APP/L2250/V/10/2131934 & APP/L2250/V/10/2131936

SECTION 77 TOWN AND COUNTRY PLANNING ACT 1990 – REFERENCE OF APPLICATIONS TO THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

TOWN AND COUNTRY PLANNING (INQUIRIES PROCEDURE) (ENGLAND) RULES 2000

WRITTEN SUBMISSION
on behalf of the Applicant
relating to Lydd Airport Action Group's
Proof of Evidence ref: LAAG/11/A

In respect of:

Planning Application Reference:	Y06/1647/SH (New Terminal Building)
Planning Application Reference:	Y06/1648/SH (Runway Extension)

relating to land at London Ashford Airport, Lydd, Romney Marsh, Kent, TN29 9QL

1. INTRODUCTION

1.1 We set out by way of assisting the Inquiry some points of rebuttal to the proof of evidence of Mark Watts (LAAG/11/A). This is not intended to be an exhaustive rebuttal and only deals with selected points where it is considered necessary to respond. Where a specific point has not been dealt with, this does not mean that these points are accepted and these other points will be addressed at the Inquiry.

1.2 To assist in locating the relevant section of Mr Watts' evidence to which we refer in this written submission, the appropriate paragraphs in LAAG/11/A are inserted in parentheses thus [ ].

1.3 Mr Watts' evidence addresses point 4 in LAAG's statement of case "*in line with the Scoping Opinion and Lydd Airport's Master Plan, the planning application, the Environmental Impact Assessment and the Appropriate Assessment under the Habitats Regulations should have been assessed on the basis of 2million passengers per annum (2mmpa), rather than the throughput considered of 500,000ppa*".

1.4 The main points to be addressed in this written submission relate to:

1.4.1 LAAG's assertion that London Ashford Airport Limited's (the "**Applicant**") intention is to reach 2 million passengers per annum ("**mppa**");

1.4.2 the adequacy of the Environmental Statement ("**ES**") that accompanied planning application Y06/1647/SH (new terminal building) and planning application Y06/1648/SH (runway extension) (the "**Planning Applications**"); and

1.4.3 the contention that the Appropriate Assessment should have been assessed on the basis of 2mppa rather than 500,000 passengers per annum ("**ppa**");

1.5 This written submission is accompanied by Appendix A (LAA/17/B).

2. 2MPPA INTENTION

2.1 [21] Mr Watts asserts that the Applicant "*has openly marketed its true intention – in its Master Plan, its planning application, on its website, in marketing literature and in presentations to councils and other bodies*."

2.2 [33] Mr Watts alleges that the Applicant's "true intention" is to reach a throughput of 2mppa. These statements from Mr Watts are misleading for the simple reason that he is referring to documents that pre-date the submission of the Planning Applications and they do not reflect the Planning Applications that the Applicant has made.

2.3 [22] First, Mr Watts refers to the Applicant's Masterplan. This Masterplan was a document produced and sent to the Department of Transport in December 2003, and was then updated as long ago as December 2005. It does not form any part of the Planning Applications and it has no statutory force or origin. The Masterplan was very much a voluntary document (within the meaning of the Government's Air Transport White Paper) and London Ashford Airport (the "**Airport**") was not an airport which was expressly advised to produce a Masterplan by the Government in this White Paper.

2.4 The Masterplan merely set out what the Applicant then considered to be the long term vision of the Airport eventually accommodating a throughput of 2mppa. It is plain that that vision does not mean such a long term aspiration would necessarily be pursued, let alone materialise in practice. Any such aspiration would require appropriate development consents if it were to be pursued. The Applicant's only objective now is to obtain approval for the Planning Applications. These Planning Applications are capped at a throughput of 500,000ppa. If the Applicant were to receive planning

permission for the Planning Applications, the Applicant could not exceed this throughput unless it submitted a new planning application.

2.5 Moreover, the Masterplan itself recognised that any increase from 500,000ppa to 2mppa would need to be accommodated by a "Phase 2" development, consisting of an addition to the proposed new terminal building at some stage in the future.

2.6 In addition, the grant of permission for the Planning Applications is not of itself any guarantee that the Airport will in fact reach 500,000ppa or do so within any particular period.

2.7 [23] Mr Watts misleadingly asserts that the Applicant's website, as at 16 December 2010, was promoting expansion proposals for 2mppa. Mr Watts seeks to justify this assertion by referring to a document entitled "Stakeholder Consultation Strategy: London Ashford Airport." However, this Strategy set out the consultation that the Applicant had undertaken between January 2003 and December 2005 and the consultation that the Applicant was about to undertake in the year leading up to submission of the Planning Applications.

2.8 The Strategy, therefore, is a pre-Planning Application document which refers to the historical position where the Applicant was previously considering the submission of an outline planning application for a terminal building that could accommodate a throughput of 2mppa. This Strategy refers to that historical position and consultation. However, as is common on many applications during the consultation process, the proposals were changed during 2006 and the Planning Applications that were submitted in December 2006 are only for use of the Airport for a maximum of 500,000ppa. Changes resulting from consultation reflect the central purpose of consultation. It is an iterative process that enables development proposals to be finally formulated in light of the consultation responses received before submission to the planning authority. This process of taking account of consultation is something which the Planning Act 2008 places considerable weight upon.

2.9 [24] Mr Watts also claims that the Applicant's marketing literature promotes a throughput of 2mppa. But yet again, the reference Mr Watts seeks to use to justify his remarks is to a pre-application document dating back to 2006. It is unsurprising that this 2006 document referred to 2mppa, given that the Applicant was consulting on proposals for 500,000ppa and 2mppa as explained in paragraph 2.8 above.

2.10 [25] Mr Watts then refers to presentations by the Applicant to local authorities and other bodies and claims that these "*all confirmed the intention to develop an airport in order to cater for 2 million ppa*." He seeks to support this by reference to his Appendix E, which is a presentation by the Applicant to the Channel Chamber of Commerce and Kent County Council. But yet again, Mr Watts is referring to pre-application documents which preceded the final formulation of the Applicant's planning proposals in light of the consultation it undertook. The date of this presentation was 22 October 2004. This was over six years ago, and two years and two months prior to the submission of the Planning Applications themselves.

2.11 [22] Finally, Mr Watts asserts that the Terminal Building Planning Statement demonstrates the Applicant's "true intention." However, Mr Watts fails to refer to paragraph 3.2 of the Terminal Building Planning Statement. This identifies that Phase 2 as identified in the Masterplan would only ever be feasible if "*Phase 1 is a commercial success*." The Planning Statement also makes it absolutely clear that Phase 2 would have to be the subject of its own individual planning application and that the Masterplan is not part of the Planning Applications.

2.12 Mr Watts' claims are therefore either based on pre-application documents (so pre December 2006) or fail to recognise that the Planning Statements submitted with the Planning Applications state that any prospect of an application for 2mppa is wholly dependent on Phase 1 and would need to be the subject of its own planning

application. There is no planning application for 2mppa that is before the Inspector and Secretary of State. It is speculation that the Applicant would ever submit an application for 2mppa or when that could or would occur. And if any such application were ever to be submitted, it would need to be subject to assessment and consideration at that time.

3. ADEQUACY OF THE ENVIRONMENTAL STATEMENT THAT ACCOMPANIED THE PLANNING APPLICATIONS

3.1 [35] Mr Watts claims that "*LAAG do not subscribe to the view that Lydd Airport has conformed to the Environmental Impact Assessment (EIA) Directive since it has submitted a planning application for 500,000ppa with an environmental impact assessment and intends to submit another planning application with an associated EIA for the second phase of the development".* Mr Watts goes on to assert that "*this is not the spirit or the letter of the EIA directive which aims to take into account the overall development, not just an integral part of it".*

3.2 To similar effect, at [37] Mr Watts asserts that "*all the evidence demonstrates that the current applications are an integral part of an inevitably more substantial development... therefore the more substantial 2 million ppa figure should have been assessed*". The consequence of this alleged inadequacy of the Environmental Statement, asserts Mr Watts [39], is that "*the application can be determined only by refusal*".

3.3 These claims are misconceived. They are based upon the hypothesis that the expansion proposals of 500,000ppa and the previous consultation on possible expansion to 2mppa form part of a "single project" which should be assessed as such under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (as amended) ("**EIA Regulations**") ([35] to [40] and paragraphs 28 to 44 of Appendix B to LAAG/11/A). The hypothesis is flawed.

3.4 The concept of a "single project" in this sense is one which has been developed through case law. This law is concerned with circumstances where a large Environmental Impact Assessment ("**EIA**") development has been artificially divided up (or salami-sliced) into smaller development in a way which then potentially avoids the need to carry out an EIA for each of the smaller parts. The conclusion has been reached that in that sort of case, the smaller initial non-EIA development should be treated as being part of a larger single EIA project of which it forms part. An example of this might be an overall road or rail project which is divided up into segments, but should be considered as a whole, or one part of an overall development project which depends upon another development in order to proceed.

3.5 There is no basis for seeking to apply that approach to the Planning Applications. The Planning Applications are supported by Environmental Statements themselves and therefore fully comply with the requirement that the impacts of what is proposed are subject to EIA. They are not proposed as part of a larger development, nor are they dependent upon a larger development. Whilst the Airport (like any landowner or developer) may have its own commercial aspirations as to the future, these are not existing proposals and whether or not such aspirations could ever be realised in the future is a matter of speculation but would require full assessment at the stage that they were promoted. Thus any increase above 500,000ppa would need permission, and any significant impacts of such an increase would need to be fully assessed for the environmental consequences. This approach has been repeatedly applied in the context of aviation development where the development is assessed based on the limit of what is proposed and capped. In this regard, we refer to the Secretary of State's decision relating to Coventry Airport (where this issue was addressed by reference to other Inspector decisions such as Bristol Airport) to reach the conclusion that further development at the airport, beyond that subject of the application, should be judged and assessed at the appropriate time in the future.

3.6 There are no proposals for development beyond 500,000 ppa before the Inspector or the Secretary of State. If aspirations of this kind are pursued in the future, applications would need to be made with compliance with the relevant EIA requirements. This is very different to a situation where proposals have already been advanced or there is an integral project, but where it has been artificially divided into smaller projects.

3.7 It is also worth considering paragraph 46 of Circular 02/99 (Environmental Impact Assessment) which addresses the issue of "multiple applications." Paragraph 46 states in this context:

"*For the purposes of determining whether EIA is required, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development. In such cases the need for EIA (including the applicability of any indicative thresholds) must be considered in respect of the total development. This is not to say that all applications which form part of some wider scheme must be considered together. In this context, it will be important to establish whether* ***each of the proposed developments could proceed independently and whether the aims of the Regulations and Directive are being frustrated by the submission of multiple planning applications***" (our emphasis).

3.8 It is plainly the case here that the Planning Applications can proceed independently without any other development proposals and that the EIA Regulations and the Environmental Impact Assessment Directive 85/337/EEC (as amended) are not being frustrated as there are no multiple planning applications, just the Planning Applications that are both accompanied by an Environmental Statement.

3.9 **Case Law**

3.9.1 At paragraph 41 of Appendix B to LAAG/11/A, Mr Watts refers to the case of *R v Swale Borough Council and Another, Ex Parte Royal Society Protection of Birds* [1991] 1 PLR 6. In determining whether a development would be likely to have significant effects on the environment, the Court held that:

"*The proposal should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the regulations by piecemeal development proposals*" (16E).

3.9.2 The effect of the *Swale* case is to require an assessment of each project on a case by case basis to see whether it forms part of a wider project as well as an assessment against the thresholds in the EIA Regulations where the object of the regulations might otherwise be defeated. That is clearly not the case here.

3.9.3 The Planning Applications are subject to a full EIA and so there is no "defeat" of the object or spirit of Regulations and there is no larger development being proposed. The need for an assessment of the environmental effects of any potential future development proposals not included in the Planning Applications would need to be considered at the appropriate time, i.e. if any detailed proposals were ever to be pursued and planning applications are submitted.

3.9.4 The case of *R (on the Application of Candlish) v Hastings Borough Council* [2005] EWHC 1539 (Admin) is material here. The Court summarised the issue:

"*The issue perhaps can be put compendiously in this form: where an application for planning permission is for a development which, taken on its own by reference to the application, would not require an assessment of the likelihood of significant effects on the environment, is such an assessment nevertheless required if at the time that development is prospectively part of a wider development?*"

3.9.5 Again, the Planning Applications clearly do not fall within this category as they are already the subject of their own Environmental Statements. Moreover, as the Court identified in *Candlish* if a project of this kind were treated as part of a wider project, then that poses difficulties for the assessment, for even if there was a "*probability*" that there might be some eventual wider project there could "*be no certainty at all*" as to what eventual size and form it might ultimately take or be permitted to take, "*assuming planning permission for that project was granted at all.*"

3.9.6 In dismissing the judicial review challenge in *Candlish*, the Court held that the consideration of the individual application before the determining authority is the best approach as it avoids an attempt to evaluate projects "*on the most speculative of bases*."

3.9.7 In *R (On the application of Littlewood) v Bassetlaw DC* [2008] EWHC 1820 (Admin), the main ground of challenge was an alleged failure by Bassetlaw to require the production of a masterplan for the area as a whole before determining the application for a small first phase (i.e. on the basis that this failed to take into account the likely significant environmental effects of the development, in particular, the cumulative impact of the proposal together with any likely future proposal on the rest of the site).

3.9.8 Bassetlaw had required an environmental statement on the basis that the possible cumulative effects of future redevelopment of the site should be considered, but the developer did not accept that a masterplan was required at that stage as the development proposal was said to be "standalone" and not reliant on any future development of the neighbouring land.

3.9.9 Further, Bassetlaw's scoping opinion also stated that they thought at that time that the application site should not be considered in isolation from the rest of the site. However, by the time the application came to be determined no proposal for the wider area had yet been formulated.

3.9.10 The Court concluded that it did not see how there could be a cumulative assessment when "*there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site…[and] there was not any, or any adequate, information upon which a cumulative assessment could be based*."

3.9.11 The general approach of a cumulative assessment being required where one project is in fact an integral part of another project, or it is dependent upon another project for it to proceed or it cannot or will not proceed in isolation (neither of which is the case here) is clear from both *R (Davies) v Secretary of State for Communities and Local Government* [2008] EWHC 2223 (Admin) and *R (Brown) v Carlisle City Council* [2010] EWCA 523.

3.10 **Conclusion**

3.10.1 It is clear that there is no merit in LAAG's contentions regarding the Environmental Statement of the proposals for 500,000ppa.

3.10.2 The Environmental Statement submitted by the Applicant to support the Planning Applications has correctly assessed the environmental impacts of the Planning Applications which it accompanies. It would be incorrect and beyond European and national legislation to assess the impact of 2mppa when planning permission is being sought for a throughput of only 500,000ppa. If, in the future, a planning application were to be submitted seeking a throughput of 2mppa at the Airport, then at that stage consideration of an EIA would need to be carried out.

3.10.3 Finally, it should be noted that if there had been any merit in LAAG's contention, it could not properly result in dismissal of the Planning Applications. If the Environmental Statements were deficient in the way alleged (which they are clearly not), there would be a duty on the Inspector and/or the Secretary of State to require further information under the Regulations. No such request has been made by the Inspector or the Secretary of State.

4. **CONTENTION THAT AN APPROPRIATE ASSESSMENT SHOULD HAVE BEEN ASSESSED ON THE BASIS OF 2MPPA RATHER THAN 500,000 PASSENGERS PER ANNUM**

4.1 [44] Mr Watts refers to an opinion of Mr Horton QC which advised LAAG that "*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*". This appears to be because Mr Horton QC considers that the Planning Applications are a "*project*" and/or a "*plan*" within the meaning of the Conservation (Natural Habitats &c.) Regulations 1994 (now the Conservation of Natural Habitats and Species Regulations 2010 (the "**Habitats Regulations**")).

4.2 [54] and [55] Mr Watts then contends that the Masterplan "*provides a great deal of detail about the airport's intentions...is a statement of intent and that it demonstrates the airport intends to expand in this case beyond the size of the planning application*".

4.3 Without prejudice to such legal submissions as the Applicant may make generally, Mr Horton's views are, with respect, not correct in principle. Such an interpretation of the Habitats Regulations and European Directive 92/43/EEC is both contrary to its wording and purpose. The Applicant's Masterplan is neither a relevant "plan or project" under the Habitats Regulations nor a development plan or document that sits behind the development plan subject to assessment under the Habitats Regulations. A statutory plan, such as a development plan, which is adopted by a relevant authority, would generally be subject to the Habitats Regulations. However, this is in direct contrast to an aviation masterplan document. The Applicant's Masterplan is merely a document which has been published unilaterally by an airport operator. There are no statutory procedures governing the making of an aviation masterplan or for the adoption or decision making for the publication of an aviation masterplan. Further, there is no basis for treating an aviation masterplan as a material consideration in the determination of a planning application. Moreover the assumption that an Appropriate Assessment would be required fails to follow the staged process under the Habitats Regulations even if they had been applicable.

4.4 In any event, the point is academic for the purposes of the current Planning Applications. Even if it were the case (which it is clearly not) that the making of a Masterplan required application of the steps under the Habitats Regulations, any relevant omission in this regard would be irrelevant. It would simply relate to the

validity of the masterplan document, not the Planning Applications before the Secretary of State.

4.5 As to issues relating to whether any Appropriate Assessment is required for the Planning Applications themselves, this is a matter for legal submission in due course. However it is clearly wrong to suggest that even if such an Appropriate Assessment were required, it ought to assess the implications of 2mppa rather than 500,000ppa for the same reasons given above in the context of the EIA.

4.6 Following receipt of the Matthew Horton QC opinion (Shepway District Council forwarded us the Matthew Horton QC opinion on 13 February 2009) the Airport obtained a legal opinion from Peter Village QC and James Strachan on the status of the Applicant's Masterplan. We enclose at Appendix A a copy of this opinion, which was issued to Shepway District Council on 9 April 2009.

5. REQUEST FOR FURTHER INFORMATION

5.1 Mr Watts makes reference to regulation 19 of the EIA Regulations that enables a local authority, the Secretary of State and an Inspector to request further environmental information from the applicant (paragraphs 61 - 62 of Appendix B to LAAG/11/A).

5.2 Shepway District Council was, of course, well aware of LAAG's contentions that the Environmental Statement should assess 2mppa, having been provided with a copy of Matthew Horton QC's legal opinion in 2009. However, during its considerations of the Planning Applications, Shepway District Council did not make a regulation 19 request asking for further environmental information assessing a hypothetical 2mppa scenario.

5.3 Further, despite Mr Watts' protestations that the Environmental Statement is inadequate, LAAG has, at no point during the Inquiry into the Planning Applications, made a request to the Inspector or the Secretary of State for further environmental information under regulation 19 of the EIA Regulations. Despite alleging that the Environmental Statement is inadequate and despite not requesting that the Inspector or the Secretary of State make a regulation 19 request, Mr Watts [40] rather incredulously observes that:

"*In accordance with the Regulations and the Directive if the Secretary of State or Inspector refuse to require the applicant to undertake an assessment at 2 million ppa and subsequently grants planning permission, the objectors have the right to ask the UK Courts or the European Commission to quash any decision to grant permission*."

5.4 That is not the case. It is clear that alleged deficiencies of this kind by way of legal challenge (through a judicial review) could and ought to be pursued timeously. Neither the Inspector nor the Secretary of State has issued a regulation 19 request. If LAAG considers this to be in error, any challenge to that decision ought to have been pursued by way of judicial review and it is not appropriate to await the determination of the Planning Applications themselves.

5.5 In the event that the Inspector or the Secretary of State were to accede to this very late request, and without prejudice to the Applicant's contention that such a request is misconceived, then the Applicant entirely reserves its rights with respect to the consequences, in terms of costs thrown away, of any such request being acceded to.

6. SCOPING OPINION

6.1 Given the history set out above, it is unsurprising that the Applicant's original EIA scoping request document to Shepway District Council requested an EIA scoping opinion on what was at that stage still being considered as the subject of potential planning applications, namely a two phased development scenario of 500,000ppa and 2mppa. Following receipt of the scoping opinion and the Applicant's own consultation, the Applicant decided, as it was perfectly entitled to do, to refine its development

proposals by not pursuing the 2mppa scenario. Accordingly, the Applicant did not have to comply with the scoping opinion in respect of 2mppa as no planning application for 2mppa was submitted.

6.2 Other than removing the 2mppa scenario, the rest of the development applied for by the Applicant conforms to that which was scoped out in Shepway District Council's scoping opinion. It is therefore misleading of Mr Watts to state at paragraph 57 of Appendix B to LAAG/11/A that the "*Statement does not comply with the Scoping Opinion in relation to passenger numbers*." In any event, as Mr Watts himself acknowledges at paragraph 58 of Appendix B to LAAG/11/A, paragraph 95 of Circular 02/99 states that "*an ES is not necessarily invalid if it does not fully comply with the scoping opinion."* It would be nonsense for the Applicant to have to comply with those parts of the scoping opinion that were only required for the 2mppa scenario when a smaller development was eventually applied for.

6.3 In terms of Mr Watts' comment at paragraph 51 of Appendix B to LAAG/11/A, that the "*public consultation on scoping was conducted on the basis of 2 million ppa and it would seem to be a breach of the Aarhus Convention if this Scoping Opinion is no longer valid*," Mr Watts ignores the fact that those parts of the scoping opinion that relate to the development that was eventually applied for were complied with (i.e. the runway extension and a terminal building to accommodate 500,000ppa). Further, the Planning Applications were consulted on between December 2006 and March 2010, when the Planning Applications were determined by Shepway District Council, and are now the subject of further scrutiny by the Secretary of State. It is therefore unwarranted to claim that the public have somehow been prejudiced.

Pinsent Masons LLP **Peter Village QC**

James Strachan

June 2011