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By email only

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Your Ref:
Our Ref: RGA/MAT/00342227/2
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Dear Leeds City Council,

Applications for certificates of existing use or development for relaxation of flying restrictions at Leeds Bradford Airport (23/05440/CLE, 23/05441/CLE, 23/05442/CLE, 23/05443/CLE and 23/05444/CLE)

1. We write on behalf of Group for Action on Leeds Bradford Airport ("**GALBA**"). This constitutes our client's response to the five applications by Leeds Bradford Airport Limited ("**LBA**") for certificates of existing use or development ("**CLEUDs**") under section 191 of the Town and County Planning Act 1990 ("**the TCPA 1990**"), in respect of planning permission ref: P/07/02208/FU dated 29 August 2007 ("**the Permission**"), made on 5 September 2023 and clarified by letter dated 2 October 2023.

2. On 27 September 2023, Leeds City Council ("**the Council**") issued a call for evidence in relation to applications 05440 and 05442. GALBA has obtained relevant evidence, which is in the accompanying **Appendices G1 – G7**. This submission provides and analyses that evidence, in light of the relevant legal framework. The evidence shows, on the balance of probabilities, that:
    a. the evidence provided by LBA on both Applications is inaccurate in many respects;

b. the breaches on which LBA relies in Application 1 were not continuous;
c. in any event, LBA concealed the breaches relied on in both Applications such that it cannot benefit from CLEUDs.

3. The Council did not call for evidence in relation to applications 05441; 05443 and 05444. GALBA agrees that was the correct approach, given that these applications are not properly made under section 191 of the TCPA 1990 and so no certificates could lawfully be granted. GALBA addresses this in more detail below.

RELEVANT LEGAL FRAMEWORK

CLEUDs

4. By s.191(1) of the TCPA 1990, any person wishing to ascertain whether any existing use or any operations which have been carried out are lawful or "*any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful*" may make an application for that purpose to the local planning authority specifying the land and describing the use, operations or other matter.

5. For the purposes of the TCPA 1990, any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if "*(a) the time for taking enforcement action in respect of the failure has then expired; and (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force*" (s.191(3)).

6. The relevant time limit for enforcement action, for present purposes, is found in s.171B(3) which states that "*no enforcement action may be taken after the*

end of the period of ten years beginning with the date of the breach [of planning control]".

Concealment

7. In determining whether the relevant time for taking enforcement action in respect of a matter has expired for the purposes of s.191(3), that time is to be taken not to have expired if (among other things) the time for applying for an order under s.171BA(1) (a 'planning enforcement order') in relation to the matter has not expired: s.191(3A). A planning enforcement order may be applied for where there has been deliberate concealment by any persons in respect of a breach of planning control (ss.171BA-171BC).

8. The principles on concealment were set out by the Supreme Court in ***Welwyn Hatfield BC v SSCLG*** [2011] UKSC 15, §§45-64, 71, 80-84. In essence, the time limits for enforcement in s.171B do not apply in cases involving "*positive and deliberately misleading false statements*" by a developer which are designed to successfully prevent enforcement action (§54). As explained by the Court, the statutory limits in s.171B were conceived as periods during which a local planning authority would normally be expected to discover a breach of planning control, but cases of positive deception undermined this process, and developers were not entitled to profit from such deception.

"Continuous" breach

9. A breach of planning control, including any breach of condition, must be "continuous" throughout the immunity period: see for e.g. ***R (Ocado Retail Ltd) v Islington BC*** [2021] EWHC 1509 (Admin) ("***Ocado***"), §§133-134. Whether the breach has been continuous in any given case will be a matter of fact and degree: ***North Devon DC v First Secretary of State*** [2004] EWHC 578 (Admin) ("***North Devon***"), §25. This is because, as the courts have recognised, some conditions are capable of being breached continuously,

while some may only be breached on certain days or perhaps seasonally (see for e.g. *North Devon*, §§1, 22). Essentially, immunity from enforcement is only attained if, "*throughout*" the period of ten years, the condition was breached "*whenever it was capable of being complied with (disregarding exceptional compliance as a matter of fact and degree)*": *Ocado*, §57; see also *North Devon*, §17.

10. Further, the scope of any accrued right is determined by the nature of, and extent to which, a condition is demonstrated to have been breached for ten years; it is not the case that the underlying condition is to be treated as being removed altogether: *Ocado*, §§59-60, 164.

Procedure

11. The burden lies on the applicant to demonstrate that a breach of planning control has become lawful applying the civil standard: *Gabbitas v SSE* [1985] JPL 630. The applicant's evidence needs to be sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. If the Council has evidence from others or of its own which contradicts or otherwise makes the applicant's version of events less than probable, then there will be good reason to refuse the application.

Interpretation of Conditions

12. The proper approach to the interpretation of a planning permission and conditions was clarified by the Supreme Court in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85 ("***Trump***") and *LB Lambeth v Secretary of State* [2019] 1 WLR 4317 ("***Lambeth***"). The key principles are well-established. The essential question is "*what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole*": *Trump*, §34, per Lord Hodge.

13. A summary of the relevant principles and factors to consider is found in ***UBB Waste Essex Ltd v Essex County Council*** [2019] EWHC 1924 (Admin) ("***UBB Waste***"), §§52-57 (quoted by LBA in its Application Statement, pp.2-3). Permissions must be interpreted with "common sense", which points to the "planning purpose" of the permission or the condition. As emphasised in ***UBB Waste***: "*If the interpretation advanced flies in the face of the purpose of the condition, and the policies underlying it, then common sense may well indicate that that interpretation is not correct*" (§53).

GALBA'S SUBMISSIONS

14. GALBA's submissions on each of the Applications is set out below. At the outset, however, it is helpful to set out the relevant conditions subject to which the Permission is granted.

15. Condition 1 explains that the Permission "*relates to the relaxation of operating hours at [LBA] and the controls and limitations to be applied to night-time operations*". It provides a number of relevant definitions, including as follows:
    (1) The "*night-time period*" is defined as "*2300 hours to 0700 hours local time*" (para (c)).
    (2) An "*aircraft movement*" is defined as "*a landing or a departure*" (para (d)).
    (3) "*Quota count means the value assigned to a take-off or landing of an aircraft which is related to its noise classification as defined in the Civil Aviation Authority UK NOTAM S45/1993*" (para (e)).

16. Condition 4 prohibits certain departures in the night-time period in the following terms: "*No departures in the night-time period shall take place by aircraft with quota counts of 1, 2, 4, 8 and 16 on take-off.*"

17. Condition 5 prohibits certain landings in the night-time period in the following terms: "*No landings in the night-time period shall take place by aircraft with quota counts of 2, 4, 8 and 16 on landing.*"

18. Condition 9 carves out a limited exemption in respect of aircraft movements falling within Conditions 4-5 in the following terms:

> "Movements in the night-time period by aircraft defined by conditions 4 and 5 will only be permissible in the following circumstances:-
> a. Delayed landings up to 0100 hours by aircraft scheduled to land at [LBA] between 0700 hours and 2300 hours.
> b. An emergency, i.e. a flight where there is an immediate danger to life or health, whether human or animal. Aircraft movements in these categories are exempt from night-time restrictions and will not count against the night-time period limits specified in condition 7."

19. Accordingly, Condition 9 is relevant to Application 1, as movements will not be in breach of Conditions 4 if they fall within Condition 9(b).

20. Condition 6 prescribes the aircraft movements that are allowed to take place during the night-time period. It provides a closed list of the types of aircraft movements that are permitted, in the following terms:

> "During the night-time period, (2300-0700), no aircraft movements shall take place other than by:-
> a. Landings by aircraft classified as falling within Quota Count 0.5 and 1 for arrivals as defined in UK NOTAM S45/1993 issued by the Civil Aviation Authority and any succeeding regulations or amendments/ additions/deletions.
> b. Departures by aircraft classified as falling within Quota Count 0.5 for departures as defined in UK NOTAM S45/1993 issued by the Civil Aviation Authority and any succeeding regulations or amendments/ additions/deletions.
> c. Aircraft which are approved by the Local Planning Authority and have, taking account of maximum take-off weights and stage lengths, an EPNdB value of not greater than 90 on departure.

d. Aircraft approved by the Local Planning Authority and which, by the demonstration of performance data collected at Leeds-Bradford Airport, have, taking account of maximum take-off weights and stage lengths, a 90dB(A) SEL noise contour on departure the same or smaller than, the 90dB(A) SEL noise contour for a Boeing 737-300/757 as shown on plan 6.
e. Exempt aircraft defined by UK NOTAM S45/1993."

21. Condition 7 of the Permission then sets an overall cap on the number of aircraft movements in the night-time period by aircraft specified in Condition 6(a)-(d). At present, the effect of Condition 7 is to cap such aircraft movements to 2,800 during the 'Summer season' and 1,200 during the 'Winter season'.

22. Condition 12 makes provision for monitoring and reporting:

> "No aircraft movements in the night-time period shall take place until a scheme has been submitted and approved in writing by the Local Planning Authority for the monthly monitoring and reporting to the Local Planning Authority of the number of night-time aircraft movements by type of aircraft. The scheme shall allow for reference to the numbers of and reasons for delayed landings and emergency departures and landings."

23. The Council is familiar with the Quota Count ("**QC**") system, referred to in Condition 6, which classifies aircraft separately for landing and taking off, based on official noise certification data derived from measurements made on actual aircraft: a helpful explanation by the Department for Transport ("**DfT**") is provided as **Appendix G1**. The DfT explains that aircraft may be classified differently for arrival and departure, depending on maximum certificated take-off weight ("**MTOW**"), maximum certified landing weight ("**MLW**") and engine fit [**pg 6**, §4.8]. This is relevant to the determination of both Applications 1 and 3.

24. The Council will also be familiar with the notices issued pursuant to s.78 of the Civil Aviation Act 1982 for the purpose of avoiding, limiting or mitigating the effects of noise and vibration connected with the taking-off or landing of aircraft at a designated airport ("**NOTAMs**"), referred to in Condition 6. Planning permission 29/114/93/FU, which modified flight times and was approved on 19/1/94, referred to the NOTAM which was in place at the time: UK NOTAM S45/1993 ("**1993 NOTAM**"). When this was varied in 2007 and the Permission was issued, the previous conditions citing the 1993 NOTAM were repeated, but as the Council is aware, NOTAMs are regularly updated. This is linked to the QC system, as the NOTAMs list the noise classifications for arrivals and departures of specific aircraft, with the relevant certified maximum take-off and landing weights falling within the QC bands. They also define "exempt aircraft", which are outwith the QC system.

25. Over the course of the relevant period for Applications 1 and 3, ie 2008-2019, there will have been a number of different NOTAMs in force.

General observation about LBA's evidence

26. LBA has, over the years, provided a considerable amount of information to the Council, some of which is available via the planning portal. GALBA has attempted to review the publicly-available information, but the volume of that information means that inevitably some may not have been reviewed. The reason for drawing the Council's attention to this considerable amount of information is that LBA has provided a very small snapshot of "evidence" to the Council in support of the Applications.

27. For example, Appendix 7 to the Application Statement is titled, on the header sheet (pg 31), "Reports produced by LCC", but in fact it only provides a single report from 2012. As shown in **Appendix G2**, and as one would expect, there have been numerous monitoring reports over the period 2008 – 2019.

Appendix G2 provides the monitoring reports to which GALBA has access on the Council's planning portal. They date from April 2008 – December 2012. The evidence they provide is referred to below, but it is telling that LBA has not provided or referred to all the monitoring reports over the relevant period. They are clearly crucially relevant, but have been omitted. This serious omission of itself reduces the clarity and cogency of LBA's evidence.

28. As set out below, from GALBA's review of the documents held by the Council which are publicly available, the Monitoring Reports and the information provided by LBA pursuant to Condition 12 contradict and undermine LBA's evidence.

29. Furthermore, the information provided by LBA pursuant to Condition 12 shows that, throughout the relevant period, LBA was positively asserting to the Council that it was complying with the relevant conditions. **Appendix G3** brings together the letters from LBA to the Council accompanying the monitoring information LBA provided. They show that:
    a. On 5 May 2011, LBA informed the Council that, for the period August 2011 – December 2011 inclusive, only two movements in total exceeded the night-time noise quota-count restrictions [**pg 44**];
    b. On a date likely 5 January 2012, LBA informed the Council that, for the period August 2011 – December 2011 inclusive, all aircraft movements complied with the night-time noise quota-count restrictions [**pg 45**];
    c. On 22 May 2012, LBA informed the Council that, for the period January – April 2012 inclusive, only five movements in total exceeded the night-time noise quota-count restrictions [**pg 46**];
    d. On 2 November 2012, LBA informed the Council that, for the period May – October 2012 inclusive, only three movements in total exceeded the night-time noise quota-count restrictions [**pg 47**];

e. On 22 April 2013, LBA informed the Council that, for the period November 2012 – March 2013 inclusive, only two movements in total exceeded the night-time noise quota-count restrictions [**pg 48**];
f. On 24 September 2013, LBA informed the Council that, for the period April – August 2013 inclusive, only four movements in total exceeded the night-time noise quota-count restrictions [**pg 49**];
g. On 27 August 2014, LBA informed the Council that, for the period September 2013 – August 2014 inclusive, only seven movements in total exceeded the night-time noise quota-count restrictions [**pg 50**];
h. On 13 October 2015, LBA informed the Council that, for the period September 2014 – August 2015 inclusive, all aircraft movements complied with the night-time noise quota-count restrictions [**pg 51**].

30. These statements are completely at odds with the information provided by LBA in support of the Applications. Either they wholly undermine LBA's evidence, or they amount to evidence of LBA continually providing positive and deliberately misleading false statements designed to successfully prevent enforcement action (ie concealment/deception). It is highly likely that there are letters from LBA to the Council that cover the whole of the relevant period, which will also likely be completely at odds with the information provided in support of the Applications and/or show deception.

31. It is also highly likely that the Council holds more evidence obtained as part of the monitoring regime under Condition 12 and provided with various planning applications by LBA, which wholly undermines the cogency of the evidence that LBA relies on as supporting the CLEUD applications.

Application 1 (05440)

32. LBA clarified that this application seeks confirmation of immunity against enforcement of Condition 4 of the Permission in respect of the departure of

aircraft with a QC of 1 during the night-time period, based on ten years of continuous breach from 2008 to 2019.

33. It is agreed that Condition 4 prohibits departures in the night-time period by aircraft with a QC of 1. However, as mentioned above, this prohibition is subject to the limited exceptions provided for by Condition 9.

34. As set out below, LBA has failed to provide evidence that demonstrates, on a balance of probabilities, that it has breached Condition 4 for a continuous period of 10 years.

35. Further, even if LBA's evidence of breach were accepted (which it cannot be, given this, as well as the inaccuracies and lack of clarity identified below), then in any event: (i) the evidence does not demonstrate a "continuous" breach and (ii) LBA's concealment of the breaches.

Inaccurate, Unclear or Missing Evidence

36. LBA has failed to provide any information or evidence relevant to Application 1 which shows that the exemption applicable to emergencies in Condition 9 were not applicable to the movements purportedly in breach of Condition 4, on which LBA relies. The failure to do this undermines the cogency of LBA's evidence.

37. The letters from LBA to the Council in **Appendix G3** bring specific movements over the period 2011-2015 to the Council's attention, which LBA stated had exceeded the night-time noise quota-count restrictions. The movements listed in the letters are all different from the movements listed in the detailed tables in LBA's Appendix 4. Either Appendix 4 is inaccurate, and so does not provide evidence capable of demonstrating anything on the balance of probabilities, or LBA expressly stated to the Council that the movements relied on in

Appendix 4 complied with the relevant restrictions (see the section on Concealment below).

38. Table 2 in LBA's Appendix 4 shows the MTOW for the B737-800 aircraft as 77,000 kg (77 tonnes). The 1993 NOTAM does not list the relevant MTOW for B737-800 aircraft. This can be seen in later NOTAMs and remains listed in the current NOTAM (AIR S/007/2023, 9 February 2023) [**Appendix G4**]. This shows the MTOW for different B737-800 aircraft with various engine-types and winglet-configurations [**pg 71**]. This in fact shows that, for all configurations of B737-800 aircraft, the relevant MTOW for QC 1 is 79.02 tonnes. For one configuration of B737-800 aircraft, an MTOW of 77 tonnes results in a QC of 0.5, not a QC of 1. Accordingly, LBA should have provided, for each movement by a B737-800 aircraft relied on, the exact model and configuration in order for its evidence cogently to support the assertion that all the movements relied on had a QC of 1. Furthermore, for other configurations of B737-800, the MTOW for QC 0.5 are close to, but below, 77. If, for each individual flight relied on by LBA, the aircraft were in actuality below their maximum take-off weight when they made the movement (for example because they were not full), then they could fall within QC 0.5, not QC 1. It is impossible to know from LBA's data. Accordingly, it is impossible for the Council to determine that there have been any breaches for the period 2015 – 2019, where the only movements LBA relies on are by B737-800 aircraft; for 2013, all but one movement relied on are by B737-800 aircraft.

39. In the period 2009-2013, when LBA was making applications for discharge of Condition 12, it provided with those applications tables of flight movements, by date and time and with other identifying information [**Appendices G5a-j**]. GALBA has cross-referenced the movements in LBA's Appendix 4 (B737-800 GGDFF and GGDFJ) with the movements recorded in **Appendices G5i and G5j** for 2013. This process threw up yet more inconsistencies:

a. The relevant flight GGDFF is not listed in **Appendix G5i**. The entry for 31/3/13 relating to GGDFF in LBA's Appendix 4 omits the departure date and time, suggesting that flight should not be counted. Two other flights (22/7/13 and 29/7/13) similarly omit that information and those purported flights do not appear in **Appendix G5j**. These flights should be discounted.
b. Every occasion flight GGDFJ appears in **Appendix G5j** (April – Aug 2013), it is listed with a QC of 0.5. As the engine is recorded as CFM56-7B27 (which the NOTAM in **Appendix G4** lists as one of the types of engine where the QC count is 0.5 when MTOW is 73.1 tonnes [**pg 71**]), this supports GALBA's contention that these flights properly fall within QC 0.5. Accordingly, all but one flight in 2013 should be discounted.
c. Given that LBA relies on the same plane for other years, that means that half of the flights in 2015, all of 2016 and all but one flight in 2018 should be discounted.

40. Accordingly, LBA has not begun to provide cogent evidence to support the breaches on which it relies.

<u>No "continuous" breach</u>

41. Even if LBA's evidence were cogent (which it is not), LBA's Appendix 4 shows fewer than ten breaches in nine of the 11 years listed. The Monitoring Reports in **Appendix G2** show that the Council itself has treated such low levels of breach as de minimis for enforcement purposes (apart from some consideration of enforcement in relation to recurring problems with a specific route):
    a. In April 2008, the Council considered breaches occurring in 2004-2005; 2005-2006 and 2006-2007. These are outside the period relied on by LBA, but are mentioned because they show a clear pattern by the Council of treating low levels of breach as de minimis. 17

movements in breach in 2004-2005 (0.8% of a total of 2115 movements); five movements in 2005 – 2006 (0.2% of 2180 movements) and 4 movements in 2006-2007 (0.1% of 2792 movements) were effectively de minimis (para 2.1) [**pg 9**];

b. In April 2010, the Council considered that the 15 breaches identified by LBA from November 2007 – October 2008 were effectively de minimis, because they represented only 0.6% of the total of 2326 movements that took place over the year (para 2.2) [**pg 14**]. The same approach was taken for the 10 movements identified for November 2008 – October 2009 (0.7% of the total of 1,528 movements) (para 2.4) [**pg 14**];

c. In April 2011, the Council considered that the two breaches identified by LBA from September 2010 – February 2011 were effectively de minimis, because they represented only 0.2% of the total of 960 movements that took place over the period (para 3.2) [**pg 28**];

d. In December 2011, no movements were listed in breach of planning conditions for the period March – October 2011 (para 3.1) [**pg 34**];

e. In December 2012, the Council considered that the eight breaches identified by LBA from November 2011 – October 2012 were effectively de minimis, because they represented only 0.3% of the total of 2330 movements that took place over the year (para 3.8) [**pg 41**].

42. Arguably, LBA's evidence in Appendix 4 thus establishes that no breaches took place over the period at all, as the numbers are all lower than have previously been treated as de minimis by the Council (which in 2008 treated 17 movements in a year as de minimis).[1]

[1] Only when a particular route was repeatedly problematic did the Council consider taking enforcement action, see the 7 October 2010 report para 4.6 [**pg 24**]; the number of breaches then reduced (28 April 2011 report para 5.2) [**pg 30**] and enforcement was not considered appropriate.

43. GALBA's position is that the years where the number of breaches are in single digits (2010; 2011; 2013 and 2014-2019) are plainly de minimis; 2011 is a standout in this regard as only two breaches are relied on. Accordingly, LBA's evidence shows there has not been a continuous breach over the 10-year period.

Concealment

44. Even if LBA's evidence were cogent (which it is not) and showed a continuous breach (which it does not), Application 1 should not be granted because LBA concealed the breaches on which it now relies. As set out above, all of the movements listed in the detailed tables in LBA's Appendix 4 are different from the movements in breach that LBA brought to the Council's attention in the letters in **Appendix G3** and thus listed in the monitoring reports in **Appendix G2** as part of the monitoring obligation under Condition 12. Accordingly, over the period January 2008 – October 2012, GALBA's evidence shows that LBA did not bring any of the movements now relied on to the Council's attention, but instead brought a completely different set of movements to the Council's attention as outwith the conditions. This amounts to LBA providing positive and deliberately misleading false statements to the Council, designed to successfully prevent enforcement action.

45. Furthermore, as set out in §39 above, the detailed information in **Appendix G5j** shows that LBA declared as QC 0.5 flights it now relies on as QC 1. This also amounts to LBA providing positive and deliberately misleading false statements to the Council, designed to successfully prevent enforcement action. Accordingly, the time limit for enforcement in s.171B TCPA 1990 does not start to run until September 2013 at the earliest, meaning LBA cannot show the requisite 10-year period.

46. However, LBA will have provided monitoring information to the Council for the period September 2013 – December 2019, which may equally amount to positive and deliberately misleading false statements to the Council, designed to successfully prevent enforcement action. GALBA asks that the Council reviews its records to determine whether this is the case.

Application 3 (05442)

47. LBA clarified that this application seeks confirmation of immunity against enforcement of Conditions 6(a), 6(b) and 6(c) of the Permission in respect of the prohibition of night-time movements of aircraft with a quota count of 0.25, based on ten years of continuous breach. This is based on LBA's Appendix 5, comprised of landings by "757-200 aircraft operated by Jet2" between 2008 and 2018.[2]

Main Response

48. The starting point in determining this Application is the proper interpretation of Condition 6(a)-(b). LBA asserts that under Condition 6(a)-(b) the only permitted movements are by aircraft classified as falling within QC 0.5 and 1 (for arrivals) or QC 0.5 (for departures). As a result, LBA claims that no modern aircraft – which have a QC of 0, 0.125 or 0.25 – are permitted by Condition 6(a)-(b).

49. This is an incorrect interpretation of the Condition. As per the well-established principles of interpretation set out above, regard must be had to the plain meaning of the words as understood by the reasonable reader, in light of the overall context of the Permission and common sense. Both (a) and (b) are defined by reference to "*aircraft classified as falling within QC 0.5 … as defined in [the 1993 NOTAM] issued by the Civil Aviation Authority and any*

[2] This is the period given in LBA's clarification letter, pg 3.

succeeding regulations or amendments/additions/deletions". The express incorporation of any successor NOTAMs indicates that the Condition must be interpreted in accordance with any up-to-date Notices. It is these later Notices that recognised the modern QC values, and the Condition must therefore be read as incorporating such modern aircraft.

50. This interpretation is also supported by reference to common sense arguments and the planning purpose. The stated reason for the Condition is "*to minimise the potential for increased noise disturbance to residents in the vicinity of the airport*". LBA's preferred interpretation would entirely undermine this purpose, because it would prevent all night-time movements by modern, quieter aircraft – and instead require airlines to continue using a noisier and outdated fleet despite technological advancements.

51. Applying the proper principles of construction, one must necessarily imply within Condition 6(a)-(b) references to the modern QC values, such that aircraft having a QC of 0, 0.125 and 0.25 are obviously permitted under Condition 6.

52. Accordingly, LBA is not entitled to the CLEUD applied for in Application 3, because QC 0.25 movements are not in breach of Condition 6(a) and 6(b). They fall within the Condition and so must be counted within the overall night-time flying caps in Condition 7. LBA's CLEUD is a thinly masked attempt to take many hundreds of flights outside of those caps.

Response on the Evidence

53. Furthermore, and in any event, LBA's evidence on Application 3 is not sufficiently cogent to justify granting the CLEUD. Accordingly, whether or not the Council agrees with the interpretation of Condition 6(a) and (b) above, the Application should be refused.

54. GALBA repeats the general points made at §§26-31 above about LBA's failure to provide or reference the monitoring reports and supporting information relevant for the period (including those in **Appendices G2, G3 and G5a-j**) and the other information LBA had provided to the Council. This serious omission of itself reduces the clarity and cogency of LBA's evidence.

55. GALBA also repeats, specifically, the analysis at §§29-30 of the occasions on which LBA positively provided specific statements about the extent of breaches. These are completely at odds with LBA's assertion in relation to Application 3 that more than 1000 movements were in breach over the period 2008-2013.

Inaccurate Evidence

56. LBA's Appendix 5 includes hundreds of movements where the time is between 22:00 and 23:00, ie outside the night-time period.

57. There is also a mismatch between the information in LBA's Appendix 5 and that submitted to the Council by LBA in the course of application 20/02559/FU. In support of that application, LBA provided an Environmental Statement produced by Quod. Chapter 10 shows the 2018 baseline, most clearly in Table 10.4-4 [**Appendix G6**]. This shows 357 night-time movements of a Boeing 757-200 aircraft [**pgs 79-80**], but no departures of such aircraft are QC 0.25 [**Appendix G4 pg 72**], so the relevant total would at best be 179 movements.[3] LBA relies on the landings by B757-200 aircraft operated by Jet2 in its Appendix 5. Mr Hodder's declaration states this shows 385 relevant movements for 2018 [LBA Appendix 2 §6], which is a considerable

[3] Even on arrival, only two type of B737-200 are QC 0.5: where the maximin certified landing weight is 93.89 tonnes.

discrepancy with information relied on by LBA's professional consultants as the baseline for its assessment.

58. The same issue as flagged in §38 above concerning Application 1 arises again for Application 3: B757-200 aircraft are only QC 0.25 on landing if the MLW is 95.26 tonnes [**Appendix G4 pg 62**]. Accordingly, LBA should have provided, for each movement relied on in Appendix 5, the exact model and configuration of B757-200 aircraft in order for its evidence cogently to support the assertion that all the relevant movements had a QC of 0.25.

59. The same point applies to the information in LBA's Appendix 6 (which, it is noted, only applies to one year – 2011). It is simply not possible from the information in that document for the Council to determine the QC of the landings listed.

60. As with Application 1, GALBA has cross-referenced the movements relied on by LBA with the information LBA provided to the Council to discharge Condition 12 [**Appendices G5a-j**]. Two key points emerge. First, it appears that the B757-200 flights are all listed with engine RB211-535E4, which is the configuration that is only QC 0.25 on landing if the MLW is 95.26 tonnes. This makes good GALBA's point above.

61. Second, for each of the periods that LBA filed monitoring reports to which GALBA has access (from December 2009 – August 2013), it appears that none of the movements of B757-200s in the supporting information were reported QC 0.25. They were reported predominantly as QC 0.5; sometimes they were reported as exempt; sometimes no QC value was given. **Appendix G7** shows spot checks of the reporting of these movements as QC 0.5.

62. GALBA has not undertaken further analysis to check that all the movements relied on by LBA in its Appendix 5 are listed in Appendices G5a-j, so there may well be further discrepancies.

Concealment

63. Even if LBA's evidence were cogent (which it is not), Application 3 should not be granted because LBA concealed the breaches on which it now relies. As set out at §55 above, over the period January 2008 – October 2012, GALBA's evidence shows that LBA did not bring any of the movements now relied on to the Council's attention, but instead brought a completely different set of movements to the Council's attention as outwith the conditions. This amounts to LBA providing positive and deliberately misleading false statements to the Council, designed to successfully prevent enforcement action.

64. Furthermore, as set out in §61 above, the detailed information in **Appendices G5a-j** shows that LBA declared as QC 0.5 or as exempt flights it now relies on as QC 0.25. This also amounts to LBA providing positive and deliberately misleading false statements to the Council, designed to successfully prevent enforcement action. Accordingly, the time limit for enforcement in s.171B TCPA 1990 does not start to run until August 2013 at the earliest, meaning LBA cannot show the requisite 10-year period.

65. However, LBA will have provided monitoring information to the Council for the period August 2013 – December 2019, which may equally amount to positive and deliberately misleading false statements to the Council, designed to successfully prevent enforcement action. GALBA asks that the Council reviews its records to determine whether this is the case.

Applications 2, 4 and 5

66. The Council has not invited evidence in respect of Applications 2, 4 and 5. GALBA endorses this approach on the clear basis that these applications do not constitute lawful applications under s.191 of the TCPA 1990. Section 191(1) is limited to applications seeking to ascertain whether a specified use, operation or any other matter constituting a failure to comply with a condition is lawful. This "lawfulness" is defined: for whether operations are lawful, by s.191(2); for compliance with planning conditions, by s.191(3). CLEUD applications are not an opportunity for developers to ascertain any other matters falling outside the prescribed list in s.191(1).

67. In particular, the CLEUD process is not a vehicle to allow applicants to establish the correct legal meaning of planning conditions. Another vehicle exists for this: a part 8 claim under the Civil Procedure Rules for a declaration by the High Court.

68. More importantly, under ss.191(4)-(5), a local planning authority's powers and duties are restricted to issuing certificates describing the lawful use, operation or other matter in question. To stray beyond that, in the manner invited by LBA, would be *ultra vires* of the Council's powers.

69. However, for clarity, we provide brief comments in respect of each of these Applications.

Application 2

70. The proper interpretation of Condition 6(a)-(b) is dealt with at §48-52, above. It should be noted that, while the proper understanding of Condition 6(a)-(b) is plainly needed to determine Application 3 (whether LBA has been operating outwith the condition for ten years as alleged and so is entitled to a CLEUD),

there is no freestanding power under s.191 TCPA 1990 for the Council just to assert the correct meaning of a condition.

Application 4

71. This Application seeks clarification of the correct meaning of Condition 6(e). LBA argues that this paragraph – "Exempt aircraft defined by UK NOTAM S45/1993" – is restricted to the 1993 NOTAM and that no account may be taken of any succeeding regulations or amendments.

72. This is a legally flawed approach to the interpretation of the Conditions. GALBA's position is that properly interpreted, Condition 6(e) includes by implication any updating NOTAM. LBA rightly accepts that there is no bar on the implication of terms when interpretating planning conditions (*Trump*, §32; *Lambeth*, §27). As set out above, the correct approach is to consider what a reasonable reader would understand the words to mean, taking into account the context of the conditions and the consent, and applying common sense. The short answer here is that when Condition 6 is read as a whole, and sensibly, every reference to the 1993 NOTAM must be read as including any updating NOTAM issued by the Secretary of State.

73. LBA's interpretation to the contrary would be absurd – it would fly in the face of both common sense and indeed the purpose underpinning the NOTAMs (and the relevant conditions), which is to deal appropriately with the effects of noise and vibration connected with aircraft movements. There is simply no logical nor planning basis why recourse must be had to the latest, up-to-date NOTAM for some permitted aircraft movements, but that for other aircraft movements the Council and the developer are unable to rely on the latest issued NOTAM. LBA's approach is accordingly wrong in law.

Application 5

74. This Application seeks clarification of the correct meaning of the last sentence of Condition 9. LBA argues that this sentence – "Aircraft movements in these categories are exempt from night-time restrictions and will not count against the night-time period limits specified in condition 7" – encompasses delayed landings and emergency flights by all aircraft.

75. This too is a legally flawed interpretation of Condition 9. The correct construction of Condition 9 is that "these categories" is a reference to categories (a) and (b) which deal with delays and emergencies respectively – and both of which are further restricted by reference to aircraft movements falling within Conditions 4-5 only. Therefore, the legal position is that it is only those aircraft movements which would otherwise be prohibited by Conditions 4-5, and which are allowed under Condition 9 in two limited categories, that do not count towards the overall night-time period caps set in Condition 7.

76. This correct legal interpretation is clear from the plain words of Condition 9, read as a whole and in the context of the Permission, and (once again) applying common sense. Condition 9 is expressly dealing with night-time movements by aircraft which are defined in Conditions 4-5 only. This much is evident from the plain words of the Condition. The last sentence cannot lawfully be separated from the remainder of Condition 9 so as to be read as a freestanding exemption. This is a complete answer to LBA's assertion.

77. But further, and in any event, this reading makes planning sense. Contrary to LBA's assertions, the fact that delayed landings or emergency flights of aircraft which are permitted to operate in the night-time period do not have the benefit of Condition 9 offers the most sensible reading of the Condition. This is because flights that are permitted by Condition 6 simply do not require any exemptions in order to operate in the night-time period. The upshot is that

such movements continue to be counted within the overall caps set by Condition 7. This is neither unworkable nor illogical, but rather recognises that limited exemptions may need to be carved out in respect of the aircraft movements that are prohibited in the night-time period.

Yours faithfully,

Leigh Day