

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)

Supplemental Environmental Statement

Richard Jacques

5 October 2009

JPG
c/o Clerk to the Joint Parishes Group
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CHATHAM
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1. Personal Details

- 1.1 My name is Richard Jacques and I appear at this public inquiry in my capacity as Chair of the Joint Parishes Group (JPG). I have been helped in the preparation of this proof of evidence by colleagues within the JPG. I am not an expert in planning law or any other technical matter relevant to this public inquiry. I appear as a local resident and Parish Councillor and Chairman of the JPG.

2. Introduction

- 2.1 The JPG has expressed concern in a letter dated 15 July to the Inspector that the appellant is not complying with the requirements of the Environmental Impact Assessment Directive¹. In particular, the assessment is inadequate, was produced very late in the decision making process, and key elements are still missing. Even if all the assessments are adequately conducted, including the examination of alternatives and mitigation, public consultation at this stage is clearly academic if the inquiry proceeds without an adjournment. We seek a delay to ensure compliance with Directive 85/337/EEC, as amended (“the Directive”). Failing that, we reserve the right to seek redress through the Courts, or directly to the European Commission.

3. Background

- 3.1 European law in the form of the Directive has required (since 1988) the more rigorous, scientific and transparent assessment of environmental impacts of certain projects. It is accepted by all parties that the Directive applies in this case. The Environmental Statement has to address the direct and indirect effects, consider alternatives, detail measures proposed by way of mitigation. In addition, a non-technical summary should allow laypersons to understand what is being proposed and its likely effects. Finally, international, European, and national legislation has recently been amended to safeguard the rights of the public in the law and now provides the public with rights to ensure a better balance between commercial interests on one hand and those who wish to safeguard the environment on the other by strengthening the provisions over consultation.

4. Our Concerns

- 4.1 Our concerns are three-fold: inadequate assessment of information provided; complex, voluminous and fragmented document; and inadequate consultation, especially in terms

¹ Letter from Richard Jacques Chair of the JPG to the Planning Inspector dated 15 July 2009.

of the unreasonable time-scales which have come late in the process. This proof now examines each in turn.

5. The assessment of information provided is inadequate.

5.1 We draw your attention to the significant areas which we believe are still missing from the SES. We note that additional information has now been submitted in the appellant's Proofs and the SoCG but is still inadequate and does not form part of an SES.

- Traffic Generation (some information provided by way of Proofs and SoCG)
- Forecasts for Rail Movements (some information provided by way of Proofs and SoCG)
- Ecology (some information provided by way of Proofs and SoCG)
- Landscape (some information provided by way of Proofs and SoCG)
- Hydrology (some information provided by way of Proofs and SoCG)
- Air Quality (some information provided by way of Proofs and SoCG)
- Security Details (some information provided by way of Proofs and SoCG)
- Public Health
- Cumulative impact

5.2 The omissions are too numerous to assess comprehensively in this proof but I would like to highlight the following:

6. Traffic

6.1 On traffic generation, the letter from the Kent Highways Service on 30 July 2009 states

“Much of the technical information has been submitted in draft form on limited release, rather than forming part of the ES. It would therefore seem very difficult for other Rule 6 parties and the general public to make informed comments on this amended proposal.”

I would invite the Inspector to look at the Non-technical Summary of September 2008 and the Supplemental Non-Technical Summary of July 2009. It does not even mention traffic figures. Although the Appellant has subsequently published further material in the Form of Proofs of Evidence and SoCG, the public have not been informed or consulted and the application remains in clear breach of Article 6 of 85/33/EEC (as amended), and the SES therefore remains both incomplete and inaccurate.

7. Ecology

7.1 On ecology as Natural England point out in their letter of 24 July 2009:

“They go on to highlight that essential information relating to Great Crested Newts, bats and birds and reptiles remains missing. The role of a local planning authority/decision maker in discharging their responsibilities under the Habitats Regulations has recently been confirmed by a judicial review, which provides useful guidance on the level of ecological information and the certainty of an impact that should be provided at the application stage. As the application involves an EIA development, the case of R v Cornwall County Council ex parte Hardy is also relevant.”²

- 7.2 Additionally, paragraph 98 of ODPM Circular 06/2005 states that, ‘The presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat.’
- 7.3 Paragraph 99 also states that ‘It is essential that the presence or otherwise of protected species and the extent that they may be affected by the proposed development, is established before the planning permission is granted otherwise all relevant material considerations may not have been addressed in making the decision.’
- 7.4 It seems odd that the Appellant has brought this case before the Inspector on the basis that MBC failed to make a decision in time when they had not (and still have not) supplied the information to the planning authority that the law requires.
- 7.5 Although additional data in the form of Proofs of Evidence and SoCG has now been supplied the public have not been informed or consulted and the application remains in clear breach of Article 6 of the Directive, and the SES therefore remains both incomplete and inaccurate. Moreover the ecological data remains incomplete, including the lack of downstream impacts on White-clawed Crayfish, fish and aquatic invertebrates, lack of additional bat surveys both within and adjacent to the site, the missing mitigation strategy on terrestrial invertebrates, lack of adequate mapping, drawings and descriptions of sampling for invertebrates, incomplete adder, reptile, dormice, brown hare and birds of conservation concern surveys. In relation to the great crested newt there is no proposed effective mitigation strategy, no survey of the proposed receptor site, and no consideration of the cumulative impact of repeated disturbance. There are consequently a lack of appropriate mitigation measures on all the above, a lack of examination of alternatives, lack of an up to date and complete non-technical summary in Breach of Article 5 of the Directive. Finally, there has been no attempt to address the issue of cumulative impact more widely, indeed the appellant claims in the Proof KIG 10.1 that they “do not consider that there is a need” in contravention of Article 3 of the Directive.

² Maidstone Borough Council Planning Committee Report September 2009

8. Landscape

- 8.1 Natural England (letter, as above) and English Heritage express concern about the view points and photomontages. “We note that no other additional photomontages have been provided to depict views from the many and various vantage points within the Kent Downs Area of Outstanding Natural Beauty or from the North Downs Way, a statutory National Trail within the AONB, which provide views of the proposed development site.”³ Whilst additional photos have been supplied they are inadequate and have not been the subject of public information or consultation, in breach of Article 6 of the Directive.

9. Human Beings & Cumulative impact

- 9.1 I am unaware of any attempt to examine the impact, direct and indirect, on human beings, or any attempt to examine the cumulative impact on human-beings, in breach of Article 3 of the Directive. The most recent environmental information (for example revised traffic, noise, and light data) will have an impact on human-beings but there has been no attempt to examine the impact, or cumulative impact. Consequently, there has been no public information or consultation, in breach of Article 6 of the Directive.

10. The format documentation is complex, voluminous and fragmented

- 10.1 The SES alone is neither straightforward nor clear. It is voluminous, highly technical and complex in nature. It runs to over 300 pages. According to the Appellant it needs to be read in conjunction with the original Environmental Statement (ES), and in the context of the entire planning application. It is far removed from the minor changes we were led to believe were to be submitted at the Pre-Inquiry Meeting.
- 10.2 Moreover, since the SES a further inadequate assessment has been produced on archaeology and we have received environmental information contained in a whole series of Proofs and SoCG. These have not been the subject of public information or consultation, and in many areas we are still awaiting further assessments. No revision to the SES has been produced nor has the non-technical summary been up-dated, in clear breach of Article 5 of the Directive.
- 10.3 In particular, we draw your attention to the “Note on Environmental Impact Directive for Local Authorities” (CLG, 2009) which cites the case *Berkeley v SSETR* (2000), where the House of Lords unanimously emphasised the need to comply with the Regulations, and, in particular, the ES must not be a “*paper chase*”. In his leading judgement, Lord Hoffman noted that the Directive did not allow Member States to treat:

“a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the information which should have been provided by the developer”.

³ Ibid

Of particular relevance are his comments regarding timing:

“the point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language.”

10.4 In my view, the late (or non) submission conflicts with Lord Hoffman’s “*very start*” test, and constitutes non-compliance if sufficient clarification and consultation does not now take place by way of an adjournment.

11. The consultation has been inadequate due to unreasonable time-scales which have come late in the process

11.1 Unlike the applicant, we are not a well funded multi-national company with assets that run into billions of pounds and staff numbers that run into thousands. On the contrary, Parish Councils, together with voluntary organisations and individuals, lack the in-house expertise or resources to undertake an assessment in what would clearly be an unreasonable time-frame. We must be given a reasonable opportunity, and indeed be assisted to ensure we can adequately examine this new material, if we are to genuinely be able to participate in the planning process.

11.2 The planning process should not just be an obscure and expensive debate between lawyers, planners, and officials. It should involve the public and facilitate genuine public consultation, and a public inquiry should facilitate genuine public participation. This is a clear requirement in statute, as is the need for sensible time-frames.

11.3 Since the 2000 House of Lords ruling the rights of the public have been further safeguarded by international and European law, particularly in regard to SES. The Aarhus Convention, and Article 3 of Directive 2003/35/EC (which amended the EIA Directive 85/337/EEC (as amended by 97/11/EC) seeks to ensure organisations like Parish Council are consulted in a timely and effective manner.

11.4 Moreover, consultation on supplementary environmental information shall be the same as for the original. In the case of the original, it was 12 weeks and yet subsequent consultation has only been 28 days, and more recently information in Proofs and SoCG have not been the subject of any consultation at all. In addition, in order for this Inquiry to be in compliance with international, European and UK law other assessments which have since been received since the SES was published, or assessments currently in progress or planned for the future, require this Inquiry to be adjourned to allow public the be both informed and consulted.

12. Conclusion and Next Steps

12.1 The Appellant and Inspector will be aware that failing to comply with the Directive may make a decision to grant permission unlawful and lead to it being quashed by the Court.

Although the Court has the power not to quash decisions where there has been procedural impropriety, this discretion is very limited in cases involving EIA because of the duty to comply with EC legislation. It can only be exercised where there has been "**substantial compliance**" with the Directive. The JPG is now taking advice with a view submitting a direct complaint to the European Commission who can, in cases such as this, directly intervene to overturn any permission granted.

- 12.2 In a number of areas it is suggested that additional survey work and mitigation strategies be subject to conditions, or in the case of White-clawed Crayfish the proposed engineering 'solution' be the subject of a condition. The Directive has to be complied with now. It cannot be dealt with by way of conditions. There are many similarities between this case and the case R v Cornwall County Council ex parte Jill Hardy (2001 JPL 786)
- 12.3 Local residents do not wish to suffer from any more doubt, uncertainty or blight and we have no desire to unnecessarily delay these proceedings. But we are sure we all wish to avoid the uncertainty that will inevitably arise if the Public Inquiry is not conducted in compliance with UK, EU and International law.
- 12.4 It is essential that the environmental assessment on matters such as the presence or otherwise of protected species and the extent to which they may be affected by the proposed development is established before planning permission is granted. It is also essential that consultation takes place and the results of that consultation are taken into account.
- 12.5 Given the assessments, in many cases, have not been carried out, let alone the public informed or consulted, it is hard to see how you can take them, or the consultation response, into account. It is essential you help us to ensure that the procedures are correctly followed.
- 12.6 A delay to the start of the inquiry, or an immediate adjournment, is the only way to the ensure compliance with these changes so that the thousands of residents that the Joint Parishes Group represent, and other concerned members of the public, are given sufficient time to prepare and participate effectively during the Public Inquiry.