Consideration of Associated Development on the Northern Grass of Manston Airport

1. Under Item 7 on the agenda of Issue Specific Hearing 8 held on Friday, 7 June 2019, the Applicant proposed several new provisions for incorporation into the Examining Authority's draft Development Consent Order.

2. In the first of those, concerning Article 2, – Interpretation, Requirement 19 – Airport-related commercial facilities and Schedule 1 – Authorised Development, the Applicant seeks to include additional words to clarify types of development that may be considered to be "authorised development".

3. It is made explicitly clear that these are to be considered a non-exhaustive but indicative list and not a closed set of such types.

4. Stone Hill Park and various individuals and groups of persons who oppose the proposed Development Consent Order have sought to limit the scope for Associated Development on the Northern Grass (and elsewhere) to development that is required or relevant to Airport-related development defined in Section 23(5)(b) and to increases in ATMs of 'air cargo transport services' as defined in Section 23(8)(b) and Section 23(9). I believe those limitations and interpretations that opponents of the Application have suggested proceed from a completely false premise.

5. Article 23(5) refers to Airport-related development and the issue of whether any Application submitted to the Planning Inspectorate is a 'Nationally Significant Airport Infrastructure Development.' The test of that is determined either by finding whether the proposed development increases the capacity of the airport to supply at least 10 million passengers a year for air passenger transport services **or** by at least 10,000 air transport movements of cargo aircraft for air cargo transport services. Despite the word "or" at the end of Section 23(5)(a), it is clear in context that Section 23(5)(a) and (b) are **not** mutually exclusive but are in fact simply two different **thresholds** or **triggers** that, if exceeded in **either** case, would suffice to qualify a project as 'Nationally Significant Airport Infrastructure Development'.

6. Once any proposed infrastructure development project is found to be capable of meeting or exceeding **either** Section 23(5)(a) or Section 23(5)(b), **or indeed both of them**, then the project is capable of being considered 'Nationally Significant Airport Infrastructure Development' because a threshold or trigger is simply that, it does not in itself constrain the totality or limits of the whole development.

7. Clearly, a number of the works specified as part of the present Manston Airport DCO Project do serve to reinstate and enhance features of the whole airport that its present owners have stripped out or failed to maintain sufficiently or at all. That is true of the reinstatement and enhancement of the general aviation facilities (the Flying School, the moving of existing businesses within the site as a whole, the creation of a new MRO facility, a bunded aircraft recycling capability, and the creation of new facilities appropriate for the handling and servicing of executive jets) as well as provisions for any transition and enhancement of the two museums at new locations that would be beneficial to them and mitigate or overcome any adverse effects of the wider development upon them. There is nothing in Guidance to preclude that. Indeed, even when the formal DCO Model Provisions applied, it was clear that in practice promoters adapted and supplemented those provisions.

8. If this 'either/and' approach to Section 23 were not the case, then for the creation of any new or greatly enlarged general airport to gain a capacity to provide, say, a new runway capable of carrying very large numbers of **both** air freighters and air passenger aircraft, TWO parallel DCO Applications would **have** to be submitted concurrently, but then on granting consent for the first one of those Applications, the other thereby could be excluded and indeed at that point it would become a criminal offence to provide such services as were not authorised under the first approved or even

possibly amount to a material change introduced by whichever was first approved. Only by Section 120(5) and especially 120(5)(d) of the PA 2008, I think, might that calamity be prevented.

9. That scenario has not arisen or been anticipated in the case of the Heathrow or Gatwick airport DCO applications and it is inconceivable that it should preclude the development of integrated airport facilities anywhere, particularly as they will always incorporate sub-NSIP elements the benefits of which will support and enhance the airport as a whole, not just cargo ATMs or passenger numbers. The complications arising from such an approach must be enormous and cumbersome in the extreme. Michael Humphries, in NATIONAL INFRASTRUCTURE PLANNING HANDBOOK (2016 at 232, and unchanged in 2018 at 268) avers in his pioneering practitioner manual which is well recognised as **the** go-to standard work in this field of law, that this manner of dealing with Associated Developments has never been tested in the courts but sets out the huge complications it could introduce if attempted. He points out how Parallel Applications can be made and adopted under different planning regimes (and these have been done) but does not (perhaps cannot?) provide examples of when or if those have be done in parallel Applications where both are under the PA 2008 regime rather than differing regimes (that is, the PA 2008 regime and another regime). In the absence of any other explanation, I believe this suggests that DCO Law & Practice have bedded down this respect.

10. I will depart from this for a moment to make a few additional points. The Save Manston Airport association purchased a copy of the 2016 edition of Humphries in January 2016 one day after it was published. The work guided us in our understanding of DCO law and practice as we responded to the Stone Hill Park planning appeals in 2017 and read through successive stages of public consultation on RiverOak's plans. We found it immensely useful as we worked our way through the initial and revised Applications filed by RiverOak, and after the third edition was published in June 2018, we soon acquired a copy of that, too. We compared the two works line by line, noting all changes and that which remained unchanged. Throughout that time, in support of the Save Manston Airport association and its sister organisation, Kent Needs Manston Airport, I have undertaken a thorough comparison and analysis of every one of the DCO projects that have been logged on the Planning Inspectorate's web portal for Nationally Significant Infrastructure Projects either as prospective Applications or those which have been formally submitted including those that have fallen by the way side as well as those that have progressed and been consented. Humphries, throughout, has been our Bible. I will forebear to do more than point out that neither other grassroots groups nor Thanet District Council's senior officers took the same approach to the subject that we did, and it would appear that Stone Hill Park, too, failed to grasp a number of essential points.

11. Reverting to matters at hand, Stone Hill Park's view appears to be that any Associated Development which served air passengers would be unlawful unless it benefited air freighter services to the same or even greater degree. That's just not the case. And just as that would be a nonsense where a runway was concerned (*vide* my para. 8, *supra*), so it would be with anything else defined in Sections 23(6)(a), (b) or (c). We have already seen that Stone Hill Park and others who support Stone Hill Park have sought to regard Section 23 as comprising a closed set of mutually exclusive forms of "alteration" rather than as an open and non-exclusive set of alterations (that is as 'and/or' or even 'more') by reason of the word 'or' at the end of Section 23(6)(b). To place such a weight upon the word 'or' does violence to common sense and the purposive approach of these provisions. It is obvious, I believe, that Section 23(6) again provides a **threshold** or **trigger** when it comes to specifying or accepting type(s) of development any one or more of which would qualify as relevant and permissible 'Alteration'.

12. The same, it seems clear to me, makes clear what should be regarded as 'Associated Development'. 'Associated Development', I submit, may include **any** airport-related Associated Development, whether connected to air cargo or air passenger services or both, for any Airport Project that can be deemed to have met the minimum requirements for being confirmed, one way or

another, as a Nationally Significant Infrastructure Project within the relevant category, authorised in PA 2008, Section 14(i) .

13. That, indeed, is consistent with the ways in which 'and' and 'or' are used in other qualifying NSIP projects, as, for instance, can be seen by reference to Highways NSIP projects as specified in Section 22(1)(a), (b) **or** (c), where it is clear that single NSIP projects may embrace ANY one, two **or** all three of those types of development, and that can be distinguished from the way Sections 22 (2), (3), (4), (5), (6), (7) **and** (8) should be considered where the word 'and' is used: there the word 'and' is used to indicate that ALL relevant issues MUST be included (as and where therein provided) within every one of those closed sets of sub-paragraphs.

14. Following both the 'golden rule' and the 'purposive approach' to statutory interpretation, it is therefore clear to me and I hope is accepted by the Examining Authority that Associated Development as defined in PA 2008, Section 115(1)(b) may *require a direct relationship* that serves the needs of a Nationally Significant Airport Infrastructure Project but does so broadly, organically and holistically (which it clearly does, and predictably profitably will, in the present case).

15. The DCLG Guidance Note on Associated Development (2013), as Humphries (2018) at 187 fully appreciates, clearly states that Associated Development *should not be an aim in itself* but should be subordinate to the **principal development** (my emphasis: *vide infra*). Development *should not be treated as associated development if is* ***only*** *necessary as a source of additional revenue* [my additional emphasis] in order to cross-subsidise the cost of the principal development. It doesn't state that Associated Development **may not** cross-subsidize the cost of the principal development but just that this must not be the **sole** aim in itself. It must follow that such Associated Development should be considered and gauged in the round. The highlighted word **only,** *supra*, is key: subordinate parts (offices or other facilities, for instance), might not **each** have such a direct relationship but *taken as a whole* be regarded as doing so when the interactions within an AD programme obviously support the operation of the 'principal development' or mitigate its impact.

16. What also seems clear to me is that within these limitations AD may be included as relevant and permitted **provided** that it does no harm nor undermines the capability of the relevant project from meeting a triggering point that determines whether the project itself IS an Nationally Significant Infrastructure Project: that further proviso, if approved and applied, is fully satisfied in RiverOak's indicative cluster of Associated Developments.

17. It would be helpful to clarify what the phrase 'principal development' means, for I believe therein has lain a source of confusion for Stone Hill Park Ltd., Thanet District Council's senior management team and others who have been hostile to the proposed development particularly in relation to the Northern Grass. Is it any one of those NSIP categories listed in PA 2008, Section 14(1) (as amended)? Or is it **circumscribed** and **restricted** to a relevant subcategory [e.g., Sections 23(3)(a) or (b)] defined by the **particular** triggering threshold capable of establishing that a specific project that falls within a broader Section 14(1) category meets an acceptable level of development to qualify that project as 'nationally significant'?

18. The answer to that may help determine how wide is the ambit of learned expert guidance, as bedded down in both the 2016 and 2018 editions of Humphries, that Associated Development *should be proportionate to the nature and scale of the principal development* and that Associated Development may be on "on a larger scale than is necessary to serve the principal development": while Humphries provides instances of cases where that may be justified (*viz.* the potential that a further DCO project may be in contemplation for another or future untested application), it seems to me clear that **these need not necessarily all fall within a single closed set:** it will always depend on local and specific circumstances. Broadly, as Humphries says, the "annexes are not intended to be exhaustive" and the purposes of each facet of AD must be taken as simply part of the totality of them, in the round.

19. I also checked our copy of the pdf edition of Humphries (2016), where I can do word or phrase searches instantly. I can confirm that at NO point in that edition of Humphries is "Principal Development" defined, nor is it addressed in any context except that of "Associated Development" (from which it is distinguished). The relevant chapters of Humphries (2018) are unchanged when it comes to Principal Development.

20. The phrase "Principal Development", of course, might be thought to come from the PA 2008 itself, as amended, but it is NOT to be found in the original act or as amended: I know that because I have checked both. Use of the phrase in a constrictive sense or indeed in any meaningful sense at all, therefore, cannot be said to be the intention of Parliament.

21. The phrase “Principal Development”, indeed, appears to come only in the *DCLG Guidance Note on Associated Developments* (2013), but the phrase in Para 2 of that Note occurs strictly within the context of Section 115 of the PA 2008 and is defined as the "development for which development consent is required under Part 3 of the Act". Well, Part 3 of the Act does nothing more than define what each of the categories set out in Section 14 of the Act, and in relevant part that means, for us, Section 14(i) "Airport-related Development", defined further in Section 23: nothing more, nothing less. I believe that strongly supports the whole of the rest of the analysis that I have submitted above. In short, the use of the word "Principal" **cannot** bear any of the weight given to it by Stone Hill Park, No Night Flights or anyone else who opposes the Manston Airport DCO Project.

22. The whole of my approach, I suggest, is consistent with the the *DCLG Guidance Note on Associated Developments* (2013). I also suggest that the interpretation preferred by Stone Hill Park does violence to the DCLG Guidance by treating each segment of Associated Development as an aim in itself, or constrained within the limitations of triggering mechanism that justifies classification of the Application as an Nationally Significant Infrastructure Project, rather than, **where taken as a whole**, as each part dovetails within an AD that is clearly subordinate and supportive of the P**rincipal Development** (which I conceive is defined in Section 14(1)(i) simply as A**irport-related Development**). What constitutes qualifying “Airport-related Development” is found in Section 23(1). The rest of Section 23 establishes thresholds or triggering points that set minimum points of ‘nationally significant’ capacity and significant effects that bear upon Section (23)(1)(a), (b) and/or (c).

23. Further and alternatively, I would suggest that PA 2008, Section 120(5)(c) and Sections 122(1), 122(2)(a) & 122(2)(b) are broad enough to embrace any acquisition, actions or functions in the Northern Grass area for Associated Development related to or ancillary to that Airport-related Development of the Manston Airport DCO scheme.

24. Thus the four Core Principles set out in Paragraph 5 of the DCLG Guidance and dealt with seriatim in Humphries (2016 & 2018, at 153 & 187, respectively) are, in fact, relevant to the ways in which, taken together and in their relationship to each other, the proposed developments on the Northern Grass support the operation of the principal development or help to address and mitigate its impacts.

25. As Humphries implies, Associated Development that is disproportionate in scale must be regarded as ‘unwelcome’ but it is imperative to consider that issue in the round and with regard to what is required for the smooth running of the airport and its relationship to the impact of the airport upon the wider area in which it is situated. Any alternative associated development that Stone Hill Park may think it could develop instead of RiverOak in respect to AD for the DCO project that it unreservedly opposes in principle and merits can carry no weight, not least in resisting RiverOak’s Compulsory Acquisition of land in which AD is needed in the round and under the overall operational control of the Applicant within the DCO scheme.

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