could benefit significantly from increased growth whilst persisting in breach of a Limit. As such a financial sanction is necessary to ensure that the airport operates within the environmental effects envelope set out in the Environmental Statement.
- 2.7.2 A financial compensation payment regime is **relevant to planning** and **relevant to the development to be consented** because it is a necessary component of the framework to ensure that the airport operates within the environmental effects envelope set out in the Environmental Statement, and that the operator cannot benefit from increased growth whilst not complying with the Limits that it has proposed. It is clearly more than ‘tangentially related’, being the backstop in the event of a persistent breach of a Limit. Without it, there is nothing to disincentivise persistent breaches of the Limits.
- 2.7.3 A financial compensation payment regime can be put in place which is **enforceable** and **precise**.
- 2.7.4 A financial compensation payment regime is **reasonable in all other respects**. There has been discussion during the Examination as to the need for the benefits of growth to be equitably shared between the Applicant and local communities. The same principle applies in the event of continuing breaches which give rise to on-going adverse effects on communities – those communities should be appropriately compensated. This approach is supported in various aviation industry guidance, such as in the Civil Aviation Authority CAP 1129: Noise Envelopes available at <https://publicapps.caa.co.uk/docs/33/CAP%201129%20Noise%20Envelopes.pdf> [accessed 5 January 2024]. This states on page 51 that financial compensation to a community fund is one form of appropriate action in the event planning controls are breached.
- 2.8 In the Host Authorities’ view, absent an ability to ‘reverse’ growth in the event of continued breaches of Limits, a proportionate, but suitably robust, financial sanctions regime should be put in place, culminating in payments to a community fund (which the Authorities propose is the existing Community Fund proposed to be kept in place under the s.106 agreement, which already envisages ‘penalty’ payments for different breaches (by airlines) being paid into it).
- 2.9 The concept of a payment to a community fund to compensate for a breach of environmental limits is entirely consistent with the tests for planning conditions.

Does not meet specific tests for imposition of conditions

- 2.10 Sub-section (3) of section 120 of the Planning Act 2008 provides that an order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted. It is clear that provision of a financial compensation payment to the Community Fund is a matter relating to or relating to matters ancillary to the development, noting that it is a necessary

component of the framework to ensure that the airport operates within the environmental effects envelope set out in the Environmental Statement.

- 2.11 Sub-section (8) of section 120 of the Planning Act 2008 provides that an order granting development consent may not include provision creating offences. It is not proposed that the regime for financial compensation payments in the event of a continued breach of a Limit would create any offences.
- 2.12 As such the Host Authorities consider that there is a clear legal basis for the inclusion of such a regime in the DCO.