LAA

S.77 TOWN AND COUNTRY PLANNING ACT 1990

APPLICATIONS BY LONDON ASHFORD AIRPORT, LYDD

PINS REF: APP/L2250/V/10/2131934
& APP/L2250/V/10/2131936

LEGAL SUBMISSIONS
ON BEHALF OF THE APPLICANT

PETER VILLAGE QC
JAMES STRACHAN

4-5 GRAY'S INN SQUARE
GRAY'S INN
LONDON WC1R 5AH

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1. Introduction

1.1. These legal submissions are submitted as requested by the Inspector in advance of the parties' closings and on an exchange basis. The Applicant has therefore not had sight of the other parties' legal submissions and does not know what legal points (if any) are being made beyond those that have been alluded to during the inquiry. The Applicant therefore reserves the right to deal in full with any legal points in its Closing Submissions and to revise, incorporate and/or supplement this document into its Closing Submissions in due course.

1.2. These legal submissions on behalf of the Applicant ("LAA") consider the following:

1.2.1. Environmental Impact Assessment

1.2.2. The Conservation of Habitats and Species Regulations 2010

1.2.3. Fallback

1.2.4. Alternatives

1.2.5. Consistency

2. Environmental Impact Assessment

2.1. There are two applications ("the Applications") before the S/S: (1) a proposed runway extension involving the construction of a 294m runway extension and a 150m starter extension; and (2) a proposed new terminal building capable of processing up to 500,000 passengers ("pax") per annum, and associated parking facilities.

2.2. The Applications are described in more detail in the SOCG between LAA and SDC[1], section 5.

2.3. The Applications are supported by a huge range of supporting material[2], including the Environmental Statements accompanying both Applications, the supplementary information supplied during the course of the Applications and the proofs of evidence and other evidence and material which has been produced or heard during the course of this inquiry.

[1] CD 4.1
[2] CD 4.1 (section 5)

2.4. At the time that these applications w ere submitted the relevant legislation for EIA purposes was contained in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 EIA Regulations"). The 1999 EIA Regulations transpose the UK's obligations under Council Directive 85/337 (as amended) on the assessment of the effects of certain public and private projects on the environment into domestic law.

2.5. The Directive has a wide scope and broad purpose: see eg *Kraaijeveld* [1996] ECR I-5403 at [30]. But the requirement for environmental impact assessment provisions is intended to be an aid to efficient and inclusive decision-making. It is not intended to be a legal obstacle course that a developer has to overcome: see *Jones v Mansfield District Council* [2003] EWCA Civ 1408, Carnwath LJ at [58].

2.6. The 1999 EIA Regulations have now been revoked by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 which came into force on 24 August 2011 ("the 2011 EIA Regulations"): see Regulation 65(1). However Regulation 65(2) makes clear that such revocation shall not affect the continued application of the 1999 EIA Regulations to an application lodged or received by the relevant authority before the commencement of the 2011 EIA Regulations. This is also clear from Regulation 3 of the 2011 EIA Regulations which makes it clear that they only apply to applications lodged on or after 24 August 2011. Accordingly, the 1999 EIA Regulations continue to apply to the Applications before the Secretary of State[3].

2.7. The Applications are "EIA development" for the purposes of the regulation 2(1) of the 1999 EIA Regulations.

2.8. Regulation 3 applies to every application for planning permission for EIA development received by an authority. Regulation 3(2) provides that the Secretary of State may not grant planning permission for such an application unless he first takes the "environmental information" into consideration and states in his decision that he has done so.

[3] There are, in any event, no material changes in the two sets of Regulations relevant to the current Applications

2.9. "Environmental information" is defined in regulation 2(1) as meaning:

> "the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development"

2.10. The term "environmental statement" is itself defined in regulation 2(1) and means a statement:

> "(a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile; but
>
> (b) that includes at least the information referred to in Part II of Schedule 4."

2.11. Part I of Schedule 4 sets out various pieces of information for inclusion in environmental statements to the extent reasonably required and Part II of Schedule 4 sets out required information, including "the description of the development" and "the data required to identify and assess the main effects which the development is likely to have on the environment."

2.12. The description of the development must be sufficient to enable the main effects which the development is likely to have on the environment to be identified and assessed to enable the likely significant effects on such matters as flora, fauna, water, air and the landscape to be described and to enable mitigation measures to be described where significant adverse effects are identified: see eg *R v Rochdale MBC ex p Milne (No.1)* [1999] 3 PLR 74.

2.13. The provisions of Part I and Part II of Schedule 4 under the 1999 EIA Regulations do not require alternatives to the development to be studied, only that where such study has occurred, an outline is provided and an indication given of the main reasons for the choice made.

2.14. The requirement to take the "environmental information into consideration" and the wide definition of "environmental information" needs to be properly understood. Contrary to the assertion of Mr Watts on behalf of LAAG such environmental information includes all additional information before the inquiry, including the oral evidence given by witnesses; moreover there is no need for such

further information that is provided to be subject to further publicity as the essential feature of a public inquiry is that it is held in public: see *R(Davies) v Secretary of State for Communities and Local Government* [2008] EWHC 2223 Admin [39]-[47].

2.15. In addition, it should be noted that pursuant to Reg. 19 of the 1999 EIA Regulations the Secretary of State or an Inspector dealing with an application in relation to which the applicant has submitted a statement which he refers to as an environmental statement and is of the opinion that the statement should contain additional information in order to be an environmental statement, they or he shall notify the applicant in writing accordingly and the applicant shall provide that additional information, to be known as "further information".

2.16. There have been claims from certain objectors such as Mr Watts and Natural England ("NE") that the environmental statements in this case are deficient for one reason or another[4]. Tellingly such claim is not made by RSPB.

2.17. There has, quite properly, been no request from the Inspector for any further information pursuant to Reg. 19 of the 1999 Regulations. If the Inspector considered that there was any deficiency of the kind alleged, the Inspector has no discretion about this – he must (in accordance with the mandatory language "shall") notify the Applicant in writing if he considers that further information is required in order for the environmental statement to properly be considered as such.

2.18. The environmental information before the inquiry, as contained in the ESs and all other material, must therefore be satisfactory and the decision that it is satisfactory is only challengeable on traditional *Wednesbury* grounds: see *Milne (No.2)* [2001] Env LR 22 and *R(Blewett) v Derbyshire County Council* [2004] Env LR 29. As identified in *R (Edwards) v Environment Agency* [2008] UKHL 22, Lord Hoffmann at [38]: the cases where an ES is so deficient as not to be an ES at all are likely to be few and far between

2.19. Whilst a failure to deal with an issue altogether which was required to be dealt with may affect the validity of an Environmental Statement (such as a failure to deal with a European protected species known to be on the site: see eg *R v Cornwall*

[4] See eg NE S/C paras 6.17 to 6.20

County Council ex p Hardy [2001] Env LR 25), the views of objectors that particular topics have not been adequately dealt with in an Environmental Statement or that particular details have been omitted do not come near to establishing that it is unlawful to consider the Environmental Statement to be an Environmental Statement: see eg *R(Bedford) v Islington Borough Council* [2002] EWHC 2044, Ouseley J at [203]. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, then attempts to rely upon such deficiencies as breaching the EIA Regulations are misconceived: see eg *Blewett* at [68].

2.20. The Environmental Statements submitted with the Applications are properly environmental statements within the meaning of the 1999 Regulations, in that they contain the information contained in Schedule 4 Parts I and II. It follows that the environmental information before the inquiry allows a full assessment of the environmental impact of the development to be undertaken from the information before it. If there had been any deficiency in the information before the inquiry for the purposes of assessing the environmental impact of the development, a request for further information would need to have been made to the Applicants.

2.21. This point is also relevant to the case advanced by some parties, but principally by LAAG[5] that the ESs are deficient by reason of their failure to assess a throughput of 2mppa. This is a point was raised by LAAG in its Rule 6 statement and maintained throughout this inquiry. If, in truth, this was a proposal for 2mppa then the environmental information before the inquiry might be considered deficient and further information would have been required by the Inspector pursuant to his mandatory duty under Reg. 19.

2.22. But the fact that this is self-evidently **not** a proposal for 2mppa has comprehensively been addressed by LAA[6] in a rebuttal note. LAAG's point simply misunderstands the law and the reasoning behind it, as well as the scope of the Applications. LAAG mistakenly rely upon the concept of development proposed

[5] LAAG/11/A
[6] LAA/17/A

which is in fact "an integral part of an inevitably more substantial development", a concept identified by Simon Brown LJ in *R v Swale BC exp p RSPB* [1991] PLR 6. But that is clearly not applicable to the present case. The current Applications stand alone and are strictly restricted. If any future application were ever to be made for further development or an increase in passenger numbers or aircraft movements, that application will have to be considered and determined on its own merits at that time. There is no question nor ability for any process of "salami-slicing" so as to avoid the effects of the 1999 EIA Regulations: see *R(Davies)* (above) per Sullivan LJ at [53] in similarly rejecting that sort of challenge in respect of separate development proposals for a park and ride scheme and a link road. See also Rebuttal Note of LAA, *R(Candlish) v Hastings Borough Council* [2005] EWHC 1539 (Admin), Case C-227/01 *Commission v Spain* [2005] Env LR 384. for more detail.

2.23. As Simon Brown LJ observed in *Swale*, unless a proposal is an integral part of another project:

> "the question whether or no the development was of a category described in either schedule has to be answered strictly in relation to the development applied for, not any development contemplated beyond that."

2.24. Thus if at any future date, an application for planning permission for infrastructure or for permission to have 2mppa were to be made, then the environmental effects of such a proposal will have to be considered at that stage. However the development in issue is for a runway extension capped with 300,000 passengers per annum, and the new terminal, capped with 500,000 passengers per annum and these limitations on the development form a basic part of the Applications and the assessments therefore undertaken.

2.25. Finally, it can be noted that if there had been any substance to LAAG's points, then it would have been incumbent upon the Inspector to have requested such further information (assessing the effects of the proposals on the basis of 2mppa) months ago.

3. <u>The Conservation of Habitats and Species Regulations 2010</u>

3.1. The Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations") have replaced the 2007 version of the Regulations which were applicable at the time that Shepway District Council made its decision. It is the 2010 version of the Regulations which is now in force and which is considered below.

3.2. The Habitats Regulations transpose the UK's obligations under the European Council Directive on Habitats 92/43/EEC and the Directive on Wild Birds 79/409/EEC.

3.3. Part 6 of the Habitats Regulations deals with the assessments of certain plans and projects.

3.4. Regulation 61 in Part 6 provides:

> "A competent authority, before deciding to undertake or give any consent, permission or authorisation for, a plan or project which –
>
> (a) is likely to have a significant effect on a European site … (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 that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives."

3.5. Regulation 61(2) provides that a person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

3.6. Regulation 61(3) provides that for the purposes of the assessment, the competent authority must consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify. Under Regulation 61(4) they must also, if they consider it appropriate, take the opinion of the general public and, if they do so, must take such steps for that purpose as they consider appropriate.

3.7. Pursuant to regulation 61(5), in light of the conclusions of the assessment and, subject to regulation 62, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site. Under regulation 61(6), in considering whether a plan or project will adversely affect the integrity of the site, the authority must 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.

3.8. Regulation 3(1) identifies that the term "competent authority" is to be construed in accordance with regulation 7. Regulation 7 identifies that a "competent authority" includes any Minister of the Crown, government department, statutory undertaker, public body of any description or person holding a public office.

3.9. A "statutory undertaker" is also defined in regulation 3(1) and means a person who is, or is deemed to be, a statutory undertaken for the purposes of Part 11 of the Town and Country Planning Act 1990 ("TCPA 1990"). The Applicant is a statutory undertaker in consequence of the Airports Act.

3.10. Regulation 3(1) also defines a "European site" as having the meaning given by Regulation 8. It includes a special area of conservation ("SAC") and a SPA.

3.11. Again, the Habitats Regulations have to be construed by reference to the relevant Directives and their broad scope and purpose and by application of the precautionary approach: see eg *Landelijke Vereniging tot Behoud de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I -7405 ("*Waddenzee")*. However, the underlying principle to be derived from both the *Waddenzee* judgement and the domestic authorities is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course: see *R (Hart DC)*, Sullivan J at [72].

3.12. The procedures required under Regulation 61 have been construed in light of this broad scope and purposes, from which the following approach relevant to the present case can be summarised:

3.12.1. The first question is whether there is a relevant plan or project being undertaken by a competent authority or for which consent, permission or other authorisation is being sought from a competent authority.

3.12.2. If so the threshold question is whether the competent authority considers that the plan or project would be likely to have a significant effect on the SPA in the sense of a probability or risk of such an effect on the site concerned? Such risk exists if it cannot be excluded on the basis of objective information that the project will have a significant effect on the site concerned. When assessing this question, the competent authority should take into account all the characteristics of the plan or project including any proposed avoidance or mitigation proposed.

3.12.3. Where a plan or project has an effect on a site, but it is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned, but where a plan or project is likely to undermine the conservation objectives, it must be considered likely to have a significant effect on the site concerned.

3.12.4. If the competent authority concludes that there is likely to be a significant effect, it must then carry out an appropriate assessment after consultation. The appropriate assessment will consider the implications for the SPA in view of the SPA's conservation objectives. When carrying out the appropriate assessment the competent authority must again consider any avoidance or mitigation. The project may be authorised if the competent authority is certain it will not adversely affect the integrity of the site, which will be the case where no reasonable scientific doubt remains.

See *Waddenzee* (above) and *R(Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204.

3.13. The legal requirements in respect of European sites are not applicable to proposed European sites or Ramsar sites. However the Government's policy is to apply the same protections. The Applicant therefore deals with those proposed Sites by reference to the same tests. However it is clear that a departure from that policy

in respect of such proposed European Sites or Ramsar sites would not be unlawful or breach any obligation under the Directives.

"Plan or Project"

3.14. The words "plan or project" have an autonomous meaning and are to be interpreted in light of the underlying Directives: see *R (Friends of the Earth) v Environment Agency* [2004] Env LR 31. The words have been approached by the ECJ in *Waddenzee* at [26] by reference to the definition of a project in Article 1(2) of the Directive 85/337/EEC: "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". This definition seeks to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. To exclude such activities, it would be necessary to consider that they would not be likely to have a significant effect on the SPA.

3.15. There is no dispute that the Applications are a relevant project as they involve the construction of works at the Airport for which planning permission is being sought.

3.16. However, it appears that Natural England / RSPB are contending that not only the current Applications, but also other activities at the airport might constitute a plan or project.

3.17. In this regard, it can be seen that in *Waddenzee* the ECJ concluded that an application for a licence to conduct a dredging operation on the seabed both by the plate at the leading edge scraping the top 4-5cms into the cage, and the disturbance of the seabed by the powerful jet of water from the nozzle attached leading edge constituted a relevant plan or project for the purposes of the Habitats Regulations. This is therefore consistent with the reliance upon the interpretation of plan or project by reference to the definition in the EIA Directive.

3.18. In *R(Akester) v DEFRA and Wightlink Ltd* [2010] EWHC 232 (Admin), the High Court took the view that the introduction of a new W Class ferry was analogous with *Waddenzee* as the ferries introduced had the potential to interfere with the

natural surroundings in that, by their size and displacement, means of propulsion and steering, and the fact that they operate in narrow channels and a certain states of the tide in very shallow water, the vessels may disturb the bed and banks of the river and cause erosion to the mudflats and salt-marshes within the protected sites.

3.19. It remains to be seen how NE or RSPB develop their contentions as to any other "plan or project", but by way of anticipatory submission the following points can be noted:

3.19.1. As in *Akester* itself, there is no suggestion and never has been any suggestion that the existing running of the Airport which has no restrictions upon it is a plan or project, or that such operations cause any significant effects on any relevant Site. To the contrary, the witnesses have all confirmed the absence of any material or significant effects on the habitats or species from such operations.

3.19.2. The continuation of the Airport as an existing airport, receiving flights (as it is required to do) within its existing facilities plainly cannot be a plan or project for these purposes. Not only is there no "plan or project" in any logical sense in such continuation of the existing rationale which is to operate the Airport as an airport, there is also no implementation of such a plan or project. The Airport's operations have fluctuated in the past. Future fluctuations are no more than continuation of the Airport, namely business as usual. It would be absurd to categorise this as a plan or project.

3.19.3. It is therefore equally absurd to attempt to characterise the fall-back situation as involving a plan or project engaging the process of decision-making under the Habitats Regulations. The fallback situation is merely the continuation of existing business, with anticipated levels of growth that are likely to occur as the business continues pursuant to the existing operations of the Airport: eg business jets which already use the airport and will continue to do so and general aviation which already uses the airport and will continue to do so.

3.19.4. There is no relevant change of business at all, let alone one of the kind that occurred in *Waddenzee* or in *Akester* that engaged the definition of a project in the EIA Directive.

3.20. NE/RSPB also appear to be suggesting that a BCMP or revisions to an existing BCMP would constitute a plan or project for the purposes of the Habitats Regulations. Again, that is an absurd notion in light of the concept of a project derived from the EIA Directive. But it does not matter even if a BCMP or a revision were to engage the Habitats Regulations because:

3.20.1. There is an existing BCMP for the Airport which no one has ever suggested gives rise to likely significant effects.

3.20.2. The BCMP proposed for the Applications is before the Inquiry. As will be dealt with in Closing Submissions, the measures identified in the BCMP are sufficiently identified. They do not involve doing anything more than is in fact substantively required for current operations, but again it is also clear that they do not involve any likely significant effects to birds.

3.20.3. As to offsite measures, Natural England's expert has confirmed that the development proposed can be operated safely under the BCMP using the identified on-site measures alone, and this safety assessment was made without assuming any off-site measures would take place. Therefore off-site measures form no necessary part of what is before the Secretary of State for approval.

3.20.4. If offsite measures were to be desired in the future (and none are currently known to be required), they would (a) have to be subject to the processes identified in the section 106 anyway, and (b) if and to the extent that NE/RSPB were right and such measures were to constitute a plan or project for the purposes of the Habitats Regulations, the Airport itself would have to satisfy itself of compliance with the Habitats Regulations before proceeding with them.

3.21. LAAG are contending that LAA's masterplan (which is not before the inquiry) is a "plan or project" for these purposes. This is misconceived. The Secretary of State is not being invited to grant "consent, permission or authorisation" for any such masterplan and therefore Regulation 61 is simply not engaged at all (quite apart from the issue of whether such a masterplan could in fact be a relevant plan or project for the purposes of the Habitats Regulations).

3.22. The only "plan or project" in issue for the Secretary of State is comprised in the two Applications before him.

Likely Significant Effects

3.23. In considering the threshold question, 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 and there is no sensible reason to exclude features of that project such avoidance or mitigation: see *R (Hart DC)* above, Sullivan J at [55].

3.24. Merely expressing doubts (or concerns) as to the absence of risk of likely significant effects without providing reasonable objective evidence for doing so is not sufficient: see *R (Hart DC),* Sullivan LJ at [81].

3.25. The Applicants have addressed the Habitats Regulations on the basis of the Applications as they stand, having regard to the existing situation at the airport. For the reasons that will be set out in the Closing Submissions, on this basis alone there are no likely significant effects from the Applications (and in any event no adverse integrity to the relevant sites).

3.26. However, Natural England accept (Jo Dear XX) that it is appropriate to have regard to the fall-back position when making assessments of a plan or project under the Habitats Regulations. NE's Jo Dear was right to do so:

3.26.1. It accords with the reasoning of Sullivan J in *Hart* to the effect that the assessment is not meant to be hypothetical, but real. It would be pointless to ignore the fall-back situation in terms of assessing the future effects of a project as compared with what would happen anyway.

3.26.2. It accords with the legal view recently expressed by the High Court (per Wyn Williams J (obiter dica) in *Britannia Assets (UK) Ltd v Secretary of State for Communities and Local Government* [2011] EWHC 1908 (Admin) at [88]: it

would be strange, to say the least, if a proposal were refused planning permission on the grounds of its impact upon a protected site even though the reality might be that an existing lawful use might have a much greater impact upon nature conservation interests upon the protected site[7].

Appropriate Assessment

3.26.3. If an Appropriate Assessment were to be required, it would be carried out by the Secretary of State. There is no prescribed format or documentary form for such an Appropriate Assessment.

3.26.4. It is clear that the appropriate assessment test is only concerned with any significant adverse effect on the integrity of the site: see *ADT Auctions v Secretary of State for Environment, Transport and Regions* [2000] JPL 1155 and Circular 6/2005 at [20].

3.26.5. The Appropriate Assessment is conducted by reference to the conservation objectives for the site in question. A plan or project which has an effect on a site but is not likely to undermine the site's conservation objectives cannot be considered likely to have a significant effect on the site: see *Waddenzee* at [47].

3.26.6. A plan or project which has an effect on a site will not fail the test unless that effect is on the integrity of the site as a whole. The guidance on the meaning of the integrity of a site is that it represents the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified.

3.26.7. The requirement to be satisfied that "no reasonable scientific doubt remains" means what it says. The doubt does not only have to be scientific, but it must

[7] It is not clear to what extent NE/RSPB are seeking to refer to opinions of David Elvin QC for Bracknell Forest which were refuted by the opinions of Timothy Straker QC in this regard. (Insofar as the latter are not before the inquiry, they will be provided). In fact the issue in that case related to the implementation of an extant permission, not the continuation of a fallback situation on site and do not deal with the view set out in *Britannia Assets* and the views of Natural England's own expert. It would therefore be contrary to Natural England's own evidence to do so. But if and to the extent these opinions are relied upon, the Applicants will refer to those of Timothy Straker QC in response.

also be reasonable. The test is certainly not one that equates to absolute certainty.

3.26.8. Again, as with the threshold test, the Applicants have approached this issue on the basis of looking at the Applications and existing operations. However, Jo Dear has identified that it is also appropriate to address this in light of the fallback which is correct (for the reasons set out above).

4. Fallback

4.1. In determining a planning application, a decision-maker is obliged to have regard to the fall-back situation, ie what would happen to the site if planning permission were to be refused: see *Snowden v Secretary of State for the Environment* [1980] JPL 749 and *Brentwood Borough Council v SSETR* (1995) 72 P&CR 61. The prospects of the fall-back situation must be real rather than merely theoretical. The Inquiry has heard detailed evidence from an independent, highly experienced expert as to the continuation of the Airport's existing business for business aviation, cargo and general aviation in the event that planning permission is refused and the numbers of resulting movements as a result of a natural growth in that continued business.

4.2. It is clear that the fallback situation is logically relevant to EIA and the Habitats Regulations, as Natural England's witness accepted (as dealt with above).

5. Alternative Locations

5.1. LAAG and CPRE have continually sought to compare the proposals at Lydd with proposals at Manston, and have suggested that the proposed developments ought to be refused on the basis of an alternative location. The factual fallacies in that argument will be dealt with in the Applicant's closing submissions. However the basis for such argument is also legally flawed. The existence of an alternative proposal, even if it were to be considered to be better than that proposed (which is not the case here anyway), is an irrelevant consideration if the proposed development is acceptable on the planning merits: see *Trust House Forte Limited v. Secretary of State for the Environment* (1986) 53 P&CR 293 and *R (Mount Cook Land Ltd) v. Westminster CC* [2003] EWCA Civ 1346; *First Secretary of State v Sainsbury's Supermarkets* [2007] EWCA Civ 1083; *Governing Body of Langley Park School for Girls v. Bromley LB* [2009] EWCA Civ 734.

5.2. Accordingly, LAAG/CPRE's reliance upon Manston as an alternative is not well-founded in law, quite apart from the absence of any justification for this argument on the facts (as will be dealt with in closing submissions).

6. Consistency

6.1. There is a general principle of public law and good administration which is applicable to planning that such decisions should have proper regard to the need for consistency.

6.2. The Applicants will refer to the 1992 Planning Permission and findings within it in their Closing Submissions having regard to that underlying principle.

PETER VILLAGE QC

JAMES STRACHAN