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Date: 10 November 2011

Chris Howsham
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Dear Sir

**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**

Thank you for providing the District Council with the opportunity of responding to the representations which have been so far made. The Council makes further comments on the submissions of CGMS on behalf of Helioslough Limited and the Department of Transport.

CGMS Submissions on behalf of Helioslough

1. Paragraph 4. The effect of Helioslough's position in this paragraph is that, should the Secretary of State reach the same conclusion on the issue of comparing the Helioslough proposal with the Colnbrook proposal, Helioslough will challenge the decision again. While, should this occur, such a position raises clear questions of issue estoppel or *res judicata*, the contention is made simply to apply an unjustified pressure on the Secretary of State. The Secretary of State's analysis of the comparison between Colnbrook and Radlett in his first decision was found to be lawful – Helioslough's point was a bad one in the first decision and would be in any further challenge.
2. Paragraph 5. The right of final reply is not objected to as a matter of principle, but in the usual way submissions should be made on the basis of evidence which has already been submitted to the Secretary of State and should not raise new facts and matters on which the Council has not already had a chance to comment. If Helioslough does raise any such matters in its reply, the Council will ask the Secretary of State for the opportunity to comment on any such matter. Consequently, it requests sight of any further representations submitted by Helioslough.



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3. Paragraphs 7 – 20. In the main, Helioslough is raising the same arguments as it made at the time of the Secretary of State's original determination as to why condition 33 and the section 106 obligation dated 17 December 2009 should be accepted.
4. The only additional contention which it makes is that there is now an emphasis of economic growth and the approach of the Secretary of State should be to find solutions to facilitate delivery of developments and not create obstacles to such delivery. As is dealt with further below, while there is an emphasis within current Government guidance to encourage sustainable development, until a decision has been reached that Radlett is a better site than Colnbrook, the Green Belt test of very special circumstances will not be overcome and (given the Government's recent emphasis that the protection afforded to the Green Belt is not undermined by current Government policy) the development is plainly not sustainable. In those circumstances, there is no justification for taking a different approach to the relevant policy tests which were previously applied by the Secretary of State.
5. In relation to the specific alternatives, Helioslough relies primarily on alternative number 2 (at paragraphs 12 – 17). It is contended that the Secretary of State's only reason for rejecting this alternative previously was on the basis that it did not meet the test of precision. It is quite clear that the original condition was not precise: it is not possible to understand what the "approved rail works" means.
6. As for the proposed amendments to the alternative, even if the Secretary of State considers that this is sufficiently precise, it nevertheless fails the test contained in paragraph 13 of Circular 11/95. While on the face of the condition it simply prevents operations on area 1 until the approved rail works on area 2 has been commenced, the *effect* of the condition is as much contrary to the policy contained in paragraph 13 of 11/95 as alternative 1: what it requires is that a party shall enter into a section 106 agreement because it is directly linked to the section 106 agreement which itself requires the entry into the agreement by third parties. All that has been done is to transfer the rationale of alternative 1 into the section 106 agreement by way of the condition in alternative 2. In that way, alternative 2 is not different to, and is as impermissible as, alternative 1.
7. In relation to alternative 1, the Appellant's contentions are the same as those which it raised before the Inspector previously¹ and which the Secretary of State rejected previously. The Appellant did not challenge that decision. The effect of alternative 1, as we have dealt with already, is that it requires parties to enter into a section 106 agreement contrary to paragraph 13 of 11/95. The Appellant has suggested that the amendment of Circular 11/95 by the letter from the ODPM Head of Development Control Policy dated 26 November 2002 has the effect of making alternative 1 acceptable. However, the Circular 11/95 guidance was clear at the time of that letter and was repeated in Circular 05/05, paragraph B51. It is patently unlikely, as the Appellant would have it, that paragraph 13 was looking only to prevent positive conditions to enter section 106 agreements, but was allowing the same effect through a *Grampian* condition. Had that been the case, the Secretary of State would have been aware that the approach in paragraph 13 could always have been

¹ See paragraphs 12.22-23.

circumvented by a *Grampian* condition and would have realised there was no point reiterating the policy in Circular 05/05.

8. The reason the Secretary of State decided to repeat the advice in Circular 05/05 is because, whether in *Grampian* or positive form, conditions which have the effect of requiring other parties to enter into section 106 agreements leads to an unacceptable element of uncertainty in the development planning process.
9. It is to be noted that the Appellant makes no other representations on alternative 3. That is a veiled acknowledgement that the condition was rightly rejected by the Secretary of State previously.
10. Paragraphs 21-27. The Secretary of State has quite clearly asked to be informed of any changes in circumstances in this case from his previous decision. The Appellant has nevertheless used the opportunity to reiterate its submissions on the appeal.
11. It is quite wrong to suggest that the Secretary of State could not reach different conclusions on any of the main issues. Should the Secretary of State provide reasons for any different conclusion, he is well entitled to change his views on the merits of the Appellant's case. Without returning to matters that have been set out in the Council's representations, the Council contends that the appeal should be dismissed. It, of course, also says that the permission should not be granted because the recent changes of circumstances further support the case it was putting forward.
12. Paragraphs 28-39. The Appellant is seeking in respect of its submissions on the alternative site at Colnbrook to revisit the case which it lost comprehensively in its High Court challenge. As the Court made clear, the position which the Secretary of State took in the proceedings - that Colnbrook was capable of being an alternative to Radlett even though it was smaller in scale - was appropriate and lawful then and it is appropriate and lawful now.
13. In those circumstances, rather than it being necessary for the Secretary of State to find some new issue of substance to conclude that Colnbrook is capable of being less harmful than Radlett, it is for the Appellant to establish that there has been some new issue of substance which would require the Secretary of State to change his previous conclusion. Given that, at paragraphs 32-38, the Appellant expressly states that nothing has changed, the Appellant produces nothing that should alter the Secretary of State's conclusion.
14. It is in the light of the Appellant's position on the primary facts relevant to "the fundamental issue", that the Council addresses the further matters raised in paragraph 40 and following of the CGMS letter; the express effect of the Appellant's position in paragraphs 32-38 is that these other changes of circumstances are not of themselves sufficiently significant to justify a different conclusion from that previously reached by the Secretary of State.
15. Paragraphs 41-44. It is stated that the sole basis on which the Secretary of State refused to grant permission in 2010 was a misunderstanding of the strategic gap policies. That is wrong. The decision was quashed on the basis



of a lack of adequate reasons². The Secretary of State was clearly aware of the relevant policy position having set that out in his previous decision and was fully entitled in that decision to take the view that less weight should be given to the policy than the Inspector had given to it. The Inspector's previous view was extremely strong, namely, that "due to the site being located in a Strategic Gap within the Green Belt, I agree with the appellant that it cannot be rationally concluded that Colnbrook would meet the needs for an SRFI in a less harmful way than the appeal site". Since the decision was quashed on the basis only of a lack of reasons, it falls to the Secretary of State only to provide further explanation as to why Colnbrook might cause less harm than Radlett in spite of the strategic gap policy.

16. That is plainly a matter for the Secretary of State but the Council suggests that it is because the weight to be placed on the strategic gap is tempered by the other paragraphs contained within the Core Strategy at paragraphs 2.29 – 2.30 and because the strategic gap policy will be applied to a smaller development than Radlett. In the light of that, even should the Secretary of State decide - contrary to the Council's original submissions - that the strategic gap does add a further layer of policy to Green Belt policy, its application to a smaller development explains why the strategic gap policy does not prevent the conclusion which the Secretary of State previously reached.
17. Further, there are the following points of relevance to the 'essential to be in that location' test:
 - a) The test is passed if, looking at Colnbrook on its own, there is a need for the proposal as an SRFI to be located in that position for rail and road access and particularly in a location where a rail route crosses the M25.
 - b) It is to be noted that the test is not concerned only with SRFI; it applies to all development. Nor is it directed specifically to whether there is another proposal somewhere else outside the local authority's area. Nevertheless, should it be decided that Colnbrook is a better site than Radlett or any other site within the relevant area, it will plainly be an essential development.
18. Paragraphs 45 – 52. Little need be said about these paragraphs of the letter. The Appellant is seeking to re-run the argument that was made in the High Court and which was comprehensively rejected by it³. The Secretary of State was entitled to reach the conclusion that a smaller scale SRFI at Colnbrook was capable of being judged against Radlett. The Appellant in this part of the representations sets out no circumstances which would justify a different conclusion from that which the Secretary of State reached. Of course, the reason that the Appellant seeks to repeat this argument is because it recognises that, should the comparison be allowed to be made, Colnbrook would be capable of being less harmful.
19. Paragraphs 53 – 59. The Appellant refers to the Government's guidance contained in "Planning and the Budget" and the DCLG letter to Chief Planning Officers dated 31 March 2011. These documents are relied on for the

² See paragraphs 78 – 87 of the Judgment.

³ Cf paragraphs 65 et seq of the Judgment.

proposition that the Government is seeking to promote growth and jobs. That is not, however, an adequate summary of current Government policy. What the Appellant has omitted is that, at the centre of the planning policies seeking to encourage growth, is the requirement that growth should be sustainable⁴. That is also the crux of the draft National Planning Policy Framework ("NPPF"). It is defined in the NPPF at paragraph 10 as:

For the planning system delivering sustainable development means:

planning for prosperity (an economic role) – use the planning system to build a strong, responsive and competitive economy, by ensuring that sufficient land of the right type, and in the right places, is available to allow growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure

planning for people (a social role) – use the planning system to promote strong, vibrant and healthy communities, by providing an increased supply of housing to meet the needs of present and future generations; and by creating a good quality built environment, with accessible local services that reflect the community's needs and supports its health and well-being; and

planning for places (an environmental role) – use the planning system to protect and enhance our natural, built and historic environment, to use natural resources prudently and to mitigate and adapt to climate change, including moving to a low-carbon economy. [emphasis added]

20. The Government's position is that the very special circumstances test within Green Belt policy (as the Appellant accepts) has not been changed by the NPPF when it reiterates Green Belt policy at paragraph 143. Development which would contravene Green Belt policy could necessarily not be regarded as sustainable development and the fact that a development would provide economic growth alone could not, consequently, amount to compliance either with the preliminary planning documentation relied upon by the Appellant at paragraph 55 or the NPPF. As the Appellant accepts very special circumstances could not be established in this case if it has failed to show that there is no better alternative for an SRFI which could cause less harm on the Green Belt (the burden of this test, of course, is on the Appellant). Since that is the conclusion which should be reached once again in this case, the current national policy position plainly does not support the Appellant's case.
21. The Appellant has also said that no SRFI development has been undertaken in the South East. That is not, however, a justification for a planning permission. Planning permission has been granted for an SRFI⁵ and that development has not been implemented. This at least indicates that there is no overriding need for granting permission in the face of an alternative which has the potential to operate better than Radlett.
22. Paragraphs 65 – 70. As the Council has already stated, Colnbrook is now a developed proposal and is to be favoured over Radlett. The Appellant's claim that there has been a misapplication and misstatement in Goodman's alternative sites assessment is made without any basis and nothing is specifically relied upon.

⁴ See *Planning and the Budget*, paragraphs 1 and 3.

⁵ At Howbury Park

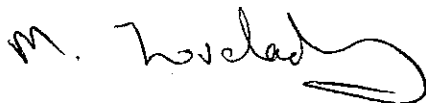
23. Paragraph 71. None of the points relied upon by the Appellant provide any basis for changing the clear conclusion which the Secretary of State has previously reached on the merits of Colnbrook as an alternative site and, consequently, the appeal should be dismissed.

The Department for Transport Letter

24. The Council makes the following observations on the Department for Transport's letter:
- a) The letter expressly gives no positive support for the Radlett proposal as a specific development. In fact, any site which is capable of being an SRFI (and it is accepted by the Appellant that Colnbrook is such) will benefit from the support provided by the guidance contained in the letter and the general support for SRFI in the South East and London.
 - b) It is clear from the guidance attached to the letter that:
 - i) There is no overriding policy imperative which indicates that in circumstances where a better (or even potentially better) alternative exists, an SRFI application in the Green Belt should be granted.
 - ii) Colnbrook is an SRFI proposal under the terms of the guidance.
 - iii) The need for SRFIs is confirmed but it is clear that this is a limited need, not an open requirement. The need to ensure that the right locations are granted permission for SRFIs within London and the South East is plainly imperative. Colnbrook is a better site than Radlett and in those circumstances it would be quite wrong to grant permission for Radlett.

As a result of the above matters, the Secretary of State is respectfully requested to dismiss the appeal.

Yours sincerely



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