

**VALIDATION REPORT
ON
DOCUMENTS SUBMITTED
BY
MANSTON INTERNATIONAL AIRPORT
RELATING TO A PROPOSED
NIGHT-FLYING POLICY**

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Introduction

Thanet District Council (TDC) received a submission from Manston International Airport (MIA) on the 27th October 2011. The existing planning agreement between TDC and MIA requires that the airport develops and agrees a night flying policy, including management and control, before scheduled night flights can take place. TDC considered the policy documentation submitted and concluded that there was a need for an independent validation of the technical data; together with a more general review of the case for night flights at MIA as presented.

On the 28th November TDC appointed Parsons Brinckerhoff to undertake this validation and review with a scope that would consider:-

- The suitability of the methodology used
- A test of the assumptions made
- A review of the Planning situation

Parsons Brinckerhoff, with the agreement of TDC developed this scope to consider 4 main topics which form the body of this report:-

- A review of the proposed night flying policy
- A review of the economic benefits presented
- A review of the Noise Report
- Expert Planning advice relating to the submission.



Review of Proposed Night Flying Policy

Aviation in the South East of England

In order to put the proposed policy into context it is considered essential to first consider the current status of aviation in the South East of England.

The policy from Central Government appears to restrain the development of new facilities, such as the 3rd runway at London Heathrow, whilst accepting that the demand for aviation services is set to dramatically increase in the next 20 years. The conclusion is therefore that better use needs to be made of the existing facilities.

Despite the global financial difficulties passenger numbers are continuing to grow at about 5% year on year throughout Europe. The increased traffic at MIA may relate to more cargo operations but trends in passenger numbers are generally followed by cargo operations. It is therefore reasonable to accept that there is an increasing pressure on the existing facilities in the South East and that any removal of constraints at MIA would help to meet this demand.

Existing Night Flying

Some non-scheduled night flights do operate from MIA. Night flights are defined as any aircraft movement (take off or landing) that occurs between 2300 and 0700. In the year up to September 2011, MIA reported a total of 43 night-time movements of which 31 were between the hours of 2330 and 0600. TDC & the airport consultative committee have the data to validate these figures.

It is reasonable to expect any airport to handle some non-scheduled night flights but the cost to the airport itself is quite high as full staffing is required (e.g Fire Fighting) and so a full shift is worked by staff even if only one aircraft is involved. Airports therefore seek to maximise their efficiency by introducing scheduled services that can be relied upon to make full use of the staff and facilities.

The Proposed Policy

The proposal is to allow aircraft to operate throughout the night with the controlling constraint being both the amount of noise disruption caused, and with the actual number of movements per year being capped. The noise and economic impacts of this Policy are addressed later in this report. From an aviation operational aspect it is obviously in the airports best interest to have no constraints on its operations. This will allow any prospective business to be pursued by the airport.

Conclusions

Overall we are satisfied with the approach and values used for the aviation / operational aspects of the proposed policy.

Review of Economic Impact of night flying policy

This high-level draft report is split into two sections:

- A review of the Air Traffic & Freight Forecasts (pages 3 to 18 of the York Aviation Report);
- A review of the Economic Impact Assessment (pages 19 to 36 of the York Aviation Report);

Introduction

The plan being put forward for consideration by MIA is to allow “...scheduled passenger and freight services in the night time period”, with both a limit on total movements, and on a total permitted Noise Quota Count, in which operating aircraft are assigned a Quota Count value and these are totalled over the year with an upper limit set.” This form of Quota system is already in use at other South East Airports, notably Heathrow, Gatwick and Stansted. The night time rules generally apply from 23:00 until 06:00 with a ‘shoulder period’ at either end of the night, with slightly less strict rules – generally this is 23:00-23:30 and 06:00-07:00.

MIA believes that the ability to operate at night will be a crucial factor in attracting a regular air freight service provider which will improve the financial viability of the airport in the short-term. This financial viability will ensure the airport is able to sustain operations, which, they believe, will facilitate a future growth in passenger numbers in the medium to long-term. MIA contend that without an approved night time quota system the potential economic benefit to the local area and wider region will be severely restricted.

Review of the Air Traffic & Freight Forecasts


Air Traffic

The basis of the analysis provided by York Aviation is the passenger and freight forecasts contained within MIA’s Master Plan published in November 2009. We would note that despite the forecasts only being two years old, the airport is not achieving the level of forecast passenger growth, however, we would also note that the aviation sector is suffering due to the global economic crisis and therefore, most other UK airports would not be achieving forecasts set two years ago.

York have further based their analysis on the passenger and freight forecasts for 2018 when they believe the wider aviation market will have seen a recovery. We would agree that a fixed date, such as 2018, is appropriate for this type of analysis, however, and as recognised by York, no adjustment has been made to the 2018 figure to take into account the downturn seen during 2009 onwards. In our opinion it is highly likely that the 2018 planning assumption used is significantly overstated.

We would agree with the York commentary that the likely short-term growth in passenger traffic would be delivered by away-based carriers, and that to reach the 2018 Master Plan forecast the airport will have to attract based aircraft. Carriers with based aircraft will require the airport to operate a flexible opening timetable to facilitate scheduled flight times but also to offer the ability to position aircraft or offer ad hoc charters.

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Therefore, in the short term we do not believe that the airport can justify a night flying quota system to support passenger growth. We would partially disagree with the bullets provided at 2.14 [of the York Report] that suggest the resultant effects of not having based units would be; fewer destinations, less likelihood of key European city links and fewer overall passengers. Given the geographic location of MSE it is unlikely that carriers would show much interest for inbound traffic from key European city links – we would argue this would only be relevant if MIA was strategically placed near to a large city or a region with a large catchment area.

Without seeing the underlying analysis used by York Aviation to create Table 2.2 it is difficult for us to accurately assess the likely loss of traffic without night time movements. York's Table 2.2 shows that by 2018 over half of the forecast passenger traffic would be lost without night movements. At first appearance this does not seem unreasonable; however, to grow to 989,000 passengers without any based units is very unlikely. There are no examples of airports within the UK that have passenger volumes of approximately 1million passengers per annum without based units. Therefore, the argument that a block on night flying would prohibit based aircraft is not supported by the evidence available.

A ban on night time flying would almost certainly prohibit a large number of potential carriers, however, could work for some carriers reflecting the nature of their operations. Any potential carriers' decision will also be influenced by the commercial arrangements to operate from the airport – for example, the airline could be incentivised to only operate between 07.00 – 23.00.


Freight

We would agree that over the short to medium term, without significant capacity being built into the South East of England, freight volumes at Heathrow Airport are likely to fall as the airport allocates landing / take off slots to higher yielding passenger aircraft (assuming no additional capacity is added). We would disagree, however, that MIA would likely benefit in any substantial way from these freight volume decreases. Stansted, and Gatwick to a lesser degree, have significant capacity to accept additional freight volumes and are strategically better located close to motorways and major conurbations. For this reason we would disagree with York's contention that "It is for the relocation of these services that MIA is ideally geographically located". MIA, whilst only 50 minutes from the M25 at Junction 2, is not strategically positioned for freight to be dispatched anywhere other than the far South East of England.

The York commentary regarding the nature of freight operations is correct and they importantly point out that freight operations are very different from passenger traffic – above all, freight providers need flexibility and a ban on night flying would undoubtedly hinder the ability of MIA to attract either regular flights or a based operator.

Figure 2.1 [para 2.32] contains a map showing "Countries Leading to Arrivals between 23.00 – 07.00 In The UK After 23.00 Departure from Origin". Whilst the map accurately shows the countries from which originating flights would arrive at MIA between 23.00 to 07.00 there is no rationale provided as to why 23.00 has been used as a departure time. We would agree that freight carriers will want to wait until the end of the working day for goods to arrive and be loaded onto aircraft, however, would contend that an earlier time should be used for this analysis. We would add, however, that even if an earlier time was used the majority of the areas of the world identified for significant freight increases in coming years would arrive at MIA during the 23.00 – 07.00 period.

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Para 2.36 demonstrates that, based on current UK freight arrival times, MIA would only be excluded from 9% of the scheduled freight market if the night flying ban were to remain. This percentage will almost certainly increase over the medium to long term, with additional flights from Asia, but overall we do not believe that this provides a compelling argument for significant economic benefit to the region as a result of the introduction of a night flying quota system.

York Aviation have not provided any of their calculations used to estimate the annual freight loss of 40%, if a night time quota system were to be rejected. We would agree with the comments made in paras 2.40 and 2.41 that with a quota system in place, it will be easier to attract a based carrier, but we would need to see the calculations and assumptions used in getting to 40% before this figure could be validated.

Review of the Economic Impact Assessment

The overall approach used to consider the economic impact of MIA in terms of both operational impacts and impact on the wider economy is to categorise these impacts in accordance to the standard framework advocated by ACI Europe (Economic Impact Study Kit, 2000):

- Direct On-Site;
- Direct Off-Site;
- Indirect;
- Induced; and
- Catalytic/Wider

The examples of user groups generating economic activity for each category are suitably assigned and relevant to the activities at Manston Airport. It is noted that the report generates quantitative estimates of direct, indirect, and induced impacts of the airport proposals. Catalytic or wider impacts cannot be robustly measured due to the indirect relationship between air travel and economic activity, and this has been identified in the report.

The purpose of this review of the Economic Impact chapter of the report is to validate the quantitative assessment methodology as well as to comment on the suitability of the qualitative analysis of the wider impacts.

Assessment Methodology

Even before the lifting of night flying restrictions is taken into account, there is expected to be considerable growth in passenger numbers at Manston Airport by 2018. These forecast increases are set out in Manston Airport's Master Plan. For the economic impact assessment, the 'Do Nothing' scenario comprises the situation where night flying restrictions are still imposed in 2018. This then allows for assessment of a 'Do Something' situation where a comparison can be made with night flying restrictions lifted and the additional growth this would imply.

Although we agree with this approach, it would be useful for a present day baseline figure to be provided in order to assess the extent of growth by 2018 for each scenario. While an estimate for growth has been included in paragraph 3.28, this should be further justified. The Master Plan expects further growth by 2033 and therefore the quantitative assessment should also include the economic impact for this period.

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The assessment has not tested a scenario in which Manston Airport experiences unlimited activity during the night time period, as the Airport proposes to use a Night Time Noise Quota System. Should this quota system not be used then economic activity at the airport could be understated.

A regression methodology has been used to forecast future direct employment on the site. Employment at six comparator airports has been plotted against workload units. Justification of the inclusion of these airports (and exclusion of other airports) should be provided to ensure that the best airports are being used as part of the methodology. We would also seek passenger throughput data on these six airports to ensure they are comparable to Manston.

Although we agree with this overall approach, an outlier within the regression analysis shows an airport with approximately 5,500 employees for 7,000,000 workload units. This appears high compared to the other five airports and could therefore impact the 'line of best fit' (denoted by the R2 value).

Were the outlier to be removed from the analysis, the 'line of best fit' would be curved, demonstrating economies of scale, where increased workload units can be addressed by increased staff productivity. Paragraph 3.15 identifies existing low productivity at the airport, due to certain jobs being required regardless of workload volume. Therefore increased productivity would be likely to absorb some employment increases.

Indirect and induced employment has been calculated as a multiplier of 0.5 for each direct employee. This is based on work from Airport Council International ("The Social and Economic Impact of Airports in Europe", 2004). Figure 5.6 from this report would suggest that the multiplier should be slightly lower, although due to the relatively low levels of future employment for Manston Airport, the effect of a lower multiplier on economic impact would be small.

The assessment provides a GVA per head in the South East of £20,923 to calculate the economic benefit of each job. Given that this amount includes those who are currently not earning, perhaps a more comprehensive approach would be to use "GVA per employee". Nevertheless, this provides some comfort with respect to the economic appraisal as if anything; the appraisal is understating the full economic impact.

When establishing the economic benefit to the local area, the multiplier of 0.25 is not based on any specific evidence. The multiplier should consider the existing local employment of the airport, employment rates and the availability of required skills. Calculations of economic impact of direct, indirect and induced effects are otherwise robust and follow a standard recognised methodology for an assessment of this type. The report suggests that Night Flying would generate 1,452 jobs and £30.4m GVA, but the above issues would need to be addressed before these figures could be validated.

Wider Economic Impact

The arguments with regard to the wider economic impact are robust and we concur with York Aviation's conclusion that these cannot be readily quantified. Removal of night flying restrictions would allow Manston Airport to develop a greater network of routes with the following benefits:

- ➔ Tourists can access or depart the local area from a greater range of locations (as defined by chartered flights); and

- ➔ Businesses can develop stronger links with other locations, particularly where early morning business travel is facilitated through improved air services. These improved services will enable business traveller access to key European cities much earlier in the day.

Conclusions

The overall approach conforms to what we would consider 'industry standard' for an economic impact assessment of this kind. The use of Direct On-Site, Direct Off-Site, Indirect, Induced and Wider employment impacts is well recognised for socio-economic impact studies.

We have some relatively minor queries and these centre around:

- ➔ We would like to see more detail as to how 'workload units' are derived (especially the relationship between a passenger and 100kg of freight);
- ➔ We would seek more detail on the six 'comparator' airports and the extent to which these are similar to Manston Airport;
- ➔ For the regression analysis, there are comparatively few (six) inputs used – as we note above, one of these six values is an 'outlier' and its removal from the analysis would indicate a different R2 value as well as a curve with a 'declining' slope. As expected, the shape of this curve would denote productivity gains as increasing workload units could be handled by proportionately fewer staff; and
- ➔ Use of a multiplier of 0.25 for the 'travel to work' area, although having a relatively small impact, needs further justification.

Given that Manston Airport currently employs a proportionately large workforce for a small throughput, growth of passengers and freight in the short term may not necessarily lead to a significant employment and hence economic impact.

We would therefore like to see more evidence of the 'threshold' whereby Manston Airport achieves a specified level of throughput such that additional employment is required.

Overall, however, we are satisfied with the approach and values used for the economic assessment.

A Review of the Noise Report

The “Noise” implications of the Section 106 agreement

A Section 106 agreement appears to be in place dated September 2000 which supersedes a 1988 agreement (which has not been provided). This agreement was valid for three years, or continues until a new one is in place. The original reason for the 106 agreement is not stated.

The second schedule of the Section 106 relates to Night Time Flying Noise Policy, requiring the airfield operator to submit and agree the policy six months before regular flying commences. The following restrictions were included in the schedule:

- No aircraft to operate at night with a Quota Count in excess of 4;
- A process of sharing data with the council on night operations;
- Adopt UK best practice;
- A policy exemption is in place for 0600 and 0700 for departures to Europe and arrivals from North America;
- Fines for breaches are spelt out.

In relation to noise limitations, the daytime noise contour is benchmarked against the 63 dB(A) contour from 1996. Details of an Insulation Scheme, Noise Abatement routes, preferred departure runway and noise monitoring are also laid out.

There are no specific requirements for the night time noise policy, and by not specifying a time period in section 8, (see below) it is understood to apply equally to night as well as day time operations.

8. Noise Monitoring

The Owner will:

8.1 by 1st April 2002 or having carried out twelve months of noise monitoring at the Airport agree with the Council new maximum noise levels for aircraft movements which will produce a significant reduction in the noise impact for individual aircraft over the previous two years of operation and which in no circumstances will be less than a 5% reduction over the average of the previous two years. Failure to agree on a suitable reduction level will result in the matter of a suitable reduction level being put to a mutually agreed and independent expert in aviation matters, or in the event of failure to agree within one month he shall be appointed by the President of the Institute of Vibration and Acoustic Engineers. The expert will decide the appropriate level of reduction suitable for the Airport by reference to the levels of individual aircraft noise acceptable at one or more comparable airports, judged to be comparable by reference to the characteristics of operation and geographic proximity to urban areas. The expert will act as an expert and not as an arbitrator and shall be entitled to rely on his own judgement and opinion. He shall afford the Parties a reasonable opportunity to submit both representations and counter-representations to him and shall consider all of the same. He shall give to the Parties written notice of his determination (within 25 working days after counter-representations) (if any) and his decision shall be binding on both Parties to the Agreement in respect of the level of reduction to be achieved; and

However, there are several problems with this interpretation. Firstly, with little or no night flying currently, the 5% reduction per annum would prevent any additional night flying that is not currently exempt from the policy. Secondly, the arbitrator in this instance is from an Institute that does not exist in the UK. The nearest equivalent would have to be established, and that would be the Institute of Acoustics, although they would not be disposed to appoint someone in the manner suggested.

Without the use of Section 8, the only restrictions that appear to apply to night flying are those for planes with a QC>4 (1.5.1) and a ban on training flights (1.5.2). There are no stated restrictions on the number of movements of aircraft that comply with para 1.5.1 and 1.5.2.

It is inconceivable that the original intent of the authors of the Section 106 agreement would not have been to restrict the noise impact at night and it is beyond the scope of this review to speculate as to the reasons why this has occurred.

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Applicants Proposed Night Time Noise Policy

The applicant has published their proposed night time noise policy on their website, which is subject to this review. The policy is backed up by an assessment undertaken by Bickerdike Allen and Partners.

The Bickerdike Allen report entitled “MANSTON AIRPORT AIRCRAFT NIGHT NOISE ASSESSMENT REPORT” dated 25.10.11 presents a detailed literature review of current noise policy in the UK as they relate to night time operations, and concludes that the LAeq,8hr and the SEL should be used to control night noise. This is in accordance with current practice.

However, whilst this literature review appears to be comprehensive, it fails to reflect the weight given to each document reviewed, and where it considers the façade or window loss to correct outdoor to indoor levels it mainly considers the situation with windows closed, allowing a 27 dB loss. This of course fails to consider the partially open window situation described in both WHO guidelines and PPG24, which might be expected in the late spring, summer and early autumn months of the year. This corresponds to the months of year covered by the summer timetable in which the bulk of activity occurs at most airports in the UK.

Therefore the thresholds suggested by the applicant as being appropriate for Manston may be understating the impacts, particularly for those within the 90 – 95 SEL contours, where only a slight impact is predicted. Even at the rate of 1 in 75 that may be woken up by aircraft movements, the 312 people (Table 11) predicted to be within this contour could give at least 4 complainants for 2.3 events per night, a not insignificant number of disturbances.

In relation to the noise predictions, the calculations appear to be fully in accordance with current good practice, subject to validation of the input data (by others).


In relation to the proposed QC quota, the exclusion of the shoulder hours from the night time period is out of step with other airports, and would result in a “cramming” of movements into the shoulder hours, times in which most of the UK population is attempting to get to sleep, or before they would normally wake. This would be the reality with the restrictions as currently written, as to have the movements in the night periods would incur financial penalties for the airport operator.

Mitigation

The mitigation scheme proposed by the operator goes further than that required by current Government guidance, but appears to reflect more the economics of the airports expansion than the risk of noise complaints from the larger aircraft movements at night. It may be more appropriate to propose a threshold based on the number of movements of >QC2 aircraft, as well as the 48dB night time noise contours, as well as the 90dB SEL.

Summary

The applicant has presented a substantive noise assessment to underpin their night noise policy, and at first glance this seems to tick all the right boxes. However, the failure to consider the impacts with windows open, coupled with a mitigation scheme that potentially may not reflect the noise risks from larger aircraft movements at night, may not be as favourable to protecting the local amenity for nearby residents.



Had the council been considering a planning application for night operations with 5338 properties above 48 dB, and 312 exposed to the 95 dB Single Event Level, it is unlikely that the application would be seen favourably unless there was a substantive economic argument for its approval.

Conclusion

The analysis of the noise impacts have, in our opinion, resulted in an underestimation of the potential adverse impacts on residents in the area.

Planning Advice

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Introduction

This section of the Report considers the planning background to the Airports operations, including the Certificates of lawfulness of development at the Airport and the two resulting Court Judgements when legal challenges were made to the Certificates.

Consideration is given to the S106 Agreement that governs operations at the Airport and assesses whether as a result of the implementation of night flying activities there would be a material change of use of the land arising from the intensification of the activities at the Airport, and thus whether the Council could reasonably seek a planning application from the Airport operators to carry out these operations.

It should be noted that in preparing this Report we have not seen copies of the original Certificates, although the Court judgements provided did make extensive reference to them. We have also sought clarification of any other planning permissions or Agreements issued post the Certificates by Thanet Council to confirm whether any such permissions or Agreements place any restrictions or conditions on the activities of the Airport. This clarification is awaited at the time of drafting this Report.

Planning Background

The Airport benefits from a series of Certificates of Lawfulness of proposed use or development – to follow the approach of the Courts these are referred to below as LDCs.

The Court judgements explain the background to the issuing of the LDCs in some detail which it is not necessary to repeat here. In summary the LDCs were sought by the Ministry of Defence, in anticipation of the transfer of the site from the MoD to new owners who would operate it wholly as a civilian airport.


The purpose of the LDCs sought by the MoD was to confirm that the anticipated use of the whole of the land as a civilian airport would be lawful and that it would not require planning permission to undertake the use. The MoD set out that the site had been used as an Airport for military purposes for many years and in turn parts of the site had been used for civilian passenger transport for many years.

The proposed LDCs are understood to have sought to establish the use of the land in general, the use of buildings for specific purposes and clarification of the general and specific extent of the site and areas within it.

The Council granted 4 LDCs, two in 1998 and a further two in 1999.

LDCs 98/399 and 98/399 confirmed the lawfulness of the use of the land and a specified list of buildings for civilian purposes. The LDCs are understood to include plans and schedules but have no other specified details or conditions/restrictions relating to the operation of the Airport.

Two further Certificates were issued in 1999, 98/377 and 98/400. It is understood that these again specify a list of buildings and the more general confirmation that the use of the Airport for civilian purposes was lawful given had operated as such for at least the preceding 10 years.



The LDCs were the subject of a High Court Challenge and a subsequent Challenge to the judgement of the Courts on the first matter. These challenges are considered below.

In September 2000 a Section 106 Agreement was entered into by the new operators of the airport and the Council. It is understood that the S106 was issued as a standalone planning obligation and was not specifically linked to any of the LDCs.

The S106 deals with a number of matters, the key issue for this Report being night time flying.

The second Schedule of the S106 sets out that there will be no night time flying at Manston (except in specified exceptional circumstances) until such time as a night time flying policy has been prepared and lodged with the Council.

The schedule sets out that the owners will consult with the Council, who in turn will be allowed time to consult on the proposed policy. It is important to note that the wording of the S106 makes it clear that whilst the Council will be consulted and their views will be assessed, if the airport decides not to adhere to any views or suggestions as to changes to the policy, they are under no obligation to do so.

In simple terms if the airport owners issue a policy and consult with the Council on it, they can choose to ignore any views set out by the Council and begin carrying out night time flying in accordance with the policy. There is nothing in the S106 of itself that would enable the Council to prevent night time flying in this instance.


It would be presumed that the reason for this wording is that given the LDCs had established the use of the airport as lawful, without restriction, the airport owners would not have entered into a S106 Agreement which would have prevented a part of the activity without planning approval i.e. night time flying.

Instead it would appear reasonable to suggest that the owners agreed to issue a clear policy on night time flying rather than agree to an absolute prohibition on night flying without planning permission being granted: they would take the view that the LDCs had already in effect granted permission.

In schedule 2, at 1.5 it is noted that, in effect, the airport will be fined each time it exceeds noise quotas for a night time flight even if a noise policy has been prepared.

This appears to be a financial mechanism for noise control rather than a planning restriction on night time flying. It is difficult to see what enforcement action could be taken against a breach of this clause in planning terms beyond failing to pay the specified penalties. The clause does not prevent the noise: it only sets out a financial penalty for noise breaches.

The LDCs issued in relation to the airport contain no restrictions on night time flying, so no planning application or variation of condition etc is required to fly at night. Similarly the S106 is written in such a way that the airport is not required to apply through the planning process to undertake night time flying.



The Councils planning control therefore appears to be limited to finding that in operating the proposed night time policy once issued by the operator, this would lead to an intensification in the use of the airport to the extent that a material change of use will take place, and that such a change of use would require planning permission.

High Court Challenges

Two of the LDCs, 98/377 and 99/400 were the subject of a High Court Challenge. The challenge was mounted by members of the public against the Council.

It is important to note that such challenges can only be made to the way an LDC (or indeed any planning matter) has been considered and not the 'outcome' of the process. In this way a challenge cannot be made solely, for instance, to the grant of permission for a particular development. Instead a challenge could be mounted that in reaching the decision to grant permission a Council had failed to take in to account key factors, failed to consult properly, or wrongly applied the regulations etc.

In this case the challenge was that the Council in not adding restrictions or conditions on the way the airport could operate as part of the LDCs had failed to follow the correct approach in its decision making.

The challenge failed. It is not necessary in this Report to reproduce in detail the Court's findings but in summary the Court held:-

- ➔ That there was no requirement for the Council to consider issues such as intensification of use or operations. It could have considered them but in choosing not to there was no procedural error;
- ➔ Even if they had chosen to consider intensification they would have been entitled to conclude based on the history of the site that placing controls or limitations would not have been practical;
- ➔ Whilst a lack of detail or precision in drafting any LDC may cause the issuing Council problems later, this lack of precision is itself not unlawful; and
- ➔ Given the Council had issued the other two LDCs, containing no restrictions, and these LDCs were effectively the same as the ones before the Court, even if the Court had quashed the two LDCs before it this would have made no difference as the uses could take place under the other certificates.

The decision of the Court on this High court Challenge was itself then challenged by the local residents. The higher Court again dismissed this challenge, endorsing in full the approach and judgement of the earlier Court.

The first judgement contains a discussion on the principles of 'intensification' in the planning system, some of which is relevant to the current situation and is considered below.

Intensification – Planning Principles

The concept of intensification is explained in the Planning encyclopaedia and referred to in the Court judgements at P55. This states:

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“There may be a material change in use where an existing use has become intensified.....mere intensification of a use does not in itself constitute a material change....It must be intensification of such a degree as to amount to a material change in the character of a use.”

The quotation above has been simplified for the purposes of clarity by excluding references to a series of Court cases that have examined this issue. It is important to understand that the establishment of the principles set out above has itself resulted from a series of Court cases, in turn arising because nowhere in the planning acts or supporting circulars or guidance is there a clear description of what constitutes intensification.

Intensification must be judged on a site by site/case by case basis having regard to the facts and issues in each.

In the majority of planning cases where there is no LDC in place the test above seeks to determine if one use has, by virtue of intensification changed to another. The Court judgement refers to examples and these again result from testing over many years:

- *A hobby operating from a residential property becomes a business; it intensifies to the point that the residential property is deemed to have changed use from a house to an office or other B class use or to become of mixed use. The tests of intensification in this example could be the amount of the building being used for business; the number of people working or visiting the building.*

In this case there would be a change of use from one use class to another which requires planning permission. This is not the case at the airport where no such straightforward change of use class from one to another would occur as a result of night time flying.

The assessment is not whether a change of use from a class to another class has occurred. In the case of the airport the test is not (as the judgement refers to it) whether a use has started from scratch and intensified, but whether there has been intensification from the use established by the planning system as lawful, to a position where it would be deemed to be unlawful.

In the case of the airport it would appear that the relevant test of intensification is from the position established by the 4 LDCs as lawful use at the airport.

The Courts have also examined this issue in several cases. For example, *Childs v Test Valley Borough*. In this much reported case a caravan site existed with a lawful use certificate for four residential caravans. The applicant was refused additional certificates, seeking to establish that the use of the site for eight, 15, 30 and 50 caravans would be lawful.

The Courts held that the extent to which intensification constitutes a material change is a matter of fact and degree. In this case, the judge decided that the degree of change in the nature of the use from 4 caravans to 15 or more would be material and planning permission would be required.

A more pertinent example again reported widely is the Lyons case. This is summarised as follows:

“The Lyons case considered the nature and degree to which intensification affected the character of the land in question. The claimant sought to quash an inspector's decision upholding an enforcement notice requiring a reduction in aircraft numbers at Damyns Hall Aerodrome in east London.”

“In March 2007, a lawful use certificate had been issued for the site that limited the number of aircraft to 15. In April 2009 the number of aircraft present on the site totaled 41”.

The appellant argued that the inspector had failed to give adequate reasons for concluding that intensification of the aerodrome use had changed its character. The inspector followed the process set out in Childs, taking the certificate figure as his starting point. Applying common sense, he accepted that a breach of this figure by one or two aircraft would not amount to a material change. However, he felt that the impact on green belt openness and the visual harm caused by 26 extra aircraft resulted in a “material change in the character of the use.”

In both Childs and Lyons an LDC was in place which set a number as lawful and thus the degree to which a use can be carried out. Testing for intensification, and thus lawfulness, can therefore start with a figure set by an LDC. There would still be a need for assessment of fact and degree in each case but that would be against a benchmark.

At the airport 4 LDCs exist but as has been noted above, and is reflected in the two Court judgements, these do not themselves set a formal benchmark position – the Courts understood that whilst the Council were entitled to have considered setting benchmarks they had not done so.

Scope for Considering Intensification

The Court in the second judgement considered in part the practical implications of the lack of a benchmark figure in the LDCs when considering future developments at the airport.

The judgement notes:

“In my judgement, upon the issue of a certificate, if that (intensification) question arises, the parties would be in no better or worse of, depending on whether or not the certificates have been issued. The certificates permit the continuation of the existing use. They do not relate to the question whether intensification might involve a change of use. That point could be taken whether or not the certificate has been issued.”

The judgement continues that there is protection for the future within the planning system where a particular type of development at the airport extends beyond permitted development to the need for a planning permission. The Judge noted that there would still be a need for a planning permission, and the LDC would not prevent the need for permission.

This is again relatively straightforward where for instance a new terminal building or runway extension was being examined. These things need planning permission and given they do not exist. The presence of LDCs confirming various things to be lawful does nothing to change this position.

In the case of night time flying however this is less clear cut in that it is an activity rather than physical building of structures. The 2001 judgement appears to contemplate the example of night flying:

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“There could in some cases, and night flying may be an example, be an increase in use which affected local amenity without the need for a fresh planning application. That, however, would be the case whether or not the certificate had been issued.”

It continues:

“The certificate, in my judgement, put the operators of the airfield in on better position when consideration comes to be given to further developments on the airfield or, upon the raising of an argument that an intensification involved a change of use”.

The implications of this assessment appears to be therefore that whilst the LDCs do not specify a benchmark figure against which intensification could be assessed, this does not matter; the test still remains as a planning tool.

The LDCs do not give complete and unfettered rights for night time flying, only a confirmation that by virtue of what had happened in the 10 years preceding the issue of the LDCs, this level of use was lawful.

The key issue for the Council now therefore must be what level of night time flying was there happening in the 10 years prior to the LDCs being issued, and thus what could be considered to be lawfully established. This, having regard to the court judgement, would then effectively establish the benchmark against which to test whether the new proposed night time flying would in fact be intensification.

Given the passage of time since the LDCs were applied for it is unclear whether the evidence of previous night time flying, if any exists. This is a matter for the Council to consider.

There is, however, an additional complication in this case arising from the presence of the S106 agreement.

The S106 was signed in September 2000 and specifically prohibits Regular Night Flying Operations, until a Night Flying Policy Noise policy has been prepared and submitted to TDC. So, if the airport owners were to apply now for a certificate to establish the lawful use now of the airport and its activities, it would be reasonable to conclude that as no regular night time flying operations have taken place for over 10 years, an LDC issued now may either expressly or by implication confirm that any regular night time flying is unlawful as it has not been happening.

If this position is adopted then the benchmark for the test of intensification changes significantly to a position where no night time flying is deemed lawful at the present time.

However, the submission made by the Airport in support of its night time flying policy sets out quite clearly that night time flying is taking place:

“12. Consistent with the Section 106 agreement with TDC, there are no Regular Night Flying Operations at Manston. Such activity as there exists is unplanned and ad hoc, not operating to a planned schedule. The current level of movements during night-time varies from month to month. There is no direct correlation to the overall level of business, nor the level of commercial traffic.

The need for unplanned night movements is driven by operational disruption to airlines’ schedules caused by a variety of factors including technical faults, weather impacts and logistic delays.

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The table below shows the monthly record of movements from January 2009 to September 2011, compared with the level of night-time activity between 2300 and 0700, and between 2330 and 0600. In the 12 months to September 2011, a total of 43 aircraft movements were recorded between 2300 and 0700, of which 31 occurred between 2330 and 0600”.

So, whilst the S106 prohibits it, night time flying is taking place presumably within the noise/quota/financial penalty structure also set out by the S106. If therefore the airport applied now for an LDC it could presumably claim that this level of activity is lawful, and thus this would form the benchmark against which intensification should be considered.

This is not clear cut. Whilst there appears to be logic in the S106 point set out above, given the previous history of the airport and third parties, and generally given the notoriously litigious nature of issues related to intensification it would be recommended that a legal opinion is sought if reliance is to be placed on this approach.

Judging Intensification

From the above it will be noted that either there is a benchmark level of night time flying inherently set by the LDCs or there is a benchmark of no lawful night time flying by virtue of the S106. Whichever is the case as set out above, the fact that there is now to be night time flying does not in itself constitute proof of intensification.

It seems that the Council are still required to apply the approach of fact and degree and form a judgment as to whether a particular numerical increase is actual intensification.

In testing intensification it could be possible to test the effects of night time flying on the physical operation of the airport. It could perhaps be suggested that different parts of the airport are being used; that there are additional buildings being built or used; that there are more aircraft on the site; that there is more (possibly open) storage of cargo; more movements of people/increased traffic than at present.

It will be for the Council to consider a full range of issues. It would be noted straightaway however that the erection of buildings linked to night time flying would be in all likelihood PD. In the other cases it may be that the Council will want to ask the airport what are the implications of its night time policy on the physical appearance/operation of the airport in order to consider intensification issues.

The key judgements could however still end up being the change in the number of flights at night and/or the change to the noise environment that would result.

The submitted proposed noise policy deals with the issue of numbers as follows:

“38. In conjunction with this proposal, the airport has commissioned and impact assessment of the potential noise that this level of activity may generate. A copy of this report – Aircraft Night Noise Assessment Report, October 2011 – is provided with this proposal.

The report has been carried out by Bickerdike Allen Partners, leading experts in the assessment of noise surrounding airports. This study has assessed the extent of the noise contours that are predicted to result from the proposed level of activity, together with the dwelling and population counts within each contour. Further it considers the likely perception of the community exposed to these levels, in line with UK standard practice.

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39. This study has been based on the activity level forecast in the Master Plan for 2018 combined with an internal assessment of the likely distribution of business through the day. The table below displays the estimated distribution of aircraft movements for 2018.

<i>Estimated Average Daily Movement Profile</i>	<i>0700-2300</i>	<i>2300-2330</i>	<i>2330-0600</i>	<i>0600-0700</i>
<i>Passenger</i>	49.6	2.8	0.6	2.8
<i>Freight</i>	5.1	0.4	1.2	0.4
<i>Total</i>	54.6	3.2	1.8	3.2

This indicates an average of less than two movements per night during the Night-time Quota Count Period, and demonstrates that less than 3% of the airport’s overall activity is expected to take place during this time.”

This seems to set out that combined passenger and freight flights would be no more than 2 per night from 23.00 until 06.00. This would appear to be around 60 flights per month or over 700 for a year. This compares to the figures set out above that in the 12 months to September 2011, there were 31 movements during these hours.

The S106 and the proposed night time flying policy consider the issue of noise and the use of quotas. In previous sections of this report the submitted noise information and the degree of change in the night time noise environment that will occur as a result of the implementation of the night time flying policy has been reviewed.

Only by taking all factors into account can a judgement about the impact of the change in the noise regime and thus the degree of intensification be formed.

It is worth finally on this issue to point out that whilst these tests can be made against the existing situation, it must be part of the testing process as to what the Council’s position is on the proposed levels of night time flying.

If the Council considers that, for instance, a level of night time flying of 50% of the suggested level would be acceptable, then the test of intensification could be said to change to comparing this position with the proposed levels. This may have a significant impact on the assessment of the intensification issue.


Legal Opinion

As has been noted above, and is recognised in the two court judgements that relate to the airport and the previous LDCs the issue of intensification is a matter which has been before the courts on many occasions.

In the case of the airport the two cases were brought by third parties and the specific grounds related to concerns about intensification of the activities of the airport.

We therefore recommend that the Council consider seeking legal opinion on the issues raised by the night time flying policy and its planning implications.

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This would potentially assist the Council in forming a judgment about the issue of intensification itself having regard to the discussion set out above.

Conclusions on Planning Issues

The submission of the Night Flying Policy document satisfies the legal requirement of the Section 106, its acceptance by the Council is not required.

It is recommended that Legal Council Opinion is sought on the question of intensification of use.