

**Town & Country Planning Act 1990 – Section 77
Town & Country Planning (Inquiries Procedure)
(England) Rules 2000**

Lydd Airport Action Group (LAAG)

Proof of Evidence

Applicant: London Ashford Airport Limited (LAAL)
Location: London Ashford Airport Limited, Lydd, Romney Marsh, TN29 9QL
Applications: Y06/1647/SH and Y06/1648/SH
Proposals: 294m runway extension and a 150m starter extension
plus a new terminal to accommodate up to 500,000ppa
Inspectorate APP/L2250/V/10/2131934
References: APP/L2250/V/10/2131936
Document
Reference: LAAG/12/C

Louise Barton, BSc (Ag), MCSI

Lydd Airport Action Group

The Hook

Madeira Road

Littlestone, Kent TN28 QX

January 4th, 2011

1.0 Introduction

- 1.1 My name is Louise Barton. I am the principal representative for Lydd Airport Action Group (“LAAG”) which opposes the application to enlarge the airport made by its owner London Ashford Airport Limited (“Lydd Airport”). My credentials are outlined in my proof of evidence.
- 1.2 The purpose of my evidence is to explain LAAG’s belief that the decision by Shepway District Council (“SDC”) to grant planning permission for the runway extension and new terminal and car park was not made in a fair and balanced manner and therefore should not be considered as a material factor in determining whether the proposed development should proceed. References to the main proof of evidence are shown in square brackets

2.0 Why LAAG believes that the Decision to Grant Permission was not Reached in a Fair and Balanced Manner

- 2.1 LAAG’s perception is that SDC favoured Lydd Airport by allowing it more time to submit more evidence in support of its case, yet not agreeing to support requests from Natural England, RSPB and LAAG for outstanding information from Lydd Airport. [2.2.1]
- 2.2 Letters and emails obtained as a result of a Freedom of Information (“FOI”) request reveal that Lydd Airport actively challenged the refusal recommendation of SDC’s First Officer’s report, published on July 1st 2009 and that SDC acquiesced to Lydd Airport’s requests to delay determination to allow differences in opinion to be resolved and more information to be produced to support its case. This resulted in the determination of the planning application being postponed from its original scheduled date of July 9th 2009 to September 24th 2009 and finally March 3rd 2010. [2.1.1-2.1.13]

- 2.3 In the period between the publication of the second Officer's Report on February 19th 2010, which also recommended refusal although with diluted reasons, and the determination date of March 3rd 2010, Chris Lewis, the Head of Planning at Shepway District Council colluded with the applicant to implement a detailed scheme to facilitate the overcoming of the refusal recommendation in the second Officer's Report.
- 2.4 Emails obtained as a result of a Freedom of Information request clearly show that Chris Lewis, despite being SDC's Head of Planning Services, sought to establish a mechanism by which SDC could overcome the recommendation to refuse planning permission which he, supported by other officers, had made. [3.1.4]
- 2.5 In the email exchange, Indigo Planning, Lydd Airport's adviser outlined how SDC could amend its Appropriate Assessment by substituting evidence that demonstrated that there would be no adverse impacts on the Special Protection Area ("SPA"). Indigo prescribed how it would submit a table of suggested amendments to the Bureau Veritas Appropriate Assessment and recommended two possible alternative approaches for SDC to take at SDC's meeting on 3rd March – Option 1 in which the members would adopt the changes to the Appropriate Assessment and resolve to grant permission and a second approach which was rejected. [3.1.5]
- 2.6 The emails reveal that Chris Lewis agreed to Option 1 and clarified with Indigo the paragraphs of the Appropriate Assessment which would be changed. The amendments were entitled "*The Applicant's Proposed Revisions to the February 2010 Revised Appropriate Assessment Report*" and were accordingly published in the pink schedule of *Supplementary Information to Schedule of Applications* circulated to members and other interested parties on February 26th, 2010. [3.1.7]
- 2.7 It cannot be claimed that Chris Lewis was only on a fact finding exercise so that he would be in a position to answer members' questions on the night of March 3rd. This was a well orchestrated plan, put together in great detail before the evening of March 3rd to assist members wishing to vote in favour of the planning application against the recommendation of their own planning officers.

- 2.8 The email exchanges as a result of the FOI request also show that SDC Officers deliberately prevented a letter from Natural England being distributed to members on the night of March 3rd 2010. Natural England had requested that this letter be circulated to members given the materiality of its contents in relation to the planning application. In this letter Natural England reiterated its opposition to the planning application, pointed out that no further material evidence had been provided and that the advice given by Jonathan Gordon, the Managing Director of Lydd Airport, in his briefing note sent to members the night before, was incorrect, and contradicted the advice of Lydd Airport's own legal advisers. [3.1.9 - 3.1.10 & 3.1.8]
- 2.9 It appears to LAAG that this letter was withheld because its contents would have made members less likely to vote in favour of the planning application.
- 2.10 The reason given for not circulating Natural England's letter, which was received by Shepway District Council at 14.19 on March 3rd, was that Shepway District Council had "*made it clear to the applicant and others involved that we will not be circulating further papers on the night over and above the reports already circulated.*" It seems to LAAG that such reasoning favoured Lydd Airport since Terry Ellames and Chris Lewis were aware, the Managing Director of Lydd Airport, Jonathan Gordon had directly sent a briefing document to council members as late as 20.46 on the evening of March 2nd. [3.1.11]
- 2.11 When Natural England challenged the Officer's decision that its letter would not be circulated, Terry Ellames reassured it that he would state that the letter had been received and that the representative from Bureau Veritas would present the salient points. At the meeting, however he mentioned the letter only in passing, and Kevin Webb of Bureau Veritas briefly explained only two of the five points in Natural England's letter at the end of his presentation, and concluded by apologising for the brevity and incoherence of the comments. [4.12-4.13]
- 2.12 LAAG considers that the proposed substitution of text produced by the experts advising the applicant to replace text in an Appropriate Assessment produced by the expert

advising SDC (BV) was extraordinary and required careful consideration by members of the original text compared to that proposed, particularly as the evidence claimed by Indigo to justify the text of these amendments had been rejected by Natural England, the RSPB, LAAG and the SDC's consultant, Bureau Veritas in their respective responses to the original planning application. In particular, a photomontage of a Boeing 737 and ATR42-300 which was re-presented as evidence by Lydd Airport at the meeting on March 3rd to demonstrate that birds would not be visually impacted by the airport's development, was rejected as factually incorrect by LAAG's aviation consultant, Spaven Consulting. No such consideration of the relative merits of BV's evidence versus the airport's substitute evidence took place. [3.1.6 & 4.2.1-4.2.6]

- 2.13 Consideration of Option I dominated the proceedings. The circulation of the amendments to the Appropriate Assessment before the meeting, in the "pink" supplementary information published on February 26th, stimulated questions about the mechanism by which this could be achieved, rather than whether there was a substantive basis for preferring the judgement of the applicant's experts.
- 2.14 On the evening of March 3rd, Cllr Deardon's question at the outset of the debate between councillors sought only "*clarification... [i]n particular of the difficulties that the Council might or might not have in adopting the BV Appropriate Assessment and then going on to resolve to grant planning permission*". That question did not seek guidance on whether the assessment by Lydd Airport's experts should be preferred to BV's on behalf of SDC. Furthermore, Chris Lewis, in responding to the question, gave no advice on that substantive issue. [4.2.2 -4.2.3]
- 2.15 Although members could have chosen to debate the merits of the conflicting views of SDC's and Lydd Airport's experts, they did not do so. That suggests to LAAG that many members were intent on granting permission regardless of the merits.

3.0 LAAG's Perception of the Legality of SDC's Decision to Grant Permission

- 3.1 In substituting the data on the evening of March 3rd, Shepway District Council clearly did not consult Natural England as required by Habitats Regulations.

Conservation of Habitats and Species Regulations 2010 (Document 5: Statutory Instrument 2010 No. 490, page 45, Regulation 61 (3) says: "*The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.*"

- 3.2 The case *R (Akester) v DEFRA* [2010] EWHC 232 (Admin) highlights the impropriety of Shepway District Councils decision not to disclose the Natural England letter, and in so doing, failing to give Natural England's opinions the mandatory weight - and cogent and compelling reasons for departing from them. [6.2]
- 3.3 The composite Appropriate Assessment created on the evening of March 3rd cannot be used as the basis for supporting Lydd Airport's planning application. It seems to LAAG that members had no cogent reasons for preferring the judgement of Lydd Airport's experts to the judgement of their own appointed expert, other than their desire to grant permission.

4.0 Summary & Conclusions

- 4.1 The decision to grant permission appears to LAAG to have been taken in a manner which not only did not strike a fair balance between the applicant and the objectors, but also rejected the advice of SDC's own experts without any proper consideration of whether to do so was justified having regard to the substantive merits. LAAG's understanding is that a decision taken in such a manner is unlawful. LAAG believes, therefore that, in considering the decision to take pursuant to this Inquiry, it would not be safe to attach any weight to SDC's resolution to grant permission.

