Submission to Sligo County Council Regarding Planning Application 08/632: Sligo Airport's Proposal to Extend Runway into EU Protected Areas

Introduction

1. Further to the additional information recently supplied by Sligo North West Airport Co Ltd (**the Applicant**), this submission relates to the Applicant's plans to, amongst other things, extend Sligo airport's runway 285m (length) by 160m (width) into the sea, reclaiming an area that is part of two EU nature conservation areas: a Special Protection Area for birds under the Birds Directive and a Site of Community Importance under the Habitats Directive (awaiting designation as a full Special Area of Conservation by the government).

2. For the reasons set out below, a decision to grant planning permission in respect of the above application would represent a breach of EC and Irish law.

3. We are copying this submission to the Foreshore Section of the Department of Agriculture, Fisheries and Food, and to Trevor Sargent, Minister of State at that Department. The considerations set out under section A below apply equally to the grant of a foreshore licence as they do to a grant of planning permission: if granting the latter would be a breach of EC and Irish law, granting the former would too.

4. We are also copying this submission to the Minister for the Environment, Heritage and Local Government, John Gormley, as we understand that the foreshore licensing function is soon to transfer to his Department,[1] and that he, as Minister for the Environment, is responsible under regulation 33 of the European Communities (Natural Habitats) Regulations 1997 (as amended)(the "**Habitats Regulations**") for ensuring compliance with Article 6(4) of the Habitats Directive in the planning context; Article 6(4) is the key legal provision in the present case.[2]

5. The consequences of breaching EC and Irish law are serious, putting the government at risk of infringement proceedings under Article 226 of the EC Treaty, and judicial review proceedings before the High Court. The European Commission has been made aware of the present case.

A. The EC Habitats and Birds Directives

6. The following links contain consolidated versions of the Habitats Directive (Council Directive 92/43/EEC) and the Birds Directive (Council Directive 79/409/EEC), which are referred to in the analysis below.

   http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1992/L/01992L0043-20070101-en.pdf

   http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1979/L/01979L0409-20070101-en.pdf

7. The proposed site for the construction of the runway extension in the present case is the subject of a number of national and international nature conservation designations, and is protected under EC and Irish law. The site in question forms part of an area which:

[1] See http://www.irishtimes.com/newspaper/ireland/2009/0513/1224246387738.html.
[2] S.I. No. 94 of 1997.

- is a Special Protection Area (**SPA**) for birds under the Birds Directive;[3]

- has been adopted by the European Commission as a Site of Community Importance (**SCI**) under Article 4 of the Habitats Directive,[4] and is awaiting designation as a Special Area of Conservation (**SAC**) under the Directive by the Irish Government[5] (the site is described as a candidate SAC (**cSAC**) in the Applicant's Environmental Impact Statement (**EIS**));

- has been designated as a Ramsar site[6] - an internationally important wetland designated pursuant to the Convention on Wetlands of International Importance especially as Waterfowl Habitat;

- is a BirdLife Important Bird Area (**IBA**); and

- has been proposed as a Natural Heritage Area (**pNHA**), though it has yet to be designated under the Wildlife (Amendment) Act 2000.[7]

8. The legal significance of this is as follows:

- Status as SPA: by virtue of Article 7 of the Habitats Directive, Articles 6(2), (3) and (4) of the Directive apply to sites classified as SPAs pursuant to the Birds Directive;

- Status as SCI: by virtue of Article 4(5) of the Habitats Directive, SCIs are similarly subject to Articles 6(2), (3) and (4) of the Directive;

- Status as Ramsar site: such sites have no formal legal status under Irish law unless objectives for their conservation are included in statutory environmental management plans or they are included in statutory nature designations. Since the Ramsar site in the present case has almost an identical boundary to the SPA in question, and since the SPA is the subject of a detailed legal protection regime, the analysis below focuses on the consequences of classification as an SPA (and SCI). Protection of the SPA under Article 6 of the Habitats Directive will effectively result in protection of the Ramsar site;

- Status as IBA: confers no legal protection as such, so this designation is not considered below.

- Status as pNHA: until a notice has been served under section 16(2)(b) of the Wildlife (Amendment) Act 2000, pNHAs benefit from limited legal protection.[8] For that reason, the site's status as pNHA is not dealt with below.

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[3] Cummeen Strand SPA; see http://www.irishstatutebook.ie/1995/en/si/0031.html.
[4] See http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_387/l_38720041229en00010096.pdf.
[5] The Government has six years from 7 December 2004 (the date of the site's adoption as an SCI by the European Commission) to designate the Cummeen Strand/Drumcliff Bay site as an SAC (see Article 4(4) of the Habitats Directive), though it has yet to do so.
[6] See http://www.ramsar.org/profile/profiles_ireland.htm.
[7] No. 38 of 2000. See http://historical-debates.oireachtas.ie/D/0462/D.0462.199603120095.html and http://www.npws.ie/en/ConservationSites/NaturalHeritageAreasNHAs/.
[8] See http://www.npws.ie/en/ConservationSites/NaturalHeritageAreasNHAs/.

Article 6 of the Habitats Directive

Introduction

9. For present purposes, Articles 6(3) and (4) of the Habitats Directive are the central provisions. They provide:

6(3) *Any plan or project not directly connected with or necessary to the management of the site [i.e. the SPA or SCI] but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

6(4) *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000*[9] *is protected. It shall inform the Commission of the compensatory measures adopted.*

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

10. In other words, in the present case there are two – and only two – ways in which the present application could legally proceed: under Article 6(3) or Article 6(4) of the Habitats Directive. If the application does not meet the terms of these provisions, it cannot legally be granted planning permission or a foreshore licence.

11. For present purposes, the above provisions have been implemented in Ireland by regulations 27 (planning permission), 31 (foreshore licence) and 33 (planning permission) of the Habitats Regulations.[10] Of course, the European Court of Justice is the ultimate arbiter of EC law, and its decisions regarding the interpretation of the Habitats Directive have a direct impact on the Irish legal provisions which implement the Directive.

Article 6(3) not met in this case

12. In the present case, the EIS (together with the additional information supplied by the Applicant) represents an "appropriate assessment" for the purposes of Article 6(3) of the Habitats Directive.

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[9] Natura 2000 is simply the collective name for the network of SPAs, SCIs and SACs in the EU.

[10] Note that the Habitats Regulations' definition of "European site", contained in Article 2(1) (as amended by s.75 of the Wildlife (Amendment) Act 2000 (No.38 of 2000)), includes SCIs and SPAs.

13. For the reasons set out below, the Applicant's treatment of Article 6(3) is flawed and disingenuous. To be frank, the Applicant's lengthy morass of an EIS (running to several hundred pages) has failed to deal with the Habitats Directive in a systematic or consistent way. Notwithstanding certain statements in the EIS, there appears to be a broad consensus – which seems to be shared by the Applicant in effect – that Article 6(3) cannot be met in the present case, and that the Applicant must rely on Article 6(4) if the project is to proceed.

14. At paragraph 10.6.4.4 of the EIS, the Applicant states:

"The scientific assessments carried out in the EIS have concluded that there will not be a negative impact on the integrity of the natura 2000 site[11] however as emphasised above the various procedural steps [i.e. the steps in Article 6(4)] *have been followed as the project cannot predict the decision of the competent authority."*

15. First, it is worth noting that it is unclear what has triggered the shift in scientific opinion since the (second) EIS accompanying the Applicant's previous planning application regarding this project (since withdrawn), which reached a different conclusion. There the clear conclusion was that Article 6(3) could not be met and that it would therefore be necessary to satisfy the terms of Article 6(4). Setting that to one side, however, in the present case the Applicant appears to have concluded that Article 6(3) of the Directive has been fulfilled, on the grounds that the project "will not adversely affect the integrity of the site" (the wording of Article 6(3)). However, the EIS also sets out how the project apparently falls within Article 6(4) (i.e. an absence of alternative solutions; demonstration that there are imperative reasons of overriding public interest which justify granting consent to the project; and the provision of compensatory measures) – "various procedural steps" in the Applicant's words.

16. The Applicant's argument appears to be that the Council might ultimately decide that the Applicant's conclusion under Article 6(3) was not justified and that Article 6(4) must be applied, so the Applicant has decided to short-circuit this eventuality by applying Article 6(4) in any event.

17. In our view, compliance with Article 6(4) in the present case is neither optional nor a safety-net to cover the eventuality that the Council might disagree with the Applicant's conclusion. Rather, it is required under the terms of the Habitats Directive.

18. By virtue of the leading decision on Article 6(3) of the Directive - the European Court of Justice's decision in Case C-127/02 *"Waddenzee"*[12] - national authorities may grant consent to a project under Article 6(3) *"only if they have made certain that it will not adversely affect the integrity of [the SPA/SCI in question]. That is the case where <u>no reasonable scientific doubt remains as to the absence of such effects</u>."*

19. While the Applicant's EIS states that "there will not be a negative impact on the integrity" of the sites in question, it would be extraordinary to suggest that the *Waddenzee* threshold has been met in the present case (e.g. see paragraph 10.5.3 of the EIS, which states "…as with all projects of this nature, there is a risk of unforeseen incidents that could cause harm to the environment").[13] Unsurprisingly, nowhere does the EIS state that the absence of adverse

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[11] NB. There are in fact two Natura 2000 sites in question: the SCI and the SPA.

[12] See http://eur-lex.europa.eu/en/index.htm for the full text of this judgment and the other judgments of the European Court of Justice referred to in this submission.

[13] And as to the Applicant's conclusion regarding site integrity, cf. the government's arguments before the Commercial Court in the recent Galway bypass case.

effects on site integrity is "beyond reasonable scientific doubt." In such circumstances, the test in *Waddenzee* has not been fulfilled, and hence Article 6(3) has not been fulfilled.

20. In summary, the test in Article 6(3) has not been met in the present case, and the present application can receive planning permission and a foreshore licence only if it satisfies the terms of Article 6(4) of the Habitats Directive. In terms of the Irish legal provisions which implement the Directive, this means that the Council cannot grant consent to the present application under regulation 27(3) of the Habitats Regulations, and that it must consider whether regulations 27(5) and 33, which together implement Article 6(4) of the Directive, apply. The same is true in respect of the Minister's consideration of an application for a foreshore licence, via regulation 31 of the Habitats Regulations.

Article 6(4) not met in this case

21. For present purposes, Article 6(4) of the Habitats Directive is therefore the key provision – it is the *only* legal route potentially available if the project is to proceed. To recap, Article 6(4) provides:

> ***6(4)*** *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000[14] is protected. It shall inform the Commission of the compensatory measures adopted.*
>
> *Where the site concerned hosts a **priority**[15] natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.*

22. It is important to highlight that, as with the recent Galway bypass case, which is currently pending judgment before the Commercial Court, a priority habitat is at issue in the present case. Indeed, as the Applicant's EIS notes (at paragraph 10.5.2): "The main potential for impact is associated with the fencing and platform extension which have the potential to impact on the fixed dune habitat (Annex I, **priority** habitat) through damage to the fragile soils and habitat by vehicles during construction." Because a priority habitat type is in issue here, the second paragraph of Article 6(4) applies, limiting the reasons that the Applicant may rely on for the purposes of demonstrating "imperative reasons of overriding public interest."

23. Article 6(4) can be used to grant consent to a project only as a last resort, and hence only in very limited circumstances. See the European Commission's guidance on the provision, published in January 2007:

    http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

24. Three tightly-defined conditions must be met in order for Article 6(4) to apply:

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[14] Natura 2000 is simply the collective name for the network of SPAs, SCIs and SACs in the EU.
[15] Certain habitat types are afforded "priority" status by the Habitats Directive, to which special rules apply.

Condition 1: There must be an *"absence of alternative solutions"*;

Condition 2: There must be *"imperative reasons of overriding public interest"* for carrying out the project (which are limited in the case of priority habitats); and

Condition 3: *"[A]ll compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected"* must be taken (and the relevant Member State must inform the European Commission of the compensatory measures adopted).

25. It is clear as a matter of EC - and hence Irish - law that the present application fails to meet these conditions. And since all three conditions must be met in order for Article 6(4) to apply, this is fatal to the present planning application, and to any application for a foreshore licence.

26. Throughout the planning process in respect of the runway extension, there has been a tendency to focus on Condition 3 – compensatory measures – at the expense of the other two conditions, which must also be fulfilled. One is left with the distinct impression that the Applicant believes that the other two Article 6(4) conditions - "no alternatives" and "imperative reasons of overriding public interest" - are in the bag. We do not believe this to be the case, for the reasons set out below. Nor do we believe that the Applicant has satisfied Article 6(4) in respect of compensatory measures.

Condition 1 – an "absence of alternative solutions"

27. The European Court of Justice's decision in Case C-239/04 *Commission v. the Portuguese Republic* established that the burden of demonstrating an <u>absence</u> of alternative solutions is on the Member State.[16] The case concerned the routing of a motorway, with the ECJ ultimately finding the Portuguese government in breach of Article 6(4) of the Habitats Directive, concluding:

> *It is not apparent from the file that [the Portuguese] authorities examined solutions falling outside that SPA and to the west of the settlements referred to above, although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4) of the Habitats Directive, even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties.*

28. In considering the present application, the Council (or the relevant Minister in the case of the foreshore licence) must assess alternative solutions and must be satisfied that there are **no** alternative solutions in the present case. Further, the Council (and Minister) must decide whether imperative reasons of overriding public interest demand the implementation of *the proposed* project or whether they could be met by an alternative.

[16] See paragraph 40 of the Court's judgement: "by implementing a project for a motorway whose route crosses the Castro Verde SPA, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of the Habitats Directive."

29. The latter point is made clear in Advocate General Kokott's Opinion to the European Court of Justice in Case C-209/04 *Commission v. Republic of Austria*. There, AG Kokott stated (emphasis as per the original):

"68. This complaint on the part of the Commission is based on the first sentence of Article 6(4) of the Habitats Directive, according to which a project can be carried out in spite of a negative assessment of the implications for the site only if there is no alternative solution. As the Austrian Government relies on this exemption, it is for it to prove that the requirements of the first sentence of Article 6(4) have been met.

69. The Austrian Government concedes that the road line had already been set definitively, thus precluding an examination of alternatives, when, in 2000 and 2002, the assessment of the implications for the site pursuant to Article 6(3) of the Habitats Directive was submitted and was the subject of a decision by the competent authorities. However, the Austrian Government maintains that all the alternatives to be considered had already been examined, and rightly discarded, in 1994 as part of a general examination of the *environmental impact* in accordance with the EIA Directive.

70. However, the Austrian Government overlooks the fact that the first sentence of Article 6(4) of the Habitats Directive permits approval of a project only in the *absence* of alternative solutions, whereas the examination of alternatives under the EIA Directive entails no restrictions on the choice of alternatives but requires only an *account* of the choice made and the reasons for it.

71. Under Article 5(1) of, and point 2 of Annex III to, the EIA Directive, the developer must, where necessary, supply in an appropriate form an outline of the main alternatives studied by him and an indication of the main reasons for his choice, taking into account the environmental effects. However, there is no obligation concerning weighing the environmental effects against other considerations.

72. By contrast, Article 6(4) of the Habitats Directive permits projects to be approved only if *no* alternative is available. Although the Austrian Government is right that not every theoretically imaginable alternative stands in the way of project approval, the examination of alternatives cannot be confined – as in the case of an EIA – to 'the main alternatives studied by the developer' (point 2 of Annex III to the EIA Directive). That would not guarantee the absence of alternatives as required by Article 6(4) of the Habitats Directive. Consequently, the approving authority must ensure that at least those alternatives are examined that are not obviously – beyond reasonable doubt – out of the question. In selecting the alternative, the decisive factor is whether imperative reasons of overriding public interest demand the implementation of *this* alternative or whether they can also be met by *another* alternative.

73. It is apparent from the documents submitted by the Austrian Government, however, that an allegedly less damaging alternative was not even considered in the procedure."

30. The EIS's consideration of alternatives is seriously deficient in the present case, for three reasons:

(1) "No alternatives": the alternatives considered are essentially limited to the present airport site

31. Fleeting, inadequate consideration is given (at para 3.2 of the EIS) to the relocation of the airport to a greenfield site. However, this is not considered a "viable" or "feasible" alternative

by the Applicant, on what are essentially economic grounds, with cost trumping ecological factors, in breach of the European Commission's guidance on Article 6(4).[17] Note that the Directive states simply that there must be "*no* alternatives," entirely in keeping with the strict protection afforded to the EU's most important conservation areas.

32. That a relocation option has not been given serious consideration is evident from the transcript of an Ocean FM radio broadcast on 6 November 2007 (attached to this submission as Appendix 1), in which the following exchange took place between the interviewer (Niall Delaney) and Albert Higgins, at that time a County Councillor (on Sligo County Council), as well as Chairman of the board of the Applicant company:

Interviewer: *Albert Higgins, first of all, is the airport going to be moved or not in your opinion?*

A. Higgins: *No, you have to be realistic in this world and it just doesn't make economic sense. If someone could come and give us €100m, then you could start looking at it but anyone with a little bit of common sense would realise that it's just not on.*

Interviewer: *Was it ever considered as part of the discussions of the runway extension, was it ever mooted as a possibility at all?*

A. Higgins: *It wouldn't have been mooted. It would have been looked at just vaguely but looking at the cost and that was the reason why….the option, it's a non-runner so therefore I felt and I still feel it would have been a complete waste of money for me to go and spend a couple of hundred thousand to get an answer that you already know.*

33. A relocation option should have been - and should by the Council and Minister be - given serious treatment in the present case, not least because the present runway has run out of land to expand (i.e. if the present project were to go ahead and the airport wanted at some future date to expand further, where would the additional space be found for a runway extension? An extension to the west has of course been ruled out by the Applicant). Note that the Council's (and Minister's) obligation is not limited to considering potential sites that are within the Applicant's ownership.

34. In the above-mentioned radio interview, Albert Higgins stated: "….if someone can tell me where there is 200 acres of land that you can land a plane on, that's the first starting point…". Significantly, later that month, in a letter dated 28 November 2007 (see Appendix 2 to this submission), a serious alternative was put to Mr. Higgins by the businessman Charles J. Fergus, who offered land to relocate the airport.[18]

[17] Cf. paragraph 1.3.1 of the European Commission's guidance in that regard (see para 23 above): "In this phase [i.e. in considering alternatives]…, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria."

[18] Also see http://www.donegalpost.com/2008/11/20/bundoran-airport-row/.

35. This was a serious proposal: Mr. Fergus - no stranger to airport development[19] - engaged consulting engineers to survey the land in question, who confirmed its potential suitability for an airport. Mr. Fergus wrote:

> *The Consultant Engineers (Jennings & O'Donovan, Conor McCarthy) retained by me, have confirmed that the land at Kinlough, County Leitrim has the potential to provide the standards required for an Airport that should strategically serve what has been identified as the Border, Midlands and Western (BMW) Region, for the foreseeable future.*
>
> *As you correctly point out, any alternative site should be located North of Sligo Town* [i.e. not south, which would be in the direction of Knock airport]*.*
>
> *The proposed site is located on the shores of Lough Melvin, situated near Kinlough, Rossiner and Garrison in North Leitrim, this striking location is within a few miles of your County Sligo and not any more distance removed from the Ulster Counties of Fermanagh and Donegal.*
>
> *I have attached a map for ease of reference detailing the proposed lands.*
>
> *I invite you to survey the proposal of my Company and with your considerable experience and knowledge of the aviation industry join with us in lifting this proud North West to the heights to which it is capable.*

36. Notwithstanding this clear invitation, and the work put into the proposal by Mr. Fergus, the Applicant has made no attempt to consider this alternative, in breach of Article 6(4) of the Habitats Directive.

37. While Lough Melvin is itself an SCI under the Habitats Directive, the map provided by Mr. Fergus's consulting engineers suggests that it would be possible to accommodate a relocated runway on the proposed land without encroaching on the protected area (the proposed runway runs for approximately 2km, in a east-west configuration from a point near the shore of Lough Melvin, immediately to the south of Inishtemple island). Thus, there is a serious alternative which has not been considered by the Applicant, and there are certainly no imperative reasons of overriding public interest to press ahead with the proposed runway extension at the existing site. To grant planning permission in such circumstances would represent a breach of Article 6(4) of the Habitats Directive and Ireland's implementing legislation.

(2) "No alternatives": the Applicant's "Option 2" (retro-fitting runway end safety areas within the existing runway) has not been properly considered

38. The Applicant's reasoning in respect of Option 2 ("Retro Fit RESAs within Existing Property Option") is unclear. In what appears to be a carefully worded passage, the Applicant states (at paragraph 3.2.2 of the EIS):

> *If the retro-fitting option is implemented the resulting runway length available for operations would be insufficient to allow for any of the scheduled commercial aircraft presently used for the Department of Transport's Public*

[19] See http://www.donegalpost.com/2008/11/20/bundoran-airport-row/.

> *Service Obligation (PSO) commercial air services to operat* [sic] *under full load conditions. Termination of the scheduled commercial air services under this option would result in the subsequent closure of the airport.*

39. Note that there is no direct logical link between the sentence ending "….conditions." and the sentence beginning "Termination…..". In other words, it is not clear, and it is not stated (at least not in the passage above), that the retro-fitting option would result in termination of the scheduled commercial air services at Sligo Airport. The key question here would appear to be whether flights at Sligo Airport typically (or ever) operate under "full load conditions." If not: (1) Figures 1.1 and 1.2 of the EIS (at pages 1.5 and 1.6) do not tell the full story, since they are premised on "Maximum take-off weight" and "Maximum landing weight"; and (2) it would be hard to see what is wrong with retro-fitting runway end safety areas within the existing runway; i.e. Option 2. Indeed, if any necessary safety restrictions as a result of accommodating RESAs within the existing runway would allow aircraft to operate *near* full-load, it is hard to see why commercial air services could not continue.

40. In summary, it remains for the Council (and the Minister) to establish whether Option 2 represents an alternative for the purposes of Article 6(4) of the Habitats Directive.

(3) "No alternatives": the "Do-Nothing" Option has not been properly considered

41. The Applicant considers the "Do-Nothing" Option at paragraph 3.2.1 of its EIS. It rules this option out on the basis that it would "result in the termination of the scheduled commercial air services at Sligo Airport….the airport would not be permitted by the IAA to operate as anything other than an unlicensed recreational flying field", with an attendant loss of jobs.

42. In that regard, it is very interesting to note the following statement by the Airport Manager, Joe Corcoran, in an interview published in the Sunday Business Post on 12 July 2009:

> *…..the payload of [Aer Arann's] ATR72* ***70-seater*** *turboprop aircraft is currently restricted because of the length of the runway. "There is a payload restriction to* ***64 passengers****," said airport manager Joe Corcoran. "The runway extension would do away with that.""*[20]

43. A key question for the Council to answer before reaching its decision is whether this is the restriction (or the sort of restriction) that would apply permanently if the runway extension were not to go ahead, allowing services to continue on the above basis. In other words, at present Aer Arann's 70-seater aircraft are allowed to carry a maximum of 64 passengers as a result of the length of the runway at Sligo airport. If this situation could continue into the future in the absence of a runway extension, it would appear that, for a shortfall of a *maximum of 6 passengers per flight*, the Applicant wants to construct a runway extension, at vast cost (during a recession), into two of the most important conservation areas in the EU. This would beggar belief.

44. **Before reaching its decision in the present case, the Council must: (a) establish with the relevant air authorities whether the above restriction would apply permanently in the absence of a runway extension at Sligo airport, allowing commercial aircraft to continue operating, albeit subject to a passenger limit of 64 passengers; and (b) carry**

[20] See: http://www.thepost.ie/post/pages/p/story.aspx-qqqt=IRELAND-qqqm=news-qqqid=43092-qqqx=1.asp.

out a detailed analysis of passenger numbers at the airport: how often, if ever, do flights out of Sligo Airport operate at the capacity of 64 passengers? If the answer is rarely or never, there is no justification at all for the proposed runway extension, and hence a clear alternative: do nothing.

45. In that regard, it is important to remember the Applicant's claim that:

> *The [Bord Pleanála] appeal [in respect of the hangar application]*[21] *seeks to argue that all three [proposed projects at the airport] will facilitate expansion of the airport. This is incorrect. The proposal relating to the runway safety issues* ***principally*** *addresses a long-standing requirement of the Irish Aviation Authority and Department of Transport to correct safety deficiencies and bring the runway into compliance with the aviation standards to which Ireland has committed by international treaty****. The work proposed does not expand the operational capability of the airport in any way and will not permit larger aircraft to use the airport than are being operated into Sligo Airport by Aer Arann at present.***[22]

46. In other words, it seems that the plan would be for Aer Arann's 70-seater aircraft (or something similar) to operate into the future at Sligo airport. If such aircraft can operate, under current restrictions, with a maximum of 64 passengers, why not simply allow this to continue?

47. Finally, there is another aspect of the "do nothing" approach that the Applicant has not properly addressed in its EIS: the proximity of Knock airport (even Albert Higgins, then County Councillor and Chairman of the Applicant's board, noted: "…**Knock is so close to us**.."[23]) and the highly-questionable need for two publicly-subsidised airports so close together, particularly in light of climate change and the current economic situation. Indeed, according to Google maps, the driving distance from, say, the city of Sligo to Sligo airport is 8.4 km, about 16 minutes in the car. But the distance from the city of Sligo to Knock airport is a mere 54 km, around 51 minutes in the car. To suggest that the north-west *needs* Sligo airport to stay open is absurd. It would be akin to the residents of south Dublin demanding an airport in Dún Laoghaire because the drive to Dublin airport takes 45 minutes.

Condition 2 – There must be "imperative reasons of overriding public interest" for carrying out the project

48. Turning now to Condition 2: since a "priority" habitat (fixed dune) is at issue in the present case, as noted above the only reasons that can be cited by the Applicant are "those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

49. In the present case, it is clearly the public safety ground that the Applicant must be relying on (see paragraph 2 of the EIS, and see paragraph 10.6.4, from which it is clear that the Applicant has not grasped the significance of a priority habitat being at issue in the present case). The problem for the Applicant is that even if one accepts that there are "imperative

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[21] Planning reference 08/712.
[22] See http://www.pleanala.ie/documents/reports/231/R231918.pdf.
[23] See the radio interview attached to this submission as Appendix 1.

reasons of overriding public interest" for doing *something* to address the present situation regarding Sligo airport's runway, there is nothing to suggest that imperative reasons of overriding public interest demand the implementation of the proposed runway extension, as opposed to one of the alternatives discussed above (again, see the quotation from the European Court of Justice's AG Kokott in paragraph 29 above: "…..the decisive factor is whether imperative reasons of overriding public interest demand the implementation of *this* alternative or whether they can also be met by *another* alternative.") Clearly relocating the airport to another location, or allowing the airport to continue operating under its current restrictions, or allowing the airport to close and its business to transfer to Knock airport - all potential alternatives - would deal with the public safety issue in question.

Condition 3 - "all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected" must be taken

50. While the Applicant's proposed compensatory measures have undoubtedly come a long way from its 2007 suggestion of a management plan and a bird hide/educational resource, the compensatory measures recently proposed still fall short of what is required, legally, under Article 6(4) of the Habitats Directive.

51. In essence, the Applicant has proposed to: (1) add an area known as Trawbane Bay to the existing SPA and SCI; and (2) restore the fixed dune habitat to the north of the airport runway, where there is currently a conifer plantation.

52. In respect of (2), while we welcome and look forward to the Applicant carrying out the restoration works to the north of the runway, such works cannot represent compensatory measures for the purposes of Article 6(4) of the Habitats Directive, for the following reasons.

53. As the Applicant's document *The Restoration of Afforested Sand-dune Habitat at Strandhill, Co. Sligo* makes clear: "the area of interest lies **within** the…Special Area of Conservation." It goes on to draw direct parallels with the pine removal project that was carried out at the Ainsdale Sand Dunes Nature Reserve in England (an SAC; the plantation there was also within the boundaries of the protected area). The problem for the Applicant is that the Irish government is already legally obliged to carry out the proposed restoration work, such that it cannot be put forward as a compensatory measure for the purposes of Article 6(4).

54. The obligation in question arises under Article 6(2) of the Habitats Directive:

> *Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*

55. The work in the Ainsdale reserve – cited by the Applicant – arose as a direct result of this obligation. In response to an argument that pine removal work should not be carried out in Ainsdale owing to the presence of a red squirrel population, the UK's Secretary of State for the Environment highlighted that: "Article 6(2) of the Habitats Directive requires member

states to take appropriate steps to avoid the deterioration of natural habitats."[24] Pine plantations on fixed dunes of course cause the dune habitat to deteriorate.

56. As the European Commission's guidance on Article 6(4) of the Directive makes clear: "Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EC law." Since the pine removal project mooted by the Applicant is already a legal obligation via Article 6(2) of the Habitats Directive, it cannot represent compensatory measures for the purposes of Article 6(4).

57. Turning to the second aspect of the Applicant's proposed compensatory measures: the designation of Trawbane Bay as an addition to the existing SPA and SCI. The European Commission's guidance on Article 6(4) provides:

> *In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; b) provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough that the compensatory measures concern the same biogeographical region in the same Member State.*[25]

58. In other words, the Commission typically looks for like-for-like replacement habitat, at ratios "generally well above 1:1."[26] In the present case, the problem for the Applicant is that the designation of Trawbane Bay will not provide like-for-like replacement habitat for the area to be lost, as it itself acknowledges (emphasis added):

> *The site provides like-for-like habitat replacement for the five hectares that would be lost as a result of the runway reconfiguration, inasmuch as this is possible, given that all areas of existing mud- and sand-flat within the Sligo Bays are already designated.*

59. In terms of habitat, it is interesting to note that the Applicant's further information in effect focuses solely on replacing mudflats and sandflats (e.g. see the quote immediately above, and "The sandy beach in Trawbane Bay can be classified as 'Mudflats and Sandflats not covered by seawater at low tide (Site Code 1140)"), neglecting the runway extension's impacts on other protected habitat types (e.g. the priority fixed dune habitat – see paragraph 22 above). As noted above, the Applicant's proposal to remove a pine plantation from dunes to the north of the runway cannot legally be regarded as addressing this gap.

60. And even in so far as the Applicant's proposed measures go, they are not like-for-like. Trawbane Bay is extremely exposed, facing out into the Atlantic (as the Applicant's *Trawbane Bay Community Assessment* states, at para 4.3, "Overall results indicate that diversity is low in Trawbane Bay reflecting the exposed nature of the site…"). In contrast, the area to be lost as a result of the runway extension is in a relatively sheltered location in Sligo bay.

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[24] See answer regarding the Petition of the Sefton Coast Watch Committee, 20 November 2007 http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm071120/petntext/71120p0001.htm.

[25] At paragraph 1.4.2.

[26] See paragraph 1.5.4 of the Commission's guidance on Article 6(4), cited at paragraph 23 above.

61. In summary, the present planning application fails to meet the terms of Article 6(4) of the Habitats Directive, and hence fails to meet the terms of regulations 27(5), 31 and 33 of the Habitats Regulations. To grant planning permission or a foreshore licence in such circumstances would represent a breach of EC and Irish law.

Miscellaneous points regarding Article 6(4) and compensatory measures

62. It is worth noting that, even if the Applicant's proposed compensatory measures *did* meet the terms of Article 6(4), the relationship between the NPWS and the Applicant in respect of the proposed measures is unclear. Paragraph 1.5.7 of the European Commission's guidance on Article 6(4) provides that "It appears logical that, in line with the 'polluter pays' principle, the promoter of a project bears the cost of the compensatory measures." If the NPWS were to bear any of the cost of the compensatory measures (whether directly or by way of uncompensated staff time, etc.), this could be regarded as a subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site. This could be considered unlawful State Aid within the meaning of Article 87 (ex. 92) of the EC Treaty – see paragraph 1.6 of the European Commission's guidance on Article 6(4).

63. In that regard, we note the reference (at paragraph 1.1 of the EIS) to the fact that the proposed project is to be carried out under funding from Transport 21, "the capital investment framework through which the transport system in Ireland will be developed, over the period 2006 to 2015." If any of this money were used to fund compensatory measures under Article 6(4) of the Habitats Directive, State Aid issues would almost certainly arise.

64. In addition, it is worth noting in passing that where new designations are to form part of proposed compensatory measures, timing is a key issue, as the European Commission's guidance on Article 6(4) makes clear:

> *New designations as part of compensation measures shall be submitted to the Commission before those are implemented and before the realisation of the project but after its authorisation. The new designations should be made available to the Commission through the established channels and procedures as in the process of adoption of the SCI lists and SPA designations (business as usual).*

65. And before any new designations could be submitted to the Commission, of course, there would need to be a consultation process regarding the proposed areas (allowing for objections, referrals to the Nature Conservation Designations Advisory Board, etc.), together with any necessary compensation payments.[27]

66. Finally, per paragraph 1.8 of the Commission's guidance on Article 6(4):

> *In order to allow the Commission to request additional information on the measures taken or to take actions in case it considers that the legal requirements of the directive were not correctly applied, compensatory measures should be submitted to the Commission before they are implemented and indeed before the realisation of the plan or project concerned but after its authorisation. It is therefore advised that compensatory measures should be submitted to the Commission as soon as*

[27] See http://www.npws.ie/en/media/Media,6318,en.pdf.

they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied.

67. Thus, if planning permission/a foreshore licence were to be granted in the present case, the European Commission would have to be informed of the compensatory measures to be adopted, and of the other requirements in respect of Article 6(4) ("absence of alternatives" and so on – see the standard form at the end of the Commission's guidance on Article 6(4)). The fact that Article 6(4) has not been met in the present case will therefore inevitably come to the Commission's attention, putting the government at risk of infringement proceedings under Article 226 of the EC Treaty.

B. Material Contravention of Development Plan

68. As you will be aware, a planning authority cannot legally grant permission for development which materially contravenes its development plan unless it adopts a special procedure for doing so (see section 34(6) of the Planning and Development Act 2000). This special procedure invites public participation and ensures that the material contravention is permitted only with the support of a majority of not less than three quarters of the total elected members of the planning authority.

69. Paragraph 7.2.2.4 of Sligo County's Development Plan (2005-2011) provides, under the heading "Objectives for designated nature conservation sites":

A. Maintain, and where possible enhance, the conservation value of all pNHAs, cSACs and SPAs, as identified by the Minister for the Environment, Heritage and Local Government, as well as any other sites that may be proposed for designation during the lifetime of this Plan.

B. Discourage development that would destroy or damage any sites of international or national importance, designated for their wildlife/habitat significance, including pNHAs, cSACs and SPAs.

70. In respect of Sligo Airport, paragraph 8.1.5.1 sets out the following objective:

A. Promote and support improved access to and expansion of Sligo Regional and Knock International Airports, so as to secure a better level and frequency of service and promote Sligo's accessibility to tourists and businesses, both nationally and internationally.

This objective must of course be read in the light of the objectives set out in paragraph 69 above (not least because these objectives simply reflect obligations under EC and Irish law).

71. In *Rougham v. Clare County Council*[28], Barron J. suggested that materiality should be judged by reference to the grounds on which the development in question might be challenged:

"What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be opposed by local interests. If there are no real or substantial grounds in the content of planning law for opposing the development, then it is unlikely to be a material contravention."

[28] Unreported, High Court, December 18, 1996.

72. As set out above, there are substantial grounds for opposing the development in the present case. Granting planning permission in the present circumstances would result in damage being caused to a pNHA, SCI and SPA (notwithstanding the proposed compensatory measures, which merely *compensate* for damage, rather than avoid damage altogether), and would therefore represent a material contravention of the County's Development Plan.

73. There is no evidence that the Council is planning to proceed by way of the special procedure set out in section 34(6) of the Planning and Development Act 2000. We request clarification from the Council regarding this issue.

C. Conflicts of interest and bias

74. As a final point, we would be interested to hear how the Council proposes to deal with conflicts of interest and bias in the present case (whether it proceeds by way of the normal planning procedure or via the special procedure for materially contravening its development plan), given the fact that a number of representatives of the Council are also members of the Board of the Applicant company.

75. We raised this point in our appeal to Bord Pleanála regarding the Council's decision to grant planning permission for the Applicant's hangar extension, etc. (planning application 08/712). Bord Pleanála's Inspector's report made the following observation:

> *It is true that the County Council is a major shareholder in the airport company. The Council is also the planning authority and is required by law to deal with the application. There is therefore no impropriety by the Council.*[29]

76. While we did not challenge Bord Pleanála's decision before the High Court, the Inspector's reasoning on this point was ripe for challenge. The Inspector mentioned shareholdings, which are undoubtedly relevant, but she did not mention the fact that a number of *individuals* are both members of the Applicant company's board *and* members of the Council, the decision-making body. Nor did she deal with the fact that, while the Council is indeed the planning authority, it must operate within the bounds of Irish law, such that there is no flow of logic between the Inspector's second and third sentences. In the present circumstances (as with the hangar application), there is a clear potential for bias. The Council should bear in mind that, under Irish law, decisions of public bodies must not only be fair, they must be seen to be fair, and must be free of any reasonable suspicion of bias.

77. We would refer the Council in that regard to the following:

> *…..two types of bias are recognised by Irish law: actual bias on the part of the decisionmaker (referred to as "subjective bias") and a mere perception of bias on the part of the decision maker (referred to as "objective bias").*
>
> *…..where a plea of subjective bias fails on the facts, the impugned judgment will nevertheless be quashed where there is a reasonable apprehension or suspicion of bias on the part of the decision maker.* [This test for objective bias, as articulated by Keane C.J. in the Supreme Court's decision in Orange

[29] See http://www.pleanala.ie/documents/reports/231/R231918.pdf.

> Communications Limited v Director of Telecommunications Regulation [2000] 4 I.R. 159, was approved by Murray J., as he then was, in Spin Communications Limited v IRTC [2001] 1 I.R. 411 at 431.] *This is because it is "the policy of the common law … to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists*". [Locabail (UK) Limited v Bayfield Properties Limited [2000] Q.B. 451, cited by Keane C.J. in Orange, supra, at 121.][30]

78. We will state this very clearly to give the Council fair warning: if the Council does not do something to address suspicions of bias before reaching its decision in the present case, its decision will be impugnable by way of an action for judicial review before the High Court.

Helen McCauley
Secretary
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30 July 2009

[30] See Sheehan, B. (2005) Biased Judgments: are Irish Courts too Lenient with Public Maladministration? *Irish Law Times* 23: 235.