REBUTTAL PROOF OF EVIDENCE

Variation of Conditions 8 (passenger throughput cap), 10 (noise contours), 22 (car parking management), 24 (travel plan) and 28 (approved plans and documents) to Planning Permission 15/00950/VARCON (dated 13 October 2017) to accommodate 19 million passengers per annum and to amend the daytime and night-time noise contours.

LPA Ref: 21/00031/VARCON

PINs Ref: APP/B0230/V/22/3296455

SoS Ref: PCU/RTI/B0230/3269175

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REPORT DETAILS

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APPENDICES

1. Introduction

1.1. I am Alastair Skelton and I am instructed by LADACAN to provide expert evidence on planning matters. This Rebuttal Proof of Evidence responds to matters arising from the Proofs of Evidence of Andy Hunt, Rupert Thornely-Taylor and Sean Bashforth submitted on behalf of the Applicant, and the Proof of Evidence of David Gurtler submitted on behalf of the LPA, insofar as these touch upon planning matters. This rebuttal proof responds to those aspects of the above proofs which refer to and/or rely on the ES information ultimately submitted in respect of the Section 73 Application. This rebuttal evidence supplements the evidence provided in my original Proof of Evidence.

1.2. My evidence focuses first on the approach to EIA required by this Application and highlights the approach taken by the Applicant to Environmental Impact Assessment ("EIA"), the numerous and overlapping Environmental Statement ("ES) documents and addenda produced and relied upon by the Applicant. At section 7 of his proof Mr Thornely-Taylor confirms that the noise assessment for the proposals is contained wholly within ES3 and ES4.

1.3. I will set out my opinions whether the approach taken by the Applicant to EIA satisfies the statutory provisions of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations"), and whether it is consistent with Government Guidance relating to EIA.

1.4 I then focus on whether there is sufficient clarity and structure in the ESA provided (or indeed sufficient information) to enable proper assessment to be made, by reference to an example of what I consider to be a sound, clear and robust ESA.

1.5 Following that, I consider whether there is clarity over what will constitute the baseline for assessment, and whether and how the environmental impacts of the "Do Something" and "Do Nothing" cases are presented to inform the comparative assessment of any new or materially different significant effects. In doing that I focus particularly on the noise effects, although similar concerns would apply to changes in carbon emissions for example. I also consider whether there is sufficient clarity and structure within the various ES documents to enable all interested parties, including members of the local community, to understand what assessments have been made and how key conclusions have been reached and justified.

1.6 Finally, I respond to the information at paragraphs 2.29 – 2.32 and Table 2.5 in Mr Bashforth's proof where he summarises the breaches of condition 10 of the 2017 Planning Permission and the discussions that led to what is effectively a retrospective Section 73 application to address those breaches.

1.7 I consider the implications of the fact that this is a retrospective planning application following multiple breaches of condition 10 which in this instance appear to have caused past impacts greater than those presented as being declining residual impacts in the future. Part of my evidence will focus particularly on rebutting the suggestions that the Application is now being presented by the Applicant and the LPA as conforming to the Local Plan (Mr Bashforth proof paragraph 5.30) and Mr Gurtler paragraph paragraph 6.3), whereas for the purposes of the Planning Meeting it had been advertised as not conforming.

1.8 The comments and opinions in this rebuttal proof should be read alongside those in my original proof of evidence.

2 The Required Approach to EIA

2.1. The Proof of Evidence provided by David Gurtler (LPA-W5.1, paragraph 5.11) highlights the need to satisfy EIA Regulations in the context of airport expansion, and I have looked for evidence of the Applicant's approach to EIA.

2.2. Paragraph 1.1.1 of CD1.19 ("the Note") states:- *"This Note is provided at the request of the Planning Inspectors. It confirms what comprises the Environmental Statement documentation to be considered in support of the Section 73 application (reference 21/00031/VARCON) in light of the updates that have been provided".* Paragraph 1.1.3 goes on:- *"This Note confirms that the relevant parts of the Environmental Statement and Addenda which are relevant to this Section 73 application are contained within ESA 2, ESA 3 and ESA 4."*

2.3. The Note and the Screening Opinion from the LPA given at PDF page 108 of ES Volume 3 (CD1.10) confirm that the Application is *"to vary two conditions attached to 15/00950/VARCON"* which in turn, as confirmed by the 2017 decision notice CD7.03, is a permission attached to the 12/01400/FUL development. Paragraph 1.3.3 of the Applicant's Planning Statement CD1.07 states with regard to the screening decision *"This confirmed that the Proposed Amendments constitute EIA development and therefore an Addendum to the Environmental Statement previously undertaken in*

support of the 2014 Planning Permission and the Original Permission has been undertaken in support of the planning application. This Addendum has been prepared to consider whether the Proposed Amendments are likely to alter the conclusions of the Environmental Statement and to identify whether there are any additional or new likely significant environmental effects arising from the Proposed Amendments."

2.4. ESA 2 (CD 1.09) states at paragraph 1.3.1 that *"This ES Addendum has been prepared to consider whether the Amendments are likely to alter the conclusions of the 2012 ES and to identify whether there are any additional or new likely significant environmental effects arising from the Amendments to the development consented by the 2014 Planning Permission."*; and in paragraph 1.3.2 "*The 2012 ES, supplemented by this ES Addendum, read together, set out the assessment of the likely significant environmental effects of the development consented by the 2014 Planning permission including the Amendments (the "Proposed Scheme)".*

2.5. Under these circumstances I would have expected the 2012 ES and ESA 1 as defined in the Note to form part of the ES submitted and relied upon by the Applicant, yet those documents do not form part of the Application. In any case, the approach to environmental impacts must be consistent with and referable back to the approach taken in the 2012 ES and must recognise the baseline set by the 2014 Planning Permission CD6.03.

2.6. Schedule 4 to the 2017 Regulations sets out the 'Information for Inclusion in ES. Schedule 4(3) states that ES must include: "*A description of relevant aspects of the current state of the environment (baseline scenario) and an*

outline of the likely evolution thereof without implementation of the development as far as natural changes to the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental information and scientific knowledge". In my opinion this would require the ES and ES updates relied upon by the Applicant in the context of the Section 73 Application to consider the likely evolution of the baseline development without implementation of the original underlying development.

2.7. The baseline environmental conditions would have been wholly unaffected if the underlying development had not been implemented and represent a reasonable baseline for assessment of the development proposals with the variation of conditions 8 and 10 as sought by the Section 73 Application. In my opinion it is also reasonable to assume that the growth in throughput at the Airport, and indeed its fleet, could have been different had the alternative set of conditions put forward in the Application been available.

2.8. As far as I can determine, the comparison of impacts is based on forecasts prepared based on a methodology set out in the evidence of Andrew Hunt on behalf of the Applicant. At paragraph 59 of his Appendix 1 Mr Hunt indicates that those forecasts are arrived at on the basis of a "scaled down" version of the non-compliant 2019 operation in order to render it compliant. Mr Hunt indicates that adjustments were made "where necessary" but it is not explained or evidenced how and where it was determined that such adjustments represent a viable model of the operation of the Airport under that applicable set of Conditions.

2.9. Planning Practice Guidance – Flexible Options for Planning Permissions ("the PPG") deals with how the 2017 Regulations apply to Section 73 planning applications and states:

"A section 73 application is considered to be a new application for planning permission under the 2017 Environmental Impact Assessment (EIA) Regulations."

"Where an EIA was carried out on the original application, the planning authority will need to consider if further information needs to be added to the original Environmental Statement to satisfy the Regulations." Paragraph: 016 Reference ID: 17a-016-20140306.

2.10. Regulation 18(3) of the 2017 Regulations states that an ES is a statement which includes at least: "*(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development; (b) a description of the likely significant effects of the proposed development on the environment;"*

3 Concern over the scope of the EIA

3.1 The various ESA3 and ESA4 all rely on a baseline which uses the situation pertaining in 2019 (a time when it is acknowledged that the airport was operating beyond the noise contour limits imposed by condition 10 – see paragraph 59 of the Appendix to Mr Hunt's proof). It is unclear how this baseline was agreed with the LPA and does not reflect concerns raised during initial scoping of the ES for the Section 73 Application. The EIA scope was raised by the Council's acoustic consultant during pre-application assessment – see paragraph 8.5.1 and Table 8.3 in ESA 2 (CD 1.09).

3.2 The first row of Table 8.3 documents the query: *"if it [the Application] is a s73 then it is varying conditions (8 and 10 possibly) on the application that was submitted in 2012 (12/01400/FUL) and varied in 2017 (15/00950/VARCON) and so you would need to be looking at the difference from then to now – there is a lot of data available as LLAOL provide their quarterly reports (and annual monitoring report). You would also need to consider the difference between the permission for 18mppa (what is happening on the ground currently) and the additional 1mppa".*

3.3 The response given was: *"There is limited data to undertake comparative assessments with the 2014 Planning Permission 2012 ES, which was based on a short term assessment against the 2011 baseline and a future baseline in 2028. It is considered that 2028 is the key year of assessment and that the increased mppa should be assessed against both the change in Condition 10 as a result of the proposal and also the difference with the original future year assessment of the 2014 Planning Permission 2012 ES. As it is expected that the effect of the proposals will diminish over time, the worst-case year of airport noise above that allowed for in the existing Condition 10 has also been assessed."*

3.4 This initial scoping concern expressed by the Council's acoustic consultants appears to correctly reflect the requirements of Schedule 4(3) of the 2017 Regulations by confirming the need for the ES to "*be looking at the difference between then and now*" – thus reflecting Schedule 4(3) of the 2017 Regulations where they refer to the baseline scenario and "*an outline of the of the key evolution thereof without implementation of the*

development". The method used by the Applicant does not follow this approach.

3.5 The query clearly highlights the need for the Application to assess the difference which would arise from varying two conditions over a timeframe spanning the period from the original 2012 application and its variation in 2017 and I agree with the assertion that assessment must cover the entire period and "*would need to be looking at the difference from then to now*".

3.6 The Applicant's response shown above does not meet that requirement, and also appears to contain an internal inconsistency arising from the fact that the Application proposes to vary both the Condition 8 passenger cap (by 1mppa) and the size of the Condition 10 noise contours (as well as other parking Conditions). Assessing *"the increased mppa … against both the change in Condition 10 as a result of the proposal and also the difference with the original future year assessment"* apart from being unclear is also inappropriate since the overall impacts of the Application in so far as they affect noise (which both Conditions 8 and 10 seek to control) would need be assessed against a "Do Nothing" case, not just against internal aspects of the proposed change.

3.7 The response given by the Applicant to the query also indicates that the *"worst-case year of airport noise above that allowed for in the existing Condition 10 has also been assessed",* but a comparison of the effects "from then to now" would require assessment including the worst affected

year over the whole period of comparison from the perspective of the original decision-maker.

3.8 Assessment of that whole period would accord with the requirement of Schedule 4(3) of the 2017 Regulations to outline the likely evolution of the original baseline without implementation of the development.

3.9 Table 8.4 in ES 2 (CD 1.09) does set out comments and responses on a free-standing Noise Impact Assessment which was shared with the Council and which informed the assessment within ESA 2. The previous requirement for the assessment to look back and provide a comparison to a 2014 baseline was not reiterated, but neither is it recorded that the basis for assessment had been agreed as something different with a substantiation for that decision. However, Table 8.4 makes other relevant points regarding scope:

a) it requires reference to the separate S73 applications 19/00428/EIASCR (to vary Condition 10) and 19/01253/EIASCR (to build new aircraft stands) to be removed, hence focusing on the impacts of the variation of the passenger cap and of the noise contour limits

b) it refers to the worst-case year, querying whether 2021 is the correct year, and requiring a proper assessment of which that year will be

c) it highlights in general the confusing and contradictory nature of the assessment and appendices; the need for clear and coherent links; the need for rationalisation and justification; the method being unnecessarily convoluted; the large amount of data in tabular form being excessive.

3.10 It is my opinion that the ES does not meet the standards required by Regulation or planning practice guidance in respect of the clarity

necessary to evidence whether it has been performed correctly, or even to determine with any clarity how it has been performed. In making these particular comments I am particularly mindful of the fact that the EIA process and the ES documentation are intended to assist public understanding of the proposed development and the potential environmental impacts likely to arise. An ordinary member of the public would, in my opinion, find it hugely difficult navigate the numerous overlapping ES documents, to understand easily which aspects of each document (or in some cases tables and scattered information within those documents) are relevant to the Section 73 Application, and to understand how particular conclusions have been arrived at and justified.

4 Lack of clarity, structure and accessible information in the ESA

4.1. ESA 2, ESA 3 and ESA 4 all refer to the "proposed scheme" in various ways and provide an abbreviated description of the proposed development. This is a fundamental issue because EIA is a critical aspect of the decision-making process in this case, and it is essential that all parties are able to review and understand the documents that are comprised in an ES, to understand the basis for and scope of the assessment, to be able to assess the evidence upon which it is based, and to be able to access the results in a clear, intelligible and unambiguous way. The necessity for such clarity and use of accessible language is set out in PPG as follows:

"The main findings must be set out in accessible, plain English, in a non-technical summary, to ensure that the findings can more readily be disseminated to the general public, and that the conclusions can be easily

understood by non-experts as well as decision makers (see regulation 18(3)". (Paragraph: 006 Reference ID: 30-006-20190722)

4.2. Throughout the ES documentation submitted by the Applicant in this case there are inconsistencies in terms of how the scheme has been described, and the focus has been largely on the implications of the variation to condition 8 (the additional 1mppa).

4.3. ESA 2 (CD1.09) does appear to confirm that in respect of all of the matters/topics considered in the 2012 ES, the purpose of ES2 is to look back to the previously identified effects. Paragraph 1.3.3 of ESA 2 states: - "*A number of the topics considered in the 2012 ES do not require further consideration since the Amendments will not materially affect the* ***previously identified effects presented in the 2012 ES*** *and will not introduce any additional significant effects."* (my emphasis).

4.4. Paragraph 1.3.4 in ESA 2 (CD1.09) goes on to state: - "For the remaining topics, the Amendments **may materially change the previously identified significant effects** or introduce new significant effects and therefore a revised assessment or further assessment has been undertaken and the results are presented in this ES Addendum." (my emphasis). It is not helpful to be given information such as that in Table 6.1 in ES 4 (CD 1.16) where ranges of contour levels are provided rather than to be consistent with the specific 57dB LAeq 16h (day) and 48db LAeq 8h (night) values used in the

2012 ES. Similarly, the late-arriving supplementary information document[1] drawing together the scattered elements of a key table is indicative of the Applicant's apparent disregard for clarity and accessibility. I respectfully draw the Panel's attention to consultation responses to the ES Addendum from respondees who are concerned about the lack of clarity and structure[2].

4.5. In approaching consideration of a Section 73 application a decision maker would need to do so by reference back to the original planning permission(s) and the underlying development. Regulation 4(2) indicates that the EIA must "*identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect effects of the* ***proposed development****…."*. (my emphasis). I reiterate that throughout the 2017 Regulations refer to and are directed at the effects of the proposed development and I take this to mean the underlying development as a whole, rather than a proposal to vary conditions attached to the existing planning permission for that development. In cases such as this where an application for planning permission is made under the provisions of Section 73 of the 1990 Act a new planning permission is sought for the whole development. It follows that the baseline scenario should consider the state of the environment, and the likely evolution thereof without implementation of the proposed development as a whole.

[1] CD1.21 'Note on ESA 4 Appendix B-Table 8B.1-Aircraft Movements', Wood, Aug 2022

[2] See Andrew Mills-Baker opening para plus paras 7 and 8; Joint Herts Authorities (Herts CC + N Herts CC + Dacorum BC + St Albans C&DC.pdf) para 2.2, 2.4, 3.6, 7.2; LADACAN consultation response (which cites CD4.02 'Noise review on behalf of the council', Vernon Cole, Feb 2021 sections 5.1 and 5.2; CD4.07 'Noise review', Suono, Jul 2021, section 6.1; CD5.09 'DMC Amendment Sheet', Clive Inwards, Suono slides PDF p29); Peter Lawford, para 2; Rachael Webb – paras 4 and 5 and general inability to respond; Sophie MacNeill – para 3; Susan Wiseman – para 2 and throughout

4.6. The Note on ES Documentation (CD 1.19) demonstrates the impenetrable nature of the overlapping ES documents forming this Application. As an experienced planning practitioner, I consider that I should be able straightforwardly to navigate the ES documents and understand how various assessments and conclusions have been arrived at, and how that relates back to the development. I would stress those aspects of the planning practice guidance which indicate the importance of clarity and consistency in ES documentation so that members of the public without technical or technical experience or expertise are able to establish and understand the implications for them in terms of environmental impacts.

4.7. Noise in the context of airport development is a key environmental effect that impacts directly on the day to day lives of the local community and I fear that the public will have extreme difficulty navigating and understanding the conclusions of the various ES documents, and how its conclusions that the additional noise impacts are "imperceptible" (as Mr Gurtler's Proof states at paragraphs 12.4 and 12.15) have been arrived at and justified. Key aspects such as the selection and justification of an appropriate baseline, derivation of relevant impacts and benefits for relevant affected years are either missing, unclear or obfuscated, which taken together with the various inconsistencies that I have set out above, the questionable approach of the Applicants to EIA, this ES in my opinion cannot be considered sound, clear or robust.

4.8. Such clarity is particularly important in a complex case such as this where the causes of noise (i.e. the noisiness of the aircraft undertaking the individual flights, and the mix and numbers of such aircraft in the fleet) have changed and continue to change over time and much of the assessment is hypothetical (based on forecasts) and in relation to factors (such as the type and deployment of aircraft) not under the direct control of the Applicant. Members of the local community have in recent years experienced noise levels exceeding those currently permitted under condition 10 due to previous breaches of that condition, which have arisen in part as a result of past assumptions and predictions around quieter aircraft and aircraft fleets operated by airlines proving to be unreliable.

4.9. Mr Thornely-Taylor at paragraph 6.5.5 of his proof confirms that previous forecast noise contours prepared in the last decade when compared to the actual contours "*are larger because of a combination of a smaller amount of refleeting than foreseen and a smaller actual noise reduction from those new aircraft that did enter service".*

4.10. The local community will have legitimate and understandable concerns that the predictions and assumptions relied upon in the Section 73 ES should be robust and reliable, when previous forecast and assumptions did not materialise as expected. Given the uncertainties around these aspects it would have been appropriate for the ES to consider alternative scenarios which take a less optimistic/more realistic approach to these aspects, particularly where they are outside the direct control of the Applicants – but this is not evidenced.

4.11. In my opinion the approach to EIA/ES that has been adopted by the Applicant in ESA2, ESA3 and ESA 4 raises real concerns in terms of whether it can be considered compliant with the 2017 Regulations and/or whether it follows planning practice guidance. Beyond those concerns it is my opinion that the unstructured nature of the ES documentation means that it is not able to be interpreted sufficiently clearly to be considered robust in terms of key conclusions, particularly as they apply to noise.

5 Lack of clarity over baseline and "without development" scenario

5.1 My concern over the lack of consistency in the Applicant's approach to ES methodology in respect of the Application relates to the way that planning decisions are considered and made. I note that Mr Bashford sets out the planning application at Section 3 of his proof and subsequently refers to the proposal which I have read as meaning the proposed variation of conditions 8 and 10 in particular. Wherever Mr Bashforth refers to impacts of the proposal he comments and conclusions appear to be limited to the impacts (certainly in terms of noise) that are forecast to arise as a result of the amendments to condition 10. However, at various points Mr Bashforth refers to the development proposed and it is unclear whether that is a reference to the whole underlying development or the proposed amendments to conditions 8 and 10. At paragraph 5.30 of his proof Mr Bashforth states: "*LBC concluded that the proposals were contrary to Policy LLP6 and LLP38 of the Local Plan and indeed advertised it as a departure, but that the benefits of the development proposed outweighed any such conflict".* It seems that those references to the LBC

conclusions relate to positive benefits arising from the airport development and expansion contained in the 2014 and 2017 Planning Permissions.

5.2 The proposed development in this case is:

"Full planning application for dualling of Airport Way/Airport Approach Road and associated junction improvements, extensions and alterations to the terminal buildings, erection of new departure/arrivals pier and walkway, erection of pedestrian link building from the short-stay car park to the terminal, extensions and alterations to the mid-term and long-term car parks, construction of a new parallel taxiway, extensions to the existing taxiway parallel to the runway, extensions to the existing aircraft parking aprons, improvements to ancillary infrastructure including access and drainage, demolition of existing structures and enabling work. Outline planning application for the construction of a multi-storey car park and pedestrian link buildings (all matters reserved).

5.3 The 2012 ES (and ESA 1) considered the overall impacts of that development and informed the decision-making process of the Council. That decision-making process, insofar as it related to the issue of noise, involved consideration of the significant effects arising from the development and measures that were necessary to mitigate those significant noise impacts and to accord with the local plan and local and national policy.

5.4 The result was the imposition *inter alia* of conditions to cap the passenger throughput (recognising that there was a correlation between passenger numbers, aircraft movements and noise) and to impose Summer noise contour limits. Those conditions (8 and 10 on the 2017 Planning Permission) were confirmed as reflecting the Local Plan insofar as that policy refers and relies upon two external documents – The Airport Master Plan and the Airport Noise Action Plan. It is noted that the January 2021 Airport Masterplan (CD1.06) indicates at paragraph 6.2.4 that "*The agreed noise controls* [i.e. those imposed by conditions 9 – 12 on the 2017 Planning Permission] *referred to above contains detailed schemes of action to ensure that the obligations of the planning conditions are met".* That is not correct as the proposed increase of passenger numbers to 19mppa results in the noise contours set by condition 10 on the 2017 Planning Permission being breached and necessitating the proposals to increase the extent of those current noise contours. The Airport Noise Action Plan (CD13.11) contains the noise contours as currently imposed by condition 10 of the 2017 Planning Permission, and as discussed in my main proof Policy LLP6B (v) stipulates that proposals will only be supported if they achieve further noise reduction or no material increase in day or night time noise *"in accordance with the Airport's most recent Airport Noise Action Plan".*

5.5 As I set out in my original Proof of Evidence, the LPA deemed those and other conditions to be necessary and reasonable in order to balance the perceived economic and social benefits with the significant environmental and local community impacts arising from the proposed development, and to conform with local and national policy. I consider that the provisions of Policy LLP6 are clear in terms of the reference back

to the Airport Noise Action Plan, and it is clear that the proposed change to condition 10 only arises if there is to be a material increase in day and/or night time noise relative to the existing conditions and relative to the current Airport Noise Action Plan. Whilst the Applicant takes the stance that the changes in terms of the proposed increased noise contours and noise impacts are small in magnitude and significance Policy LLP6 does not exclude support only where increases in noise and noise impacts are significant. Policy LLP6 does not offer to support to a proposal which materially increase noise and noise impacts, irrespective of whether those increase may be small in magnitude and/or limited in duration, as asserted by the Applicant.

5.6 In my opinion it is important that the overall noise impacts of the proposed development should be considered with some reference back to an appropriate baseline position. Paragraph 1.3.1 of ESA 2 (CD1.09) states that "*This ES Addendum has been prepared to consider whether the Amendments are likely to alter the conclusions of the 2012 ES and to identify whether there are any additional or new likely significant environmental effects arising from the Amendments to the development consented by the 2014 Planning Permission.".* That cannot be the case as the requirement to look at the difference between then and now (as originally indicated by the Council's acoustic consultants in response to the emerging noise assessment methodology for ESA 2) was dismissed by the Applicant and there is no direct consideration or comparison of the outcomes of the noise modelling and assessment against the conclusions of the 2012 ES.

5.7 By reference to paragraph 8.1.2 of ESA 2 (CD 1.09) it is not apparent that the noise aspects have been approached by reference to the "*previously identified effects presented in the 2012 ES".* In respect of noise the 2012 ES utilised a 2011 baseline for the assessment of effects arising from the development. Paragraph 8.1.2 of ESA 2 confirms: - "*This noise assessment has assessed the likely significant effects arising from the proposed change to condition 8 to raise the passenger throughput cap to 19mppa, and those arising from the proposed increases to the daytime and night-time noise contours, through the variation of Condition 10, for the period to the end of 2027, and from 2028 onwards (**see Section 3.2**).* For the reasons I set out in the preceding paragraph it is very difficult to see such a direct comparison. Mr Roberts describes the approach as a "pseudo-baseline" (see LADACAN W1.1 paragraph 3.8). Mr Roberts has produced a rebuttal proof of evidence where he sets out his opinions on the Applicant's approach to the baseline scenario.

5.8 Paragraph 4.4.6 of the non-technical summary to ESA 2 (CD1.18) suggests that the assessment considers a number of scenarios, including:- a comparison between the 'with Proposed Scheme' in 2028 and the 'without Proposed Scheme' as had been expected under the 2014 Planning Permission's ES (as assessed in the 2012 ES). Yet it is difficult clearly to identify an assessment of the fully condition-compliant performance of the Airport without the Proposed Scheme.

One conclusion of the 2012 ES (CD6.02) in respect of the residual effect of the proposed development (paragraph 12.128) was that "*The level of airborne aircraft noise will remain significant."* Those residual effects took into account the mitigation of noise by fleet modernisation, secured by

conditions including the passenger cap (condition 8) and noise contour limits (condition 10), and obligations.

5.9 Section 73(2) of the 1990 Act states of course that an LPA "shall consider only the question of the conditions subject to which the planning permission should be granted" and that the Inspectors are not required or able to consider the original grant of planning permission itself. However, one option for the Inspectors is to decide that the planning permission should be subject to the same conditions, and therefore to refuse the Application to vary them. Part of such a consideration would naturally require the Inspectors to consider whether the conditions in question remain necessary and adequate to mitigate the overall noise impacts of the re-conditioned development, subject to local and national plans and policies.

6 Implications of this being a retrospective application

6.1. As indicated earlier in this proof the information at paragraphs 2.29 – 2.32 and Table 2.5 in Mr Bashforth's proof summarises the breaches of condition 10 of the 2017 Planning Permission and the discussions that led to what is effectively a retrospective Section 73 application to address those breaches. From a planning control perspective, and having noted the emphasis on noise control in the Officer's Report from 2013 (CD09.08 Development Control Committee Report, Dec 2013), and the balanced growth and mitigation trajectory, I can see no reason why the Airport could not have been operated within its planning limits during the period of growth from 2014 onwards. As indicated above, operating within the limits does not necessarily mean reaching all the limits simultaneously or even at all.

6.2. Mr Lambourne's Proof evidences the obligations for monitoring, reporting and scrutinising the performance of the Airport against its noise controls, and the means of control of throughput which can be used to regulate demand. I therefore find it surprising that contour breaches occurred at all, and that having occurred they increased in magnitude rather than diminishing.

6.3. The LPA's enforcement policy requires it to take account of a number of factors a number of which, in my opinion, appear on the face of it to have merited investigation in this case, particularly given repeated breaches and the correspondence which passed from Council to Applicant at the time:
"Where there has been a breach in legislation the Council will take into account the following principles in arriving at a decision on the most appropriate course of action.

…

(a) Whether the breach was committed deliberately or recklessly, caused by neglect or without due diligence or, if a breach by a corporate body, whether caused by consent, connivance or neglect of a company officer.

(b) Whether the breach was intended to cause gain for the offender or loss to another.

(c) Any complaints, previous history or other information relevant to the business or individual including any previous advice given.

(d) The business's or the individual's attitude and in particular, whether they were open, co-operative and prepared to assist the Officers, or obstructive and noncooperative.

(g) Whether enforcement action could act as a deterrent and encourage compliance generally.

(h) Inadequate mitigation or explanation given by the individual, business or trader (including the failure to provide an explanation).

(i) The effect of the breach on the victim, in particular where the victim is in some way vulnerable.

(k) The level of risk that persons or the environment could suffer harm as a result of the breach.

Investigations, enforcement decisions and actions will be made in good time, in accordance with statutory time limits, taking into account the complexity, size and nature of the investigation."

6.4. PPG guidance on Enforcement and Post Permission Matters asks 'why is effective enforcement important?', and lists three reasons in Paragraph 005. Reference; ID. 17b-005-20140306:

- To tackle breaches of control (which would include breaches of planning conditions) which would otherwise have unacceptable impact on the amenity of the area;
- To maintain the integrity of the decision-making process;
- To help ensure that public acceptance of the decision-making process is maintained.

Again, in my opinion, in this case all three are relevant.

6.5. I regard it as most unfortunate that the LPA did not provide when requested any documentation evidencing its consideration of whether enforcement was necessary, or any evidence of the investigation required by its Policy.

6.6. As a matter of good practice, it would be essential for noise conditions to be monitored and that any material breach dealt with reasonably and proportionately by the LPA if the enforcement of those conditions is to be effective.

6.7. Other aspects of the PPG do consider when it may not be appropriate for formal enforcement action to be taken and this includes:

a) where it is a trivial or technical breach which causes no material harm of adverse impact on the amenity of the surrounding area;

b) where the development is acceptable on planning merits and any action would solely regularise matters;

c) where in the assessment of the LPA it is considered that an application is the appropriate way forward to regularise matters – e.g. where planning conditions need to be imposed.

Case (a) cannot in my view be argued unless an assessment of the harm were to be conducted, given that the relevant condition was established to protect residential amenity, and given the correspondence, the LPA recognised that the breaches of the conditions could not simply be set-aside as trivial or technical.

Case (b) cannot in my view be argued since the noise contour limits were and are required in particular to conform with the Local Plan.

Case (c) cannot in my view be argued since the noise contour limits are already the subject of conditions which by definition meet the six tests, and also meet the requirements of the Local Plan and National Policy, and are specified as being required to protect residential amenity.

6.8. The timing of the first regularising application (April 2019) did not precede the first breach (reported November 2017), therefore the regularising applications are retrospective and as Mr Lambourne's Proof shows the corrective Action Plan proposed by the Applicant was clearly inadequate since the breaches to both contours increased rather than reduced in magnitude in 2019 and had been forecast to continue in 2020 and were likely to be joined by a breach of the passenger throughput cap.

6.9. If the integrity of the decision-making process and public acceptance of the decision-making process is to be maintained unacceptable impacts of the development must be avoided, and the mitigation provided by condition 10 was considered to be necessary in order to avoid unacceptable impacts arising from the underlying development permitted in 2014 and 2017.

6.10. Furthermore, whilst the scenario is different, it is relevant to note the Planning Policy Statement of 31 August 2015 (see Appendix 2) on the enforcement of intentional unauthorised development:

> *"This Statement confirms changes to national planning policy to make intentional unauthorised development a material consideration, and also to provide stronger protection for the Green Belt, as set out in the manifesto.*
>
> *The Government is concerned about the harm that is caused where the development of land has been undertaken in advance of obtaining planning permission. In such cases, there is no opportunity to appropriately limit or mitigate the harm that has already taken place. Such cases can involve local planning authorities having to take expensive and time consuming enforcement action.*
>
> *For these reasons, we introduced a planning policy to make intentional unauthorised development a material consideration that would be weighed in the determination of planning applications and appeals."* (my emphasis)

6.11. The concern expressed in the Statement applies to all unauthorised development. In the case of the Airport, the development of land facilitated the increase of throughput, but the only permitted increase of throughput

was that which remained within the envelope of the conditions, including most particularly conditions 8 and 10 but not excluding any others. I would invite the Inspectors to view this application in the context of the 31 August 2015 Planning Policy Statement when weighing it merits or demerits.

6.12. In this case, as Mr Lambourne's Proof indicates, the past harms were not mitigated and have not been assessed in the ES, since the future harms are predicted to "tail off" if the anticipated modernisation of the fleet occurs: the material difference being the time factor. Had the growth of throughput not occurred at a rate which was ahead of that anticipated, the mitigating influence of modernisation would have had time to balance the increasing numbers of flights, breaches would have been avoided – that much is clear since the Airport has operated post-pandemic with reduced numbers of flights and no further breaches.

6.13. In my opinion, given that this application is to regularise three years of breaches resulting from operations in breach of condition 10 , it is therefore reasonable, necessary and justified to perform two impact assessments:

1. To weigh the relative environmental impacts of the current set of conditions for the intervening years compared to the appropriate baseline, versus weighing the relative environmental impacts of the proposed set of conditions for the intervening years compared to that baseline (as would be the case for an application ahead of development)
2. To weigh the relative environmental impacts of the non-permitted development for the intervening years compared to the appropriate

baseline (to take account of the fact that the past harms cannot be mitigated)

6.14. To support this view, I also refer to PPG – Noise, and those aspects of policy guidance which indicates that where noise sensitive locations already experience high noise, a development that is expected to cause even a small increase in the overall noise level may result in significant effect occurring even though little or no change in behaviour would be likely to occur. I note that this aspect of policy guidance relating to noise does not appear to have been considered or assessed as part of the ES. The local community is likely to been keenly interested in how the proposed changes to conditions 8 and 10 may impact them and this particular aspect of planning guidance seems to be highly applicable to the situation associated with the Airport. In my view the ES fails to take account of this factor which is one of a number of factors which are highlighted by planning policy guidance as being a factor that will influence whether noise could be a concern. The ES suggests that the increase in noise that it has assessed are small but does not in my view consider whether, in the context of already high noise levels, those small changes may result in a significant adverse effect occurring.

7. Conclusion/Summary

7.1. This rebuttal proof has focussed on a number of concerns around the way that the Applicant has approached the requirements for EIA of the proposed development and the approach to key matters in the ES, and in particular the issue of noise impacts arising from the proposed development. It is apparent from review of the proofs of Messrs Bashforth, Hunt and Thornely-Taylor that there has been something of a pick and mix approach to the ES documentation with Mr Thornely-Taylor confirming at paragraph 7.1.1 of his proof that the noise assessment for the proposals is contained in ESA3 and ESA4. Mr Gurtler on behalf of the LPA also relies upon ESA4 in forming his conclusions at paragraphs 6.4 , 6.16, 6.17 and 6.18 of his proof.

7.2. I have identified what I consider to be fundamental failings in the various overlapping documents which arise in part from the way that the Applicants have provided layers of additional information in a form which lacks clarity and cohesion. The clarification around which documents do and do not form the relevant ES for the Section 73 Application under consideration has only become apparent in the various proofs of the Applicant and the LPA. However, uncertainty and lack of clarity and structure remain an issue in my view. The Applicant has indicated that the ES documents relevant to the Section 73 Application do not include the 2012 ES or ESA1 which accompanied the application which resulted in the 2017 Planning Permission. That means that the ES documents do not, in my view, contain the necessary information required by the 2017 Regulations – see the requirements of Schedule 4 of the 2017 Regulations. That is because the ES focusses on the proposed changes to conditions 8 and 10 of the 2017 Planning Permission and not on the underlying development as a whole.

7.3. Mr Roberts has raised similar concerns around the Applicant's approach and how what he describes as a pseudo baseline being used to make comparisons between the likely noise impacts relative to the 'no development' scenario. I suggest that the ES should have included assessment based on the 'no development' scenario in which the underlying development had not been implemented in addition to the baseline adopted by the Applicant which reflects the scenario with the permitted 18mppa cap in existence. In my view that would reflect the requirements of the 2017 Regulations Schedule 4 (3) to provide an outline of the likely evolution of the baseline without implementation of the development.

7.4. I also raise concerns regarding the way in which the various ES documents have been prepared and introduced in evidence. In raising those concerns I have drawn attention to those aspects of planning practice guidance which indicate that the main findings and conclusions can be easily understood by the non-experts and the general public. The nature of the documentation is such that it is very difficult to navigate and understand, and whilst conclusions on noise may be simply put it is not clear how they have been arrived or how they have been justified.

7.5. I have also raised concerns that the ES assessment has not fully taken account of uncertainties around the factors that influence and affect the overall assumptions about noise reductions over time. This is a critical factor as it is claimed by the Applicant that the noise contour reductions over time will be achieved. Recent history demonstrates that the previous assumptions and forecasts relied upon (in the context of the 2014 and 2017 Planning Permissions) to fix the current noise contours were overly optimistic, and this was one of the key reasons that breaches of condition 10 occurred in 2018 and 2018 – despite a range of operational measures utilised by the Airport in seeking to ensure compliance with condition. In particular, the Applicants noise expert has confirmed that previously forecast noise contours were ultimately not reliable because the introduction of newer quieter aircraft did not happen as assumed, and the aircraft that were introduced not achieving the noise reductions as predicted. It remains the case that those aspects lie directly outside the control of the Applicant and there is no guarantee that the introduction of new aircraft will progress as assumed or will be as effective as predicted in reducing noise. Given those uncertainties I have questioned why the ES has not also considered a less optimistic scenario which would model potential impacts that would arise were the re-fleeting to be slower and less effective in reducing noise.

7.6. I have also drawn attention to the fact that the application to vary condition 10 is in effect a retrospective application and the need for the application has been generated by the inability/unwillingness of the Applicant to comply with it historically. The Applicants various submissions indicate that, even in the absence of the increased passenger cap of 19mppa, it is likely that future exceedances/breaches of condition 10 would occur and persist. Mr Lambourne's evidence explains why in his view operational and management decisions and choices could have been taken by the Applicant to ensure compliance with the current condition 10. I have drawn attention to the Planning Policy Statement of 31 August 2015 which deals with intentional breaches of planning control – see my Appendix 2. That statement indicates that the intentional breach of planning control can be a material consideration when considering planning applications for development. I invite the Inspectors to have regard to that statement in this case.

7.7. Finally, I have set out my views on those aspects of planning practice guidance relating to Noise. In particular those elements of the planning guidance which highlight specific factors which are likely to influence whether noise could be a concern. On such specific factor is where *"existing noise sensitive locations already experience high noise levels, a development that is expected to cause even a small increase in the overall noise level may result in a significant adverse effect occurring even though little or no change in behaviour would be likely to occur".* In my opinion the ES submission have failed to address this specific concern. The ES conclusions are that the changes are small in magnitude and that, therefore, no significant effects occur. There is no assessment beyond the magnitude of the overall increases in noise within the ES and I question whether it can be considered robust in the absence of consideration of that factor which is specifically identified in planning practice guidance.