Blackbushe Airport

Blackbushe Airport Limited's Reply to Public Consultation Responses to its Common Land Application made under Paragraph 6 of Schedule 2 of the Commons Act 2006

1 Introduction

1.1 This statement is made by Blackbushe Airport Limited in reply to the public consultation responses provided to us by Hampshire County Council on 18 December 2017. We have been provided with copies of 103 letters of objections and 10 letters of support. Two of the letters of objections were submitted outside of the statutory consultation period.

1.2 Blackbushe Airport's application has been made under paragraph 6 of Schedule 2 of the Commons Act 2006 ("the 2006 Act"). Paragraph 6 states that "*if a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove that land from its register of common land*".

1.3 The criteria relevant to the determination of our application are set out in paragraph 6(2) as follows:

(a) The land was provisionally registered as common land under section 4 of the 1965 Act;

(b) On the date of the provisional registration the land was covered by a building or was within the curtilage of a building;

(c) The provisional registration became final; and

(d) Since the date of the provisional registration the land has at all times been, and still is, covered by a building or within the curtilage of a building.

1.4 No objections seek to dispute that criteria 6(2)(d) is met in respect of this application.

1.5 We have identified 23 letters of objection that include representations on the application criteria. One objection states that criteria 6(2)(a) has not been met and the remainder focus on paragraphs 6(2)(b) and 6(2)(d), specifically whether the Application Land falls within the curtilage of the Terminal Building.

1.6 Whilst the other objections do not make specific arguments on the application criteria, there are a number of other issues which have been commonly raised and, in order to provide some clarification, we have included section 6 in response to wider objections submitted during the consultation period.

2 Objection based on paragraph 6(2)(a)

2.1 We have been provided with one objection that states that we have not included with our application any evidence that the Application Land was provisionally registered on 16 May 1967.

2.2 Evidence of both provisional and final registration is set out in the Statutory Declaration of Cameron Ogden and the exhibits appended to that declaration. To summarise, the date of provisional registration is the date shown in entry number 1 of the Land section of the Common Land Register for Unit CL24 (a copy of which is appended to the Statutory Declaration of Cameron Ogden as exhibit CO6). Entry number 1 was made by the Registration Authority in accordance with the relevant legislation then in force being section 4 of the Commons Registration Act 1965 ("1965 Act"). Section 4(3) of the 1965 Act stated that *"A registration under this section shall be provisional only until it has become final under the following provisions of this Act". (Our underlining added for emphasis).* Where objections were made to the provisional registration, the provisional registration had to be referred to a Commons Commissioner in accordance with the 1965 Act. In the case of Unit CL24 (of which the Application Land comprises part), it was duly referred and the matter was considered by Commons Commissioner A.A Baden Fuller. A copy of Mr Baden Fuller's decision is annexed to the statutory Declaration of Cameron Ogden as Exhibit CO7. We note that on page 7 of Commissioner Baden Fuller's decision he refers to 16 May 1967 as *"the first registration of the Unit Land under the Act".* Entry number 2 in the Land Section of the Commons Register confirms that the registration of the land described in entry number 1 became final on 4 April 1978.

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3 Objections based on Paragraph 6(2)(b)

3.1 There are two elements to paragraph 6(2)(b). Firstly, it must be established that a building existed on the land at the date of provisional registration and secondly, once the existence of the building has been established, consideration must be given to the extent of the curtilage at that time.

3.2 The building at the date of provisional registration

3.3 A number of objections have claimed that the legislation is aimed at dwelling houses only so it cannot be used by the Airport to de-register a commercial building and its curtilage.

3.4 Whilst it is accepted that the most common scenario for use of this part of the 2006 Act will often be for the de-registration of a dwelling and its garden, the 2006 Act does not restrict its use to any particular building type in this way. Paragraph 6 simply refers to a building without further definition. The legislation has already been used for de-registration of a non-domestic building and its curtilage in the case of a covered reservoir at Trewint Village Green[1] in Cornwall (copy enclosed at Appendix 1).

3.5 We also note that the OSS response (at paragraph 1.5) does not dispute that the terminal and clubhouse buildings meet this part of the statutory test.

3.6 The curtilage at the date of provisional registration

Domestic Use

3.7 A number of objections state that the meaning of curtilage is restricted to domestic use. It is suggested therefore that the terminal building is not a house or dwelling, so the land attached to it cannot meet the definition of curtilage. In particular, we note that the objection from Mr J Hayward suggests that section 22 lists curtilage as "a dwelling house with a garden".

3.8 As noted at paragraph 3.4 above, the relevant legislation is not restricted in this way and can be applied equally to a domestic curtilage, a curtilage attached to a commercial building or any other type of building. For clarification, Section 22 makes no reference to "a dwelling house with a garden".

A Small Area

3.9 A number of objections have focused on the size of the curtilage claimed. The main thrust of the argument is that for the purposes of the legislation, the curtilage of a building must be a small area/restricted area, that the application land is disproportionate to the size of the building and cannot reasonably be considered curtilage. In addition, the OSS has made detailed representations on the size of the claimed curtilage and the relevance of certain cases cited in the Supporting Statement. The OSS state that *"the society believes that Skerritts and other cases derived from listed building law, have limited value in the interpretation of the relevant tests"*[2]. Similarly, they state that *"it is simply not credible to apply the precepts of Skerrits and Sutcliffe to the interpretation of paragraph 6"*.[3] The OSS also considers that its analysis of relevant cases is consistent with the relevant online Government guidance on paragraph 6 of Schedule 2 called "Commons Registration Authorities: Correct Mistakes"[4].

3.10 The Government's current guidance states that *"the meaning of 'curtilage' isn't clearly defined. In recent judgments, common ownership seems to be less important than current use - for example, a basement area, driveway, passageway, garden and yard. A whole common or green is unlikely to be the curtilage of a building, but if a house has a physical enclosure around it (eg a wall or a fence), then the whole area within that enclosure (except the house) could be considered to be curtilage."*

3.11 The guidance does not state which case law is relevant to the consideration of curtilage for the purposes of paragraph 6 of Schedule 2. We also note that both Skerrits and Sutcliffe are referred to by the High

[1] The land is known as Trwewint Village Green but it is registered common land.

[2] Paragraph 2.8 of the OSS response

[3] Paragraph 5.9 of the OSS Response

[4] Published in November 2015 at https://www.gov.uk/guidance/commons-registration-authorities-correct-mistakes

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Court[5] in the very recent planning enforcement decision of *Burford v Secretary of State [2017] EWHC 1493*[6] (where the relevant building was not listed) as relevant cases for the assessment of curtilage, alongside the case of Dyer cited by the OSS. Whilst we acknowledge that the cases cited by the OSS are also relevant for the decision-maker to consider, we disagree that the cases of Skerrits and Sutcliffe should be disregarded in the way suggested by the OSS.

3.12 The overriding point coming from the cases referred to in the Supporting Statement and additional cases referred to by the OSS is that the extent of a curtilage in any given case is a matter of fact and degree depending on the context and particular circumstances of each case. Ultimately it will be for the decision maker to decide.

3.13 With regard to size, the Government's guidance does not preclude the possibility that a curtilage could be a large area when it states that *"a whole common or green is unlikely to be the curtilage of a building"* (our underlining for emphasis). Use of the word 'unlikely' is important here because it leaves open the possibility that the particular facts of a case could mean that the curtilage extends to a whole common. The likelihood of a large area of land comprising a curtilage in this case is fundamentally linked to the purpose to which the buildings and the land associated with them have been put, which in the case of aviation buildings and associated airfield involves a use that is inherently linked to larger rather than smaller areas of land. The Application Land is an area that is defined by its usage for aviation purposes and on its particular facts should be regarded as the curtilage of the terminal building.

3.14 This guidance is reflected in the approach taken in recent Planning Inspectorate decisions on Schedule 2, paragraph 6. For example, in the Trewint Mills case the Inspector states that *"the question of whether land is considered to be within the curtilage of a building is a question of fact and degree, considering the use and function of the land; ownership does not in itself demonstrate that specific land is part of the curtilage."* In addition, the Inspector states *"I consider that to fall within the curtilage of a building, land should serve the purpose of the building in some reasonably necessary or useful manner."* Whilst it is acknowledged that the decision also states, *"It is likely to be a small area forming part and parcel with the building which it contained or to which it was attached, intimately associated with the building."* Similar to the above, the use of the term 'likely' (or, in other Planning Inspectorate decisions, 'generally') does not mean it must always be a small area. The size of the land is not a determining or overriding factor. All the relevant factors in any given case need to be assessed and weighed-up by the decision maker.

3.15 The application does not seek to de-register the whole common or even all the land within the freehold titles. Whilst it is accepted that in many instances, and in many previously decided cases, the areas of land claimed as curtilage were smaller, the situation at Blackbushe is one of those more rare situations where a relatively large area of land defined by a particular usage must be considered to be the curtilage of the Terminal Building when regard is had to the specific circumstances and all the relevant factors as set out in the Supporting Statement and this Reply.

3.16 Function and Use

3.17 It appears to be generally accepted that it is relevant for the decision maker to consider the relationship between the building and the land including whether the application area is ancillary to the Terminal Building and is land that serves the purpose of the Terminal Building in some necessary and reasonably useful way or in other words, the land and the Building should be intimately connected.

3.18 Whilst at para 5.14 of its response the OSS appears to accept that the application land could not realistically function without the existence of the Terminal Building, the OSS disputes that this intimate relationship between the Terminal Building and the other parts of the application land upon which the apron, runways and taxiways are located means that they fall within its curtilage. In addition, the OSS claim that the fact that the apron, runways and taxiways and other land fall within the operational area has no bearing on whether those and other lands fall within the curtilage of the Terminal Building[7]. In

[5] See paragraphs 32 to 37 of Mr Justice Supperstone's judgement

[6] NB – Burford is also referred to by Cycling UK in their supplementary submission dated

[7] Paragraph 5.15 of the OSS Response

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particular, it is claimed that our analysis is exposed if you consider a different layout such as at other airports where there is a separate terminal building and stand-alone control tower.

3.19 Analogies from other airport situations have to be considered by reference to how close in fact are the circumstances of those cases. The decision maker must assess the facts of the situation at Blackbushe Airport at the date of provisional registration and up to the present day. At Blackbushe, it is a matter of fact that the control tower is located within the Terminal Building and has been since the date of provisional registration.

3.20 Other representations (including those from Lydia Frew and Steve Byrne[8]) have argued that the land is not ancillary to the building, that it is the building that serves the purpose of the land and not the land that serves the purpose of the building.

3.21 The key purpose of the Terminal Building is to enable Blackbushe to operate as a licensed aerodrome as it houses the control tower. It also has a number of other important functions. It is the place of work for Airport staff, it is a flying school and it provides support facilities for pilots, crew and passengers. At Blackbushe, the Terminal Building is the central hub of this licensed aerodrome and the Application Land is ancillary to it. The apron, runways and taxiways serve the main purpose of the Terminal Building which is to enable the operation of Blackbushe Airport as a licensed aerodrome. The apron, runways and taxiways also provide training facilities for the flying school. The car parking area is ancillary to the Terminal Building which it serves by providing parking for the users of the Terminal Building i.e. the staff, pilots, crew and passengers. The café located in the Clubhouse is an ancillary amenity facility which is used by the staff, pilot, crew and passengers. At the date of provisional registration, this building used to house the Three Counties Clubhouse which also provided amenity facilities for the users of the Terminal Building.

3.22 As an additional point, the OSS claim that it is *"not credible that the curtilage of the terminal building includes land on both sides of the fence (separating airside and landside) which serves such a strong purpose of demarcation of use and function of the application land."*[9]

3.23 It is acknowledged that there is a fence demarcating the airside and landside facilities at the airport, but that does not mean that one should conclude that the curtilage of the terminal building can only include either airside or landside areas and not both. The airside and landside areas both connect to the Terminal Building and are components of the same wider airport use. As the central hub of the airport the Terminal Building is intimately connected to both airside and landside areas and facilities. The various parts of the Terminal Building are set out clearly at paragraphs 23 to 30 of Mick Lambert's statutory declaration and many of the areas within the Terminal Building have dual purposes, for example, the passenger, pilot and crew lounges provide areas where those users can wait to board aircraft on the airside after having arrived at the airport via the landside. The fence is in place for logical safety reasons and not to define or demarcate any entirely separate or standalone use or function of the land.

3.24 Buildings

3.25 A main contention from objectors is that land cannot be within the curtilage of two or more buildings and that the buildings at Blackbushe Airport each contain separate intimate activities of their own and therefore each has its own curtilage.

3.26 The Supporting Statement clearly set out how the Application Land (including the Clubhouse and other ancillary buildings) falls within the curtilage of the main Terminal Building. It is recognised however that the extent of the curtilage is a matter for the decision maker. In the event therefore that the decision maker disagrees with our position and concludes that the Clubhouse is not within the curtilage of the Terminal Building it is open to the decision maker to consider deregistration under paragraph 6 of Schedule 2 of each building and its curtilage that was in existence at provisional registration and where each relevant building remains on the land (i.e. the Clubhouse and the Terminal Building). We note that

[8] Representation received on 23 December 2017 outside the prescribed consultation period

[9] Paragraph 5.12 of the OSS Response

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at para 5.5 of its response the OSS accept that that each of the Terminal Building and the Clubhouse may have a curtilage for the purposes of the relevant tests.

3.27 As set out in the Supporting Statement at paragraph 2.8 by reference to the Sutcliffe case, our position is that a curtilage of one building may include other buildings. This is also acknowledged in the cases of *Methuen-Campbell v Walters [1979] 1 QB 525* (cited by the OSS) and *Denis Lowe v First Secretary of State, Tendring District Council [2003] EWCH 537,* and most recently in the *Burford* decision by its reference to *Lowe* at paragraph 37 of the judgement.

3.28 Enclosure

3.29 Some objections state that the Application land is not curtilage because:

(a) It not part of a single enclosure, in particular a right of way runs through it; and

(b) It includes open fields beyond any possible curtilage.

3.30 As set out in the Government's guidance (referred to at paragraph 3.10) above, enclosure is a factor that may indicate the extent of the curtilage but it is not by itself determinative. However, it can be seen from the various photos provided with our application that the boundary of the licensed aerodrome has always been clearly demarcated and has for all intents and purposes been enclosed around its boundary by various features including the road, fences and/or hedgerows/trees since the date of provisional registration.

3.31 It is also acknowledged that a right of way (known as the Welsh Drive) exists which crosses the runway area. Access to the right of way is restricted for safety reasons. Whilst the Airport would (and has previously done in the past) facilitate an individual walking the route of the Welsh Drive by prior arrangement with the Airport Manager, most walkers choose to walk around the perimeter of the Airport, not least because it is not possible to walk the whole length of the Welsh Drive once a person crosses onto BCA's adjoining land where it meets with the former hangar buildings. The existence of the right of way does not in itself prevent the land it crosses forming part of the curtilage of the Terminal Building.

3.32 The Application Land does not include open fields. The presence of runways, hard-standings and buildings within the Application Land means that it does not have the character of open fields. The Application Land only includes land that has remained within the area of the licensed aerodrome since provisional registration.

4 Objections based on paragraph 6(2)(d)

4.1 For the purposes of paragraph 6(2)(d), the decision maker must consider whether the Terminal Building has remained on the Application Land and whether the Application Land has remained within the curtilage of the Terminal Building since the date of provisional registration.

4.2 We note that none of the objections seek to suggest that the Terminal Building has not been in situ since 1967 (the date of provisional registration). Similarly, we note that none of the objections suggest that the Clubhouse Building has not been in situ since the date of provisional registration either.

4.3 As with paragraph 6(2)(b), the objections relate to the extent of the curtilage of the Terminal Building or in the event the decision maker concludes that the Clubhouse falls outside the curtilage of the Terminal Building, the extent of any separate curtilages of (i) the Terminal Building and (ii) the Clubhouse.

4.4 The objections relating to the definition of curtilage have already been covered under paragraphs 3.6 to 3.32 above and our response applies equally here.

5 Conclusions on Application Criteria

5.1 As set out in detail above, our position remains that the Application Land meets all the requirements of paragraph 6 of Schedule 2 of the 2006 Act and accordingly, those areas of the Application Land falling

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within the registered Common Land Unit CL24 (known as Yateley Common) should be removed from Hampshire County Council's Common Land register.

6 Other Issues raised during Consultation

6.1 A number of other issues that go beyond the relevant application criteria have been raised during the consultation. Whilst not relevant to the determination of the application based on the Paragraph 6 criteria, in order to provide some clarity, we have set out some comments on the main themes raised below.

'Wrongly Registered/Mistaken Registration'

6.2 We note that a number of responses have stated or suggested that the application is not valid because there was no mistake with the original registration.

6.3 We understand from the representations that the use of the phrases 'wrongly registered' or 'mistaken registration' are contentious for the objectors. We also acknowledge that these phrases are used in the Supporting Statement. However, we also note that those phrases are commonly used in paragraph 6 cases because it is one of the categories that falls under Schedule 2 which is headed "non-registration or "mistaken registration under the 1965 Act".

6.4 On this point, we agree with the Open Spaces Society's (OSS) submissions at paragraphs 1.8 to 1.10 of their response where it acknowledges that the question of whether or not the land was wrongly or mistakenly registered under the Commons Registration Act 1965 is not relevant for the purposes of determining applications made under paragraph 6 of Schedule 2.

Ownership

6.5 A number of objections make comments about the ownership of the land. In particular, some objections have suggested that common land cannot be owned by an individual, that the land is not owned by the Applicant or that it remains unregistered at the Land Registry.

6.6 We have submitted clear evidence of ownership with our Application. The Statutory Declaration of Cameron Ogden confirms that the Application land is registered under title numbers HP623124 and HP707673. Copies of the Land Registry title register and plan documents dated 30 August 2016 were submitted with our application (see Exhibits CO1 – CO4). Due to the passage of time, we enclose with this Reply up to date copies of those Land Registry titles (see Appendix 2). The titles remain unchanged. The freehold owner is Falcon PropCo 4 Limited which leases the land to us. A copy of the lease was submitted with the application as exhibit CO5. The freehold owner has given consent for the Airport to make the application. A copy of that letter is appended to this statement as Appendix 3.

6.7 The early history of ownership of the Application Land is set out in Commissioner Baden Fuller's decision (see pg7 exhibit CO7). At that time, the Application Land was within a wider area described in the Commissioner's decision as the "Blackbushe Part". The "Blackbushe Part" (as acknowledged in the Commissioner's decision) was registered under title number HP6277. It is worth noting that the Land section of the Commons Register does not refer to the names of all the various owners of CL24 because the land was registered at the Land Registry and section 12 of the Commons Registration Act 1965 required the Registration Authority *"to delete the registration of ownership under this Act and indicate in the register in the prescribed manner that it has been registered under these Acts".* Entry 3 of the Land section of the Commons Register (exhibit CO6) does however duly note that part of the common land has been registered at the Land Registry. HP6277 was one of the titles noted at the time Entry 3 was included on the register.

6.8 The ownership of the land contained within HP6277 has been further subdivided over the years when separate areas have been conveyed at different times or to different entities. Those smaller parts have been given their own freehold of leasehold title numbers as appropriate, which is why the land leased to us and owned by Falcon PropCo 4 Limited is now registered under title numbers HP623124 and HP707673.

6.9 The history of ownership of the Application Land is well known and documented. As well as Commissioner Baden Fuller's decision, the more recent history of the site is referred to in both Peter

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Brown and Michael Lambert's Statutory Declarations. To summarise, the Church Commissioners were the original Lords of the Manor, they conveyed part of the common land to Lord Calthorpe in 1891. The Blackbushe Part of the land remained within the Calthorpe family's ownership at the time it was requisitioned by the Government during World War 2. After the derequisitioning of the land in 1960, part of the Calthorpe land was sold to A-V-M Bennett in 1961. AVM Bennett then sold it to Douglas Arnold in 1973 and Mr Arnold sold it to British Car Auctions ("BCA") in 1986. BCA most recently sold part of its landholding to Falcon PropCo 4 Limited in 2005.

Purpose of the Application

6.10 We note that concerns have been raised regarding the purpose of the application. The Airport wishes to improve its existing facilities and add new hangarage facilities to replace those retained by the previous owner. These facilities will continue to cater to the existing mix of light aircraft, helicopter and small jet aircraft that are using Blackbushe today. Integral to this is the ability to replace ageing temporary structures with modern permanent structures, re-align taxi-ways and aircraft parking areas, and to secure the active Airport boundary to improve safety and security.

6.11 The purpose of the proposed structures is to support long term maintenance and long term aircraft parking rather than to significantly increase flying activity. The current runway cannot be extended, not least because the land to the west and to the east of the Airport is owned by BCA and Hampshire County Council respectively. The runway length precludes aircraft larger than those already using the Airport due to the performance characteristics of such aircraft.

6.12 As well as planning permission, the improvements we wish to make would also need to be in compliance with the current registration of the land as common. The improvements cannot be authorised under section 38 of the Commons Act 2006 because they are of a type that fall outside the Government's policy for applications made under section 38. De-registration of the common land is therefore necessary to enable us to comply with our legal obligations going forwards.

Undesirable Development, SSSI/SPA designations and Duties under the Habitats Regulations

6.13 We understand that some people have concerns that any de-registration will lead to 'undesirable' development such as housing or industrial uses. That is not our intention. It is also worth noting that any such development would require planning permission and the concerns relating to any potential impacts of other development on the SSSI/SPA designations would be relevant to the determination of any such application in the event it were made, but they are not material to the determining criteria for this application under paragraph 6 of Schedule 2 to the 2006 Act.

6.14 We also note that the OSS has flagged that a decision maker has a duty to have regard to the requirements of the Habitats and Species Regulations 2010 ("2010 Habitats Regulations") so far as the designated area may be affected by the exercise of its functions. It should be noted that the 2010 Habitat Regulations have recently been consolidated and updated by the Conservation of Habitats and Species Regulations 2017 ("2017 Habitats Regulations"). The 2017 Habitats Regulations have been in force since 30 November 2017 and are now the relevant regulations to refer to for these purposes. Whilst we agree that decision makers should be mindful of their duties under the 2017 Habitats Regulations, this application, if granted, would not itself result in any change of use or detrimental impact on a designated area. The application is a decision on what land should be included within the common land register and is not in itself a decision granting permission for any development. Observations that any de-registration may lead to undesirable development and therefore negative impacts on the relative designations is speculative and not within the remit of this application. Deregistration of the Application Land would not decrease or remove the relevant habitats designations.

Land to be returned to community use if Airport ceases to exist

6.15 We also note that local residents have stated that the land should be returned to community use if the airport business fails. Any potential future use of the land can and is controlled through the planning system and the need for planning permission. Removal of the common land designation does not alter that.

Exchange Land should be provided as part of the application

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6.16 It is not a requirement of Paragraph 6 applications that exchange land should be provided.

Rights of Way

6.17 Concerns have been raised regarding Rights of Way and specifically the Welsh Drive. The removal of common land status does not impact the status of any public rights of way. This is a separate issue that is not relevant to the determination of this application.

Precedent

6.18 We note that concerns have been raised that this decision will set some sort of precedent. Apart from not being relevant to the application criteria, we do not consider that this will set a precedent as the facts of this case are, as already noted above, unusual. The extent of a building and its curtilage is a matter of fact and degree in every case and each case must be considered on its own merits.

Human Rights

6.19 The OSS (in section 6 of its consultation response) claims that deregistration would be contrary to Article 1 of the first protocol of the European Convention on Human Rights and therefore the Human Rights Act 1998 ("the HRA"). We acknowledge that Article 1 of the Protocol states that *"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."* We also draw the decision maker's attention to Section 3 of the HRA. Section 3(1) states that legislation *"must be read and given effect in a way which is compatible with Convention rights"* This legislation, if applied correctly is not incompatible with the HRA. In any event, it is also worth noting that section 3(1) is caveated by the phrase *"so far as it is possible to do so"* and, section 3(2) makes clear that, the Section 3(1) requirement does not affect the validity, continuing operation or enforcement of any primary (or subordinate legislation) in the event that it were found to be incompatible with the HRA.

Signed by

………… ……………

Cameron Ogden, Director of Blackbushe Airport Limited
On behalf of Blackbushe Airport Limited

1 February 2018

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Appendices

1 Trewint Village Green Inspector's Decision

2 Land Registry Titles – HP 707673 and HP623124

3 Falcon PropCo 4 Limited Letter of Consent