

TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 78

APPEAL BY HELIOSLOUGH LIMITED

**LAND IN AND AROUND FORMER AERODROME, NORTH ORBITAL ROAD, UPPER COLNE VALLEY,
HERTFORDSHIRE (Application Ref 5/09/07/08)**

Representations on behalf of Helioslough Ltd, September 2012

1. We write in response to your letter of 19th September 2012.

Request for Clarification

2. The approach in your letter appears to be that the Secretary of State (“the SoS”) wishes to consider further evidence on the comparative merits of the two schemes. We require clarification as to what that means in terms of the scope of any conjoined inquiry.

3. Our understanding is as follows:

- a. it is not part of the SoS’s intention to re-open consideration of the site specific issues on Radlett in respect of which clear conclusions have been reached and in respect of which there have been no material changes in circumstances; and
- b. the scope of the “conjoined inquiry” will be to consider the comparative merits of the sites with factual conclusions being reached in respect of Colnbrook and then those conclusions being compared with the existing site specific conclusions in respect of Radlett; and
- c. necessarily therefore, the re-opened Inquiry will be before Mr Mead who heard the earlier inquiry into Radlett and who will therefore be able to make a proper comparison.

4. Please confirm immediately that our understanding is correct.

5. The comments below are based on the assumption that the above points are correct. If our understanding of the intent is not correct then please urgently clarify what is the intent as to the scope of the inquiry and provide us with additional time to respond.

6. Your answer to paragraph 4 above will form the basis of all our decisions as to what future steps we take (including in terms of preparation for any inquiry and other legal action currently being considered). We require your response forthwith.

The Proposal to Re-Open

7. We consider that any decision to re-open the inquiry would be unlawful and irrational. Further it is plainly unnecessary and will serve no lawful purpose. We require a decision on our appeal to be provided promptly. The situation here is akin to, but worse than, the “deplorable” history in *Niarchos v. Secretary of State for the Environment* [1981] JPL 118

(CA) and inconsistent with the SoS's professed intention to speed up planning decision making.

The Background

8. Given the huge delay on the part of the SoS, it is necessary to remind the SoS of some basic facts.
9. Helioslough ("HS") applied to the Council for planning permission for the current scheme on 27th July 2006. Following a very substantial inquiry in 2007, all the very wide ranging site specific reasons for refusal were rejected by the Inspector and the SoS in his decision letter in 2008 ("the 2008 DL"). The sole outstanding issue was whether there was any alternative site for the proposal in the NW Sector of the M25 which would cause less harm to the GB. Had the SoS been satisfied on that issue, the necessary very special circumstances ("VSC") would "almost certainly" have been established [DL58].
10. Thus a new application was submitted for exactly the same scheme with a comprehensive alternative sites assessment ("ASA") in 2009 to address that issue. That ASA demonstrated why Radlett was to be preferred to Colnbrook.
11. Following a refusal by the Council, an inquiry was held in 2009. The focus of that inquiry was on the methodology and results of the ASA. The ASA was subjected to exceptionally detailed criticism as to its methodology and the assumptions and judgments in it by St Albans Council ("the Council") and STRIFE both of whom argued that alternative sites including Colnbrook would be better. Goodman made written representations to that inquiry based on its proposals¹ at Colnbrook in essence contending that the site at Colnbrook was to be preferred. Our client responded in detail to those criticisms and the cases put by the Council, STRIFE and Goodman. After a detailed and prolonged examination, the Inspector concluded that the ASA was "sufficiently methodical and robust to indicate that there are no other sites in the north west area of search which would be likely to come forward in the foreseeable future which would cause less harm to the Green Belt" and the Inspector rejected all of the criticisms made by the Council, STRIFE and Goodman. He did that in the knowledge that Colnbrook was being progressed by Goodman
12. Through that inquiry conducted in accordance with the statutory processes and at which all parties including Goodman had full opportunity to put their cases as to whether there was a better site than Radlett, the Inspector reached the unequivocal conclusion that "it cannot be rationally concluded that Colnbrook would meet the needs for an SRFI in a less harmful way than the appeal site."
13. It is thus plain that the issue which the SoS relies on in seeking to re-open the Inquiry namely whether there is a better site at Colnbrook: (1) was the core issue in the 2009 Inquiry; (2) all parties have had full opportunity to make their case on that issue in

¹ which were about to be the subject of an application

accordance with the statutory scheme; and (3) unequivocal conclusions have been reached on the facts by a senior Inspector whose report stands.

14. The SoS did not accept those conclusions. His decision was quashed in 2011 in robust terms (*Helioslough v. Secretary of State for Communities and Local Government* [2011] EWHC 2054 (Admin) at [86]. He had simply not applied the “very high bar” posed by the strategic gap (“SG”) policies. The judge therefore held that “the 2010 Report must be reconsidered” [87] and remitted the decision to the SoS for re-determination.
15. Following that judgment (and after Goodman had applied for planning permission at Colnbrook) the SoS: (1) gave the parties an opportunity to ask for the Inquiry to be re-opened; and (2) invited written representations on limited issues. He did not ask for further representations on the comparative merits of Colnbrook and Radlett (letter of 15th September 2011).
16. No party sought the re-opening of the inquiry in their responses and the SoS thereafter proceeded with written representations only (progressively limiting the ambit of the matters on which he wished to be addressed). He did not ask to be addressed on the comparative merits.
17. It was plain that all times through this written process the SoS intended to issue a decision once the written representations were complete (see the evolving date given by him as to when he would make his decision).
18. The written representations finally closed on 26th April 2012 and at all times since the SoS has indicated both formally and informally that a decision was imminent.
19. During the written representation procedure, Goodman appealed against the refusal of its scheme at Colnbrook. Its statement of case made clear that it was not competing against Radlett [para 6.5]. It was only if the SoS concluded in granting Radlett that there was only capacity for one SRFI, that Goodman asked to be given the opportunity to comment on that issue before a decision on its appeal was made. By the time of its statement of case, Goodman was plainly not contending that Colnbrook was to be preferred to Radlett.
20. Consistent with this, Goodman applied for a postponement of its inquiry until after Radlett was determined. In a letter dated 4th September 2012 it said it would withdraw its appeal unless its inquiry was postponed on the basis that it needed the Radlett decision before it wished to pursue its appeal. The next working day the SoS granted the postponement.
21. The factual position is therefore: (1) detailed site specific conclusions on the Radlett proposals have been reached and there have been no material adverse changes in circumstances in respect of Radlett: (2) whether there was a better site than Radlett has already been the key subject matter of a major public inquiry at which all parties had a

full opportunity to put their case and at which very clear conclusions have been reached in the Inspector's Report which stands; (3) the SoS's decision was quashed because of his approach to the comparative merits of Colnbrook and Radlett; (4) on the re-determination, the SoS (and all parties) opted for the written representation procedure; and (5) Goodman is very carefully not seeking to compete with Radlett and is not, through its statement of case, contending that it is a better site than Radlett.

Legal Position

22. We do not accept that there is any power to re-open the inquiry for the purposes of an assessment of the comparative merits of the schemes for the following reasons:
- a. the SoS has decided to adopt the written representations route on the redetermination. Once he has made his decision as to which route to pursue there is no power thereafter to revisit that issue;
 - b. in any event there is no rational reason for re-opening the inquiry to consider the comparative merits:
 - i. The appeal is in respect of Radlett. The statutory duty on the SoS is to determine that appeal. On that appeal, the SoS has a report which, after full debate, addressed the question as to whether Colnbrook should be preferred to Radlett and concluded that it cannot rationally be preferred. That report stands. Nothing has changed. All parties have had their say on that issue. That which the SoS proposes to be done has therefore already been done (at vast expense);
 - ii. Goodman are not claiming to be better than Radlett – the only parties who are so claiming (STRIFE and St Albans) have pursued that argument at great length already and lost;
 - iii. The Goodman appeal supports our case rather than undermines it. It is quite plain from recent correspondence and its statement of case that Goodman is not prepared to pursue an inquiry until Radlett is determined. The state of play in respect of the appeal therefore confirms that there is no “comparative issue” on the Colnbrook appeal to be determined;
 - iv. Our client has gone to very considerable expense over a prolonged period to secure a decision on its appeal. It has complied with all time limits imposed by the SoS and has been promised a substantive decision at various points only for time to then be extended. From the process adopted and the correspondence to date our client has a substantive legitimate expectation that upon closure of the written representations the SoS would move towards a final decision.
23. The SoS appears to be suggesting that he can change his mind as to how to proceed given the Goodman appeal. However, (even if on a correct legal analysis he had the power to change his mind so late in the day), for reasons already explained the Goodman appeal cannot rationally justify the re-opening of the inquiry.

Next Step

We therefore invite the SoS to confirm that he will not re-open the inquiry or cause a joint inquiry to be held, and that he will move rapidly to a decision on Radlett within a set period.