FINAL SUBMISSIONS ON BEHALF OF THE LOCAL PLANNING AUTHORITY

LONDON CITY AIRPORT: SECTION 73 APPLICATION

The Starting Point

1. The starting point is the legislation, which, of course, provides the basis on which the Secretaries of State will have to determine the matter. This is a section 73 application. It is that section which gives the starting point. The section reveals what is to be done to determine the matter.

2. Section 73 of the Town and Country Planning Act 1990[1] was introduced[2] to overcome a gap in the legislation namely that if someone was concerned about a condition imposed on a permission, he[3] could appeal but to do so would put at risk the permission. Section 73[4] enables an application to be made where the only question to be considered is whether the condition or conditions to which the permission should be subject should remain. If the decision maker decides the conditions should remain as originally granted, then the application is to be refused. If the conditions are to be altered, then a new permission is granted.

3. The preceding paragraph or, more particularly, section 73(2)(a), makes plain that the Secretaries of State can leave in place condition 17, as numbered on the existing permission, which protects amenity whilst changing one or other of the other conditions[5]. This is perfectly straightforward[6].

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[1] The 1990 Act is at CD 3.1.1

[2] In fact, through a predecessor to section 73.

[3] Pronouns are used in the conventional way, i.e. he embraces she and she embraces he. (As a matter of law this is confirmed by the Interpretation Act 1978).

[4] There are certain circumstances where section 73 is not available, but this case is not one of them.

[5] This was the subject of limited discussion, under the label split decision, on 26/1/24. The response from LCY was unnecessarily complicated and made without reference to the relevant legislative provision.

[6] Of course, it is always possible for the Secretaries of State to seek more information. However, they have a full environmental assessment. (They also have the benefit of the 2016 permission).

4. In reflecting upon it one can have in mind that Louise Congdon told the inquiry that LCY could reach 8.8 million passengers per annum. Further, Dr Smith in a reasoned approach describes how LCY could reach 9 million passengers per annum without extending operating hours.[7] This was not challenged by LCY. Dr Smith had explained in evidence in chief how this, i.e., 9 million passengers per annum, could be achieved within the existing hourly movement capacity of 45. These are plainly important pieces of information, which if acted upon would, or would substantially, produce the benefits sought by LCY without the loss of protection of amenity, which protection was given by the Secretary of State.

5. The original permission, in any scenario, remains in place. If a new permission is granted there is a choice available as to implementation[8], although the first permission must have been begun[9]. There is no question but that the 2016 has been begun although not everything that can be done under it has been done[10].

6. Accordingly, on a section 73 application one starts with the existing permission and, particularly, the conditions. (The reason, it can be noted parenthetically, why there is an environmental assessment on a section 73 application is because, if granted, a new permission comes into being and the law requires, for development consents[11] having significant environmental consequences[12], environmental assessment)[13].

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[7] See Dr Smith's rebuttal proof at paragraph 1.23 and table 1.1.

[8] We should note that there are aspects of the 2016 permission yet to be fulfilled. No sensible person can claim that benefits that could arise under the 2016 permission if further implemented are benefits under a new permission as sought.

[9] See section 73(4) of the 1990 Act.

[10] We need to remember that the employment and other benefits spoken to by LCY are largely derivable from the 2016 permission. It can only be extra socio-economic benefits that can be relevant on this (section 73) application.

[11] The language derives from European legislation on which our environmental impact assessment legislation was based. There is not a shadow of doubt, *pace* Mr Richard Greer (23/1/24 a.m.) that permission for development is being sought; this is new development. Mr Greer seemed to be under the impression that some sort of variation to a licence was being sought and that the application was not for development. But the statutory text refers to section 73 applications as applications for planning permission for the development of land without complying with conditions: section 73(2). The development must be new because for old development one already has or had permission. Further, section 73 uses the expression 'development'.

[12] Obviously, even if one reflects solely on the condition there are significant environmental effects here, viz the noise.

[13] There can be no doubt but that this is an application for development.

A particular type of planning application

7. Thus, one is determining a particular type of planning application that requires only consideration of conditions, but which is, none the less, an application for planning permission. Section 70(2) tells us what one is obliged to consider on such a determination. However, section 38(6) of the Planning and Compulsory Purchase Act 2004[14] tells us that when regard[15] is to be had to the development plan on an application the determination is to be made in accordance with the development plan unless material considerations indicate otherwise.

8. Section 38(6) is obviously not the starting point. One starts with section 73-consider only conditions- then has in mind-section 70(2)-that in dealing with the application one has regard to the provisions of the development plan so far as material to the application, i.e., the application in respect of conditions, and any other material considerations[16].

9. None of this is to say the development plan, a statutorily defined[17] set of documents is unimportant. But it is to say (as the legislation requires) that one has regard to the development plan so far as material to the application. And the application relates particularly to a condition as to noise[18], which if changed, as the LCY seek, will introduce noise as plain as a pikestaff[19]into a temporal period highly valued and considered necessary to be protected from noise for the future by the Secretaries of State in 2016.[20]

10. I say there are clear breaches of the development plan[21], which will be highly material in the consideration by the Secretaries of State. But we

[14] The 2004 Act is at CD 3.1.2
[15] That is to say, the regard required by the Act, i.e., so far as material to the application.
[16] This is not the full legislative language but is accurate and sufficient for our purposes.
[17] See section 38(2) of the 2004 Act as to what the development plan consists of for the purposes of any area in Greater London.
[18] It is clear as discussed with Mr Bashforth (26/1/2024) that noise is particularly significant in the planning regime generally and airport planning in particular. Noise is capable of being seriously deleterious to health and quality of living.
[19] Undisputed evidence of Mr Thornley-Taylor probably the leading noise expert in at least the United Kingdom
[20] See the language of section 17; that future has, most certainly not expired. The permission had three years to be implemented, i.e., by 2019 and enures for the benefit of the land, section 75 of the Town and Country Planning Act 1990. To say it should be viewed as not contemplating a continuing existence up to and beyond today is absurd.
[21] For example, Policy T8 H of the London Plan, which constitutes part of the development plan, is clearly breached.

are considering the development plan so far as material[22] to the application in respect of the proposed discard of a condition[23], which protects amenity by precluding noise, which would otherwise be seriously deleterious. Consequently, we should keep clearly in mind what the Act requires to be done-consider only the question of conditions-and determine whether, in effect, the extant planning permission should be left in place by itself or be supplemented by another permission, which, could, of course repeat existing condition 17, viewed by the Secretaries of State as necessary to protect amenity[24].

A vital material consideration

11. This means that the existing (conditional) permission is a vital material consideration. Students of the law of town and country planning know, incidentally, that even before section 73 had been introduced, an existing planning permission was a vitally material consideration on a later application[25]. Thus, it must be accepted that very substantial weight is to be given to the extant planning permission. That extant planning permission was not an idle exercise but a mature consideration against a definite legal framework, which has not changed.

12. It should be noted that the 2016 permission was clearly intended by the Secretaries of State to be something that would persist for[26] a significant period of time. First, the permission, as a matter of law, enures[27] for the benefit of the land and of all persons for the time being interested in it. Second, the application on which the 2016 permission was granted made plain that it was a long term matter[28]. Third, the application was designed

[22] Such is the statutory language, one asks, therefore whether this or that development plan policy material to the question of retention of condition. Plainly, the development plan policies most obviously material to the question whether a condition protecting, by the preclusion of noise, the amenity of present and future occupants are policies relating to noise together with policies seeking to protect amenity.
[23] This serves to emphasise the care that must be shown in how one views 'economic benefits', which substantially from the airport as presently permitted.
[24] We are not asked to consider whether the London City Airport is a good thing or whether flying is a social good or a social ill. But we can note that tourism (into the UK) is a highly prized export, being the sale of a service for foreign currency. The same is not true of UK holiday makers going abroad.
[25] See the judgment in Spackman v Secretary of State [1977] 1 All ER 257. The judge said it goes without saying, but then said so, that a valid planning permission was a vitally material consideration.
[26] At the very least.
[27] Section 75(2) of the Town and Country Planning Act 1990
[28] See INQ 17, at page 2, paragraph 4.

to secure the optimum capacity of LCY[29], fulfil its potential[30] and make best use of the airport[31] with larger aircraft[32] being inevitable[33]

Relevant text of section 73

13. The relevant text of section 73 is that the section applies to applications for planning permission without complying with conditions subject to which a previous planning permission was granted[34]. Further, on such an application only the question of the conditions subject to which planning permission should be granted[35]is to be considered.

Public information and the planning register

14. A register of planning decisions is required to be maintained by local planning authorities[36]. The documents are public documents. The Town and Country Planning Act 1990, by sections 69 and 69A, requires there to be a register of applications and regulations[37] require that register to contain the relevant documents. They will also be available through other sources. This register is, of course, available to all so that, for example, a solicitor acting for a purchaser would be negligent if he failed to draw his client's attention to a planning permission bearing on his prospective purchase. Thus, we can take it as clear that, for example, the developers of blocks of flats with balconies would have known of the relevant

[29] Ibid.
[30] INQ 17, at page 5, paragraph 1.4.
[31] INQ 17, at page 10, paragraph 2.10.
[32] i.e., quieter aircraft. It was given in evidence by LCY at the 2016 inquiry that there were incentives for quieter aircraft though the 2016 proposal, see CD 17.8, Inspector's report at page 38, paragraph 142. This passage was entirely dependent on LCY's evidence: see (ibid) footnote 210.
[33] INQ 17, at page 59, paragraph 4.11
[34] Thus, the applicant is saying please may I be excused from compliance from a condition imposed in the public interest as being necessary to meet a planning purpose. Please remember that the law is absolutely clear; planning is an exercise in the public interest (not private interest such as easing a commercial position) and that conditions must be reasonable, necessary and serve a planning purpose. This accords those points a higher status than planning practice, although planning practice demands the same. It is unnecessary to ask which came first, although the answer is the law.
[35] The legislative text refers to the consideration by the local planning authority but, by section 79 of the 1990 Act, the Secretary of State may (and does) deal with a planning application as if made to him in the first instance, i.e., the consideration by the Secretary of State has to reflect the legislation as it bears on local planning authorities. (Reference to the Secretary of State should be taken as reference to the Secretaries of State, the singular includes the plural and vice versa).
[36] It is worth noting that the web site Gov.UK enables a visitor to link directly to that local authority, in England and Wales, holding the register for any given site in England and Wales. All one needs is a postcode. The London City Airport has a postcode.
[37] See SI 2015/595, especially Part 9.

conditions limiting the adverse effects of airport activities. Further, the purchasers of property would know, as would lessees and prospective lessees.

15. It is absurd to suggest[38] that a document[39], viewed negatively by the local planning authority, produced by a business, having no statutory or planning status whatsoever, can be taken by those considering property in or near the airport as a kind of substitute for official documents, lawfully prepared and lawfully and publicly registered. It is to be noted that the document relied upon was viewed with disapprobation by the local planning authority[40].

16. Thus, there is no scope for LCY to rely on population growth either as supporting a proposition that people have arrived in the knowledge of the airport and therefore have to accept Saturday afternoon noise or that they have arrived anxious to fly from the airport on Saturday afternoons.

17. This matter has a further significance. Thus, beyond precluding certain arguments from LCY it reveals the profound impact that planning decisions have on an area and its character.

18. We heard from Mr Rupert Thornely-Taylor, whose experience, expertise and authoritative status are all unchallenged and unchallengeable, that LCY had never had Saturday p.m. or Sunday a.m. flights so that the character of the area, confirmed by the (public) planning regime, is clear. Saturday afternoons, evenings and Sunday mornings are a time of respite, curfew, relief or as the appropriate term may be[41].

19. We heard from Mr Liam McFadden, a highly experienced and well-respected planning officer, describe what is kept on the planning register, which is all accessible 'on line' 24 hours of every day of the year[42].

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[38] By LCY on 25/1/24 (morning session).
[39] CD 5.1 produced, let it be noted, as a pre-application submission not as a policy document.
[40] 26/1/24 at 2 p.m.
[41] This relief avoids noise which Mr Thornely-Taylor described as plain as a pikestaff. He was not challenged on that point.
[42] The Secretaries of State will know that HMG's web site will directly refer to a local authority's web site for the register on entry of a post code.

The Secretaries of State's Decision

20. What would a person see when he looked for the decision? What is the existing decision? What is the vitally material consideration? Such a person would see that the Secretaries of State for Local Government and Transport had decided to grant conditional planning permission for a very substantial development. The development is set out at paragraph 27 of the letter of 29 July 2016[43] and runs from (a) to (q). It included demolition, aircraft stands (both upgraded and new), modification of the airfield and the creation of a taxi lane, extended terminal building and significantly more besides. As a matter of fact, some of this development has yet to be carried out[44].

21. He would also see that the Secretaries of State gave consideration to the Inspector's analysis of conditions and the reasons for them. It can be noted that the Secretaries of State were satisfied that the conditions recommended by the Inspector complied with policy. They imposed those conditions. Those conditions had to be necessary and serve a planning purpose.

22. When our member of the public, looking at public documents, sees the Inspector's, Mr Whitehead's, report he would notice that the conditions had been agreed[45] and, it may sensibly be supposed, put forward by LCY. Mr Whitehead said the conditions were reasonable and necessary[46]. Our reader would notice, by reading condition 17[47], that weekend relief was both reasonable and necessary to protect the amenity of current and future[48] occupants. Our reader, especially if he had an elementary knowledge of town and country planning, would know that as a matter of

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[43] CD 7.8

[44] This agreed fact makes it even more bizarre to hear it asserted that an incomer should have assumed what the LCY now put forward as their plans, which in so far as they want to remove amenity protection depend on another planning permission being granted. (LCY may know all about Countdown but they don't appear alive to the proposition that I have started so I will finish., see Mastermind).

[45] Paragraph 261, page 73

[46] The Secretaries of State agreed: CD 7.8, letter of 26 July 2016, at paragraph 4, paragraph 23, & paragraph 27.

[47] Page 115

[48] When the Secretaries of State refer to future occupants did that future merely embrace a year or two? The answer is obviously no. Please have in mind that a planning permission enures for the benefit of the land: section 75 of the Town and Country Planning Act 1990, i.e., a planning permission persists in perpetuity. This is the context in which one considers future occupants. It is clearly wrong to suppose, as LCY do, that the future occupants to be protected embraced merely those who arrived in the year or so after the 2016 decision. Further, present occupants, given protection by the condition, included children whose childhood lasts, one hopes, many years. But the LCY would have them protected merely for a year or two. (It can be noted that it is 2019 figures on which the LCY base themselves).

law a condition can only be imposed if both necessary and serving a planning purpose.[49]

23. Our member of the public would also notice that Mr Whitehead had the advantage of having been provided with very many documents, which are listed over 13 pages. A number of these documents were part of the environmental statement, which, of course, bears a particular status. All these documents are available to the public.

24. It is immediately apparent that LCY pursued a 'need' case before the Mr Whitehead and the Secretaries of State. Thus, Mr Whitehead in reporting LCY's case said[50] (it was that) 'demand forecasts show a substantial and pressing need for [certain][51] capacity constraints to be overcome if the Airport is to deliver its potential'. LCY also stated that the development, that found expression in the 2016 permission[52], generated socio-economic benefits such as employment[53].

25. The report made by Mr Whitehead of the case for LCY accurately reflected the material, including the environmental statement, put before the inquiry by LCY. Thus, the need statement[54], which was a core document before Mr Whitehead, said it demonstrated that the proposal would be consistent with Government policy in securing better runway use. It was stated in bold type that this was particularly so in the context of how best to secure airport capacity in the short, medium and long

[49] Curiously, no one from LCY appears to have thought about this. No suggestion has been made let alone evidence tendered to suggest that the conditions imposed had ceased either to serve a planning purpose or to be necessary. In fact, Mr Greer, for the LCY, told us on 23/1/24 at 10.18 am that it was important to protect the amenity that the condition protects albeit from 6.30 p.m. Later, on the same day, he said that the amenity that presently stands protected before 6.30 pm on a Saturday was the same as the amenity he regarded as important to protect after 6.30pm. A ridiculous suggestion was made on 25/1/24 by the advocate for LCY that no one, so to speak, bothered about conditions in 2016 at the inquiry. Mr McFadden to whom the suggestion was made pointed out that whether or not conditions were carried forward they had to be properly considered and determined to be necessary to meet a planning purpose. (In fairness to LCY it can be noted that Mr Bashforth later disowned that suggestion).

[50] Paragraph 95, page 26 of report.

[51] These had been set out above and included need for backtracking, need for stands and expanded terminal.

[52] CD 7.8

[53] We should have in mind that the 2016 permission has yet fully to be deployed. The economic benefits put forward as dependent on that permission have still fully to emerge. It would be a serious error to assign to this application socio-economic benefits that are consequential on the first permission. It will be remembered that one can get without removing Saturday's protection to 9 million passengers per annum: see paragraph 4, above.

[54] INQ 17

term[55]. The proposal was said to allow LCY to reach its optimum potential[56].

26. This need statement has never been disowned[57]. It remains publicly available[58] without any suggested qualification. It was produced by a consultant conscious of her obligations, which are owed generally and particularly under environmental legislation. It should be noted that the approval in 2016 was sought to allow a potential of 120,000 noise factored movements per annum[59]. This appears to be equivalent to 111,000 ATMs, which, of course, is what LCY have secured through the 2016 permission but have yet to reach.[60]

Some threads

27. It is worthwhile, at this stage, drawing together some threads.

28. Those threads make plain that LCY was seen, as it is, as unique[61] and that its optimum potential is 111,000 ATMs[62]. Further, that it was (and is) the case that 111,000 ATMs can be achieved through the permitted flying hours, the bulk of which are on Mondays to Fridays.[63] Furthermore, that the Secretaries of State determined that a condition to protect amenity by precluding aircraft noise from LCY for 24 hours, i.e. 12.30 p.m. Saturday to 12.30.p.m. Sunday, was necessary and reasonable.

29. LCY were seeking to say through re-examination of Mr Greer (23/1/24) that Saturday afternoons were no different from other afternoons. Mr

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[55] None of these was defined. The need statement was maintained as accurate at the 2016 inquiry, see CD 7.8. It appears improbable that the short, medium and long term have all been exhausted in the 7 years since the decision letter of the Secretaries of State. An absurd position was suggested by the advocate for LCY to his witness in re-examination on 27/1/24 that long term, despite short term and medium term being mentioned in a document relied upon in 2016 by LCY (Mr Bashforth leading the team) took us only to about 2020, i.e. less than a year after that year by when the permission had to be implemented.

[56] See INQ 17; optimum potential; enable response to forecast growth and accommodate new generation aircraft; make best use of runway. For example paragraph said the application was driven by a desire for physically larger, new generation aircraft.

[57] It can be noted that Louise Congdon agreed, 17/1/24, as indeed is obvious, that the policy substance was the same in 2016 as it is today.

[58] Through the planning register, which is maintained online.

[59] See paragraph 4 of executive summary at INQ 17.

[60] As is well known there are multiple vacancies (for flights or slots) every day.

[61] Per Mr Richard Greer, pm 23/1/24, there is no other airport like it in the United Kingdom.

[62] INQ 17, page 2 paragraph 4.

[63] Each Monday to Friday has 16 hours of potential flights. There is a maximum of 45 flights per hour. 45 x 5 (number of weekdays) x52 (number of weeks per annum) equals 187, 200. Of course, there is scope as well for flights on Saturday mornings and Sunday afternoons and evenings.

Greer said, in cross examination, (23/1/24) that the end position, after all his work on the numbers, was that Saturday afternoons[64], if LCY succeed, will be more or less the same as other afternoons.

30. This, i.e., the proposition of little material difference in respect of noise between Saturday afternoons as proposed and weekdays as permitted, is a very interesting answer. We know that in 2016 the Secretaries of State would have been alive to the fact that all other London airports had Saturday flying. They would also have known that if Saturday flying occurred at LCY it would be little different in respect of noise from Monday to Friday. The Secretaries of State knew in 2016 that good use[65] should be made of the runway at LCY.

31. None the less the Secretaries of State deliberately and after due deliberation said that, at LCY, Saturdays will be different and that such difference related to both the evening and the afternoon.

32. This deliberate decision by the Secretaries of State[66] must be recognised and respected. It is vitally material to our consideration. And, moreover, it has clearly been proved to be a wise decision. The heart- felt evidence about Saturdays and the ability to do things on Saturdays can be brought back to mind[67]. One cannot readily forget the evidence of Anne Sharp[68] or Teresa Perighetti[69], which evidence can be taken as representative. We

[64] When noise will be as plain, as is undisputed, as a pikestaff.

[65] I use that expression to avoid choosing between best and better use. The concept is clearly that one should use a runway to take advantage of it in its location so that one does not waste the facility. This is obviously different from a suggestion that best or better use requires a continuous parade of aircraft 7 days a week. Best use is made of the cricket square at Lord's but play does not occur every day. The same is true of the tennis courts at Wimbledon and the football pitch at Wembley.

[66] The point is not answered by saying the application was for x and the conditions were agreed. We will all be aware of decisions by Inspectors on behalf of Secretaries of State or Secretaries of State themselves when it has been decided that an application for x was not to be approved because it did not make best use of the land.

[67] See, additionally, CD 1.06, the Statement of Community Involvement, e.g., page 35, opposition to extended Saturday hours and increased early morning flying on the ground of noise disturbances; page 34, increased traffic at these times will have considerable impact on residents, particularly the elderly and families with young children; page 37, we greatly value our afternoon of peace but this will be destroyed if flights continue on Saturday afternoons; page 40, it [Saturday past 12.30 pm] is the only day I can have my windows open and sit on my balcony; page 56, extra Saturday flights would impact [a] quiet afternoon; and, page 61, [no] change to Saturday flight restrictions. Clearly, Saturday afternoon noise is significantly deleterious. The fact that expression is (per Mr Bashforth) not used in policy statements is nothing to the point (*nihil ad rem*).

[68] INQ 27

[69] INQ 28

can also have in mind that one quarter of all the local authorities[70] across Greater London[71] have objected to the loss of the protection from noise on Saturdays. They are well able to respond to the concerns of their population.

33. The response of LCY appears to be, per Mr Greer, that people complain and, anyway, people can get habituated[72] to noise. In re-examination (23/1/24 pm) it was suggested to him, and he adopted the suggestion that there were, in any event, other noise sources on a Saturday.

34. Assuming such to be the case one can note the question, which should have been but was not asked[73]. Were the Secretaries of State and their Inspector alive, in 2016, to the propositions that people complain, get habituated to noise and that in around the Docklands and underneath the flight paths there were on Saturdays other sources of noise?

35. Plainly, the Inspector and the Secretaries of State would have been so aware, but they still said Saturdays are and will be different. They said it was necessary to protect amenity.

The existing permission

36. The existing permission, by which I mean the decision letter and inspector's report[74], should be studied closely. The relevant permission[75] was for a development that was briefly set out above[76]. This development plainly enabled the airport to operate in the 21st century. It is apparent there were infrastructure requirements[77]. These requirements enabled the airport to operate as such. The physical requirements were described by LCY as being needed to fulfil its potential.[78] Further, an economic rationale was advanced[79].

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[70] There are 32 London boroughs; the Corporation of the City of London, which can trace its history to the Conquest is not a local authority. 8 local authorities responding in the way they did is remarkable for a development in the London Borough of Newham.

[71] Greater London covers 1,579 square kilometres.

[72] This is obviously a fallacious proposition even on LCY's case. If people are habituated why continue to protect as LCY say is necessary to do Saturday evenings? Every other evening has flights.

[73] By LCY.

[74] CD 7.8

[75] See decision letter at paragraph 27.

[76] See paragraph 20.

[77] These were set out in INQ 17. They are represented graphically at Figure 1 on page 3

[78] INQ 17 page 5, paragraph 1.4.

[79] See INQ 17 at page 4, paragraph 10 et seq.

37. The Secretaries of State did not describe[80] these matters as 'need'. The Secretaries of State weighed environmental impacts against benefits, which included allowing LCY to increase its flights within its permitted level, i.e., 111,000 ATMs and increase in the likelihood of more efficient aircraft[81]. It can here be noted that on 23/1/24 in re-examination Mr Greer said, despite having in cross examination maintained that any question of need was for another, that the socio-economic benefits in this case are greater than in 2016. This is palpable nonsense. Compare and contrast the 'need case' in 2016 with the 'need case' in 2024. The former can be taken from the Inspector's report at paragraphs 94 and 95. They were put by LCY (through Ms Congdon) as physical capacity constraints needed to be met for LCY to reach its potential. Further, in respect of other benefits compare and contrast chapter 5 of the (still extant) need statement produced and relied upon for the 2016 decision with current suggested benefits[82].

The so-called 'need' case

38. The 'need' case at the moment is made up of these matters (1) LCY would like to have Saturday 12.30 to 6.30 p.m. flights; no doubt that would increase its value to its owners but there is no maintainable suggestion that LCY needs Saturday afternoons to survive; (2) an airline would like to have Saturday 12.30 -6.30 pm flights but there is no maintainable suggestion that the airline or any airline would cease to use LCY if the condition imposed by the Secretary of State were sustained; (3) prospective passengers do not have the possibility of Saturday 12.30 pm to 6.30 pm flights. Added to these matters is the proposition that if Saturday flights are granted it will incentivise airlines to move to larger quieter aircraft[83]. Further, Mr Bashforth repeatedly[84] said that although he

[80] See decision letter paragraph 26, CD 7.8

[81] Ibid. The paragraph provides a useful indicator as to the taking of decisions. Despite a prompt in re-examination as to changes in approach after 2016 the position remains that the approach as to balance is the same today as it was then; *plus ca change, plus c'est la meme chose.*

[82] Remembering to take care to avoid counting benefits attributable to 2016 as attributable to 2024.

[83] This was said before by LCY in 2016 at the inquiry, see CD 7.8, Inspector's report at paragraph 142, page 38, (81 PDF). The derivation of the incentivisation put forward was evidence from a Mr Henson, the noise expert for LCY, see footnote 210 (ibid). The relevant extract from the list of documents is at page 99 of the Inspector's report. Ms Congdon had also stated (see INQ 17 at page 59, paragraph 4.11) that the shift to larger aircraft was inevitable.

[84] 26/1/24, morning session.

was not an expert Saturday afternoon opening assisted rotational use of aircraft[85]

Business Case or Benefits for some

39. Need, which word was not used by the Secretaries of State in 2016[86], is clearly the wrong word to use[87]. The matters advanced are, at best, benefits for some persons[88]. These benefits, such as they are[89], are clearly outweighed by other considerations. However, let us consider these suggested benefits and, in doing so, consider matters to whose existence they do not contribute in the slightest.

40. They are not necessary for the continuation of LCY. First, there is no sensible suggestion by LCY that such is the case[90]. Second, there is no evidence that such is the case. Third, there is an extant permission which according to LCY[91] secured the full potential of the airport[92].

41. The benefits are not necessary for the continuation of any airline, whether the one cited by LCY or at all. (Parenthetically, it is not understood why the planning system, which operates in the public interest, should be used to aid the economic performance of an airline or any airline). First, the benefits identified are not necessary for the viability of or continuation of any airline. This is not so suggested and there is no evidence to that effect. Second, in any event it is undisputed but that there are plenty of

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[85] It was not explained why the current (large number of) unused Monday to Friday slots did not enable rotational activity. Manifestly, such slots could be used for that purpose.

[86] See CD 7.8, decision letter at paragraph 26, page 5.

[87] Merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative. *The flowers that bloom in the spring, tra la, have nothing to do with the case*: see the libretto to the Mikado by W.S. Gilbert and Arthur Sullivan.

[88] I am using that word here to include legal persons, such as the LCY a body corporate owned by its shareholders and the airline (relied upon) also a body corporate owned by its shareholders.

[89] Not much.

[90] Although Louise Congdon did say in cross examination you never could tell. (She was making the point that forecasts can be difficult as the future is not known. *Trust no future, howe'er pleasant*: Longfellow, Psalm of Life, stanza 6.

[91] The team being led by Mr Bashforth, see his proof, who appeared at this inquiry as well.

[92] See CD 7.8, Inspector's Report at page 26, paragraph 95. This is a report of LCY's case which made clear that the then desired permission enabled the airport to deliver its potential. This reflected the need statement, which has never been withdrawn, and was part of the environmental statement, which had to be prepared in a particular way so the public could rely upon it. This document made plain, see INQ 17, at paragraph 4, page 2, that permitting, what became the 2016 permission, would allow the Airport to reach its optimum potential. The same document, prepared (and in effect verified by Ms Congdon) said the aim was to make full use of the consented runway movement limit… ensuring it makes 'better use' of the runway, see page 11, paragraph 2.12

slots on every day[93] that LCY operates, which could be taken up by airlines if they chose to do so. LCY complain that an airline gave up use of LCY yet concurrently assert that airlines cannot presently meet demand.

42. Dr Smith, whose evidence was clear and is to be commended, pointed out the following. The difference per aircraft would be a financial improvement of £196,191 per annum for the airline's shareholders at the expense of Saturday afternoon disturbance[94].

43. Accordingly, a simple desire by LCY to have Saturday afternoons is a matter of no planning consequence save to say that to meet that desire would undermine a matter seen by the Secretaries of State as necessary for a planning purpose, i.e., the condition which secures no aircraft movement between Saturday 12.30 p.m. and Sunday 12.30 pm.

44. Further, the desire of an airline or airlines to operate during part of that time is a matter of no planning consequence save to say that to meet the desire would undermine a matter seen by the Secretaries of State as necessary for a planning purpose, i.e. the condition mentioned in the preceding paragraph.

45. This leaves the third supposed benefit namely meeting the desire of those living within the catchment area of LCY to travel on a Saturday afternoon to or from destinations not now serviced during the rest of the week from LCY. Ms Congdon when asked how this had been itemised or determined (in the absence, for example, of any representation by a putative leisure traveller[95]) said (repeatedly) that this is what the airline said[96].

46. There are a number of difficulties with this supposed benefit. It is predicated on the proposition that the leisure travellers in question will only take off or land on a Saturday afternoon. This only has to be stated

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[93] Confirmed by Ms Congdon when she gave evidence: 17/1/24.

[94] See paragraph 1.21 of Dr Smith's rebuttal evidence. The benefit would, of course, be available anyway if the presently vacant slots were utilised by the airline relied upon by LCY or any other airline . Further, the larger, quieter aircraft are in any event said by LCY to be inevitable: see INQ 17 and CD 7.8.

[95] Quite apart from the fall off of business travel, Saturday afternoons obviously constitute that time when one will find the lowest number of business passengers. Mr Bashforth appeared (26/1/24) to agree this.

[96] 'They would, wouldn't they' as Miss Mandy Rice Davies might have said. The letter, appendix 1 to the proof of Louise Congdon had no identifiable provenance, was relied upon for a multitude of matters as if it were some sort of modern Gospel. The author of the letter did not present himself to the inquiry (unlike those who gave vivid evidence about noise and its deleterious effect).

to be shown to be nonsense and, in any event, is contradicted by the evidence of LCY who maintained, although not to very good effect, that one could not and should not distinguish[97] between any weekday and Saturday.

47. There is no material whatsoever to support the proposition that there exist putative Saturday afternoon only travellers. If there were why should something viewed as necessary to protect amenity be removed to accommodate the person who says 'I will not travel by air at any time other than Saturday 12.30 p.m. to 6.30 p.m. and furthermore I will not travel from any airport other than LCY (despite the proximity of the Elizabeth line and cheaper fares elsewhere)'? LCY are clutching at straws.

48. It can be accepted as realistic that there are people in and around LCY who would like, from time to time, to go on holiday. It can be accepted that some such people may view the present leisure destinations furnished by LCY with disdain and distaste[98] but who would not view other destinations in such a light[99]. We know remarkably little about these people because LCY have not condescended to produce any material bar the assertion, per Louise Congdon[100], that the airline has said so. It can be accepted that some such people may find it more convenient to get to LCY than (for example) to take the Elizabeth line to Heathrow.

49. The previous paragraph is, because it has to be, devoid of numbers, None has been provided by LCY or its favoured airline. However, we do know that there are multiple slots available every weekday Monday to Friday. If there are leisure travellers, in and around the airport, falling into one or other of the groups mentioned in the preceding paragraph then an airline could simply take one of the slots and fly to the new beach or leisure destination, presuming it is one that will not be treated with disdain or distaste.

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[97] Mr Greer in re-examination was keen on this proposition despite having said that Saturday evenings were important to protect and that the amenity being then protected was the same amenity protected by the Secretary of State from 12.30 to 22.30 on Saturdays.

[98] Perhaps someone met someone he wanted to avoid when he went to such a destination.

[99] No reason was offered by LCY why such should be the case.

[100] As a recurring theme in her oral evidence; on occasion it appears that questions were treated not as something to be answered but as an opportunity for a general discourse.

50. The fact this has not happened tells us a great deal[101]. It tells us that this supposed benefit or desire for leisure has not been sufficient to be responded to by LCY or any airline. It tells us that LCY want the benefit of further potential utilisation of the airport even though the local market does not generate that utilisation on a Monday to Friday. It must be remembered that there is an obvious pecuniary advantage to the airport, whether on a prospective sale or otherwise, in having secured release from the Secretary of State's condition[102].

51. It tells us, in short, that the supposed benefit of this application, as a response to desired local leisure travel, is illusory.

Forecasts are forecasts

52. It can here be noted that the forecasts put forward by LCY through Louise Congdon are fraught with curiosity. They were presented in a peculiarly solipsistic way[103] and were, to a considerable degree, based on propositions that are either laughable or manifestly wrong. The most egregious was the proposition that the elasticity on which the forecasts were based, prepared on material that pre-dated 2020 or any reference to Covid, none the less took account of Covid and any effects that had on the way people operate[104].

53. It should also be in mind that the forecasts depend on a variety of factors including gross domestic product. The approach of LCY appears unduly optimistic.

54. Dr Smith's evidence should be carefully considered. He was condemned by Louise Congdon for giving his opinion.[105]However, that is what he was asked to do: offer an independent expert opinion. He did so without being beholden to anyone or any previous set of documents. He drew attention to clear risks in the forecasts and drew attention to deficiencies

[101] Cf., The Silver Blaze by Sir Arthur Conan Doyle. 'is there any other point to which you would wish to draw my attention' Holmes replies 'to the curious incident of the dog in the night- time'. 'The dog did nothing in the night- time'. 'That was the curious incident'.
[102] Which otherwise operates in futurity.
[103] For example, we were told that because she had seen some other travellers on the train to or from Manchester, whom she presumed were business travellers, therefore business travel was restored.
[104] As to which she was wholly unrealistic as to changes in business practice. Rember and marginally adapt what, in St Paul's, Sir Christopher Wren said: *si monumentum requiris circumspice.* If you want a monument to Covid look around any business area or any office block. This is all a matter of notoriety.
[105] See her rebuttal in its opening flourish.

in the position of Ms Congdon and LCY. The fact he indicated that an approach could be followed does not undermine but rather emphasise his cautionary observations.

55. It is next necessary to enquire whether the supposed incentivisation of larger quieter aircraft materially aids the position of LCY. It is clear it does not. First, it has all been said before. Second, inevitably, quieter aircraft will come forward for economic reasons.

56. Accordingly, the benefits or asserted need case for the LCY is hopeless[106].

Noise

57. Next, we can consider the question of noise. Fortunately, this matter can be approached very straightforwardly as there are agreed, unchallenged or unchallengeable propositions. The basic and agreed propositions are that noise is important, noise can cause a serious loss of amenity and the noise referable to the application is as plain as a pikestaff.

58. Further, there is a distinct amenity necessary to protect. This derives from the extant planning permission and the decision of the Secretaries of State.

59. Second, the noise on a Saturday afternoon should not mimic the noise on a Monday to Friday. This also derives from that decision but is reinforced by (amongst other things) the Statement of Community Involvement[107], evidence to the inquiry, representations to the local planning authority and general notoriety that Saturday afternoons are different from Monday to Friday afternoons. For example, do the school children hereabouts go to school on Saturday afternoons? If they do is it only for out- door fixtures and the like.

60. Third, the evidence from LCY is that the amenity post 6.30 pm on a Saturday is important to protect and that the amenity being protected between 12.30 pm and 6.30 pm is no different save that such amenity is more likely to have hours of daylight. Although people have a propensity

[106] Or a busted flush.
[107] CD 1.06

to be indoors, or so it is said by LCY[108], there is a greater likelihood of being out of doors during hours of daylight.

61. There is no need to worry unduly about the figures produced in the ES or by Mr Greer. It is agreed that the Saturday noise would be similar to the noise on Mondays to Fridays and unchallenged but that it would be as plain as a pikestaff[109]. And we know that such a level of noise is, according to LCY, important to be prevented on Saturday evenings. Further, we know that such noise causes disturbance.

62. Further, we know it is agreed that there is no metric capable of providing advice[110]. This was said by Mr Greer to be why something else had been done. However, that something else is a 16 hour approach based on existing aircraft noise in order to consider a 6 hour period where there is no aircraft noise. The solution does not relate to the problem. However, good Mr Greer may be with numbers we are no further forward. It as well to remember that pikestaffs can determine outcomes[111]

63. It is worth making an incidental observation about sleep deprivation. Mr Thornely-Taylor made plain that the ES finds that in several locations there are increases of up to 2 dB in summer LAeq,8h which, if there is no major seasonal variation is equivalent to Lnight, but the additional population which is likely to be highly sleep disturbed is not reported. The research which led to these figures did not take into account whether or not the residents studied had sound insulation installed in their homes. If that were taken into account, the %HSD could be less than reported in

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[108] LCY called no social scientist but made sweeping observations about the behavioural habits of the resident population, when such statements suited their case.

[109] Evidence of Mr Thornely-Taylor; his professional position stands supreme. It was peculiarly refreshing to hear an expert say, as all experts ought to say, 'I am here to give my advice in accordance with my expertise. It is not for me to advise let alone tell a decision maker how she should weigh the various factors, some of which will not involve my area of expertise'. Cf the evidence of Louise Congdon and Richard Greer. The benefits evidence should simply have said these are the benefits and the noise evidence should simply say this is the noise. The evidence gets muddled if it departs from that dynamic. This was shown vividly in the evidence of Mr Greer when he was trying to justify why one deserved protection from noise at, e.g. 6.30 pm but not at 6 pm. This muddle was even more pronounced when trying to justify protection when we have Greenwich Mean Time but not when we have British Summer Time; an hour which is protected one week is not protected the next week (even though it is lighter, and one is more likely to be out of doors). It may be doubted that the amateur cricket grounds or football grounds in and around this area are flood lit.

[110] See proof of Mr Thornely-Taylor passim and Mr Greer's proof at paragraphs 5.8.10 (judgment to assess noise) and 5.8.14 no procedure for assessment of Saturday p.m. loss of protection. We know the professional judgment is that the noise is as plain as a pikestaff.

[111] In the end spades are always trumps, here the pikestaff is the trump.

the WHO ENG[112]. Mr Greer gave the surprising answer in re-examination that if all dwellings had sound insulation there would be zero sleep disturbance, although that proposition was not in his written evidence. If such were the case the Government's continuing efforts to reduce night noise arising from airports would seem somewhat superfluous.

64. The critical point is that the research did not take into account whether residents had sound insulation. The answer that comes back from LCY is to the effect that if everybody has sound insulation all will be well. And Mr Thornely-Taylor agrees that if such is the case and all are using (functioning) sound insulation this particular aspect of the harm caused by the proposal is lessened or avoided. However, we all know the world is not perfect, that some will not have sound insulation, that some will have it, but it will not work perfectly or some will have it but still want an open window.

65. Accordingly, the Secretaries of State should conclude that the early morning noise will be increased so that it consists of 6 flights of any description of aircraft and 3 flights of newer (and one hopes quieter) aircraft rendering it probable (given the improbability of all having sound insulation) that there will be sleep disturbance.

66. Further, the Secretaries of State should also conclude that there will intrusive noise seriously adversely affecting amenity on Saturday afternoons. This noise can properly be described as plain as a pikestaff.

Planning Policies

67. I can now move to the question of planning, which is linked to the balancing exercise being performed. The critical point to draw from planning policy is the great weight given by policy to two propositions. First, that aircraft noise[113] is a matter of great seriousness within development plan policies. Second, that development plan policies recognise the amenity damage caused by such noise leading to the desiderata of avoiding or precluding such noise.

[112] See Mr Thornely-Taylor's proof at 7.2.13.

[113] This is not a surprise as planning control is the principal mechanism for minimising or precluding aircraft noise, which noise, we know, can be seriously deleterious to health or quality of life.

68. The development plan policies mentioned in the reason for refusal are D13 and T8 of the London Plan and SP2 and SP8 of the Newham Local Plan. I deal with them in sequence[114].

69. D13[115] is the agent of change point. This policy is plainly intended to deal with the common law principle that coming to a nuisance is no defence. In other words, if I build my house next to a factory and then sue the factory for nuisance the factory cannot defend on the basis it was built first. Thus, and inevitably the policy distinguishes between existing noise and new noise.

70. It is obvious that we are here concerned with new noise. It is absurd to say that because there is noise on Saturday morning and you need planning permission to make noise on Saturday afternoon then the noise on Saturday afternoon is existing noise. Are we to tell the Secretaries of State who considered the matter so carefully in 2016 that notwithstanding their care in precluding noise they are to be taken as having created existing noise? What is the point of seeking planning permission? What is the point of the planning register? What is the point of LCY saying and seeking permission on the basis that the optimum use is 111,000 ATMs Monday to Friday with Saturday mornings and Sundays after 12.30?

71. This is new noise. You can test that by asking what would happen if LCY broke the condition. Would they be able to defend a breach of condition notice on the basis the noise was existing noise? The District Judge would laugh at the advocate who put that forward.

72. Clearly D13 C and D13 E are relevant. C says that new noise and other nuisance-generating development proposed close to residential and other noise-sensitive uses should put in place measures to mitigate and manage any noise impacts for neighbouring residents and businesses. Please notice that noise is categorised, as it is, as a nuisance. Certain questions need to be asked in considering whether D 13 has been breached.

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[114] It is worth observing that the advocate for LCY made an erroneous observation when discussing a document that Hacan East had wished to submit. He said that Dr Lois Lane would be bound by answers that Mr Bashforth might give about the meaning of a (policy) document. This is clearly wrong. The meaning of a document is a matter of law and is to be determined by the decision maker subject to correction by the court. Further, no inspector or Secretary of State is bound by what a witness gives as his opinion. (The erroneous point was plainly derived from a half-remembered rule of evidence that an advocate is bound by answers as to credit).

[115] London Plan page 150-151.

73. Has it been clearly demonstrated that the development proposal will mitigate and manage the noise? The answer is plainly no. We are concerned with noise in the afternoon. When asked about funding for outdoor facilities LCY have to say that those using the facilities will still hear the noise. Further, there is no recognised means of assessment. Judgment has to be used and the approved judgment is that the noise will be as plain as a pikestaff.

74. Further, the amendment to the proposal by the LCY is predicated on the noise on a Saturday evening being significantly deleterious. This is the same noise which is proposed to be introduced, contrary to the Secretaries of State's decision in 2016, for Saturday afternoon. The amenity to be protected in the time before the proposed condition takes effect is more noticeable given it is during daylight. The pikestaff will be present and will not be sheathed in any way.

75. It should be noted that by D 13 E one should not normally permit development proposals that have not clearly demonstrated how noise and other nuisances will be mitigated and managed. Given that such is the case here, refusal is indicated.

76. T8[116] is conspicuously breached. It is the policy of the London Plan that deals with aviation. In considering the weight to be given to this policy please bear in mind that this plan went through a long inquiry process with several inspectors and had to gain the approval of the Secretary of State who had the power to delay or stop it. Plainly, this proposal is for airport expansion, whether or not one has in mind that the 2016 permission constituted optimum capacity[117]. It follows there should be an overriding public interest or no suitable alternative solution[118]. This, the overriding public interest, is said to be[119]those commercial benefits to the airport and the airline and such socio-economic benefits as can be derived from this application if permitted and are additional to those derived from the 2016 permission.

77. T8 has, of course, to be read and considered as a whole. It is never appropriate to pick out a little from a text and assert it represents the

[116] London Plan page 438
[117] See INQ 17 passim
[118] London Plan T8 B
[119] As suggested to Mr Bashforth in re-examination.

whole. Naturally, one reads the policy in the context of the London Plan as a whole taking account of any words that are glossed in the plan[120].

78. T8 H helps us realise how seriously noise is viewed. It can be recognised that the first sentence, in the light of the glossary, is, at least principally dealing with something different from the proposal here pursued but it helps us recognise the care that is needed before there are changes in circumstances which generate environmental harm. It is perfectly clear that such harm does here exist. This is expressly acknowledged by LCY through their evidence about the importance of the proposed condition and their bringing forward just under £ 4 million[121] to help outdoor leisure areas even though it is acknowledged[122]that such help does not preclude the noise from being heard.

79. However, T8 H consists of two distinct and separate sentences, each of which in the ordinary way carries its natural meaning. The second sentence says any significant shift in the mix of operations using an airport – for example, the introduction of scheduled flights at airports not generally offering such flights – should be refused. Please notice this policy refers to any-that is the word used- significant shift in the mix of operations at an-the indefinite article is used- airport. An example, being recorded as such is given.

80. The City Airport is clearly an airport, which proposes significantly to shift operations to include in its mix Saturday afternoon flights.

81. Consequently, T 8 H is important on two counts. First, because it directly suggests refusal and, second, because it shows the significance of aircraft noise. Thus, there are clear breaches of the London Plan.

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[120] It is an elementary legal error to suggest that a definition in another document is carried into the document one is considering. A word defined in an Act of Parliament does not carry that meaning in another Act of Parliament; such is an elementary rule of statutory interpretation. It is important to appreciate these matters when considering a statutorily approved set of documents such as a development plan. If it were otherwise the public preparation and particular approval methods of such documents would be undermined. This is a further reason why it was absurd to suggest that the LCY's own masterplan could somehow be taken as showing what was to occur.

[121] One does not bring forward such money unless something significant is going on.

[122] Evidence of Mr Greer 23/1/24, cross examination.

82. The Newham Local Plan[123] has at SP 2 a policy supporting the need for certain types of facilities. Noise would be deleterious. SP 2 indicates what is needed. This includes attending to environmental impacts such as noise. Are we seriously to say that attending to environmental secures allowing noise, as plain as a pikestaff, where hitherto such noise has been precluded?

83. SP 8 seeks to ensure neighbourly development, which this is not. SP 8 reveals an expectation that development avoids negative environmental impacts, which obviously includes noise. Is it neighbourly to overfly people on a Saturday afternoon? Is it avoiding negative environmental impacts to do so. Obviously not.

Further threads

84. Accordingly, I can draw further threads together. We have seen that the need case is hopeless and that the best that can be said about the benefits case is that it is overstated. The noise case reveals intrusive noise against which there should be protection and the planning case reveals on the balance overwhelming deficiencies on the part of LCY and clear breaches of the development plan.

Conclusion

85. It is now possible to move to a conclusion. First, what is the question[124]. The question is whether having regard to the development plan so far as material and bearing in mind other material considerations should a planning permission be granted subject to different conditions from those judged necessary in 2016.

86. The development plan, so far as material, indicates refusal but this allows for the possibility of an overriding case in the public interest as a material consideration overcoming that indication. But that supposed case in the public interest is no more than a flawed business case and a limited amount, bearing in mind the existing permission, of socio-economic benefits. Further, other material considerations, in any event, strongly indicate refusal. These other material considerations include the existing

[123] CD 3.4.1
[124] As the late Professor J.A. Jolowicz QC used to remark identification of the question is critical.

permission, which allows an airport satisfactorily to operate and was predicated on the proposition advanced by the London City Airport that the permission secures optimum use of the airport. Other material considerations include multiple points of impact on public and private activities on Saturday afternoons together with some likely sleep deprivation. These impacts have all been vouched safe by the multitude of representations by members of the public and representatives of the public. There is nothing that serves to override those considerations that militate against permission.

87. Accordingly, permission should be refused or, at the least, condition 17 in its existing form ought to be preserved.

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clerks@4-5.co.uk

0207 404 5252

TIMOTHY STRAKER KC

4-5 Gray's Inn Square,

London WC1R 5AH