



**London Ashford Airport, Lydd, Romney Marsh, Kent, TN29
9QL, Planning Appeals, APP/L2250/V/10/2131934,
APP/L2250/V/10/2131936**

Proof of Evidence by Mark Watts BSc (Econ), MSc, FRSA

Ground 4: Why 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 2 million passengers per annum (2 million ppa), rather than the throughput considered of 500,000ppa.

For Lydd Airport Action Group (LAAG)

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LAAG/11/A

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This Proof of evidence addresses that part of LAAG's case that contends that the planning application should have been determined on the basis of 2mppa.

1. My name is Mark Watts BSc (Econ), MSc, FRSA.
2. I am Director of Luther Pendragon Brussels.
3. I am a consultant specialising in transport, planning, economic development and European Union (EU) regulation.
4. I have a degree in economics, BSc (Econ) and a Master of Science degree in Urban & Regional Planning (MSc), both from the London School of Economics and Political Science (LSE).
5. I was a UK Member of the European Parliament (MEP) for ten years, where I specialised in transport and EU regulation.
6. I was MEP for Kent East, which included Lydd, and therefore I am very familiar with the area and the planning issues surrounding London Ashford Airport (LAA).
7. I was appointed by the Prime Minister to advise the Cabinet Office on EU regulation between 1999-2004.
8. I followed and advised on the amendments to the Environmental Impact Assessment Directive on behalf of the Government.
9. I was a planning officer for a London Borough for six years. I was involved in both strategic, local and development control matters. I was a member of a local authority planning Committee in Kent for ten years.
10. Luther Pendragon Brussels specialise in EU regulation, law and policy making.
11. I have advised clients on EU regulations for several years. My recent clients include the Civil Aviation Authority, the Port of Tilbury London Limited, UPS, Maersk, European Commission and the Joint Parishes Group (JPG). I recently gave advice to the JPG in relation to the appeal by KIG in Maidstone.
12. I was elected a fellow of the Royal Society of Arts in 2009.

13. The evidence which I have prepared and provide for this appeal in this report is true and I confirm that the opinions expressed are my true and professional opinions.
14. This proof of evidence examines LAAG's contention that the planning application should have been determined on the basis of 2 million ppa. As set out in the fourth entry in the LAAG statement of case:

(4) 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 (2mppa), rather that the throughput considered of 500,000ppa.
15. First I review the evidence produced by Lydd Airport themselves, and in particular their Master Plan.
16. Second, I review the Report from the Department of Air Transport, Cranfield University on the economic viability of an airport with a throughput of 500,000 ppa (Appendix A).
17. Third, I review the Report I have produced which assesses whether for the purpose of the Environmental Impact Assessment (the Statement) the more substantial 2 million ppa figure should have been assessed and consequently whether the Statement does contains all the information required by EU Regulations and the Environmental Impact Assessment Directive. (Appendix B)
18. Fourth, I review the Opinion by Matthew Horton QC, which examines whether the current applications should be assessed in combination with the Master Plan.(i.e. 2 million ppa) (Appendix C)
19. Fifth, I review the relationship between EU law and UK law, and how it should be interpreted.
20. I conclude by summing up whether this evidence supports the contention that the planning application should have been determined on the basis of 2million ppa.

The evidence produced by Lydd Airport

21. Lydd Airport 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 – Chamber of Commerce for example.
22. The Master Plan sets a clear goal of 2 million ppa¹. The December 2003 version is a detailed document which shows throughput up to 10mppa, in particular page 1 and page 2 of 2003 Master plan (Appendix D). In addition the planning application - London Ashford Airport at Lydd, Terminal Building Planning Statement, December 2006, 4.1-4.6 refers to the Master Plan)². It states in 4.1

“In accordance with the recommendations of the Aviation White Paper, an Aviation Master Plan Study for the development of LAA was initially produced on behalf of LAA by Parsons Brinckerhoff in December 2003. The Study was further updated in December 2005.”

4.6 states: *“This planning application for the new terminal and the accompanying application for an extension to the existing runway are the first phase in the development of LAA. This will allow the airport to accommodate 500,000ppa. In the longer term, it is anticipated further applications will be submitted to enable the airport to accommodate 2pppa.”*

The introduction in the same document says in 1.12:

“The new terminal building will provide facilities for processing up to 500,000 passengers per annum (ppa). However, it is LAA’s medium term aspiration to achieve 2 million passengers per annum (mppa). Further expansion work will be required to accommodate this number of passengers. It is intended that these works will be the subject of further planning applications in the future

23. The website clearly sets out the plans for handling 2 million ppa and (as at 16 December 2010) states:
 - a. “The airport plans to expand its operations to enable it to handle 2 million passengers a year by 2015. This expansion will be phased gradually over this period and will involve further upgrading to its facilities including a runway extension and new terminal facilities.”³

24. Marketing literature has promoted the concept of an airport handling 2 million ppa. For example the document *LAA Marketing Document – Closer to You, Closer to the Market (2006) core document CD11.10 (LAAG)* says (page 9)⁴:

“The management is understandably ambitious given the part LAA has played in aviation in the past. The immediate plan now is to develop the airport to handle two million passengers annually by 2014 - an ambition that is wholly consistent with existing District and County structure plans.”

¹ Master plan, 2003, LAA

² London Ashford Airport at Lydd, Terminal Building Planning Statement, December 2006

³ http://www.lydd-airport.co.uk/documents/Community_Consultation_Strategy_290306.PDF

⁴ http://www.lydd-airport.co.uk/documents/The_case_for_LAA.pdf

25. Presentations to local authorities, and other bodies including Chamber of Commerce have all confirmed the intention to develop an airport in order to cater for 2 million ppa. I attach a presentation to the Channel Chamber of Commerce and KCC. (Appendix E)

Report from the Department of Air Transport, Cranfield University

26. The Department of Air Transport, Cranfield University was asked to examine the assertion:

i. "Lydd Airport would remain loss making at a throughput of 500,000 passengers per annum (ppa)"

27. The approach adopted to address the above was to analyse the financial results of a range of UK airports including those with a scale of operations similar to that proposed by Lydd Airport.

28. The analysis by Cranfield University demonstrates that it is highly unlikely that Lydd Airport could make a positive operating profit at levels of annual passenger throughput of 500,000. They argue the only way an airport of such a traffic volume could be profitable would be to attract lucrative off-shore oil business, a flourishing business park or other activities on the airport that were not related to commercial air transport activities.

29. They point out Lydd Airport has none of the specific advantages that a very limited number of other UK airports have for successful commercial exploitation of these activities, and could be seriously disadvantaged by the special status of the land surrounding the airport.

30. Having significant volumes of air cargo operations might also help them argue for it to become profitable, although these do not generate the amounts of ancillary revenues that passengers provide through retail and parking purchases. The latter are usually offered by third parties under concession agreements rather than the airport itself.

31. They believe low passenger numbers are unlikely to attract the more successful operators in this field and any firm would incur substantial fixed costs (in addition to those of the airport in providing space and services) with the prospect of low and possibly seasonal revenues.

32. They summarise and conclude by stating:

- *It is highly unlikely that Lydd Airport could make a positive operating profit at levels of annual passenger throughput of 500,000*
- *The only way an airport of such a traffic volume could be profitable would be to attract lucrative off-shore oil business, a flourishing business park or other*

activities on the airport that were not related to commercial air transport activities.

- *Lydd Airport has none of the specific advantages that a very limited number of other UK airports have for successful commercial exploitation of the above activities, and could be seriously disadvantaged by the special status of the land surrounding the airport.*
- *Low passenger numbers are unlikely to attract the more successful concessionaires, severely limiting the potential to generate ancillary revenues*

33. This clearly demonstrates that 2million ppa is the true intention as no commercial operation sets out to lose money – the 500,000ppa is the first step to achieving the 2mppa objective.

34. Although we believe it is unlikely that Lydd Airport will achieve its 500,000 ppa objective, if we are incorrect and the Lydd Airport grows successfully it will not stop at 500,000 ppa. Witness the growth of airport's across the UK. CAA statistics show in 1990⁵ that Prestwick Airport in Scotland had 195,000 ppa and Stansted 1.2 million ppa, yet by 2009⁶ the figures respectively were 1.8 million ppa and 20 million ppa and these figures were below the peaks achieved for these airports. Similarly Southampton had 492,000 ppa in 1990 and 1.8 million ppa in 2009 – again off its peak.

⁵ <http://www.caa.co.uk/default.aspx?catid=80&pagetype=88&sglid=3&fld=1990Annual>

⁶ <http://www.caa.co.uk/default.aspx?catid=80&pagetype=88&sglid=3&fld=2009Annual>

Report by Luther Pendragon Brussels

35. 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 500,000 ppa with an environmental impact assessment and intends to submit another planning application with an associated EIA for the second phase of the development. The belief by some is that the airport is conforming to the regulations since it cannot be accused of the form of incremental development designed to avoid conducting an environmental Impact Assessment. 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. Similarly, the Habitats directive, which is addressed in the next section (Horton Opinion), with its “in combination test” for which the underlying intention is to take account of cumulative impacts, and these will often only occur over time.
36. My Report addresses this issue and examines whether the Environmental Impact Statement (the Statement) produced by London Ashford Airport Limited complies with The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999 No 293 and the Environmental Impact Assessment Directive 85/337EEC, as amended by 97/11/EC and 2003/35/EC.
37. All the evidence demonstrates that the current applications are an integral part of an inevitably more substantial development. The environmental impact was assessed assuming 500,000 ppa, despite the clear intention, as set out in the latest Scoping Report, Scoping Opinion, and Master Plan, to reach the figure of 2 million ppa. Phase 2 is certainly likely, if not inevitable. Therefore the more substantial 2 million ppa figure should have been assessed and consequently the Statement does not contain all the information required by the Regulations and the Directive
38. In light of the sensitive nature of the location, the public consultation by Shepway District Council on the Scoping Opinion that has taken place that assumed 2 million ppa, UK Government guidance, EJC Case Law that seeks to prevent developers seeking to circumvent the regulations and Directive by submitting multiple applications, and the need to ensure the legislation is interpreted with wide scope and broad purpose, I conclude the current Statement is not substantially compliant with the Regulations and the Directive.
39. In accordance with the Regulations and the Directive if an applicant fails to provide enough information to complete the Statement, the application can be determined only by refusal.
40. 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. According to Government guidance the Courts has very limited discretion in cases involving environmental impact assessments because of the duty to comply with EC

legislation. If the statement does not comply with EU law the permission should be quashed.

Opinion by Matthew Horton QC

41. Matthew Horton QC was instructed to advise on whether the Master Plan, and the 2 million ppa should be taken into account. He was asked to examine the contention that:
42. Lydd Airport's Master Plan qualifies as a "plan" under the habitat's regulations and should therefore be considered in combination with the two planning applications in an Appropriate Assessment. In the case of Lydd Airport this would imply that the Appropriate Assessment should be carried out on the basis of a throughput of 2 million passengers per annum (2 million ppa) as opposed to the basis of 500,000 ppa currently proposed.
43. His analysis of Article 6 of the Habitats Directive is particularly worth highlighting. He cites the need to conduct a 'cumulative assessment' of 'plans', and he argues the word 'plan' should be given broad meaning, and that the cumulative impact should assess the Master Plan. He clearly believes the appropriate assessment is at 2 million ppa and that the Directive and the Regulations require such an assessment.
44. He concluded 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:

The works and level of use proposed in the current applications are a "project" within the meaning of the Directive. Since they are formulated also in a form which has plans and explanatory text, I consider that they are also a "plan" within the meaning of the Directive.

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 the first phase of that more ambitious plan or project.

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 from therefore the first phase is

not an isolated proposal separable from the second, but is part of an overarching project in the Master Plan.

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.”

Supremacy of EU law over UK law, and the need for to interpret purposively and having wide scope and broad purpose.

45. It has been ruled many times by the European Court of Justice that EC law is superior to national laws. Where a conflict arises between EC law and the law of a Member State, EC law takes precedence, so that the law of a Member State must be disapplied. This doctrine, known as the supremacy of EC law, emerged from the European Court of Justice in *Costa v ENEL*.⁷ It stated:

“It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.”

46. Subsequent judgments have upheld this principle.⁸

47. Britain became a member of the Common Market on 1 January 1973. Section 2 of the enabling legislation, the European Communities Act, 1972, established the principle that European Law would always prevail over British Law in the event of a conflict.

48. There are many examples where the UK has in failed to properly transpose EU law, and interpreted EU Directives too narrowly⁹. EU law should be fully transposed and interpreted with “wide scope and broad purpose”¹⁰. There have been a number of cases where the UK has been successfully challenged.

⁷ Case 6/64, *Falminio Costa v ENEL* [1964] ECR 585, 593

⁶ Craig and de Búrca, ch. 7. See also: *Factortame Ltd. v. Secretary of State for Transport (No. 2)* [1991] 1 AC 603, *Solange II (Re Wuensche Handelsgesellschaft, BVerfG decision of 22 Oct. 1986* [1987] 3 CMLR 225,265) and *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372; *Raoul George Nicolo* [1990] 1 CMLR 173.

⁹ *Commission Versus United Kingdom, Case C-6/04 (Judgement of the European Court of Justice, delivered 20 October 2005)*

¹⁰ *Kraaijeveld – Dutch Dykes Case (C-72/95)*

49. One particularly relevant example is R on behalf of *Akester and Melanaphy v Department of Environment, Food and Rural Affairs and Wightlink Ltd.* which exposed a particular loophole in the UK's implementation of the Habitat's Directive. The case revealed that the UK Habitats Regulations had not been designed to cover operations which might trigger the requirement for an appropriate assessment within the meaning of the Directive, prompting a swift amendment to address its shortcomings. The Court's interpretation of the leading case of *Waddenzee* (ECJ) is of significance. The term "plan or project" should be given a "very broad" definition and meaning in light of Article 6.3's objective to achieve a high level of environmental protection.
50. Courts must also adopt a purposive approach in interpreting laws implementing EU law. For example they must find what Parliament intended, and take into account all sources.¹¹
51. We believe the failure to assess at 2 million ppa results from a refusal to take heed of very well established EU law, and a very narrow interpretation of EU Regulations or recent ECJ and UK Court rulings.
52. The intention of EU law is to require assessments for the relevant plans, which in this case includes the Master Plan, in order to ensure all the long term and cumulative impacts are properly taken into account. They should be taken into account at this stage, since later and subsequent assessments will clearly be prejudiced by the earlier decision and any environmental impacts that result.
53. Northern Ireland's Habitat Regulation Guidance raises the possibility of a broader interpretation of a plan in cases where sufficient detail exists to ascertain whether the plan will have an impact on the European site¹². It states:
- a. *It may also be appropriate to include plans and projects, including policy statements, not yet submitted to a competent authority for consideration, but for which sufficient detail exists on which to make judgements on their impact on the European site.*
54. The Master plan provides a great deal of detail about the airport's intentions.
55. The Master Plan is a statement of intent and that it demonstrates the airport intends to expand in this case beyond the size of the planning application.

¹¹ *Lister v. Forth Dry Dock and Engineering Co Ltd* [1989] 1 ALL ER 1134

¹² *Habitats Regulations Guidance Notes, 3.2.3 page 9 (2002)*, Northern Ireland Executive

Conclusion

56. Lydd Airport themselves admit that their aim is develop an airport to handle 2 million ppa and have produced a Master Plan which clearly sets out how they plan to fulfil that ambition.
57. Cranfield University argues that It is highly unlikely that Lydd Airport could make a positive operating profit at levels of annual passenger throughput of 500,000, suggesting that the airport must rely on a higher throughput to become profitable and that the first planning application is phase one of a larger plan.
58. Luther Pendragon Brussels argues that the Environmental Impact Assessment Regulations and Directive *requires* an assessment at 2 million ppa if the current application is an integral part of an inevitably more substantial development. They conclude the current Environmental Impact Assessment is non compliant.
59. Matthew Horton QC argues that the applications should, in order to comply with the Habitats Directive, be assessed in combination with the Master Plan which is a plan as defined by the Directive and case law.
60. The failure to assess at 2 million ppa seems to result from a refusal to take heed of very well established EU law, and a very narrow interpretation of EU Regulations.
61. The UK has in the past been reluctant to fully comply with the letter and spirit of EU law. The UK has previously failed to properly transpose EU law or recognise it takes precedence over UK law. After several important ECJ rulings it is now accepted that not only does EU law have supremacy, but also it should be interpreted purposively and, in the environmental field in particular, should be interpreted as having wide scope and broad purpose. In the context of the application is clear that the Master plan should be assessed.
62. Given the clear aim of operating an airport to handle 2 million ppa, all the evidence supports the contention that the planning application should be determined on the basis of this higher figure.