TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPULSORY PURCHASE ACT 2004

APPEAL BY BAA LTD AND STANSTED AIRPORT LIMITED AGAINST THE REFUSAL BY UTTLESFORD DISTRICT COUNCIL OF PLANNING PERMISSION FOR DEVELOPMENT PERMITTED UNDER PLANNING PERMISSION UTT/1000/01/OP WITHOUT COMPLYING WITH CONDITION MPPA1 AND VARYING CONDITION ATM1

LOCAL AUTHORITY REF: UTT/0717/06/FUL
PLANNING INSPECTORATE REF: APP/C1570/A/06/2032278

LEGAL SUBMISSIONS ON BEHALF OF STOP STANSTED EXPANSION

Introduction

1. We have already made opening submissions at this Inquiry[1], since when much of SSE's case has been put in cross-examination of the BAA witnesses. In the light of that, we do not repeat – but neither do we resile from – one word of what we then submitted.

2. Nonetheless, and as we indicated when Mr Humphries QC made submissions on the import of *R (Essex County Council) v. Secretary of State for Transport* [2005] EWHC 20[2], we do wish to avail ourselves of the opportunity to make legal submissions prior to presenting the case for Stop Stansted Expansion. We hope that will be helpful, especially in light of the radically different view that we take of that case and its implications.

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[1] SSE/34.
[2] CD/342.

3. We will, in particular, make brief legal submissions on the following three matters:

   (i) The argument advanced by the Appellant that economic matters are "settled" by the Air Transport White Paper ("the ATWP").[3]
   (ii) The consequence, in law, of the Appellant not calling any evidence on the economic case.
   (iii) The suggested condition proposed by the Appellant whereby a cap on passenger throughput is proposed at 35mppa.

4. We also, in due course, intend to make legal submissions on the discrete issue of air quality (and in particular on the non-existence of a 5km exclusion zone for NOx thresholds as asserted by the Appellant) but propose to do that at the same time as Uttlesford District Council and the Appellant, rather than take that issue out of sequence.

5. Finally by way of introduction, you will have noted that SSE has reduced the number of witnesses it intends to call. The Appellant was consulted upon and agreed to this move.

6. Again, we hope that is helpful and will save Inquiry time without detracting from the evidential case that we make. By way of brief explanation, a number of experts were commissioned to test the work undertaken by SSE. The work having been tested and corroborated, we take the view that it is not now necessary to call all of those experts to give oral evidence which essentially duplicates the work already done.

7. SSE does request, however, that the Proofs of those witnesses which it no longer seeks to call are treated as Appendices to the Proofs which they mirror, and the appropriate witnesses will be happy to answer questions on them. John Whitelegg's Proof on economic and employment matters[4] should now be

[3] CD/87.
[4] SSE/9/a.

attached to Brian Ross's Proof on the same[5]; and Peter Forbes' Proof on forecasts[6] should now be attached to Brian Ross's Proof on air traffic data.[7]

8. We turn then to the first of our legal submissions, and the status in law of the ATWP.

(i) The ATWP and the Economic Case for the Expansion of Stansted

9. Just as we predicted in our earlier opening, the Appellant has indeed been brandishing the ATWP throughout this Inquiry as its full and final case on the economic justification for the proposed development, none more so than Mr Rhodes. He told us, you will recall, that since the Government had already published its policy framework for aviation and stated that the first priority was to make the "best use" of the existing runway at Stansted, it was not the place of this Inquiry even to question the ATWP in these regards.

10. In particular, so Mr Rhodes declared, when deciding upon the policies espoused by that White Paper, the Government had already considered both the environmental impact of their proposed expansion, including the noise attendant upon increased movements at Stansted, and the economic case for the proposed expansion of aviation at Stansted. Having done so, it had decided that expansion was both needed and beneficial so that the infliction of those environmental harms was justified.

11. That meant, at least according to Mr Rhodes, that it was not this Inquiry's function even to question either the Government's view that there was a "need" for increased aviation activity at Stansted, or their assertion that this would bring "significant benefits". If any adverse harm would be caused, whether by noise or otherwise, and even if in comprehensive breach of the Development Plan, that was all justified and we were not at liberty to argue otherwise.

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[5] SSE/8/a.
[6] SSE/5/a.
[7] SSE/4/a.

12. It was on this basis that BAA did not deign to adduce a single word of direct economic evidence to support its contention that the appeal proposal was justified, the harm occasioned by so many more air movements being outweighed by need or overwhelming economic benefits.

13. However, you will recall that SSE, in its opening submissions, set out in some detail the correct approach to the determination of *any* planning application: namely that the application must be determined in accordance with the Development Plan unless material considerations indicated otherwise.[8] The ATWP is not part of the Development Plan. It has not (as envisaged by Sullivan J in the *Essex County Council* case) been incorporated into the RSS[9]. It is just a material consideration, alongside all of the others including subsequent statements of Government policy on other cognate issues, including global warming – the greatest challenge of the age. The ATWP does not, therefore, permit the statutory test to be sidestepped, as was also expressly acknowledged by Mr Rhodes in the course of cross-examination by SSE.

14. Despite this, however, the way in which the Appellant has chosen to present its case, calling no direct evidence on the economic justification for its proposed development, relying exclusively on the assertions and assumptions contained within the ATWP, is – in effect – attempting precisely the statutory side-step of the Development Plan against which we cautioned in our opening submissions. To all intents and purposes the Appellant *is* saying that the ATWP settles the economic argument in their favour, from which – so BAA claims – it inexorably flows that all harms are justified and planning permission for their proposal *must* therefore be given.

15. And yet, as matter of law, ATWP does not "settle" at all the question of whether expansion at Stansted to 35mppa is economically justified, for all of the reasons which we expand upon hereafter, and taking into account the following:

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[8] Planning and Compulsory Purchase Act 2004, s.38(6) and Opening Submissions of SSE, SSE/34 at paras 13-21.

[9] This point was conceded by Mr Humphries QC on behalf of the Appellant.

1. The nature and wording of the ATWP itself, and how it has been considered by the Environmental Audit Committee in the House of Commons.
2. The Witness Statements made on the Secretary of State's behalf in the case of *Essex County Council*.
3. The judgment of Mr Justice Sullivan in that same case.
4. Subsequent statements to Parliament by the Minister.
5. The more recent judgment of Mr Justice Sullivan in the case of *R (Kings Cross Railway Lands Group) v. London Borough of Camden* [2007] EWHC 1515 (Admin).
6. The recent White Paper issued by the Government, *Planning for a Sustainable Future White Paper HM Government*[10].

(1) The Nature and Wording of the ATWP

16. It is necessary - first - to consider what, within the ATWP, is a statement of "policy" and what is not. In particular, "policy" (as defined by Lord Diplock in *Bushell v. Secretary of State for the Environment* [1981] AC 75)[11] is "descriptive of departmental decisions to pursue a particular course of conduct". In other words, it describes what the Government actually proposes to do; it does not describe the inputs and assumptions that underpin that proposal.

17. With that in mind, let us look at precisely what the Government has said in the ATWP upon which the Appellant now relies so heavily:

> *"Making full use of Stansted would generate large net economic benefits. We therefore support growth at Stansted to make full use of the existing runway…"*[12]

That quotation is made up of two sentences. The second sentence is – truly - a statement of Government policy, namely that the Government supports in

[10] CD/376
[11] Extracted in the judgment of Sullivan J in *Essex County Council*, CD/342 at para 60.
[12] CD/87 at para 11.26.

principle growth at Stansted to make full use of the existing runway. The prior sentence is not a statement of policy however. It is but an input into that policy, namely a statement of the Government's belief or assumption, based on the work which had then been undertaken, that full use of Stansted would generate large net economic benefits.

18. Indeed, it is as nonsensical to describe a statement that the full use of Stansted would generate large net economic benefits as one of government "policy" as it would be to so describe the similar statement in the ATWP that "daytime noise impacts would not be greatly worse as a result of an increase to 35mppa"[13]. Both are no more than statements of the Government's belief as to the facts, and both have exactly the same status in law at this Inquiry – being identically susceptible to scrutiny and challenge.

19. Accordingly, and just as the ATWP could not in law "settle" the issue as to the extent of noise impact in the absence of any Environmental Impact Assessment, neither can the ATWP settle the economic case for those impacts being inflicted, especially since the claims made by the ATWP for the economic justification of the expansion of activities at Stansted are the result of nothing more substantial than a high level, generalised review of the economic case.

20. Moreover, it is clear that the Government's view – based on that high level, generalised review - that making full use of its existing runway would generate large economic benefits (see, for example, para 11.26) is simply wrong. For example, the Environmental Audit Select Committee concluded as follows, when it considered these matters[14]:

> *"38. It is disappointing that neither the Treasury nor the DfT have conducted any recent analyses of the overall economic impact on the UK of the aviation sector, and in particular an analysis of the growth in aviation which is proposed.*

[13] CD/87 at para 11.25.
[14] CD/365, House of Commons Environmental Audit Committee Budget 2003 and Aviation Ninth Report of Session 2002–03.

> *39. In the absence of a robust evaluation, we are astonished at the overt bias the DfT has displayed by emphasising so consistently the economic benefits of aviation. It is disturbing, for example, that the consultation document quotes figures for the positive economic benefits of tourism but entirely fails to mention that there is an overall substantial negative balance of £15 billion."*

21. Indeed, subjecting the Government's assumptions to the most minimal analysis shows that they cannot withstand the scrutiny. For example, the ATWP Consultation Paper[15] makes it clear that the economic case for "maximum use" was based on the assumption that outbound leisure tourism would increase only marginally (39 to 41.3 million) and that inbound tourism and business travel would increase substantially (22 to 37.3 million and 23.9 million to 66.3 million respectively). It was *inter alia* on the bases of these assumptions that large net economic benefits were predicted. The reality in terms of passenger type has, however, turned out to be quite different as SSE's evidence will demonstrate, with radical consequences for the economic case. This Inquiry must deal with the real world as it has turned out to be, not the hypothetical world as it was wrongly assumed to be when the ATWP was published, testing and challenging the assumptions upon which the ATWP relied when concluding that "*making full use of Stansted would generate large net economic benefits"*.

(2) The Witness Statements and Submissions made by the Government in Essex County Council

22. Moreover, the capacity to undertake such an exercise was expressly confirmed in the Witness Statement of Mr Ash, submitted on behalf of the Government in the *Essex County Council* case.

23. In that Witness Statement Mr Ash confirmed that it was important, *not just relevant but important*, to recognise that no statements, even of policy, and whether at the national or regional level, could pre-empt any decision on an

[15] CD/113 at Table 14.7, p132. Passenger forecasts for South East airports: "maximum use" scenario.

application for planning permission.[16] Indeed, the Witness Statement went on to state in terms that:

> *"The establishment of need for a type of development in a policy statement does not mean that an Inspector, and ultimately the decision-maker, will be precluded from considering the need for the proposed development, but that this will be done in the context of what is said about need in the national policy statement…"*

24. You cannot be much clearer than that, although Counsel for the Secretary of State in *Essex County Council* tried, expressly submitting not only that the ATWP did not authorise any development, but that it *"merely informed and guided the consideration of planning applications"*.[17] That was the extent of the weight to be attributed to it. It followed, so the Secretary of State's Counsel went on to submit, that it was both possible and legitimate to argue at any subsequent Inquiry in respect of Stansted that the adverse environmental impacts were such that planning permission should be refused notwithstanding that this would frustrate national policy.

25. And that submission was rightly made. If it were otherwise, there would be a fundamental breach of the requirement not to grant planning permission for an application requiring an Environmental Impact Assessment unless all of the required environmental information has been taken into consideration – the direct, indirect, secondary and cumulative impacts of the proposal – including all of the impacts on the environment which would result from incremental changes brought about by past, present or reasonably foreseeable actions in the future.

26. And just as that it is true for the environmental issues at large at this Inquiry, so – as Counsel made clear – was it true for economic issues also.

[16] As extracted in CD/342 at para 56.
[17] CD/342 at para 223.

(3) The Judgment of Sullivan J in Essex County Council

27. Moreover, it is equally clear from the judgment of Sullivan J that any assertion that the ATWP does settle the economic case in favour of the maximum use of the existing runway would be unduly prescriptive and wrongfully encroach on your proper role at this Inquiry. That is apparent as soon as you see the passages of Sullivan J's judgment which Mr Humphries QC ignored when taking you through the case. In particular, having earlier identified the meaning of "policy" as stated by Lord Diplock in Bushell, Mr Justice Sullivan stated as follows:

> *"222. Views may differ as to whether the White Paper does live up to the promise on page 164 of the Consultation Document to make clear, or even to give a "clear indication", of the weight Ministers attached to the provision of new airport capacity. Whatever view is taken, it is one thing to give such an "indication" at national level, and quite another to give policy support in a White Paper for a particular form of runway, with a particular capacity, at a particular airport, upon the basis of an unpublicised decision that the advantages of obtaining a capacity gain of up to 46mppa outweigh the environmental impacts described in a desk-top study. The adoption of such a prescriptive policy does encroach upon the proper role of an Inspector at a public inquiry, assisted by the detailed information contained in an EIA."*

28. Just as that was true for the particular form of runway, and its contemplated capacity, that Mr Justice Sullivan was considering, so it is true with this particular runway and its contemplated capacity also.

(4) Subsequent Statements by the Government

29. Moreover, just as the Secretary of State was at pains to reassure Sullivan J. that nothing in the ATWP indicated that there was any "done deal" over aviation expansion, that Planning Inquiries would be free both to consider the harms caused thereby and to test the economic case assumed by the ATWP, so the then

Minister, Yvette Cooper MP, was at equal pains to reassure the House of Commons.

30. In particular, and during the passage of the Planning and Compulsory Purchase Bill on 19th April 2004, she was obliged to deal with a Lords' Amendment requiring, first, that economic impact assessments be required on major infrastructure proposals; and second, that an Inspector be always at liberty to consider the need for a development even though it was specifically proposed within a White Paper. In both aspects, so Ms Yvette Cooper MP said, the Lords Amendment was unnecessary[18].

31. So far as the economics were concerned the Minster stated as follows:

> *"… the Inspector will consider the economic effects, along with all the other aspects of the application as part of the Inquiry. Those would also include environmental and any other impacts, and local people would have a further opportunity to raise their concerns, including any concerns on economic aspects, at the Inquiry. If the economic impact is disputed, concerns can be raised about that, too… The Government do not want to predetermine through the legislation which issues the Inspector should consider or focus on at an Inquiry. The Inspector will need to be able to consider what the particular issues to be resolved are, and what to devote Inquiry time to, in each particular case."*

32. She went on to state that:

> *"… the Inspector will still need to consider the balance between a project's economic impact and other benefits, and will still be able to consider the rigour of different analyses and assessments that are put forward, as is the case at the moment. We in no way dispute the importance of rigorous economic assessment and its role in any analysis of a major infrastructure project and in the debates that are*

[18] CD/380.

> *necessary **at the planning level**. Material considerations that are disputed, whether economic, environmental, social, even aesthetic, will obviously be the territory of the Inquiry."*
> **(emphasis added)**

33. And as for the issue of "need", the Minster confirmed that:

> *"Again, we do not think that that requirement is necessary. Throughout the progress of the Bill, the Government have said that where there is a national policy statement White Paper, it should help to reduce the argument at a Planning Inquiry about the need for a specific development at a particular site—but that of course, the Inspector is likely to have to consider the balance between need and other factors.*
>
> *Those who oppose a specific development will be able to present their arguments against it, and it is right that they should have the opportunity to do so. It has never been the Government's intention to rule out the possibility of the Inspector spending some time considering need, but that will be done in the context of what is said about need in the national policy statement. The Inspector must ensure that all relevant impacts of a specific development are considered during an Inquiry, and that means all material considerations, together with relevant impacts such as the economic or environmental impact."*

34. Those statements are clear and they were deliberate. By making them, the Minister was making it clear to Parliament, just as those speaking on the Secretary of State's behalf made it clear to the High Court, that SSE are not to be prevented from arguing *either* that the environmental harms of this proposal make it unacceptable even though it is supported by the ATWP *or* that those harms are not outweighed by economic need or benefit, so that this proposal should not go ahead even though it will frustrate one aspect of Government policy.

35. Indeed in order to weigh the economic case for the expansion of Stansted in the balance against the environmental harms, one has to quantify accurately the actual economic benefits that are said to result. This is precisely what the evidence of SSE has done and precisely what the evidence of the Appellant, taken as a whole, fails to do.

36. To conclude otherwise, as the Appellant invites you to do, would mean finding that the Government did not mean what it said when it submitted the witness statement of Mr Ash to the High Court in *Essex County Council* case; that it did not mean what it said when it instructed Counsel to make the submissions set out above; and that the Minister deliberately misled Parliament.

37. The Appellant, in response, may well contend that this argument undermines the purpose of the ATWP, stating the same to be to settle certain matters and so reduce Inquiry time. Let us pre-empt that possibility. Our submission is *not* in conflict with that purpose.

38. We accept that certain matters are settled by the ATWP and we have not wasted Inquiry time arguing about them. For example, it is quite clear that the ATWP provides an affirmative answer to the question of whether aviation expansion is supported in principle. The ATWP cannot however, and does not, provide the balance to be struck between the environmental harms caused by airport expansion and their alleged economic benefits.

39. Rather, and as the Minster made clear, statements within the ATWP on this issue are no more than the starting-point and backcloth to deliberations at the Inquiry, or – in terminology with which we are all familiar – a "material consideration" which must be taken into account and given such weight as is appropriate.

40. Moreover, we do not dispute that considerable weight has to be given to the Government policy statement to the effect that its preliminary view was that best use must be made of the existing runway at Stansted. The statement is

contained in a White Paper, albeit of some antiquity[19] and one which pre-dates more recent developments in Government policy, not least the far stronger policy emphasis upon sustainability and tackling climate change.

41. Nonetheless, the weight to be attached to that material planning consideration must – in the end – depend upon the extent to which the assumptions upon which it is based withstand scrutiny; otherwise the Government's reassurances, to both the High Court and to Parliament, that all matters can be tested at Inquiry, will be meaningless.

(5) R (Kings Cross Railway Lands Group) v. London Borough of Camden

42. Moreover, there is some helpful guidance on the approach to take in this regard in the recent *King's Cross Railway Lands Group* case, also concerning the weight to be attached to a "preliminary view", albeit in that case in respect of a decision in principle of a far more substantial nature than is here in issue, being a decision of a Local Planning Authority that it was minded to grant planning permission for a specific proposal subject only to the entering into of a section 106 Agreement, that decision having been made - unlike here - after very detailed consideration of all relevant considerations.

43. In even that case, however, where a Local Planning authority had fully considered every planning detail of a proposal, and had formally resolved to grant it planning permission, and had to take that prior decision into account as a "material consideration", it was still at liberty to change its mind, attaching less weight to that consideration if it had a good planning reason to do so, whether in a change of circumstances since that earlier decision, or because – as matter of judgment looking at all of the relevant factors – it now decided that the balance should now be struck against rather than in favour of granting planning permission.

[19] The Appellant has sought to argue that the ATWP was somehow refreshed by the 2006 Progress Report [CD/88]. This is incorrect. The latter was not a Government policy review or White Paper but merely a departmental status report.

44. And if that is true of a formal decision made by a Local Planning Authority on an actual planning application and made after very detailed consideration, *a fortiori* must it be true of a preliminary view contained within a White Paper, based on dated analysis and assumptions (much of the ATWP analysis being based on 2000 data), and after far less detailed consideration.

45. In particular, you are at liberty to recommend to the Secretary of State that, in the light of all of the evidence you have heard at this Inquiry – both in respect of the economic assumptions upon which the preliminary view was expressed in the ATWP to support growth at Stansted to make full use of the existing runway and in respect of the environmental harms that such use would cause; and in the light also of matters which have happened subsequent to the ATWP's publication – including the publication of other Government policies on global warming, and the scrutiny of its aviation proposals by Select Committees, less weight should now be attached to that policy statement within the ATWP and that – for good planning reasons – that aspect of their policy should properly be frustrated

(6) Planning for a Sustainable Future White Paper

46. We have included in the above paragraph the reference to the scrutiny of the Government's proposals by Select Committee for very good reason. In particular, the recent White Paper issued by the Government, *Planning for a Sustainable Future White Paper*[20], makes it absolutely clear both that the ATWP will be subjected to full review in just three years time; and that it will then be subjected to Parliamentary scrutiny. That will be a first, for the ATWP itself was never subjected to Parliamentary scrutiny before it was published, albeit that it was scrutinised after the event by the Environmental Audit Select Committee who expressed themselves variously as "disappointed" at its lack of analysis and "astonished" at its overt bias[21].

[20] CD/376 at, respectively para 3.31; and paras 1.44, 1.46 and 2.13
[21] CD/365, Ninth Report, 2002-3, Budget 2003 and Aviation, paras 38 and 39

(ii) The Appellant's Failure to Call Economic Evidence

47. Moreover, if SSE's submissions are correct, and the ATWP does *not* settle the economic case for the expansion of Stansted to 35mppa, then certain consequences flow. In particular, the only evidence before this Inquiry of the economic effects of the proposed is that adduced by SSE. This evidence is not controverted by the Appellant. The evidence demonstrates quite clearly that the proposed expansion of Stansted will result in an economic detriment. There is no evidence before the Inquiry on which it could conclude that Stansted has a positive economic benefit either on a local basis or a national basis.

48. Furthermore, SSE invite you to draw the necessary adverse inference from the Appellant's failure to adduce any evidence as to the alleged economic impacts of the proposed development in contrast to the detailed evidence adduced by SSE as envisaged in the cases of *R v. Inland Revenue Commissioners, ex p. Coombs & Co* [1991] 2 AC 283[22] and *Wisniewski v. Central Manchester Health Authority* [1988] Lloyd's Med Rep 223.[23]

49. Both cases make it clear that adverse inferences are to be drawn where there is no credible explanation whatsoever for a failure to call a witness to give evidence on an issue in dispute. The Appellant could have called Tribal to give evidence. They failed to do so. There is no credible explanation for that failure other than that they were too afraid to have their economic case subjected to cross examination, and understandably so in light of the criticisms of the Environmental Audit Committee[24] and the evidence now adduced by Mr Ross on behalf of SSE.

[22] Per Lord Lowry at 300.
[23] Per Brooke LJ at 240.
[24] CD/365.

(iii) The Suggested 35 mppa Condition and Incrementalism

50. And, finally, we come to the Appellant's proposal that, even though it has applied to remove the limitation on the number of passenger movements per annum, it now volunteers a cap by condition at 35 mppa, so that any environmental impact beyond that figure need not even be considered. There are three points to make about this proposed condition.

51. The first is that it has been admitted by Mr Rhodes when he was cross-examined that the environmental effects of expansion of Stansted Airport beyond 35mppa have not been fully assessed. That must mean that planning permission cannot be granted for any more than 35mppa because the work necessary to gauge the environmental impact of such a passenger throughput has not been undertaken.

52. The second point is that the suggested condition has been proposed by the Appellant, in the full knowledge that it can only be imposed if justified on the weighing of the planning balance between environmental harm and economic need or benefit. Mr Maiden has given evidence that 35mppa is not the capacity of the existing runway (he sees this as being a little in excess of 40mppa) and so we know that the Appellant is seeking to justify a condition, on the basis of that planning balance, limiting the use of this runway to below its capacity. The Appellant has conceded, moreover, through the evidence of Mr Rhodes under cross-examination that *"best use"* of the runway, as sought by the ATWP, does not necessarily mean the *maximum use*. It follows that, whereas it is not open to this Inquiry to sanction a use in excess of 35mppa, it is open to the Inquiry – on weighing the same balance but in the light all of the evidence heard – to determine that "best use of the existing runway" is below 35mppa, be it 30mppa as suggested by the ACC, or the existing limit of 25mppa as contended by SSE.

53. The third point is the need to look at this proposed development in the context of all of the development which we know is proposed by the Appellant, or can reasonably foresee being proposed. Only then can we assess the entirety of the cumulative impact of the proposal which is before us today.

54. It will in this regard be recalled that in the course of cross-examination by SSE, Mr Maiden made the following admissions:

(i) The Appellant has undertaken forecasting work for the scenario that Stansted remains a single runway airport and increases its passenger numbers to 40mppa by 2030.

(ii) That if the current deadline for the G2 application slipped that there might well be a further G1 expansion application.

55. Indeed, in the course of the cross-examination of Mr Maiden, Mr Humphries QC on behalf of the Appellant stated that *"it has never been hidden, that in the context where there was no second runway, at the point where the planning consent of a 35 MPPA condition was reached or about to be reached, the company would obviously have to consider coming back for another application"*. The same point can be derived from the letter from Cameron McKenna to the Inspector dated 20 March 2007.[25]

56. We know also that in due course, the Appellant will put in an application for G2.

57. The offer of a conditional cap on passenger movements is, therefore, just as we asserted in our earlier opening - no more than a ruse to prevent the cumulative environmental impacts of the Appellant's real proposals from being assessed, in flagrant denial of the requirements of Regulation 3(2) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 Regulations").

58. In *R v. Swale Borough Council, ex p. RSPB* [1991] 1 PLR 6 Simon Brown LJ held (at 16):

> *"The question whether the development is of a category described in either schedule [of the 1999 Regulations] must be answered strictly in relation to the development applied for, not any development contemplated beyond that. But the further question arising in respect*

[25] CD/507.

of a Schedule 2 development, the question "whether it would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location" should, in my judgment, be answered rather differently. 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 to be 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."

59. On the Appellant's evidence the Inquiry can be sure that there will be a further application, either for a second runway or for the lifting of the 35mppa cap. By failing to include all of the forthcoming development within the Environmental Statement, the Appellant has failed to inform the Inquiry of all of the cumulative effects of the proposed development. This is not compatible with paragraph 4 of Schedule 4 to the 1999 Regulations and a grant of planning permission in the face of this failure would be a breach of the duty set down in Regulation 3 of the 1999 Regulations.

60. For local residents, the Appellant's offer of a cap of 35mppa, cynically made, typifies the incrementalist approach to development at Stansted which has so bedevilled its recent planning history.

Conclusion

61. For all of the reasons identified in our earlier opening, supported by the evidence you will hear over the course of the next two weeks, and in the light of the legal submissions we have now made, we will in due course invite you to recommend to the Secretary of State that this appeal be dismissed.

Paul Stinchcombe

Sarah Hannett

4-5 Gray's Inn Square

17 July 2007