

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/A

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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 (“LAAL”).
- 1.2 I have an Agricultural Science Degree (University of Melbourne). I worked for the Australian government’s Commission of Inquiry into Rural Poverty and for the Institute of Applied Economic and Social Research on the Australian Economic Review. After moving to the UK, I became an investment analyst and spent over twenty years analysing companies and market sectors for fund managers, stock brokers and investment banks. Although retired, I remain a member of the Securities Institute and I am a non-executive director of a small financial software company.
- 1.3 I helped resuscitate Lydd Airport Action Group (LAAG) in August 2004. This is the action group formed in 1988 to fight the previous planning application to expand Lydd Airport. I have been heavily involved in distilling and pursuing all grounds of objection, coordinating objectors and consultants advising LAAG, studying the relevant documents and responding to the planning applications.
- 1.4 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 (Y0/1648/SH) and new terminal and car park (Y06/1647/SH) 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.

2.0 Background 2009

2.1 Officers' recommending refusal and LAAL's reaction

- 2.1.1 **June 15th, 2009:** After four consultations on the planning applications (the original application dated December 2006 and the three sets of supplementary environmental information (“SEI(1)”) dated October 2007, (“SEI(2)”) August 2008 and (“SEI(3)”) March 2009), SDC informed LAAL that the report by Chris Lewis, the Head of Planning Services (“the First Officer’s Report”) recommended refusal; that the Report was to be published on July 1st 2009 and that the determination date was scheduled to be July 9th 2009.
- 2.1.2 **June 17th:** Public informed of July 9th determination date.
- 2.1.3 **June 2009:** Publication of the Appropriate Assessment under the Habitats Regulations (“AAHR”) (exact date of publication unknown).
- 2.1.4 **June 30th 2009:** Press release from SDC announcing the postponement of the determination meeting until September 23rd 2009. This was later changed to September 24th 2009 due to a clash with the Liberal Democrats national conference. The deferral was granted as a result of a request from LAAL (see Appendix 1).
- 2.1.5 **July 1st 2009:** Publication of the first Officer’s Report. The report concluded that the planning application for the extended runway and new terminal should be rejected – the principal reason being LAAL’s inability to prove under the Habitats Regulations that the proposed development would not have an adverse impact on the Dungeness Special Area of Conservation (“SAC”) and the Dungeness to Pett Level Special Protection Area (“SPA”), the proposed extension to the latter (“pSPA”) and a proposed new RAMSAR site (“pRAMSAR”). The report also stated that the development would damage the Dungeness, Romney Marsh and Rye Bay Site of Special Scientific Interest (“SSSI”). The conclusions reflected the assessments made in the Appropriate Assessment.

- 2.1.6 **August 17th 2009:** Email (disclosed pursuant to a request under the Freedom of Information Act (“FOIA”)) from Jonathan Gordon to SDC announcing his reappointment as Managing Director of Lydd Airport (effective September 1st 2009), that Drivers Jonas had been appointed advisers and requesting an urgent meeting with SDC – See Appendix 2.
- 2.1.7 **August 27th 2009:** The publication of LAAL’s rebuttal of the First Officer’s Report with covering letter from LAAL’s planning consultants, Indigo Planning Limited (“Indigo”), requesting a meeting in order to resolve the last few areas of disagreement (disclosed pursuant to an FOI request) (see Appendix 3).
- 2.1.8 **September 3rd 2009:** Email (disclosed pursuant to an FOI request) from Jonathan Gordon to Alistair Stewart (SDC) requesting that the determination date be deferred to February / March 2010 so that LAAL had time to resolve the remaining issues (see Appendix 4).
- 2.1.9 **September 7th 2009:** SDC announce that the determination date would be delayed until February / March 2010 (see Appendix 5).
- 2.1.10 **October 15th 2009:** Publication of the rebuttal of LAAL’s Rebuttal (August 27th 2009) by Bureau Veritas (“BV”) on behalf of SDC. BV concluded on the currently available data that the conclusions remain unaltered: *“Should the developments proceed they would lead to a likely detrimental effect upon the SAC, SPA, SSSI, pSPA and pRamsar”*.
- 2.1.11 **October 28th 2009:** LAAL wrote to SDC stating its intention to submit further environmental information.
- 2.1.12 **November 3rd 2009:** Press Release from SDC announcing the determination date of March 3rd 2010.

2.1.13 **December 11th 2009:** Fourth set of supplementary Information (“SEI(4)”) published by LAAL as part of its response to the recommendation for refusal.

2.2 **Comment on 2009 events**

2.2.1 LAAG believes SDC did not act impartially when it agreed to LAAL’s request for time so that it could challenge the First Officer’s Report. SDC had employed the leading consultant Bureau Veritas and its advice had influenced the conclusion in the First Officer’s Report. Officers had concluded that no more information was required to produce the Officer’s Report despite a number of bodies including Natural England, RSPB and LAAG indicating that more information was required before the planning application could be determined. That suggests that Officers were not persuaded by the information provided by LAAL, when considered by reference to the advice received already from others and consequently there was no need to await further advice from those others. Consequently, when, on October 29th 2009, LAAL announced its wish to submit further information, if SDC considered that fairness required it to allow LAAL further time for that purpose, it should have made that decision conditional on LAAL providing the additional information requested by Natural England and others so that those bodies could consider further their own advice to SDC.

2.2.2 SDC’s Chief Executive, Alistair Stewart, was disingenuous to announce on September 7th that the determination meeting was to be postponed until February / March 2010 because Jonathan Gordon, the new MD, needed more time to review all the paperwork involved in the two applications, including the airport’s response to concerns raised by the council on its published reports. Mr Gordon had long been associated with Lydd Airport, having been a director and shareholder, before and after the acquisition of a controlling interest in Lydd Airport by Sheikh Fahad al Athel in 2001 and a leading figure in the preparation of the previous planning application submitted in 1988. He was therefore already familiar with most of the issues associated with this application. Further, Mr Gordon was already engaged in scrutinising the refusal recommendation dated 1st July 2009 before his appointment

was made official on September 1st 2009 (Appendix 2) while LAAL's consultants had already examined the information and published a rebuttal on August 27th 2009 (Appendix 3).

3.0 Background 2010

3.1 Events in 2010 leading to full council meeting on March 3rd, 2010

3.1.1 Mid January 2010: Consultation on fourth set of supplementary Information (SEI(4)) completed. LAAG in its response to SEI(4) highlighted the introduction of new RNAV(GPS) flight procedures at Lydd Airport in August 2009 which would have an impact on noise, pollution and safety assessments, but this representation was not regarded as material.

3.1.2 February 2010: Publication of second Appropriate Assessment, referred to as the revised Appropriate Assessment ("RAAHR") - exact date of publication unknown.

3.1.3 February 19th 2010: Publication of the second Officer's Report, referred to as the Supplementary Officers Report. The report retained its refusal recommendation but diluted the reasons for refusal by concluding that the proposals would not have any adverse effects on the integrity of the Dungeness Special Area of Conservation (SAC). The report retained the view that the airport was unable to prove that there would be no adverse impacts on the SPA, pSPA and pRAMSAR. The acceptance that the SAC would no longer be adversely affected reflects the conclusion of the revised Appropriate Assessment.

Paragraph 9.7 of the Supplementary Officer's report acknowledged that despite the Officers' opinion that LAAL had advanced a strong case, they could not properly recommend the grant of permission having regard to the strengths of the case against such a grant. The paragraph stated:

“It should be noted that whilst these planning applications are being recommended for refusal, officers consider that LAA have put forward a strong case in support of the applications. However, because of the advice from Natural England and the council’s consultants, it has not been possible to recommend consent. This is because of the potential and likely adverse effects on the internationally designated SPA, the nationally designated SSSI, and proposals for an extension to the SPA and potential

designation of a RAMSAR. Taking this in to account, officers are of the opinion that the adverse noise impact and the implications for sustainability should be retained as reasons for refusing the applications, especially given other alternatives at Manston.”

3.1.4 February 23/24th, 2010: February 24th: An email on 24th February timed at 18.02 (obtained pursuant to an FOI request) between Chris Lewis and Sean McGrath of Indigo Planning in which Chris Lewis reminded Sean McGrath that that he (Sean McGrath) was going to send him “some thoughts” as to how “the Council might conceivably adopt a revised AA”. In fact, Indigo had sent its thoughts already by email on 23rd February timed at 18.21. At 18.04 on 24th February, Chris Lewis emailed Mr McGrath again asking him to ignore his earlier email as he had found the relevant email dated February 23rd (see Appendices 6A and 6B).

3.1.5 February 23/24th: February 23rd 2010: Email (obtained pursuant to an FOI request) to Chris Lewis from Indigo Planning (Appendix 7 – Page 1 & 2). The email appears to reveal that Indigo understood that SDC wished to grant permission and that it was considering how to do so, given the unfavourable Appropriate Assessment. In the email, Indigo outlines how SDC could amend its Appropriate Assessment by substituting evidence that demonstrated that there would be no adverse impacts on the SPA. It outlines how it would submit a table of suggested amendments to the Bureau Veritas Appropriate Assessment (RAAHR) and suggests 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 the second approach whereby the members would grant delegated authority to Officers to adopt the AA once it had been amended. Option 2 was not favoured by Indigo. The attachments to the email outline the two options in detail (Appendix 7: Pages 3 & 4). Option 1 & 2 both stated that the document containing the amendments would be entitled “*The Applicant’s Proposed Revisions to the February 2010 Revised Appropriate Assessment Report*”.

3.1.6 February 26th, 2010: The publication of the pink schedule of *Supplementary Information to Schedule of Applications*. This contained the revisions which were proposed to be substituted in the Appropriate Assessment (Appendix 7A, page 12 - note, pages are not numbered). The revisions were headed, as suggested by Indigo (in Appendix 7: Pages 3& 4): “*The Applicant’s Proposed Revisions to the February 2010 Revised Appropriate Assessment Report*”. 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 and SEI(1) - SEI(4). In particular, the photomontage of a Boeing 737 and ATR42-300 which was presented as evidence in SEI (4) and at the meeting on March 3rd (see the Transcript of proceedings (“CD2.5LAAG”), page 78) to demonstrate that birds would not be visually impacted by the airport’s development, was rejected as evidence by LAAG through its aviation consultant, Spaven Consulting, in its response to SEI (4) - (CD3.6 LAAG, Appendix 2 - note also LAAG/10/A pages 34-36).

The pink schedule also contained a letter from Indigo Planning on behalf of the applicant outlining why it disagreed with the conclusions of SDC’s Supplementary (second) Officer’s Report and further evidence in the form of summaries of letters from Lydd Airport’s ornithology expert and Professor Callum Thomas (Chair of Sustainable Aviation, Manchester Metropolitan University).

3.1.7 March 2nd 2010: email (obtained pursuant to an FOI Request) **timed 16.50** from Chris Lewis to Eilish Loftus (Indigo Planning) in which Chris Lewis states that option 1 would probably be the best way to proceed (Appendix 8, bottom of page). He then states “*Your replacement text is set out in your document ‘Applicant’s Proposed*

Revisions to the February 2010 Revised Appropriate Assessment Report' [see 2.1.3]. You haven't said exactly which pages of the BV report you would suggest it replaces but I think this would be pages 22-38 inclusive. Is this what you are suggesting?" At 17.14 Eilish Loftus sent an email to Chris Lewis clarifying the paragraphs that needed to be superseded – from pages 6-38 (see also Appendix 8 top of the page).

3.1.8 March 2nd 2010, email timed 20.46 (obtained pursuant to an FOI request): Email from Jo Oliver on behalf of Jonathan Gordon sent to all council members directly, and copied to, among others, Terry Ellames (SDC's Manager for Major Applications and Projects and the Case Officer for this application) and Chris Lewis, informing members about the possibility of disagreeing with the Officer's Report and relying on LAAL's advice (see Appendix 9, pages 1-2). *"The Officer's Report states that the integrity of the SPA would be affected. However, no evidence has been presented to support this. You are lawfully able to disagree with this view, if you find the evidence that the Airport has put forward makes you 'reasonably satisfied' that the integrity of the SPA should be preserved.*

Councillors should consider all of the evidence before them on the potential impact on birds. Councillors do not have to accept the Officers' recommendation and are lawfully able to make up their own minds based on all of the evidence before them."

3.1.9 March 3rd 2010, email timed 14.19 (obtained pursuant to an FOI request) from Natural England to SDC (Appendix 10, bottom of the page) stating that the letter attached to the email (Appendix 11) was important and requesting that it be circulated to members. In the 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 in his briefing note was incorrect and contradicted the advice of LAAL's own legal advisers.

3.1.10 March 3rd 2010, email timed 16.56 (Appendix 10, top of the page) from Natural England to Estelle Culligan (one of SDC's internal solicitors) expressing concern over Terry Ellames intention not to circulate Natural England's letter at the determination

meeting and reiterating the need for members to be “*fully aware of the legal position and in receipt of all material facts in our correspondence of today prior to coming to their decision*”.

3.1.11 **March 3rd, 2010, email from Estelle Culligan timed 17.12** (obtained pursuant to an FOI request) to Natural England (See Appendix 12, centre of page) reiterating Terry Ellames’ stance and pointing out that “*We have made 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.*” She went on to say that Terry Ellames would state during the presentation that Natural England’s letter has been received and that the Bureau Veritas representative will represent the salient points.

3.2 **Comments on events in 2010 leading to full council meeting on March 3rd, 2010**

3.2.1 The emails 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.

3.2.2 It cannot be claimed that Chris Lewis was only on a fact finding exercise to ascertain the facts 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.

3.2.3 The letter from Natural England dated March 3rd was deliberately withheld from members despite the materiality of its contents and the wishes of this organisation. The excuse given for not circulating the letter was that SDC 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.*” Yet, Terry Ellames and Chris Lewis were aware that LAAL’s Managing Director had sent a briefing document

directly to council members as late as 20.46 on the evening of March 2nd (since the email that provided this information was copied to them).

3.2.4 Natural England's letter reiterated its opposition to the planning application, pointed out that no further material evidence had been provided by Lydd Airport and that the advice given by Jonathan Gordon was incorrect and contradicted the advice of its own legal advisors. It is LAAG's belief that the letter was withheld so that the information provided to members could be controlled so as to enable Option 1 to be adopted. LAAG believes that the contents of this letter would have made council members uneasy about voting in favour of the development, whatever their views about the airport.

4.0 Events at Full Council Meeting on March 3rd 2010

4.1 Natural England's letter

4.1.1 At the start of the meeting Chris Lewis gave a summary of the relevant documents, highlighted their importance and set out a number of procedural issues including the role of the Appropriate Assessment (see Transcript ("CD2.5 LAAG") pages 9-13). He referred specifically to the amendments in the pink supplementary document, (Appendix 7A) to the Appropriate Assessment, proposed by LAAL (page 12, CD2.5LAAG). No mention was made of Natural England's letter, despite it being a material document. Further, when introducing the Bureau Veritas (BV) consultants no mention was made that they would be covering a number of important points raised by Natural England (page 13).

4.1.2 Terry Ellames (the case officer) gave his presentation after Chris Lewis. He began by reiterating that SDC had received late representations including a letter from Indigo Planning. He stated that, as there had been no time to provide a written response to LAAL's proposed revisions to the Appropriate Assessment, Kevin Webb, one of the Bureau Veritas' consultants, would provide a "*ten to fifteen minute response*". He then mentioned Natural England: *We've also received further letters of objection*

several further letters of objection, one of support, further comments from Kent Wildlife and also Lydd Airport Action Group and only a few hours ago a further submission from Natural England in response to the further Indigo Planning comments. Again Kevin Webb will touch on those issues” (see CD2.5LAAG, Page 15). There was no indication of the significance of Natural England’s letter.

- 4.1.3 Kevin Webb, BV’s consultant gave his presentation after Terry Ellames. At the end of his presentation he mentions Natural England in the following context.

At the very last minute today at four o’clock Natural England made a response to the issues that had been raised by the applicant. I’ll summarise these very briefly (page 42, CD2.5LAAG). He covered two of the five important points raised by Natural England, made a statement about a third and completed his presentation with the following remark.

“But otherwise that’s [sic] summarises very, very briefly – and excuse the slightly incoherent nature, it was four o’clock when we received the response from Natural England today so... thank you” (see page 43, CD2.5(LAAG).

The two points covered were: point 3 (the correct area of the proposed Ramsar site) and point 1 (letters from Nigel Deacon and Prof. Thomas). Mr Webb made a statement about point 2. (Revised Appropriate Assessment dated February 2010) rather than bring out the salient points. He left out both point 4 (the proposed SPA and Ramsar site - planning materiality and weight) and point 5 (letter from Jonathan Gordon, LAA to Councillors 02 March 2010). The analysis of the points covered in the transcript is given in Appendix 13.

4.2 Adoption of Option I

- 4.2.1 Michael Howard QC, the local Member of Parliament, was the last speaker before the applicant presented its case. He spoke in favour of Option I as follows:

“You are free to accept the evidence of the experts who put material before you on behalf of the airport instead of the evidence of the experts retained by the council” (see page 72, CD2.5(LAAG).

He then stated:

“You are free to come to the conclusion as I have, that you can be reasonably satisfied that there is no reasonable scientific doubt that the integrity of the designated areas, looking at the areas as a whole and taking into effect the level of bird populations for which they were designated or which they're proposed to be designated for, would be adversely affected by these proposals. And if you come to that conclusion, and once you've come to that conclusion, you are free to approve these proposals.”

4.2.2 Option I was considered further at the start of the debate amongst councillors which followed the applicant's presentation. Before there was any debate, Cllr Dearden asked a question and at the same time said he would like to make a proposal after the question was answered. He asked for clarification about the difficulties the council would face if it wanted to support the planning application when the Appropriate Assessment said there would be adverse impacts on the SPA.

“I would be grateful for further clarification regarding the issues raised in paragraph 9.8 of the supplementary report. In particular the difficulties that the Council might or might not have in adopting the BV Appropriate Assessment as the Councils Appropriate Assessment and then going on to resolve to grant planning permission despite the fight [sic] that the Appropriate Assessment it has just made would be a negative one. I wish to follow that when I have an answer with a proposal” (Page 89, CD2.5(LAAG)).

4.2.3 Chris Lewis was asked to respond to Councillor Deardon's question. He responded by saying that it would be difficult for councillors to vote in favour of the planning application when the current Appropriate Assessment is negative [not able to prove

the absence of adverse impacts] as the recommendation would be inconsistent with the Appropriate Assessment. He then outlined the mechanics of Option I.

As members will be aware the Council has to make an Appropriate Assessment on the proposals before it can actually go ahead and consider a recommendation on the planning application. That's a matter of law and I don't think that is in dispute. At the moment the Appropriate Assessment that you have before you is that the Council has commissioned from Bureau Veritas and they have completed that and it is before you tonight in the papers attached to the supplementary report.

Obviously that is as you have heard a negative assessment in as far as the proposals relate to the existing SPA but not the existing SAC. It therefore follows that if you accept Bureau Veritas's Appropriate Assessment you are effectively as a Council making a negative assessment in some respects of the proposal and that then does create difficulties if you were to go ahead and seek to approve the planning applications because the decisions on the planning application would be inconsistent with the Appropriate Assessment that you have made immediately before hand.

However the Lydd Airport have put forward and this is included in the pink sheets of your papers, a series of paragraphs that the proposed be substituted for certain paragraphs in the Bureau Veritas Appropriate Assessment. My advice would be that if you were looking to make a positive Appropriate Assessment that you would have to affectively amend the Bureau Veritas Appropriate Assessment with the suggested amendments coming forward London Ashford airport so as that actually amalgamates the two and that would then be the Appropriate Assessment the Council would have to make and obviously vote on.

In those circumstances your Appropriate Assessment wouldn't be negative and it wouldn't then be inconsistent for you to go ahead and decide to grant the planning applications (Pages 90-91, CD2.5(LAAG).

- 4.2.4 Immediately after Chris Lewis's explanation Councillor Deardon proposed that the Council adopt Option 1. His garbled proposal is below.

"Following on from that reply and thank you very much for making what I thought would be clear. I propose that the recommendation that the Council adopt the revised Appropriate Assessment under the habit regulations as set out in the report - I can't read my own writing, detail at the end of the supplementary report and prefer and adopt the applicants proposed revisions to the February 2010 revised Appropriate Assessment report put forward by Indigo Planning on behalf of the LAA.

Further that this Council approve the application of the LAA with suitable 106 conditions as promulgated by them" (CD2.5LAAG, Page 91).

Councillor Deardon's proposal was then seconded and several attempts were made to improve the wording of the proposal. The final wording of the proposal was not agreed until before the final vote (CD2.5LAAG, page 189 below).

It's an amended recommendation. It was done on the advice of the officers and meets my initial proposal but in a way that deals with the matter.

One, that the Bureau Veritas revised appropriate assessment report in Appendix Two be further amended by way of the deletion of pages 22 to 28 inclusive, the deletion of paragraph 4.4.5 on page 29, the deletion of the last two sentences of paragraph 5.1.6 on page 30 and 31 and the deletion of page 34 to 38 inclusive and the replacement of that content by the text set out in the applicant's proposed revisions to the February 2010 revised appropriate assessment report paragraph 1 to 4.5 inclusive.

That this revised appropriate assessment, as amended, be agreed and adopted by the council as the competent authority, having regard to the Wildlife and Countryside Act 1981 as amended and Regulation 48 of the Conservation Natural Habitats and Sea Regulations 1994.

This concludes A, the proposals for a runway extension and new terminal and car park are considered not to have any adverse effects on the integrity of the Dungeness Special Area of Conservation, SAC, subject to mitigation.

B, the proposals for a new runway extension and new terminal and car park are considered not to have any adverse effects on the integrity of the Dungeness to Pett levels Special Protection Area, SPA, subject to the proposed mitigation.

And in that respect it becomes the proposed assessment report and if that is favoured I would then go on to make another proposal.

4.2.5 After the recorded vote registered that 27 members voted in favour, 13 against and there was one abstention, Councillor Deardon proposed:

“that the council authorise that planning permission be granted for the runway extension YO6/1648/SH and the new terminal and car park YO6/1647/SH subject to completion of a suitable Section 106 legal agreement and planning conditions, the terms of which to be delegated to the head of Planning Services to agree on the council's behalf” (CD2.5LAAG, page 198).

4.2.6 By the process summarised above, Option I was adopted by the Council at the meeting on 3rd March 2010.

4.3 **Comment on the proceedings at the Council meeting on 3rd March 2010**

4.3.1 Natural England's letter was material in relation to the proposed changes to the appropriate assessment yet in the formal proceedings it was only mentioned in passing. Only two of the five points mentioned in the letter were covered. By his own admission Kevin Webb gave a brief and incoherent account of its implications.

4.3.2 Consideration of Option I dominated the proceedings. 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 experts advising SDC was extraordinary and required careful consideration by members of the original text compared to that proposed. No such consideration took place. 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. 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 LAAL'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. Hardly surprising, therefore a large proportion of the subsequent debate centred on the mechanics of implementing Option I rather than whether BV's judgement was wrong.

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

5.1 LAAG's perception is that SDC favoured LAAL 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 LAAL.

- 5.2 In the period between the publication of the second Officer's Report (February 19th 2010) and the determination date (March 3rd 2010), Chris Lewis, the Head of Planning at Shepway District Council appeared to collude with the applicant to implement a detailed scheme to facilitate the overcoming of the refusal recommendation in the second Officer's Report.
- 5.3 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 and the briefing document circulated to members by Jonathan Gordon. 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.
- 5.4 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 LAAL since, as 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.
- 5.5 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, Kevin Webb (Bureau Veritas) briefly explained 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.
- 5.6 The circulation of an amendment to the Appropriate Assessment before the meeting stimulated questions about the mechanism by which this could be changed rather than the substance. Cllr Deardon's question at the outset of the council debate on the evening of March 3rd, allowed Chris Lewis to explain the mechanics. Although

members could have chosen to debate the merits of the conflicting views of SDC's and LAAL's experts, they did not do so. That suggests to LAAG that many members were intent on granting permission regardless of the merits.

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

6.1 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.*"

6.2 The case *R (Akester) v DEFRA* [2010] EWHC 232 (Admin) highlights the impropriety of Shepway District Council's decision not to disclose the Natural England letter, and in so doing, failing to give Natural England's opinions the mandatory weight. In this case, although Wightlink (a ferry operator) was not obliged to follow the advice given by Natural England, it "*was bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it*" ([112]). Wightlink's decision was not reasoned. In the absence of a reasoned decision, the Court could not be satisfied that Wightlink "*gave the formal advice from Natural England the weight that it deserved, and in consequence that it could properly have come to the conclusion that no doubt remained as to whether the introduction of the new ferries would have adverse effects on the protected sites*" ([115]). The decision was also improperly influenced by commercial considerations ([119]-[121]).

6.3 The composite Appropriate Assessment created on the evening of March 3rd cannot be used as the basis for supporting LAAL's planning application. It seems to LAAG that members had no cogent reasons for preferring the judgement of LAAL's experts to the judgement of their own appointed expert other than their desire to grant permission.

7.0 Summary & Conclusions

7.1 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.

APPENDICES: 1-13

Appendix 1: SDC press release dated June 30th 2009 announcing postponement of July 9th determination meeting

Appendix 2: FOI Email dated August 17, 2009, from Jonathan Gordon announcing his appointment as MD & requesting meeting

Appendix 3: Rebuttal of Officers Report (first 2 pages) with covering letter dated August 27th 2009

Appendix 4: Letter (FOI revealed) from Jonathan Gordon to Shepway District Council dated September 3rd, 2009 requesting deferral of determination meeting to Feb/Mar 2010

Appendix 5: Press release from Shepway District Council announcing deferral of determination meeting to February/March 2010

Appendix 6: Email from Chris Lewis: February 24th (FOI) to Sean McGrath reminding him that he was to send him some thoughts about how the Council might adopt a revised AA

Appendix 7: Email from Indigo Planning to Chris Lewis dated February 23rd 2010 (FOI) outlining scheme to change the Appropriate Assessment plus attachments giving details of options

Appendix 7A: Pink schedule of *Supplementary Information to Schedule of Applications*.

Appendix 8: Email (FOI) from Chris Lewis to Idigo Planning (March 2nd) stating that OPTION 1 is the best way forward (email at bottom of page) and email (FOI) from Indigo Planning (March 2nd) to Chris Lewis outlining the pages to be substituted (email at top of page)

Appendix 9: Email dated March 2nd (FOI) from Jo Oliver on behalf of Jonathan Gordon with attached briefing note – sent to all council members.

Appendix 10: Two emails (FOI): an email from Natural England (NE) with attached letter to Shepway District Council (SDC) timed 14.19 (bottom on the page) requesting that the letter be made available to members, and a second email timed 16.56 (at top of the page) from Natural England to SDC expressing its concern following the discovery that the letter would not be circulated.

Appendix 11: Natural England's letter dated March 3rd 2010 received by Shepway District Council at 14.19

Appendix 12: Email (FOI) dated March 3rd (time 17.12) from Shepway District Council to Natural England outlining reasons for not circulating letter

Appendix 13: Analysis of points raised by English Nature's letter at the determination meeting

