Appendix A – Local Authority and Associated Consultant Pen Portraits

Name	Examination Role	Job Title	Expertise
West Sussex County Council Officers			
Amy Harrower BSc, MSC, MIEMA CEnv	WSCC Core team	Gatwick NRP DCO Project Officer for WSCC	Chartered Environmental Consultant and Full Member of IEMA, with 15 years of experience in EIA and 10 years in NSIPs and the DCO process. Contracted by WSCC to provide specialist input into the NSIPs that WSCC are host authority for, including Gatwick NRP, Rampion 2 Offshore Wind Farm and A27 Arundel Bypass. Amy has responsibility for collating officer level responses to consultations undertaken by each Applicant and leading on engagement with them through the DCO process. Before her appointment to WSCC in 2020, Amy worked for an environmental consultancy specialising in EIA and onshore consenting for NSIPs.
Rupy Sandhu BSc (Hons), LLm, MSc	WSCC Core Team	Principal Planner, WSCC	Principal Planner with 15 years of experience in Planning Policy, having worked at WSCC since 2012. Rupy forms part of the Core Team, as well as specialising in minerals and waste planning matters related to this application.
Michael Elkington BA(Hons), DipTP, DipSM, MRTPI	WSCC Core Team	Head of Planning Services, WSCC	A Chartered Town Planner and Full Member of the Royal Town Planning Institute, with 35 years of experience in land-use planning, primarily in planning policy and development management. Mike has worked in local government at district and county level, joining West Sussex County Council in 2000. He has been the WSCC's head of service for planning since 2008 and sits on the Corporate Management Team. In relation to WSCC's role as a host authority for the Gatwick Northern Runway Project, Mike is the Senior Responsible Officer (SRO) for the County Council, which includes briefing senior members and officers, and recommending sign-off for key documents. He is also the SRO for WSCC in relation to the current tripartite legal agreement with Gatwick Airport Limited and Crawley Borough Council, which addresses the operation of the Airport in its current one-runway, two-terminal configuration.
Nicholas Scott	WSCC Core Team	Principal Rights of Way Officer, WSCC	Subject matter expert having worked in the field of Public Rights of Way for just under 20 years.

Name	Examination Role	Job Title	Expertise
Graham Roberts BSc (Hons), MSc, MCIEEM	WSCC Core Team	County Ecologist, Environment and Heritage Team, WSCC	County Ecologist and Full Member of the Chartered Institute of Ecology and Environmental Management, with 36 years' experience as a local government ecologist. Graham has held the post of County Ecologist at WSCC for the past 21 years.
Jordan Walker MArborA	WSCC Core Team	County Arboriculturist, Environment and Heritage Team, WSCC	Subject matter expert for arboriculture with thirteen years of industry experience, six of which relevant to planning and arboriculture. Jordan joined WSCC in 2022.
Carolyn Carr	WSCC Core Team	Economic Development Strategic Lead, WSCC	Subject matter expert on socio-economics including supply chain, employment and skills, and the visitor economy, and responsible for County Council Economy Plan with than 15 years' experience.
Barry Newell. RGN, DipHEP, DipN, PgD MH&SC, PgCert IPC, NEBOSH, Level 7 Health Protection.	WSCC Core Team		Head of Public Health EPRR & Health Protection Nurse. Over 40 years Nursing and 18 years Public Health/ Health Protection in NHS and Local Government.
James Mcgrath	WSCC Core Team	West Sussex Fire and Rescue Service (WSFRS), Station	James has 20 years experience with WSFRS. His current role is to understand organisational and operational risk to WSFRS. His previous role for WSFRS was a Gatwick Liaison Officer.

Name	Examination Role	Job Title	Expertise
		Manager - Risk & Improvement	
Steven Shaw BA (Hons) MSc MCIHT	WSCC Core Team	County Highways (Development Management) Team Manager, County Highways team, WSCC	Manager of the County Highways team at West Sussex County Council. 18 years of transport planning experience across various roles of development related transport planning and highway design, in both the public and private sector. Steven has represented WSCC at planning appeals and planning committees. Steven is the transport lead for WSCC reviewing the highways and transport related implications of the Gatwick Northern Runway proposals.
Crawley Borough Council Officers			
James Freeman	CBC Core team	Gatwick NRP DCO Consultant commissioned by CBC	Chartered Town Planner and full member of the Royal Town Planning Institute with over 35 years experience predominantly within the public sector. As a previous Head of Planning for a district in North Kent, he has led teams involved in Local Plan preparation and development management and has been involved in many large-scale projects. Whilst appointed by CBC to co-ordinate and support work in relation to their response to the DCO application, part of the role is funded through the Governments Innovation and Capacity Funding to support joint co-ordination of work across the ten Gatwick Local Authorities.
Jean McPherson, Bsc, Dip TP, MTRPI	CBC Core team	Group Manager – Gatwick Northern Runway DCO	Chartered Town Planner with over 25 years experience within the public sector, currently on secondment from her regular post as Group Manager of the Development Management team. With many years experience in both policy and development management disciplines within local government, Jean is tasked as a lead officer for CBC throughout the DCO examination. She has experience of delivery of a variety of large-scale transport infrastructure applications including the Three Bridges Depot/ Signal Centre, the

Name	Examination Role	Job Title	Expertise
			Boeing Hangar and has regularly dealt with Gatwick airport on a number of projects for at least 10 years.
Sallie Lappage BA, MA, MRTPI	CBC Core team		Chartered Town Planner with over 30 years' experience within the public sector. Sallie manages all the work of the Strategic Planning team which particularly focusses on the Local Plan. She has been the lead policy officer for CBC's engagement with Gatwick Airport Limited on the s106 legal agreement and other matters, and Chair of the Gatwick Authorities Gatwick Officer Group, since 2014.
Anthony Masson BSc, MA, MRTPI		CBC planner – Economic and Socio-Economic inputs	Chartered Town Planner with over 15 years planning policy experience within the public sector. Anthony leads on matters of economy, and has worked on airport related matters, including airport parking, the S106 legal agreement, and the Annual Monitoring Report since 2019. More recently, Anthony has worked on planning policy matters relating to the DCO.
Gill Narramore BSc, MSC, MCIEH	CBC Core Team	CBC Environmental Health	Qualified Environmental Health Officer with over 35 years' experience within the public sector working across all EH disciplines, including over 20 years as lead on air quality. Responsible for local air quality management for Crawley Borough Council and providing advice and consultation responses to the Council's Planning department on air quality impacts of major developments, including matters relating to Gatwick airport and the DCO.
Segun Oke MBA MSc CEng MICE		CBC - Civil engineer	Chartered civil engineer with over 25 years' experience in flood risk mitigation, river re-engineering and environmental management. Has led several flood mitigations and environmental improvement schemes from design to construction phase. He is presently Crawley borough councils civil and flood engineer overseeing the councils flood program and providing consultation responses to the planning department regarding the flood risk assessment of developments
Mid Sussex District Council Officers			
Alice Henstock	MSDC Core Team	Principal Planner	Principal Planner within Planning Policy Team at Mid Sussex District Council. A Member of the RTPI, with over 25 years' experience working the planning profession.

Name	Examination Role	Job Title	Expertise
			Lead team responsible for the preparation of Development Plan, responsibilities include preparation of evidence and giving evidence at local plan examinations. Lead officer at MSDC for matters relating to aviation, including Gatwick Airport, working closely with specialist officers across MSDC.
Kevin Toogood	MSDC – Legal	Assistant Director, Legal and Democratic Services	Assistant Director responsible for legal services and MSDC's statutory Monitoring Officer. Qualified solicitor with approx. 20 years experience primarily in Town & Country Planning but also local authority governance.
Adam Dracott	MSDC EHO - Noise	Team Leader	Qualified EHO with post graduate Diploma in Acoustics. 25 years experience in environmental health and 13 years as the team lead for environmental protection covering contaminated land, nuisance, air quality and industrial pollution control. Currently involved in working groups for aircraft noise monitoring around Gatwick.
Nicholas Bennett	MSDC EHO – Air Quality	Senior Environmental Health Officer	Qualified EHO, 16 years' experience, lead officer at MSDC for Air Quality. Member and active participant of the Sussex Air Quality Partnership.
Caroline Duffy	MSDC - Economy and Sustainability	Senior Economic Development Officer	Senior Economic Development Officer within Mid Sussex's Sustainable Economy Team with responsibility for leading the team to support local businesses, key sectors and attract inward investment. Member of the Institute of Economic Development. Previous private sector experience of over 20 years in consultancy, working with a variety of stakeholders including local authorities and developers.
Anthony Else	MSDC – Economy and Sustainability	Sustainability and Net Zero Coordination Officer	Sustainability advisor to the Council and responsible for development of the Council's net zero programme. Holds a degree in Geography and post-graduate degree in Environmental Policy. 4 years of public sector experience with Sussex Police and MSDC.
Horsham District Council Officers			
Julia Hayes MSc LRTPI	HDC Core team	Senior Planning Officer	Senior Planning Officer working for Horsham District Council on the Strategic Planning team and Member of the Royal Town Planning Institute. Key responsibility is preparing policies and evidence base documentation for the Local Plan, particularly those relating to infrastructure delivery. Experience working with infrastructure partners, both within the Council and externally, to enable development across the District.

Name	Examination Role	Job Title	Expertise
Thais Covre Delboni	HDC EHO – Air Quality	Environmental Protection Officer (Air Quality)	Environmental Engineer with over two years' experience working for Horsham District Council with Air Quality and environmental control. Provide expert advice on relevant Council policies and decisions including planning developments that HDC is the host authority for, Gatwick NPR and Rampion 2 Offshore Wind Farm DCOs.
External Consultants			
David Monk,	HDC Noise Consultant	Chartered Environmental Health Practitioner	A Chartered Environmental Health Practitioner, Corporate Member of the Chartered Institute of Environmental Health and an Associate Member of the Institute of Acoustics. His qualifications include a Diploma of the Institute of Environmental Health, Masters Class Degree and a post graduate Diploma of the Institute of Acoustics. He has over 35 years experience in pollution and noise control within local authorities dealing with a variety of sources including waste and minerals abstraction sites, industrial, commercial, on airport and aviation derived noise and pollution as well as commenting on development proposals. In fulfilling his role he has provided evidence to court and planning inquiries as well as negotiating the section 106 agreement with Gatwick in relation to the Sustainable Development Strategy in the early 2,000s. Contracted to Horsham District Council to provide specialist advice in connection with aviation noise impacts on the Local Plan, the Development Consent Order for the Northern Runway and the airspace change proposals.
Louise Congdon	Managing Partner York Aviation LLP	Advisor to Host Authorities on Need, Capacity, Demand Forecasts and Socio-economics	40 years experience in airport development. Given evidence on need, capacity, demand forecasts and socio-economics at planning inquiries into Manchester Runway 2, Liverpool Airport, Doncaster Sheffield Airport, Stansted Generation 1, Stansted 35+ mppa, London City Airport. London Luton Airport DCO.
James Brass	Partner York Aviation LLP	Advisor to Host Authorities on	25 years experience in economic impact assessment and demand forecasting for airports. Given evidence on demand forecasts and socio-economics at the planning inquiry into Bristol Airport.

Name	Examination Role	Job Title	Expertise
		Socio-economics	
Matt Jones	Partner York Aviation LLP	Advisor to Host Authorities on Airport Planning	15-years consultancy experience on the design and growth of airports.
Dr David Deakin, PhD, BSc (Hons), MIAQM, MIEnvSc	AECOM	Air Quality Reviewer	David is the Highways air quality leader for AECOM in the UK and Ireland with over 20 years of experience. He is responsible for managing the delivery and technical quality of highways air quality and road user carbon commissions for both assessment and appraisal. David has significant experience in public and private sector projects and has previously undertaken Airport air quality review work. Through his project experience to date, David has also fulfilled peer reviewing, research, advisory and expert witness roles (planning inquiry, DCO and judicial review).
Ian Davies BA (Hons), CEnv, MIEMA	AECOM	Climate and GHG Lead Reviewer	Ian has over 20 years experience specialising in greenhouse gas (GHG) and climate change resilience assessments as well as strategy development and reporting for major, clients and projects across the UK and abroad. He has also led climate impact and mitigation strategy assessments for inclusion in EIA and ESIA on a range of high-profile climate impact assessments including transport, masterplanning, urban regeneration and other large-scale infrastructure projects. Ian is fully conversant on UK legislation and policy with regard to climate change including greenhouse gas emissions, transitioning towards net zero emissions targets and climate change resilience assessment. Ian's experience in the aviation sector includes the provision of climate assessment inputs on various airport projects including Heathrow, Luton, Dublin and Libreville. He is currently climate lead on the Luton Airport DCO application where is has provided expert advice on climate during Examination Hearings with the Planning Inspectorate.
Andy Steeds,	AECOM	GHG Reviewer	Andrew has experience in leading infrastructure and building whole lifecycle carbon footprint assessments and decarbonisation strategies for numerous clients – in the private and public sectors.

Name	Examination Role	Job Title	Expertise
MSc, BSc, AMIEnSc			Andrew is also responsible for the U.K. AECOM coordination and management of whole lifecycle carbon assessments and climate change impact assessments for Environmental Impact Statements for many Development Consent Order (DCO) projects.
Lauren Harrington, BSc (Hons), BA	AECOM	Climate Reviewer	Lauren is a Principal Climate Consultant with over 6 years' experience in climate change risk, adaptation, and resilience. She has experience successfully undertaking climate scenario analysis, climate risk and vulnerability assessments and adaptation planning for public and private clients, assessing and mitigating the risk profile of infrastructure projects and corporate organisations across a variety of sectors. Most recently, Lauren has worked with public infrastructure clients to develop climate risk and adaptation guidelines.
Edward Robinson, Dip, BSc (Hons), MIOA	AECOM	Noise Reviewer	Edward Robinson has been responsible for a wide variety of environmental acoustic projects. Edward has a strong background in aviation acoustics and is an expert at noise modelling aircraft noise using the Integrated Noise Model (INM) and the Aviation Environmental Design Tool (AEDT), which is the current industry standard software for modelling aircraft noise. Edward has represented aviation projects at public consultation events and has been an expert witness at DCO examination.
Dave Widger MSc, BSc, IED Board Member, RTPI Associate	AECOM	Socio-economics Reviewer	Dave is Head of Economic Development in AECOM's Economic Development team. He has over 20 years of experience of working in Economic Development. Dave has worked on several major airport projects (Heathrow, Luton, Dublin, Gabon). He led the economics work for Heathrow Hub's independent bid for expanding Heathrow airport, two economic studies for the proposed Dublin Airport expansion project, and the socio-economic chapter of the Environmental Statement for the Luton Airport DCO scheme.

Appendix B: Adjacent Development Sites

Crawley Local Plan Review (5,330 dwellings)

- Forge Wood Neighbourhood (Policy H2)
- Key Housing Sites (Policy H2)
- Indicative Key Housing Site (Policy H2)
- Biodiversity and Heritage Enhancements (Policy H2)
- Housing and Community Facilities (Policy H2)
- Housing and Open Space (Policy H2)
- Housing for Older People and those with Disabilities (Policy H2)
- Town Centre Key Opportunity Site (Policy TC3 and H2)

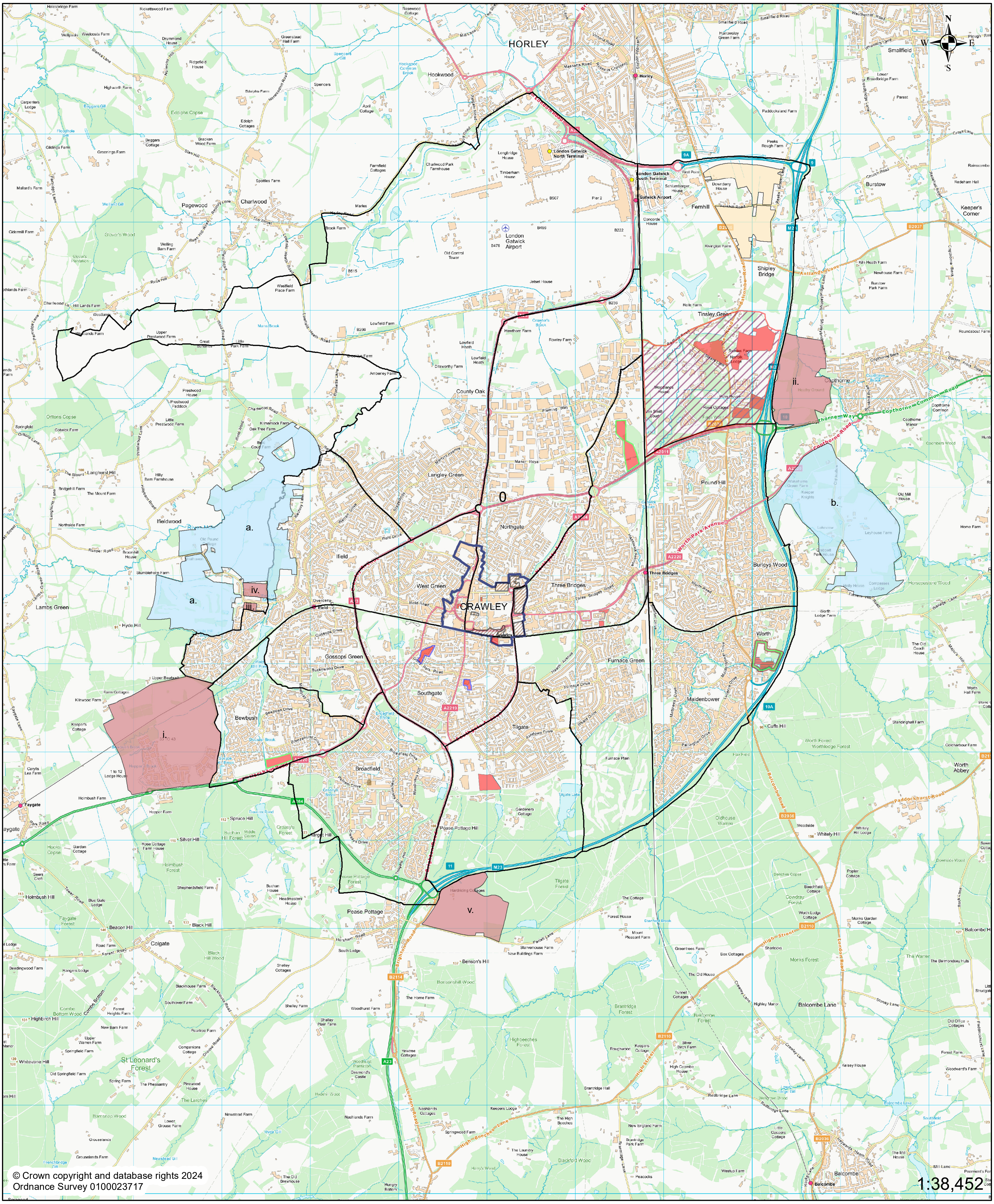
- Gatwick Green Strategic Employment Location
- Town Centre Boundary

Promoted Sites outside Crawley

- a. West of Ifield (3,000 dwellings)
- b. Crabbet Park (2,000 dwellings)

Committed/Completed Sites outside Crawley

- i. Kilnwood Vale (2,750 dwellings)
- ii. West of Copthorne (500 dwellings)
- iii. South of Rusper Road (36 dwellings)
- iv. Rusper Road (95 dwellings)
- v. East of Brighton Road (600 dwellings)



1:38,452

Appendix C - Planning History

Gatwick Airport (Within the DCO Limits, West Sussex land only) – Years 1979 -2023

The table includes only applications for planning permission granted within the DCO Limits, all other consents and permitted development consultations have been omitted. Those applications which have ongoing conditions are listed back to 2005 comprehensively, prior to this date only selected major developments where conditions remain in perpetuity have been identified are listed. **Any related Legal Agreements are summarised in BOLD**

Year	Location	Proposal	Decision	Notes
2023/2022/2021				
No applicable records found				
2020/2019/2018				
CR/2020/0707/NCC	HAMPTON BY HILTON, LONGBRIDGE HOUSE NORTH TERMINAL, LONDON GATWICK AIRPORT	REMOVAL OF CONDITION 3 (GARAGES & PARKING) PURSUANT TO CR/2010/0692/FUL	PERMIT 26.04.2021 (Section 73 Application)	Travel plan, bird hazard plan, Flood risk contingency plan.
CR/2020/0575/NCC	HILTON, HILTON (SOUTH TERMINAL), LONDON GATWICK AIRPORT, EASTWAY	VARIATION/REMOVAL OF CONDITION 3 (APPROVED PLANS) AND CONDITION 9 (AMENDED BUILDING HEIGHT) PURSUANT TO CR/2018/0337/OUT FOR THE ERECTION OF MULTI-STOREY HOTEL CAR PARK	21.04.2021. (Section 73 Application)	**SUBJECT TO S106 (DEED OF VARIATION)** Car park use restriction, Roof use and height restriction, Bird hazard plan, Lighting, Travel plan, Sustainability statement, Flood mitigation,
CR/2019/0885/ARM	HILTON (SOUTH TERMINAL), LONDON GATWICK AIRPORT, WESTWAY	RESERVED MATTERS FOR LANDSCAPING PURSUANT TO CR/2018/0337/OUT - FOR ERECTION OF MULTI-STOREY HOTEL CAR PARK	APPROVED 05.03.2020	5 year landscape maintenance (still valid).

CR/2019/0802/FUL	BLOC HOTEL, SOUTH TERMINAL, PERIMETER ROAD EAST, GATWICK,	ERECTION OF EXTENSION TO EXISTING HOTEL TO PROVIDE AN ADDITIONAL NET 231 BEDROOMS AND ASSOCIATED BACK OF HOUSE AND SUPPORT ACCOMMODATION	PERMIT 11.02.2020	Bird hazard management plan, Removal of pd rights for pv panels / telecoms / adverts on roof, Lighting scheme, Maintained as per flood risk report / Suds designs, Travel plan
CR/2019/0842/NCC	HILTON, (SOUTH TERMINAL), LONDON GATWICK AIRPORT, WESTWAY	VARIATION OF CONDITION 2 (APPROVED PLANS) AND CONDITION 5 (TREE REPLACEMENT) PURSUANT TO CR/2018/0070/FUL	PERMIT 24.01.2020	Tree replacement with 5 year landscaping maintenance
CR/2018/0642/NCC	FIRST POINT, BUCKINGHAM GATE, GATWICK	VARIATION OF CONDITION 2 (OCCUPATION OF BUILDING) PURSUANT TO CR/1997/0311/FUL TO ALLOW THE TEMPORARY OCCUPATION OF FIRST & SECOND FLOORS BY NON AIRPORT RELATED USERS	PERMIT 01.02.2019	Controls – temporary relaxation of use for non-airport related occupiers. Temporary permission until 30.06.2026
CR/2018/0522/FUL	PREMIER INN, LONGBRIDGE WAY, GATWICK	INSTALLATION OF WATER STORAGE TANKS AND BOOSTER PUMP AND 2.5M HIGH TIMBER FENCE.	PERMIT 23.11.2018	Water pumps implemented and maintained
CR/2018/0337/OUT	HILTON (SOUTH TERMINAL) LONDON GATWICK AIRPORT, EASTWAY, GATWICK AIRPORT	ERECTION OF MULTI-STOREY HOTEL CAR PARK	PERMIT Outline Planning Application – 21.11.2019	**S106 AGREEMENT (tree mitigation** Bird Hazard Plan, Lighting, Building height, Flood mitigation, Travel Plan, Cycle parking,

CR/2018/0070/FUL	HILTON (SOUTH TERMINAL), LONDON GATWICK AIRPORT, WESTWAY	EXTENSIONS WITHIN EXISTING SOUTHERN COURTYARD TO PROVIDE ENLARGED RESTAURANT SEATING AREA, ADDITIONAL RESTAURANT /, MEETING ROOMS	PERMIT 14.05.2018	Landscaping with tree replacements and maintenance 5 years
2017/2016/2015				
CR/2017/0956/NCC	LAND NORTH OF RING ROAD NORTH, GATWICK **(KFC Drive thru)**	VARIATION OF CONDITION 2 (APPROVED PLANS) TO AMEND HEIGHT AND SIZE OF THE RESTAURANT BUILDING, ALTERATIONS TO PARKING AND LANDSCAPING - PURSUANT TO CR/2015/0052/FUL	PERMIT 26.04.2018	Landscaping (5 years maintenance), Approval of lighting scheme, Roof netting details agreed and maintained, bird hazard management plan.
CR/2017/0116/FUL	GATWICK AIRPORT, LAND WEST OF UNIFORM TAXIWAY, NORTH WEST DEVELOPMENT ZONE (**Now Boeing Hangar)**	CONSTRUCTION OF HANGAR AND OTHER ASSOCIATED WORKS INCLUDING AIRCRAFT APRON, CONNECTION TO TAXIWAY UNIFORM, VEHICLE PARKING AND EXTERNAL PARTS STORAGE AREA, FIRE SUPPRESSION PLANT, DIVERSION OF LARKINS ROAD, FENCING, DRAINAGE, LIGHTING, LANDSCAPING AND ECOLOGICAL MITIGATION AND ENHANCEMENT WORKS	PERMIT 19.10.2017	Drainage, Radar mitigation scheme Lighting, Bird hazard management plan, Some pd rights removed, Operating restrictions for aircraft towing, Travel plan.
CR/2015/0840/FUL	MCDONALDS DRIVE-THRU RESTAURANT, RING ROAD NORTH, GATWICK	RECONFIGURATION OF CAR PARK AND DRIVE THRU LANE TO PROVIDE A SIDE-BY-SIDE ORDER POINT AND ASSOCIATED WORKS	PERMIT 05.02.2016	Bird hazard management plan
CR/2015/0348/NCC	FIRST POINT, BUCKINGHAM GATE, GATWICK	VARIATION OF CONDITION 2 (OCCUPATION OF BUILDING) PURSUANT TO CR/1997/0311/FUL TO ALLOW A TEMPORARY VARIATION TO ALLOW	PERMIT 06.08.2015	Relates to first floor and part 2nd floor. Temporary permission until 06.08.2025

		OCCUPATION BY TWO NON-AIRPORT RELATED USERS		
CR/2015/0052/FUL	LAND NORTH OF RING ROAD NORTH, GATWICK SOUTH TERMINAL,	ERECTION OF A RESTAURANT AND DRIVE THRU FACILITY WITHIN USE CLASSES A3 AND A5	PERMIT	Landscaping scheme, Permanent lighting scheme, Netting details for roof and retention, Bird hazard management plan.
2014/2013/2012				
CR/2014/0250/FUL	SERVICE STATION, LONGBRIDGE WAY, GATWICK	INSTALLATION OF 3 X LPG ABOVE GROUND STORAGE TANKS…… AND ANCILLARY EXTERNAL WORKS	PERMIT	Details of secondary containment of LPG compound agreed, implemented and retained.
CR/2013/0429/NCC	FIRST POINT, BUCKINGHAM GATE, GATWICK,	NON COMPLIANCE OF CONDITION 2 (OCCUPANCY) PURSUANT TO CR/1997/0311/FUL FOR THE GROUND FLOOR, FIRST FLOOR, PART SECOND AND PART THIRD FLOOR	PERMIT 27.11.2023 (Section 73 application)	Relates to first floor and part 2nd floor. Temporary permission until 06.08.2025
CR/2012/0273/FUL	NORFOLK HOUSE, PERIMETER ROAD EAST, GATWICK, **(Now Bloc Hotel)**	CHANGE OF USE FROM OFFICE TO HOTEL, ALTERATIONS TO THE EXTERNAL APPEARANCE OF THE BUILDING AND ROOF PLANT	PERMIT 09.07.2012	External lighting, Bird Hazard Management Plan, Travel Plan**.**
CR/2012/0064/FUL	SOUTH TERMINAL, GATWICK AIRPORT, PIER 1, PERIMETER ROAD EAST, GATWICK,	REDEVELOPMENT OF PIER 1 AND UPGRADE AND EXTENSION SOUTH TERMINAL DEPARTURES BAGGAGE SYSTEM INCLUDING RECONFIGURATION OF APRONS, TAXIWAYS	PERMIT 04.05.2012	Permanent Lighting
2011/2010/2009				
CR/2011/0620/FUL	LAND ADJ TO GATWICK AIRPORT, WEST OF BALCOMBE ROAD	CONSTRUCTION OF POLLUTION CONTROL LAGOON, UNDERGROUND PIPELINE	PERMIT 23.01.2012	Ongoing landscape and ecological mitigation , netting details,

		CONNECTION, PUMP HOUSING KIOSK, FENCING, ACCESS, ASSOCIATED LANDSCAPING, FOOTPATH DIVERSIONS, ECOLOGICAL MITIGATION AND ENHANCEMENT WORKS		control on overall level in lagoon.
CR/2011/0224/OUT	SOFITEL LONDON GATWICK HOTEL, NORTHWAY, GATWICK,	OUTLINE APPLICATION FOR THE ERECTION OF A 3 DECK CAR PARK	PERMIT 20.06.2011	Travel plan
CR/2011/0014/FUL	SOFITEL LONDON GATWICK HOTEL, NORTHWAY, GATWICK,	ERECTION OF 630 BEDROOM 12 STOREY BUDGET HOTEL TOGETHER WITH PENTHOUSE OFFICE AND 2 UPPER STOREY DECKED CAR PARKING.	PERMIT 08.03.2011	Car parking, Company transport plan,, Restriction on areas surrounding to be retained as flood attenuation , Bird hazard plan
CR/2010/0396/NCC	RUNWAY SHOULDER AREAS, ADJ TO MAIN RUNWAY, GATWICK AIRPORT	REMOVAL OF CONDITION 1 (USE AS DIVERSION ONLY) OF CR/2008/0465/FUL FOR WORKS TO RUNWAY SHOULDERS TO ENABLE A380 DIVERSIONARY OPERATIONS & ASSOCIATED FLOOD ALLEVIATION WORKS	PERMIT	Implementation and operation of the airport vortex damage policy
CR/2010/0343/NCC	JUBILEE HOUSE, NORTH TERMINAL, GATWICK AIRPORT	NON COMPLIANCE WITH CONDITION 3 OF CR/376/1990 [FOR RENTAL OF OFFICE SPACE TO NON AIRPORT RELATED BUSINESS	PERMIT	Airport user restriction relaxed until 27.09.2017
CR/2009/0498/NCC	CONCORDE HOUSE, SOUTH TERMINAL, LONDON GATWICK AIRPORT	VARIATION OF CONDITION TO ALLOW THE OFFICE SPACE TO BE USED FOR NON AIRPORT RELATED PURPOSE	PERMIT 23.12.2009 (Section 73 application)	Airport user restriction relaxed until 18.12.2016
CR/2009/0327/FUL	CAR PARK, ADJ NORTH TERMINAL, COACH ROAD, LANGLEY GREEN	ERECTION OF MULTI STOREY CAR PARK	PERMIT 30.11.2009	**S106 AGREEMENT WITH 0326 for surface access provision including continuation of car park**

	(Now Multi-Storey Car Park 6)			**levy, lump sum payment and further lump sum payment when APT exceed 36 and 38 mppa.** Lighting
CR/2009/0326/FUL	NORTH TERMINAL, LONDON GATWICK AIRPORT DEPARTURES ROAD, LANGLEY GREEN	ERECTION OF SOUTHERN AND EASTERN EXTENSIONS TO NORTH TERMINAL	PERMIT 30.11.2009	**S106 AGREEMENT WITH 0327 (see above details),** No reduction to earth bunds which run adjacent to northern and western boundaries without prior written consent.
CR/2009/0003/OUT	SOFITEL LONDON GATWICK HOTEL NORTHWAY, GATWICK AIRPORT	OUTLINE APPLICATION FOR ERECTION OF 630 BEDROOM 12 STOREY HOTEL TOGETHER WITH ALTERATIONS TO ACCESS AND 2 STOREY DECKED CAR PARKING	PERMIT 11.03.2009	Cycle and car parking provided and retained, Travel Plan, flood compensation storage areas retained.
2008/2007/2006				
CR/2008/0665/FUL	GATWICK AIRPORT NORTH WEST ZONE, LANGLEY GREEN	CONSTRUCTION OF 6 NEW REMOTE AIRCRAFT STANDS & ASSOCIATED INFRASTRUCTURE COMPRISING AIRCRAFT STAND AREA & ASSOCIATED TAXI LANE, EARTH SCREENING BUND, SURFACE WATER ATTENUATION PONDS & OTHER ASSOCIATED INFRASTRUCTURE	PERMIT 27.01.2009	Scheme for compensatory habitat creation and management thereafter,
CR/2008/0465/FUL	RUNWAY SHOULDER AREAS, ADJ TO MAIN RUNWAY, GATWICK AIRPORT	RETROSPECTIVE APPLICATION FOR WORKS TO RUNWAY SHOULDERS TO ENABLE A380 DIVERSIONARY OPERATIONS & ASSOCIATED FLOOD ALLEVIATION WORKS	PERMIT 16.10.2008	A380 airbus only when diverted* (*note condition now varied 2010/0396)
2005/2004/2003				

No applicable records found				
2002 /2001/2000				
CR/2002/0865/FUL	TRAVEL INN, LONGBRIDGE ROAD, GATWICK AIRPORT	ERECTION OF 4 STOREY SIDE EXTENSION, SINGLE STOREY REAR EXTENSIONS AND SINGLE STOREY FRONT EXTENSION	PERMIT	Parking provision and retention, Use only in connection with hotel
CR/2001/0435/FUL	ENVIRONMENTAL BUND, NORTH WEST BOUNDARY, GATWICK AIRPORT	ENHANCEMENT OF EXISTING ENVIRONMENTAL BUND ALONG NORTH WEST BOUNDARY OF AIRPORT	APPROVE	Landscape management measures to replace habitats lost*
CR/2001/0123/FUL	THE NORTH WEST AREA, GATWICK AIRPORT	PROVISION OF PUBLIC LONG TERM BLOCK PARKING FACILITY (2000 SPACE) - SCHEME B	PERMIT	External lighting, Limit on area of parking
1999/1998/1997				
CR/1999/0360/FUL	NORTH TERMINAL, LONDON GATWICK AIRPORT	ERECTION OF EXTENSION TO NORTH TERMINAL INTERNATIONAL DEPARTURES LOUNGE (IDL)	APPROVE	Extension only to be operated as 'airside' facility
CR/1999/0243/COU	JETSET HOUSE AND COMPOUND ADJACENT TO PERIMETER ROAD SOUTH AND JETSET HOUSE, CHURCH ROAD	CHANGE OF USE FROM B1 /B8 TO MIXED USE OF OFFICE WAREHOUSE AND TRAINING CENTRE FOR FLIGHT CREW. CAR PARKING IN THE PRESENT AIRPORT OPERATIONAL LAND TO TAKE ACCOUNT OF THE ADDITIONAL PARKING CREATED BY PART USE OF JETSET HOUSE FOR TRAINING OF FLIGHT CREWS.	APPROVE	Parking provision retained, Car park 70 vehicles only.
CR/1998/0462/FUL	INTERNATIONAL DEPARTURE LOUNGE, SOUTH TERMINAL, GATWICK AIRPORT	ERECTION OF EXTENSION TO INTERNATIONAL DEPARTURES LOUNGE	APPROVE	Extension only to be operated as 'airside facility'

CR/1998/0245/FUL	SITE 4, MAINTENANCE AREA 1, SOUTH PERIMETER ROAD, GATWICK AIRPORT	ERECTION OF MAINTENANCE HANGAR AND TECHNICAL SUPPORT OFFICES WITH ASSOCIATED CAR PARKING	APPROVE	Parking as laid out retained, No extension or alterations without planning permission.
CR/1997/0557/FUL	TRAVEL INN, NORTH TERMINAL, LONGBRIDGE WAY, GATWICK AIRPORT	ERECTION OF FOUR STOREY EXTENSION TO EXISTING HOTEL TO PROVIDE AN ADDITIONAL 100 BEDROOMS	APPROVE 19.01.1998	**S106 AGREEMENT: to operate a courtesy bus service for customers**, No external lighting and floodlighting, Vehicular access to Charlwood Road for emergency purposes only**.**
CR/1997/0508/RUP	NORTH WEST ZONE, GATWICK AIRPORT	DIVERSION OF RIVER MOLE	APPROVE	No other development on the site
CR/1997/0311/FUL	COMPUTER CENTRE, BUCKINGHAM GATE, LONDON GATWICK AIRPORT – **Site known as FIRST POINT**	DEMOLITION OF BUILDING, AND ERECTION OF OFFICE BUILDING WITH ASSOCIATED CAR PARKING AND LANDSCAPING	APPROVE	Parking provision and thereafter retained
CR/1997/0138/FUL	CAR PARK Z, SOUTHERN PERIMETER AREA, GATWICK AIRPORT	CONSTRUCTION OF NEW STAFF CAR PARK	APPROVE	External lighting, vehicular access to Charlwood Road emergency purposes only
1996 /1995/1994				
No applicable records found				
1993/1992/1991				
CR/1993/0572/FUL	SIDE ADJ LONGBRIDGE WAY/AIRPORT WAY, GATWICK AIRPORT - **Now Texaco Garage**	ERECTION OF NEW PETROL FILLING STATION.	APPROVE	Means of access to site Longbridge Road only, Parking provided and retained, Forecourt kept clear.

CR/1993/0418/FUL	ADJ LONGBRIDGE ROAD, GATWICK AIRPORT	ERECTION OF 120 BEDROOM HOTEL AND CAR PARKING	APPROVE	Parking provided and retained
CR/1991/0239/FUL	EAST OF RAILWAY, GATWICK AIRPORT	CONSTRUCTION OF POLLUTION CONTROL POND TO HOLD 250,000 CUBIC METRES OF WATER CONSTRUCTION COMPRESSOR HOUSING AND ASSOCIATED PUMPING MAIN	PERMIT	Landscaping scheme implemented and maintained, **S106 AGREEMENT stipulating that (i) the land shall not be treated as operational land and (ii) no future development without express planning permission**.
CR/009/1991	POVEY CROSS FUEL FARM, GATWICK AIRPORT	ERECTION OF OFFICE AND WORKSHOP BUILDINGS ….	PERMIT	Occupation only by airport related occupiers
1990/1989/1988				
CR/650/1990	NORTH TERMINAL, SOUTH OF MULTI-STOREY CAR PARK, GATWICK AIRPORT	ERECTION OF OFFICE BLOCK	CONSENT	Occupation only by airport related occupier
CR/376/1990	ADJACENT TO NORTH TERMINAL AT GATWICK AIRPORT.	CONSTRUCTION OF OFFICE BLOCK.	CONSENT	Occupier airport related user only
CR/372/1988	WEST APRON, NORTH TERMINAL, GATWICK AIRPORT	APRON AREAS TO FORM AIRCRAFT STAND AND MANOEUVRING AREAS TO PIER 5 AND NORTH WEST APRON.	CONSENT	No auxiliary power units to be operated between hours of 2300 and 0700 except in an emergency, Except in emergency no 'start and stop' engine testing between 2300 and 0700 Except in emergencies use of aircraft of three NW stands limited to tow-on / tow off during 2330 - 0630

1987/1986/1985				
CR/474/1986	PERIMETER ROAD, GATWICK AIRPORT	ERECTION OF NEW FLIGHT CATERING UNIT	CONSENT	Parking spaces, Storage of materials, Airport related user.
1984/1983/1982				
CR/014/1983	NORTH TERMINAL, GATWICK AIRPORT	LAYOUT AND PHASING (RESERVED MATTERS FOR CR/127/1979)	CONSENT	Use of Povey Cross Road shall not exceed terms of Agreement.
1981/1980/1979				
CR/591/1980	SITE D, LAKER AIRWAYS SITE ON THE WESTERN BOUNDARY OF SOUTH PERIMETER ROAD, GATWICK AIRPORT	ERECTION OF ENGINEERING WORKS FOR AIRCRAFT MAINTENANCE, MOTOR VEHICLE WORKS FOR ALL LAKER AIRWAYS GROUP VEHICLES AND ASSOCIATED PARKING	CONSENT	Floorspace restriction, Building only used for repair and maintenance of aircraft.
CR/469/1980	GATWICK AIRPORT, OLD BRIGHTON ROAD, TIMBERHAM BRIDGE, GATWICK AIRPORT	ERECTION OF AIRPORT FUEL STORAGE AND PIPE LINE RECEIPT AND DELIVERY FACILITIES (PHASE 1) …	CONSENT	Access only from airport internal road system and at no time from Old Brighton Road.
CR/293/1980	SOUTH PERIMETER ROAD, GATWICK AIRPORT.	DISMANTLING OF EXISTING HANGAR AND CONSTRUCTION OF A NEW HANGAR.	CONSENT	Hangar to be used for repair and maintenance of aircraft only
CR/507/1979	LAND ADJOINING EASTERN BOUNDARY OF BP/SHELL FUEL TERMINAL, GATWICK AIRPORT	ERECTION OF VERTICAL TANK FOR STORAGE OF AVIATION FUEL (981,000 LITRES) TOGETHER WITH BUND WALLS AND ANCILLARY WORK	PERMIT	Fuel tank painted and maintained in agreed colour
CR/127/1979	**GATWICK AIRPORT, CRAWLEY**	**OUTLINE APPLICATION FOR AIRPORT PASSENGER TERMINAL COMPLEX AND ASSOCIATED ACCESS**	**CONSENT**	**LEGAL AGREEMENT (See 125/1979 below)** No auxiliary power units operated between 2300 and 0700 except in emergency**,**

				No 'stop / start' engine testing for maintenance on stands or taxiways between 2300 and 0700 except in emergency, Any offices in second terminal occupied only by airlines or organisations providing facilities at the airport.
CR/125/1979	**GATWICK AIRPORT, CRAWLEY**	**WIDENING OF EXISTING MAIN TAXIWAY, CONSTRUCTION OF TAXIWAY ENTRANCES AND EXITS, INSTALLATION OF RUNWAY LIGHTING AND REPOSITIONING OF CERTAIN FACILITIES IN ORDER TO PROVIDE EMERGENCY RUNWAY**	**CONSENT**	**LEGAL AGREEMENT (Also ties 127/1979 above) No second operational runway, no use of emergency runway as operational runway, emergency runway only used when main runway temporarily non operations. BAA record all movements on emergency runway. 40 year agreement expired 13/08/2019** Emergency runway only to be used when main runway temporarily non-operational, Earth bank at western end of runway to be retained no changes to it without permission,

				BAA to keep record of all aircraft movements on the emergency runway.

Appendix D – Planning History

Applicant's Future Baseline Works (as listed in 4.4 of the ES (APP-029)).

Planning Reference	Development description	Location	Decision / Date	Controls (if any) Notes
AIRFIELD PROJECTS				
Pier 6 Extension and Stand reconfiguration				
CR/2023/0737/CON	PIER 6, NORTH TERMINAL, GATWICK AIRPORT	RESUBMISSION FROM GATWICK AIRPORT LTD IN RESPECT OF CONSULTATION UNDER PART 8 OF SCHEDULE 2 OF THE TOWN AND COUNTRY PLANNING (GENERAL PERMITTED DEVELOPMENT) (ENGLAND) ORDER 2015 FOR PROPOSED WESTERN EXTENSION TO PIER 6, NORTH TERMINAL	NO OBJECTION 16/01/2024	
CR/2023/0562/CON	PIER 6, NORTH TERMINAL, GATWICK AIRPORT	CONSULTATION FROM GATWICK AIRPORT LTD IN RESPECT OF DEVELOPMENT PERMITTED BY CLASS F, PART 8 OF SCHEDULE 2 OF THE TOWN AND COUNTRY PLANNING (GENERAL PERMITTED DEVELOPMENT) (ENGLAND) ORDER 2015 FOR PROPOSED WESTERN EXTENSION TO PIER 6, NORTHERN TERMINAL	NO OBJECTION – 01.12.2023	Applicants now wish to proceed with revised design (see CR/2023/0737/CON).
CR/2019/0427/CON	PIER 6 WESTERN EXTENSION, NORTH TERMINAL,	CONSULTATION FROM GATWICK AIRPORT LIMITED FOR PIER 6 WESTERN EXTENSION	NO OBJECTION	Site preparation works undertaken – proposal not being implemented.

	GATWICK		– 07.08.2019	
CR/2018/0481/CON	QUEBEC TAXIWAY, NORTH TERMINAL, GATWICK	CONSULTATION FROM GATWICK AIRPORT LIMITED FOR WORKS TO REALIGN PART OF QUEBEC TAXIWAY	NO OBJECTION – 27.07.2018	**Implemented.**
CR/2018/0373/CON	GATWICK AIRPORT LTD, PIER 5, FURLONG WAY, GATWICK,	CONSULTATION FROM GATWICK AIRPORT FOR THE RECONFIGURATION OF THREE STANDS ON PIER 5, NORTH TERMINAL TO PROVIDE A CODE F STAND	NO OBJECTION – 27.07.2018	**Implemented**
Rapid Exit Taxiway				
CR/2019/0448/CON	GATWICK AIRPORT, NORTH OF MAIN RUNWAY	CONSULTATION FROM GATWICK AIRPORT LIMITED FOR A RAPID EXIT TAXIWAY (RET) TO RUNWAY 26L	NO OBJECTION SUBJECT TO:- 30.08.2019	Response to consultation included reservations raised by the Planning Committee and the highlighting the recent Climate Emergency resolution declaration.
CAR PARKING				
CR/2020/0575/NCC	HILTON, HILTON (SOUTH TERMINAL), LONDON GATWICK AIRPORT, EASTWAY,	VARIATION/REMOVAL OF CONDITION 3 (APPROVED PLANS) AND CONDITION 9 (AMENDED BUILDING HEIGHT) PURSUANT TO CR/2018/0337/OUT FOR THE ERECTION OF MULTI-STOREY HOTEL CAR PARK	Application under Section 73 of Town and Country Planning Act – PERMITTED 21.04.2021.	Subject to S106 (deed of variation) and controls materials, car park use restriction and roof use restriction, construction management plan, bird hazard plan, lighting roof height, travel plan, cycle storage, sustainability statement, landscaping and tree protection. Implementation by 5th March 2022.
CR/2019/0885/ARM	HILTON (SOUTH TERMINAL), LONDON GATWICK AIRPORT,	APPROVAL OF RESERVED MATTERS FOR LANDSCAPING PURSUANT TO CR/2018/0337/OUT - OUTLINE	APPROVED – 05.03.2020	Controls tree protection, as per agreed landscaping scheme and 5 year landscape maintenance.

	WESTWAY, POUND HILL	APPLICATION FOR ERECTION OF MULTI-STOREY HOTEL CAR PARK		
CR/2018/0337/OUT	HILTON (SOUTH TERMINAL) LONDON GATWICK AIRPORT, EASTWAY, GATWICK AIRPORT	ERECTION OF MULTI-STOREY HOTEL CAR PARK	Outline Planning Application – PERMITTED 21.11.2019	Subject to S106 (to secure tree mitigation contribution). Controls materials, construction management plan, bird hazard plan, Iighting, building height, flood mitigation, travel plan, cycle parking, sustainability measures
CR/2022/0707/CON	STAFF CAR PARK, TUNNEL ROAD, GATWICK AIRPORT	CONSULTATION FROM GATWICK AIRPORT LIMITED IN RESPECT OF DEVELOPMENT PERMITTED BY CLASS F, PART 8 OF SCHEDULE 2 OF THE TOWN AND COUNTRY PLANNING (GENERAL PERMITTED DEVELOPMENT) (ENGLAND) ORDER 2015 FOR **PROPOSED MULTI STOREY CAR PARK 7 (MSCP7**), NORTH TERMINAL, GATWICK AIRPORT	NO OBJECTION :- SUBJECT TO – 03.03.2023	No Objection in principle, but further clarity sought regarding the relationship of parking provision to passenger numbers and their projected growth, and sustainable transport measures, including compliance with the public transport mode share, in quantitative terms. 8 advisories added to letter.
CR/2018/0935/CON	SOUTH TERMINAL LONG STAY CAR PARK, ZONE B, GATWICK AIRPORT	CONSULTATION FROM GATWICK AIRPORT LIMITED FOR ROBOTIC CAR PARK PILOT PROJECT	NO OBJECTION - 11.03.2019	Proposal was for a **3 month temporary trial period to establish if robotic parking is viable** - 100 additional spaces. Informative on decision letter advised additional spaces would be liable for surface access levy secured through the S106 Agreement..
?	SOUTH TERMINAL	ROBOTIC PARKING FOR UP TO 2,500 SPACES.		Further consultations expected.
CR/2021/0066/CON	SOUTH TERMINAL CAR PARK FORECOURT, FIRST POINT,	CONSULTATION FROM GATWICK AIRPORT FOR **ELECTRIC VEHICLE CHARGING FORECOURT**	CON- NO OBJECTION	**Implemented.** Operator is Gridserve.

	BUCKINGHAM GATE, GATWICK		– 12.05.2021	
HIGHWAY IMPROVEMENTS				
	Local widening on junction exit / entry lanes for both North and South Terminal roundabouts. Signalisation of the roundabouts and provision of enhanced signage	Plans prepared WSCC views sought (from active travel perspective). Works on the National Highways Network		**NOT FUNDED**
RAILWAY STATION				
CR/2022/0544/NCC	GATWICK AIRPORT RAILWAY STATION, GATWICK AIRPORT,	VARIATION OF CONDITION 14 (SUSTAINABILITY)	-	-
CR/2018/0273/FUL	GATWICK AIRPORT STATION, SOUTH TERMINAL, GATWICK	PROPOSED CONSTRUCTION OF NEW STATION CONCOURSE/AIRPORT ENTRANCE AREA, LINK BRIDGES, PLATFORM CANOPIES, BACK OF HOUSE STAFF ACCOMMODATION AND ASSOCIATED IMPROVEMENT WORKS	Full Planning Application – PERMITTED – 19.03.2019	**Implemented** - Outside the DCO boundary.

Appendix E: PA 2008 – S.104 and S.105 - EFW Group Limited v Secretary of State for Business, Energy and Industrial Strategy, Dove J – 8 October 2021.

Neutral Citation Number [2021] EWHC 2697 (Admin)

Case No: CO/1160/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

EFW Group Limited	**Claimant**
- and -	
Secretary of State for Business, Energy and Industrial Strategy	**Defendant**

- -
- -

Michael Humphries QC and **Mark Westmoreland Smith** (instructed by **Keystone Law**) for the **Claimant**
Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 13th and 14th July 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE DOVE

Mr Justice Dove :

1. This is an application for judicial review pursuant to section 118 of the Planning Act 2008 ("the 2008 Act") seeking to quash the defendant's decision dated 19th February 2021. The application before the defendant included two separate and discrete proposals. The first proposal was for the Wheelebrator Kemsley North ("WKN") and the second was for the Wheelebrator Kemsley K3 ("K3"), both of which were proposals for energy from waste described in greater detail below. Whilst the name of the claimant company changed between the determination of the application and the commencement of these proceedings nothing turns on the fact that the claimant's name has altered.

The Facts

2. The claimant is the developer and operator of a pre-existing waste-to-energy plant at Kemsley, Kent which was granted planning permission on 14th June 2019 and has been fully built out ("the Kemsley plant"). It supplies heat to an adjacent paper mill, and has permitted capacity of up to 49.9MW with a waste throughput of 550,000 tonnes per annum. It was commissioned in July 2020.

3. The claimant contemplated two further development projects. Firstly, K3, which amounted to a proposal to increase the generating capacity of the consented Kemsley plant from 49.9MW to 75MW, and increase the total waste tonnage throughput from 550,000 to 657,000 tonnes per annum. This project simply involved an increase in the permitted capacities of the facility and did not require any physical works in order to achieve them. The second proposal was WKN, which was a new waste-to-energy facility capable of processing 390,000 tonnes of waste and generating 42MW of electricity. WKN was intended to supply energy to the adjacent paper mill when the Kemsley plant was offline for maintenance and was designed to be combined heat and power ("CHP") ready in order to take advantage of any future developments. The K3 project fell within the definition of a nationally significant infrastructure project ("NSIP") as defined by section 15 of the 2008 Act (which is dealt with in greater detail below), on the basis that the final capacity for the Kemsley plant following the consenting of the K3 proposal would lead to a generating station which had a capacity in excess of 50MW. The WKN project did not satisfy that criterion and therefore did not fall within the definition of an NSIP.

4. As part of the preparation of the application for the projects, on 1st June 2018 the claimant wrote to the defendant to request that the defendant exercise the power under section 35 of the 2008 Act to direct that the WKN facility be treated as a development for which development consent is required, and thereby bring it within decision-making processes of the 2008 Act. The section 35 application explained that the WKN proposal was "an entirely stand-alone facility, and not an extension to [the Kemsley plant]". Given the close physical proximity between the K3 and the WKN proposals, on the basis that they were proposed to be developed on adjacent sites, the application emphasised the added efficiency to the decision-making process which would arise were they to be considered as part of the same application for a Development Consent Order ("DCO") for both proposals.

5. On 27th June 2018 the defendant granted the section 35 application. In doing so the defendant noted that the development did not currently fall within the definition of an

NSIP and therefore it was appropriate to consider use of the power in section 35 of the Act. The defendant was satisfied, on the basis that the WKN proposal sat on the same site as two significant applications, including the K3 proposed application, that cumulatively the developments located on the same site could "comprise a significant facility of national sustainable energy supply". The defendant directed that an application for the form of development described in the request of 1st June 2018 was to be treated as a proposed application for which a DCO was required, and that any consultation carried out prior to the date of the section 35 direction was to be treated as complying with the consultation requirements under the 2008 Act notwithstanding that it had been carried out prior to the date of the direction.

6. On 11th September 2019 the claimant applied for a DCO in relation to both the K3 and the WKN projects. Although, as noted above, the projects were separate and distinct, in the application they were combined, as anticipated by the section 35 application, within an application for a single DCO. Pursuant to section 55 of the 2008 Act the application was accepted for examination on 8th October 2019. The examination began on 19th February 2020 and concluded on 19th August 2020.

7. The examination proceeded in the form of a series of written exchanges provided in accordance with a structure of eight Deadlines for the submission of material. One of the issues which the examination addressed was the question of whether or not there was sufficient waste arising in order to support the proposed facilities whilst complying with principles of the waste hierarchy and the proximity principle. Participants in the examination included Kent County Council ("KCC") who are the waste planning authority for the area within which the proposals lie. KCC, assisted by BPP Consulting, who had provided them with advice in relation to the Early Partial Review of the Kent Minerals and Waste Local Plan ("the EPR"), presented submissions to the examination at the stage of Deadline 1 contending that there was no robust evidence to justify the need for the facilities in terms of the availability of appropriate waste to support the proposed energy from waste capacity. KCC contended that whilst the claimant's evidence in relation to additional suitable waste capacity produced in support of the application stated it lay within a range of 495,540 tonnes per annum and 840,463 tonnes per annum, BPP Consulting had undertaken a sensitivity analysis using the Environment Agency's WDI 2018 data and the claimant's methodology and found that the range actually fell between -760,390 tonnes per annum and -373,473 tonnes per annum.

8. At Deadline 3 of the examination, the claimant submitted evidence disputing the validity of the sensitivity analysis produced by KCC and BPP Consulting. The claimant indicated that it had tried to replicate the BPP Consulting figures but was unable to do so. The claimant produced its own table which reproduced the two original analyses, firstly, produced by the claimant in support of the application and, secondly, produced by KCC at Deadline 1, and then added a further calculation based on the WDI 2018 data that showed a remaining level of need ranging between 306,554 tonnes per annum and 680,032 tonnes per annum. Whilst this showed a reduction over the original calculation supporting the application, the claimant contended that there was still a substantial need for residual waste treatment capacity even after both of the proposals had been consented.

9. Immediately after Deadline 3, on 23rd April 2020, the Inspector's report on the examination of the EPR was published. As the name of the document implied, the

EPR contained a number of proposals to modify the Kent Minerals and Waste Local Plan adopted in 2016, including KCC's position that it was no longer proposed to produce a Waste Sites Plan following a reassessment of the need for waste facilities over the plan period. The evidence base for the EPR included a further assessment of need. The EPR Inspector set out the essence of that exercise and the conclusions arising in the following terms:

> "20. The Capacity Requirement for the Management of Residual Non-Hazardous waste (CRRNH) has assessed the need for provision for residual non-hazardous waste arising in Kent, including Local Authority Collected Waste (LACW) and Commercial and Industrial (C&I) waste, as well as some waste originating from London. The calculation of need takes into account revised recycling rates which are based on government guidance and the actual rates achieved. The forecast requirement is based on continuing reductions in landfill.
>
> 21. The CRNNH considers the capacities of existing consented facilities and the extent to which they would satisfy identified need. A permitted facility at Barge Way has not been built. Irrespective of whether there is any uncertainty as to whether that facility will be provided, the strategy for waste management capacity does not depend on its provision. Waste arisings are forecast for intervals of 5 years up to the end of the Plan period in 2030/31. The proposed diversion of LACW and C&I waste from landfill is greater than that in the KMWLP. The proportions of those waste streams that are to be subject to other recovery instead of recycling/composting are greater in the EPR than in the KMWLP, taking into account the re-assessed recycling rates.
>
> 22. Since the adoption of the KMWLP, a significant new waste recovery facility has been built at Kemsley and is being commissioned. This provides capacity of 525,000 tonnes per annum (tpa). Policy CSW7 of the KMWLP identifies a recovery requirement of 562,500 tpa but this requirement has been re-assessed in the CRRNH having regard to the revised recycling rates and revised figures for diversion of waste from landfill.
>
> 23. Table 9 of the CRRNH shows that there is no gap in capacity for other recovery treatment of residual non-hazardous waste throughout the Plan period and demonstrates that the Kemsley facility together with the existing Allington facility will provide a surplus of other recovery capacity. On this basis there is no need to allocate sites. However, Policies CSW6 and CSW7 provide flexibility in that they are permissive policies that would allow for other recovery facilities to be developed should they be required."

10. In its response at Deadline 4, KCC did not submit any further calculation in response to that produced by the claimant, but placed reliance on the endorsement by the EPR Inspector of the data reports produced to support the EPR by KCC in the form of the CRRNH. In response to earlier submissions made by KCC the examining authority ("ExA") requested a copy of the representations made on behalf of the claimant to the EPR examination in support of the contention that the EPR was unsound.

11. In the claimant's response at Deadline 5, the claimant again noted that KCC had offered no explanation for its position beyond reliance upon the EPR Inspector's report. The claimant noted that the EPR report was very short and made no mention of third-party submissions, appearing to take the CRRNH at face value. The claimant made the observation that it was reasonable to assume that the inspector had not considered the analysis of empirical data in relation to need and waste available for incineration in detail at the examination of the EPR.

12. Within the material related to Deadline 5 and Deadline 7, KCC provided the claimant's representations to the EPR, and also made further submissions in relation to waste types and waste data addressing the potential available feedstock for the facilities. Within their Deadline 8 submissions the claimant pointed out that they had responded to the submissions made in Deadline 5 by KCC, and consistently demonstrated throughout their representations to the examination of the DCO that the level of fuel of an appropriate character available to the proposed development would be sufficient to demonstrate a need for both of the proposed developments and indeed still leave even further available capacity for the recovery of waste.

13. By contrast, in its Deadline 8 representations, KCC contended that they had undertaken further analysis of the claimant's data during the course of the examination and discovered that the quantity of waste reported as going to landfill that was suitable for incineration was a good deal less than the claimant had claimed. KCC submitted that no compelling evidence had been presented by the applicant to address their doubts in relation to the suitability or combustibility of the waste targeted by the proposals in the applicant's assessment, and that given the EPR had been found to be sound, on the basis that its waste needs assessment was robust, there was clearly insufficient need to support the additional capacity proposed.

14. At Deadline 8 the final version of the Statement of Common Ground ("the SOCG") was provided to the examination. Within the matters that were agreed in the SOCG the following appeared:

> "2.2.3 …
>
> (b) KCC has undertaken an Early Partial Review (EPR) of the Kent Minerals and Waste Local Plan (KMWLP), which has been found sound with the addition of main modifications. The parties agree that the relevant local waste plan would be the Kent Minerals and Waste Local Plan Early Partial Review, should that be adopted by the KCC prior to the application being determined. In advance of adoption, increasing weight ought to be given to the EPR, given it has now been approved by the Examining Inspector."

15. The SOCG also recorded matters which were not agreed. These matters included the relevance of national policy statements ("NPSs") to WKN. The claimant's position was that policies in NPS EN-1 and EN-3 (see below) were both "important and relevant" to the decision to be made in relation to WKN, firstly, because it was very close to having a capacity which would require it to be an NSIP, and, secondly, because its function, scale, and the nature of its impact was similar to that of K3. Further, it had been accepted by the defendant as being of national significance through the section 35 direction. KCC, by contrast, contended that the parts of the application which were not an NSIP should be determined in accordance with the development plan, and that those parts of the application included the expansion of waste throughput at K3 as well as the construction and operation of WKN.

16. On the 19th November 2020 the ExA completed his report, which contained a recommended decision, and it was passed to the defendant. The report is a lengthy and detailed document, and for present purposes what follows is a summary of those aspects of the report pertinent to this challenge. Within section 3 of the report, the "Legal and Policy Context", the ExA noted the provisions of sections 104 and 105 of the 2008 Act (which are set out in detail below), and that in essence section 104 applies to applications for a DCO where an NPS has effect, and section 105 applies to decisions where no NPS has effect. Where section 104 is in play, then by virtue of section 104(3) the application must be determined "in accordance with any relevant national policy statement", subject to a number of limited exceptions. By contrast, section 105 prescribes matters to which the defendant is to have regard to when making a decision without the statutory presumption set out in section 104(3). The ExA noted that the WKN proposal fell short of the threshold for it to be examined as an NSIP, a position which the ExA concluded was not altered by virtue of the section 35 direction. The ExA noted that neither NPS EN-1 nor EN-3 were worded to include a project subject to a section 35 direction. That said, the ExA noted that although the WKN did not meet the threshold for an NSIP, nonetheless the matters in NPS EN-1 and EN-3 could be taken into account in determining the WKN proposal to the extent that those matters were both important and relevant to the defendant's decision. Thus, the ExA concluded that whilst in relation to the K3 proposal the NPSs formed the primary policy context for the examination given the statutory duty imposed by section 104 of the 2008 Act, with respect to the WKN proposal the following was noted:

> "3.3.4 In relation to the WKN Proposed Development the NPSs are important and relevant matters to take into account in the view of the ExA, however the statutory duties as to the applicability of the NPSs do not apply in the same way as for development which is a nationally significant infrastructure project. The primary policy context is nevertheless found in the PA2008, namely s105 which requires the SoS to have regard to LIRs, matters prescribed by regulations in relation to development of the description to which the application relates; and other matters considered important and relevant which will include so far as relevant, the NPSs."

17. The section went on to assess the relevant policy framework and reached conclusions in relation to the applicable policy. In relation to NPS EN-1 and EN-3, the ExA

concluded that the need for the K3 proposal was established through the NPSs, whereas the WKN proposal generally conformed to high-level policy in NPS EN-1 and EN-3. In relation to the development plan, at paragraph 4.6.4 of the report the ExA recorded as follows:

> "4.6.4 There are no issues arising from development plan policies that necessarily conflict with relevant policy directions arising from NPSs. Whilst NPSs are the primary source of policy for a decision on an NSIP under PA2008 such as Project K3, development plan policies take precedence for a decision on Project WKN. None of the development plan policies indicate against the directions set in NPS EN-1 or NPS EN-3 and it follows that effect can be given to all relevant development plan policies in a manner which reinforces and adds local context and detail to NPS compliance where the NPSs apply."

18. Within this section the ExA set out the competing contentions in relation to whether or not there was a need for the facility in terms of available waste suitable for incineration. The concern raised by KCC was that if there were not adequate quantities of waste arising within their administrative area this would undermine the waste hierarchy and lead to a diversion of waste into Kent, with the potential to undermine wider regional planning objectives and the proximity principle. The ExA introduced his conclusions in relation to the planning issues for the examination by noting as follows:

> "4.10.96 In terms of the core decision-making section of NPS EN-3 (paragraph 2.5.70) it must be clear, with reference to the relevant waste strategies and plans, that the proposed waste combustion generating station would be in accordance with the waste hierarchy and of an appropriate type and scale so as not to prejudice the achievement of local or national waste management targets in England. I am not satisfied that this is the case with reference to the WKN Proposed Development because the increase in capacity which it would bring about would significantly increase the capacity gap already identified by KCC. For such provision to be made at this time for an additional 390,000 tonnes of waste per annum over the 50-year lifetime of the development would present a significant risk to meeting the waste hierarchy objectives set out in KMWLP as revised by the EPR, by pulling Kent waste that might otherwise be recycled down the hierarchy.
>
> 4.10.97 The EPR of the KMWLP has been found sound and the supporting Waste Needs Assessment is taken to be robust, and the arisings and forecasts are now reflected in the most recent Authority Monitoring Report released by KCC. Applying an assessment based on these values to the Proposed Development, the ExA is satisfied that the need for the additional capacity proposed to maintain net self-sufficiency in

> Kent throughout the Plan period while making reduced provision for London's waste, does not exist."

19. In relation to the principles of local policy, and the EPR in particular, the ExA noted that the adverse effects of creating a waste management facility that would be likely to draw waste in from further afield than Kent would include locking waste into feeding the plant that might otherwise be recycled, contrary to the waste hierarchy, as well as undermining the viability of more locally-based solutions which would accord better with the proximity principle. The ExA noted the strategy in the EPR to meet the area's objectively assessed needs. The ExA noted it was an important consideration that the EPR had dispensed with the preparation of a Waste Sites Plan, and that the purpose of this and the other provisions of the EPR were to avoid over provision of other recovery capacity which could discourage the development of recycling and composting capacity further up the waste hierarchy.

20. The ExA went on to consider the energy production issues and noted the following in that connection:

> "4.10.120. Generally, the power produced by both projects would be a benefit to be considered in the overall planning balance.
>
> 4.10.121. However in the case of the WKN Proposed Development, the electricity generation is allied to the sourcing of some 390,000 tpa of waste fuel which is a significant amount in itself, the composition of which should be scrutinised to see whether overall the proposed generation is justified by reference to such matters as the biogenic to fossil carbon ratio and its energy content, the confidence that can be placed on the assumed biogenic content, comparisons with other methods of electricity generation, and whether avoided emissions from landfill would actually materialise. Within that process, consideration of harm to KCC's strategy that underpins its WLP is not excluded."

21. The ExA then went on to consider the provisions of the Kent Minerals and Waste Local Plan Policy CSW4 and need and local capacity issues. The ExA's conclusions in relation to this issue were as follows:

> "4.10.122. I am not persuaded than even assuming 65% recycling is achieved (which is acknowledged to be a higher target than is set out in the KMWLP or EPR) there remains a need for the Proposed Developments in particular Project WKN. The WHFAA [APP-086] sets out in Table ES2 Summary of Fuel Availability Assessment and sensitivities, a projected surplus in the remaining fuel available in the Study Area compared to future capacity likely to be delivered, including taking account of both projects within the Proposed Development.

4.10.123. There is an obvious difference between the lower and upper estimates. This is predominantly due to the substitution of shortlisted waste types disposed to landfill rather than all Household/Industrial/Commercial (HIC) waste disposed to landfill. Clearly in my view the use of the former category is more appropriate since, as is clarified in the WHFAA, the HIC category in the WDI contains certain waste types that would be inappropriate for combustion in the Proposed Development, the use of which would result in an over-estimation of available fuel. Thus, under the WHFAA ones arrives at a remaining level of fuel availability to the tune of 992,540 tpa, which would be taken up by the Proposed Development leaving a shortfall in capacity of facilities equivalent to processing the remaining figure of 495,540 tpa.

4.10.124. However KCC's alternative calculation, based on the same methodology, including an allowance of 27% recycling to achieve the CEP 2035 target, and using the EA's WDI 2018 data as set out in [AS-010] would result in fuel availability of between 420,000tpa and 123,500tpa, which latter figure takes account of shortlisted waste types disposed to landfill within Study Area. Applying the proposed capacity of both projects within the Proposed Development, one arrives at negative figures whether shortlisted waste types or HIC waste disposed of to landfill are applied, indicating a surplus capacity of facilities in the Study Area. I find it significant that KCC's waste needs assessment has underpinned the EPR under which the development of increased waste recovery capacity follows a sustainable pattern of waste management to achieve overall net self-sufficiency, an approach found to be sound in the Examination of the EPR [REP4-016].

…

4.10.126. Turning to the Applicant's criticism of the Inspector's EPR Report [REP4-016] there is no reason to suppose that the Inspector did not properly examine the evidence on the capacity requirement for non-hazardous waste. The Applicant made several representations against the proposed changes in the EPR based on the evidence and appeared at the examination hearings to convey these objections to the Inspector. I asked for these representations which were supplied in full [REP5-040]. They clearly show that the Applicant was critical of the evidence base underpinning the EPR, however the Applicant accepted (p2 [REP5-040], that its own representations were:

"not submitted as in-depth need assessments for waste management in Kent; this is a task for KCC in preparing its development policy plan."

…

4.10.128. Paragraph 23 of the Inspector's Report [REP4-016] accepts that the "CRRNH" (Capacity Requirement for the Management of Non-Hazardous Waste) shows that there is no gap in capacity for other recovery treatment of residual non-hazardous waste throughout the Plan period and demonstrates that the "Kemsley facility" (ie the Consented K3 Facility) together with the existing Allington facility will provide a surplus of other recovery capacity. Paragraph 23 ends:

4.10.129. "*Policies CSW6 and CSW7 provide flexibility in that they are permissive policies that would allow for other recovery facilities to be developed should they be required*". (My emphasis).

4.10.130. I also note that the BPP report, Waste Topic Report 8 concluded the following on the need for Energy from Waste (EfW) capacity: "… sufficient sites should be identified such that new capacity in EfW could be provided for an additional 562,000 tpa. However, only 437,500 tpa new EfW capacity should be permitted until monitoring indicates that the provision of only this amount of EfW capacity would result in non-hazardous landfill capacity in Kent being used up before the end of the plan period. This will need one site to be identified in Kent that would not need to be developed until the long term, if at all." This conclusion underpins Policies CSW7 and CSW8 of KWMLP.

4.10.131. KCC's analysis and data are also more focussed on the particular geographical source of waste accepted at locations to which waste is removed as well as a more localised approach to investigating capacity, which in my view is more important to analysing the geographical need for EfW additional waste treatment capacity. It was found to be sound by the EPR Inspector.

4.10.132. On balance I prefer KCC's assessment in KCC WNA 2018, Capacity Requirement for the Management of Residual Non-Hazardous Waste [REP4-020] of fuel availability and future capacity likely to be delivered, to that of the Applicant. This does not imply that in general future treatment capacity would no longer be necessary, however in the case of the WKN Proposed Development to grant consent for an additional 390,000 tpa throughput would in my judgment seriously undermine the local and regional strategy for managing waste development in Kent and the south east region. This would be contrary to KMWLP Policies CSW2, CSW4, CSW6, CSW7 and CSW8."

22. The ExA's overall conclusions in relation to waste hierarchy issues in respect of both of the proposals were expressed in the following terms:

> "**Overall conclusions as to waste hierarchy related matters: K3**
>
> 4.10.139. The evidence underpinning the KCC's revised development plan policies which was independently compiled, points to a capacity gap which at both the upper and lower ranges of estimates, produces a negative level of need to manage waste fuel available in Kent, even taking into account the capacities of the Proposed Development. This would be contrary to the Waste Needs Assessment produced by KCC to support the EPR which has now been found sound by the examining Inspector. This evidence base found no need exists in Kent for additional capacity for the Plan period.
>
> 4.10.140. However, although the Applicant's position is that both Project K3 and Project WKN are important, relevant and appropriate infrastructure projects that would meet net zero emissions goals and ensure waste is managed efficiently, there are differences between the two. Project K3 is a CHP facility, connected to the Kemsley Paper Mill with the benefits of increased heat export. That the WKN Proposed Development would provide a sustainable source of steam/heat to local customers for industry and housing within the area is uncertain as there is no clear agreement with any customer for this purpose, except perhaps arguably with DS Smith for the very limited occasions when K3 is undergoing maintenance. Therefore, whilst the benefits of co-location of both facilities to provide steam to the paper mill, remain unclear, increased weight should be given to the K3 Proposed Development in this respect.
>
> 4.10.141. The need for infrastructure covered by NPS EN-3 is assumed and must be accorded significant weight. Further, the increased capacity provided by the K3 Proposed Development would be a more modest increase than that of Project WKN, therefore the risk of prejudice to the principles of proximity and net self-sufficiency in local and regional strategies and plans is reduced. The ability to generate additional electricity without change to its design or increase in throughput would be an additional benefit.
>
> **Overall conclusion as to waste hierarchy related matters: WKN**
>
> 4.10.142. The generation of 42MW electricity would be a significant benefit having regard to the need for all types of infrastructure set out in NPS EN-1, although the energy generated would be partially renewable at best.

> 4.10.143. However, the Applicant has not provided a robust argument that justifies a concentration of a new waste management facility that would increase the capacity gap at this time. Although put forward as a regional facility, given that the waste recovery capacity is well catered for by the Consented K3 Facility and the EfW facility located at Allington, there is no proven need for the plant to be located in Kent. An alternative location outside Kent where the heat produced can be more effectively utilised, would appear to better serve the strategic purposes of member authorities of SEWPAG in order to comply with the aims set out in their respective WLPs, and in particular the KMWLP. Therefore, in this respect I find the WKN Proposed Development inconsistent with the KMWLP and EPR. Such a finding would be in accordance with upholding the role of the planning system as found in NPS EN-1 to provide a framework which permits construction of what Government as well as the market identify as the type of infrastructure needed "in the places where it is acceptable in planning terms (paragraph 2.2.4)".
>
> 4.10.144. Further, the introduction of additional Other Recovery capacity of the scale proposed at this time with respect to the WKN Proposed Development would put at risk achievement of the revised recycling and composting targets in the revised KMWLP which would also be in conflict with National Planning Policy for Waste."

23. In section 6 of the report the ExA set out the conclusions reached in relation to the DCO application. So far as relevant to this case those conclusions were as follows:

> "**6.2. CONSIDERATIONS IN THE OVERALL PLANNING BALANCE**
>
> **Application of NPSs and development plan to the Proposed Development**
>
> 6.2.1. The designated National Policy Statements (NPSs) NPS EN-1 and NPS EN-3 provide the primary basis for the Secretary of State (SoS) to make decisions on development consent applications for energy based Nationally Significant Infrastructure Projects (NSIPs) in England, which includes the K3 Proposed Development.
>
> 6.2.2. In terms of Project WKN the NPSs may be considered "alongside" other national and local policies, however as the adopted local plan for waste matters, I consider the development plan and in particular the Kent Minerals and Waste Local Plan (KMWLP) to be the primary policy against which this element of the Proposed Development should be determined. The presumption in favour of determining the application in accordance with the NPS is absent here although

the relevant NPSs are important and relevant matters to be considered.

6.2.3. I disagree with the Applicant's response [REP5-011] to ExQ3.6.2 [PD-014] that EN-1 and EN-3 are so germane to the assessment of the WKN Proposed Development that it would be irrational not to give them primacy for the reasons they give. As to the reasons given for this proposition, the NPPF is not dispositive of the issue, and the s35 direction does not override s105(2)(c) PA2008. S105 PA2008 does not stipulate that the NPSs take precedence viz a viz local plan policies (although as The Queen (oao David Gate on behalf of Transport Solutions For Lancaster and Morecambe) v The Secretary of State for Transport v Lancashire County Council [2013] EWHC 2937 (Admin) would suggest they are capable of being important and relevant matters).

6.2.4. The Applicant suggested further in its reply [REP5-011] to ExQ3.6.2 [PD-014], that local plan policies would otherwise take precedence by default. Indeed, whatever the reason behind the lack of definitive statutory or judicial clarity over the issue, it would be sensible in my view to apply the statutorily adopted development plan as the primary consideration to a project that, but for the s35 Direction, would have fallen to be considered on that basis.

6.2.5. That said, conclusions on the case for development consent set out in the application are reached in the context of the policies contained in the NPSs, according to how important and relevant are the matters contained therein.

Need for and benefits of the Proposed Development

Project K3

6.2.11. In relation to NPS EN-1 and NPS EN-3 which apply to the K3 Proposed Development I find that the need for infrastructure covered by these national policies is assumed and must be accorded significant weight. The recovery of energy from the combustion of waste forms an important element of waste management strategies in England. Furthermore, the ability to generate an increased amount of electricity without change to the design of the Consented K3 Facility is an additional benefit, as is the potential to generate that amount without necessarily increasing the throughput of waste feedstock. The adverse impacts as a result of increase in throughput are considered separately.

6.2.12. Although there are marked uncertainties as to what if any net carbon benefit would be achieved by comparison to other forms of waste management, it is reasonable to assume

that it would perform better in Greenhouse Gas (GHG) emission terms than had it not been linked to an integrated CHP facility to serve the adjoining DS Smith Paper Mill. This is a further positive benefit that would align with the aspirations of NPS EN-1 and EN-3.

Project WKN

6.2.13. Although the need for the WKN Proposed Development is not established through either NPS EN-1 or EN-3, the generation of up to 42MW of electricity would be in accordance with those national policies and would be a benefit as such. As a fossil fuel generated supply, it could be brought online quickly when demand is high and shut down when demand is low, but the supply generated is not significantly high and the benefits would therefore be limited.

6.2.14. The economic impacts of the Proposed Development would be an additional acknowledged benefit, principally in the form of the anticipated job creation of up to 482 staff during the construction period and between 35 to 49 staff once the WKN Proposed Development is operational and would be a positive factor in support of the WKN Proposed Development.

6.2.15. Achievement of R1 recovery status is not guaranteed and would only be a positive factor insofar as the SoS considers it likely that R1 status would be achieved. The energy produced from the biomass fraction of waste is regarded as renewable under EN-3 although there is uncertainty as to the proportion of waste fuel that would be derived from this component.

6.2.16. However, recognising that EfW facilities have an important role to play in waste management, the key important and relevant matter contained in the relevant NPSs as far as concerns the WKN Proposed Development, is under EN-3: whether, with reference to the relevant waste strategies and plans, the proposed waste combustion generating station would be in accordance with the waste hierarchy and of an appropriate type and scale so as not to prejudice the achievement of local or national waste management targets in England.

6.2.17. I find on this issue that, as described in Chapter 4 and summarised further below, it has not been demonstrated that there is a need for the Proposed Development having regard to the WPA's Need Assessments and other evidence that has underpinned the formulation of KCC's revised development plan. The statutorily adopted development plan and relevant policies discussed, form part of the overall planning system adverted to in NPS EN-3, the role of which is to identify the types of infrastructure needed in the places where it is acceptable in planning terms.

Conformity with the Development Plan

6.2.18. As a preliminary matter it should be noted that it is likely that a final decision on adoption of the changes proposed by the EPR will have been taken by KCC at some point after the close of the Examination (see p2 KCC Closing Statement [REP8-016] which referred to its proposed meeting on 10 September 2020). Therefore, the SoS may wish to consider whether to confirm with KCC whether the changes discussed in this Report have been incorporated into the development plan and have now attained the same status as other development plan policies.

6.2.19.Both the K3 and the WKN Proposed Development would be in conflict with fundamental policies of the development plan, namely KMWLP Policy CSW6 which requires it to be: "demonstrated that waste will be dealt with further up the hierarchy... and where such uses are compatible with the development plan" and Policy CSW7 which would be permissive of new capacity to manage waste "provided that: 1. it moves up the Waste Hierarchy".

6.2.20. In addition, KMWLP Policy CSW4 as revised through the EPR, incorporates revised targets for management of waste in Kent, however waste recovery capacity is sufficiently met by the Consented K3 Facility and the EfW facility at Allington, and there is no proven need for the plant to be located in Kent. This presents a serious risk of prejudice to the principles of proximity and net self-sufficiency which underpin Policy CSW4, and the wider regional strategy in SEWPAG's Memorandum of Understanding (MoU)/"Statement of Common Ground" would clearly be undermined through any significant increase in the capacity gap located in Kent.

6.2.21. The weight attached to the harm thereby caused is however assessed in light of the specific circumstances pertaining to each of the two projects. The increased capacity provided by the K3 Proposed Development would be markedly less than that of Project WKN.

…

Waste Hierarchy

6.2.25. The evidence underpinning KCC's revised development plan policies which was independently compiled, points to a capacity gap which at both the upper and lower ranges of estimates, produces a negative level of need to manage waste fuel available in Kent, even taking into account the capacities of the Proposed Development. This would be contrary to the Waste Needs Assessment produced by KCC to support the EPR

which has now been found sound by the examining Inspector. This evidence base found no need exists in Kent for additional capacity for the Plan period.

6.2.26. Therefore the Proposed Development would be in conflict with KMWLP Policy CSW6 which requires it to be: "demonstrated that waste will be dealt with further up the hierarchy... and where such uses are compatible with the development plan" and Policy CSW7 "provided that: 1. it moves up the Waste Hierarchy".

6.2.27. However, although the Applicant's position is that both Project K3 and Project WKN are important, relevant and appropriate infrastructure projects that would meet net zero emissions goals and ensure waste is managed efficiently, there are differences between the two. Project K3 is a CHP facility, connected to the Kemsley Paper Mill with the benefits of increased heat export. That the WKN Proposed Development would provide a sustainable source of steam/heat to local customers for industry and housing within the area is uncertain as there is no clear agreement with any customer for this purpose, except perhaps arguably with DS Smith for the very limited occasions when K3 is undergoing maintenance.

6.2.28. Therefore, whilst the benefits of co-location of both facilities to provide steam to the paper mill, remain unclear, increased weight should be given to the K3 Proposed Development in this respect.

6.2.29. The need for infrastructure covered by NPS EN-3 is assumed and must be accorded significant weight. Further, the increased capacity provided by the K3 Proposed Development would be a more modest increase than that of Project WKN, therefore the risk of prejudice to the principles of proximity and net self-sufficiency in local and regional strategies and plans is reduced. The ability to generate additional electricity without change to its design or increase in throughput would be an additional benefit.

6.2.30. As to the WKN Proposed Development, the generation of 42MW electricity would be a benefit having regard to the need for all types of infrastructure set out in NPS EN-1, although the energy generated would be partially renewable at best.

6.2.31. However, the Applicant has not provided a robust argument that justifies a concentration of a new waste management facility that would increase the capacity gap at this time. Although put forward as a regional facility, given that the waste recovery capacity is well catered for by the Consented K3 Facility and the EfW facility located at

Allington, there is no proven need for the plant to be located in Kent. An alternative location outside Kent where the heat produced can be more effectively utilised, would appear to better serve the strategic purposes of member authorities of SEWPAG in order to comply with the aims set out in their respective WLPs, and in particular the KMWLP.

6.2.32. Therefore, I find that the WKN Proposed Development would be inconsistent with the KMWLP and EPR. Such a finding would be in accordance with upholding the role of the planning system as found in NPS EN-1 to provide a framework which permits construction of what Government as well as the market identify as the type of infrastructure needed "in the places where it is acceptable in planning terms (paragraph 2.2.4)."

6.2.33. Further, the introduction of additional Other Recovery capacity of the scale proposed at this time with respect to the WKN Proposed Development would justifiably put at risk achievement of the revised recycling and composting targets in the revised KMWLP which would also be in conflict with National Planning Policy for Waste.

…

6.3. OVERALL CONCLUSIONS ON THE PLANNING BALANCE

…

Project K3

6.3.4. The public benefits of the Proposed Development can be identified in the context of NPS EN-1's recognition of the need for energy generating infrastructure and the presumption in favour of granting consent for energy NSIPs whilst recognising that Energy from Waste (EfW) facilities play a vital role in providing reliable energy supplies.

6.3.5. The potentially adverse impacts of Project K3 and the concerns raised in submissions on the application have been considered. The ES identifies that the practical effect of the K3 Proposed Development would have no significant effects from construction, operation and decommissioning activities on the environment, or that the potentially significant effects identified can be mitigated as far as practicable by the package of controls that are appropriately secured in the Recommended DCO.

6.3.6. I have found that, as with the WKN Proposed Development the Applicant has not provided a sufficiently robust assessment of fuel availability in relation to assessed

capacity in facilities for its treatment. Nevertheless, taking account of the positive benefits of Project K3 as described above, and mindful of the limited harms identified, I find that it would generally accord with the waste hierarchy and would be of an appropriate type and scale so as not to significantly prejudice the achievement of local or national waste management targets. Therefore, all harmful effects would be within the scope envisaged in the relevant NPSs as policy compliant.

6.3.7. In conclusion, I find that the identified harms in relation to the K3 Proposed Development would be outweighed by the benefits from the provision of energy to meet the need identified in NPS EN-1 and by the other benefits of the application as summarised above.

6.3.8. No HRA effects have been identified and there is no reason for HRA matters to prevent the making of the Order.

6.3.9. For the reasons set out in the preceding chapters and summarised above, I conclude that the K3 Proposed Development is acceptable, and that development consent should be granted therefor. This conclusion is taken forward in light of identified minor changes required to the DCO, described in Chapter 7 below.

Project WKN

6.3.10. Although the need for the WKN Proposed Development is not established through either NPS EN-1 or EN-3, the generation of up to 42MW of electricity would be in accordance with those national policies and would be of some benefit. In addition, there would be some positive economic advantages through job creation during the construction and operational phases of the facility.

6.3.11. However, the prospect of Project WKN becoming a viable CHP facility is uncertain. The lack of a clear and immediate sustainable source of steam/heat to local customers contrasts unfavourably with Project K3. With no guaranteed heat offtake, the proposed incineration would not qualify as Good Quality CHP. In my view this is an important and relevant factor to weigh in the balance, not least having regard to the need to transition to a low-carbon electricity market, as underlined by the UNFCCC Paris Agreement and the June 2020 Progress Report which indicates that plants without CHP should not be regarded as supplying renewable energy.

6.3.12. Moreover, the Applicant's assessment of fuel availability in relation to assessed capacity for its treatment, compares unfavourably with the Waste Planning Authority's

own assessments of need and capacity that underpin its strategy in revising targets within the KMWLP which aim to ensure that new facilities demonstrate that waste will be dealt in a manner that clearly moves its management further up the waste hierarchy. Therefore, the WKN Proposed Development would be in conflict with key policies of KMWLP including Policy CSW4, Policy CSW6 and Policy CSW7.

6.3.13. I have had regard to the other benefits of the WKN Proposed Development set out by the Applicant that may comply with other provisions of the development plan including both the Swale Local Plan and KMWLP. However my conclusion is that the provision of too much waste capacity in conflict with the waste hierarchy, represented by the WKN Proposed Development, is a serious conflict that would result in conflict with the development plan as a whole, the adverse impacts arising from which in my view would clearly outweigh the benefits of the facility.

6.3.14. It would also be in conflict with National Planning Policy for Waste (NPPW) which expects applicants to demonstrate that waste disposal facilities not in line with the Local Plan, would not undermine its objectives through prejudicing movement up the waste hierarchy. The WKN Proposed Development is a non-NSIP proposal and where the NPSs do not apply as such, the more recent NPPW that sets out detailed waste planning policies should in my view carry considerable weight.

6.3.15. I have had regard to NPS EN-1 at paragraph 5.2, that CO2 emissions are not reasons to place more restrictions on projects in the planning policy framework than are set out in the energy NPSs. However, as I have found that there is no need for the WKN Proposed Development, the GHG emissions would be an additional harm that would result, whether or not a conclusion could have been reached as to any net carbon benefit that would result.

6.3.16. To conclude, I find that the identified harms in relation to the WKN Proposed Development would outweigh its benefits from the provision of energy and by the other benefits of the application as summarised above.

6.3.17. For the reasons set out in the preceding chapters and summarised above, I therefore conclude that the WKN Proposed Development should not proceed at this time, and that development consent should not be granted, therefore.

6.3.18. However, should the SoS consider that the advantages of Project WKN outweigh the harm caused by the adverse effects as I have described, and is minded to grant consent, then

> consideration should be given to the Alternative Recommended DCO set out at Appendix E, which is the subject of minor changes required to the Applicant's Preferred DCO, and as described in Chapter 7 below."

24. In the light of these conclusions the ExA's recommendation was that a DCO should be granted in respect of the K3 proposal, but that the WKN proposal ought to be refused.

25. On 19th February 2021, having considered the report of the ExA the defendant issued his decision. Having set out the provisions of sections 104 and 105 of the 2008 Act and the approach taken to them by the ExA the defendant observed as follows:

> "4.6 The Secretary of State takes the view that the Application should be treated as a whole and determined under section 104 of the Planning Act 2008. This section, and section 105 would seem to be mutually exclusive and it would not be correct to determine different parts of the Application under different provisions. It is also noted that WKN is a type of generating station which would generally fall to be considered under EN-3 had it met the 50MW threshold by itself and was directed into the Planning Act regime on the basis of its combined significance with the WK3 project. In any event, the Secretary of State does not consider that determining the whole application under section 104 has a material impact on the overall outcome in this case. Section 104(2)(d) of the 2008 Act enables the Secretary of State to give consideration to any important and relevant matters appropriate to this aspect of the application as fully considered by the ExA."

26. In relation to the waste hierarchy and fuel availability the defendant set out a summary of the issues considered by the ExA, and then provided a summary of the ExA's conclusions together with the conclusions of the defendant as follows:

> "*Wheelabrator Kemsley K3* [ER.4.10.139 et seq]
>
> 4.18 While Kent County Council submits that there is no need in Kent for additional waste capacity for the period of the Kent Minerals and Waste Local Plan (up to 2030) and that neither WK3 nor WKN should benefit from the National Policy Statements' presumption in favour of energy development infrastructure, the Applicant submits that both projects are important and relevant to meeting a number of critical national needs including on net zero and waste management. The ExA notes that WK3 would, in addition to generating electricity, also provide steam and heat to local customers which is a factor in its favour. The ExA's overall conclusion is that the need for WK3 should carry significant weight in the decision-making process and the small increase in the proposed generating capacity with related increase in waste throughput would not

> prejudice the principles of sourcing waste locally and aiming for self-sufficiency.
>
> *Wheelabrator Kemsley North* [ER 4.10.142 et seq]
>
> 4.19 The project would contribute 42MW of electricity to the electricity grid. Whilst noting this, the ExA states that the Applicant has not provided robust arguments to support the new plant and that there is no proven need for it to be located in Kent. WKN would be inconsistent with the Kent Mineral and Waste Local Plan and the revisions to it that were the result of the 'Early Partial Review' carried out on the Plan. (The Early Partial Review is an independent report carried out by the Planning Inspectorate which checks whether local plans are 'sound'.) The ExA considered that WKN did not accord with paragraph 2.5.70 of NPS EN-3 as it was not in compliance with the Kent Minerals and Waste Local Plan and there was no evidence provided as to why an exception should be made. Following on from that, WKN would not satisfy the statement in paragraph 2.2.4 of NPS EN-1 that the planning system should provide a framework which permits the construction of the infrastructure needed in the place where it is acceptable in planning terms. Finally, the ExA noted that WKN would be in conflict with the National Planning Policy for Waste because it would put at risk the achievement of revised recycling and composting targets in the Kent Minerals and Waste Local Plan.
>
> 4.20 The Secretary of State sees no reason to disagree with the ExA's conclusions in this matter."

27. The decision then records the defendant's conclusion that in relation to the various environmental and infrastructural issues considered by the ExA there was no reason to depart from the ExA's conclusions, nor any new information which justified a different approach. The defendant's decision then turns to the consideration of the planning balance and the conclusions of the defendant in that respect are set out as follows:

> "**6. The Secretary of State's Consideration of the Planning Balance**
>
> 6.1 All nationally significant energy infrastructure developments will have some potential adverse impacts. In the case of WK3 and WKN, most of the potential impacts have been assessed by the ExA as being acceptable subject in some cases to suitable mitigation measures being put in place to minimise or avoid them completely. As set out above, the ExA determined that consent should be granted for WK3 only. The adverse impacts for the WK3 project did not outweigh the significant weight attaching to the need case established by the National Policy Statements.

6.2 However, the ExA's consideration of all the issues, particularly in respect of arguments about where the incineration of waste stood in the waste hierarchy and how this related to adopted policies in relevant local plans, led to the conclusion that WKN, while offering some benefits (particularly from the 42MW of electricity that would be generated), did not accord with the relevant provisions in the National Policy Statements, the National Planning Policy Framework and in relevant local plans. The ExA recommended, therefore, that WKN should not benefit from the grant of consent.

6.3 As set out in above, sections 104 and 105 of the Planning Act 2008 set out the procedures to be followed by the Secretary of State in determining applications for development consent where National Policy Statements have and do not have effect. In both cases, the Secretary of State has to have regard to a range of policy considerations including the relevant National Policy Statements and development plans and local impact reports prepared by local planning authorities in coming to a decision. However, for applications determined under section 104, the primary consideration is the policy set out in the National Policy Statements, while for applications that fall to be determined under section 105, it is local policies which are specifically referenced although the National Policy Statements can be taken into account as 'important and relevant considerations'.

6.4 The Secretary of State adopts a different approach to the ExA's in this matter and is of the view that the whole application (including the benefits and impacts of WKN) fall to be considered under section 104 of the Planning Act 2008. This means that in the consideration by the Secretary of State, more weight has been given to the National Policy Statements. However, the Secretary of State does not consider that this different approach to the planning process results in a different conclusion to that reached by the ExA, namely that development consent should not be granted for WKN and that the benefits of WKN are outweighed by the non-compliance with policies elsewhere, in particular, the policies regarding compliance with the NPS EN-1 and the policies referencing both the waste hierarchy and local waste management plans in NPS EN-3.

6.5 The determination of applications for development consent for nationally significant infrastructure projects is a balancing exercise and the weight afforded to different elements of the matrix of impacts and benefits may affect the overall conclusion. The ExA identifies that there are undoubtedly concerns that WKN would have adverse impacts on local and

> regional targets for moving waste up the waste hierarchy. As noted, the ExA has had regard to these matters in framing its recommendation. However, the Secretary of State is not bound to follow that recommendation if he feels that the evidence presented to him can support a different conclusion.
>
> 6.6 The Secretary of State has considered the arguments in the ExA Report together with the strong endorsement of developments of the type that is the proposed Development. He notes the ExA's comments that WK3's anticipated provision of steam to nearby industrial facilities are a further benefit in its favour. He considers that the overall planning balance supports the grant of consent for the increase in generating capacity and an increase in waste-fuel throughput at WK3. As noted, whilst taking a different approach to the application of sections 104 and 105 of the Planning Act 2008 and consequently to the application of the planning balance in considering WKN, the Secretary of State nevertheless agrees with the ExA's conclusion that even though there are benefits from WKN, these do not outweigh the adverse impacts. The Secretary of State does not, therefore, consider that development consent should be granted for WKN."

28. The ultimate decision of the defendant was, therefore, that although he approached the decisions on the basis that section 104 of the 2008 Act applied to both the elements of the application, as distinct from the approach taken by the ExA (namely that K3 fell to be assessed under section 104 of the 2008 Act and WKN fell to be considered under section 105 of the 2008 Act), the substance of the decision which he reached would be the same, namely that a DCO should be granted for K3 but refused for WKN.

The Proceedings

29. The claimant brought these proceedings within the prescribed timescales and challenged the defendant's decision on the basis that, having correctly concluded that the application should be determined under section 104 because sections 104 and 105 of the 2008 Act were mutually exclusive, the defendant had failed to appreciate the fundamental difference that this made to decision-making, and ought to have unpicked the conclusions of the ExA prior to seeking to reach his own decision within the context of a different statutory framework. In particular, the decision failed to give effect to the conclusion that section 104 applied to the application as a whole in a variety of ways, which included a failure to properly reflect the presumption in favour of granting consent to applications falling within section 104 which accorded with NPS policies, in particular in the event of conflict with development plan policies. Other instances of the differences between the decision-making frameworks of sections 104 and 105 of the 2008 Act were also relied upon.

30. Four grounds of challenge were, and still are, advanced. Ground 1 is the failure to give proper effect to section 104 in the decision-making process and, in particular, the failure to give primacy to the relevant NPSs in accordance with section 104(3). It is alleged that the defendant allowed the primacy of the NPSs to be overtaken by the

application of the development plan's policies as an important and relevant consideration: the adoption of the conclusions of the ExA in their entirety, which were predicated upon primacy of the development plan policies not the NPS, demonstrates the defendant's error in this respect.

31. Ground 2 is the contention that the defendant failed to determine whether or not the WKN proposal complied with the NPSs judged as a whole, in particular, again, by adopting the ExA's conclusions which were made in the context of section 105 of the 2008 Act, without considering any conflict with the NPSs which the ExA found in the light of the section 104 duty to consider whether the application was in accordance with the NPS "judged as a whole". Ground 3 is the failure of the defendant to give adequate reasons in the context of his disagreement with the ExA. Ground 4 is the contention that the defendant failed to comply with the requirements of fairness: in the light of the fact that the defendant was proposing to make a decision on a different statutory footing to that which had been reached by the ExA, it was incumbent upon him to go back to the parties and invite their comments on the effect of such a change of approach.

32. In responding to the claim the defendant, having reflected on the position, concluded that the better view was that section 105 of the 2008 Act applied to WKN rather than section 104 and, therefore, that these sections were not mutually exclusive. In effect, therefore, the defendant conceded that he was at least arguably wrong in law to have solely applied section 104 of the 2008 Act to the whole application, and the approach of the ExA to these provisions was correct. However, the defendant went on to submit that this was not a material error of law, because in reality whilst the defendant had given more weight to the NPSs than the ExA in favour of the WKN proposal and the consideration of need, there was nothing to suggest that the defendant had in fact directly applied the policy provisions from NPS EN-1 or EN-3 to the WKN proposal, and therefore he had undertaken a lawful exercise in planning judgment. Further, it was submitted by the defendant that any legal error that may have occurred did not cause the claimant any prejudice and no relief should be granted as a matter of discretion. Further detailed submissions were advanced in relation to the claimant's grounds which it is unnecessary to rehearse fully at this point in the judgment.

The Law

33. The 2008 Act established a bespoke statutory code for addressing the granting of consent to certain types of project identified as NSIPs. It is an essential feature of the 2008 Act that a key part of the process for considering NSIPs is, as will have been gathered from the facts of the present case, the designation of NPSs. Section 5 of the 2008 Act gives power to the defendant to designate an NPS for the purposes of the 2008 Act if it is issued by the defendant and "sets out national policy in relation to one or more specific descriptions of development". Section 5(3) provides that prior to the designation of a statement as an NPS the defendant must carry out a sustainability appraisal of it, and section 5(4) provides that both specified consultation requirements and Parliamentary endorsement, in the form of the statement being approved by the House of Commons, have to be complied with prior to it being designated. Section 5(5) provides than an NPS may, in particular, set out in respect of a particular description of development "the amount, type or size of development of that description which is appropriate nationally or for a specified area".

34. NSIPs are defined by section 14 of the 2008 Act, and for present purposes they include, by virtue of section 14(1)(a), a project consisting of "the construction or extension of a generating station" and, by virtue of section 15(1)(c) such a project achieves NSIP status if the generating station when constructed or extended is expected to have a capacity of more than 50MW. Section 31 of the 2008 Act provides that consent under the 2008 Act is required for development to the extent that it is, or forms part of, an NSIP.

35. As set out above, the defendant made a direction under section 35 of the 2008 Act in relation to the WKN proposal. Section 35 of the 2008 Act provides as follows:

> "35 Directions in relation to projects of national significance
>
> (1) The Secretary of State may give a direction for development to be treated as development for which development consent is required. This is subject to the following provisions of this section and section 35ZA.
>
> (2) The Secretary of State may give a direction under subsection (1) only if –
>
> (a) the development is or forms part of –
>
> (i) a project (or proposed project) in the field of energy, transport, water, water waste or waste, or
>
> (ii) a business or commercial project (or proposed project) of a prescribed description,
>
> (b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and
>
> (c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with –
>
> (i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;
>
> (ii) in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii)."

36. Sections 104 and 105, as alluded to above, relate to the approach to be taken to decisions where an NPS has effect (when section 104 provides the decision-making framework) and where no NPS has effect (where section 105 provides the decision-making framework). These sections, so far as material to the issues in the present case, provide as follows:

> "104 Decisions in cases where national policy statement has effect

(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

(2) In deciding the application the Secretary of State must have regard to –

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

…

(b) any local impact report (within the meaning given by section 60(3) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),

(c) any matters prescribed in relation to development of the description to which the application relates, and

(d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

> …
>
> 105 Decisions in cases where no national policy statement has effect
>
> (1) This section applies in relation to an application for an order granting development consent (if section 104 does not apply in relation to the application).
>
> (2) In deciding the application the Secretary of State must have regard to –
>
> (a)any local impact report (within the meaning given by section 60(3) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (b) any matters prescribed in relation to development of the description to which the application relates, and
>
> (c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision."

37. The effect of the statutory provisions is to create a separate statutory regime in relation to certain identified types of project, freestanding from other statutory regimes of development control. Projects that are within the scope of the regime created by the 2008 Act require a DCO before they can be implemented. As set out above, a key feature of the regime created by the 2008 Act is the NPS, a form of policy designated pursuant to a specific statutory process which includes Parliamentary approval. The NPS is key to the 2008 Act's regime, as NPSs play an important role in the determination of applications for NSIPs. As Holgate J observed in paragraph 46 of his judgment in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin); [2020] PTSR 1709, the content and merits of an NPS are the responsibility of the defendant who, in that connection, is accountable to Parliament. The statutory process of designation, alongside the statutory prescription of those matters which may be part of an NPS, underline the national character of such policy statements.

38. An important part of the significance of the NPS is the role that it plays under section 104 of the 2008 Act in the determination of DCO applications in respect of applications for which the NPS has effect. By virtue of section 104(2) the defendant "must have regard" to any NPS which has effect in relation to the development. As Holgate J observed in paragraph 48 of *Client Earth*, section 104(3) goes further in requiring that the defendant "must decide the application in accordance with any relevant national policy statement except to the extent that one or more of subsections (4) to (8) applies". As was observed in the claimant's submissions, this decision-making framework is akin to that created in relation to planning permissions by section 38(6) of the Planning and Compulsory Purchase Act 2004. Obviously, in the context of the 2008 Act's regime there are the specific caveats contained within section 104(4) to (8), but the claimant was correct to observe that section 104(3)

creates a form of presumption in favour of a DCO which is in accordance with relevant NPSs.

39. In addition to these matters it is also to be noted that in the case of *R (Gate) v Secretary of State for Transport* [2013] EWHC 2937 (Admin) Turner J observed in relation to a challenge to a highway scheme for which there was no directly relevant NPS that, as a matter of the statutory construction of section 105(2)(c) of the 2008 Act, as well as common sense, a decision-maker is not precluded from taking into account matters incorporated within an NPS in determining an application to which section 105 applies, so long as they are both important and relevant to the decision under consideration. Turner J found there had been no legal error in that case arising from the ExA referring to NPSs in respect of ports and nuclear power generation where both a port and two nuclear power stations were matters of relevance to the decision being made (see paragraphs 55 to 58 of the judgment).

40. In relation to the claimant's grounds with respect to the defendant's reasons, it is to be noted that section 116 of the 2008 Act creates a requirement for the defendant to provide reasons when making a decision on a DCO application. In respect of the quality of those reasons, the claimant relies upon the well-known summary of the applicable legal principles contained within the speech of Lord Brown at paragraphs 35-36 in *South Bucks DC v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953.

41. Turning to the requirements of fairness, whilst it is to be noted that a duty to reconsult the parties is provided by rule 19 of the Infrastructure Planning Examination Procedure Rules 2010, the circumstances giving rise to that duty do not apply in the present case, as the difference from the ExA arising in the defendant's decision did not relate to either a matter of fact, or any new evidence or new matter of fact, which gave rise to the defendant's reasons for disagreeing with the ExA. Rather, the claimant relies upon the principles of fairness within a process of this kind which was set out by the Court of Appeal in the case of *Hopkins Developments Ltd v SSCLG* [2014] EWCA Civ 470; [2014] PTSR 1145, in particular at paragraph 62.

Relevant Policy

42. There are two NPSs that are particularly relevant for the purposes of these proceedings. The first is EN-1, entitled Overarching National Policy Statement for Energy. It is important to appreciate that the document was published in July 2011, at which time the arrangements under the 2008 Act for decision-making were different from those at present. The version of the 2008 Act in force at that time provided that decisions on NSIPs were to be examined and determined by the Infrastructure Planning Commission ("the IPC"). The NPS notes at paragraph 1.3.1 that at the time of it being designated there were proposals in what was then the Localism Bill (which subsequently became the Localism Act 2011) proposing to abolish the IPC. Prior to the reforms of the Localism Act 2011, decisions where NPSs had effect were determined by the IPC pursuant to section 104 of the 2008 Act; where decisions were taken in relation to projects where there was not a designated NPS having effect, the decisions pursuant to section 105 of the 2008 Act were taken by the defendant. The reforms brought both types of decisions before the defendant for determination. Against that background, in paragraph 1.1.1 of the NPS it explains that the NPS has effect "on the decisions by the Infrastructure Planning Commission (IPC) on applications for energy developments that fall within the scope of the NPSs". At

paragraph 1.4.1 the NPS explains that it is part of a suite of NPSs dealing with energy and climate change. At paragraph 1.4.2 the NPS points out that the Act empowered the IPC to examine applications and make decisions on NSIPs in relation to energy generating stations generating more than 50MW of power which were onshore. This NPS is therefore only of application to proposals falling within the statutory definition of an energy NSIP.

43. Part 4 of EN-1 sets out Assessment Principles. In particular, so far as relevant to the present decision, these principles are expressed as follows:

> "4.1.2 Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of the Planning Act 2008 referred to at paragraph 1.1.2 of this NPS.
>
> …
>
> 4.1.5 The policy set out in this NPS and the technology-specific energy NPSs is, for the most part, intended to make existing policy and practice of the Secretary of State in consenting nationally significant energy infrastructure clearer and more transparent, rather than to change the underlying policies against which applications are assessed (or therefore the "benchmark" for what is, or is not, an acceptable nationally significant energy development). Other matters that the IPC may consider both important and relevant to its decision-making may include Development Plan Documents or other documents in the Local Development Framework. In the event of a conflict between these or any other documents and an NPS, the NPS prevails for purposes of IPC decision making given the national significance of the infrastructure."

44. The other relevant NPS is EN-3 which is entitled National Policy Statement for Renewable Energy Infrastructure. This was designated in July 2011 at the same time as EN-1. In paragraph 1.2.1 of the document it explains that this NPS, alongside EN-1, provides "the primary basis for decisions of the Infrastructure Planning Commission (IPC) on applications it receives for nationally significant renewable energy infrastructure". That relationship is emphasised in paragraph 1.3.1 in terms of the need and urgency for new energy infrastructure to be consented in order to make a contribution to sustainable development and to mitigate and adapt to climate change. EN-1 noted the need for specific technologies including the infrastructure to which EN-3 relates. At paragraph 1.8.1 the NPS points out that it covers renewable energy projects such as energy from biomass and/or waste in excess of 50MW. At paragraph 1.8.2 the NPS states that it "does not cover other types of renewable energy generation that are not at present technically viable over 50MW onshore". Paragraph 2.1.2 observes that reading EN-3 and EN-1 together, the position for the IPC is that

they "should act on the basis that the need for infrastructure covered by this NPS has been demonstrated".

45. Amongst the matters covered by the NPS in relation to biomass/waste impacts is the issue of waste management. The NPS notes that waste combustion generating stations need not disadvantage reuse or recycling initiatives where the proposed development accords with the waste hierarchy. In this connection it provides the following in relation to IPC decision-making:

> "2.5.70 The IPC should be satisfied, with reference to the relevant waste strategies and plans, that the proposed waste combustion generating station is in accordance with the waste hierarchy and of an appropriate type and scale so as not to prejudice the achievement of local or national waste management targets in England and local, regional or national waste management targets in Wales. Where there are concerns in terms of a possible conflict, evidence should be provided to the IPC by the applicant as to why this is not the case or why a deviation from the relevant waste strategy or plan is nonetheless appropriate and in accordance with the waste hierarchy."

46. In terms of development plan policy, as noted above, reference in the decision-making process was made to the Kent Minerals and Waste Local Plan 2013-2030 which was adopted in September 2020 in an amended form as a result of the EPR process. Particular reference within the decision-making process was made to policies CSW6 and CSW7 which provide as follows:

> "Policy CSW 6
>
> Location of Built Waste Management Facilities
>
> Planning permission will be granted for proposals that:
>
> a. do not give rise to significant adverse impacts upon national and international designated sites, including Areas of Outstanding Natural Beauty (AONB), Sites of Special Scientific Interest (SSSI), Special Areas of Conservation (SAC), Special Protection Areas (SPAs), Ramsar sites, Ancient Monuments and registered Historic Parks and Gardens. (See Figures 4, 5 & 6).
>
> b. do not give rise to significant adverse impacts upon Local Wildlife Sites (LWS), Local Nature Reserves (LNR), Ancient Woodland, Air Quality Management Areas (AQMAs) and groundwater resources. (See Figures 7, 8, 10 & 15)
>
> c. are well located in relation to Kent's Key Arterial Routes, avoiding proposalswhichwouldgiverisetosignificantnumbersoflorrymovementsthroughvillagesor on unacceptable stretches of road.

d. do not represent inappropriate development in the Green Belt.

e. avoid Groundwater Source Protection Zone 1 or Flood Risk Zone 3b

f. avoid sites on or in proximity to land where alternative development exists/has planning permission or is identified in an adopted Local Plan for alternate uses that may prove to be incompatible with the proposed waste management uses on the site.

g. for energy producing facilities - sites are in proximity to potential heat users.

h. for facilities that may involve prominent structures (including chimney stacks)- the ability of the landscape to accommodate the structure (including any associated emission plume) after mitigation.

i. for facilities involving operations that may give rise to bioaerosols (e.g. composting) to locate at least 250m away from any potentially sensitive receptors.

Policy CSW 7

Waste Management for Non-hazardous Waste

Waste management capacity for non-hazardous waste that assists Kent in continuing to be net self-sufficient while providing for a reducing quantity of London's waste, will be granted planning permission provided that:

1. it moves waste up the hierarchy,

2. recovery of by-products and residues is maximised

3. energy recovery is maximised (utilising both heat and power)

4. any residues produced can be managed or disposed of in accordance with the objectives of Policy CSW 2

5. sites for the management of green waste and/or kitchen waste in excess of100 tonnes per week are Animal By Product Regulation compliant (such as in vessel composting or anaerobic digestion)

6. sites for small-scale open composting of green waste (facilities of less than100 tonnes per week) that are located within a farm unit and the compost is used within that unit.

> Where it is demonstrated that waste will be dealt with further up the hierarchy, or it is replacing capacity lost at existing sites, facilities that satisfy the relevant criteria above on land in the following locations will be granted consent, providing there is no adverse impact on the environment and communities and where such uses are compatible with the development plan:
>
> 1. within or adjacent to an existing mineral development or waste management use
>
> 2. forming part of a new major development for B8 employment or mixed uses
>
> 3. within existing industrial estates
>
> 4. other previously developed, contaminated or derelict land not allocated for another use
>
> 5. redundant agricultural and forestry buildings and their curtilages
>
> Proposals on greenfield land will only be permitted if it can be demonstrated that there are no suitable locations identifiable from categories 1 to 5 above within the intended catchment area of waste arisings. Particular regard will be given to whether the nature of the proposed waste management activity requires an isolated location."

Submissions and Conclusions

47. As set out above, the claimant's ground 1 is the contention that the defendant failed to properly apply section 104 of the 2008 Act. As will be apparent from the history of both the decision-making and also the submissions in these proceedings, there is clearly a preliminary issue arising in relation to the question of whether or not section 104 and section 105 of the 2008 Act are mutually exclusive, or whether it is appropriate, as the ExA did, to apply those sections differentially where there are two freestanding and distinct projects within the scope of a single application for a DCO and the NPSs apply to one of those projects but not the other.

48. The claimant contends that, in principle, the defendant was correct in making his decision by applying section 104 of the 2008 Act to the application as a whole. The claimant advances this position on the basis of two principal lines of argument. The first is that the mutual exclusivity arises from the specific language of the statute. Both section 104 and section 105 of the 2008 Act refer to those sections applying "in relation to an application for an order granting development consent" (emphasis added). Thus, it is clear from the language of the legislation itself that where there is an application for which the NPS has effect it is to be decided within the section 104 framework.

49. Furthermore, the claimant submits that this language is to be contrasted with the language of section 14 of the 2008 Act which defines an NSIP in terms of being "a

project", consisting of one of the types of infrastructure identified within section 14(1). The selection of the word "application" in section 104 and 105 of the 2008 Act is clear and deliberate, and has the effect of attracting the section 104 decision-making framework to applications like the present where there is more than one free-standing development or proposal comprised within the same application, albeit that one of those projects or developments is not one which falls within the definition of an NSIP for which an NPS has effect.

50. The second line of argument pursued by the claimant places reliance upon the section 35 direction which was given in the present case. The claimant submits that when section 35 of the 2008 Act provides that the defendant "may give a direction for development to be treated as development for which development consent is required" this is in the first place a reference back to section 31 of the 2008 Act, which provides as follows:

> "31 When development consent is required
>
> Consent under this Act ("a development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project."

51. The claimant contends that when section 35(1) of the 2008 Act describes the effect of the direction as being that development subject to the direction is "to be treated as development for which development consent is required" it means what it says. In other words, the effect of the section 35 direction is to lift the development proposed into section 31, and thereafter to bring it within scope of section 104 of the 2008 Act, on the basis that it is to be treated as NSIP development. Thus, reading all of these provisions together, and observing the subtlety in the statutory language, where as here there are two projects falling within an application, and one of them falls within the definition of an NSIP, and the other does not but has been subject to a section 35 direction, then the application containing these two projects requires each of them to be determined applying the framework provided by section 104 of the 2008 Act.

52. Finally, the claimant contends that in effect the position for which the defendant argues reads words into section 104 of the 2008 Act, by treating it as if it included words to apply the provisions of section 104 to part only of an application.

53. As set out above, although the defendant disagreed with the ExA and approached his decision on the basis that sections 104 and 105 of the 2008 Act are mutually exclusive, the position which he now adopts is that the ExA was correct to apply section 104 and section 105 separately to the individual standalone proposals comprised within the application. The analysis presented in the defendant's submissions commences from the observation that the 2008 Act creates a specific and bespoke statutory framework for approving particular kinds of development within what was intended to be a streamlined process of determination. A key feature of this bespoke statutory framework is the NPS which, pursuant to the broadly drafted provisions of section 5 of the 2008 Act, is specified in advance and has a special status and a particular process to produce it including Parliamentary approval.

54. Against this background the defendant submits, firstly, that the starting point for addressing the question of whether section 104 applies is to examine whether an NPS

applies to the project which is being evaluated. In this case a clear policy choice was made in the designation of the NPS that it should only apply to projects fulfilling the statutory definition of an NSIP, and therefore that it cannot apply to the WKN proposal. Once that is understood, if section 104 of the 2008 Act were to be deployed to determine the WKN proposal this would have the effect, in practice, of expanding the application of the NPS to a scale of project for which it had never been intended. Such an approach would be quite inconsistent with the centrality of the NPS within the statutory framework devised by the 2008 Act. As noted above, the contents of an NPS are not open to question within the decision-making process, and that includes the thresholds adopted for the application of the NPS in the policy.

55. Furthermore, the defendant submits that the section 35 direction in the present case does not assist the claimant. When section 35 speaks of treating the proposal as an NSIP that does not and could not have the effect of altering the terms of the NPS policy framework and the choices which have been made in designating the scale of proposals to which it will apply: it cannot give rise to an assumption that the proposal is bigger than in fact it is. The reference to section 31 is also contended to be of no avail to the claimant. Sections 31 and 35 are in a different part of the 2008 Act, Part 4, to the part of the Act containing sections 104 and 105, namely Part 6, and the purpose of section 35 is simply to bring qualifying proposals for which a direction is granted within the 2008 Act's decision-making processes.

56. In short, the defendant submits that sections 104 and 105 of the 2008 Act are mutually exclusive on the basis that the language of section 104 precludes its application to a proposal such as WKN which does not fall within the scale of projects to which the NPS specifically applies. This is as a result of the clear intention to be derived from the structure of the 2008 Act which places the NPS at the heart of the statutory framework as well as ensuring that NPSs are only applied within their identified scope. The defendant submits that section 105(1) can, in the context of the intent of the statutory framework, be read more broadly as including "where" or "to the extent that" section 104 does not apply to the proposal and so as to be consonant with the statutory purpose.

57. In my view the ExA was correct in his approach to sections 104 and 105 of the 2008 Act in the context of the present proposals. Clearly there is no dispute, firstly, that it is possible to include more than one project or development within the same application for a DCO and, secondly, that the K3 Project was one for which the NPS had effect, and therefore to which section 104 applied. Whilst I can see the force in the submissions of the claimant in relation to the use of the word "application" in both sections 104 and 105, the use of this word needs to be understood in the context of the statutory framework as a whole.

58. To suggest that by incorporating a project in respect of which the NPS has no effect within an application for a separate free-standing project which does fall within the scope of an NPS it is possible effectively to enlarge the scope of the NPS so as to include a project to which it was not designed to apply would clearly run contrary to the overall statutory scheme. That overall statutory scheme places the NPS at the heart of the decision-making process, and prescribes specific procedures, including endorsement by Parliament, prior to its designation. The contents of the NPS cannot be questioned in the decision-making process: so much is made clear in sections such as section 106(1) which applies in the decision-making context, and which entitles the

defendant to disregard representations which "relate to the merits of policy set out in a national policy statement". Similar provisions are contained in section 87(3) respecting like representations to the ExA, and section 94(8) in relation to like representations made at hearings. It would be inconsistent with the centrality of the NPS within the statutory decision-making framework for its scope to be enlarged and its provisions bypassed by the manner in which an application has been formulated.

59. Whilst specific circumstances of the kind presented by the application in the present case may not have been directly foreseen by those framing the 2008 Act, it is clear that the overarching approach of the legislation is that decisions should be reached in relation to proposals for development in respect of which an NPS has effect deploying the framework within section 104 of the 2008 Act, whereas proposals for development within the statutory framework's decision-making process for which there is no applicable NPS having effect are to be decided pursuant to the framework provided by section 105 of the 2008 Act. Such an approach clearly reflects the language of section 104(1) which refers to an NPS having effect "in relation to development of the description to which the application relates". It is less consistent with a literal reading of section 105(1), but when that text is placed in the context of the purpose and structure of the legislation as a whole, it is clear that section 105(1) should be interpreted as applying to those discrete elements of an application which comprise proposals for development for which no NPS which has effect. I accept the submission of the defendant that section 105 of the 2008 Act should be interpreted as applying to free-standing parts of an application to the extent that "section 104 does not apply in relation to the application". Such an approach reflects the purpose and intent of the legislation without unduly disturbing the effect of the statutory language. Thus, the ExA was correct to take the approach which he did.

60. The question arises as to whether or not the section 35 direction which was made in relation to WKN has the effect of bringing it within the scope of the decision-making framework pursuant to section 104. In my view it does not. I am unable to accept the submission that the terms of section 35(1) have the effect of turning a project or development which does not fall within the definition of NSIPs provided within sections 14 and 15 of the 2008 Act into a project which has such a designation. The words "be treated as development for which development consent is required" simply have the effect of making the proposed development subject to the decision-making framework contained within the provisions of the 2008 Act. They do not change the understanding of the proposal as not being within the definition of an NSIP, any more than they change the physical nature of what is comprised within the development. More particularly, they cannot have the effect of altering the scope of an NPS which has been drafted specifically to apply only to those projects that are within the definition of an NSIP.

61. There are clear advantages of the 2008 Act incorporating a provision like section 35, both procedurally in terms of the economy of dealing with projects which are not NSIPs alongside those which are leading to more efficient decision-making, as well as enabling a project of national significance which does not fulfil the definition of an NSIP to take advantage of the DCO regime, for instance in the form of the exemptions from other consenting processes comprised within section 33 of the 2008 Act. It is pertinent to the understanding of the intention of section 35 that it appears in the same Part of the 2008 Act as section 31 and 33 which all refer to the requirement

for development consent, rather than that part of the Act containing sections 104 and 105 which deals with the processes of deciding applications.

62. The cross reference made by the claimant to section 31 of the 2008 Act does not assist. It is clear that the purpose of section 35 is not to make a project which is not and does not form part of an NSIP into an NSIP. Its purpose is more modest, namely to enable the defendant to bring within the scope of the 2008 decision-making framework projects which satisfy the requirements of section 35(2), and are of a particular type of infrastructure which either by themselves or when considered with other specified types of project are of national significance. They are then able to take advantage of the streamlined decision-making processes as well as the available exemptions from other consenting regimes.

63. In the light of these conclusions it is clear that the defendant clearly did misdirect himself when issuing his decision in relation to the WKN project in relation to the statutory framework for determining that part of the application which related to it. Section 104 did not apply to the WKN project, unlike the K3 project, and the defendant ought to have assessed the WKN project deploying the section 105 decision making framework. In the light of these conclusions, albeit contrary to the claimant's submissions on the preliminary issue, the clear outcome is that the defendant has reached a decision incorporating a misdirection and an error of law. The defendant, however, contends that the error of law is not material and that relief should be refused as a matter of discretion. These are matters which are returned to below, following consideration of the claimant's grounds.

64. To deal with the balance of ground 1, it is contended on behalf of the claimant that the defendant ought, in applying section 104, to have accorded primacy to the NPS, accepted that need had been demonstrated for the WKN and, to the extent necessary, have unpicked the conclusions of the ExA in order to reach a lawful decision. In effect, this ground is predicated on the basis that the defendant was right to apply the section 104 decision-making framework to the WKN project, but that he failed to faithfully apply that framework in practice. In reality, in the light of the conclusions in relation to the applicability of section 105 to the WKN project this ground no longer arises. The claimant's ground 2 is similarly predicated upon the WKN proposal needing to be evaluated against the decision-making framework in section 104 of the 2008 Act. For the reasons which have been explained that is not the case. There was no need for the presumption in favour of the proposal pursuant to section 104(3) to be applied, nor was the NPS the primary decision-making tool in the assessment of the application, against which the WKN proposal was required to be judged as a whole. Although within ground 2 the claimant complains that the defendant found a conflict with the waste hierarchy provisions of paragraph 2.5.70 (by adopting the ExA's conclusions in that regard) but failed to judge that conflict against the NPS taken as a whole, in the light of the conclusion that section 104 did not apply to the appraisal of the merits of the WKN proposal there is no substance in this criticism.

65. Turning to ground 3 the claimant's contentions in relation to the failure to give reasons relate, firstly, to the failure of the defendant, when purporting to consider the WKN proposal within the context of section 104, to properly analyse the weight to attach to the need established through the NPS for the electricity which it would generate and the benefit that would bring. Adoption of the ExA's conclusions, forged through the application of section 105 of the 2008 Act was inappropriate, and the

difference between the ExA and the defendant was not properly explained. Again, in the light of the conclusions reached as to the applicable decision-making framework these criticisms are to some extent moot. They are criticisms which do not arise since the defendant was wrong to have sought to reach his decision by solely applying the framework derived from section 104 of the 2008 Act.

66. Further criticisms of the reasons provided by the ExA, giving rise to errors on behalf of the defendant, relate to, firstly, what is said to be a muddling or conflation of the issues in relation to electricity generation and the waste hierarchy. The claimant contends that in the ExA's report, in particular for example at paragraphs 6.2.11 and following, the reasoning of the ExA conflates two separate issues, namely energy need on the one hand, and compliance with the waste hierarchy or the need for further waste facilities on the other. This muddling of the benefits arising from meeting the need for further sustainable energy generation, with the impact on the waste hierarchy of the proposal occurs again in paragraphs 4.18–4.20 of the defendant's decision to accept the conclusions of the ExA on these matters.

67. Having examined these paragraphs, and the ExA's report as a whole, I am not satisfied that there is any legitimate complaint in relation to the reasons that are provided by the ExA in connection with these issues. It is important, obviously, for the ExA's report to be read in its entirety. Further, both in paragraphs 6.2.13-6.2.17, 6.2.25–6.2.33 as well as in paragraphs 6.3.10-6.3.17, the conclusions of the ExA are clear in relation to the benefit to be recognised from the energy generated by the WKN proposal but also (and bearing in mind the differences in the increase in capacity between the K3 proposal and the WKN proposal) the impact of the WKN proposal upon the interests of the waste hierarchy. The reflection of these conclusions in the decision letter again clearly identifies the assessments in relation to electricity generation and impact on the waste hierarchy. The issues are not in my judgment muddled: it was necessary in terms of the applicable policy for the ExA and the defendant to form conclusions in relation to the benefits of energy generation as well as any impact on the waste hierarchy since both are material issues in relation to the operation of the proposed facility. Both the ExA and defendant undertook an analysis of these considerations and then brought them into their analysis of the planning balance. The conclusions arrived at in the decision-making process with respect to these issues are clearly spelt out. They are treated separately, as they should be and as the policy framework required, in the light of the fact that they are both individual elements of the overall planning appraisal as well as integrally related to the operation of the facility which is under consideration.

68. The second aspect of the reasoning with which the claimant takes issue is that pertaining to the dispute set out above in respect of waste arisings and the availability of fuel for the application proposals. It is contended on behalf of the claimant that there was a clear issue joined between itself and KCC in relation to the volumes of waste arising which fell to be considered when examining the availability of fuel for the proposal. It is said by the claimant that the ExA, and thereafter the defendant, provided no reasons which grappled with this difference in the figures, nor did the ExA or the defendant provide any understanding as to why the claimant's analysis of the waste arisings had been rejected.

69. I am unable to accept these criticisms. In my view the basis upon which the ExA reached his interconnecting conclusions about, firstly, the evidence in relation to

available waste as fuel, secondly, the conclusions to be drawn from this evidence as to the proposal's impact on the waste hierarchy and, therefore, thirdly, the relationship between the proposals and the policies of the EPR and NPS EN-3 at paragraph 2.5.70 are all clearly expressed. In respect of the competing positions as to volumes of waste, and the available capacity of additional waste fuel, paragraphs 4.10.122-4.10.132 of the ExA's report quoted above provide clearly articulated conclusions resolving the issues. The ExA explains why he prefers the KCC assessment, noting that the EPR inspector had accepted KCC's consultant's analysis as a sound evidence base for the revised plan. These paragraphs also explain the relationship between these conclusions and, alongside paragraphs 4.10.139-4.10.144, their impact in relation to the merits of the WKN project upon the interests of the waste hierarchy. Subsequent paragraphs within the ExA's analysis of the overall planning balance further reflect these conclusions and explain them. In my judgment this material is more than adequate to clearly explain the reasons for the ExAs conclusion that the KCC assessment was to be preferred to that of the claimant, as well as the further consequences for the assessment of the merits of the WKN project against the relevant planning policies.

70. Ground 4 is the contention that in the light of the difference between the approach of the ExA and that of the defendant, fairness required the defendant to return to the parties for submissions on the impact that this change of approach would have upon the decision-making process. In particular, the claimant contends that submissions would have been made on the primacy of the NPS within the section 104 decision-making framework, together with the establishment by the NPS of the need for the electricity which was being generated. Further submissions could have been made on matters covered by section 104(7) of the 2008 Act on how these issues should be weighed in the overall balance to determine the merits of the proposal.

71. In my judgment, the difficulty with this submission is that it is necessary for the claimant, in reliance upon the principles of procedural fairness set out in *Hopkins Developments Ltd*, to establish there has been any relevant or material prejudice as a result of the failure to reconsult. As set out above, there was no requirement pursuant to the 2010 Rules to revert to the parties in these circumstances. The reality is that all of the matters which the claimant contends would have been raised upon the matter being referred back to them are matters which were already before the defendant: the claimant had emphasised the importance of the benefits arising from electricity generation at the WKN proposal, and the importance of the policies contained in the NPS. In any event, these matters pertained to the application by the defendant of the section 104 decision-making framework which for the reasons already given was not the correct approach to reaching a decision in connection with the WKN proposal. I do not consider, therefore, that there is any substance in the claimant's ground 4.

Relief

72. The defendant contends that the claimant should be deprived of relief, in particular in relation to the quashing of the decision, either in so far as it relates to the WKN proposal, or in its entirety. In order to evaluate this submission, it is important to start with the error of law which has been identified. In this case the error of law is the application by the defendant of section 104 of the 2008 Act to both the K3 and WKN proposals whereas, in accordance with the findings set out above, the defendant should have applied section 105 of the 2008 Act to the WKN proposal. Since this is

an application for judicial review the framework for considering this submission is set out in section 31(2A) of the Senior Courts Act 1981, and amounts to the question of whether or not it was highly likely that the outcome would not have been substantially different.

73. The approach to this question has been the subject of consideration in a number of cases in recent years and it is important to observe that it sets a high threshold to be overcome before relief can be withheld. It is less strict than that which applies in statutory reviews which requires that the court be satisfied that the decision would have been the same (see *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041), albeit as Coulson LJ observed in the recent case of *R (on the application of Hudson) v Royal Borough of Windsor and Maidenhead* [2021] EWCA Civ 592 at paragraph 80, the precise formulation of the test whether in the terms of the section 31(2A) test, or the alternative test derived from the *Simplex* case that the decision would inevitably have been the same, may not matter in practice, save in a very unusual case.

74. The court must be cautious about straying into assessing the merits of the application in evaluating this question, which is the reserve of the defendant as decision-maker. This point has been observed in several of the relevant authorities dealing with the discretion to withhold relief both under section 31(2A) and also the *Simplex* jurisdiction: see *SSCLG v South Gloucestershire Council* [2016] EWCA Civ 74 at paragraph 25 and *R(Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at paragraph 273 for instance. Obviously, the proper evaluation of the question posed by section 31(2A) is one which will vary from case to case and no single analysis will be capable of resolving all of the many scenarios which courts will have to address. In addressing the question in the present case I have found the following approach helpful.

75. As the *South Gloucestershire* case demonstrates, it is useful, firstly, to clearly identify the error of law infecting the decision, and secondly, those findings or elements of the decision-making process or of the decision itself which are untainted by illegality. This can then enable an analysis of the decision to be undertaken which properly tests the proposition that the decision would have been the same, or would not have been likely to be substantially different. The *South Gloucestershire* case is a helpful illustration of the necessary analysis: in that case the Inspector's error related to the absence of a five-year housing land supply, but Lindblom LJ was satisfied that so strong were the considerations in favour of the grant of permission that even had the Inspector taken into account, as he should have done, that the local planning authority could demonstrate a five-year housing supply, he would still have granted consent as he did in the decision under challenge: see paragraph 26 of the judgment in particular.

76. In considering these questions in relation to the present case it is important to observe, firstly, that the contentions of the claimant in relation to any error of law in the ExA's report have not been upheld. Secondly, in relation to the waste hierarchy and fuel availability, the Secretary of State adopted the ExA's conclusions. He also adopted the ExA's conclusions in relation to all of the other environmental and infrastructure considerations which were examined, and in paragraphs 4.18-4.20 accepted the overall conclusions reached by the ExA in relation to each of the individual proposals. The defendant noted at paragraph 4.6 his view that determining the whole application under section 104 of the 2008 Act did not have a material impact on the overall

outcome in relation to the case. This observation is further justified at paragraphs 6.4-6.6 in which the defendant explains that whilst taking a different approach to the ExA and, as a result of considering both projects under section 104 of the 2008 Act according "more weight" to the NPS, nevertheless his balancing of the issues did not result in a different conclusion to that which was reached by the ExA, namely, that the benefits of the WKN project were outweighed by its non-compliance with policies in NPS EN-1 and EN-3 related to the issues associated with the waste hierarchy and local waste management plan policies.

77. The effect of the defendant's conclusions set out above is that the defendant's assessment of the planning balance did not favour the grant of consent for the WKN project whether it was considered under section 104 of the 2008 Act (with the additional weight being afforded to the NPS in assessing the merits), or whether it was assessed under section 105 of the 2008 Act. It follows that on the basis of the defendant's assessment, the overall outcome of the application would have been the same even if he had adopted the decision-making framework contained within section 105 of the 2008 Act. That assessment is unsurprising because, as the defendant's reasons explain, even applying greater weight to the NPS as required by section 104 of the 2008 Act, and adopting a more favourable approach to the balance than that afforded by the ExA, the adverse impacts of the WKN proposal would still outweigh its benefits. It follows that the decision of the defendant would have been the same, and certainly the outcome would not have been substantially different, without commission of the error of law which has been identified in his decision, and therefore I have formed the view that the claimant is not entitled to relief by way of the quashing of the decision.

Conclusions

78. For the reasons set out above whilst I am satisfied that there was an error of law in the defendant's decision in relation to the application, in the very particular circumstances of this case I do not consider that the claimant is entitled to relief on the basis that the decision would have been the same, and certainly unlikely to have been substantially different, even if the error of law had not been committed by the defendant.

Appendix F: York Aviation Needs Case Review

Gatwick North Runway Project
Needs Case Review for Local Impact Reports

1. York Aviation (YAL) has been appointed by the Host[1] and Neighbouring Authorities[2], collectively known as the Joint Local Authorities (LAs), to provide advice in relation to aviation capacity, need and forecasting, and aspects of the socio-economic case for Gatwick Airport Ltd's (GAL) North Runway Project (NRP). These are embodied in the Needs Case (**APP-250**) for the proposed development.

2. It is important for the LAs to understand the implications of the NRP in order to ensure that appropriate mitigations are in place to address the adverse effects having regard to the extent of benefits that can be realised.

3. Ultimately, the assessment of the effects of the NRP, both positive and negative, rely on the projections of future passenger demand and aircraft movements at Gatwick, which in turn rely on the assessment of the increase in capacity that can be delivered by the NRP compared to the Base Case capacity.

4. This paper has been prepared to inform the LAs Local Impact Reports (LIRs), drawing on submitted application documents, the Relevant Representations, PADSS and GAL's Issues Tracker [**AS-060**]. The paper addresses:

   - Need
   - Base Case and NRP Capacity
   - Demand Forecasts
   - The Wider Economic Case

Need

5. It is not disputed that aviation policy provides in principle support for airports to make best use of their existing runways[3], as set out in the 2018 policy document *Beyond the horizon: making best use of existing runways*[4] (MBU), or that having a second runway available for use by departing aircraft at peak times would improve the resilience of the Gatwick operation in terms of minimising and mitigating the substantial levels of delay experienced by aircraft at the high levels of single runway usage experienced pre-pandemic as set out in Section 7.2 of the Needs Case (**APP-250**). Concerns regarding the extent of

[1] Crawley Borough Council, West Sussex County Council, Mole Valley District Council, Reigate and Banstead Borough Council, Tandridge District Council, and Surrey County Council.
[2] Horsham District Council, Mid Sussex District Council, East Sussex County Council, and Kent County Council.
[3] It is noted that further information is to be provided by the Applicant to the Examination about the construction/engineering works involved in repositioning and resurfacing the emergency runway to enable dual runway operations and this information will be relevant to an assessment of whether the NRP is properly to be regarded as making best use of an existing runway or the establishment of a new runway. Pending the provision of that further information, this review proceeds on an assumption that the MBU policy is applicable.
[4] Department of Transport, Beyond the Horizon, making best use of existing runways, June 2018.

congestion currently at Gatwick have been expressed in Relevant Representations by its main airline customer, easyJet (**RR-1256**), and the Gatwick Airline Consultative Committee (**RR-1493**). This is relevant as the current levels of congestion are material to assessing the extent to which the baseline throughput of the Airport can be materially increased above the peaks of demand handled pre-pandemic and this is considered further later in this note under the heading Demand Forecasts.

6. As GAL notes in the Needs Case (**APP-250**) at paragraph 5.2.9, the Secretary of State is clear in the decision on the Manston DCO[5] that policy does not require potential capacity at other airports to be taken into account in determining whether a specific proposal for development at an airport can be approved. Each case falls to be determined on its own merits having regard the benefits and environmental impacts of the development.

7. However, noting that the *Airports National Policy Statement* (ANPS) at paragraph 1.42 refers to other airports being able to *"demonstrate sufficient need for their proposals additional to (or different from) the need which is met by the provision of a Northwest Runway at Heathrow"*[6], a helpful interpretation of how need should be construed is provided at paragraph 37 of the Manston decision:

"The Secretary of State agrees with the Applicant that the ANPS does not provide an explanation of 'sufficient need'. He also agrees that the MBU policy, which is relevant to this Application, does not require making best use developments to demonstrate a need for their proposals to intensify use of an existing runway or for any associated Air Traffic Movements ("ATMs"). The Secretary of State notes, however, that the MBU policy states that a decision-maker, in taking a decision on an application, must take careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations (MBU paragraph 1.29). The Secretary of State considers that the benefits expected from a proposed development would materialise if there is a need for that development. Therefore, in order to assess whether the expected economic benefits will outweigh the expected environmental and other impacts from this Development, the Secretary of State has considered need in the context of identifying the likely usage of the Development from the evidence submitted in the Examining Authority's Report, the Independent Assessor's Report and the representations submitted by Interested Parties during the redetermination process."

8. Hence, it is essential that applications for making best use of an existing runway must be accompanied by robust forecasts of the likely usage of the additional capacity so as to ensure that the assessment of benefits, impacts and their required mitigation is reasonable and forms a sound basis for decision making.

9. It is notable, however, that part of the rationale for the Secretary of State dismissing consideration of the potential for other airports to meet all or part of the need in the case of Manston was that the alternative development proposals might not be brought forward by other airports. Since that time, an application for development consent has been brought forward for the expansion of London Luton Airport to 32 mppa and there is a proposal for London City Airport to expand to 9 mppa. It also remains the case that the ANPS is still in force and expressly supports the provision of the Northwest Runway at Heathrow as a matter of policy and applicants need to demonstrate a specific need (likely usage) for their development that differentiates the expected usage from that which could be met at Heathrow. We address later in this paper, the extent to which GAL has demonstrated a need distinct from that which could be met at Heathrow.

10. In this context, we note, nonetheless, that the Planning Inspectorate's Scoping Opinion on the Environmental Statement (**APP-095**), at paragraph 3.3.13, is clear that the timing of the provision of an additional runway at Heathrow is a matter that it expected to be fully considered as part of the

[5] Department for Transport, Application for the Proposed Manston Airport Development Consent Order, Decision, 18th August 2022.

[6] Department for Transport, Airports National Policy Statement, June 2018.

sensitivity testing, i.e. the possibility of another runway coming forward cannot be ignored and the implications should be assessed both individually and cumulatively. We address the adequacy of GAL's approach to this issue further later in this note.

Capacity

Base Case

11. The Base Case capacity of the existing runway to handle up to 55 aircraft movements per hour is accepted as the maximum hourly runway capacity with a single runway in use for the purpose of baseline capacity assessment. This is the peak hourly runway movement rate used for scheduling purposes in busy hours currently, although, as noted in paragraph 5 above, GAL's airline customers have expressed concern about the acceptability of the levels of congestion and delay at that throughput:

    "GAL's performance is below the performance of other large airports in Europe. GAL is consistently ranked in the lower half of punctuality rating in relation to average arrival and departures of the 33 airports reported by Eurocontrol (see sources). GAL has provided sub-standard Air Traffic Control services in 2022 and 2023 demonstrating a clear inability to cope with the current levels of traffic, let alone an increase in capacity with a second runway." (**RR-1256**)

12. We understand that easyJet has removed some of its based aircraft from Gatwick in summer 2024 in part to improve resilience and plans to reduce its fleet at the Airport still further[7]. We believe that the level of delays seen at the Airport are a factor in the slower recovery of demand at Gatwick than at the other major airports. Gatwick was the poorest performing of the UK's top 10 airports in 2023 with traffic recovered to only 88% of 2019 volumes in the previous 12 months compared to 98% at Heathrow, 99% at Stansted and 90% at Luton, with the latter impacted by measures put in place to protect the noise contour and passenger limits pending the more recent approval for these to be raised[8].

13. Ultimately, the extent of delays impacts on airlines' willingness to base or schedule more aircraft into the Airport, and this has implications for the Base Case passenger and aircraft movement forecasts that have informed the baseline assessment of environmental impacts. This issue is addressed further later in this note in terms of the annual passenger throughput that the current airport capacity can support.

NRP

14. The assessment of the impacts of the NRP relies on the difference between the baseline capacity and that attainable with the two runways in operation.

15. In terms of the capacity uplift attainable with the NRP, GAL claims that it can attain an hourly runway movement of up to 69 movements per hour with both runways in use. Whilst this may be theoretically correct in hours when there is a close to even split of arriving and departing traffic, it is not likely to be the case when there is a predominance of either arriving or departing aircraft movements within any given hour as arriving and departing movements cannot be interleaved with each other and minimum separation standards apply between consecutive arriving or departing aircraft according to weight or the departure route used.

[7] https://aviationweek.com/air-transport/airports-networks/easyjet-return-3000-gatwick-slots-british-airways

[8] Department for Levelling Up, Housing and Communities and Department for Transport, Town and Country Planning Act 1990 – Section 77 Application made by London Luton Airport Operations Ltd (LLAOL) London Luton Airport, Airport Way, Luton, LU2 9LY, Application Ref: 21/00031/VARCON, Decision Letter, October 2023.

16. Given the predominance of activity by based aircraft, including the large easyJet fleet based at the Airport, coupled with based aircraft of British Airways, TUI and Wizz Air UK, this means that between 55% and 60% of all aircraft movements in Summer 2023 involved based aircraft. Based airlines are critically dependent on making maximum use of their aircraft over the day, particularly to sustain low and competitive air fares in order to attract passengers to use them. Hence the first hours in the morning are critical in terms of capacity for departing aircraft and this, in large part, determines the overall throughput attainable at the Airport. It seems likely that concerns regarding levels of congestion and delay in this critical period for based airlines underpins the concerns about GAL's ability to successfully deliver the project as expressed by easyJet in its Relevant Representation (**RR-1256**):

"easyJet therefore questions whether GAL would be in a position to manage the increased aircraft movements that the Northern Runway would bring.

Current infrastructure plans set out by GAL do not sufficiently account for increased capacity.

easyJet is aware that GAL has initiated some conversations on improvements to terminal infrastructure needed for the Northern Runway Project, however these are at a concept / pre-planning stage."

17. Hence, a critical time of day in terms of available runway capacity is the early morning period dominated by departing aircraft movements. GAL's own data (ES Appendix 4.3.1 (**APP-075**), Annex 7, page 6) shows a requirement for 48 aircraft departures in the first hour of the morning from 2032 onwards, with a total number of departures over the first 4 hours of the morning of 163 (an average of over 40 departing aircraft movements an hour when such based aircraft need to depart). This requires no more than 90 seconds on average between each pair of departing aircraft.

18. Although the NRP will enable both runways to be used for departures, meaning that aircraft can be lining up for take-off on both runways simultaneously, the separation between the two runways, even after modification, will be such that they are treated as a single runway in terms of the airspace as confirmed at paragraph 4.5.9 of the Planning Statement (**APP-245**):

"Because of the minimum 210m separation distance between the centrelines of the two runways, they would be treated for the purposes of air traffic control as a single runway for departure departure separation purposes".[9]

19. In general, this means that aircraft following the same departure route for any distance beyond the end of the runway must be separated by 2 minutes between successive departing aircraft regardless of which runway they depart from. Only where departure routes diverge by 45° or more immediately at the end of the runway is it possible, under current rules, to reduce the separation between two departures to 1 minute, subject to wake vortex considerations[10]. GAL's original runway capacity modelling as reported in the Needs Case (**APP-250**) had assumed that 1 minute separation would be achievable between all departing aircraft.

20. The most critical direction for assessing the capacity of Gatwick's runway configuration is the westerly Runway 26 direction, used for 70% of the time on average. The departure route structure for this runway direction is shown in **Figure 1** (provided at the Technical Working Group [TWG] on 22nd June 2023) along with the proportionate usage anticipated for the first few hours in the morning that are

[9] This is confirmed by the CAA in its Relevant Representation (**RR-0831**), where it states at paragraph 4.6 that the proposed use of the North Runway would not alter existing traffic patterns. Whilst the CAA has also confirmed that there is no impediment foreseen to the ability to certificate the use of the North Runway on the layout proposed, this cannot be taken to imply that the CAA has validated the capacity attainable through the NRP having regard to the fact that no change to airspace is directly proposed.

[10] Where lighter aircraft follow heavier aircraft, greater separations distances apply due to wake turbulence effects from the leading aircraft.

critical for overall departure capacity and the ability of the Airport to grow operations by based aircraft. Although Gatwick has recently initiated consultation on potential changes to its departure routes to the south, the implications of these changes in terms of capacity are not clear, nor is the timescale for further information becoming available. It is understood that GAL has not modelled the capacity implications of these potential changes to the departure routes, which adds further doubt to whether the capacity increase claimed can be relied on.

Figure 1: Structure of Gatwick Departure Routes and assumed usage 2038 with NRP

Characteristics of the 2038 Busy Day Forecast Schedule

NRP - 2038

Hour UTC		5	6	7	8
Total	NB	47	49	62	46
	WB	17	14	7	13
	Total	**64**	**63**	**69**	**59**
Arr	NB	2	12	26	14
	WB	14	12	7	5
	Total	**16**	**24**	**33**	**19**
Dep	NB	45	37	36	32
	WB	3	2	0	8
	Total	**48**	**39**	**36**	**40**

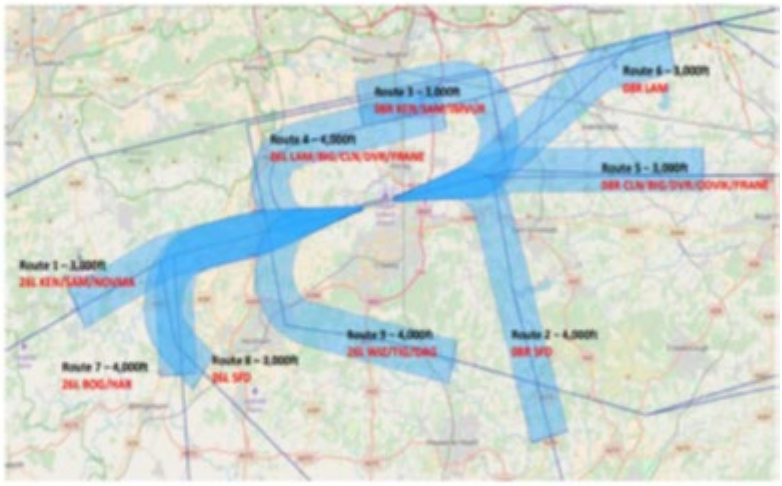
SID usage by hour of day

2038 Modelled

Hour (UTC)	Route 4/9	Route 7 or 8	Route 1
4	44%	31%	25%
5	48%	35%	17%
6	51%	28%	21%
7	36%	42%	22%
8	39%	26%	36%

Westerly SIDs = Routes 1, 7 & 8.

LONDON GATWICK



21. On the basis of the departure routes as currently operational, it is evident from **Figure 2** that Departure Routes 1, 7 and 8 do not diverge and require 2 minute separations between all aircraft. Only Routes 4 and 9 provide the requisite divergence from the other three routes. However, Route 9 – WIZAD – is precluded from use before 07:00 local time (06:00 UTC in summer), which is the busiest hour (05:00-06:00 UTC) for departures and, in any event, is only permitted to be used on a tactical basis by air traffic control when Route 4 is subject to congestion en route. Hence, it is not clear how 1 minute separations could be attained for a greater proportion of departures in future during the critical early morning departure peak than can be achieved currently given that:

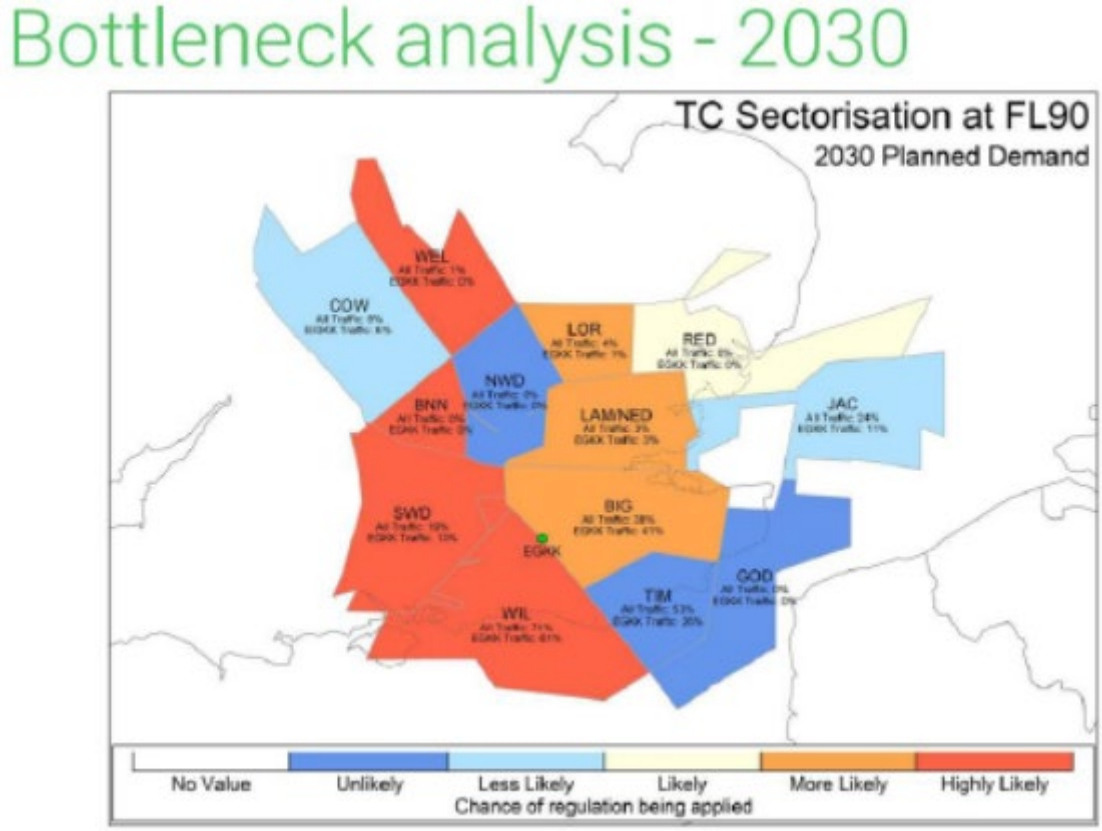
- the existing structure of departures routes; and
- constraints on the use of WIZAD in terms of pre-07:00 departures and in terms of the expectation that its use will be limited (as assumed for noise assessment purposes).

In other words, it is not clear the extent to which an uplift in capacity of the order put forward by GAL can be achieved through, effectively, just the time saved from being able to have two aircraft lined up simultaneously. We understand that GAL assumes that the runway utilisation can be optimised by through holding and sequencing aircraft onto the runway to minimise the occurrence of departing aircraft following the same route. This is discussed further below in the context of the simulation modelling results.

22. Whilst it is anticipated that the Airspace Modernisation Programme (FASI-S) underway for the South East of England may overcome congestion problems, for example impacting Route 4, over the longer term, the timescale for implementation remains unknown. GAL itself presents evidence of the

likelihood of departures from Gatwick being impacted by airspace bottlenecks (i.e. subject to delays) in the sectors surrounding the Airport, as shown in Figure 2 (ES Appendix 4.3.1 [**APP-075**], Annex 7, page 12).

Figure 2: Prospective Airspace Congestion



23. Although GAL has asserted that it is not dependent on airspace change to deliver the NRP, this is only true in the narrow sense of GAL not expressly requiring a change to its departure routes to bring the north runway into simultaneous operation as these remain the same with one runway or two. Given the prospective congestion impacting airspace through which these routes pass, it cannot reasonably be assumed that greater use will not be required of Route 9 – WIZAD to deliver an increase in hourly aircraft movements. In particular, this is material to the achievability of 48 departures in the first hour of the day when, under current rules, no use of WIZAD is permitted. GAL provided information in June 2023 to suggest that, in the critical first hour for departures, 48% of aircraft would be using Route 4 (Route 9 not being available) and 52% using Routes 1, 7 and 8. Given the potential for broader airspace congestion, particularly to the north of the Airport on Route 4, where there is interaction with movements to and from Heathrow and the other airports north of London, it does not seem realistic to assume that 48% of an increasing number of departures in peak periods as the Airport grows could use Route 4 without being subject to broader airspace flow management delays as air traffic demand grows more generally.

24. There are possible two consequences of this airspace congestion:

- either a relaxation on the use of the WIZAD route to facilitate increased early morning departures will be required, which has implications for the assessment of noise in areas south of the Airport, as only limited use of the WIZAD route has been assumed over the day; or

- the projected increase in aircraft movements and passengers will not be capable of delivery until into the later 2030s, pending the roll out of airspace change across the whole London system

and having regard to the target end date for implementation of airspace modernisation being 2040.

25. Although GAL has recently clarified (TWG 9th February 2024) why the use of Route 9 does not directly of itself lead to an increase in capacity as it converges with Route 4 to the east of the Airport and the same separation between aircraft would be required at that point regardless of whether Route 4 or 9 was used, this does not address the potential need for Route 9 to be used more extensively in periods of airspace congestion.

26. We do not consider it reasonable to rely on the limited use of the WIZAD route or no use before 07:00 if GAL is to attain the throughput claimed in the early morning period, particularly in the circumstances of FASI-S not being implemented in time to deliver a material uplift in the throughput of the Airport by 2032, as put forward by GAL (ES Appendix 4.3.1 [**APP-075**], Table 10.1-1). We do not believe that it can be realistically assumed that broader airspace constraints would not limit potential throughput at least in the short to medium term. This position has, in essence, been confirmed by the CAA in its Relevant Representation (**RR-0831**) where it states, at paragraph 4.7 that:

"It is the case that it is too early in the Airspace Modernisation programme to say what trade-offs will be required to resolve any conflict between the sponsors of separate airspace changes, or between different objectives. Therefore, it is also too early to say what benefits individual airports might achieve from airspace modernisation, whilst recognising that one of the goals for the AMS is to provide greater capacity overall."

This suggests that some caution needs to be applied to the ability to sustain a material uplift to capacity before the mid-2030s at the earliest on airspace grounds alone.

27. Over and above considerations of airspace congestion, we challenged the assumption that 1 minute separations would be attainable between a majority of departures sufficient to sustain a peak morning aircraft departure rate of 48, as required to support the forecast throughput. Although a 51:49 split of departures by track in the 07:00 local hour might imply that 1 minute separations might be achievable between most departures, this would require perfect sequencing of departures so that Route 4 (or 9) and Routes 1,7 or 8 would be used alternately[11]. Although departure management tools could be used to help achieve this, there would be consequential delays to aircraft either on stand or at the holding point to enable this optimised flow to be achieved.

28. In practice, the probability of aircraft demanding to use the runway in precisely the optimum sequence of departure is extremely low. Meaning that air traffic control will need to carefully sequence aircraft from pushback from stand to lining up on the runway to ensure the optimum sequence of departing aircraft. This is why the large area of 'Charlie Box' is being provided (Design and Access Statement [**APP-253**], paragraph 4.4.16) to allow space for aircraft holding and sequencing close to the two runways.

29. GAL reported its original fast-time simulation modelling of the NRP configuration (Needs Case [**APP-250**], paragraph 7.3.12). This includes some analysis of the Base Case, the results for which had not previously been shared by GAL. Our understanding, based on discussions at TWG meetings, is that this initial simulation modelling did not expressly take into account the departure route required by each departing aircraft but had instead assumed that 1 minute separations would be achievable between all departing aircraft. This is simply not valid. Either the modelling should expressly have considered the separation required between each pair of departing aircraft using a random distribution by departure route relative to the proportion of departures on each route expected in each hour according to the expected destinations of flights in future, or GAL should have modelled the process of sequencing such departures on the ground in order to optimise the sequence to achieve close to

[11] The tracks used by aircraft depend on their ultimate destination.

the 1 minute average. This is necessary to reflect real world variation in the time that aircraft actually demand to use the runway, including the need to adhere to broader en route air traffic flow management slots[12] in peak periods. Either way, there will be additional delay incurred by departing aircraft over and above that modelled by GAL.

30. This is material as it is the average and maximum levels of delay over a busy period that determine the acceptability to the airlines of declaring a runway movement rate as achievable. Delays cost airlines substantial sums of money and can result in lost aircraft utilisation if there are knock-on consequential delays over the day. Gatwick is already an airport with substantial levels of delay as evidenced by the representations from easyJet and the Gatwick Airline Consultative Committee. Ultimately, the existence of a high level of delay is a significant deterrent to airlines increasing their use of the Airport.

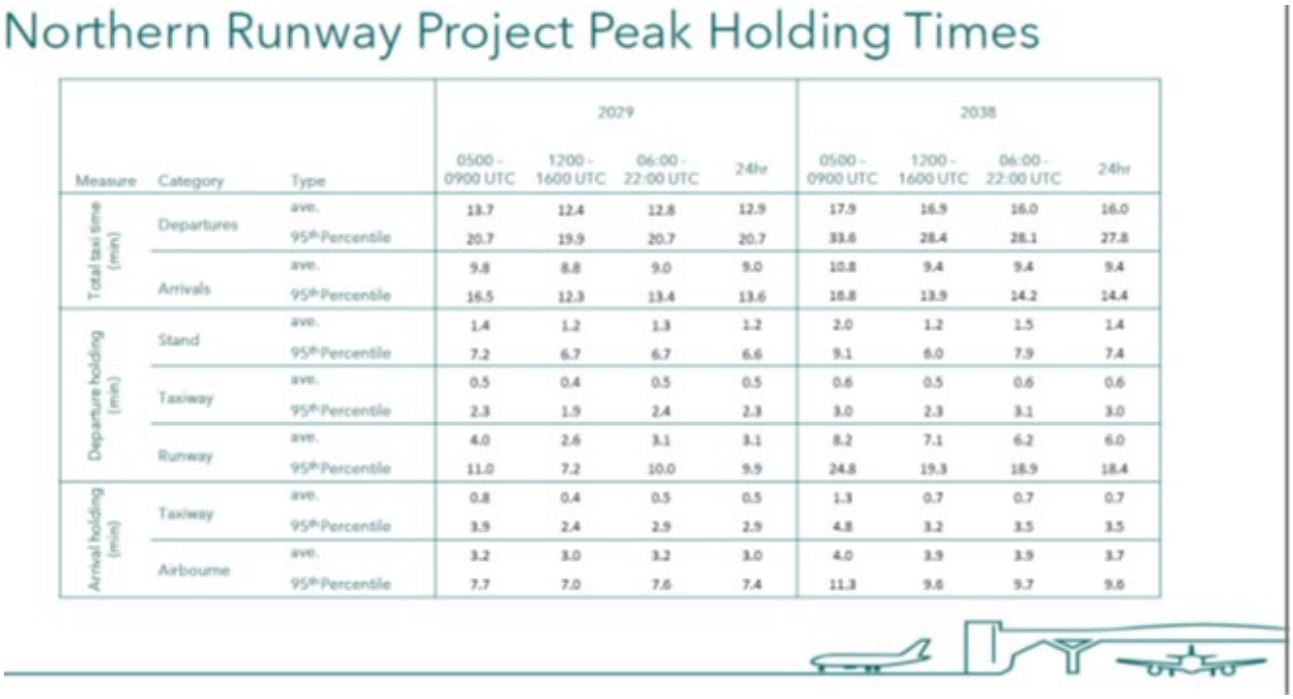
31. It is notable that Tables 7.3-1 and 7.3-2 of the Needs Case [**APP-250**] do not report the level of delay for the Base and NRP Cases but only report overall taxi-times. This is somewhat disingenuous. Some information for runway holding delays is provided in Appendix 4.3.1 to the ES [**APP-075**], Annex 8, page 8 but this only shows the runway holding delay and not the other delay components of holding on stand when an aircraft's pushback is delayed for sequencing or congestion reasons or delays on the taxiway due to congestion. All of these are normally included within the delay component considered in relation to declaring runway capacity for scheduling purposes. Furthermore, information is only provided averaged over the day as a whole rather than the critical busy period as would be normal practice in validating the capacity of any runway. It is important to understand the components of delay and how these impact individually on the critical busy hours. Until this material has been shared and discussed, we do not consider it is prudent to place reliance on these outputs.

32. We note the very high departure taxi-time recorded in Tables 7.3-1 and 7.3-2 for the Base Case, no development, Case. This implies excessive levels of delay at the baseline throughput modelled, which casts some doubt on the robustness of the assumptions underpinning the growth projected in the Base Case and the likelihood of airlines being willing to increase services at Gatwick at such levels of delay, reinforcing the view expressed earlier in this section. If the Base Case capacity and throughput has been overstated, this means that the difference in effects with and without development will have been understated in the ES.

33. **Figure 3** shows more detailed information on the delays predicted through GAL's simulation modelling as provided to the Planning B TWG on 10th January 2023. We are unclear whether this now relates to the same scenarios as presented in the Needs Case but assume it still to be valid. However, this information did not provide sufficient breakdown for the critical busy hours individually.

[12] These are allocated on the day by Eurocontrol to manage broader airspace congestion and determine the time window in which any aircraft is allowed to take-off.

Figure 3: Modelled Delay as provided by GAL



Northern Runway Project Peak Holding Times

Measure	Category	Type	2029 0500 - 0900 UTC	2029 1200 - 1600 UTC	2029 06:00 - 22:00 UTC	2029 24hr	2038 0500 - 0900 UTC	2038 1200 - 1600 UTC	2038 06:00 - 22:00 UTC	2038 24hr
Total taxi time (min)	Departures	ave.	13.7	12.4	12.8	12.9	17.9	16.9	16.0	16.0
		95th Percentile	20.7	19.9	20.7	20.7	33.6	28.4	28.1	27.8
	Arrivals	ave.	9.8	8.8	9.0	9.0	10.8	9.4	9.4	9.4
		95th Percentile	16.5	12.3	13.4	13.6	16.8	13.9	14.2	14.4
Departure holding (min)	Stand	ave.	1.4	1.2	1.3	1.2	2.0	1.2	1.5	1.4
		95th Percentile	7.2	6.7	6.7	6.6	9.1	6.0	7.9	7.4
	Taxiway	ave.	0.5	0.4	0.5	0.5	0.6	0.5	0.6	0.6
		95th Percentile	2.3	1.9	2.4	2.3	3.0	2.3	3.1	3.0
	Runway	ave.	4.0	2.6	3.1	3.1	8.2	7.1	6.2	6.0
		95th Percentile	11.0	7.2	10.0	9.9	24.8	19.3	18.9	18.4
Arrival holding (min)	Taxiway	ave.	0.8	0.4	0.5	0.5	1.3	0.7	0.7	0.7
		95th Percentile	3.9	2.4	2.9	2.9	4.8	3.2	3.5	3.5
	Airbourne	ave.	3.2	3.0	3.2	3.0	4.0	3.9	3.9	3.7
		95th Percentile	7.7	7.0	7.6	7.4	11.3	9.6	9.7	9.6

34. From the above data, it is evident that, over the key 4 hour period in the early morning for departures, average departure delay with the NRP was projected, on the basis of GAL's original simulation modelling, to be 10.8 minutes. This is more than the normally accepted 10 minutes average delay over such a peak period. Peak delays (95th percentile) would be materially greater and could be in the range 25-36 minutes. Significantly, as discussed above, this delay is before accounting for the additional delays caused by either a greater proportion of departures requiring a separation of 2 minutes from the preceding departing aircraft and/or the holding and sequencing delays incurred on the ground to deliver an optimum sequence to achieve 1 minute separations between successive departing aircraft on average.

35. It was made clear at TWG meetings from mid-2022 onwards that this was considered to be a flaw in the simulation modelling and we understand that GAL has now revised its modelling taking the average separation currently achieved between departing aircraft following the same route of 106 seconds rather than 1 minute previously assumed. This assumes that ATC can tactically achieve less than 2 minutes separation in such circumstances. Some results were shared in February 2024 (TWG 9th February 2024) including some results from the Base Case modelling. However, the information was not presented in sufficient detail to enable robust comparison with previous results. Further information has been requested in sufficient detail to enable the implications for peak period delay to be properly understood. Although some information has been provided informally ahead of Deadline 1, further clarification is still required in relation to the reasons for differences to the previous modelling as reported at TWGs and in the Needs Case [**APP-250**].

36. Currently, we do not consider, based on the information so far presented, that GAL has robustly demonstrated that the assumed increase in capacity with the NRP can be attained in practice at acceptable levels of delay to the airlines. Of particular concern is the level of delay likely to be incurred by based aircraft at the movement rates claimed by GAL in both the NRP and Base Cases. In both cases, it seems likely that the attainable throughput may be less than claimed by GAL having regard to the capacity of the runway(s) and when realistic patterns of demand by airlines are taken into account. Whilst it is recognised that air traffic control procedures may evolve and allow more relaxed separations between aircraft following the same departure route, consideration of the capacity deliverable with and without the NRP should be judged, in the first instance, based on current procedures as it cannot be guaranteed that higher capacity could be delivered in practice.

37. If the capacity deliverable by the NRP is lower than projected by GAL, this has implications for the level of demand that can be accommodated and the assessment of the effects, both positive and negative of the proposed development.

Demand Forecasts

Bottom Up Forecasts

38. Understanding the capacity attainable with the NRP is particularly important in this case as GAL has not adopted a conventional approach for forecasting the demand that could be attracted to the Airport if it had additional capacity available with the NRP. Rather than modelling the level of future demand within the wider catchment area served by the Airport then assessing the share that Gatwick might attain of the overall market demand using top down econometric modelling, GAL built its demand projections for the NRP entirely bottom up. This is evident from Section 2 of Annex 6 to Appendix 4.3.1 to the ES [**APP-075**]. This report contains no analysis of market demand at the individual world region level and no justification for the assumed share of that growth that might be taken up at Gatwick. It simply states assumptions as to the additional services in each market that the Airport might be able to attract on the basis that there is *"limited growth opportunity at other London airports"*[13].

39. Whilst bottom up forecasts are commonly used for short term planning at airports, typically for up to 5 years, as these are able to reflect known discussions with the airlines, they are too dependent on judgement and assumptions to be reliable over the longer term not least given the short term nature of airlines' planning horizons at the individual route level. We would also note that the report only covers in detail the period to 2032 and there is no evidence that justifies the forecast growth to 80 mppa in 2047.

40. Best practice for long term demand forecasting is to use econometric modelling and, in the circumstances where there are step changes in airport capacity expected, it would be best practice to use a systematic allocation model that assesses the share of each airport in different competitive circumstances. We do not accept GAL's contention that top down modelling is less applicable to capacity constrained situations (Issues Tracker [**AS-060**], 16.2) as, properly specified, a model can replicate the effect of constraint and its release. Such an approach has traditionally been adopted by the Department for Transport and has been used for the London Luton Airport DCO application as well as for other airport applications, such as at Bristol in 2021. GAL relies in its Issues Tracker [**AS-060**] on the Secretary of State's decision in respect of Manston Airport[14], stating:

"At Manston, for example, the SoS preferred the applicant's bottom-up approach. In GAL's view a bottom-up approach to forecasting, particularly is more appropriate in a constrained market where demand exceeds supply. In those circumstances, GAL is well placed to forecast how airlines would react to the release of capacity at the airport, particularly as many of them have known, unmet requirements for slots.

This is a practical, market based approach which is likely to be more meaningful than a theoretical, modelled top-down approach.

The long term risk referred to by the authorities is less of a concern here than it might be at other airports because the forecasts show that the new capacity would be quickly filled."

41. It is important to note the context in which the Secretary of State preferred a qualitative approach in preparing forecasts for Manston to conventional modelled approaches to demand forecasts. This was because:

[13] ES Appendix 4.3.1 [**APP-075**] Annex 6, page 12.

[14] Application for the Proposed Manston Airport Development Consent Order, Decision Letter 18th August 2022.

"The Secretary of State has considered the reasons given by the Applicant for taking a qualitative bottom-up approach to forecasting in it's [sic] *Azimuth Report which are: 1) data to extrapolate is only available until 2014; and 2) the history of underinvestment when it previously operated as an airport before it closed in 2014 [ER 5.6.53]."*[15]

"the qualitative approach taken in the Azimuth Report is preferable to the other forecasts considered by the Examining Authority. Given the dynamic changes that are currently taking place in the aviation sector as a result of the challenges and opportunities from the COVID-19 pandemic, the opportunities from the UK's emergence as a sovereign trading nation and the age of the available data allied with historic under investment, the Secretary of State, contrary to the Examining Authority [ER 5.7.4] and the Independent Assessor, places little weight on forecasts that rely on historic data and performance to determine what share of the market the Development might capture."[16]

42. The same conditions cannot be said to be true at Gatwick:

- passenger forecasting methodologies are well tried and tested;
- to the extent that capacity constraints at Heathrow are a factor in traffic development, these have been evident for many years and the effects capable of modelling;
- Gatwick Airport has not suffered from under-investment such that it has not been attractive to airlines; and
- unlike the cargo sector, there is no shortage of data regarding the origins and destinations of passenger demand to and from the Airport's catchment area.

43. We consider that, even if the capacity achievable with the NRP was correct, little reliance could be placed on the 'markets and pipeline' report as a robust justification of the demand that Gatwick might attract. The report simply asserts the number of additional flights that GAL hopes to attract in each market without any underpinning analysis of the likelihood of such flights being attracted by reference to the size of the market and the other airports competing for services in that market. This is purely aspirational and does not provide sufficient evidence to support the claimed increase in throughput or its composition in terms of routes and the future airline fleet of aircraft. It is an exercise in demonstrating how the capacity provided by the NRP might be used but it does not provide evidence that there is a realistic prospect of it being so used. This applies to both the Base and NRP Cases.

44. In relation to the claimed increases in flights in each geographic market in the Base Case, it is unclear why, given constraint in capacity at Heathrow, some additional services have not yet been attracted. The extent to which this is linked to current congestion issues is not clear. Consequently, it is not clear what is planned to improve the attractiveness of the Airport sufficient to justify the assumption that additional flights in each market could be attracted with the existing infrastructure sufficient to deliver a forecast throughput in the Base Case of up to 67 mppa. For this reason, we consider that the assumption that the Airport can attain 67 mppa, up from 46.6 mppa in 2019, is not realistic and that a Base Case capacity in the range 50-55 mppa is more likely.

45. The same applies to the NRP Case but, fundamentally, GAL provides no analysis that would enable the claimed increases in air services in each market to be validated having regard to demand that could be better accommodated at other airports including Heathrow. On this basis, we do not believe that the demand forecasts in their present form can be relied on.

[15] Department for Transport, Planning Act 2008 Application for the Proposed Manston Airport Development Consent Order, Decision Letter 18 August 2022, paragraph 81.
[16] Ibid, paragraph 89.

46. The forecasts also assert a substantial spreading of demand outside of peak periods at Gatwick in order to reach the total passenger and aircraft movement throughputs assumed in both Base Case and NRP Case. Prima facie, it does not seem plausible to assume the same degree of spreading of the peak would be possible in the Base Case due to the limited scope for new less seasonal services to be accommodated compared to the extent to which growth might enable somewhat less seasonal operations to be attracted with the NRP.

47. Overall, the consequence of this, given the capacity constraints at peak periods, is most likely to be that the total number of passengers and commercial air traffic movements has been further overstated. The projections in both cases assume that growth will be focussed towards winter months, with a typical winter day increasing from 78% of a typical summer day's traffic volume to 88% in 2038 and 90% in 2047. This compares to the ratio at Heathrow in 2019 of 92-93%. Given that the low seasonality at Heathrow is largely driven by its substantial component of long haul demand and its hub role, it seems unlikely that such spreading of the peak would be attainable at Gatwick, which is forecast to remain dominantly a short haul airport (67% in 2047 compared to 73% in 2019) whereby patterns of demand are much more seasonally peaked, particularly given the substantial low fare airline presence at the Airport, with or without the NRP, operating a large number of leisure routes.

48. Even if the hourly aircraft movement capacity asserted by GAL was correct, it seems likely that the annual passenger and aircraft movement projections are overstated in both cases. The consequence of this is that the environmental effects of the NRP compared to 2019 may have been overestimated, i.e. represent a reasonable worst case, but the assessment of economic benefits will have been similarly overstated. Furthermore, to the extent that this risk of overstatement in terms of additional services that can be attracted may affect the Base Case to a greater extent than the NRP Case, it is equally possible that the difference with and without development may have been understated. It will be important to clarify this during the Examination.

<u>Top down benchmarking</u>

49. GAL has sought to validate its long term bottom up demand forecasts by top down benchmarking against the Department for Transport's UK Aviation Forecasts. Initially, this was undertaken based on the 2017 forecasts[17] then updated to the Jet Zero Forecasts[18] as set out in Section 5 of the Needs Case [**APP-250**]. Further top down benchmarking was discussed at a TWG on 16th February 2024 and we understand will be submitted at Deadline 1. This included a comparison with the more recent Department for Transport projections of March 2023 referred to in the *Jet Zero: One Year On* report of July 2023[19] and set out some work undertaken by GAL on assessing what Gatwick's share of the market would be based on these latest demand projections. However, various aspects of the approach adopted and the presentation of the results is unclear and further clarification is needed. We will comment further on the information when submitted.

50. As originally presented, the benchmarking is based on considering what the London airports' share of the total UK demand forecast might be and then considering the extent to which other London airports have capacity to meet that demand. This starts from an assumption, illustrated in Figure 5.2-1 of the Needs Case [**APP-250**], that the London airports' share of the overall UK air passenger market remains the same as in 2019.

51. The more substantive issue is that the overarching UK demand forecasts, from which GAL asserts a total pool of demand for the London airports, includes an assumption that Heathrow grows. In the case of the DfT 2017 forecasts[20], the forecasts shown in the Needs Case [**APP-250**], Figure 5.1-1, are

[17] Department for Transport, UK Aviation Forecasts, 2017.
[18] Department for Transport, Jet Zero Dataset, 2022.
[19] Department for Transport, Jet Zero: one year on, July 2023.
[20] Department for Transport, UK Aviation Forecasts 2017.

wholly unconstrained and reflect underlying demand to fly unconstrained by any consideration of available airport capacity. The Jet Zero forecasts adopted for the London Airport share in Figure 5.2-1 are forecasts constrained by the maximum capacity assumed to be deliverable across all airports, i.e. consistent with the making best use of airport runways and assuming a third runway at Heathrow[21].

52. In other words, if the provision of a third runway was not assumed and other airports were not assumed to have additional capacity available, the constrained demand would be lower. In a constrained market, some element of demand is priced off from flying due to the inconvenience of having to use an alternative airport that may be further away from the passengers' origin or destination. Not all demand simply moves from one airport to another.

53. By way of corroboration, the ANPS at paragraphs 3.20 and 3.21 compares the incremental passenger throughput deliverable by a third runway at Heathrow at an additional 28 million passengers in 2040 compared to no expansion at any airport, whereas a full second runway at Gatwick would have delivered an additional 10 million passengers in the same year. This was, of course, on the basis of a fully independent second runway at Gatwick, which is a different proposition in terms of an uplift in capacity compared to the NRP. In other words, the total level of passenger demand is not independent of which airport is assumed to expand and the extent of that expansion.

54. In the context that the overall UK passenger forecasts, as used in GAL's benchmarking, allow for growth at Heathrow, they include an assumption of continued growth of the Heathrow hub, including growth in the number and proportion of transfer passengers expected to use the hub, which currently account for a third of all passengers at Heathrow. The effect of assumed capacity constraint on transfer passenger volumes is illustrated in Table 60 of the DfT's UK Aviation Forecasts 2017 where international to international transfer passengers are assumed to be impacted by the effect of constrained capacity being assumed at Heathrow to a greater extent than point to point passengers – declining from 23.9mppa in 2016 to 4.9 mppa in the 2050 central forecast case. There would also be an expected reduction in domestic to international transfer passengers.

55. As Gatwick is not expected to replicate the Heathrow hub role, with a decline in its proportion of transfer passengers expected (Needs Case [**APP-250**], Table 6.4-10), at the very least some downwards adjustment needs to be made to the projections of London airport passengers before considering the adequacy of capacity to meet demand if no additional runway is assumed at Heathrow, which is the core of GAL's case for the NRP. Although we understand that GAL has made some adjustments for the transfer passenger element in its latest modelling as discussed at the TWG, the basis for this is not clear and further information is sought. Taking into account these factors, demand across the London system in 2037, from which Gatwick could draw, would be materially less than the 247 mppa suggested at Figure A5.3.1 of Annex 5 to Appendix 4.3.1 to the ES [**APP-075**], leaving less residual demand to be met at Gatwick even with the NRP and without a third runway at Heathrow.

56. Although GAL presents a Heathrow R3 Sensitivity Test in Annex 4 of Appendix 4.3.1 to the ES [**APP-075**], the basis of this has not been adequately explained. The effects are merely asserted without any explanation as to how they have been derived. Furthermore, whilst doubts remain regarding the timetable over which a third runway at Heathrow might come forward, its provision remains policy, and it now seems more likely that Heathrow will initially seek some form of capacity increase through adjustment to its existing annual aircraft movement limit and potential use of both of its existing runways in mixed mode[22].

57. Similarly, a slower growth sensitivity test has been presented but this is not, as would be normal practice, referenced to assumptions about slower economic growth or higher carbon costs, for

[21] Department for Transport, Jet Zero Dataset, 2022, Airport Capacity tab.

[22] Both runways used simultaneously for both arriving and departing aircraft, compared to the current operating mode with arrivals on one runway and departures on the other.

example. It is not possible to judge whether this slower growth sensitivity test properly reflects downside economic risks or the longer term cost of carbon and its abatement.

58. Overall, we have doubts that Gatwick would achieve the forecast growth with the NRP over the timescale claimed GAL. This applies regardless of whether a third runway is constructed at Heathrow or not. GAL has not demonstrated that its bottom up forecasts are robust either in terms of their derivation or by reference to subsequent benchmarking, despite more recent analysis.

Implications for the Noise Envelope

59. At the outset, it is important to note that the parameters for the Noise Envelope have been set by referenced to a conservative fleet transition case. Such an approach is not entirely unreasonable as it represents a worst case but we consider that the long run fleet transition is probably overly conservative in the light of more recent information on aircraft orders by airlines such as easyJet, which is the largest airline user at Gatwick. The fleet transition assumptions were originally presented in Appendix 4.3.1 to the PEIR and have not subsequently been updated. Since the date of the PEIR, easyJet UK has ordered 224 new (next) generation quieter aircraft, which compares to their pre-existing orders for such aircraft at the time of the PEIR of 133. A similar pattern of new orders will apply to most airlines. Whilst it is reasonable to assume that GAL anticipated future aircraft orders in determining its fleet mix assumptions, this is not clearly stated in the Forecast Data Book (Appendix 4.3.1 to the ES [**APP-075**]. The Slower Fleet Transition Case used to define the Noise Envelope [Table 3.1, Appendix 14.9.5 to the ES [**APP-175**]) is simply no longer plausible.

60. Furthermore, to the extent that the ceiling Limit for the noise contour area is set by reference to the forecast noise at 2029 and this is a long term ceiling (ES Appendix 14.9.7 – The Noise Envelope [**APP-177**], paragraph 6.3.1), there is a significant risk that this has been set too high if the demand forecasts for that early year are overstated, as would appear to be the case, particularly when coupled with the more limited fleet transition assumed for the early years. This provides headroom for noise to increase in circumstances where the benefits of growth do not materialise to the extent projected by GAL. This risk of asymmetry of effects needs to be taken into account in the planning balance.

The Economic Case

61. We do not challenge the initial assessment of the operational impact of the growth projected with the NRP. However, it is important to note that if the forecasts were lower, the benefits would be lower for any given year or scenario. It seems strange however, that two different views of the operational economic impacts in terms of local employment and gross value added (GVA) have been presented – one by Oxford Economics (OE) at Appendix 2 of the Needs Case [**APP-252**] and one by Lichfields in the ES Chapter 17 [**APP-042**]. The LAs have an overarching concern to understand the impacts from the operational and construction phases at individual authority level.

62. In terms of the wider societal welfare and catalytic and impacts of the NRP, these are presented in gross terms and, significantly, in the work of Oxera on the National Economic Impact (Needs Case, Appendix 1 [**APP-251]**) and the OE Report [**APP-251**], which both assume that all passenger growth at Gatwick is entirely incremental at the national level. Given our comments above about the likelihood of the forecasts being overstated and the lack of account taken of the potential for at least some of the growth to be displaced from other airports, this substantially overstates the net benefits of expansion in both cases.

63. This is especially the case in the work of Oxera as it not only takes no account of the potential for other airports, including Heathrow, to develop additional capacity over the period, it values the benefits to users starting from average London system air fares in 2019 (Needs Case, Appendix 1 [**APP-251**], Table 5.4.1) that include the higher fares attained at Heathrow compared to Gatwick. In terms of the benefits to users at Gatwick, the appropriate start point would have been average Gatwick fares,

reflecting the low cost nature of much of the operation, the lower proportion of long haul flights and predominance of leisure travel at the Airport. Hence, the start point for air fares in the assessment of wider economic benefits is overstated undermining the reliance that can be placed on the results.

64. Having started from too high a point, the potential benefits to users, in terms of air fare savings, are then calculated on the assumption that all passengers projected to use the NRP are incremental at the London system level and Oxera effectively reverse engineers an assumed air fare saving using an elasticity between air fares and incremental demand, i.e. what would the air fare saving have had to be to stimulate that additional growth in demand on the basis that passengers would not otherwise have travelled absent the NRP. This is not a robust methodology for assessing the value of air fare savings not least as, to the extent that all passengers are not genuinely incremental, this approach will have resulted in too great an air fare saving being calculated and, hence, overstated the benefits to users. On this basis, the economic societal-welfare benefits are likely to have been materially overstated on two counts – the starting level of average air fare and an overstatement of the demand that would be genuinely incremental.

65. It is also unclear the extent to which the WebTAG cost benefit analysis has followed the best practice guidance[23] in terms of the treatment of displacement or in using the required carbon appraisal values. Whilst there is no requirement for such an appraisal in connection with a planning application (paragraph 1.1.4 of the Guidance), the errors in the analysis undertaken would diminish any weight that could be attached to the national level benefits claimed.

66. The OE report (The Economic Impact of Gatwick Airport [**APP-252]**) uses an approach of considering tourism (Figure 4.3) and trade (Figure 4.5) implications individually. This is a more usual approach. However, it is important to note that the benefits calculated represent the gross impact of the NRP, assuming that all passengers using the NRP are incremental at the UK level, which is highly unlikely to be the case to the extent claimed by GAL in the light of our comments above. So, whilst this approach avoids the methodological difficulties of the Oxera approach, it nonetheless overstates the benefits when displacement from other airports is taken properly into account or if, more likely, the level of demand is overstated in the first place.

67. A further issue in the assessment of wider economic benefits relates to the asserted local catalytic impact of the area in terms of the role of expansion in attracting other economic activity to the local area. Oxera, in Appendix 17.9.2 of the ES [**APP-200**] sets out a methodology for estimating the catalytic footprint of the Airport in the local area. The methodology relies on estimating total employment in the area around each airport and relating that to the scale of activity to estimate how employment might grow as an airport moves up the size scale in terms of an elasticity which is them applied to the traffic growth at Gatwick.

68. This methodology was discussed at TWGs in November 2022 and August 2023 and the concerns expressed about this methodology in November are not captured in the record of engagement at Table 17.3.3 of the ES Chapter 17 [**APP-042**], nor has any attempt been made to address these concerns, albeit further discussions were held in February 2024. The concerns derive from three causes:

- the process for estimating levels of demand arising in the catchment area of each of the cross section of airports used (ES Appendix 17.9.2 [**APP-200**], Annex 5, Figure A5.1) uses a theoretical relationship, derived in Italy, which takes no account of actual levels of demand nor which airport the passengers actually used. It was recommended to GAL that Civil Aviation Authority (CAA) passenger survey data was used instead to ensure that the levels of demand in each catchment area were representative of actual demand in the catchment area of airports in the

[23] WebTAG Unit A5.2 Aviation Appraisal November 2023.

UK[24] and to calibrate how much of the local demand was related to the level of air services at the relevant local airport;

- the scale of catchment areas used for each of the airports in the sample varied significantly such that the relationship between the estimated volume of passengers and the total employment in the area could be skewed by the scale of the area being considered and also by the scale of overall activity at an airport, meaning that larger airports would generally provide a greater level of service to local passengers than a smaller airport, with different consequential effects at all scales. The model appears to have ascribed all passenger demand estimated for an area as being related to an individual airport. So, for example, no account was taken of the fact that much of the demand arising in Cornwall uses Bristol Airport and much of the demand from South Yorkshire uses Manchester, East Midlands or Leeds Bradford Airports etc.. Hence, employment in any of these locations cannot be safely ascribed simply to the local airport and account would need to be taken of the specific contribution of each airport in order to isolate the true effects;

- No account was taken of other factors that could boost or diminish total employment in a locality, e.g. Enterprise Zones, regeneration initiatives or other local economic factors.

69. The methodology was applied by Oxera to estimate the effect of a change in the total air passengers locally due to the project by applying the growth rate (ES Appendix 17.9.2 [**APP-200**], paragraph 6.2.2) in total passengers then taking the elasticity of total employment to total passengers and using this to generate an estimate of the proportionate growth in total employment in each of the study areas around Gatwick (e.g. the Gatwick Diamond) so as to identify the uplift in other employment that could be ascribed to the NRP. The direct, indirect and induced employment estimates arising from growth are then deducted to produce an estimate of catalytic employment and GVA as set out in Table 6.4 (ES Appendix 17.9.2 [**APP-200**]).

70. Whilst the methodology might be a reasonable basis for assessing the effect of airport growth on overall employment in an area, this is only robust to the extent that the number of air passengers deriving from any given area is robust and they are properly related to the airport concerned, i.e. to the extent that air passenger demand in the vicinity of Gatwick uses Heathrow Airport, it would be wrong to ascribe the uplift in catalytic employment in the area solely to growth at Gatwick. Given the availability of robust CAA data on passenger origins and destinations in the UK, particularly across the South East of England, we consider this data should have been used as the basis for deriving the relationship. This has been discussed at a TWG on 16th February 2024 and further feedback from GAL is awaited. As things stand, we have little confidence that the estimates of the catalytic impact of the NRP at a local level are robust.

71. Ultimately, for the reasons explained above, the wider economic benefits of the NRP are almost certainly substantially overstated and this is material to assessing the balance between such benefits and any environmental impacts.

Conclusion

72. Our overall conclusion is that the level of increase in capacity attainable from the NRP has been overstated by GAL and that, as a consequence, levels of usage – the demand forecasts – have been overstated. It is likely that achieving the claimed throughput in peak periods may require different use of the departure routes resulting in potentially greater environmental effects.

[24] We note that the methodology adopted for estimating levels of demand in the academic paper was applied in the circumstances where there is no actual data on the surface origins and destinations of passengers and how these relate to the catchment areas of individual airports. This is not the case in the UK.

73. The methodology by which the demand forecasts have been derived is not robust, even if the underpinning assumptions as to the capacity attainable with two runways in use was correct.

74. For similar reasons, the demand projections for the Base Case with the existing runway are likely to have been overstated, possibly even more so than those with the NRP given current levels of airfield congestion and the views of airlines. This may mean that the differences in the environmental impacts with and without development may have been understated.

75. The consequence of this overstatement of demand is that the limit size of the noise contour in the Noise Envelope will have been set too large and so provide no effective control or incentive to reduce noise levels at the Airport.

76. The wider economic benefits of the proposed development have been overstated due to the failure to adequately distinguish the demand that could be met at Gatwick from the demand which could only be met at Heathrow and the economic value that is specific to operations at Heathrow. The methodology by which the wider catalytic impacts in the local area has been assessed is not robust and little reliance can be placed on this assessment.

77. Overall, this means that there can be little confidence that the decision maker can rely on the assessment of effects to judge whether the benefits outweigh the harms.

YAL/5.3.24

Appendix G: Location Review in relation to WIZAD controls

Horsham and North Horsham

1. The following tables present data for Horsham (Table 1) and the whole of the town (Table 2). These compare two years, the 2019 baseline and the 2032 worst case. The same analysis could not be performed for 2029, 2038 or 2047 because the overflight data was not presented by the Promoter.

2. Table HDC 1 North Horsham

Location	Metric	Year		Change
		2019	2032	
North Horsham	$L_{Aeq8hr\ night}$	No effect shown	No effect shown	-
	$L_{Aeq16hr\ day}$	No effect shown	No effect shown	-
	Overflights	<1 overflight	11-50	1100% to 5000%
	N60	0	0	-
	N65	0	20	-

Note: 2019 and 2032 are the only years for which the Promoter presented the overflight data.

3. In summary for North Horsham: the area is presently unaffected by aircraft noise. When it does occur it is only very occasional as the route is a tactical offload route. The radar track data shown in Figure HDC 1 above and HDC 1 below confirms this.

4. The forecast data provided by the Promoter for 2032, during the daytime, suggests that aircraft noise will become a feature of the area on a frequent and regular daily basis. It is not clear how these flights would be dispersed throughout the day and if it is at busy periods to alleviate traffic this is more likely to be between 7AM and 10AM (local time) in the morning. This is further discussed in the specific section on Wizad.

Figure HDC 1 2019 Baseline Daytime N65

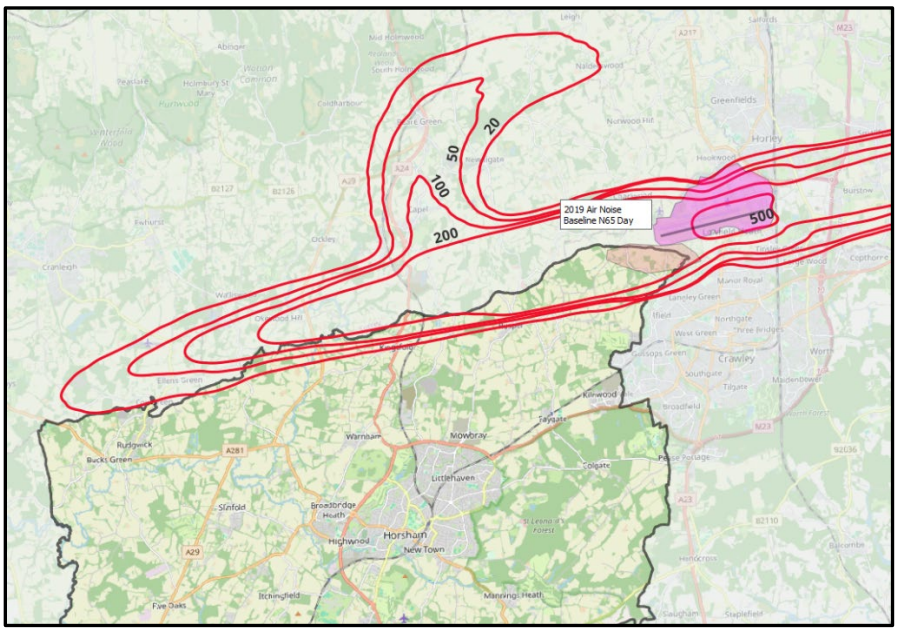


Figure HDC 2 2032 Daytime N65 Slow Transition Fleet (with Northern Runway Project)

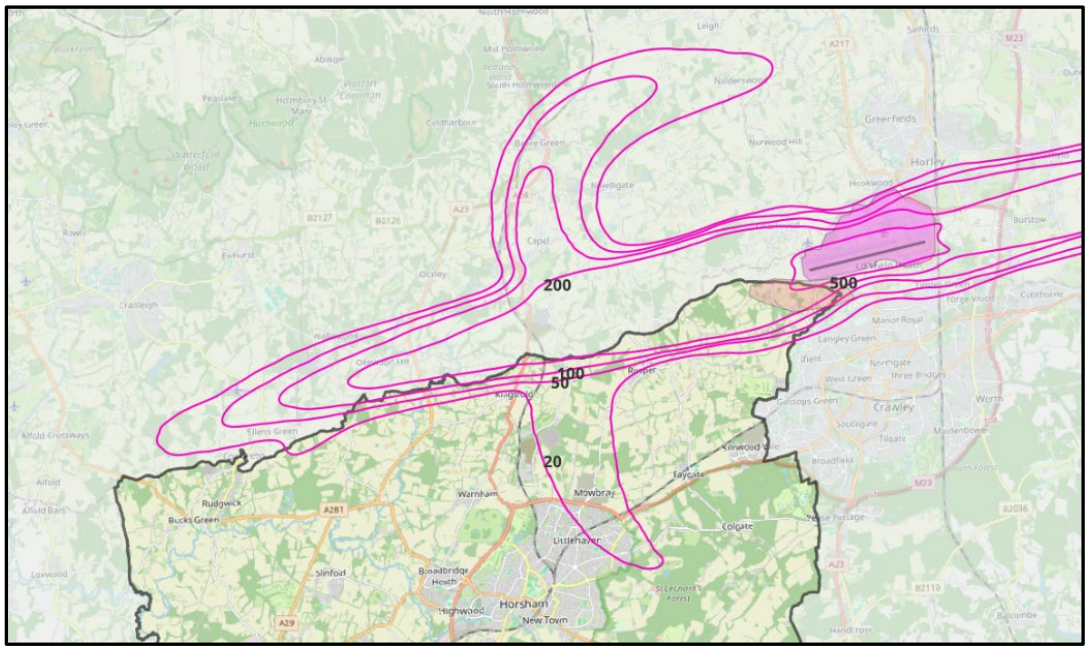
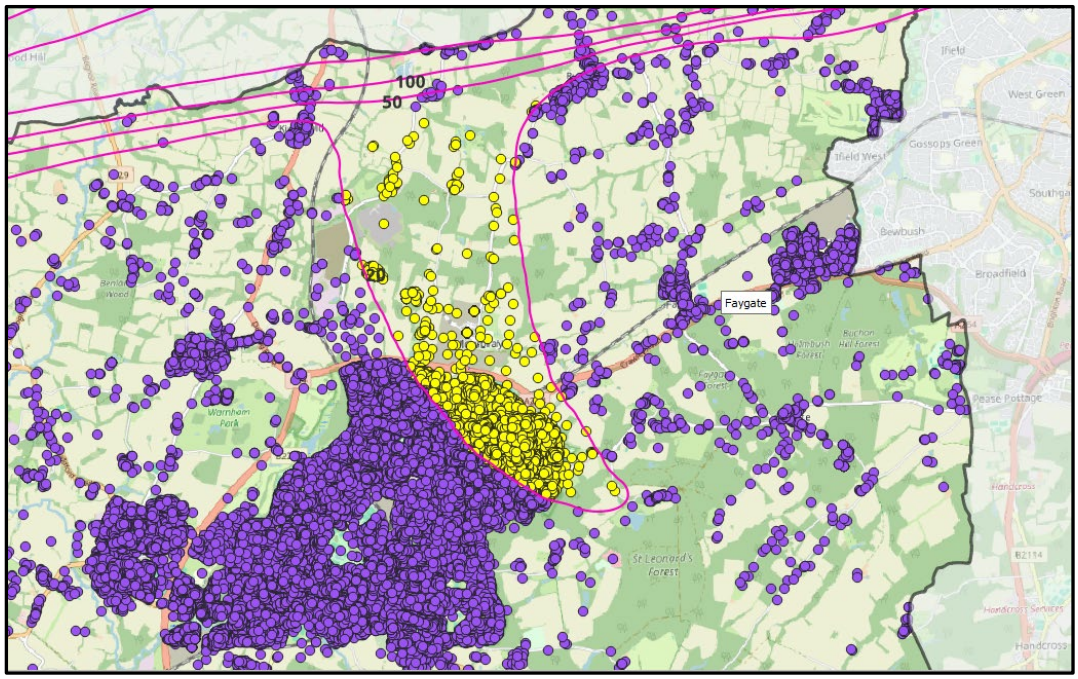


Figure HDC 3 Daytime N65 showing the location of the 3570 domestic properties now appearing within the noise contours for 2032. (Note this does not include the property address information for the permission for 2500 properties to the North of Horsham).



5. Therefore, interpreting the noise contours for the Leq, as shown are correct when taking into consideration all the air traffic movements that occur for the whole of the airport along all the routes. However, due to the way the L_{Aeq} contours are calculated, the L_{Aeq} for route 9 does not give a representative indication of the impact.

6. Unfortunately, this makes it very difficult to determine with any certainty the effects on the locality. It is also potentially misleading to people who are not familiar with the way in which L_{Aeqs} are calculated. What we are certain about is that use of this route has changed and is to the detriment of the residents of Horsham who are to all intents and purposes newly overflown.

7. It has been difficult to secure information from Gatwick on this, but based on proposals for percentage changes in baseline and then with the Northern Runway Project, the number of aircraft newly overflying this route increases from less than 100 aircraft per year to a number in excess 16,000.

8. Due to the way in which noise levels are calculated using logarithmic scales, this number of movements has almost no influence on the L_{Aeq} contours which are calculated taking into account the 381,000 projected ATMs on all the routes in 2032 (Table 10.1-1 Environmental Statement Appendix 4.3.1 Forecast Data Book [APP-075]). Even if the single mode Westerly operation is modelled then we estimate that the numbers would need to be much higher than 16,000 for the use to be shown in a representative manner in the single mode model. However, the effect on the ground would be noticeable immediately as can be seen from both the number of overflights and the N above figures.

9. Other areas with a similar N above values have daytime L_{Aeqs} in the range of 51 to 54 dB. This, along with the N aboves makes it very clear that there is a newly affected population. However, given that aircraft will be climbing and turning under power it is possible that the Leq will be higher than this on Route 9 Wizad. The population response is also likely to be greater than would otherwise be expected as this has not been explicit in any of the public consultation and attitude toward the airport is likely to influence this. In essence a higher exposure response is likely at levels lower than for the equivalent response with the SONA report.

10. With these type of adjustment and as there would be no habituation to the noise the type of responses by the community could be those as described within the SOAEL range yet this has not been explored by Gatwick.

11. Due to the concerns highlighted herein there are concerns about the proposal to consider this route within the Airspace Change Programme as the adverse effects are likely to increase even further and fundamentally change the nature of the town.

12. To understand the effect of the use of this route on the Horsham area, the route itself requires modelling under 100% Westerly departure for the typical 92 summer day with slow transition fleet. The metrics that need to be modelled include the LAeq 16hr* in 3 dB bands commencing where there is no effect down to 42 L_{Aeq}, the numbers of people within each of the 3dB bands needs to be produced, the N above range from N70 in 5 dB bands to N45 with population exposure in each band. These metrics are in addition to overflights that need to be presented for all years.

    * or shorter period to demonstrate the worst effects across the anticipated 4 hour morning departure period. While this relates to only a proportion of the day, the use of this route is over a school facility and the effects on the school need to be understood.

13. The area of North Horsham has permission for 2500 properties. There is a new school and other community facilities as part of the master plan. A specific assessment of this area and the community facilities ought to be presented once the route is properly modelled.

14. Table HDC 2 Horsham

Location	Metric	Year		Change
		2019	2032	
Horsham	$L_{Aeq8hr\ night}$	No effect shown	No effect shown	-
	$L_{Aeq16hr\ day}$	No effect shown	No effect shown	-
	Overflights	<1 to 1-10	1-10 to 11-50	1100% to 5000%
	N60	0	0	0
	N65	0	<20	Up to an additional 20 overflights

Note: 2019 and 2032 are the only years for which this range of data is available

15. In summary for Horsham: the area is presently unaffected by aircraft noise. When it does occur it is only very occasional and is associated with aircraft using route 9, the occasional vectoring of aircraft, the occasional overflight just above the 7,000' ceiling on approach (but which is still plainly audible). By 2032 it will become a feature of the area on a regular daily basis. It is not clear how these flights would be dispersed throughout the day and if it is at busy periods to alleviate traffic this is likely to be in the peak morning hours at the airport. Note that the Leq contour does not change markedly showing only a small bulge toward Horsham implying this is driven by departing aircraft utilising the limited use Route 9 (Wizad). The N above criteria describe the impact better at this location.

Appendix H: Location Review provided in context of Noise Insulation Scheme

1. In the tablee below we have only compared two years, the 2019 baseline and the 2032 worst case. The same analysis could not be performed for 2029, 2038 or 2047 because the overflight data was not presented by the Promoter.

Rusper

2. Table HDC1 below provides a summary for Rusper:

Location	Metric	Year		Change
		2019	2032	
Rusper	$L_{Aeq8hr\ night}$	45	45	-
	$L_{Aeq16hr\ day}$	51	51	-
	Overflights	1-10	51-100	500% - 1000%
	N60	20-50	20-50	None
	N65	20-50	20	Small reduction

Note: 2019 and 2032 are the only years for which this range of data was presented by the Promoter.

3. In summary for Rusper: this implies that there will be similar levels of equivalent noise experienced but significantly greater number of overflights. This is assumed to be through quieter aircraft using the route (it is thought unlikely that aircrafts will have climbed to 7,000' at this point) such that the N60 / N65 is not breached. However, although aircrafts might be quieter and not breaching the N above values as shown in the table above, they are still likely to be heard and cause a material change in people's behaviour and attitude. This may include having to adapt by keeping windows closed, greater potential for sleep disturbance including difficulty in getting to sleep and premature awakening. Quality of life is likely to be diminished.

4. When comparing the noise contours for the baseline of 2019 and 2032 slow transition fleet with Northern Runway the extent of the 45 L_{Aeq8h} is marginally worse than it would have been in the baseline case.

5. Rusper lies just outside the HDC proposed extent of the 48 L_{Aeq8h} night contour inner zone but it is within the 45 L_{Aeq8h} identified in the night noise restriction consultation as being a problem. Taking into consideration uncertainty associated with the modelling we consider that this location also requires mitigation in respect of the effects of noise at night.

6. Kingsfold and Rudgwick are also on the periphery of the standard mode 45 L_{Aeq8h} contour and we consider that the airport should offer insulation to reduce exposure in these locations as well.

Appendix I: Gatwick Airport Parking Survey Results (September 2023)

Gatwick Parking Survey 2023 Location	Authorised	Unauthorised	Total Vehicles	Authorised Capacity	Vacant Authorised Capacity	Council Area
Tinslow Farm	270	0	270	298	28	Crawley Borough Council
Hilton South Terminal	10	0	10	106	96	Crawley Borough Council
Europa Gatwick Balcombe Road	268	0	268	395	127	Crawley Borough Council
Lowfield Heath Service Station (London Road)	231	0	231	385	154	Crawley Borough Council
Crown Plaza Langley Drive, Tushmore Roundabout	25	0	25	122	97	Crawley Borough Council
Travelodge (Fm Mecure/Renaisance) Hotel, Povey Cross Roundabout	490	0	490	623	133	Crawley Borough Council
Ibis Hotel	0	0	0	70	70	Crawley Borough Council
Airport Inn Brittania (Fmly Gatwick Best Western Moat House)	0	0	0	135	135	Crawley Borough Council
Premier Travel Inn, Gatwick Manor (London Road)	0	0	0	178	178	Crawley Borough Council
Sofitel MSCP North Terminal	360	0	360	565	205	Crawley Borough Council
Purple Parking, Lowfield Road (Formerly Airparks, Q and BCP)	2676	0	2676	3265	589	Crawley Borough Council
City Place by Nestle (fmr BT) building	0	245	245	0	0	Crawley Borough Council
City Place SE Corner	0	96	96	0	0	Crawley Borough Council
Gatwick House, Peeks Brook Lane	0	121	121	0	0	Crawley Borough Council
Brook Lane House, Peeks Brook lane	0	330	330	0	0	Crawley Borough Council
Radisson Red, Lowfield Heath	0	0	0	0	0	Crawley Borough Council
Black Corner Small Holdings, Balcombe Road	200	0	200	250	50	Crawley Borough Council
Arora Hotel, Southgate Avenue	0	0	0	230	230	Crawley Borough Council
Maple Manor Hotel, Charlwood Road	0	0	0	12	12	Crawley Borough Council
Hawthorn Farm	0	117	117	0	0	Crawley Borough Council
Sandman Signature (Fmr Ramada Plaza)	62	0	62	117	55	Crawley Borough Council
Schlumberger House, Buckingham Gate	0	488	488	0	0	Crawley Borough Council
TOTAL FOR AREA	4592	1397	5989	6751	2159	
Long Stay Car Parks	25932	0	25932	34,440	8,508	Gatwick On Airport
Short Stay Car Parks	3120	0	3120	4556	1436	Gatwick On Airport
TOTAL FOR AREA	29052	0	29052	38,996	9,944	
Cambridge Hotel	450	0	450	492	42	Reigate & Banstead
The Grove	242	0	242	279	37	Reigate & Banstead
Menzies Chequers (was Thistle) Hotel	36	0	36	95	59	Reigate & Banstead
Gatwick House	2	0	2	30	28	Reigate & Banstead
Hazelwick, Oldfield Road	0	0	0	0	0	Reigate & Banstead
Best Western/Gatwick Skylane Hotel	0	0	0	338	338	Reigate & Banstead
TOTAL FOR AREA	730	0	730	1234	504	
Crawley Down Garage (Snow Hill)	0	0	0	1500	1500	Mid Sussex
Wakehams Green	2900	0	2900	3250	350	Mid Sussex
Copthorne Hotel	0	0	0	759	759	Mid Sussex
Holiday Inn (Formerly Gatwick Worth)	167	14	181	650	483	Mid Sussex
Keepers Knight	164	472	636	309	145	Mid Sussex
Bridges Breakers Yard, Pease Pottage	0	583	583	0	0	Mid Sussex
Site Adjacent Acacia Grove	0	64	64	0	0	Mid Sussex
Acacia Grove	129	378	507	129	0	Mid Sussex
TOTAL FOR AREA	3360	1511	4871	6597	3237	
Holiday Inn	335	0	335	636	301	Mole Valley
Gatwick Filling Station, Tudor Rose	304	0	304	400	96	Mole Valley
Russ Hill Hotel	0	0	0	400	400	Mole Valley
Ricketts Wood	198	0	198	200	2	Mole Valley
Wagoners Farm	98	0	98	131	33	Mole Valley
Stan Hill Hotel	0	168	168	0	0	Mole Valley
Gatwick Business Park, Reigate Road, Hookwood	0	109	109	0	0	Mole Valley
Trumbles Guesthouse	33	0	33	40	7	Mole Valley
Hookwood Lodge, Reigate Road	0	0	0	0	0	Mole Valley
TOTAL FOR AREA	968	277	1245	1807	839	
Ifield Court Hotel	200	97	297	200	0	Horsham
Curtis Farm	0	0	0	250	250	Horsham
Little Park Enterprises	502	183	685	586	84	Horsham
Waterhall Country House Hotel	3	0	3	14	11	Horsham
Little Foxes Guesthouse	28	0	28	50	22	Horsham
Outaway, Bonnetts Lane	483	0	483	950	467	Horsham
North West of Old Pound Cottage (Old Pound Nursery)	0	0	0	0	0	Horsham
Field off Bonnetts Lane (opp Manor Lodge B&B)	0	0	0	0	0	Horsham
Crawley Horsham MOT Centre (adj. Stumbleholm)	85	42	127	150	65	Horsham
Prestwood Farm	0	0	0	18	18	Horsham
Furlong Farm, Rusper Road	0	0	0	0	0	Horsham
TOTAL FOR AREA	1301	322	1623	2218	917	
Cophall Farm	1627	0	1627	1653	26	Tandridge District Council
Leylands (incl extension)	262	0	262	262	0	Tandridge District Council
Westlands Farm	0	0	0	1486	1486	Tandridge District Council
The Terning Wheel	521	0	521	580	59	Tandridge District Council
The Oak Tree, Effingham Road	20	0	20	21	1	Tandridge District Council
Effingham Park Hotel	0	0	0	600	600	Tandridge District Council
Kiln Heath Farm, Antlands Lane	20	0	20	20	0	Tandridge District Council
TOTAL FOR AREA	2450	0	2450	4622	2172	
TOTAL FOR ALL SITES	42453	3507	45960	62,225	19,772	

Gatwick Parking Notes:

Cars parked are total number of long stay vehicles counted at 9am on Friday 9 September

Short Stay figures exclude Kiss and Fly, and only relates to pre-booked cars. Would otherwise overstate real peak occupancy on this day as it assumes all prebooked cars are present for entire 24 hour period

Appendix J - Public Rights of Way Photographs.

Photograph – Paragraph reference 11.28 - Footpath 360Sy – entrance to route fenced between 2 car parks looking south. (February 2024)

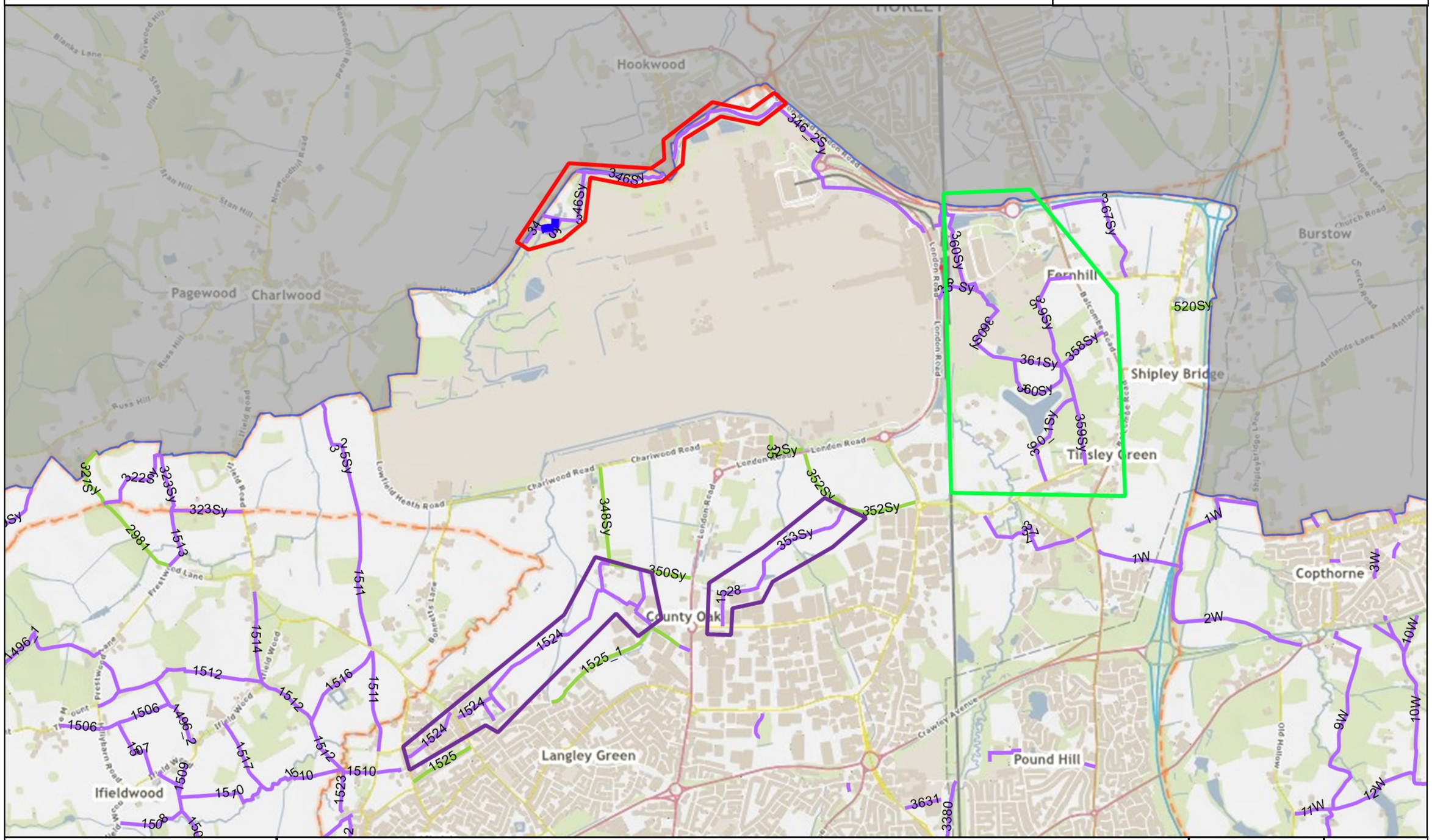
Photographs - Paragraph reference 11.30

Below: Section of Footpath 360Sy (between the footbridges looking south east). Note narrow and poor condition of path with its width compromised by drainage ditch to east and fencing to west. (February 24)

Above (February 2024) and Below (September 2021):Section of Footpath 360Sy (between the footbridge looking north west). Note poor condition of drainage ditch and limited path width due to car park fences running parallel to path and ditch. Ditch not readily visible in summer autumn.

APPENDIX K: Proposals for enhancements as part of Gatwick Northern Runway Proposal - WSCC PRoW

Parish:	Agenda Item No:



Proposals for enhancements as part of Gatwick Northern Runway Proposal - WSCC PRoW

Plan:	1:25000	OS Sheet:	Photocopy liable to distortion	Matt Davey Assistant Director Highways, Transport and Planning
Date: 28 February 2024		Grid Ref: TQ2718140215		

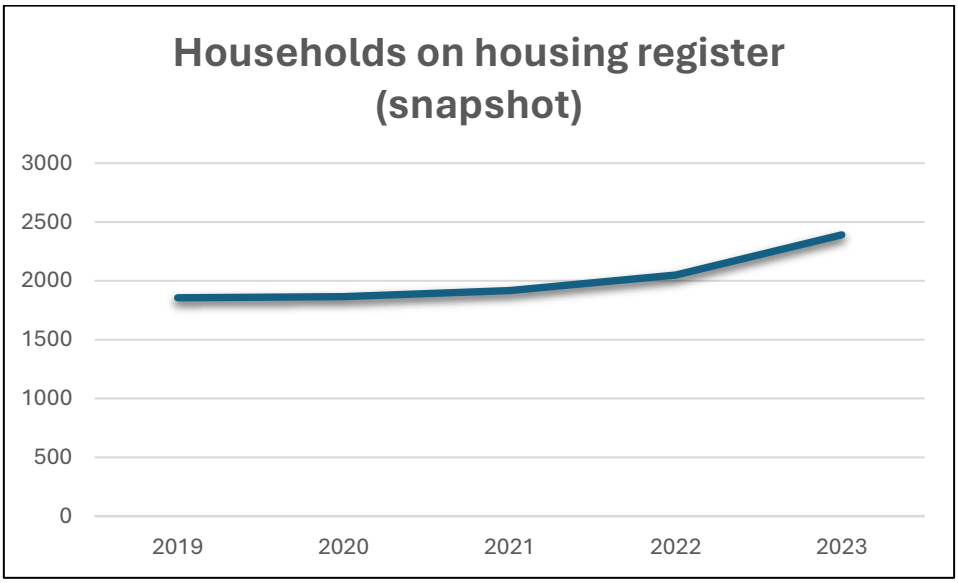
west sussex county council

N W E S

APPENDIX L – CRAWLEY BOROUGH COUNCIL HOUSING REGISTER INFORMATION

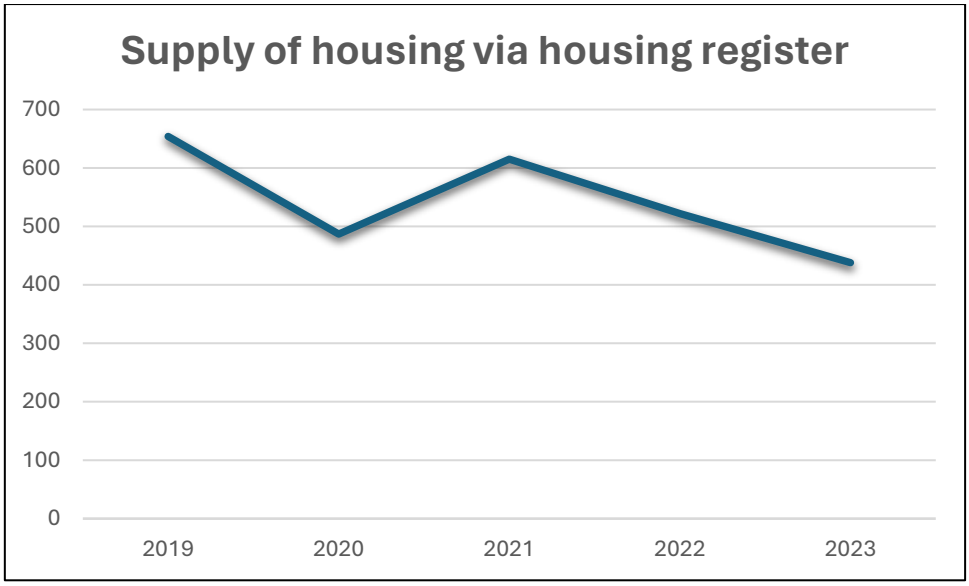
Crawley Borough Council Housing Register Information

The number of applicants on Crawley Borough Council's (CBC) Housing Register usually remains relatively constant with around 2000 applicants during the time when the supply of new-build rental units averages about 100 to 150 units per annum. However, since the advent of water-neutrality housing developments have almost ceased, which directly impacts on the number of applicants on the Housing Register, as evidenced in the table below, with the Housing Register close to reaching 2,500 applicants, increasing by about 20% in the last two-years.



Source: CBC Strategic Housing

This is further evidenced below, where the allocations of properties through the Housing Register is impacted by the reduced supply of new-builds, and this downward trend is likely to continue for a few years to come, until new affordable housing completions become available that are currently stalled due to water-neutrality. In the meantime, however, the Housing Register will continue to expand and the demand for accommodation will continue to grow, with most people on CBC's Housing Register competing for accommodation in the private rented sector, in Houses in Mutiple Occupancy, with the most vulnerable needing to be housed in hostels, B&B's and hotels in and around Crawley, or out of the borough.



Source: CBC Strategic Housing

Wait time info can be found here: Wait Time - Crawley HomeChoice (crawley-homechoice.org.uk) (note this chart displays average to longest wait times, in order to better manage customer expectations)

The table below shows how many households are waiting for housing, what properties became available in 2023, and how long successful applicants had been waiting.

Property size	How many households are waiting for this accommodation?	How many became available in 2023?	How long had successful applicants waited? *
Studio and one bed	495	90	1 to 3.5 years
Two bed	682	172	1.5 to 8 years
Three bed	553	70	2 to 10 years
Three bed + dining room	260	6	1.5 to 7 years
Four bed	Included in three bed + dining room	7	2.5 to 8 years
Five bed	Included in three bed + dining room	0	NA
Sheltered and extra care	435	91	1 to 7 years

*Wait times vary from applicant to applicant depending on their banding, priority housing date and the availability of the property type they are eligible for in their preferred areas. You may have a longer wait than this depending on your circumstances.

Appendix M: Comments on the draft Development Consent Order [PDLA-004] (Version 3.0, February 2024)

Introduction

1. This Appendix sets out the Councils' initial comments on the draft DCO [PDLA-004]. A further more detailed review of the draft DCO will be submitted at Deadline 3. It considers provisions which are a cause for concern for the Councils and (where relevant) suggests alternative drafting which would address those concerns. For other provisions, the concern is described and the solution summarised, and for others, the Applicant is asked to provide additional information. As mentioned elsewhere, this Appendix does not include the Councils' proposed changes and additions to the proposed s106 Agreement. An update in respect of the s106 agreement will be provided at Deadline 2.

2. In this Appendix, the following terms are used for the following documents –
    - The Manston Airport Development Consent Order 2022 (2022/922) ("Manston DCO")
    - Sizewell C (Nuclear Generating Station) Order 2022 (2022/853), ("Sizewell DCO")
    - M42 Junction 6 Development Consent Order 2020 (SI 2020/528) ("M42 J6 DCO")
    - Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (SI 2014/2384) ("Thames Tideway DCO")
    - Model Provisions The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ("the Model Provisions"),

3. In addition, "WSCC" and "SCC" are used for West Sussex CC and Surrey CC, respectively.

4. Where a deletion is suggested to a provision, it is shown in bold, struck through and in red ink. Where an addition is shown to a provision, it is shown in bold, underlined and in red ink.

5. This Appendix also sets out the changes which need to be made to the following documents: Parameter Plans / Works Plans / Tree Survey Plans, Design and Access Statement (APPENDIX 1- APP 257), Outline Construction Workforce Travel Plan (APP-084), Outline Construction Traffic Management Plan (APP-085), Outline Construction Traffic Management Plan (APP-085), Outline Landscape and Ecology Management Plan (APP-113-116), Code of Construction Practice (APP-82), Code of Construction Practice – Annex 3 (APP-085),

Flood Risk Assessment (APP148 -149), Written Scheme of Investigation for West Sussex (APP-106), Public Rights of Way Management Strategy (APP-215), Employment, Skills and Business Strategy (APP-198), Noise Insulation Document (APP-180) and Additional Control Documents Needed.

Reference	Provision	Comment and suggested alternative drafting
Part 1 – Preliminary		
1.	Article 2 (interpretation)	<u>The definition of "commence" (i)</u> The definition of "commence" excludes 15 operations (i.e. those listed in sub-paragraphs (a) to (o) of the definition). The excluded operations are wider than those included in the cited precedents. Paragraph 3.4.1 of the Explanatory Memorandum ("**EM**") **[AS-006]** states the excluded operations "do not give rise to any materially new or materially different environmental effects to those assessed in the Environmental Statement (Doc Ref. 5.1), being either de minimis or having minimal potential for adverse effects, in line with the Planning Inspectorate's Advice Note 15". Paragraph 3.4.1 then goes on to refer to them as "low impact preparatory works". Certain of the excluded operations would seem capable of giving rise to significant effects and it is not clear how the dDCO restricts these works to "low impact preparatory works". To give one example, sub-paragraph (k) ("erection of temporary buildings and structures") does not place any limit on the size of the "buildings and structures" or indicate what "temporary" might mean. An explanation is needed. Regarding other temporary works, (for instance, as well as the temporary buildings and structures already referred to, sub-paragraph (n) provides for the "establishment of temporary haul roads" and sub-paragraph (o) for the "temporary display of site notices, advertisements or information") it is not clear how these will be dealt with when they are no longer needed and the Councils would expect a requirement to deal with this.

		Moreover, regarding sub-paragraph (m), which concerns "the establishment of construction compounds", the Councils wish to understand the potential impact on any surrounding properties. The Councils are surprised by the Applicant's conclusion that no passage from the ES can be cited in respect of any exception (noting that, to give one example, the exception could provide for a temporary building of limitless size). The Councils consider this approach to pre-commencement activities is too casual and, owing to the absence of justification for each exemption, and the lack of certainty as to what the exceptions to "commencement" would entail, consider these works should be subject to the approval of either the local planning authority or local highway authority, depending on the type of works involved. This approval should be included in a requirement. In addition, the Councils note paragraph 1.3.1 of the CoCP **[APP-082]** states – "The scope of this CoCP applies to construction activities authorised by the DCO. For the purpose of this CoCP, the term 'construction' includes all pre-commencement activities and construction activities required to deliver the Project". Notwithstanding the limitations of the CoCP and the improvements the Councils consider should be made to it, the Councils consider this should be made explicit on the face of the dDCO. There should therefore be a further requirement, drafted as follows – **Pre-commencement operations** **(XX).—(1) No operation listed in sub-paragraphs (a) to (m) and (o) of the definition of "commence" may be carried out without the consent of the local planning authority, following consultation with the local highway authority.** **(2) No operation listed in sub-paragraph (n) of the definition of "commence" may be carried out without the consent of the local highway authority, following consultation with the local planning authority.**

		(3) All operations listed in sub-paragraphs (a) to (n) of the definition of "commence" must be carried out in accordance with the code of construction practice. The Councils request that the Applicant confirms which other control documents will apply to the carrying out of the pre-commencement operations.
2.		The definition of "commence" (ii) – justification of the provision in the EM It is noted (from paragraph 3.4.1 of the EM **[AS-006]**) that the Applicant's approach to "commencement" is "widely precedented … in other made DCOs" and the following are cited as precedents: Sizewell, M20 Junction 10a Development Consent Order 2017, and M25 Junction 28 Development Consent Order 2022 ("**M25 J28**"). The EM **[AS-006]** identifies precedents; however, this is not enough. For instance, it does not follow that a provision relevant to the authorisation of a nuclear-powered generating station in Suffolk (Sizewell) or the alteration of a motorway junction in Essex (M25 J28) is relevant to the instant project. The relevance must be explained and the inclusion of the provision justified. *Advice Note Fifteen: Drafting Development Consent Orders* (republished July 2018 (version 2)) is clear on this point. It states – "If a draft DCO includes wording derived from other made DCOs, this should be explained in the Explanatory Memorandum. The Explanatory Memorandum should explain why that particular wording is relevant to the proposed draft DCO, for example detailing what is factually similar for both the relevant consented NSIP and the Proposed Development. It is not sufficient for an Explanatory Memorandum to simply state that a particular provision has found favour with the Secretary of State previously; the ExA and Secretary of State will need to understand why it is appropriate for the scheme applied for. Any divergence in wording from the consented DCO drafting should also be explained. Note, though, that policy can change and develop". (Paragraph 1.5, emphasis added).

		In the light of the above, it is clear the Applicant should justify each exception being suggested, rather than rely on the generic reference to precedent made in the EM.
3.	Article 2 (interpretation)	Art.2(9) states – "References in this Order to materially new or materially different environmental effects in comparison with those reported in the environmental statement 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". This provision appears unprecedented and there is no explanation in the EM **[AS-006]** as to why it might be needed for the instant project. Absent any justification, the Councils consider it should be omitted from the dDCO.
4.	Article 6 (limit of works)	The Council maintains its position (which has been explained to the Applicant previously) that clarification is needed on how what is shown on the plans relates to the various definitions of the airfield boundaries, DCO limits and operational land for both the current and future Airport.
5.	Article 9(4) (planning permission)	Article 9(4) provides that any conditions of any planning permission granted prior to the date of the Order that are "incompatible" with the requirements of the Order or the authorised development shall cease to have effect from the date the authorised development is commenced. This provision also includes use of any permitted development rights. The Councils consider the applicant should justify inclusion of this provision in the dDCO by explaining which planning permissions are considered "incompatible". The Councils also consider the article should include a mechanism for determining incompatibility and a mechanism for informing a party who might be affected by the cessation.
6.	Article 9(5) (planning permission)	Article 9(5) (planning permission) of the dDCO provides (amongst other things) that nothing in the Order restricts the future exercise of GAL's permitted development rights.

		The EM **[AS-006]** justifies this as follows: "This provision is necessary to ensure that the airport operator can continue, in particular, to rely on its extant permitted development rights to facilitate the ongoing operation of the airport and to allow for minor works to be separately consented without needing to rely on an amendment to the Order which would be disproportionate and impractical in the circumstances." (Paragraph 4.28). First, the Councils consider the potential scope of development permitted by the provisions cited in article 9(5) cannot be dismissed as "minor works" and is unconvinced these should be retained. Second, if further development, which is not authorised by the DCO, is to take place at the airport, it should be subject to control by the local planning authority. Third, if the applicant wants the DCO to authorise yet further works, these should be included in Schedule 1 in the usual way (and their effects assessed). This approach is consistent with *Advice note thirteen: Preparation of a draft order granting development consent and explanatory memorandum* (Republished February 2019 (version 3)) which states (at paragraph 2.9) the dDCO should include the following – • "A full, precise and complete description of each element of the NSIP, preferably itemised in a Schedule to the DCO; and • A full, precise and complete description of each element of any necessary "associated development"". The retention of permitted development rights could, contrary to *Advice note thirteen,* result in a partial and incomplete description of the proposed development being included in the dDCO".
7.	Article 10 (application of the 1991 Act)	Subject to the condition below, the Councils are opposed to the disapplication of sections 73B, 73C, 77 and 78A of the 1991 Act. While the precedents cited in the ES **[AS-006]** are noted, the Councils consider it is now for the Applicant to explain why the disapplication of the cited provisions is relevant to this project. That is the approach required by paragraph 1.5 of Advice Note Fifteen (see comments on article 2(1) re "Commencement" above). While the Council has not undertaken an analysis of the cited precedents, the Council assumes the inclusion of these provisions was not controversial in those projects. The position is different here because their inclusion is of concern to the Council. The condition mentioned above is that disapplication of the provisions would be acceptable if the relevant highway authority's permit scheme was applied to the authorised development. These will be provided to the Applicant and the Applicant's view as to their application would be welcomed.

8.	Article 11(1) (street works)	This Article allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. It departs from most precedents by authorising interference with any street within the Order limits, rather than those specified in a schedule. This is a significant departure from the Model Provisions (see Model Provision 8(1)) and established precedent; for example article 14 (street works) of the Sizewell DCO, article 12 (street works) of the M42 J6 DCO and article 10 (street works) of the Thames Tideway DCO each cross-refers to a schedule of named streets. The Councils consider the usual cross-reference should be included in article 11(1) and that it should be amended as follows – "(1) The undertaker may, for the purposes of the authorised development, enter on so much of any of the streets **specified in Schedule [X] (streets subject to street works)** as are within the Order limits and may— …" In addition, a new (corresponding) Schedule [X] should be included in the Schedules. Absent such cross-reference, the Council considers the power should be subject to street authority control and article 11(1) should be amended as follows – "The undertaker may, for the purposes of the authorised development **and subject to the consent of the street authority**, enter on so much of any of the streets as are within the Order limits and may …". The Applicant states in its Statement of Common Ground with WSCC (September 2023 – Version 1.0) – "Article 11 is by reference to streets "within the Order limits" rather than a specified list of streets because (i) there are only a small number of streets within the Order limits and there is little benefit therefore in listing them in a schedule and (ii) GAL foresees a need for flexibility as regards the streets under which it may need to carry out works, particularly in relation to necessary utility diversions which may become apparent during construction". Taking each point in turn –

		(i) Owing to the small number of streets affected within the Order limits, it would seem straightforward to cross-refer in the article to a specified list. The Applicant will be aware that such an approach is not unusual, as the cited examples above demonstrate. (ii) Regarding the Applicant's need for flexibility regarding the streets under which it may need to carry out works, article 11 could be further amended to include the following provision – "**(X) Without limiting the scope of the powers conferred by paragraph (1) but subject to the consent of the street authority, the undertaker may, for the purposes of the authorised development, enter on so much of any other street within the Order limits, for the purposes of carrying out the works set out at paragraph (1) above.**" A similar provision is included in the Sizewell (article 14(2)) and Thames Tideway (article 10(2)) DCOs.
9.	Article 12 (power to alter layout, etc. of streets)	Deeming provision (i) – deletion of deeming provision Article 12(1) allows the Applicant to enter onto and alter the layout of, or carry out any works (either temporarily or permanently) on, any street whether or not within the Order limits, for the purposes of constructing, operating and maintaining the authorised development. By article 12(3), this power is subject to the consent of the street authority. Article 12(4) provides that where a street authority fails to respond to an application for consent under Article 12(3) within 56 days of the application being made, it is deemed to have given its consent under Article 12(3). The Councils are concerned about the principle of deemed consent, consider there should be no deeming provision and so paragraph (4) should be omitted from article 12 i.e. – "~~**(4) If a street authority which receives a valid application for consent under paragraph (3) fails to notify the undertaker of its decision before the end of the period of 56 days beginning with the date on which the application was made, it is deemed to have granted consent.**~~"

		Paragraph 5.14 of the EM **[AS-006]** states, in respect of article 12(4) – "This Article is considered necessary to enable the undertaker to exercise its powers and undertake works in an efficient and expedient manner and to give full effect to the power to carry out the authorised development. It is important to note that the deemed approval provision does not remove the street authority's ability to refuse the application, it simply imposes a deadline by which it must exercise its statutory functions". SCC and WSCC, the local highway authorities who will receive applications for consent under this article, stress that the key factor in determining an application expeditiously is the quality of the submission. It is often necessary for the highway authority to request revised submissions (sometimes several requests are needed) and Applicants do not always provide the requested material in good time. A sub-standard submission and an Applicant which does not provide revised submissions timeously can lead to applications taking longer than 56 days (and, occasionally, substantially longer than 56 days) to determine. There is no question of a local highway authority consenting a submission which is sub-standard because of the risk of compromising highway safety. Owing to this, and given the deeming provision, SCC and WSCC would have to refuse the application and follow the procedure under paragraph 4 (appeals) of Schedule 11 (procedures for approvals, consents and appeals) to the dDCO. SCC and WSCC consider it would be more sensible for the deeming provision to be omitted. Paragraph 5.17 of the EM **[AS-006]** cites article 13 (power to alter layout, etc. of streets) of the Sizewell DCO as a precedent for article 12; however, article 13 of the Sizewell DCO does not include a deeming provision and the Councils consider the same approach should be followed here. The following provisions also include a deeming provision: article 14(8) (temporary closure of streets), 18(10) (traffic regulations), 22(5) (discharge of water), and 24(6) (authority to survey and investigate the land) and the Councils consider the deeming provision in each of these articles should also be omitted.
10.	Article 12(4) (power to alter	<u>Deeming provision (ii) – if the deeming provision is retained: additional paragraphs</u>

	layout, etc. of streets)	If the deeming provision is retained, it should be followed by the following provision, which has been included consistently in highways DCOs since 2020[1], and which requires the undertaker to inform the authority of the deeming provision when it makes its application – "**(X) Any application to which this article applies must include a statement that the provisions of paragraph (4) apply to that application**". The officers dealing with an application under article 12 might not be aware of the deeming provision and so it is reasonable for any application to inform the recipient of that significant power. In addition, a failure to inform the recipient of the power should have a consequence and new paragraph (X) should be followed by – "**(Y) If an application for consent under paragraph (4) does not include the statement required under paragraph (X), then the provisions of paragraph (3) will not apply to that application**".

[1] For example –
A12 Chelmsford to A120 Widening Development Consent Order 2024 (SI 2024/60) (articles 16 (power to alter layout etc. of streets), 18 (temporary alteration, diversion, prohibition and restriction of the use of streets), 23 (traffic regulation), 24 (discharge of water), and 26 (authority to survey and investigate the land)).
A47 Wansford to Sutton Development Consent Order 2023 (SI 2023/218) (articles 14 (power to alter layout etc. of streets), 16 (temporary stopping up and restriction of use of streets), 20 (traffic regulation), 21 (discharge of water), 23 (authority to survey and investigate the land), and 39 (felling or lopping of trees and removal of hedgerows)).
A417 Missing Link Development Consent Order 2022 (SI 2022/1248) (articles 15 (temporary stopping up and restriction of use of streets) 19 (traffic regulation), 21 (discharge of water) and 23 (authority to survey and investigate the land)).
A47/A11 Thickthorn Junction Development Consent Order 2022 (SI 2022/1070) (articles 14 (power to alter layout etc. of streets), 16 (temporary stopping and restriction of use of streets), 20 (traffic regulation), 21 (discharge of water), 23 (authority to survey and investigate the land), and 39 (felling or lopping of trees and removal of hedgerows)).
A47 North Tuddenham to Easton Development Consent Order 2022 (SI 2022/911) (articles 13 (power to alter layout etc. of streets), 15 (temporary stopping up and restriction of use of streets), 19 (traffic regulation), 20 (discharge of water), 22 (authority to survey and investigate the land), and 39 (felling or lopping of trees and removal of hedgerows)).
A47 Blofield to North Burlingham Development Consent Order 2022 (SI 2022/738) (articles 14 (power to alter layout etc. of streets), 16 (temporary alteration, diversion, prohibition and restriction of the use of streets), 20 (traffic regulation), 21 (discharge of water), 23 (authority to survey and investigate the land)) and 39 (felling or lopping of trees and removal of hedgerows)).
M42 Junction 6 Development Consent Order 2020 (SI 2020/528) (articles 16 (temporary stopping up and restriction of use of streets), 20 (traffic regulation), 21 (discharge of water) and 23 (authority to survey and investigate the land)).

		New paragraphs (X) and (Y) should also be included in articles 14 (temporary closure of streets), 18 (traffic regulations), 22 (discharge of water), and 24 (authority to survey and investigate the land), each of which includes a deeming provision.
11.	Article 12(3) (power to alter layout, etc. of streets)	<u>Deeming provision (iii) – if the deeming provision is retained: consent being "unreasonably withheld or delayed"</u> In a number of cases, SCC and WSCC are under a requirement to approve various documents, and provision is made to say that approval must not be "unreasonably withheld or delayed" (see article 12(3)). This is in addition to the 56-day deeming provision. In several cases this appears to be unprecedented in DCOs or not well precedented. SCC and WSCC will be receiving considerable numbers of requests for approval and will of course ensure that they are dealt with as quickly as possible. With the deeming provisions included there is no need to say that the approvals must not be "unreasonably withheld or delayed", and in some cases the deeming provisions are unprecedented and unnecessary. Moreover, by section 161(1)(b) (breach of terms of order granting development consent) of the Planning Act 2008, it is an offence for a person to fail to comply with the terms of a DCO. SCC and WSCC consider it excessive for it to potentially face criminal liability in these circumstances. SCC and WSCC consider article 12(3) should be amended as follows – "The powers conferred by paragraph (1) must not be exercised without the consent of the street authority ~~(this consent not to be unreasonably withheld or delayed)~~". Paragraph 5.17 of the EM **[AS-006]** cites article 13 of the Sizewell DCO and article 12 of the National Grid (Hinkley Point C Connection Project) Order 2016 ("**Hinkley 2016**") as precedents for article 12. It is noted that article 13 (power to alter layout, etc. of streets) of the Sizewell DCO does not include the words that consent must not be ""unreasonably withheld or delayed". Similarly, those words are not included in article 12 (power to alter layout, etc. of streets) of the Hinkley 2016 DCO, even though article 12(5) of the Hinkley 2016 DCO includes a deeming provision.

		This point also applies to every deeming provision which refers to consent being "unreasonably withheld or delayed" i.e. articles 14(4) (temporary closure of streets), 18(5)(c) (traffic regulations), 22(3) and 22(4)(a) (discharge of water), and 24(4) (authority to survey and investigate the land).
12.	Article 12(4) (power to alter layout, etc. of streets)	Deeming provision (iv) – if the deeming provision is retained: when the clock starts to run By article 12(4), the 56-day period begins "with the date on which the application was made". It is noted that while the 56-day period in articles 12(4), 14(8) (temporary closure of streets) and 18(10) (traffic regulations) begin on the date when the application is made, the corresponding period in articles 22(5) (discharge of water) and 24(6) (authority to survey and investigate the land), begins when the application is received. SCC and WSCC consider it desirable for every period mentioned in the above articles to begin at the same time and consider it reasonable for the period to begin when the application is received by the decision-maker. SCC and WSCC consider article 12(4) should be amended as follows – "If a street authority which receives a valid application for consent under paragraph (3) fails to notify the undertaker of its decision before the end of the period of 56 days beginning with the date on which the application was **received** ~~**made**~~, it is deemed to have granted consent". Corresponding amendments should be made to articles 14(8) and 18(10).
13.	Art. 13 (stopping up of streets)	In summary, article 13(2)(b) provides that no street identified in certain columns of Schedule 3 can be wholly or partly stopped up under the powers contained in that article unless a temporary alternative route is provided then maintained by the undertaker. SCC and WSCC consider it reasonable that the alternative should be provided and maintained to the "reasonable satisfaction" of the relevant street authority.

		A precedent cited for this provision in the EM **[AS-006]** is the Model Provisions; however, it is noted that Model Provision 9(2)(b) (stopping up of streets) includes the commitment for the temporary alternative route to be provided and maintained by the undertaker to the reasonable satisfaction of the relevant street authority. (A precedent often cited by the Applicant – the Sizewell DCO – also includes that commitment in article 16(2)(b) (permanent stopping up of streets, change of status, and extinguishment of private means of access)). SCC and WSCC do not understand why a similar commitment is not included in article 13(2)(b) and consider the following amendment should be made – "(2) No street specified in columns (1) and (2) of Part 1 of Schedule 3 is to be wholly or partly stopped up under this article unless— … (b) a temporary alternative route for the passage of such traffic as could have used the street to be stopped up is first provided and subsequently maintained by the undertaker **to the reasonable satisfaction of the relevant street authority** between the commencement and termination points for the stopping up of the street until the completion and opening of the new street in accordance with sub-paragraph (a)".
14.	Art. 14(1) (temporary closure of streets)	Article 14(1) allows the Applicant to "temporarily close, alter, divert or restrict the use of any street and [do other things] …" for the purposes of the authorised development. SCC and WSCC consider the streets should be identified in a schedule and note the three cited precedents,[2] while not drafted identically to article 14, each include schedules which identify affected streets. They consider article 14(1) should be amended as follows – "The undertaker, during and for the purposes of carrying out the authorised development, may temporarily close, alter, divert or restrict the use of any street~~s~~ **identified in Schedule [X]** and may for any reasonable time— …" In addition, a new (corresponding) Schedule [X] should be included in the Schedules.

[2] Article 19 of the Sizewell DCO, article 13 of the Hinkley 2016 DCO, and article 17 of the Hinkley Point C (Nuclear Generating Station) Order 2013 (SI 2013/648).

15.	Art. 14(4) (temporary closure of streets)	For the reasons given in respect of article 12(3) (power to alter layout, etc. of streets) (regarding deeming provision (iii) – if the deeming provision is retained: consent being "unreasonably withheld or delayed") SCC and WSCC consider article 14(4) should be amended as follows – "(4) The undertaker must not temporarily alter, divert, prohibit the use of or restrict the use of any street without the consent of the street authority, which may attach reasonable conditions to any consent ~~**but such consent must not be unreasonably withheld or delayed**~~".
16.	Art. 14(5) (temporary closure of streets)	While this article is precedented in other DCOs, SCC and WSCC would expect the following paragraph to be included after existing paragraph (4) – **"(X) The undertaker must not temporarily alter, divert, prohibit the use of or restrict the use of any street unless a temporary diversion to be substituted for it, is open for use, and has been completed to the reasonable satisfaction of the street authority".** Article 19 (temporary closure of streets and private means of access) of the Sizewell DCO is cited in paragraph 5.32 of the EM **[AS-006]** as a precedent and it is noted article 19(6) of the Sizewell DCO includes a similar provision to the proposed new sub-paragraph. In the Statement of Common Ground with WSCC (September 2023 – Version 1.0) –, the Applicant states (in respect of an earlier version of the proposed drafting which was suggested to follow sub-paragraph (5)) – "The additional wording proposed to be included after existing sub-paragraph (5) is not considered necessary. Sub-paragraph (4) already provides that: "The undertaker must not temporarily alter, divert, prohibit the use of or restrict the use of any street without the consent of the street authority, which may attach reasonable conditions to any consent but such consent must not be unreasonably withheld or delayed". Should the street authority wish to request an alternative route to the temporarily altered/diverted/restricted etc. street be provided, it can do so as a condition to its consent (provided that such a condition is reasonable in the circumstances)".

		Since SCC and WSCC cannot envisage a scenario where they would not want a temporary diversion to be provided, they consider it would be more straightforward if this was made clear in article 14 and the proposed provision was included.
17.	Art. 14(5) (temporary closure of streets)	By article 14(5), where the undertaker provides a temporary substitute street, it is not required to provide that substitute to a higher standard than the street that was closed. SCC and WSCC have previously suggested to the Applicant that article 14(5) should be amended to provide that any temporary substitute street "must not be of a lower standard" than the street that was closed. In reply, the Applicant stated in the Statement of Common Ground with WSCC (September 2023 – Version 1.0) that it is not reasonable to require the temporary diversion to be of the same standard as the main permanent route, stating this is unlikely to be the case. On reflection, SCC and WSCC consider the undertaker should provide a temporary substitute street which is not of a lower standard than the street that was closed where an alternative of that standard is available. In the light of this, SCC and WSCC consider article 14(5) should be amended as follows – "Where the undertaker provides a temporary diversion under this article, the new or temporary alternative route is not required to be of a higher standard than the temporarily closed street **and, where an alternative of an equivalent standard is available, must not be of a lower standard**".
18.	Art. 14(8) (temporary closure of streets)	For the reasons given in respect of article 12(4) (deeming provision (i) – deletion of deeming provision), SCC and WSCC consider the deeming provision in article 14(8) should be omitted. If the deeming provision is retained, for the reasons given in respect of article 12(4), (deeming provision (ii) – if the deeming provision is retained: additional paragraphs), SCC and WSCC consider the following provisions should be added after paragraph (8) – **"(X) Any application to which this article applies must include a statement that the provisions of paragraph (8) apply to that application.** **(Y) If an application for consent under paragraph (4) does not include the statement required under paragraph (X), then the provisions of paragraph (8) will not apply to that application."**

		As described above in respect of article 12(4) (power to alter layout, etc., of streets), the 56-day deeming provision begins in this article "with the date on which the application was made". While the 56-day deeming period in articles 12(4) (power to alter layout, etc., of streets), 14(8) (temporary closure of streets) and 18(10) (traffic regulations) begins on the date when the application is made, the corresponding period in articles 22(5) (discharge of water) and 24(6) (authority to survey and investigate the land), begins when the application is received. SCC and WSCC consider it desirable for every period mentioned in the above articles to begin at the same time and consider it reasonable for the period to begin when the application is received by the decision-maker. SCC and WSCC consider article 14(8) should be amended as follows – "(8) If a street authority which receives a valid application for consent under paragraph (4) fails to notify the undertaker of its decision before the end of the period of 56 days beginning with the date on which the application was ~~made~~ received, it is deemed to have granted consent".
19.	Article 15 (public rights of way etc.)	Article 15(1)(a) refers to public rights of way ("PROW") for which substitutes must be provided (per article 15(2)) as being stopped up. SCC and WSCC consider the PROW here are being diverted, rather than stopped up, and consider article 15(1)(a) should be amended accordingly. Article 15(1)(c) refers to PROW being temporarily stopped up. SCC and WSCC consider the PROW here are being temporarily closed, rather than temporarily stopped up, and consider article 15(1)(c) should be amended accordingly. Corresponding amendments should be made to articles 15(2) and (3) and Schedule 4. In the light of the above points, these provisions should be amended as follows – "15.—(1) Subject to the provisions of this article, the undertaker may, in connection with the carrying out of the authorised development—

		(a) ~~stop up~~ **divert** each of the public rights of way specified in columns (1) and (2) of Part 1 of Schedule 4 (public rights of way to be permanently ~~stopped up~~ **diverted** for which a substitute is to be provided) to the extent specified in column (3) of that Part of that Schedule; … (c) temporarily ~~stop up~~ **close** public rights of way to the extent agreed with the relevant highway authority and provide substitute temporary public rights of way between terminus points, on an alignment to be agreed with the relevant highway authority (in both respects agreement not to be unreasonably withheld or delayed); and … … (2) No public right of way may be ~~stopped up~~ **diverted** pursuant to paragraph (1)(a) unless the respective substitute public right of way has first been provided pursuant to paragraph (1)(b) to the reasonable satisfaction of the relevant highway authority. (3) No public right of way may be ~~stopped up~~ **closed** pursuant to paragraph (1)(c) unless the substitute temporary public right of way agreed with the relevant highway authority has been provided to the reasonable satisfaction of the relevant highway authority". In Schedule 4 (Public Rights of Way, Footways and Cycle Tracks to be Stopped Up), the heading of Part 1 should be amended as follows: "(public rights of way to be permanently ~~stopped up~~ **diverted** for which a substitute is to be provided)". In addition, the heading of column (2) should be amended as follows: "public right of way to be ~~stopped up~~ **diverted**".
20.	Schedule 4 (Public Rights of Way, Footways and Cycle Tracks to be Stopped Up)	Article 15 (public rights of way etc.) cross-refers to Schedule 4 and WSCC make the following points in respect of it – • Part 1 cross-refers to Sheet 1 and the interference with Footpath 346_2Sy. WSCC considers the alignment of the footpath marked on Sheet 1 is incorrect and the western end of the footpath is also shown incorrectly. WSCC's Principal Rights of Way Officer would welcome discussions with the Applicant to correct these errors.

		• Part 3 lists certain footpaths and cycle tracks. Regarding cycle tracks c2, c3 and c4, WSCC's Principal Rights of Way Officer would welcome discussions with the Applicant to ensure any changes to these cycle tracks will recognise the existence of a public footpath along a shared route.
21.	Article 16 (access to works)	Article 16(1) gives wide powers to create new means of access and to improve new means of access. These powers should be subject to the consent of the street authority and so the provision should be amended as follows – "16.—(1) The undertaker may, for the purposes of the authorised development **and with the consent of the street authority**, form and layout means of access, or improve existing means of access, at such locations within the Order limits as the undertaker reasonably requires for the purposes of the authorised development". Two of the precedents referred to in paragraph 5.42 of the EM **[AS-006]** (article 21 (access to works) of the Sizewell DCO and article 14 (access to works) of the Manston DCO) both require the consent of the street authority before the undertakers can exercise their powers under the corresponding provisions.
22.	Article 18(1) (traffic regulations)	There are two points arising in respect of article 18(1). First, by article 18(1), the Applicant can (from a date of its choosing) vary or revoke the orders specified in column (3) of Part 3 of Schedule 6 (revocations & variations of existing traffic regulation orders) as specified in the corresponding row of column (4) of Part 3. While the Applicant's powers under paragraphs (2) and (3) are subject to the consent of the traffic authority, paragraph (1) does not require consent and no explanation is provided in the EM **[AS-006]**. Absent reasonable justification, paragraph (1) should be subject to the traffic authority's consent. Second, notwithstanding the point regarding consent, it is not clear how the traffic authority will be notified if an order is verified under article 18(1). The Applicant should explain.

23.	Article 18(5) (traffic regulations)	For the reasons given in respect of article 12(3) (power to alter layout, etc. of streets) (regarding deeming provision (iii) – if the deeming provision is retained: consent being "unreasonably withheld or delayed") SCC and WSCC consider article 18(5)(c) should be amended as follows – "(5) The undertaker must not exercise the powers conferred by paragraphs (2) and (3) of this article unless it has— … (c) obtained the consent of the traffic authority **~~(such consent not to be unreasonably withheld or delayed)~~** to the proposed exercise of powers".
24.	Article 18(6) (traffic regulations)	Article 18(6)(a) refers to "an instrument". SCC and WSCC want to know who will "hold it", how it will be published, and what will (say) the police be able to look at if they need to do so.
25.	Article 18(10) (traffic regulations)	For the reasons given in respect of article 12(4) above (see deeming provision (i) – deletion of deeming provision), SCC and WSCC consider the deeming provision in article 18(10) should be omitted. If the deeming provision is retained, for the reasons given above in respect of article 12(4), (see deeming provision (ii) – if the deeming provision is retained: additional paragraphs), SCC and WSCC consider the following provisions should be added after paragraph (10) – **"(X) Any application to which this article applies must include a statement that the provisions of paragraph (10) apply to that application.** **(Y) If an application for consent under paragraph (5)(c) does not include the statement required under paragraph (X), then the provisions of paragraph (10) will not apply to that application."** As described above in respect of article 12(4) (power to alter layout, etc., of streets), the 56-day deeming provision begins in this article "with the date on which the application was made". While the 56-day deeming period in articles 12(4) (power to alter layout, etc., of streets), 14(8) (temporary closure of streets) and 18(10) (traffic regulations) begins on the date when the application is made, the corresponding period in articles 22(5) (discharge of water) and 24(6) (authority to survey and investigate the land), begins when the application is received.

		SCC and WSCC consider it desirable for every period mentioned in the above articles to begin at the same time and consider it reasonable for the period to begin when the application is received by the decision-maker. SCC and WSCC consider article 18(10) should be amended as follows – "(10) If a traffic authority which receives a valid application for consent under paragraph (5)(c) fails to notify the undertaker of its decision before the end of the period of 56 days beginning with the date on which the application was ~~made~~ **received**, the traffic authority is deemed to have granted consent".
26.	Article 21 (agreements with highway authorities)	The Applicant and SCC and WSCC intend to agree template article 21 agreements, based on the councils' existing section 38 and 278 agreements.
27.	Article 22(5) (discharge of water)	For the reasons set out above in respect of article 12(4) (power to alter layout, etc., of streets), article 14(8), (temporary closure of streets), and 18(10) (traffic regulations), the deeming provision in article 22(5) should be omitted – ~~**"Where the person to whom the watercourse, sewer or drain belongs receives an application for consent under paragraph (3) or approval under paragraph (4)(a) and fails to notify the undertaker of its decision within 28 days of receiving an application, that person will be deemed to have granted consent or given approval, as the case may be".**~~ If the Applicant does not agree, it would be helpful to know why a 28-day deadline applies in article 22(5), whereas a 56-day deadline applies in articles 12(4), 14(8) and 18(10). It would seem more straightforward if the same time period was included in each provision which included a deeming provision. If the deeming provision is retained, for the reasons given above in respect of article 12(4), (see deeming provision (ii) – if the deeming provision is retained: additional paragraphs), the following provisions should be added after paragraph (5) –

		"(X) Any application to which this article applies must include a statement that the provisions of paragraph (5) apply to that application. **(Y) If an application for consent under paragraph (3) or (4)(a) does not include the statement required under paragraph (X), then the provisions of paragraph (5) will not apply to that application."**
28.	Article 22(3) and 22(4)(a) (discharge of water)	For the reasons set out above in respect of article 14(4), (temporary closure of streets) and 18(5)(c) (traffic regulations), if the deeming provision in article 22(5) is retained, the references to consent being unreasonably withheld or delayed in article 22(3) and 22(4)(a) should be omitted – "(3) The undertaker must not discharge any water into any watercourse, public sewer or drain except with the consent of the person to whom it belongs; and such consent may be given subject to such terms and conditions as that person may reasonably impose**~~, but must not be unreasonably withheld or delayed~~**. (4) The undertaker must not make any opening into any public sewer or drain except— (a) in accordance with plans approved by the person to whom the sewer or drain belongs**~~, but such approval must not be unreasonably withheld or delayed~~**; and …"
29.	Article 24(6) (authority to survey and investigate the land)	For the reasons set out above in respect of article 12(4) (power to alter layout, etc., of streets), article 14(8), (temporary closure of streets), and 18(10) (traffic regulations), the deeming provision in article 22(5) should be omitted – **~~"(6) If either a highway authority or street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision within 56 days of receiving the application for consent, that authority will be deemed to have granted consent".~~** If the deeming provision is retained, for the reasons given above in respect of article 12(4), (see deeming provision (ii) – if the deeming provision is retained: additional paragraphs), the following provisions should be added after paragraph (6) – **"(X) Any application to which this article applies must include a statement that the provisions of paragraph (6) apply to that application.**

		(Y) If an application for consent under paragraph (4) does not include the statement required under paragraph (X), then the provisions of paragraph (6) will not apply to that application."
30.	Article 24(4) (authority to survey and investigate the land)	For the reasons set out above in respect of article 14(4), (temporary closure of streets) and 18(5)(c) (traffic regulations), if the deeming provision in article 22(5) is retained, the references to consent being unreasonably withheld or delayed in article 24(4) should be omitted – "(4) No trial holes, boreholes or excavations are to be made under this article— (a) in land located within a highway boundary without the consent of the relevant highway authority; or (b) in a private street without the consent of the street authority (save for streets within the airport)~~,~~ **~~but such consent must not be unreasonably withheld or delayed.~~**"
31.	Article 25 (felling or lopping of trees and removal of hedgerows)	The Councils are concerned about article 25 for several reasons. First, it is inconsistent with paragraph 22.1 of *Advice Note Fifteen: Drafting Development Consent Orders* (Republished July 2018 (version 2)), which states – "It is recommended that DCO Articles of this kind [i.e. articles which provide for interference with hedgerows] are made relevant to the specific hedgerows intended for removal. To support the ExA, the Article should include a Schedule and a plan to specifically identify the hedgerows to be removed (whether in whole or in part). This will allow the question of their removal to be examined in detail. Alternatively, the Article within the DCO could be drafted to include powers for general removal of hedgerows (if they cannot be specifically identified) but this must be subject to the later consent of the local authority". [Emphasis added]. Article 25 is inconsistent with this recommendation: it does not include a schedule or plan, yet it seeks to remove (under article 25(5)) "any obligation" to secure consent. No justification is given for this inconsistency with the Advice Note. The Councils consider the hedgerow-related provisions must be recast to make them consistent with paragraph 22.1. Below are two alternatives to the current drafting: the first cross-refers to a schedule; the second requires local authority consent before the article's powers can be exercised.

		Second, article 25(1)(b) allows the undertaker to fell or lop a tree or shrub to prevent a danger to property within the authorised development. This unprecedented text might have been added following a request by one of the Councils; however, the Councils now consider it should be omitted. Third, in the Statement of Common Ground with WSCC (September 2023 – Version 1.0), in response to a request by WSCC that article 25 of an earlier draft of the order should be amended to state that works will be carried out in accordance with BS 3998:2010, the Applicant states: "It is not anticipated that there will be any concerns with tree and hedge works needing to be carried out in accordance with BS 3998:2010 (or more recent industry best practice)". The article should therefore be amended to reflect this. Fourth, article 25(6) provides the meaning of "hedgerow" includes "important hedgerow"; however, the Applicant's Ecology Survey Report – Part 1 **[APP-125]** states – "A survey of all hedgerows within the Project site boundary was carried out in accordance with the methodology and guidelines set out in the Hedgerow Survey Handbook (Department for Environment, Food and Rural Affairs (Defra), 2007) to identify Important hedgerows, as defined in the Hedgerow Regulations 1997. … None of the hedgerows surveyed were found to comprise important hedgerows". (Paragraphs 2.3.1 and 3.3.1) Since there appear to be no important hedgerow within the project site boundary, the reference to "important hedgerows" within article 25(6) is unnecessary and should be removed. <u>Suggested alternative drafting (i) – cross-referring to a schedule</u> 25.—(1) The undertaker may fell or lop any tree or shrub within or overhanging land within the Order limits, or cut back its roots, if it reasonably believes it to be necessary to do so to prevent the tree or shrub— (a) from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or

		(b) from constituting a danger to persons using the authorised development~~, or property within the authorised development~~. (2) In carrying out any activity authorised by paragraph (1), the undertaker **must comply with British Standard 3998:2010 "Tree Work Recommendations,"** must do no unnecessary damage to any tree or shrub and must pay compensation to any person for any loss or damage arising from such activity. (3) Any dispute as to a person's entitlement to compensation under paragraph (2), or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act. ~~(4) The undertaker may, for the purposes of carrying out the authorised development but subject to paragraph (2), remove any hedgerow within the Order limits that is required to be removed.~~ ~~(5) The powers conferred by paragraphs (1) and (4) remove any obligation upon the undertaker to secure any consent under the Hedgerow Regulations 1997(a) in undertaking works pursuant to paragraphs (1) or (4).~~ **(4) Subject to paragraph (2), the undertaker may, for the purposes of carrying out the authorised development—** **(a) remove any hedgerows within the Order limits and specified in Part 1 (removal of hedgerows) of Schedule [X]; and** **(b) without limitation on the scope of sub-paragraph (a), and with the consent of the local planning authority in whose area the hedgerow is located, remove or translocate any hedgerow within the Order limits that is required to be removed**. (~~6~~**5**) In this article "hedgerow" has the same meaning as in the Hedgerow Regulations 1997 and **does not** include~~s~~ important hedgerows. Comment The deletion from sub-paragraph (1)(b), the addition to paragraph (2), the omission of (old) paragraphs (4) and (5) and the amendment to paragraph (6) are justified above. The reference in paragraph (2) to complying with British Standard 3998:2010 "Tree Work Recommendations," is precedented in the West Midlands Rail Freight Interchange Order 2020 (SI 2020/511).

		New paragraph (4) is precedented in several DCOs including A12 Chelmsford to A120 Widening Development Consent Order 2024 (SI 2024/60) (article 46(4) (felling or lopping of trees and removal of hedgerows)); A47 Wansford to Sutton Development Consent Order 2023 (SI 2023/218) (article 39(4) (felling or lopping of trees and removal of hedgerows)); and A47/A11 Thickthorn Junction Development Consent Order 2022 (SI 2022/1070) (article 39(4) felling or lopping of trees and removal of hedgerows). Suggested alternative drafting (ii) – requirement for local authority consent 25.—(1) **Subject to the consent of the local planning authority, the** ~~**The**~~ undertaker may fell or lop any tree or shrub within or overhanging land within the Order limits, or cut back its roots, if it reasonably believes it to be necessary to do so to prevent the tree or shrub— (a) from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or (b) from constituting a danger to persons using the authorised development~~**, or property within the authorised development**~~. (2) In carrying out any activity authorised by paragraph (1), the undertaker **must comply with British Standard 3998:2010 "Tree Work Recommendations,"** must do no unnecessary damage to any tree or shrub and must pay compensation to any person for any loss or damage arising from such activity. (3) Any dispute as to a person's entitlement to compensation under paragraph (2), or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act. ~~**(4) The undertaker may, for the purposes of carrying out the authorised development but subject to paragraph (2), remove any hedgerow within the Order limits that is required to be removed.**~~ ~~**(5) The powers conferred by paragraphs (1) and (4) remove any obligation upon the undertaker to secure any consent under the Hedgerow Regulations 1997(a) in undertaking works pursuant to paragraphs (1) or (4).**~~ (~~**6**~~**4**) In this article "hedgerow" has the same meaning as in the Hedgerow Regulations 1997 and **does not** include~~**s**~~ important hedgerows.
32.	Article 29 (compulsory acquisition of land –	A drafting / typo point: the article should be amended as follows – "Parts 2 and 3 of Schedule 2 (minerals) to the Acquisition of Land Act 1981 ~~**is**~~ **are** incorporated …"

	incorporation of the mineral code)	
33.	Article 31 (time limit for exercise of authority to acquire land compulsorily)	Art.31(10) gives the undertaker up to 10 years to exercise its powers to acquire land or interests. The 10 years run from "the start date" i.e. the later of the day after (a) the day on which the period for legal challenge of the Order under the 2008 Act has expired; and (b) the final determination of any legal challenge under the 2008 Act. If there was a challenge, affected land could be sterilised for over a decade. The justification in paragraph 7.19 of the EM **[AS-006]** is "the complex nature and scale of the Project" and the Thames Tideway Tunnel and Sizewell C DCOs are cited as precedents. The instant application does not seem as complex as the cited precedents. For instance, the Thames Tideway DCO (where the equivalent time limit is also 10 years: article 45 (time limit for exercise of authority to acquire land compulsorily)) consented a wastewater transfer and storage tunnel, a number of connection tunnels and other significant works at 24 sites (across 14 local authority areas) in London along the route of the tunnel. Owing to the comparatively modest scale of the development proposed at Gatwick, ten years seems an excessively long time. The time period should be reduced to 5 years, starting when the order comes into force, rather than from the "start date".
34.	Article 32 (private rights of way)	The Councils have a query regarding article 32. Article 32(6) provides that paragraphs (1) to (4) of article 32 have effect subject to matters listed in sub-paragraphs (a) and (b) of article 32(6). (Paragraph (4) relates to compensation). Whilst similar wording is found in the cited precedents mentioned in paragraph 7.23 of the EM [**AS-006**] (i.e. article 33 the Sizewell DCO and article 28 of the Hinkley Point C (Nuclear Generating Station) Order 2013), sub-paragraph (6) in the precedents cross-refers to paragraphs (1) to (3) only and not to paragraph (4).

		The EM does not explain why article 32(6) departs from its precedents in this way and the Councils would welcome an explanation.
35.	Article 34(16) to (19) (application of the 1981 Act and modification of the 2017 Regulations)	Paragraphs (16) to (19) concern the modification of the Compulsory Purchase of Land (Vesting Declarations) (England) Regulations 2017 to allow the Applicant to vest rights for the benefit of third parties. Paragraph 7.29 of the EM **[AS-006]** explain this is for the purposes of ensuring that the right vests in a statutory undertaker, but "third party" is not defined/limited to any statutory undertakers. While paragraphs (1) to (15) are precedented in other DCOs, we have not found any example of paragraphs (16) to (19) in a made Order. Moreover, we understand where National Highways have sought to include paragraphs (16) to (19) in DCOs (as an article in themselves, rather as part of another article) the Secretary of State has consistently removed the provision from the dDCO at decision state. (See, for example, paragraph 140 of the Secretary of State's decision letter dated 16 May 2022 regarding the M25 J28 DCO where article 32 (modification of the 2017 Regulations) was removed "as it is unprecedented and there is a lack of justification as to why needed in this matter").
36.	Article 37 (temporary use of land for carrying out the authorised development)	Article 37(2) states – "Not less than 14 days before entering on and taking temporary possession of land under this article the undertaker must serve notice of the intended entry on the owners and occupiers of the land". Per article 29(2) of the Manston DCO, it would seem sensible, and helpful for the recipient, if the following words were added at the end of paragraph (2) – "**and explain the purpose for which entry is taken**". It is noted the same form of words is included in respect of the notice served under article 39(3) (temporary use of land for maintaining the authorised development) of the instant dDCO and so we assume the inclusion of the additional words in article 37(2) would not be controversial.

37.	Article 40 (special category land)	Paragraph (1) provides that the special category land identified in Part 1 of Schedule 10 will not vest in the undertaker until the undertaker has acquired the replacement land (to the extent not already in its ownership) and an open space management plan has been submitted to, and approved in writing by, the relevant planning authority. The open space management plan submitted under paragraph (1) must be in general accordance with the outline landscape and ecology management plan. Upon satisfaction of the requirements of paragraph (1), the special category land will vest in the undertaker and is discharged of all encumbrances. By s.131(4) of the Planning Act 2008, the acquisition of open space land does not trigger special parliamentary procedure if "replacement land has been or will be given in exchange for the order land". We do not consider the Applicant's approach (to submit a plan before land vests in the Applicant) satisfies the term "has been or will be given" as it is normally applied in the context of compulsory acquisition because there will be a delay (and in some instances a substantial delay) between the open space vesting in the Applicant and the replacement land being provided. The position is particularly stark in respect of certain land at Gatwick Dairy Farm (which is owned by SCC) and which is to be provided as replacement open space land; however, it will first be used as a construction compound and so the replacement open space land will not be provided until some time after the open space land has vested in the Applicant. It would be helpful if the Applicant could explain why the vesting of the open space land in the undertaker should not wait until a scheme for the provision of replacement land as open space has been implemented to the satisfaction of the relevant body.
38.	Article 46 (disapplication of legislative provisions)	By article 46(1)(a), section 23 (prohibition of obstructions etc. in watercourses) of the Land Drainage Act 1991 will be disapplied in relation to the construction of any work or the carrying out of any operation required for the purpose of, or in connection with, the construction or maintenance of the authorised development. In the Statement of Common Ground with SCC (September 2023 – Version 1.0), the Applicant states "The need for any protective provisions will be discussed with the LLFA and updates provided where necessary". Surrey CC have suggested the inclusion of the ordinary watercourses protective provisions secured on behalf of Surrey County Council in Part 4 of Schedule 9 to the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 (SI

		2002/549) would be an appropriate starting point. The Councils agree with this suggestion and would welcome the Applicant's comments on this suggestion.
39.	Article 48 (defence to statutory nuisance),	Article 48(1) is too wide-ranging in its application to nuisances falling within section 79(1) of the Environmental Protection Act 1990, with the article applying to nuisances falling within sub-paragraphs (c), (d), (e), (fb), (g), (ga) and (h) of section 79(1). Paragraphs 8.9 to 8.12 of the EM **[AS-006]** concern article 48; however, no justification is provided in respect of any of those sub-paragraphs. Absent a reasonable justification as to why these exemptions are needed for this project, the inclusion of this provision in the dDCO is difficult to justify. It is noted that, by Model Provision 7, the exemption in that provision applies to section 79(1)(g) (noise emitted from premises so as to be prejudicial to health or a nuisance) only and the position is the same in respect of the Manston DCO (see article 38 (defence to proceedings in respect of statutory nuisance)). The Applicant cites article 12 (defence to proceedings in respect of statutory nuisance) of the Sizewell DCO as a precedent, yet that article only applies to four ((d), (fb), (g) and (ga)) of the seven sub-paragraphs which are mentioned in article 48(1) of the instant dDCO. No justification for the departure from the cited precedent is provided. Article 48(2) says that compliance with the controls and measures described in the code of construction practice ("**COCP**") will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided for the purposes of paragraph (1). The Council considers this provision represents an unwelcome and unnecessary fettering of the discretion of the courts in dealing with statutory nuisance cases. So far as the Council knows, it is not widely precedented and the Council is unaware of any local need for it. The Applicant should be put to strict proof as to why it is needed, giving examples of other made DCOs where it would have been necessary (not just convenient) to have had it. Absent such proof, the provision should be deleted. (It will also be noted that the WSCC and Surrey LIR have raised concerns regarding the COCP. and that fact adds to the nervousness regarding article 48(2).

		Notwithstanding the preceding paragraph, the COCP describes its purpose as being "the environmental management system and measures that will be in place through the construction of the Project" (paragraph 1.2.1, our emphasis) **[APP-082]**. However, article 48(1) also applies to the maintenance and operation of the authorised development, which would not seem to be covered by the COCP. It seems therefore that references to "maintenance and operation" in article 48(1)(a) and (b) should be deleted. As currently drafted article 48(1) provides a defence if the undertaker can show that the nuisance relates to (a) the carrying out of the authorised development in accordance with a notice under section 60 of the Control of Pollution Act 1974 or consent given under section 61 of that Act; or (b) is a consequence of the construction, maintenance, or operation of the authorised development and that it cannot reasonably be avoided. In accordance with article 12(1)(b) of the Sizewell DCO, sub-paragraph (b) should be amended to state that the nuisance cannot, to the reasonable satisfaction of the local planning authority, be avoided. In the light of the above, article 48 should be amended as follows – "48.—(1) Where proceedings are brought under section 82(1) (summary proceedings by persons aggrieved by statutory nuisances) of the Environmental Protection Act 1990 in relation to a nuisance falling within paragraph ~~(c), (d), (e), (fb),~~ (g) ~~, (ga) and (h)~~ of section 79(1) (statutory nuisances and inspections therefor) of that Act no order is to be made, and no fine may be imposed, under section 82(2) of that Act if the defendant shows that the nuisance— (a) relates to premises used by the undertaker for the purposes of or in connection with the construction~~, maintenance or operation~~ of the authorised development and that the nuisance is attributable to the carrying out of the authorised development in accordance with— (i) a notice served under section 60 (control of noise on construction sites) of the Control of Pollution Act 1974; or (ii) a consent given under section 61 (prior consent for work on construction sites) of the Control of Pollution Act 1974(a); or (b) is a consequence of the construction~~, maintenance or operation~~ of the authorised development and that it cannot, to the reasonable satisfaction of the local planning authority, reasonably be avoided. ~~(2) For the purposes of paragraph (1), compliance with the controls and measures described in the code of construction practice will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided.~~

		(3) Section 61(9) (consent for work on construction site to include statement that it does not of itself constitute a defence to proceedings under section 82 of the Environmental Protection Act 1990) of the Control of Pollution Act 1974 does not apply where the consent relates to the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development. (4) In this article "premises" has the same meaning as in section 79 of the Environmental Protection Act 1990".
Schedules		
Schedules 1 – Authorised Development		
40.	Work Nos. 26 to 29 (re hotel)	The Councils query whether the 4 hotels should be "Associated Development". Whilst the Applicant argues that this development supports the operation of the airport, reduces impacts and is subordinate, the Councils (and in particular Crawley Borough Council) have concerns regarding the need to ensure that the control documents include adequate controls on the provision of additional on-airport parking at hotels. The Councils' view is that any such parking should be operational parking only so as to support the Applicant's Surface Access Commitments. This is particularly important as the hotels will, in due course, exist as commercial operations operated by other parties and so there is no reason that they should be exempt from the Local Planning Authorities' wider policies in relation to car parking merely by virtue of their conception under the DCO for authorising consent.
41.	Horley Strategic Business Park	The Surrey Authorities have concerns regarding the proposals insofar as they prejudice the Horley Strategic Business Park as discussed in relation to Issue Specific Hearing 2 and in the LIR for the Surrey Authorities at Chapter 15, paragraph 15.58 to 15.63. Inf the authorised development would frustrate delivery of the HSBP, Schedule 1 (authorised development) could be amended to remove those works which would frustrate its delivery.
Schedules 2 – Requirements		
42.	Requirements: general	The Councils would like to understand why "in general accordance" has been used in Requirements 8(3), 10(2), 11(2), 21 and 22(2); and why "substantially in accordance" has been used in Requirements 7, 8(4), 12(2), 13(2) and 22(3).

43.	R.3(2) (time limits and notifications)	<u>Requirement 3: start date</u> By Requirement 3(1), development must commence within 5 years of the "start date" i.e. the later of the day after (a) the day on which the period for legal challenge of the Order under the 2008 Act has expired; or (b) the final determination of any legal challenge under the 2008 Act. Justification is provided at para 7.18 of the EM [**AS-006**]. While that para is in the context of compulsory acquisition, the principle is relevant to this Requirement also. Para 7.18 states – "This is necessary following experience of recent legal challenges made to DCOs, which may delay the exercise of compulsory purchase powers and in so doing, reduce the length of time within which those powers may be exercised, if the period relates (as it usually does) to the date on which the Order is made". We have some sympathy for the Applicant's argument (i.e. why should an unsuccessful JR compromise their ability to commence development); however, the drafting appears unprecedented in DCOs: the 5 year period usually commences on the date on which the Order comes into force. If that drafting is satisfactory for controversial schemes such as the Thames Tunnel, Sizewell C, and countless recent national highways DCOs, it seems difficult to justify treating the instant project differently, especially since it will lead to the sterilisation of land for a decade (even if the usual start date is followed). <u>Requirement 3: notice period etc.</u> By Requirement 3(2), the relevant planning authority must be given 14 days' notice of commencement of each part of the authorised development. The Council considers a considerably more generous notice period should be included. The Council also considers the local highway authority, which is also a discharging authority for certain requirements, should be notified of commencement.
44.	R.4 (detailed design)	In R4(1), "excepted development" is carved out of the definition of authorised development, and the effect of this is that excepted development does not require the planning authority's approval. Excepted development is airport development under the Town and Country Planning (General Permitted Development) Order 2015 which is given deemed planning permission. Instead of granting approval, the planning authority must be <u>consulted</u> on the excepted development. The Councils' concerns with "excepted development" are set out in the commentary on

		article 9(4) and 9(5) and are relevant to this provision. In the light of these concerns, the Councils consider R4(1) should be amended as follows – "No part of the authorised development (except for the highway works ~~and excepted development~~) is to commence until details of the layout, siting, scale and external appearance of the buildings, structures and works within that part have been submitted to and approved in writing by the relevant planning authority". As a consequence of this amendment, paragraph (4) should be deleted – ~~"No excepted development may be carried out until the relevant planning authority has been consulted on that development".~~ Paragraph (2) refers to "the design principles in appendix 1 of the design and access statement". The Councils' concerns in respect of this document are set out in the LIR (and include: the document lacks detail, it contains ambiguous wording, and it will not ensure the delivery of high-quality development). Clearly, those concerns must be addressed before this provision can be considered acceptable. (The same point applies to the other requirements which refer to appendix 1 e.g. R5(2) (Local highway works – detailed design) and R10(2) (surface and foul water drainage).
45.	R.7 – (code of construction practice)	R7 cross-refers to the COCP, which is also a problematic document. As explained in the LIRs, the COCP should do better than refer to the provision of a Dust Management Plan which will be produced in the future: one should be provided for consideration during the Examination; further information (and discussion with the relevant local authority) is needed on several issues, including the management of odour, vibration control measures, and how the avoidance of percussive sheet piling will be secured. Again, the Councils' considerable concerns must be addressed before this provision can be considered acceptable.
46.	R.8 (landscape and ecology	The Councils' concerns with the outline landscape and ecology management plan (as described in the LIRs) must be addressed before this provision can be considered acceptable.

	management plan)	
47.	R.10 (surface and foul water drainage)	R.10 is drafted similarly to R.4: it provides that no part of the authorised development may commence until written details of the surface and foul water drainage for that part have been approved by the LLFA, following consultation with the Environment Agency. Again, works defined as 'excepted development' are outside the scope of this requirement. As with R4(1), the Councils consider the reference to "excepted development" should be omitted. In addition, "foul water drainage" is not a responsibility of the LLFA and the reference should be replaced with local highway authority. R10(1) should therefore be amended as follows – "No part of the authorised development (except for the highway works ~~and excepted development~~) is to commence until written details of the surface and foul water drainage for that part, including means of pollution control and monitoring, have been submitted to and approved in writing by the ~~lead local flood~~ local highway authority following consultation with the Environment Agency".
48.	R.11 (local highway surface water drainage), R.12 (CTMP), and R.13 (construction workforce travel plan)	R11(2) cross-refers to the "surface access drainage strategy"; R12(2) to the "outline construction traffic management plan", and R13(2) to the "outline construction workforce travel plan", each of which needs to be improved, as described in the Councils' LIRs. The Councils' concerns with these documents must be addressed before this provision can be considered acceptable.

49.	R.14 (archaeological remains)	The Councils consider the requirement should be amended to ensure any archaeological works are appropriately assessed and mitigated, something which the current drafting does not achieve.
50.	R.15 (air noise envelope)	First, the Air Noise Envelope is not considered fit for purpose as it does not align with policy requirements. In addition, there is no role for any local authority control in this Requirement and the Council considers there should be. Moreover, the noise envelope review document under R16(1) should include clearly defined terms of reference and a requirement for engagement and consultation with key stakeholders as part of the review process. A mechanism should be included in the DCO to require the CAA to involve the local authorities and other key stakeholders in scrutinising noise envelope reporting. The same point applies to R.16 (air noise envelope reviews) and R17 (verification of air noise monitoring equipment). The EM **[AS-006]** merely summarises R15 and does not provide the necessary justification as required by Advice Note 15. For instance, the EM does not explain why R15 is appropriate for the development of the project, nor does it explain why the CAA is the appropriate body for discharging Rs 15 to 17; the Councils consider these points should be addressed. R15(4) requires the Applicant to publish certain information on a website within 45 days of it being approved by the independent air noise reviewer. Why such a long deadline? Once approved, a document can be published on a website within seconds. (The same point applies to Rs. 16(6) and 17). In addition to these points, the air noise envelope provisions should include – • adopt the "mitigate to grow" approach the principles of which are in the Luton Green Controlled Growth Strategy; • provide for an Environmental Scrutiny Group comprising local authorities; • incorporate appropriate management systems to provide assurance that the limits will be achieved; • include appropriate enforcement powers for the Environmental Scrutiny Group / local authorities; • establish appropriate sanctions for technical and limit breaches; and • integrate the existing noise controls into the noise envelope.

51.	R.18 (noise insulation scheme)	Again, little justification is provided for this requirement, which appears to be unprecedented. In the first instance, it would be helpful to know why each of the time limits set out in the requirement has been chosen. For instance, in R18(1), why does the Applicant have up to 3 months from commencement of Work Nos. 1 to 7 to submit noise insulation scheme details to the relevant planning authority? Why can't that be done (say) before commencement? The same point applies to the 6-month limit in R18(2). The Councils would expect these points to be explained or sign-posted in the EM. Again in R.18(2), the Council considers the requirement to use "appropriate steps" to notify residential properties to be imprecise and considers these "steps" should be described in the requirement. As well as being imprecise, absent the explanation, the requirement would be difficult to enforce. In its current form, the requirement does not appear to satisfy at least two of the six tests of conditions (i.e. enforceable and precise) as required by the *Circular 11/95: Use of conditions in planning permission*. Amendments are required to the noise insulation scheme to ensure its provisions are consistent with the requirements of the LA proposed metrics and thresholds including LAeqs for day and night period, additional noise induced awakenings as an average per night over the 92 day summer period.
52.	R.19 (airport operations)	R.19(1) requires the Applicant to serve notice on the relevant planning authority no later than 7 days after the commencement of dual runway operations informing of the same. The EM explains the timeframe is relevant "to other control mechanisms", though it does not explain what these are and it is not clear from the DCO what these are. The Council would welcome an explanation. R.19(2) would restrict dual runway operations to 386,000 <u>commercial</u> air transport movements per annum. The Councils consider a control on <u>total</u> air transport movements per annum would be preferable. R.19(3) allows the use of the northern runway between the hours of 23:00 - 06:00 when the southern runway is not available for use "for any reason". The Councils consider "for any reason" to be too broad and considers the use of the northern runway between these times should only be used when the southern runway is not available because of planned maintenance and engineering works.

53.	R.20 (surface access)	For the Councils, the dDCO gives too much flexibility in allowing the development to proceed with only retrospective checks to see if the mitigation proposed is delivering results. This is reactive and ineffective, in particular in considering whether the development is appropriate for the communities who may be affected by the adverse impacts of the development and whether there is sufficient amelioration of those impacts. This requirement is an example of this concern. R20 appears to say that the operation can only be carried on if there is adherence to the surface access commitments but when those surface access commitments are considered more carefully they are toothless in terms of constraining any activity at the airport. The intention is that the surface commitments will be a certified document, and Requirement 20 requires the operation to be in accordance with those commitments. For example, the mode shift target of 55% has to be tested three years after the commencement of operations. If this is not achieved, the monitoring arrangements in the SAC envisage a reporting process and preparation of action plans for future activity. However, there is no commitment to curtail operations either during the period of the preparation of action plans or until such time as the targets are met. Therefore, this target does not actually constrain the operation of the airport. There are other elements of the surface access commitments which are too broadly expressed and too vague. The Councils consider it as more appropriate to have clear steps set out in the DCO to regulate the growth and clear sanctions should the mitigation measures not be achieved. The Luton airport expansion is currently before the Secretary of State with proposals which seek to manage growth as the Authorities suggest, i.e. green controlled growth (which is set out in Part 3 of Schedule 2 of the Luton dDCO [REP11-091]. The Secretary of State will have to decide, in deciding that development consent order, whether those controls are necessary, but it is clearly relevant that the operator and promoter of that development consider that managed growth is workable and they are putting that forward as the way in which they will achieve both their growth but also achieve the environmental objectives. The Councils would welcome a discussion with the Applicant on this issue because there needs to be a link between the growth and the delivery of the mitigation.

54.	R.21 (carbon action plan)	R21 cross-refers to the carbon action plan. The Councils consider a combined operational air quality management plan ("AQMP") (which draws together the Carbon Action Plan and Surface Access Commitments documents) should be produced to specifically focus on local air quality. An AQMP is required to collate all the proposed air quality mitigation measures, identify any further opportunities to maximise air quality benefits and avoid any unintended consequences. This should be secured by requirement.
56.	Other requirement (1)	An additional Requirement is needed to provide an Odour Management and Monitoring Plan (OMMP) to ensure the management of aviation fuel odour and other odour emissions. The OMMP should be based on best practice and include: · Procedures for recording, reviewing monitoring results and adjusting mitigation. · Data sharing and reporting with LPA. · Complaints and resolution process · Communications and Engagement Plan sharing with local authorities. · Proposed odour mitigation measures The OMMP should be provided during the Examination.
57.	Other requirement (2)	An additional Requirement is needed to secure a commitment to the delivery and long-term management of biodiversity net gain.
58.	Other requirement (3)	An additional Requirement is needed to require the Applicant to prepare, and adhere to, a Ground Noise Management Plan, which would be a certified document under Schedule 12.
59.	Other requirement (4)	An additional Requirement is needed to secure a commitment that Wizad will be used no more than presently, with monitoring controls on day (07:00 to 19:00) and prohibition on use in evening (19:00 – 23:00) and night (23:00 to 07:00) flights.
Schedule 3 – Permanent Stopping Up of Highways and Private Means of Access & Provisions of New Highways and Private Means of Access)		
60.	Schedule 3 (Permanent Stopping Up of	There are certain typographical errors in Schedule 3 which concern WSCC and which will be shared with the Applicant under separate cover.

	Highways and Private Means of Access & Provisions of New Highways and Private Means of Access)	-
Schedule 11 (procedure for approvals, consents and appeals))		
61.	Schedule 11 (procedure for approvals, consents and appeals))	Paragraph (1) provides for the determination of applications made under a requirement. The Councils consider that, for certain major works which are listed in Schedule 1 (including, but not limited to Work Nos. 26 to 29) the standard 6-week/ 8-week deadline is unreasonably short. The Council notes paragraph 1(2)(a) and (b) of Part 1 of Schedule 1 is subject to the Applicant agreeing to an extension. There is no guarantee that an extension would be agreed and no obligation for the Applicant to act reasonably in considering any request for extension. The Councils consider it would be more straightforward if the major works had their own deadlines. The Councils do not consider such an approach would cause unnecessary delay. Major applications under the TCPA 1990 regime can take 13 weeks (or longer) to determine. Providing a 6 or 8 week deadline runs the risk of the application having to be refused and the parties spending time and resources on an appeal which might have been avoided if the Schedule included a reasonable timeframe for determination. The Council notes paragraph 3 (fees) is to be populated and looks forward to discussing the most appropriate way forward regarding fees. On a drafting point, the Council considers the provision should go beyond the payment of a fee in respect of "any for agreement, endorsement or approval in respect of a requirement" and should also apply to the payment of a fee in respect of the granting of any consent in respect of the Order. It will be remembered that several articles require the consent of the street authority (e.g. articles 12(3) and 14(4)), the traffic authority (e.g. article 18(5)(c)) and the highway authority (article 24(4)) and the cost associated with administering this work should also be covered by the Applicant.

Parameter Plans / Works Plans / Tree Survey Plans

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
Plan-1	Parameter Plan site levels/sections.	Further information to understand overall physical separation from the proposed car park levels and any landscaping in relation to Charlwood Park Farmhouse	7.41 and 7.46	
Plan-2	Parameter Plan and Site Levels Plan	Provide for Pentagon Field	8.54	
Plan-3	Parameter Plans	Update to show tree retention/protection (car parks) – provide for Purple Parking, Car Park X, North Terminal Long Stay	8.55	
Plan-4	Site Survey Plan	North Terminal Long Stay	8.56	
Plan-5	Tree Survey and Retention Plans	Provide for Works sites at Purple Parking and Car Park X.	7.49 8.55	

Control Documents:

Design and Access Statement (APPENDIX 1- APP 257)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
DAS-1	DAS (APPENDIX 1 – APP 257) or	Further details on design layout of deck car park including lighting	7.45 and 7.49	
DAS-2	DAS (APPENDIX 1 – APP 257)	Submission and agreement of additional lighting detail for North Terminal Decked Car Park	7.46 and 7.50	

DAS-3	DAS (APPENDIX 1 – APP 257)	Suitably detailed design control document setting clear design principles	8.58 24.79 – 24.82	Additional detail should be added through clear works and parameter plans
DAS-4	DAS [APP-253-257]	The design principles, presented in the DAS, must include measures to minimise impacts at the detailed design stage.	9.74	Although the ES is based on a 'maximum design scenario', the detailed design must seek to minimise impacts.
DAS-5	DAS (APPENDIX 1 – APP 257) or Carbon Action Plan CAP (APP-091)	Provide clear policy compliant specification for energy and water Implement BREEAM Excellent certification (for water and energy credits).	16.72 24.83	

Outline Construction Workforce Travel Plan (APP-084)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
OCWTP-1	APP-084	The Applicant puts forward various potential measures that include improvements to walking routes, provision of site shuttle buses, collaboration with local authorities to improve public transport routes to the construction site, offering incentives or subsidies to contractors who choose to commute via sustainable transport and developing Park	17.92	

		and Ride workforce stations. However, no specific details of these measures are provided, specific details should be provided.		

Outline Construction Traffic Management Plan (APP-085)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
OCTMP-1	APP-085	Clarification should be provided as to what events or conditions will lead to the contingency construction routes being used.	17.92	
OCTMP-2	APP-085	No commitment is made to deploying road sweepers on the highway network to ensure detritus is regularly cleared from the carriageway. The Highway Authority would look for this commitment.	17.92	
OCTMP-3	APP-085	The Applicant should commit to avoid construction traffic movements on routes near schools at the start and end of the school day.	17.92	
OCTMP-4	APP-085	Additional mitigation could be focussed on other road users who are going to have to interact with the construction traffic	17.92	

		associated with the Project. Training events, funded by the Applicant, could be offered to the local community and to specific audiences such as local large employers and schools near the construction traffic routes.		
OCTMP-5	APP-085 (Requirement 12 draft DCO Construction Traffic Management Plan CTMP)	Requires criteria for use of contingency construction routes, including mechanisms for monitoring and compliance controls	13.55 – 13.73	Amendments to the CTMP and CWTMP be approved by the LPA and Highways authority
OCTMP-6	APP-085 Requirement 12 draft DCO Construction Traffic Management Plan CTMP. CoCP and Requirement 7 (CoCP) draft DCO	Requires compliance with the London Low Emission Zone for construction road vehicles, and with the London Non-Road Mobile Machinery standards for NRMM	13.56 – 13.73	Amendments to the CTMP and CWTMP be approved by the LPA and Highways authority
OCTMP-7	APP-085 Construction Traffic Management Plan	Requires phasing /timing controls to minimise disruption and disturbance to existing businesses and residents.	18.60-18.61	

Surface Access Commitments (APP-090)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
SAC-1	APP-090 Surface Access Commitment 5 & 6	The Highway Authority would look for the Applicant to undertake further engagement with the bus and coach operators to confirm that they can deliver the bus & coach services and to consider whether further mitigation, including to bus priority is required.	17.34	
SAC-2	APP-090 Surface Access Commitment 5, 6 & 7	Further information on routing, frequency and times of the bus routes is required and consideration of additional bus & coach routes.	17.50 - 17.53	
SAC-3	APP-090 Surface Access Commitment 1 - 4, 15 & 16	The Highway Authority would look for the Applicant to adopt an alternative approach to growth, similar to that adopted by Luton Airport in their Green Controlled Growth approach.	17.92	
SAC-4	APP-090 Surface Access Commitment 8	The Applicant should provide further details of specifically what support they are offering for parking controls and support for	17.89	

		enforcement of unauthorised off-airport car parking.		
SAC-5	APP 090 Surface Access Commitment 14	Further detail of the Transport Mitigation Fund should be provided including how it is to be funded, the size of the fund, what nature and scale of improvements it could assist in delivering and whether the Highway Authorities and other organisations could use this fund to implement agreed schemes. Further information on enhancements to improve NCR21 and Public Rights of Way	17.86 11.33,11.35 and 11.36	
SAC-6	APP- 090 Surface Access Commitments	The Highway Authority would look for an Outline Airport Surface Access Strategy (ASAS) to be produced detailing how the Surface Access Commitments (APP-090) could form into a robust strategy to promote and encourage active and sustainable travel.	17.92	
SAC-7	APP -090 Surface Access Commitments	The Applicant should consider with the relevant organisations' improvements to the rail infrastructure and services, including earlier morning/later evening services.	17.92	

SAC-8	APP-090 Surface Access Commitments	The Highway Authority would look for the Applicant to enhance active travel routes beyond the immediate area around the airport. These routes could include those identified within the Crawley Local Cycling Walking Infrastructure Plan (LCWIP).	17.92	
SAC-9	APP090 Surface Access Commitments	The Applicant should undertake further engagement with bus and coach operators and consider the need and potential benefits of bus priority measures to provide time savings for bus services to and from the airport, in order to increase the attractiveness of using such services.	17.92	
SAC-10	APP-090 Surface Access Commitments Commitment 1 - 4, 15 & 16 (Requirement 20 in draft DCO)	Alternative approach needed for achieving and monitoring mode share and growth within SAC: Achieve mode share commitments by commencement of dual runway operations. Adopt a controlled growth approach (similar to Luton Airport) which would restrict growth until mode share targets for surface access are met.	13.122-13.131	Amendments to the SAC to be approved by the LPA and Highways authority

Outline Landscape and Ecology Management Plan (APP-113-116)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
OLEMP-1	OLEMP [APP-113-116] and Appendix 9.9.2: BNG Statement [APP-136]	Greater clarity and detail are required on habitat loss, compensatory habitat replacement and habitat gain, including the precise locations and extent of habitat involved.	9.75	It is difficult to interpret the information presented in the ES, including Appendix 9.9.2 (BNG Statement).
OLEMP-2	OLEMP [APP-113-116]	Additional compensation measures are required for bats, including the maintenance of habitat connectivity, both on and off site.	9.78	
OLEMP-3	OLEMP [APP-113-116]	Commitment is required for the long-term positive management of the NWZ and LERL biodiversity areas.	9.83	Any loss or degradation of these core biodiversity areas could have significant impacts on the viability of proposed mitigation measures.
OLEMP-4	OLEMP [APP-113-116]	The routine monitoring section should be expanded to include frequency of inspections, methodology, recording of remedial works and reporting mechanism.	9.84	Routine inspections will be critical to ensure that maintenance tasks and remedial measures are being undertaken.

OLEMP-5	OLEMP [APP 113-116]	The ecological monitoring section should be expanded into a detailed ecological monitoring plan describing the monitoring methodologies, frequency and duration for each habitat type and location, including the NWZ and LERL biodiversity areas.	9.85	Routine monitoring and reporting will be key to successful habitat creation and management
OLEMP-6	OLEMP [APP-113-116]	Amendment to demonstrate accordance with local policy (CBLP policy CH6).	9.96	Documents should clearly identify coherence with policy or justify why not.
OLEMP-7	OLEMP [APP-113-116]	Amend to clearly demonstrate where essential compensation planting is provided and where enhancement planting is provided.	9.96	Compensation planting is expected to accord with CBLP policy CH6. Enhancement planting is expected to achieve BNG.
OLEMP-8	OLEMP [APP-113-116]	Amend to ensure that the delivery of detailed landscaping plans, plant specifications and aftercare and monitoring plans within individual LEMPs are secured in accordance with the OLEMP principles and relevant industry guidance.	9.97	Industry guidance includes: BS8545:2014; BS5837:2012; BS3936 P1-P4; & BS4428: 1989.

OLEMP-9	OLEMP [APP-113-116]	Amend outline programme for tree planting to include basic tree establishment requirements.	9.99	Such as watering and weed control.
OLEMP-10	OLEMP [APP-113-116]	Amend illustrative landscape concepts to better distinguish existing and proposed planting.	9.100	Referring to figures: 1.2.1, 1.2.2, 1.2.3 & 1.2.18 of appendix 8.8.1
OLEMP-11	OLEMP (APP-133-116)	Further detail on tree protection and retention measures to ensure a robust tree screen to safeguard Charlwood House	7.45	
OLEMP-12	OLEMP [APP-113-116] APP-114	Further justification for level of tree loss around Car Park Y and Highway Works Pentagon Field- further information on landform and visual appearance	8.46 8.56 8.54 24.74	
OLEMP-13	APP- 133-116	Further detail on tree loss mitigation for highway works (including around Car Park Y)	8.46 8.57	
OLEMP-14	APP-113	Additional detail on timing and adequacy of replacement open space provided at Car Park B	11.29	

Code of Construction Practice (APP-82)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
CoCP-1		Stronger measures are required within the CoCP to ensure the protection of ancient woodlands, and a minimum 15m buffer zone, including the provision of a revised tree protection plan.	9.76	
CoCP-2		Measures are requested within the CoCP to ensure protection of habitats within the NWZ and LERL biodiversity areas, including vegetation retention plans and protective fencing.	9.77	
CoCP-3		The roles and responsibilities of the ECoW need to be specified in greater detail within the CoCP.	9.82	
CoCP-4		Addition of outline arboricultural method statements, outline tree protection plans and outline tree retention/removals plans.	9.95	Must be carried out in accordance with relevant local policies, BS5837:2012 and statutory guidance for ancient woodland and veteran trees.
CoCP-5	CoCP [APP-082] (Requirement 7 draft DCO)	A Dust Management Plan (or an outline DMP) based on IAQM best practice guidance to be provided	13.37 -13.54	The draft DMP to be made available for the examination

		within the CoCP as a key control document and secured by Requirement (Requirement 7) in the Draft DCO. DMP should include (but not limited to): Baseline monitoring. Locations of highest dust risk, Compliance monitoring methods. Monitoring locations. Dust thresholds for trigger abatement. Procedures for recording, reviewing monitoring results and adjusting mitigation. Data sharing and reporting with LPA. Complaints and resolution process. Communications and Engagement Plan sharing with local authorities. Proposed dust mitigation measures.		phase and be approved by the LPA.
CoCP-6	CoCP [APP-082] (Requirement 7 draft DCO)	Odour Management Plan (OMP) based on best practice to be secured within the CoCP (Requirement 7 draft DCO). OMP should include (but not limited to):	13.48-13.54	The draft OMP to be made available for the examination phase and approved by the LPA.

		Procedures for recording, reviewing monitoring results and adjusting mitigation. Data sharing and reporting with LPA. Complaints and resolution process Communications and Engagement Plan sharing with local authorities. Proposed odour mitigation measures		
CoCP-7	CoCP [APP-082] and CRWMP [APP-087]	Provide reference to mineral safeguarding, policies and guidance, incidental or prior extraction, and information about local mineral operators.	12.28 - 12.40	The CoCP and CRWM are limited in information on mineral safeguarding, and therefore needless mineral sterilisation may occur.
CoCP-8	CoCP [APP-082]	Strengthening of the CoCP on how construction waste will be managed, including where on the compounds.	21.1 - 21.77	CoCP strengthening to ensure that people's health and wellbeing is not harmed by the management of construction waste, and its associated effects (noise, dust etc)

Code of Construction Practice – Annex 3 (APP-085)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
CoCP-A3-1	APP-085	Construction compounds - Details on tree loss, design, layout or area including lighting and stockpiles	8.53	
CoCP-A3-2	APP-085 or OLEMP (APP-113-116)	Pentagon Field – Additional details visual impacts, management of site works, impact on surroundings	8.54	

Flood Risk Assessment (APP148 -149)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
FRA-1	APP-148 -149	Detail of design strategies and parameters to understand basis on which strategy developed	10.30, 10.39-10.42 10.50	
FRA-2	APP-148 -149	Mitigation strategy for watercourse geomorphology. Further detail on proposed drainage design solution and impact on ecology	10.32, 10.37 10.51-10.52	
FRA-3	APP-148 -149	Sustainable drainage designs should be considered.	10.42 10.47 10.54 10.56	
FRA-4	APP-148 -149	Further information on consideration of residual risk	10.45 10.55	

Written Scheme of Investigation for West Sussex (APP-106)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
WRoI-1	APP-106	Further details recommended to enhance present document including commitment to produce site specific WSI's ensure suitable recording, evaluation, mitigation and outreach is undertaken.	7.42-7.44 7.47-7.48	

Public Rights of Way Management Strategy (APP-215)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
PRoW-1	APP-215	Applicant should consider improved connectivity and signposting to Museum Field	11.31	
PRoW-2	APP-215	Additional information of how PRoW's 359Sy and 360Sy will be maintained during construction and operation phases	11.23-11.25, 11.28,11.32	

Employment, Skills and Business Strategy (APP-198)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
ESBS-1	APP-198: Employment, Skills and Business Strategy (ESBS)	The Applicant should provide details on timescales, performance, financial management, monitoring and reporting in the ESBS which can be developed further as part of an Implementation Plan. The ESBS provides no explanation on whether it would differentiate between the provision and outputs offered through the DCO vs. provision and outputs offered in a Business as Usual scenario.	18.33, 18.48, 18.65, 18.68 to 18.72, 18.57 to 18.95	

Noise Insulation Document (APP-180)

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
NID-1	ES Appendix 14.9.10: Noise Insulation Scheme [APP 180]	The noise insulation scheme needs to be substantially revised and subject to regular and extraordinary reviews with LPA. The scheme is subject to the approval of the LPA including but not limited to: • The extent of the inner and outer zone (and any other zones as may be subsequently defined). • The methods for assessing if a property qualifies (including residential and non residential properties used for a community purpose). • The categories of metrics used to assess qualification for a grant for insulation, ventilation and cooling. • The thresholds at which properties qualify for an insulation package, including within LOAEL and above SOAEL for • The scope of qualifying works which shall include noise, ventilation and cooling. • The maximum amount of grant that a property may qualify	14.244-14.260	

		for in relation to insulation, ventilation and cooling. • Performance indicators • Frequency and method of reporting performance to the LPA • Growth being linked to the successful implementation of the noise insulation and overheating adaptation scheme.		

Additional Control Documents Needed

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
ACD-1	DCO Control document (AS-004)	**Air Quality Action Plan** (AQAP) to be provided to collate all the proposed air quality mitigation measures together, identify any further opportunities to maximise air quality benefits and avoid unintended consequences. The draft AQAP to include (but not limited to): Damage cost calculation at that date Identify and cost measures which are accounted for (embedded mitigation) in the assessments	13.78 - 13.89	The AQAP to be approved by the LPA AQAP to be secured by Requirement as a control document in the DDCO or alternatively by s106 agreement

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
		for air quality, health and economics Proposed mitigation and costs (required to offset damage cost of the operational impacts) Performance indicators Delivery timescales Engagement process for monitoring and reporting to LA		
ACD-2		**Outline Operational Waste Management Plan,** to be secured via a requirement within the DCO, that includes, but is not limited to; • Baseline waste arising data (including waste type) • Forecasted waste arisings with the NRP (including waste type) • Reference to relevant waste policies, including the Waste Hierarchy • Waste management targets, in line with national policy.	22.38, 22.40	
ACD-3		**A Ground Noise Management Plan** to be produced with the aim of preventing, avoiding and minimising the total adverse	14.225 – 14.226	

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
		effects of ground noise on the surrounding area. The plan will form the basis of effective ground noise management. It will include the following specific items and any other as may be required or agreed with the Local Planning Authority: • Predictive ground noise contours for each year. • Verification monitoring • A list of all mitigation , be they operational, physical, technological or any other mitigation. • Performance standards for the mitigation and how the performance standards are enforced. • Engagement process for monitoring and reporting to LPA and incorporating feedback including undertaking of further studies and provision of additional mitigation.		

Ref	Item	Proposed Amendment or Addition	Cross reference to LIR paragraph	Comment
		This shall operate in a complementary fashion to the air noise envelope.		
ACD-4		The Authorities requests that an **outline communications and engagement plan** is secured through an outline control document, which is discussed with the relevant stakeholders during the examination.	20.57	