NIGHT FLIGHTS

NNF10 cover

The S106 Agreement between TDC and the airport operator

The EXA has asked to see a copy of the old S.106 Agreement between the Council and the airport operator.

As local residents who lived for years with the shortcomings of the S.106 Agreement and the negative impact that it had on our life, we are very concerned by any hint that the ExA might think that the old S.106 Agreement could be a suitable framework by which the Council could monitor and manage the operational impact of a new airport at Manston on the local area and local people. It is not.

While the airport was operational, the Council itself recognised that the S.106 Agreement was inadequate in a number of ways. On a number of occasions the Council was ready to negotiate changes with the airport operator that would deliver improvements for residents. However, this was not possible because successive airport operators failed to make a commercial success of the airport. As they went into administration; or sold the business in a fire sale; or closed the airport as not being viable, the Council decided that it would wait for the next operator to set up shop before opening a renegotiation of the agreement.

In this summary we set out in headline terms the history of the Agreement and the Council's acceptance that the Agreement of 2000 is not an appropriate tool for managing the impact of airport operations on residents. We do not offer an assessment of the S.106 Agreement ourselves in this summary. Our position is that the S.106 Agreement was naïve when first developed, that it gave too much operational freedom to the operator, and that it fell further and further behind UK best practice the longer it subsisted without any update or renegotiation.

The S.106 Agreement falls far short of current Government thinking about what is acceptable in terms of the impact of airport operations on local communities. It is in no way a suitable starting point as a vehicle by which to manage any future airport operations should a DCO be awarded for a nationally significant cargo airport at Manston.

Background

The S.106 Agreement was written by Trevor Herron at Thanet District Council (TDC). Mr Herron had no aviation experience and no experience of managing airport operations. No Night Flights has met Mr Herron and he told us this directly.

The agreement was between Wiggins and TDC. It was signed on 26th September 2000. Oliver Iny and Tony Freudmann (now a Director of RSP) signed for the airport in their capacity as Directors. The Agreement was intended to be reviewed every three years. In fact, in the period between 2000 and the airport's closure in 2014, no changes were ever made to the Agreement. TDC carried out some unilateral reviews and identified a number of

shortcomings in the Agreement. However, no negotiation was had with the airport operator as a result of these reviews.

Wiggins/Planestation

In September 2004 EUJet started operating passenger flights from the airport. EUJet started to land scheduled passenger flights regularly during the night period without permission to do so. TDC agreed at short notice to allow EUJet to operate an agreed number of night flights per week between 1st April 2005 and 30th September 2005. However, this was not a permanent change to the S.106 Agreement. It was a temporary approval to reflect what was actually happening at the time.

EUJet and TDC agreed that they would need to review the S.106 Agreement in full. As part of this review, TDC carried out public consultation and also commissioned Alan Stratford & Associates (ASA) to review the S.106 Agreement.

ASA submitted its report to TDC in April 2005. ASA raised a number of concerns about the S.106 Agreement and made a number of suggestions for improvement. ASA said that the company had found it difficult to carry out the review as a lot of relevant information simply was not available. ASA said:

> *"As discussed, however, there are still a considerable number of questions to be answered, particularly in respect of the capability of available monitoring resources to be able to correctly and consistently provide an accurate picture of the environmental noise nuisance in the vicinity of the Airport."*
>
> *"The continuing lack of information on future activity levels and market forecasts is considered a major problem, since these are needed to properly evaluate the longer term environmental situation that is essential in order to fully judge the Airport's ambitions."*

Looking forward, ASA said:

> *"In considering a future Night Flying Policy the setting of both a limit to the number of movements and to a maximum quota allowance should be considered. The amount of quota can be set to ensure that a limited number of night slots are used in the least intrusive way."*

It is of note that what ASA thought was a basic requirement in 2005 as part of a night flying regime – i.e. a quota count allowance and a limit on total night period ATMs – has not been put forward by RSP in its 2018 DCO application.

As part of its process of public consultation about the S.106 and airport operations in 2005, TDC held a number of public meetings and focus groups as well as seeking feedback from other local councils. TDC also commissioned a survey from MORI. On 21 July 2005, TDC officers reported the consultation results back to full Council, saying:

> *"2.3 The results of the consultation are self-evident from the appended material. Some differences in emphasis can be noted between different geographical areas. For example, those living beneath flight paths were more likely to be concerned about noise, night-time flying and the aircraft routes, the latter being a concern highlighted in particular by residents at a Public Meeting in Herne Bay. At that*

meeting most speakers identified a need for ground radar enabling individual aircraft movements to be tracked and recorded.

2.4 Perhaps because consultation was coincident with the 2005 Night-Time Flying Policy, the subject of night flying was raised at all Public Meetings."

Planestation (the new name for Wiggins) went into administration in the summer of 2005 and no progress was made on the planned 2005 review of the S.106.

Infratil

In September 2007 TDC's Airport Working Party (AWP) reported on its unilateral evaluation of the S.106. Members discussed the experience of the temporary night flight regime that had been approved for EUJet for the summer of 2005. They noted that, despite the promises made by the airport, the airport had not been able to ensure that those night flights landed from the west so as to minimise the noise over Ramsgate. In addition, members concluded that:

> *"There was general consensus that, in terms of ad-hoc aircraft movement during the night-time hours (23.00 – 07.00), the existing Quota Count (QC) of four or less was now an inappropriate target. Aviation standards had improved, and it would definitely be appropriate to set, by Agreement, a lower QC."* [1]

The AWP felt that "humanitarian flights" needed a clear definition as to what would and would not be included, and that fines for contraventions of the S.106 should be increased. About the possibility of scheduled cargo night flights, members concluded that:

> *"In respect of cargo flights, it was understood that, generally, the industry moves cargo during night-time hours but, until and when KIA is operating at busy levels during the daytime, it could be difficult for the Council to countenance regular/frequent night-time cargo."* [2]

The AWP noted that contour maps had not been provided by the airport operator on an annual basis as had been stipulated in the S.106. Given this, there was no evidence that airport operations had not resulted in "*any expansion of the 1996 63dBLAeq (16-hour 0700 - 2300 hours) contour*" as set out in the S.106 Agreement. The AWP also noted that noise abatement routes had:

> *"… been unenforceable because secondary radar capability is not available at the Airport. This means that it is not possible to track, and report later, the flight path of individual aircraft."* [3]

The AWP concluded in 2007 that:

> *"… technical improvement in the quality in aircraft (reducing noise levels) plus new national and international guidance, make review, and changes to the Agreement desirable."* [4]

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1 Report of the Airport Working Party – September 2007 – Appendix B Para 4.2.4
2 Para 4.2.8
3 Para 5.5.1
4 Para 6.1

In April 2008 TDC informally reviewed the S.106. Brian White, Head of Regeneration at TDC, reported to the Kent International Airport Consultative Committee (KIACC), saying of the September 2000 S.106:

> *"Looking back, it is possible to be critical of that document. Nonetheless, it does form a very useful database against which future information can be compared."* [5]

> *"Members of this Committee will recall that subjects identified by Thanet Council to be revisited in the next Planning Agreement include night-time flying, noise abatement routes, training flights and, with respect of night-time flying, the quota count (QC) of aircraft of concern, the presumption being that as aircraft standards improve so should the standard expected by Planning Agreement."* [6]

> *"Although it was only intended to operate for a period of three years, because expansion of the Airport and major planning applications were anticipated, the Agreement has never been formally renegotiated between the parties and it has never been changed."* [7]

In August 2008, in response to a FOIA request from a resident, asking questions as to the extent to which the conditions in the S.106 had been monitored by TDC and complied with by the operator, TDC responded:

> *"I acknowledge that many of the requirements of the section 106 agreement have not been addressed. To a degree this is because of the extremely low level of activity at the airport. The rationale in drawing up the section 106 agreement was to ensure that predicted growth was properly controlled, the subsequent lack of activity has resulted in [sic] This issue is acknowledged by Infratil who have appointed consultants to address many of these issues which are to be the subject of consideration at the Airport Working Party."*

In its reply to this FOIA request, TDC set out a number of conditions in the S.106 which the operators had failed to meet. This included the need for the operator to reduce the noise footprint of the airport. The relevant stipulation in the S.106 Agreement said:

> *"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."*

Of the operators' performance against this condition, TDC said in 2008 that:

> *"The establishment of maximum noise levels has not been pursued, again because of changes in ownership and because of the relatively low level of activity"*

No noise abatement routes have ever been provided to the Council. When asked about this, the Council replied:

> *"No noise abatement measures have been submitted by the operators, while discussion has taken place with airport operators the relative lack of activity at the airport and changes of ownership have hindered discussion."*

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5 *"S.106 planning agreement and other planning matters"* – 29 April 2008, Para 3.3
6 Para 6.2
7 Para 5.2

In 2012, Infratil put the airport up for sale. On 26th September 2012 the AWP discussed the S.106 Agreement – now twelve years old and never reviewed. It was decided:

> *"That this was not the appropriate time to carry out a review of the current S106 Agreement until there was a new investor or there was a planning application by the airport operator."*

Summary

The S.106 Agreement was written over eighteen years ago. It has never been renegotiated, despite the parties having agreed that "*The parties shall not later than 33 months after the date of this Agreement consult to review the terms of this Agreement*."

Over the years, TDC has considered what needs to change in the S.106 Agreement. TDC has concluded that:

- QC4 is too high a noise category for night ATMs
- "Humanitarian" flights need a clear definition
- It is difficult for the Council to approve cargo flights at night when the airport has ample day time ATM capacity
- It was impossible to tell whether the 63 dB LAeq contour had been expanded or whether the airport had kept within it as agreed, but the intention was that the airport should create less noise than it had in 1999
- New national and international guidance about noise and improved technical capabilities of planes meant that there was an opportunity to reduce the noise impact of the airport on the local area and on residents
- The presumption was that any future S.106 would be made more stringent to reflect the increase in standards over the years since it had been written.

The experience of local residents is that we cannot rely on TDC to take the necessary steps to minimise the negative impact of airport operations on the area and on residents. Whilst the airport was operational between 2000 and 2014, TDC failed on a number of occasions and in a number of ways to fulfil its duty of care to local residents and to apply to the airport relevant planning restrictions. The airport was allowed to operate without:

- Planning permission
- An EIA
- Renegotiation of the S106 Agreement
- Taking account of best practice for managing airport operations
- Providing noise contour maps
- Reducing noise overall
- Providing an insulation scheme
- Proper noise monitors
- Fines being properly levied and paid
- Noise abatement routes being developed
- Setting out a Public Safety Zone.

TDC accepts that it has failed to meet its obligations under the S.106 Agreement.

TDC accepts that it has failed to ensure that the Owner meets its obligations under the S.106 Agreement.

TDC accepts that the S.106 Agreement lags behind best practice.

No Planning Permission

During World War 1 fields at Manston were requisitioned by MoD for use as a military airfield. Planning permission was not required.

During the 1960s some civilian flights took place from the airfield. Planning permission was not required as the MoD was exempt.

In 1988 the airport was granted planning permission for a terminal building and concrete apron for the civilian enclave. The lease included a S.52 agreement saying that passengers could not board or disembark from aircraft at night (2300-0700). This meant that there was a ban on night flights. Ten years later Wiggins Group bought the civilian enclave.

In 1998, less than six months after selling the civilian enclave to Wiggins, the MoD announced its intention to dispose of the rest of the airfield. The then Local Plan had no reference to development of the airfield. The Council produced a plan supplement - the Central Island Initiative - which was adopted in August 1998. This supplement was not subject to the same range of consultation procedures as the Local Plan itself, particularly not in Ramsgate, the town where residents would be worst affected by the airport's activities.

The RAF consulted TDC over possible uses for the site. The Council stipulated that it had to remain as an airfield. Wiggins Group then bought the rest of the airfield. TDC could have stipulated that the new owners submit a planning application for a civilian airport at Manston. The Council chose not to do this.

TDC issued a series of Certificates of Proposed Use or Development, on the grounds that civil aviation had been taking place at the airfield, alongside MoD operations, for more than ten years, without enforcement action. Two local residents challenged TDC in the High Court and Appeal Court over the issue of these Certificates. They argued that, in the absence of a planning application, some limits and controls ought to be included in the Certificates of Lawfulness. It was argued that, without such limits, the Certificates of Lawfulness would allow the new owners to expand the airport without the need for planning permission. The court ruled that these Certificates were simple documents allowing the airfield to be transferred from military to civilian ownership. Future intensification of use would have to be dealt with via the planning system.

No Environmental Impact Assessment

TDC then granted a series of consecutive planning permissions for development at Manston. In doing so, the Council failed to ensure that a full Environmental Impact Assessment was carried out for the site. The EIA regulations relevant at the time set out developments which require an EIA if they are likely to have significant effects on the environment. To assist in judging whether effects are likely to be "significant", the legislation provides some specific

thresholds. For airfields, the threshold stipulated is extension of the runway or if the area of works exceeds 1 hectare (approximately 2.5 acres).

Since being privatised TDC has allowed the airfield to expand by granting a series of separate planning applications for development of the airfield. There were at least 15 separate planning applications up until 2007. More development has taken place since then. The 15 developments include four separate applications which each exceeded the 1 hectare threshold and which should each have triggered an EIA in its own right. In every case, TDC argued that an EIA was not required because the development was not likely to have a "significant" environmental impact.

Since privatisation, TDC has granted a cumulative total of over 21.7 hectares of development at Manston. This far exceeds the 1 hectare threshold set out in the legislation. TDC failed to apply the planning process properly and these EIAs have not been completed. The Council accepts that it should have required the Owner to complete a full Environmental Impact Assessment, leading to a full Environmental Statement. In 2007, TDC said:

> *"It was understood by the Working Party that, should a new Agreement not be put in place before the first significant planning application is submitted by the Airport Owner, the Planning Authority will almost certainly require a full Environmental Statement from the Airport Owner. In addition, the Planning Authority will almost certainly attach a Planning Agreement to the planning consent, thus avoiding the need to separately negotiate a voluntary Agreement."*

In short, TDC failed to manage the impact of airport operations via the S.106 Agreement. It failed to negotiate a better S.106 Agreement for the local area and people. It failed to bring the airport operator within the planning system. It is our view that the old S.106 Agreement is manifestly not fit for purpose. In addition, we have severe doubts about TDC's ability properly to represent the needs of local people when it comes to assessing what it will allow the airport to do.