

APPEAL BY KENT INTERNATIONAL GATEWAY LTD ARISING FROM MAIDSTONE BOROUGH COUNCIL'S FAILURE TO DETERMINE AN APPLICATION FOR PLANNING PERMISSION FOR A PROPOSED RAIL/ROAD FREIGHT INTERCHANGE, WAREHOUSING AND OTHER WORKS ON LAND BETWEEN THE M20 AND THE A20, TO THE WEST OF JUNCTON 8 AND EAST OF THURNHAM LANE, MAIDSTONE.

Revised Proof of Evidence on behalf of the Joint Parishes Group (JPG)

Closing Statement

Richard Jacques

22 December 2009

JPG
c/o Clerk to the Joint Parishes Group
4 Birkhall Close
Walderslade
CHATHAM
Kent ME5 7QD

1. Preamble - Presenting the Strategic Case Against KIG On behalf of local people

- 1.1 Sir, when this Public Inquiry opened on 13 October I told you that the JPG represented 14 Parish Councils, 12,000 households and 23,500 electors and this remains so. However since then 58 Parish Councils and 2 Town Councils from across Kent have added their support. Parish and Town Councils representing over 216,000 registered electors have indicated their opposition to the KIG proposal. Details were submitted to you on Thursday 10 December 2009.
- 1.2 In addition, you have heard from over 100 residents who came to the Public Inquiry to tell you personally of their concerns and from many others who have submitted their concerns to you by letter.
- 1.3 The range of evidence presented against the application has been both compelling and complementary. The JPG's theme throughout this inquiry has been that KIG is in the wrong place. Most importantly, from our point of view, it is far too close to local residents but equally importantly in planning terms, it is adjacent to an area of outstanding natural beauty; it is in an SLA; it contradicts government policy on freight interchanges by being so far from the M25; and both SEEDA and the Freight Transport Association have concluded there is insufficient demand for it.
- 1.4 Parish Councils may be the lowest elected tier of local government but it is important to stress that no level of government supports KIG. The Borough Council, the County Council and local MP Hugh Robertson have all stated their opposition to this scheme. As you know, both SEEDA and Jonathan Shaw MP have both written to you personally to express their opposition.
- 1.5 The appellant's response to this has been to produce a single EDM, signed by only one Kent MP, almost 2 years ago. The fact that every other signatory came from so far away only highlights the lack of local support and may explain why the motion mistakenly claims the development would reduce traffic on the M20, despite the fact JPG proved KIG will generate as many HGV movements as the Port of Dover – perhaps these distant MPs don't realise just how far down the M20 KIG is and wrongly assumed it would comply with government policy by being near the M25.
- 1.6 In general, the evidence submitted on behalf of KIG has been based on modelling, aspiration and raw emotion. There has been a marked lack of factual information and almost nothing which remotely seeks to understand the impact of the proposal on people. This closing statement highlights a number of examples where planning law and guidance has been misquoted, misapplied or simply ignored.
- 1.7 The areas on which the JPG closing submission will concentrate are as follows:
 - Lighting
 - Special Landscape Area Designation
 - Landscape
 - Air Quality

- 1.8 Each matter is referenced by document number, witness, date and approximate time.
- 2 Lighting (Raised in Proof of Evidence Quality of Life JPG/11/02, s.3, paragraphs 3.1 – 3.11). Presented by Councillor John Horne on the afternoon of 11 November.**
- 2.1 JPG proved that in its proof of evidence KIG used the wrong wording when seeking to quote key guidance on lighting and that if the proper guidance is applied the scheme is not viable.
- 2.2 JPG's evidence drew the distinction between what the *Institute of Lighting Engineers Guidance Notes for the Reduction of Obtrusive Light (GN01) (ILE2005)*, (Core Doc No. CD/7.1), actually says and how it had been represented in the Proof of Evidence of Mr Nigel Pollard at KIG/13.1. The effect of the evidence, as put by Mr Pollard, was to reduce the rigour to be applied in assessing the night time illumination of a site adjacent to an Area of Outstanding Natural Beauty (AONB). It was accepted by the Appellant that the site is adjacent to the AONB. The actual guidance states¹:

'ENVIRONMENTAL ZONES:

It is recommended that Local Planning Authorities specify the following environmental zones for exterior lighting control within their Development Plans.

Category Examples

E1: Intrinsically dark landscapes National Parks, Areas of Outstanding Natural Beauty, etc

E2: Low district brightness areas Rural, small village, or relatively dark urban locations

E3: Medium district brightness areas Small town centres or urban locations

E4: High district brightness areas Town/city centres with high levels of night-time activity.

Where an area to be lit lies on the boundary of two zones the obtrusive light limitation values used should be those applicable to the most rigorous zone'

- 2.3 As the site lies adjacent to the AONB the more stringent E1 requirements should be applied; for example a maximum Sky Glow ULR of 0% after the curfew (the ILE Guidance recommends a curfew of 11 pm); a post curfew source of 0 Kcd. This means KIG would have to close at 11pm.

¹ Institute of Lighting Engineers Guidance Notes for the Reduction of Obtrusive Light (GN01) (ILE2005), (Core Doc No. CD/7.1),

- 2.4 In cross examination of Mr Pollard (am 27 November 2009) reference was made to documents KIG/13.1 (Proof of Evidence); KIG/13.6 (Speaking Note) and CD/7.1. Mr Pollard accepted that sites, such as this, on the border of an AONB, must have no (zero) obtrusive light after a reasonable curfew. It was agreed that the more rigorous Environmental Zones category (E1) should apply and that this included a curfew from 11 pm.²
- 2.5 The evidence obtained was not challenged at re-examination by the Appellants' Counsel therefore should you consider recommending the scheme to the Secretary of State it should be in full compliance with the ILE Guidance and which includes a curfew at 11pm each day.
- 2.6 However, given that the appellant's business case, as set out in their Logistics Proof (KIG 4.1) rests on 24 hour operation³ it is clear that the 11pm closure means that a rail interchange on this site is not viable and that the recommendation to the Secretary of State should be to refuse outline planning permission. That is because a lighting condition cannot overcome the planning objection to the KIG scheme.
- 3. Special Landscape Area Designation – Raised in JPG/6.3 Appeals Document and associated with the evidence of Sarah Goodwin presented on Thursday 11 November.**
- 3.1 The JPG has been able to establish beyond doubt that the site is located in an SLA and that SLA status is a material concern despite repeated attempts by the appellant to show otherwise. The appellants have sought to undermine the designation of this site as 'Special Landscape Area' throughout the Public Inquiry and particularly in cross examination of Mr Rupert Lovell in regard to his document reference (MBC/03/01 Proof of Evidence) which took place on 14 October 2009. Mr Hugh Bullock sought to further question the designation when being cross examined by Mr Corner QC during the afternoon of 9 December 2009.
- 3.2 Document JPG/6.3 was submitted to the Public Inquiry and refers to an Appeal Decision by Mr DE Morden MRTPI an Inspector appointed by the Secretary of State for Communities and Local Government. The appeal was dismissed on 7 September 2009.

In dismissing the appeal Mr Morden sets out under the heading 'Reasoning'

At para 9 p4:

'Dealing with the first issue, the site lies in an Area of Special Landscape Value...'

At para 11 p4:

'The Special Landscape Area was designated as a buffer between the AONB and the rest of the countryside....'

At para 13 p4 Mr Morden comments as follows:

² Cross Examination of Mr Nigel Pollard on the morning of 27 November 2009.

³ KIG 4.1 – Logistics Operations Proof of Evidence by Mr Ken Russell. Pp11-12, Paragraph 33

' National guidance has the overall aim of protecting the countryside for its own sake and there is a presumption against new development outside the existing settlements that is not associated with the needs of agriculture, forestry or other uses essential to the rural economy. The policies within the Kent and Medway Structure Plan (adopted in July 2006) and those saved in the Maidstone Borough wide Local Plan (adopted in 2000) reflect that national aim and are restrictive. Both plans were still in force at the time of the hearing and whilst the new South East Plan has now replaced them there is no material difference concerning the policy for new development in rural areas.'

3.3 The Planning Inspectorate therefore accepted in September 2009, that Special Landscape Area designation was applicable and that it was material to his decision. Therefore the appellants have no justification in questioning its validity or the weight that the Inspectorate should attach to an SLA.

4. Landscape - Evidence submitted in JPG/06/02 – Landscape (Proof of Evidence and Appendices). It was presented by Ms Sarah Goodwin during the morning of 11 November 2009.

4.1 Mr Phil Rech (Landscape & Visual Matters) presented document KIG/6.1 and the JPG cross examination of Mr Rech took place during the late morning session on 8 December 2009. Reference was made to two documents: KIG/6.1(Proof of Evidence) para 8.24 at p 41 and JPG/06/02.

4.2 Mr Rech said in KIG/6.1 para 8.24 p 41 that: '*...It should be borne in mind that some people find sites such as freight interchanges appealing...*' It was accepted that no-one appearing at this Public Inquiry opposing the planning application had suggested this would be appealing.

4.3 Mr Rech during his opening comments KIG/6.12 (Speaking Note) on 4 December 2009 referred to the views across the AONB and suggested that the proposed site would recede from view and that the 'poly-tunnels' in the distance were more obtrusive. It was accepted during JPG cross examination that erection of 'poly-tunnels was seasonal and at the time of giving evidence only the framework remained in place. Parallels between a seasonal and non-permanent structure and a rail interchange are therefore spurious.

4.4 Mr Rech was taken to JPG/06/02 (the last two pages) European Landscape Convention, Florence, 20.10.2000. It was agreed that the Preamble and Definitions provide the general thrust to protect and manage the landscape for the enjoyment of the public, in other words the impact on human beings. He admitted that he was aware of the Convention but had not considered referring to it in drawing up his evidence.

4.5 The Inspectors carried out their tour of the site and surrounding countryside on Dec 15th and 16th. It was clear that there were at least 2 areas from where the KIG proposals seriously affect the setting of the AONB. Interrupted views of the site were gained from much of the route of the Northdowns Way between the escarpment above Detling, through Thurnham to beyond Hollingbourne.

- 4.6 The second area offering substantial views was to the south of the A20 on the high land in Leeds Parish where footpaths and bridleways at Merriams Farm give an almost panoramic view of the site (Map Ref.TQ 800 535 to TQ 810 535).
- 4.7 There are other roads and rights of way that give views of the site but the above are considered by the JPG as the most important.
- 5. Air Quality - Cross-examination of Mr James Richer on 10 Dec 2009 at 2pm to 3.30pm**
- 5.1 In summary the JPG was able to obtain agreement with him on the following facts:-
- That the KIG development would be a source of pollutants.
 - That for many pollutants, including fine particles (PM10), there is no absolutely safe level.
 - That for the nearest residents, although their exposure would probably meet air quality objectives, they would be at risk of adverse health effects.
 - That distance is a very potent mitigant, such that 500m (0.5kms) could be considered to be a safe distance.
 - That Planning Guidance states that a Planning Authority may wish to encourage the implementation of mitigation (in this case distance) even where increases (in pollution) are below Air Quality Objectives or Limit Values, as any increases are likely to result in health disbenefits.
- 5.2 In reference to JPG 12.4 and CD 6.1.2, The Air Quality Strategy for England, Scotland, Wales and Northern Ireland (Volume 1) Mr Richer agreed that for many pollutants there is no absolutely safe level (CD 6.1.2. pp 16-19). He agreed that "There is clear and unequivocal health advice that there is no accepted threshold effect, i.e. no recognised safe level for exposure to fine particles (PM2.5)" (JPG 12.4, Chapt 2, para 29).
- 5.3 This is highlighted in the Ministerial foreword to the same document (JPG 12.4, page 3), signed by Jonathan Shaw: "Recent research has shown that some pollutants are more dangerous than previously thought. For some pollutants there is no absolute safe threshold". Mr Richer agreed that this indicated that the Government attached considerable importance to this concept
- 5.4 Mr Richer also agreed that, on the basis of the above, although the exposure to pollutants for the nearest residents at 50m from KIG would probably meet the targets, they would nevertheless be at some level of risk.
- 5.5 Mr Richer agreed that distance from the polluting source was a mitigating factor, such that the risks at over half a kilometre from the source could be ignored.
- 5.6 In reference to *JPG 12.5 Development Control: Planning for Air Quality. 2006 Update*: p.6, para 2.2, Mr Richer agreed that "... emerging health evidence suggests that adverse health effects occur at levels below the standards, particularly for the

carcinogenic pollutants (such as benzene and 1,3-butadiene) and for fine particles (i.e.PM10).”

Equally, p.7, para 2.10 states "Consideration of the potential impacts of development proposals on local air quality should therefore be focused on those locations where members of the public are likely to be regularly present and are likely to be exposed over the averaging period of the objective". Mr Richer agreed that this applied to those living, for instance, in Mallings Drive.

p.12, para 3.26 (complete) "Government guidance on planning and pollution control states that the possible impact of potentially polluting development (both direct and indirect) on land use, including the effects on health, the natural environment or general amenity should be considered in the preparation of development plan documents and may also be material in the consideration of individual planning applications where pollution considerations arise". Mr Richer agreed that the KIG development would be a source of pollution and that this paragraph applied.

p.23, (in a section discussing mitigation) para 6.14 "For increases in PM10 concentrations, a pollutant for which no health based threshold is apparent, a local authority may wish to encourage the implementation of mitigation measures even where increases are below air quality objectives or Limit Values, as any increases are likely to result in health disbenefits". Mr Richer agreed that this was applicable in the case of KIG.

5.7 JPG's inferences: Mr Richer acknowledged that 500m would a safe distance between KIG or similar development and local residences. It is a fact that Sources of pollution within the KIG site are 50 - 100m from many local residences. JPG's cross examination of Mr Richer proved that the KIG development would result in exposure of the local residents to pollution with resultant health risks (notwithstanding that the level of such exposure would probably meet Air Quality Objectives), that these risks cannot be satisfactorily mitigated and that therefore the Inspectors should recommend to the Secretary of State that Planning Permission should be refused.

6. Archaeology - Evidence presented by Ms Lesley Feakes during the morning of Wednesday 11 December and contained in JPG/13/02; Archaeology speaking note, KIG/7.5 and rebuttal of evidence KIG/7.4 presented by Mr Paul Chadwick for KIG on Wednesday 2 December. Further JPG documents JPG/13.9 - aerial photograph (Lidar) print; JPG/13.10 historic plan of the area and JPG/13.11 photomontage of area 6.'

6.1 In summary the evidence presented on Archaeology for the appellants failed to adequately assess the archaeology of the site or to present its results in a manner commensurable with the conservation of the historic environment.

6.2 In his oral evidence Mr. Chadwick confirmed that "he" had undertaken comprehensive evaluation of the site using Kent Historic Environment Records, historic maps, air

photographs, geophysical survey and trial trenching. Again, that he had walked and inspected every field (some, including area 2, on two or more occasions).

- 6.3 A key issue was the adequacy of the Magnetometer survey carried out by Durham University but criticism of this geophysical survey was refuted by Mr. Chadwick where he stated at paragraph 14 of his Speaking Note: *The recent response from Durham University indicates that Mr. Mason's concerns about geological and soil conditions rendering the geophysical survey results unreliable are unfounded. It follows that the geophysical survey results, which indicate that the site has only localised areas of archaeological interest, provides an accurate understanding of the site's archaeological potential.*
- 6.4 Later in his Speaking Note at 21 he cited the Saxon cemetery at Springhead (Kent). In their note KCC/2.11, the County Council produced a summary report of the Springhead and New Haine Road investigations. This states at 2.4 that *Magnetometer survey was carried out by Durham University in 2002 before the grant of the planning permission. The geophysics identified only a very limited number of features on the site and did not identify the majority of the archaeology that was subsequently found to be present.*
- 6.5 Given it is the reliability of the Durham University work that has proven so questionable it seems extraordinary that Mr Chadwick sought 'confirmation' from Durham. In effect Durham just restated their position. They did not explain why their work has proven so unreliable, in Kent, in the past and did not provide evidence of a change of approach that could mitigate their previous well documented failings.
- 6.6 The JPG, wishing to achieve concision and relevance in their cross examination took a sample site, namely area 6 and put to Mr Chadwick 3 documents as follows:
- JPG/13.9 - aerial photograph (Lidar) print;
JPG/13.10 - historic plan of the area;
JPG/13.11 - photomontage of area 6.
- 6.7 It was quite clear that Mr. Chadwick had not previously considered this available material, that he has not appreciated the topography and underlying characteristics of this area and that inappropriate techniques have been applied in their evaluation.
- 6.8 The evidence presented both by the JPG and the KCC raised a presumption that it is not unlikely there are archaeological remains of importance on the site and that the appellant's SES is incomplete and flawed.
- 6.9 Accordingly, there must be serious concern as to the overall adequacy of the archaeological report provided by the appellants. The conclusions stated therein can only be considered unsafe or unsatisfactory.
- 7. Procedural Concerns (JPG/02/02 Supplementary Environmental Statement given by Mr Martin Pepper on Wednesday 11 November)**

- 7.1 The paucity of this planning application, the delays in providing the necessary information to enable an informed decision and the lack of timely and adequate consultation still causes the JPG grave concern. The JPG's concerns over the Supplementary Environmental Statement were highlighted in our proof on the Supplemental Environmental Statement which was presented to the inquiry on 11 November but available to witnesses from mid September. It explains why we believe international, EU and national law is being breached because the appellant has not given the public sufficient information or a proper opportunity to be involved at an early enough stage in the decision making process.⁴
- 7.2 The JPG was asked to provide guidance on how to produce a cumulative impact assessment which was provided through Mrs Taplin. However, this information is freely available and the need to provide a cumulative impact assessment is not a quirk or in some way novel but an obligation on the appellant set down by the EU over 10 years ago and now transposed into UK law by the Town & Country Planning (Environmental Impact Assessment)(England & Wales) Regulations 1999 (as amended), or the EIA Regulations for short.
- 7.3 The fact that no cumulative impact assessment has been conducted is material to your decision. The appellant is obliged to have conducted such an assessment at the very start of the planning process. No one has questioned that at any stage in this inquiry. Yet here we are at closing statements and still waiting. The guidance the JPG has now produced is the single most important piece of guidance relating to the production of Environmental Impact Assessments. It has been in existence since May 1999 and could not be any clearer. It is unreasonable to expect any Inspector to make a judgement about the impact and viability of a scheme without a cumulative impact assessment which complies with the very clear guidance. Paragraph 121 of the Environmental Impact Assessment: A guide to good practice and procedures, DCLG June 2006, (JPG 2.4) states "the EIA Regulations (in Schedule 4) require that cumulative effects of development be considered within an ES. I stress the word 'require.'
- 7.4 The absence of a Cumulative Impact Assessment is just one of the deficiencies in the appellant's Supplementary Environmental Statement that the JPG highlighted in its evidence on Wednesday 11 November. But the absence of a Cumulative Impact Assessment is the clearest case of the appellant failing to comply with the EU Directive (85/337/EEC) and the EIA Regulations. The absence of a proper Cumulative Impact Assessment leaves the Secretary of State with no room to accept this appeal. Where a statement has been submitted which does not contain all the required information his hands are tied by the Directive and Article 3 of the 1999 Regulations. If a developer fails to provide enough information to complete the EIA, the application can be determined only by refusal. The JPG therefore urges you, Mr Inspector, to recommend refusal to the Secretary of State.

⁴ As presented to the inquiry in JPG02 by Mr Martin Pepper on Tuesday 13 October and submitted in JPG/02 – SES paragraph 10.1 to 10.4 and paragraph 11.3.

8. Conclusion

8.1 Based on the evidence outlined above we believe the reasons for refusal are as follows:

8.2 The site lies within a Special Landscape Area (SLA) with a presumption against new development outside the existing settlement that is not associated with the needs of agriculture, forestry or other uses essential to the rural economy. This definition was held by the PINS in a decision in September 2009 to be a material consideration for this area. Further, none of the proposed changes of use fall within these categories, nor are they supported by policy.

8.3 The proposal would be contrary to the European Landscape Convention, to which the UK is a party.

8.4 The proposed KIG development would expose local residents to a level of air pollution (especially PM10), which, although likely to meet Air Quality Objectives, would nevertheless be harmful and not capable of mitigation.

8.5 A condition precedent for this type of application is the provision of an archaeological assessment to the satisfaction of the relevant Local Authority. In fact the assessment presented by the appellants has been shown to be unsafe or unsatisfactory.

8.6 The failure or omission to provide a cumulative impact assessment, contrary to the Town and Country (EIA) (England and Wales) Regulations 1999 (as amended). Accordingly, there is a failure to comply with EU Directive (85/37/EEC) and the EIA Regulations. In the event, the appeal can only be determined by refusal.

8.7 The appellant's lighting expert, Mr Pollard, accepted that the site must be subject to Table 1 of The Institution of Lighting Engineers: Guidance Notes for the Reduction of obtrusive Light (September 2005). However, simply setting a condition for an 11pm curfew on the use of all light is not an option because the site cannot operate in total darkness and the appellant's case rests on 24 hour operation. Mr Pollard accepted the need for a condition setting out an 11pm curfew, yet Mr Russell's logistics evidence made it clear that a key strength of this site is its ability to facilitate 24 hr operation. Once a curfew is imposed the site is not viable for a rail interchange. Therefore the recommendation to the Secretary of State should be to refuse outline planning permission. That is because a lighting condition cannot overcome the planning objection to the KIG scheme.

8.8 Thank you for the opportunity to state the JPG's case.