



**Chilterns**  
National  
Landscape

Contact: Dr [REDACTED] MRTPI

Email: [planning@chilterns.org.uk](mailto:planning@chilterns.org.uk)

**By Email submission (only) to: [lutonairport@planninginspectorate.gov.uk](mailto:lutonairport@planninginspectorate.gov.uk)**

My Ref.: F:\Planning\DM\Luton Airport NSIP/DCO

6<sup>th</sup> September 2024 before 23:59.

Secretary of State / PINS reference: TRO20001.

**Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010  
Application by London Luton Airport Limited (“the Applicant”) Seeking Development Consent  
for the Proposed London Luton Airport Expansion (“the Proposed Development”).**

**Consultation seeking comments from the applicant and all interested parties (dated 23<sup>rd</sup>  
August 2024).**

**Response by the Chilterns Conservation Board (CCB)**, constituted as the Conservation Board for the Chilterns Area of Outstanding Natural Beauty (AONB under the provision of s.87 of the Countryside and Rights of Way Act 2000.

The CCB has been heavily engaged in this NSIP/DCO application. We appeared at the Issue Specific Hearings (ISH) on 29<sup>th</sup> September 2023 (ISH 6) and 29<sup>th</sup> November 2023 (ISH 8), together with undertaking various actions as instructed by the Examining Authority (ExA). We attended a round table meeting with the applicant’s landscape team on 30<sup>th</sup> October 2023, who produced a Chilterns ‘Special Qualities Study’ (SQ study), following discussions at ISH6 and the panels’ published Action 25 (seeking such a study with our engagement). We commented on that study.

We propose to comment on the Department for Transport’s questions 4 and 5. To assist the Secretary of State, we comment specifically on the applicant’s paragraphs 4.10 to 4.20 (their 19<sup>th</sup> August 2024 response to the DfT’s original consultation call of 2<sup>nd</sup> August 2024).

#### **Questions put in the Department for Transport’s letter of 2<sup>nd</sup> August 2024**

- **Q 4.** In their response to the ExA’s Rule 17 letter dated 25 January 2024, Central Bedfordshire Council considered that the Applicant had not provided mitigation to reduce the impact from overflights over the Chilterns National Landscape [REP10-095]. The Secretary of State notes that the Applicant’s proposed mitigation measures for the Chilterns National Landscape are limited to operational controls such as noise contour controls and future improvements in engine technology. Without prejudice to the final decision, the Applicant is invited to set out what, if any, further measures it considers could be brought forward, should it be decided further mitigation and compensation is necessary to offset amenity and tranquillity effects on the Chilterns National Landscape.
- **Q5.** Noting the requirements of section 85 of the Countryside and Rights of Way Act 2000 as introduced by section 245 of the Levelling-Up and Regeneration Act 2023 and without prejudice to the final decision, the Applicant is invited to set out what, if any, further enhancement measures it considers could be brought forward, should it be considered necessary to assure compliance with the amended duty in relation to the Chilterns National Landscape.



Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)





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## Chilterns Conservation Board (CCB) - Introduction and Starting Points.

To assist, we consider that an essential series of **starting points** on National Landscape matters requires weight to be attached to the following four key documents:

(1). The **Bristol Airport Planning Appeal** decision of 2<sup>nd</sup> February 2022 in which the panel of Inspectors applied the former s.85 CROW “duty of regard” when determining impacts upon the Mendip Hill AONB (please see paragraph 480 of that decision, PINS reference 3259234).

(2). The **applicant’s closing statement** (please refer to the Volume 8 Additional Submissions (Examination) 8.191 Closing Submissions Infrastructure Planning (Examination Procedure) Rules 2010 Application Document Ref: TR020001/APP/8.191).

Section 9.10 (page 142) of the applicant’s closing statement dealt with landscape and visual impacts. It made explicit the point that the proposals for the expansion of Luton Airport did not further the purpose of conserving and enhancing the natural beauty of the Chilterns National Landscape. A helpful summary of the examination is set out.

At 9.10.27, the applicant concluded,

**Applicant’s 9.10.27** *‘With regard to the AONB, the Applicant considers that the Proposed Development has been designed sensitively and with regard to various factors, including the distance between the Proposed Development and the AONB, the topography, the scale of development proposed and the nature of existing intervening and surrounding built form. The Proposed Development would not compromise the purposes of the designation of the AONB as set out in the Applicant’s Response to Issue Specific Hearing 8 Action 42 - Chilterns Area of Outstanding Natural Beauty Special Qualities Assessment [TR020001/APP/8.144]. Therefore, although the Proposed Development does not strictly protect or enhance the AONB, nor is there any strong conflict with either national or local AONB policies having regard to the nature and scale of the assessed impacts on the AONB, and the purposes for its designation. Notwithstanding that great weight is to be given to conserving and enhancing landscape and scenic beauty of the AONB, the Applicant considers that this issue does not weigh heavily in the planning balance for the Proposed Development for these reasons’.* **(CCB’s emphasis).**

We comment below on this conclusion.

(3). The combined (i) Civil Aviation Authority’s **CAP 1616 Guidance** (Airspace Change: Guidance on the regulatory process for changing the notified airspace design, 5<sup>th</sup> edition, updated 22<sup>nd</sup> May 2024) and (ii) the **Airport National Policy Statement** (ANPS, June 2018).

The ANPS at 5.222 states that *‘The duty to have regard to the purposes of nationally designated areas also applies when considering applications for projects outside the boundaries of these areas which may have impacts within them. The development should aim to avoid compromising the purposes of designation, and such projects should be designed sensitively given the various siting, operational, and other relevant constraints’*. The CAP 1616 (5<sup>th</sup> edition updated after the close of the examination) deals with the process governing airspace changes, including the creation of design principles, including environmental considerations.

(4). The strengthened duty to further the purpose of conserving and enhancing the natural beauty of the Chilterns National Landscape under s.85 of the CROW Act.

This applies to the following bodies as involved in the Luton Airport/Luton Rising DCO – The Secretary of State, the Examining Authority (EXa), Luton Borough Council (as a local authority and owner of Luton Rising), the Civil Aviation Authority (as a statutory undertaker under s.19 of the Civil Aviation Act 1982) and NATS (En Route) plc (as a licence holder under Ch.1 of Part 1 of the Transport Act 2000). The applicant is not included in this list because it is not a decision-making body. Nevertheless, in a



Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)





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similar fashion to any planning application, there is a reasonable expectation that the applicant would comment on how the proposal would comply with this duty or otherwise, as indeed they do and as cited above at (2).

### **CCB's Comments on the Applicant's Response to the Department for Transport's 2<sup>nd</sup> August call for Opinions (their letter, 19th August 2024)**

We propose focusing on the applicant's section 4.10 – 4.20 (all applicant extracts in *italics*).

Applicant section 4. **Chilterns National Landscape** (in response to Question 4)

**Applicant 4.2.** *In response to Q4, the Applicant does not consider that any further mitigation or compensation measures are capable of being brought forward to effectively reduce or offset the residual noise effects from aircraft overflights on amenity and tranquillity in part of the Chilterns National Landscape nor, indeed, does the Applicant consider that such further mitigation is necessary in planning terms.*

**CCB Comment.** We note that no further changes are proposed to mitigate impacts or compensate for them in response to the Department for Transport Question 4.

**Applicant 4.8.** *The Chilterns National Landscape is overflowed today and would continue to be overflowed by flights using the Proposed Development and other airports. Wider impacts to the Chilterns (i.e. new or different areas overflowed) could only occur through the Airspace Change Process (ACP). There are specific requirements and methodologies within the Civil Aviation Authority's methodology for airspace change assessment (CAP1616, Ref 3) and Government guidance (Ref 2) which require the consideration of changes to overflights of National Landscapes as part of airspace change proposals. This is evidenced by the airport operator's Initial Options Appraisal documentation (Ref 4) for its airspace change proposal which looks at the impact on the National Landscape for each potential design option.*

**CCB Comment.** The airspace change process (ACP) was discussed in the applicant's case before the ExA (ISH 8 and review of the Environment Statement, dealing with expanded aircraft volumes, noise contours and the spatial increase in land overflow). The applicant's case acknowledged this increase, which was placed into the public domain. The existing AONB, already impacted on an east-west axis (Tring – Dunstable), was discussed before the ExA. The applicant's paragraph 4.8 infers that matters pertinent to overflying the AONB and air traffic routing are deferred to a future delegated decision by the CAA. The applicant's evidence to the NSIP has modelled these future impacts and assessed them in their Environmental Statement. The Civil Aviation Authority is, of course, a body bound by the s.85 duty.

Other airports (i.e. non-Luton traffic) overfly the southeastern Chilterns, approximately tracking the Thames Corridor. This is, almost entirely, Heathrow traffic, which is much higher and above the 7,000 feet threshold for disturbance (often a matter discussed in the Issue Specific Hearings and in evidence). The ExA Panel, on their site visits on 23<sup>rd</sup> – 26<sup>th</sup> May 2023, took in Ivinghoe Beacon (near Tring), an iconic part of the AONB within the National Trust's 5,000-ha Ashridge Estate. The Beacon is 233m above mean sea level. Therefore, the aircraft appears much lower and more intrusive here and at Warden Hill, also in the AONB and 195m above mean sea level. We submit an appendix plan showing those locations. The existing (baseline) situation already experiences harm. This is noticeable within the Ashridge estate, a sensitive and highly valued landscape, including parts of the Chilterns Beechwoods Special Area of Conservation. Visitors recreating and enjoying the Duncombe Terrace (between the NT's visitor reception and Ivinghoe Beacon) cannot help but notice this interruption to this otherwise tranquil natural and historic environment.



Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)





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The applicant's baseline assessment for landscape and visual matters (document APP 040 and AS 079) was used to plot impacts in the special qualities (SQ) study. These impacts were judged to 'permanently deteriorate the sense of tranquillity perceived by those recreating within the AONB' (APP 040 and AS 079 at 14.9.22).

Heathrow is currently engaged in changes to its airspace configuration. As of June 2024, they had reached the so-called Gateway 2 stage of the CAA Airspace Change programme within Heathrow's 'Airspace Modernisation Change Proposals'. The consultation documents demonstrate an awareness of the CAP 1616 methodology and their aim to avoid overflying nationally protected landscapes in Southeast England.

#### **Q5. Enhancement – section 85 of the Countryside and Rights of Way Act 2000**

Applicant section 4. **Chilterns National Landscape** (in response to Question 5)

**Applicant's 4.10.** *In response to Q5, the Applicant's position is that no further enhancement measures should be brought forward because the project already complies with the duty (as amended) under section 85 of the Countryside and Rights of Way Act 2000 (the 2000 Act). To demonstrate this, the Applicant considers it would be helpful to set out in full its interpretation of amended duty and how the project complies with it. (our emphasis).*

**CCB Comment.** Their expressed view on section 85 is at odds with their acceptance, in their closing, that

'..... the Proposed Development does not strictly protect or enhance the AONB' (cited above and paragraph 9.10.27 of their closing submissions, document 8.191).

**Applicant's 4.16.** *In the absence of regulations or guidance, and in accordance with established principles of statutory interpretation, the Applicant considers that the words "seek to further" must be ascribed to their ordinary and natural meaning. It is clear, therefore, that while the enhanced section 85 duty requires the relevant authority to "seek" to further the purpose of conserving and enhancing the natural beauty of the National Landscape, it does not require any particular outcome in the pursuit of that purpose. The duty, therefore, recognises that there may be other considerations that will inform an overall decision – here a planning decision – that may affect the natural beauty of a National Landscape*

**CCB Comment.** We await DEFRA/Natural England's anticipated guidance, which is of great interest.

The applicant's point is that 'to seek' does not equate to 'must deliver'. The Oxford English Dictionary defines 'to seek' as 'to go in search or quest of; to try to find, look for (either a particular object—person, thing, or place—whose whereabouts are unknown, or an indefinite object suitable for a particular purpose)' (OED <https://www.oed.com/dictionary>, sourced 2<sup>nd</sup> September 2024).

The new duty requires the decision-maker to undertake a proactive process. The CCB have not seen evidence of the applicants undertaking any such proactive process, and this is underlined by the applicants not having unilaterally approached the CCB to discuss the potential impacts of the proposal, their mitigation or any compensatory measures for those impacts, since the passing of the Levelling-Up and Regeneration Act 2023 or the commencement of the parts relevant to the strengthened duty on 26<sup>th</sup> December 2023.

Accepting that the applicants, in their closing, accept that the proposal does not (strictly, in their words) meet the s.85 duty, then they cannot meet this new test in any event.

This legal test is focused on a particular objective derived from the rationale for designating an AONB, i.e. its natural beauty. This is a meaningful change to the duty in the CROW Act, rendering it an

Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)







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active, as opposed to a passive duty. The clear intention of the change is to move away from a situation that merely calls for passive regard to the designation in favour of a positive and proactive assessment of how that activity will be able to “further” the purposes of designation, i.e., the conservation and enhancement of the area's natural beauty. When discussed in the House of Lords at its Third Reading (September 2023) and in response to the Government’s amendments to the Levelling Up and Regeneration Bill, Baroness Jones of Whitchurch responded for the then opposition that,

*My Lords, first, I remind noble Lords of my interest in the South Downs National Park. I add my welcome to that of the noble Lord, Lord Randall, for government Amendment 9, which fulfils the commitment that was made on Report to take the rather weak phraseology of public bodies “having regard to”, which we knew in practice was not working, to a much stronger phraseology —that public bodies should “further the interests and statutory purposes” of national parks. It sounds technical, but it makes a big difference in practice. The fact that that is linked to management plans and the targets and so on really helps make sure that those processes will work in tandem and will be in force (Hansard, Vol 832, 21<sup>st</sup> Sep 2023).*

The applicant’s assertion that this duty ‘does not require any particular outcome’ infers an entirely open-ended outcome. We prefer Baroness Jones’ learned opinion.

The applicant’s assertion that ‘the duty recognises that there may be other considerations that will inform the overall decision’ infers a balancing exercise. No balancing is imported into the wording of this new duty.

The key issue is that the Applicants have provided no evidence that they have “sought” to further the conservation and enhancement of the natural beauty of the Chilterns National Landscape, while acknowledging both that there will be impacts on that natural beauty and that their proposals will not, in themselves, “strictly” conserve and enhance the natural beauty of the area.

**Applicant’s 4.17** *In the context of a DCO application, the enhanced duty under section 85 applies to the Secretary of State’s determination of the application. In this context, the Applicant’s interpretation is as follows:*

- a. *The enhanced duty requires that the Secretary of State must consider the extent to which an applicant’s proposals would further the purpose of conserving and enhancing the natural beauty of the National Landscape and consider if other opportunities exist (in the context of the project and its specific objectives and constraints) to further that purpose.*

**CCB response:** The test under the s.85 duty is not whether the proposal itself furthers the purpose of conserving and enhancing the natural beauty of the area, but whether both (a) the proposal, and (b) any decision on that proposal (by the ExA and by the Secretary of State) individually demonstrate that measures to conserve and enhance that natural beauty have been “sought”. Our case is that such measures have not, demonstrably, been sought by the Applicant and that the outcome of this is a proposal that, by the applicant’s own admission, itself has harmful impacts on the National Landscape that are not proposed to be mitigated or compensated for, and which will not further the conservation and enhancement of the National Landscape.

It is true that both the airport’s owner (Luton Borough Council, as the planning authority) and the applicant (Luton Rising) can only consider the duty in terms of “*the context of the project and its specific objectives and constraints*” as noted in (a) above. If there is a need to be met for the expansion of aviation, and they have a site available through which that need can be met, then it is reasonable to assert that the duty can only be met in terms of what can be achieved on-site or through conditions or agreements secured in relation to the development of that site. (CCB’s case is that insufficient attention has been paid to such matters.)

Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)





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However, both the ExA and the Secretary of State can, and indeed must, take account of more strategic matters. This could include whether a decision in principle to expand aviation activity in Luton would represent the most expedient starting point to comply with the strengthened duty to seek to further the purpose of conserving and enhancing the Chilterns National Landscape. Expansion in other locations would be a more appropriate strategy to meet the combined aspirations of the s.85 duty, the Airports National Policy Statement (notably para 2.18), and the NPPF (December 2023 edition, para 182) which notes that National Landscapes (AONBs) have “the highest status of protection” in relation to landscape and scenic beauty and that “development within their setting should be sensitively located and designed to avoid or minimise adverse impacts”. In that context CCB would emphasise the lack of attention paid by the applicant in seeking to further the purpose of conserving and enhancing the natural beauty of the National Landscape in their response letter of 19<sup>th</sup> August 2024.



#### **Applicant's 4.17 continued**

- b. *The enhanced duty goes beyond consideration of mere rectification of harm to a National Landscape, but this does not mean that the Secretary of State must adopt all measures that are theoretically available to further the purpose. The duty is subject always to other considerations, including what is reasonable and proportionate in the context of the project in question and its specific objectives and constraints.*

**CCB Response:** The applicant's statement that ‘*The duty is always subject to other considerations*’ is, as with sub-heading (a) not a part of the new legislation. When applying the new test, the Secretary of State must establish if the legislation is delivered and, if not, the extent to which mitigation would meet the test. As Baroness Jones of Whitchurch stated in their Lordship's support for this new wording, ‘*It sounds technical, but it makes a big difference in practice.*’ All parties to this DCO agree that it applies, as the existing and proposed air traffic overflies the AONB. No scenario was presented to the ExA to suggest that this situation could be avoided. Reference to ‘*the context of the project in question and its specific objectives and constraints*’ is a matter for the planning balance and not this legislation. What is ‘reasonable and proportionate’ is not a test in the new duty. That said, the proposal before the Secretary of State accentuates the existing harm to the AONB.

- c. *The Applicant's interpretation in paragraph b. above is further supported by the existence of other legal tests which (alongside and read together with section 85) establish a framework for the scope and extent of environmental commitments that may be imposed – by way of example: i. ii. section 120(1)-(2) of the Planning Act 2008 (2008 Act), and paragraph 4.9 of the ANPS, which provide that the Secretary of State should 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; and paragraph 4.10 of the ANPS, which provides that planning obligations should only be sought where they are necessary to make the development acceptable in planning terms, directly related to the proposed development and fairly and reasonably related in scale and kind to the development.*

**CCB Response:** Both section 120 of the Planning Act 2008 and paragraph 4.9 of the ANPS deal with the application of planning conditions and not the s.85 duty. However, the fact that the duty requires that decision-makers seek to further purpose of conserving and enhancing the natural beauty of the area may provide the legal basis under which planning obligations that seek to mitigate or compensate for harm to the National Landscape would be considered necessary to make the development acceptable in planning terms.



Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)





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- d. *The Secretary of State in determining the DCO application will need to consider whether there is anything more that could reasonably and proportionately be done to further the purpose of conserving and enhancing the natural beauty of the National Landscape beyond that which is proposed. If there is not, then the Secretary of State as decision-maker will have fulfilled their enhanced duty to seek to further the purpose.*

**CCB Response:** CCB disagrees with this interpretation. As previously noted, the applicant has already accepted that nothing has been proposed that furthers the purpose of conserving and enhancing the natural beauty of the National Landscape, and it is CCB's position that they have not demonstrably sought to do so. It is therefore both the ExA and the Secretary of State's duty to either (a) determine for themselves what steps or measures are necessary for them to be able to demonstrate that they have complied with the duty in granting the DCO, or (b) reject the application.

The evidence before the ExA and the Secretary of State includes various reports dealing with these impacts, including tranquillity, overflying, noise, and landscape/visual impacts. The applicant's Environmental Statement (ES) sets out overflying projections for phases one, 2(a), and 2(b)—see figures 14.4 to 14.17 in the original ES, chapter 14 (APP-152, superseded by document AS – 102).

The ExA panel of Inspectors, following ISH 6 (29<sup>th</sup> September 2023), sought a further assessment of the impact upon the Chilterns (Action 25), referred to as the special qualities (SQ) study and to 'confirm how achievable it is for the proposed increase in flights to avoid the AONB' (Action 26). These actions more accurately reflected the appropriate examination of the issues. Should the National Landscape (AONB) boundary review propose an extension to the east of Luton (into North Herts District), then the impacts will be geographically more extensive. That remains a matter for future consideration, subject to the findings and recommendations of Natural England. Nevertheless, a future scenario exists in which the spatial coverage of the Chilterns under the flightpath below 7,000 ft will grow extensively to the east of the airport.

## Summary of the new legislation.

### 85 General duty of public bodies etc.

(A1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.

(continues)

(2) The following are relevant authorities for the purposes of this section—

- (a) any Minister of the Crown,
- (b) any public body,
- (c) any statutory undertaker,
- (d) any person holding public office.



Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)

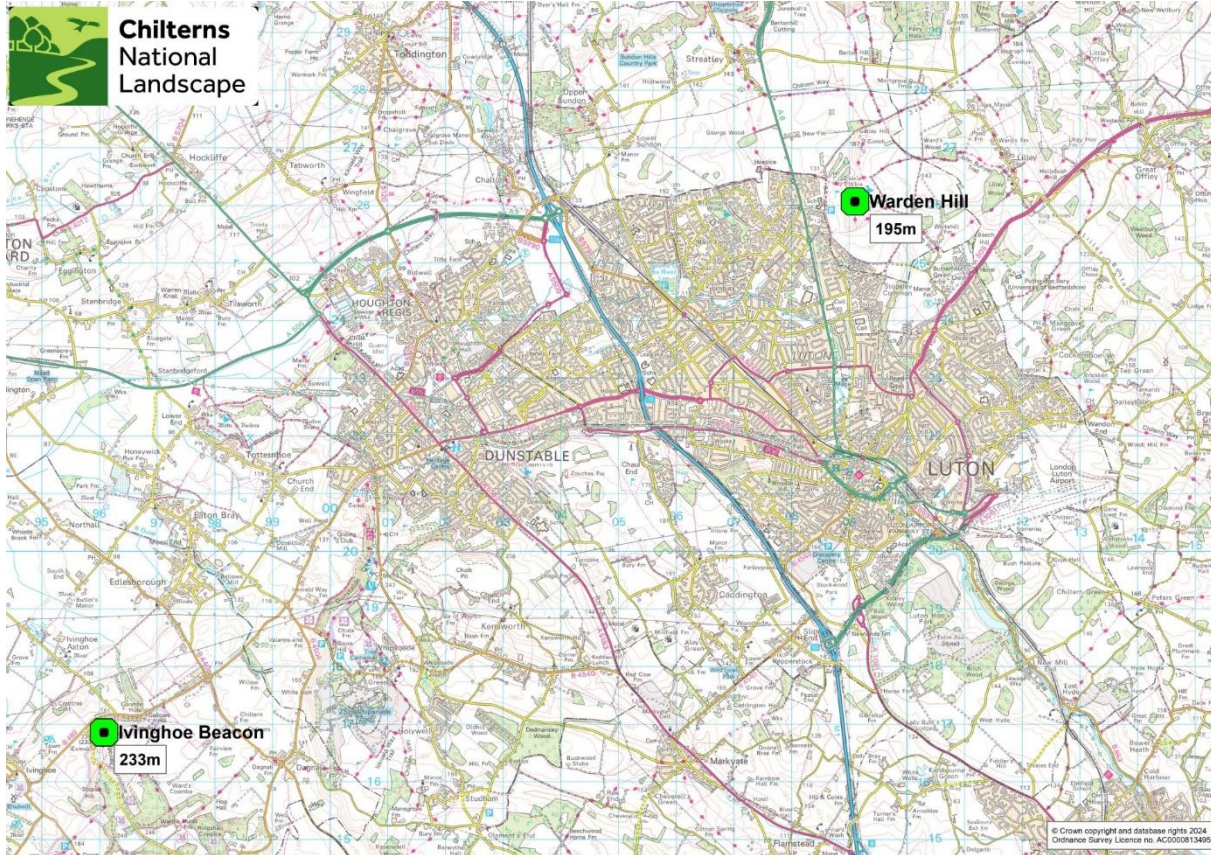






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Appendix – Plan showing two sites within the AONB at Ivinghoe Beacon and Warden Hill, already impacted by airport operations and overflying. Ivinghoe Beacon was visited by the ExA in May 2023.



Yours faithfully,

The Chilterns National Landscape  
The Lodge  
Station Road  
Chinnor  
Oxfordshire  
OX39 4HA

6<sup>th</sup> September 2024



Chilterns National Landscape  
The Lodge  
90, Station Road  
Chinnor  
OX39 4HA

 01844 355500  
 [Office@chilterns.org.uk](mailto:Office@chilterns.org.uk)  
 [www.chilterns.org.uk](http://www.chilterns.org.uk)  
   ChilternsNL  
 [chilterns-national-landscape](https://www.linkedin.com/company/chilterns-national-landscape)

