IN THE MATTER OF

LONDON ASHFORD AIRPORT LIMITED

PLANNING APPLICATIONS FOR PROPOSED NEW TERMINAL BUILDING AND EXTENSION TO EXISTING RUNWAY

JOINT OPINION

Introduction

1. We are asked to advise London Ashford Airport Ltd ("LAA"), the owners of London Ashford Airport at Lydd, Kent ("the Airport"), in respect of an Opinion by Matthew Horton QC dated 29th January 2009 provided to the Lydd Airport Action Group ("LAAG").

2. The Opinion concerns the question of what type of Appropriate Assessment should be carried out pursuant to the Conservation (Natural Habitats, etc) Regulations 1994 ("the Habitat Regulations") in respect of two planning applications made to Shepway District Council ("the Council") by LAA.

3. In that Opinion Mr Horton does not in fact set out the question on which he was asked to advise. However, at paragraph 31 Mr Horton sets out his conclusions as follows:

> "In my opinion the question on which I have to advise is difficult to answer with confidence. On balance, however, I consider that, on the facts of the present case, the Master Plan should be the subject of appropriate assessment as part of the process to be followed prior to determining the current planning applications. In summary, my reasons are as follows:
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> (i) The works and level of use proposed in the current applications are a "*project*" within the meaning of the Directive. Since they are formulate also in a form which has plans and explanatory test, I consider that they are also a 'plan' within the meaning of the Directive.
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> (ii) As a matter of fact, the *"project"* or *"plan"* in the current set of applications, were devised in the context of a more ambitious *"plan or project"*, namely the Master Plan, and are acknowledged to be the first phase of that more ambitious plan or project.
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> (iii) It is correct that the second phase of development envisaged within the Master Plan is intended to take place sequentially rather than

contemporaneously and therefore it is not within the same timescale as the first phase. Even if (which is far from certain in my opinion) that would justify not assessing that phase in combination with the first phase, such an approach would be based on a misunderstanding of the nature of a Master Plan; such a plan encompasses both phases and therefore the first phase is not an isolated proposal separable from the second, but is part of the overarching project in the Master Plan.

(iv) That being the case, in my opinion the Directive and the Regulations made thereunder require that the current applications be assessed in combination with the Master Plan."

4. For the reasons set out in more detail below, we respectfully consider that Mr Horton's tentative view is misconceived and legally wrong. There is no basis (legal or otherwise) for requiring the extant planning applications to be assessed in combination with LAA's aviation MasterPlan ("the Masterplan"). Such an interpretation of the Habitat Regulations and European Directive 92/43/EEC ("the Directive") is both contrary to its wording and its purpose.

5. Moreover, we do not consider that this is a difficult question to answer. Both the Habitat Regulations and the authorities provide a clear answer that there is no basis for seeking to assess LAA's two planning applications in combination with the Masterplan. In particular:

(1) LAA's Masterplan is not a relevant "plan or project". Nor is it a development plan or document which sits behind the development plan subject to the Habitat Regulations.

(2) The Appropriate Assessment required under the Habitat Regulations for the Terminal Application and the Runway Extension Applications should assess the implications of 0.5mppa, not 2mppa.

Factual Background

6. LAA's two planning applications were submitted on 15th December 2006 and propose:

(1) The erection of a terminal building on an existing area of hardstanding adjacent to Bravo Apron comprising of two principle "volumes" with a total gross external area of 7,666m^2, together with car parking. The proposed building would be capable of processing up to 0.5mppa ("the Terminal Application").

(2) The extension of the runway by 294m at the northern end, to create a runway length of 1,799, with a further 150m acting as a starter extension, and a Runway End Safety Area ("the Runway Extension Application").

7. The Terminal and Runway Extension Applications were validated by the Council on 22nd December 2006, and given reference numbers Y06/1647/SH and Y06/1648/SH respectively.

8. We note that, unfortunately, Mr Horton has not been correctly instructed by LAAG. As Mr Horton records at paragraph 16 of his Opinion, he did not have copies of any part of the Terminal and Runway Extension Applications, but it was his understanding that detailed planning permission was sought for a runway extension and phase 1 of the terminal building, and that there was an application for "outline planning permission for phase 2 of the terminal building (being for the accommodation of a further 1,500,000 ppa)". This may well have influenced his conclusions summarised above. In fact there was no such outline planning application for a Phase 2 development of the type suggested. The planning applications were as set out in paragraph 6 above.

9. The Airport is located on the Dungeness peninsula. It lies approximately 2km to the east of Lydd Town, and approximately 5 km to the north of Dungeness Nuclear Power Stations A and B[1].

[1] Dungeness A is owned by the British Nuclear Group. It was closed in December 2006 and is currently subject to a decommissioning programme. Dungeness B is owned by British Energy. It is scheduled to be decommissioned in 2018.

10. The Airport currently has an 8 metre high terminal building of approximately 2,500 square metres capable of handling approximately 0.3mppa. There is parking space for 143 vehicles. There are two maintenance hangars, one of 2,664 square metres and one of 441 square metres.

11. There is one existing operational runway 03/21 which is 1,505 metres in length. The runway is within category 3C of the CAA's Aerodrome Reference Codes. It is licensed for aircraft with wingspans of 24-36 metres, i.e. up to the size of Boeing 737 and Airbus A319s, although the larger of these planes would not be able to take off with full payloads. The runway has a pavement classification number of 46 which would enable these size aircraft to operate at maximum take-off weight.

12. The Airport is located in a sensitive area. In particular:

(1) There are three restricted flying areas around the Airport:

(a) The Lydd military firing range restricted area is located approximately 3.7km to the south-west, and imposes restrictions up to a height of 4,000 feet.

(b) The Hythe military firing range restricted area is located approximately 10km to the north of the Airport, and imposes restrictions up to a height of 3,200 feet.

(c) The Dungeness power stations restricted flying area is centred approximately 5 km to the south of the Airport. All aerial activities are restricted within a nautical mile radius to a height of 2,000 feet[2]. Traffic arriving at or departing from Lydd

[2] See The Air Navigation (Restriction of Flying) (Nuclear Installations) Regulations 2001.

Airport are permitted to fly no closer than 1.5nm to the notified centre of the Dungeness Site.

(2) Some of the Airport (adjacent to the existing runway) lies partly within, and adjacent to, the Dungeness, Romney Marsh and Rye Bay Site of Special Scientific Interest ("SSSI").

(3) The Airport lies within the vicinity of:

(a) the Dungeness Special Area of Conservation;

(b) the Dungeness to Pett Level Special Protection Area; and

(c) a proposed Ramsar site.

13. Both the Terminal and Runway Extension Applications were accompanied by, amongst other things, Environmental Statements ("ESs"), and supplementary information has since been submitted.

14. LAA has made it clear to the Council that it intends that the proposed terminal building would not be constructed until the runway extension has been built and passenger numbers are increasing. Thus LAA envisages a planned programme of works commencing with: the construction of the runway extension to enable passenger numbers to increase; and then the terminal building constructed to enable LAA to pass the 0.3mppa threshold and move towards its proposal for 0.5mppa.

15. LAAG refer to the position that the Terminal and Runway Extension Applications are said to represent Phase 1 of what the operator has set out as its aspirations for the Airport in the Masterplan . This Masterplan for the Airport was submitted to the Department for Transport in December 2003, and was updated in December 2005, but it does not form part of any planning applications and it has no statutory force or origin.

16. The Masterplan merely sets out the operator's long term vision of the Airport eventually accommodating a throughput of 2mppa. It is envisaged in that document that the increase from 0.5mppa to 2mppa would be accommodated by a "Phase 2" development, consisting of an addition to the proposed new terminal building at some stage in the future.

17. The Planning Statements accompanying the Terminal and Runway Extension Applications make it clear that Phase 2 as identified in the Masterplan will only be feasible if Phase 1 is a commercial success. They make it clear that Phase 2 would have to be the subject of its own individual planning applications and that the Masterplan is not part of these applications.

18. We take this to be self-evident in any event. No planning permission, nor any other type of consent, is being sought for anything other than the development comprised in the Terminal and Runway Extension Applications. LAA would not be able to rely upon any permission granted pursuant to these Applications as authority to do anything other than is within the ambit of those Applications. Likewise, the Council would not be entitled to determine the Terminal and Runway Extension Applications on the basis that LAA was seeking to do anything more than was specified within those Applications.

19. LAAG, however, have produced the Opinion from Mr Horton dated 29th January 2009. As summarised above, Mr Horton has expressed the tentative view that the Masterplan "should be the subject of appropriate assessment as part of the process to be followed prior to determining the current planning applications". Mr Horton appears to be suggesting that the Masterplan is a relevant "plan or project" for the purposes of the Regulations. As dealt with in the Analysis below, we respectfully consider that these contentions are also misconceived.

Analysis

20. The Habitat Regulations are intended to give effect to the requirements of European Council Directives on Habitats (92/43/EEC) and Wild Birds (79/409/EEC). The Habitat Regulations have recently been amended by the Conservation (Natural Habitats, &c) (Amendment) Regulations 2007 SI 2007/1843

21. Regulation 48 sets out the requirement for appropriate assessments to be carried out in particular cases as follows:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
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> (a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and
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> (b) is not directly connected with or necessary to the management of the site,
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> shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.
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> (2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.
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> …
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> (5) In light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.
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> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

22. Regulation 49 sets the circumstances under which an authority may agree to a plan or project which adversely affects the integrity of the European Site: where there are no alternative solutions, and the plan or project must be carried out for "imperative reasons of overriding public interest."

23. Regulation 54 provides for the application of Regulations 48 and 49 to grants of planning permission and other decisions taken by local planning authorities under the Town and Country Planning Act 1990.

24. We note at once something which appears to be entirely omitted from the analysis in Mr Horton's Opinion. Regulation 48, which imposes the duty of Appropriate Assessment in the cases identified, is concerned with either a competent authority deciding to undertake a plan or project itself, or a competent authority giving a consent, permission or other authorisation. As one might expect, the statutory duties created by the Regulations (consistent with the Directive) are intended to bite upon decision-making processes regulating development. It is unlawful for a competent authority to decide to undertake a plan or project itself, or to give consent for such a plan or project, where there is likely to be a significant effect on the European Site without first undertaking an Appropriate Assessment. But it is also self-evident from the Habitat Regulations (and their purpose) that the Habitat Regulations do not bite upon decisions by private individuals which do not constitute or which do not result in development. The desire of an individual to carry out development in the future which might have a significant effect on the European Site cannot trigger the need for an Appropriate Assessment. The Habitat Regulations and the Directive are concerned with decisions authorising such development, or underpinning such authorisations as is the case for spatial land use plans which form the basis for future decision making.

25. The meaning of a "plan or project" for the purposes of Regulation 48 and the relevant Directives was considered by the European Court of Justice ("ECJ") in *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Verniging tot Bescherming van Vogels v Staatsecretaris van Landbouw* Case No. C-127/02 [2004] Env LR 243 ("the *Waddenzee* case"). It concerned the question of an appropriate assessment in respect of annual licensing of mechanical cockle fishing which had been carried on for many years.

26. The ECJ referred to the 10th recital to the preamble to the Directive, which stated that an Appropriate Assessment was required for any plan or programme likely to have a significant effect on the conservation objectives of a designated site. The ECJ noted that the Directive did not

define a "plan or project", but instead drew upon the definition of a "project" contained within Article 1(2) of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive"). This defines a project as:

> "- the execution of construction works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

27. The ECJ concluded that an activity such as mechanical cockle fishing was within the concept of a "project" defined in the second indent of Article 1(2) of the EIA Directive 85/337, and that such a definition of a "project" was relevant to defining the concept of a plan or project for the purposes of the Directive. It therefore concluded that the activity was covered by the concept of plan or project set out in Article 6(3) of the Directive. In finding that it was within that concept, it stated at paragraph 28 of the judgment:

> "The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive."

28. The same approach has been applied in the domestic context in *R (Friends of the Earth) v Environment Agency* [2004] Env LR 31 in which Sullivan J concluded that in order to exclude a particular activity, it would be necessary to consider that it would not be likely to have a significant effect on any European Site in the United Kingdom.

29. The nature of an Appropriate Assessment was also considered in *Waddenzee*. The ECJ identified that the assessment must take into account the cumulative effects of what was proposed with other plans or projects. Thus the ECJ stated (at paragraphs 53-54 of its judgment):

> "53. … an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the

cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed."

30. The ECJ summarised the circumstances under which consent can be granted for a plan or project in light of the Appropriate Assessment at paragraph 61 of its judgment, to reflect the precautionary principle:

" … under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of [the plan or project] … concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

31. The Habitat Regulations and the Directive were recently re-examined by the High Court in *R(Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P&CR 16. It can be noted that Sullivan J's analysis at [55] of that Judgment identified that mitigation measures proposed as part of a project can be taken into account. His analysis specifically focuses upon the plan or project "for which permission is being sought". In this case the plan or project for which permission is sought is comprised in the Terminal and Runway Extension Applications. It is not the aspirational development referred to in the Masterplan. Thus at [55] Sullivan J stated:

"The first question to be answered under Art. 6(3) or reg.48(1) is what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. **The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought**. If certain features (to use a neutral

term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA." [Emphasis added]

32. The general position may therefore be summarised as follows:

(1) A competent authority must first consider whether a plan or project which is not directly connected with or necessary to a European Site's management **is likely to have a significant effect upon it,** whether individually or in combination with other projects. This stage of assessment does not presume that the project will have such effects, but considers whether such effects are likely in the sense of whether they are probable or there is a risk of such effects (ie they cannot be ruled out).

(2) The exercise is a practical one, where the plan or project is the one for which permission is being sought, taking into account any mitigation measures as part of that plan or project

(3) The significance of any effect is to be considered in light of the European Site's conservation objectives. If the effects do not undermine the conservation objectives, they are not likely to be significant effects, whereas if the effects are likely to undermine those objectives, they are significant.

(4) Where such effects are likely, the competent authority must then carry out an appropriate assessment. This must consider the implications for the European site in view of its conservation objectives.

(5) The competent authority must have regard to the manner in which the plan or project is proposed to be carried out or to any conditions or

restrictions subject to which it is proposed that the **consent** should be given.

(6) **Consent** should be given only if it can be ascertained, having regard to the test in *Waddenzee*, that the project will not adversely affect the integrity of the European site. If that cannot be ascertained, alternative solutions must be considered. If there are no alternatives, the project may only then be granted for imperative reasons of overriding public interest.

(7) The exercise is a practical one, not a hypothetical one, and the issue is the plan or project **for which permission is being sought.**

33. Guidance on the effect of the Habitat Regulations is provided in Part 1 of Government Circular 06/2005. It is stated in paragraph 16 of the Circular when considering the assessment of likely effects:

> "16. In considering the combined effects with other proposals it will normally be appropriate to take account of outstanding consents that are not fully implemented, ongoing activities or operations that are subject to continuing regulation (such as discharge consents or abstraction licences) and other proposals that are subject to a current application for any kind of authorisation, permission, licence or other consent. Thus the assessment is not confined to proposals that require planning permission, but includes all relevant plans and projects."

34. The assessment may therefore properly take into account in combination effects from existing permitted development, even where it has yet to be completed. But that does not mean or suggest that it would be right to take into account mere aspirations for the future.

35. Article 174(2) EC and the ECJ in *Waddenzee* make it clear that, when considering environmental issues, the precautionary principle should be applied. Measures based on the precautionary principle should, amongst other things, be proportional to the chosen level of protection consistent with similar measures already taken, and subject to review in the light of new scientific data.

36. The European case law makes it clear that the Directive is intended to be engaged in respect of land use plans. This issue was considered in Case C-6/04 *Commission of the European Communities v UK* (to which Mr Horton makes references in paragraphs 27-28 of his Opinion). The ECJ found that the UK had failed to transpose the Directive properly into national law in not applying the provisions to the making of land use plans. The ECJ stated at paragraphs 55-56:

> "55. As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.
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> 56. It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be well-founded in this regard."

29. But as we have also previously noted, it is significant that the rationale for the ECJ's finding depended upon the statutory framework which relates to a development plan. Section 54A of the Town and Country Planning Act 1990 as it then was, and now section 38(6) of the Planning and Compulsory Purchase Act 2004, requires planning decisions to be taken in accordance with development plans, unless material considerations indicate otherwise. Accordingly, the reasoning of the ECJ relates to the statutory weight that is given to a development plan in the planning decision making process.

30. It is easy to understand this rationale. Given the importance that such a statutory land use plan has in the determination of planning applications pursuant to the statutory plan-led process, it is self-evidently important for such plans to be subject to appropriate assessment, and to be treated as a relevant "plan or project" for the purposes of the Habitat Regulations and the Directive. There is a statutory framework governing the making of development plans which underpins the statutory weight that is given to them. Development plans are made and adopted by planning authorities after

detailed procedures designed to test the robustness of the evidence on which the plans are based.

31. The position for such a statutory plan is in direct contrast to an aviation masterplan document. This is merely a document which is published unilaterally by an airport operator. There are no statutory procedures governing the making of such a masterplan. There is no statutory process for the adoption or decision making for the publication of such a masterplan. And there is no basis for treating such a masterplan as a material consideration in the determination of a planning application. Indeed, it would be strange if LAAG were to suggest that such a masterplan was a material consideration to which a decision-maker determining a planning application could attach weight.

32. Applying these principles to the Terminal and Runway Extension Applications, it is neither necessary nor appropriate to conduct an Appropriate Assessment based on the Airport operating at 2mppa as compared with 0.5mppa - the proposed maximum number that could be accommodated by the development for which planning permission is sought. There is no relevant "plan or project" (whether in the form of an existing planning application or a proposed land use plan) for development which would enable 2mppa to be handled at the Airport. The existence of a further "aspiration" or "ambition" for such level of development in the future is not a relevant "plan or project" and is not something which requires assessment within the meaning or spirit of paragraph 16 of Circular 06/2005.

33. LAA's Masterplan is not a "land use" plan, nor does it fall within the concept of such a plan according to the guidance from the European Commission on "Managing Natura 2000 Sites". In addition, LAA's Masterplan is not a development plan under the UK system and does not "sit behind" any relevant development plan. The LAA Masterplan is merely a unilateral aspirational

document which was produced by LAA to set out a future vision for the Airport. The Council could not treat it as part of the development plan for the purposes of development control, and the Masterplan has not been through the relevant processes that would be required for such a development plan document for it to gain such status.

34. Leaving aside the statements of general principle Mr Horton refers to in the bulk of his Opinion (which do not of themselves support his conclusions), Mr Horton tentatively expresses the view that the Masterplan should be subject to an appropriate assessment on the basis that it is a “plan” or “project”, and that the Masterplan is not separable from the proposed development in the Terminal and Runway Extension Applications. We cannot see any justifiable basis for this analysis.

35. As we have previously advised, one of the important defining features of a plan or project intended to be caught by the Habitat Regulations is that such plans or projects require consent or permission before they are authorised (unless they are plans or projects being undertaken by the competent authority itself). It is this process of the grant of consent which is intended to be regulated by the need for an Appropriate Assessment.

36. The unilateral and voluntary production of a masterplan by an airport setting out its aspirations for the future is, and is clearly intended to be, an unregulated process. An airport does not require any consent from any person to produce its own masterplan. The masterplan is merely intended to set out the airport’s own vision for the future. The masterplan does not of itself authorise that vision, or otherwise permit it to take place, nor does it have any statutory force like a development plan document. By the same token, there is no requirement for approval or consent for the production of such a vision contained in a masterplan. We therefore do not understand how Mr Horton has reached his conclusion that a masterplan is a relevant “plan or project” for the purposes of the Habitat Regulations. We do not see that any of the

background or general principles he has expressed in paragraphs 1-30 of his Opinion support such an analysis.

37. The logic of LAAG's argument expressed in Mr Horton's Opinion is that an airport could not produce a masterplan without that masterplan being subject to an "appropriate assessment". That would be an absurd result. There is no process for a relevant authority to grant consent for the mere production of such a masterplan, and therefore no basis for requiring the production of an appropriate assessment.

38. The Government's Air Transport White Paper ("ATWP") does refer to the use of airport masterplans and recommends their production. But equally the ATWP makes clear what is necessarily the case. Such masterplans do not have development plan status. While the level of detail within a masterplan may be used to inform the content of the Local Development Framework ("LDF") (the relevant land use plan formulated by the local planning authority), a masterplan itself does not form part of such an LDF nor would it be treated as such by that local planning authority. Indeed, it would be very strange if LAAG were to suggest or accept that LAA's own documents, and its Masterplan, had material weight as part of the development plan framework merely because they had been produced by LAA.

39. In addition, LAA's Masterplan is very much a voluntary document (within the meaning of paragraph 14 of the ATWP) as the Airport is not one which is expressly advised to produce a Masterplan by the Government in the ATWP.

40. Finally, we note that Mr Horton has alleged that LAA is employing what he says are sometimes described as "salami tactics" (see paragraph 19 of his Opinion) in submitting the Terminal and Runway Extension Applications. We consider that this description is inappropriate and significantly confuses the true position.

41. In a case where a developer seeks to break up proposed development into small pieces, and attempts to make a series of smaller successive applications to avoid the need for relevant assessments (such as an Appropriate Assessment or an Environmental Impact Assessment), it might be appropriate to refer to "salami tactics". In such a situation, the plan or project can be examined by reference to the cumulative total of the smaller developments (eg a series of applications for 10 houses on a larger housing estate, or small sections of a road in respect of a longer road building project as occurred in *Commission v Spain C-227/-01* [2005] Env LR 384). But there is no basis for seeking to apply that approach to the present case. The Terminal and Runway Extension Applications proposed in this case are not part of a larger development, and there are no proposals seeking consent for any cumulatively larger development. While aspirations to expand the development in the future have been expressed, there are no proposals for such development before the authority. If the aspirations do become translated into reality, and applications are sought for any future development beyond that proposed in the current applications, such proposals will require their own assessment. That is very different to a situation where proposals have already been advanced, but artificially divided into smaller projects. That is plainly not the case here.

42. Nor is there any basis for suggesting that the requirements for assessment could be avoided in the future if the Airport were to seek to realise any wider ambitions in the future. The position is no different to any other airport where there may be ambitions for future expansion on behalf of the operator, or even ideas expressed in the AWTP. There would be no basis for requiring every application made by an airport operator to be assessed on the basis of aspirational plans for the future, where those plans do not form part of the applications which have been made.

43. By contrast, if and to the extent that the aspirations in the Masterplan are promoted in some form of spatial planning document which carries material weight in the planning process, or the aspirations were promoted through

planning applications, then the requirement for assessments may be triggered. That stage has clearly not been reached; we cannot see any legal or logical basis for some form of pre-emptive assessment against proposals which do not yet exist in this form. We therefore strongly disagree with the concept expressed by Mr Horton in paragraph 23 of his Opinion that there is a "strong argument in principle" for assessing the impact of an "avowed ambition". We also strongly disagree that the ecological baseline will be weakened in such circumstances. The current proposals will be assessed for their acceptability. If they are acceptable, planning permission can be granted. If any future proposals are put forward, they will be similarly assessed for their acceptability at that time.

44. For all of the above reasons, we respectfully consider that Mr Horton's Opinion is wrong. It would be wrong for the Appropriate Assessment for the Terminal and Runway Extension Applications to be undertaken on the basis of an assessment of a 2mppa throughput. The Appropriate Assessment should be based on the projected maximum throughput of 0.5mppa. This is the relevant "plan or project" for which consent is being sought.

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8th April 2009

IN THE MATTER OF

LONDON ASHFORD AIRPORT LIMITED

JOINT OPINION

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