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28 February 2013

By email and post

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For the attention of Christine Symes

Your ref	APP/B1930/A/09/2109433
Our ref	C2/GALLIMOM/3198950
Matter ref	U0475/00015

Dear Sirs

TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 78
APPEAL BY HELIOSLOUGH LTD
LAND IN AND AROUND FORMER AERODROME, NORTH ORBITAL ROAD, UPPER COLNE VALLEY, HERTFORDSHIRE - APPLICATION: REF 5/09/0708

We refer to your letter to CgMs Ltd dated 20 December 2012. You will be aware from previous correspondence that we also act for Helioslough Limited in connection with this matter.

At paragraph 45 of the letter of 20 December it is stated that the Secretary of State is minded to approve our client's proposal. The Secretary of State allowed until 28 February for the submission of a suitable planning obligation signed by Hertfordshire County Council ("HCC"), the freehold owner of the majority of Area 1 which is not bound by the existing section 106 planning obligation dated 17 December 2009. The date of 28 February for completion of the undertaking was subsequently extended to 28 March.

We made it clear to HCC, following receipt of the Secretary of State's letter of 20 December, that we were ready and willing to engage with them to discuss the terms of a section 106 obligation to be entered into by HCC and to reflect the form of the undertaking dated 17 December 2009. However, HCC considered that it was not appropriate to discuss the form of the planning obligation prior to the outcome of further consideration of the issues by HCC.

HCC has considered this matter at three meetings in February; the Policy, Resources and Performance Cabinet Panel meeting on 13 February; the Cabinet meeting on 25 February and the County Council meeting on 26 February. We attach as an annex to this letter a note summarising the resolutions which have been passed at those meetings, our assessment of the position which has been adopted by the County Council and the implications of that position having regard to the Secretary of State's letter of 20 December.

As is stated in the annex, we consider that HCC has fundamentally misunderstood the issues which it should be addressing in light of the Secretary of State's "minded to approve" letter of 20 December. The resolutions passed at the HCC meetings reflect confusion on the part of the Members as to their role in this process. Accordingly, the Secretary of State can have no

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confidence that HCC will be able to move to an early decision as to whether to enter into a section 106 planning obligation and it is absolutely clear that there is no prospect of an obligation being completed by the Secretary of State's deadline of 28 March. We have noted the possibility of HCC seeking an extension to this deadline (resolution (d) of the HCC Cabinet meeting on 25 February). We wish to make absolutely clear our client's position that it would strongly oppose any further extension of that deadline in view of the very significant period of time which has already elapsed (over 18 months) in the re-determination of this appeal following the High Court decision to quash the previous decision letter and the ongoing breach by the Secretary of State of the statutory timetable set by him for making the decision.

We therefore ask for our client's appeal to be determined on the basis of condition 33 for reasons which follow. We are of the firm view, for reasons already considered in detail at the inquiry and in correspondence with all parties, that there is no lawful basis for the Secretary of State to decline to adopt the suggested route to a grant of the permission.

As regards the existing Section 106 undertaking dated 17 December 2009, this undertaking binds the rest of the appeal site owned by Lafarge Aggregates Limited and the Gorhambury Estates Company Limited. At paragraph 41 of the letter of 20 December it is stated that "the Secretary of State considers that the provisions in the undertaking are relevant and necessary to the proposed development and comply with the statutory tests in the CIL Regulations." In view of these conclusions and the fact that the undertaking remains valid and fully enforceable in relation to the appeal proposal, we consider that the existing undertaking is an appropriate basis on which to proceed in relation to the land which it binds and accordingly on which to determine the appeal.

In view of the position which has been taken by HCC and the fact that it will not be possible to secure a s106 planning obligation from HCC by 28 March, we have given further careful consideration to the Secretary of State's comments in relation to proposed alternative 1 and alternative 2 of condition 33. It is appropriate to rehearse the full position in relation to condition 33. In the decision letter dated 7 July 2010 at paragraph 33 the Secretary of State stated that alternative 1 of condition 33 would be contrary to the current national guidance in paragraph 13 of Circular 11/95 and that alternative 2 would fail the test of precision unless the "approved rail works" can be properly identified and defined. Following the quashing of this decision letter in the High Court you wrote to all interested parties on 15 September 2011 inviting representations on the three alternatives for condition 33. Representations were submitted on behalf of Helioslough on 12 October 2011. These representations picked up on the Secretary of State's comments at paragraph 33 of the decision letter of 7 July 2010 and the need for a definition of the "approved rail works" for the purposes of alternative 2 of condition 33. At paragraph 15 of the Helioslough submissions, a definition of the "approved rail works" was put forward. Paragraph 11 of those submissions explained that the solution offered by Helioslough through alternative 2 had been adopted by the Secretary of State in at least one other recent appeal decision – the Crystal Palace Park appeal decision dated 13 December 2010. This appeal decision and conditions 58 and 59 imposed on the planning permission should be read alongside the supplemental section 106 agreement dated 23 September 2010 which was entered into in relation to the Crystal Palace Park development proposal. The conditions/planning obligations which were put forward in the Crystal Palace Park case and were accepted by the Secretary of State in his decision letter on that appeal mirror the approach put forward by Helioslough in alternative 2 of condition 33.

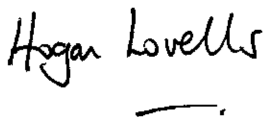
Helioslough's position remains that both alternative 1 and alternative 2 of condition 33 are appropriate alternative options to resolve this matter, either of which could be properly imposed on the planning permission consistent with an approach which is both lawful and meets the Secretary of State's policy. For reasons already debated at length at the inquiry and in correspondence, Helioslough does not consider that either alternative condition would be contrary to the current national guidance in paragraph 13 of Circular 11/95. However, in order to test this matter further Helioslough has obtained a written Opinion from an independent Leading Counsel who has not previously advised in relation to this case. We enclose a written Opinion

from Mr Tim Mould QC dated 19 February 2013 and we refer you in particular to the "Discussion" section of that Opinion in relation to alternatives 1 and 2 for condition 33 at paragraphs 26-55 of the Opinion and to the concluding section of the Opinion at paragraphs 56 and 57. For the reasons given in the Opinion, Mr Mould has concluded that it would be neither legitimate nor reasonable for the Secretary of State to have rejected the Inspector's recommended solution ie the imposition of proposed Condition 33 in the form of alternative 1 or alternative 2. At the end of paragraph 56 Mr Mould states that if HCC is not willing to enter into a planning obligation to bind its land he can see no sustainable basis upon which the Secretary of State may properly reject the Inspector's recommended solution and refuse planning permission. Accordingly, it is clear that both alternative 1 and alternative 2 of condition 33 are entirely appropriate and acceptable as a matter of law and policy and that there is therefore no lawful reason to refuse to grant planning permission on this basis.

We now require the Secretary of State to proceed to a decision on our client's appeal. The Secretary of State is, as matters stand, in breach of his duty to issue a decision on the appeal and there is no lawful reason for any further delay in determining the appeal. We urge the Secretary of State to grant planning permission on the basis of either alternative 1 or alternative 2 of condition 33. The comments set out in this letter combined with the independent written Opinion from Leading Counsel demonstrate why this is an entirely appropriate course of action for the Secretary of State to take. The enclosed written Opinion simply reinforces the submissions which have been made previously by the appellant on condition 33, upon which all parties have previously had the opportunity to comment and indeed have commented. Accordingly there is no need for the Secretary of State to invite any further representations on that matter.

We are sending a copy of this letter and enclosures by post to St Albans City & District Council, STRIFE and Hertfordshire County Council. We will leave CLG to copy on the correspondence to other relevant parties.

Yours faithfully



Hogan Lovells International LLP

Enc

CC: St Albans City & District Council

STRIFE (c/o Wayne Leighton)

Hertfordshire County Council

ANNEX TO LETTER FROM HOGAN LOVELLS TO DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT DATED 28 FEBRUARY 2013 REGARDING APPEAL BY HELIOSLOUGH LIMITED

This is the annex to Hogan Lovells' letter to CLG dated 28 February in relation to the appeal by Helioslough Limited regarding the development of land in and around former Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire (Application Ref: 5/09/0708).

This annex summarises the process which has been pursued at Hertfordshire County Council ("**HCC**") following receipt of the Secretary of State's "minded to approve" letter dated 20 December 2012.

The HCC process has been as follows:

1. HCC considered the matter at a meeting of its Policy, Resources and Performance Cabinet Panel on 13 February. At that meeting various resolutions were agreed to be reported to a meeting of HCC's Cabinet on 25 February.

2. At the Cabinet meeting on 25 February, the Cabinet agreed various matters as are set out in the HCC note attached to this annex (see the resolutions at (a)-(d)). In summary, the Cabinet agreed that further work should be carried out in relation to the possibility of entering into a Section 106 planning obligation and that a further report was required to be brought to the Cabinet in due course.

3. HCC also held a full meeting of the County Council on 26 February at which seven resolutions were approved. These are set out at (a)-(g) of the second attachment to this annex. Resolution (a) endorsed the decisions taken by Cabinet on 25 February. Resolutions (b)-(g) addressed a disparate range of issues which the County Council apparently considered relevant to its consideration of the matters arising from the Secretary of State's "minded to approve" letter of 20 December 2012.

4. Hogan Lovells had written to HCC on 21 February setting out its view that the resolutions before the County Council at the meeting on 26 February reflected a fundamental misunderstanding of the issues which the County Council should properly have been addressing in the light of the Secretary of State's "minded to approve" letter of 20 December. In particular, Hogan Lovells' letter referred HCC to the detailed contents of the Secretary of State's letter including the fact that the Secretary of State had deferred his final decision on the appeal in order to give the appellant an opportunity to provide him with a Section 106 planning obligation which binds all those with an interest in the appeal site ie which binds HCC in respect of its interest. Hogan Lovells' letter pointed out that the deadline of 28 February for the submission of the planning obligation (paragraph 46 of the 20 December letter) had been extended to 28 March. Reference was made to the Secretary of State's intention then to proceed to a final decision as soon as possible and the Secretary of State's explicit statement at paragraph 46 that the Secretary of State "does not regard this letter as an invitation to any party to seek to reopen any of the other issues in it". Hogan Lovells' letter went on to indicate our view that HCC had a straightforward decision to take on the basis of the Secretary of State's "minded to approve" letter ie whether HCC wished to sign a Section 106 planning obligation to bind its land interest and reflecting the terms of the existing unilateral undertaking dated 17 December 2009. The letter stated that it was not open to HCC to refuse to enter into the section 106 planning obligation in an attempt to reargue or redetermine issues which have already been fully addressed by both the Inspector and the Secretary of State (see R v Warwickshire County Council ex parte Powergen).

5. In the event, the resolutions passed by HCC at the County Council meeting on 26 February were amended from those set out in the report. In particular, resolutions (b) and (c) were new resolutions. Both resolutions reinforce our view that the County Council

has entirely misunderstood its present role and the fundamental issue which it should properly be addressing – whether to sign a section 106 planning obligation. In the 10 weeks which have passed since the Secretary of State's letter, HCC has not moved beyond the position of passing resolutions requesting officers to carry out more work regarding the possibility of entering into and the possible content of a section 106 planning obligation, requesting further investigations as are considered appropriate and requesting a further report to Cabinet at an undefined date, combined with resolutions on a range of other issues.

6. As a result of the approach adopted and the resolutions passed by HCC the appellant's position can be summarised as follows:

   (a) the appellant has no confidence (and the Secretary of State can have no confidence) that HCC properly understands its role in this process or that it is addressing itself to the correct issue, namely whether HCC should enter into a Section 106 planning obligation;

   (b) as a result, the appellant has no confidence (and the Secretary of State can have no confidence) that HCC will be able to move to an early decision as to whether to enter into a Section 106 planning obligation; and

   (c) it is clear to the appellant that there is no prospect of HCC entering into a Section 106 planning obligation by the Secretary of State's deadline of 28 March.

28 February 2013
Hogan Lovells International LLP

HERTFORDSHIRE COUNTY COUNCIL

NOTICE OF MOTION

Proposer: RIN Gordon Seconder: A Lee

In the light of the Secretary of State's "minded" decision to grant planning permission for a rail freight depot on the former Radlett Airfield, County Council:

(a) endorses the decisions taken by Cabinet on 25 February 2013

(b) notes that the Secretary of State does not accept its opinion, as evidenced by its submission to the 1st Public Enquiry, that the local road network is not adequate for the additional traffic that the depot would generate

(c) notes that, whilst his conclusion is that the factors weighing in favour of the appeal outweigh the harm to the green belt and other harms, the Secretary of State recognises that the development would
   i. "have a substantial impact on the openness of the Green Belt"
   ii. "result in significant encroachment into the countryside"
   iii. "contribute to urban sprawl"
   iv. "cause some harm to the setting of St Albans"

(d) recognises the strength of opposition in the local area to the proposal

(e) notes the decision of the local planning authority to seek leave for Judicial Review of the Secretary of State's decision not to hold a conjoined enquiry

(f) recognises that, as a public authority, the County Council is required to engage with the local planning authority, the applicant and other land owners both to consider the issues raised in the Secretary of State's letter and to ensure that future decisions to be made by the County Council are rational and fully informed

(g) asks Cabinet not to make or authorise any decision to enter into a planning obligation or to sell or lease the County Council's landholding before the conclusion of any relevant legal action

COUNTY COUNCIL
26 FEBRUARY 2013

ITEM 13 – NOTICES OF MOTION – STANDING ORDER 8 (5)

NORTH ORBITAL ROAD UPPER COLNE VALLEY - HELIOSLOUGH LTD

Cabinet considered a report on this matter at its meeting on 25 February 2013.

Cabinet agreed:-

(a) that the proposed potentially three stage process set out in paragraph 2.8 of the report, for consideration of all of the matters that may arise from the 'minded to approve' letter from the Department for Communities and Local Government dated 20 December 2012 regarding the former Radlett Aerodrome and other lands, be agreed;

(b) that the Chief Executive & Director of Environment and/or Assistant Director, Property & Technology be authorised to have discussions with St Albans City & District Council and the Applicant regarding the possibility of and possible content of a s106 agreement; and separately with the Applicant only regarding the possibility of and possible content of a unilateral undertaking by the County Council, taking into account the form of the undertaking dated 17 December 2009;

(c) to undertake such other further investigations as are considered appropriate, and to bring a further report to Cabinet in due course; and

(d) that the Chief Executive & Director of Environment in consultation with the Leader of the Council be authorised to write to the Secretary of State requesting an extension to the period allowed for the submission of a suitable planning obligation as referred to in paragraph 46 of the Secretary of State's letter of 20 December 2012 should that become necessary.

STRATEGIC RAIL FREIGHT INTERCHANGE AT RADLETT HERTFORDSHIRE

HELIOSLOUGH LIMITED

OPINION

Introduction

1. I have been instructed on behalf of Helioslough Limited ('Helioslough') in connection with an application for outline planning permission for a strategic rail freight interchange and associated development ('the SRFI scheme') on land in and around the former Radlett Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire ('the appeal site').

2. Planning permission for the SRFI scheme was refused by the local planning authority, St Albans City and District Council ('the LPA'). Helioslough appealed to the Secretary of State for Communities and Local Government ('the Secretary of State'). The Secretary of State recovered Helioslough's appeal for his own determination. Following a public local inquiry into the appeal, the inspector reported to the Secretary of State recommending that the appeal be allowed and planning permission be granted subject to conditions. By a decision letter issued on 7 July 2010, the Secretary of State rejected that recommendation, dismissed Helioslough's appeal and refused outline planning permission.

3. On 4 July 2011, on the application of Helioslough, the High Court quashed the Secretary of State's decision. Helioslough's appeal was remitted to the Secretary of State for re-determination.

4. On 20 December 2012, the Secretary of State issued a letter stating that he was now minded to approve Helioslough's proposal for the SRFI scheme ('the minded to grant letter'). In paragraph 4 of his letter the Secretary of State said –

   The Inspector recommended that the appeal be allowed and planning permission granted. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, except where stated, and is minded to agree with his recommendation subject to the provision of a suitable planning obligation which binds all of those with an interest in the appeal site.

5. I have been asked to give my opinion on the legitimacy and reasonableness of conclusions which the Secretary of State has reached in the minded to grant letter, in respect of certain conditions proposed by Helioslough and recommended by the Inspector. The purpose of those conditions is to enable the Secretary of State to avoid the need to refuse planning permission, in the event that Helioslough is unable to negotiate the provision of a suitable planning obligation which binds all of those with an interest in the appeal site, by the deadline set by the Secretary of State for his final decision on the planning appeal.

6. Before I give my opinion, it is necessary to set out the essential factual and procedural context which lies behind the minded to grant letter.

Background

The appeal site – land ownership

7. The appeal site comprises a number of different areas owned by various land owners. The SRFI itself is to be constructed within the area of land within the appeal site known as Area 1. The majority of Area 1 is presently owned by Hertfordshire County Council ('HCC'). The balance of Area 1 is owned by the Gorhambury Estates Company Limited ('Gorhambury'). Area 2 within the appeal site is owned by Lafarge Aggregates Limited ('Lafarge'). Area 2 will be used for rail and other works. Areas 3 to 8 within the appeal site are owned by Lafarge and Gorhambury. Those areas are to form a country park under the outline planning application.

8. Helioslough has entered into land options with Lafarge and Gorhambury for the purchase by Helioslough of their land interests in the appeal site in order to carry out the SRFI scheme. Helioslough does not have similar arrangements with HCC. Lafarge owns the benefit of a restrictive covenant over HCC's land at Area 1 which restricts the development of HCC's land. Through its land arrangements with Lafarge, Helioslough has control over that restrictive covenant. Following the grant of outline planning permission for the SRFI scheme, Helioslough intends to enter into negotiations with HCC for the purchase of HCC's land at Area 1.

The planning obligations/unilateral undertaking

9. For the purpose of its current planning appeal, Helioslough, Gorhambury and Lafarge have entered into planning obligations under section 106 of the Town and Country Planning Act 1990 ('the TCPA') in favour of the LPA and HCC as highway authority respectively. Those planning obligations are set out in a Deed of Unilateral Undertaking executed by Helioslough, Gorhambury and Lafarge ('the UU'). Those planning obligations given for the benefit of HCC as highway authority are set out in clauses 4 to 8 and 13 of the UU. Those planning obligations given in favour of the LPA are set out in clauses 9 to 12 of the UU. I shall return below to the planning obligation given in clause 14 of the UU for the benefit of both the LPA and HCC.

10. By virtue of clause 3 of the UU and section 106(3) of the TCPA, the planning obligations included in the UU bind the land within the appeal site within the ownership of Gorhambury, Lafarge and Helioslough (i.e. Part of Area 1 and Areas 2 to 8) and are enforceable against those parties. Although HCC did not pursue a highways objection to the SRFI at the inquiry, HCC as the landowner of the majority of Area 1 has declined to enter into planning obligations or to execute the UU. In the result, that part of Area 1 which is owned by HCC is not bound by the planning obligations included in the UU. The planning obligations are, therefore, not able to be enforced by virtue of the UU against HCC as the owner of that part of the appeal site.

Condition 33 – the 3 alternatives

11. Helioslough anticipated that it would be necessary to provide a mechanism whereby the planning obligations included in the UU would bind and be enforceable against that part of Area 1 owned by HCC, in the event of planning permission being granted for the SRFI scheme. At the public inquiry, therefore, Helioslough proposed three alternative candidates for Condition 33 in order to achieve that result.

12. The position is conveniently summarised by the Inspector in paragraphs 12.20 and 12.21 of his report –

    12.20 Condition 33 is disputed and is related to the Unilateral Undertaking in that it seeks to ensure that various positive works and financial contributions which are essential to the implementation of the scheme are secured. However, the majority of Area 1, which is where the built development of the SRFI would take place, is owned by Hertfordshire County Council which has declined to enter into the undertaking in respect of its land. The appellant has therefore suggested three alternative Grampian conditions to address the situation that the land owned by the County Council is not bound at this stage by the Unilateral Undertaking.

    12.21 Alternative 1 and Alternative 2 would prevent the development being commenced until the whole of Area 1 is bound by the terms of the undertaking. Alternative 3 would prevent the Units within the development being occupied until a detailed scheme has been submitted to and approved in writing by the local planning authority. The scheme would be consistent with the obligations contained in the unilateral undertaking and would address the same matters covered by the obligation, as listed at (a)-(i) of Alternative 3.

13. The proposed alternatives were set out by the Inspector as Condition 33(Alternative 1) (Alternative 2) and (Alternative 3) in Annex A to his report.

Alternative Condition 1

14. Alternative 1 is as follows –

    The development shall not be commenced until a written planning obligation under section 106 Town and Country Planning Act 1990 substantially in the same terms as the Unilateral Undertaking dated 16 January 2008 and binding the rest of Area 1 has been entered into by all relevant parties, completed and submitted to the local planning authority.

15. In paragraph 12.23 of his report, the Inspector concluded that this condition would be reasonable and recommended its imposition on the grant of outline planning permission for the SRFI scheme. In so doing, the Inspector rejected the argument advanced by the LPA that this condition was in conflict with the advice given in paragraph 13 of the Annex to Circular 11/95 "The Use of Conditions in Planning Permissions". That paragraph states –

Where conditions are imposed on a planning permission they should not be duplicated by a planning obligation. Permission cannot be granted subject to a condition that the applicant enters into a planning obligation under section 106 of the Act or an agreement under other powers.

The Inspector's view was that Alternative 1 did not require the applicant (Helioslough) to enter into a planning obligation under section 106 of the TCPA. Rather, Alternative 1 would prevent the commencement of the development authorised by the grant of planning permission until an appropriate planning obligation had been secured in respect of Area 1 of the appeal site.

Alternative Condition 2

16. Alternative 2 is as follows –

    The development shall not be commenced within Area 1 until the approved rail works forming part of the development have been commenced on Area 2.

17. In paragraph 12.24 of his report, the Inspector said that Alternative 2 had been submitted in order to address any concerns there may be about Alternative 1. As I have pointed out, the Inspector had no such concerns. Nevertheless, the Inspector went on to explain that he had no reservations about Alternative 2. He said that it would have the effect of preventing works in Area 1 until the approved rail head works have been commenced in Area 2. It was to be read in conjunction with clause 14 of the UU. Clause 14.2 of the UU sets out Alternative 2. Clause 14.1 of the UU states –

    Subject to the Planning Permission containing a condition in the form set out in clause 14.2 the Owners covenant for the benefit of the Council and the County Council that the Development will not be Commenced on Area 2 until a binding obligation under Section 106 Town and Country Planning Act 1990 has been entered into the effect of which is to bind all the parts of Area 1, which are not bound by the terms of this Deed, by the obligations on the part of the Owners contained in this Deed (save for the obligations in this clause 14).

    The Inspector said that, in effect, development would not be commenced in Area 2, until a binding Section 106 obligation to bind all those parts of Area 1 not bound by the terms of the completed undertaking, has been completed.

Alternative Condition 3

18. In paragraph 12.25 of his report, the Inspector found that Alternative 3 would be unlawful and contrary to the guidance in paragraph 83 of the Annex to Circular 11/95, since it would constitute a condition requiring the payment of money.

The quashed decision letter (7 July 2010)

19. The Secretary of State addressed the three proposed alternative conditions in paragraph 33 of his (since quashed) decision letter of 7 July 2010. He agreed with the Inspector's view of Alternative 3. However, he disagreed with the Inspector in respect of both Alternatives 1 and 2. As I understand his reasoning in paragraph 33 of that letter, the Secretary of State considered that both Alternatives 1 and 2 would be contrary to paragraph 13 of the Annex to Circular 11/95. He had a further objection to Alternative 2,

i.e. that he considered it to fail the policy test of precision unless the 'approved rail works' can be properly identified and defined.

The definition of 'approved rail works'

20. Following the quashing of the Secretary of State's decision of 7 July 2010, on 12 October 2011 Helioslough responded to the Secretary of State's concern about the lack of precision in proposed Alternative 2. Helioslough sought to explain why, in its view, that concern was unjustified. Nevertheless, and with a view to reassuring the Secretary of State on his specific point of concern, Helioslough proposed the insertion of a definition of the 'approved rail works' in the definitions section of the proposed conditions –

    For the purposes of condition 33, "approved rail works" means the rail works in Area 2 forming part of the development which are included in the description of the development in paragraphs 3.4 and 4.10 of the Development Specification Document dated March 2009 and as shown on Capita Lovejoy figure 4.44 dated December 2008 titled "Proposed Area 2".

The position of the LPA

21. The LPA has maintained its contention that Alternatives 1 and 2 are in conflict with paragraph 13 of the Annex to Circular 11/95.

The Minded to Grant Letter (20 December 2012)

22. It was against this background that the Secretary of State set out the following reasoning in paragraphs 41 and 42 of his minded to grant letter –

    41. The Secretary of State considers that the provisions in the undertaking are relevant and necessary to the proposed development and comply with the statutory tests in the CIL Regulations. However, he observes that the covenants only bind those parts of the appeal site owned by the signatories to the undertaking, and that the majority of Area 1 is in the ownership of Hertfordshire County Council, which has declined to enter into an undertaking in respect of its land (IR12.20). He considers that the County's interest would also need to be bound if the obligation is to be enforceable.

    42. The Secretary of State has given very careful consideration to the Inspector's analysis at IR12.21-12.24 and to the representations made on this matter following the close of the inquiry. However, he does not agree with the Inspector or your client that either variant 1 or variant 2 of proposed condition 33 would be an appropriate means of dealing with this deficiency. This is because he considers that either of these variants would be contrary to paragraph 13 of Circular 11/95. For the reason given by the Inspector (IR12.25), the Secretary of State shares his view that alternative 3 would be unlawful.

23. In paragraphs 43 and 44 of his minded to grant letter, the Secretary of State has stated his overall conclusions on the planning merits of the SRFI scheme. In paragraph 44 he sums up as follows –

    ... he is satisfied that the scheme would give rise to no adverse impacts which would significantly and demonstrably outweigh the benefits when assessed against the policies in the [National Planning Policy Framework] taken as a whole.

24. In paragraph 45 he says this –

Given these conclusions, the Secretary of State is minded to approve your client's proposal. However, for the reasons given at paragraph 41-42 above, he proposes to defer his final decision on the appeal. In view of his concerns, he wishes to invite your client to provide him with a planning obligation under section 106 of the Town and Country Planning Act 1990 which binds all those with an interest in the appeal site....

Summary of the Present Position

25. In the light of this analysis of the factual and procedural background and of the Secretary of State's minded to grant letter, the position is as follows –
    (1) The Secretary of State is satisfied that the SRFI scheme merits the grant of planning permission.
    (2) The Secretary of State is satisfied that the planning obligations given for the benefit of the LPA and the highway authority respectively in the UU are both relevant and necessary to enable the SRFI to proceed.
    (3) The Secretary of State considers that the SRFI scheme should proceed on the basis that those planning obligations must bind all those with an interest in the appeal site, i.e. including the interest of HCC as owner of the majority of Area 1.
    (4) The Secretary of State is aware that HCC has hitherto been unwilling to enter into the UU and so bind its land.
    (5) The Inspector has recommended that planning permission may be granted subject to a Grampian condition (in the terms of either alternative 1 or alternative 2 for proposed condition 33), the effect of which would be to enable planning permission to be granted for the SRFI scheme but to restrain commencement of the authorised development unless and until planning obligations in substantially the same terms shall have been entered into which bind all those with an interest in the appeal site, i.e. including the interest of HCC as owner of the majority of Area 1.
    (6) The Secretary of State has rejected that recommended approach as an appropriate means of dealing with the *'deficiency'* resulting from HCC's unwillingness to bind its land.
    (7) The Secretary of State has sought to justify his rejection of that approach solely on the basis that both alternatives 1 and 2 for proposed condition 33 would be *'contrary to paragraph 13'* of the Annex to Circular 11/95.
    (8) It is necessarily implicit in his reasoning in paragraph 42 of the minded to grant letter, that the Secretary of State's previous concern about the lack of precision in the use of the phrase 'approved rail works' in alternative 2 has been overcome by the definition since proposed by Helioslough.
    (9) The Secretary of State's apparent insistence upon securing the planning obligations from HCC as landowner, as a necessary pre-requisite to the grant of planning permission (as distinct from the commencement of the development), is in these circumstances likely to lead him to refuse planning permission for a scheme of development that he has otherwise found to be desirable in the public interest to proceed.

Discussion

Paragraph 13 of Circular 11/95

26. As I have pointed out, the Secretary of State has founded his rejection of the Inspector's recommended solution solely upon the view that to impose the proposed condition 33 (in the terms of either alternative 1 or alternative 2) would be contrary to the guidance given in paragraph 13 of the Annex to Circular 11/95. The Secretary of State has in mind in particular the second sentence of that paragraph, which I shall set out again for ease of reference –

    Permission cannot be granted subject to a condition that the applicant enters into a planning obligation under section 106 of the Act or an agreement under other powers.

27. In my opinion, that guidance is simply irrelevant to the two proposed alternatives for condition 33 recommended by the Inspector. In neither case would the imposition of the condition result in the grant of a planning permission subject to a condition that the applicant enters into a planning obligation under section 106 of the Act.

28. In my view, it is obvious that paragraph 13 of Circular 11/95 has in mind a condition expressed in positive or mandatory terms, such as *'[by date/stage in development process] the applicant must/shall enter into a planning obligation...'*. Paragraph 13 is not concerned with conditions which are expressed in negative or prohibitory terms, such as *'the development shall not be commenced until...'*. In my opinion, the Inspector was plainly correct in paragraph 12.23 of his report where he said –

    ...the condition proposed at alternative 1 does not require the applicant to enter into a Section 106 obligation but prevents development being commenced until an appropriate obligation has been secured.

    Both alternatives 1 and 2 are negative or prohibitory conditions in the Grampian form. Paragraph 13 simply does not apply to either of them.

29. In the planning context, there are obvious and crucial differences between (i) a condition positively requiring the applicant to enter into an agreement; and (ii) a negative type of condition which prohibits the development from being begun (or from proceeding beyond a specified point) unless the applicant has entered into an agreement.

30. A condition positively requiring the applicant to enter into a planning obligation is very likely to be unenforceable. The applicant may not have a sufficient interest in or control over the land in question to be able to enter into the required obligation under section 106 of the TCPA. In Grampian Regional Council v Aberdeen City District Council (1984) 47 P&CR 633 HL, 636, Lord Keith drew the distinction between a condition requiring a result which it was not within the power of the applicant to bring about and a condition providing that no development should begin until that result had been achieved. He said–

    ...there is a crucial difference between the positive and negative type of condition in this context, namely that the latter is enforceable while the former is not.

31. Secondly, entry into the obligation may well affect the interests of third parties and thus make it unreasonable to seek to enforce a positive condition. There are likely to be considerable difficulties in invoking the will of the Court to enforce a positive obligation to enter into an agreement or undertaking, in order to give effect to the required planning obligation. Thirdly and for similar reasons, such a condition would be very likely to fail the test of reasonableness. Fourthly, such positive condition is likely in many cases to involve a positive requirement to pay money and so fall contrary to paragraph 83 of Circular 11/95.

32. For these reasons, there would be a very serious risk that a positive condition requiring the applicant to enter into a planning obligation would completely fail to secure its intended purpose. The applicant would be in a position to proceed with the development, without in practice being obliged to deliver the very benefits or mitigation which the local planning authority intended should be secured through the required planning obligation. In short, there are powerful reasons of principle and policy for the Secretary of State's guidance against the imposition of such a positive condition in paragraph 13 of the Annex to Circular 11/95.

33. None of those difficulties arise in the present case. Because alternatives 1 and 2 are Grampian conditions and negative or prohibitory in their terms and effect, there is no problem with enforcement. Nor does such a condition raise the practical difficulties of implementation which would call into serious question the reasonableness of a positively worded condition. The distinction is accurately stated in paragraphs 38 and 39 of Circular 11/95-

> *38. It is unreasonable to impose a condition worded in a positive form which developers would be unable to comply with themselves, or which they could comply with only with the consent or authorisation of a third party....*
>
> *39. Although it would be ultra vires, however, to require works which the developer has no power to carry out, or which would need the consent or authorisation of a third party, it may be possible to achieve a similar result by a condition worded in a negative form, prohibiting development until a specified action has been taken.*

34. This distinction is plainly applicable to the present case. Had the Inspector recommended the imposition of a condition requiring the applicant to enter into or obtain a planning obligation binding HCC's land in Area 1 in the terms of the UU, such a condition would have been unreasonable for the reasons given in paragraph 38 of the the Circular. Whereas the proposed conditions as recommended by the Inspector, expressed as they are in negative terms which prohibit development until a specified result has been achieved, are acceptable in principle under paragraph 39 of the Circular.

35. In my opinion, in paragraph 42 of his minded to grant letter the Secretary of State has lost sight of that vital distinction between conditions worded in positive and negative terms in this context. As a result, he has misapplied the guidance in paragraph 13 of the Annex to the Circular. Whereas the Inspector has properly understood the position. I can see no proper basis upon which the Secretary of State can do other than to accept and

agree with the Inspector's reasoning and conclusions on the issue of paragraph 13 of the Circular, as stated in paragraph 12.23 and 12.24 of the latter's report.

36. For these reasons, I am of the opinion that paragraph 13 of the Annex to Circular 11/95 simply does not apply to the Grampian conditions proposed as alternatives 1 and 2 for condition 33. That paragraph is irrelevant, since neither alternative proposes a positive condition requiring the applicant to enter into a planning obligation under section 106 of the TCPA. Moreover, the purpose or rationale of that paragraph has no application to Grampian conditions such as the proposed alternatives 1 and 2, for the reasons I have given above.

<u>*The lawfulness of planning permission granted subject to alternatives 1 or 2 as condition 33*</u>

37. The question arises whether it would be lawful for the Secretary of State to impose either of the proposed alternatives as condition 33 on the grant of planning permission for the SRFI scheme.

38. In my opinion, the answer to that question is to be found in the reasoning of Lord Keith (giving the only reasoned speech) in <u>British Railways Board v Secretary of State for the Environment</u> [1993] 3 PLR 125 HL.

39. In that case, the inspector recommended the grant of planning permission for housing development, subject to the completion of a section 52 agreement between the Board (as developer) and Hounslow London Borough Council (as landowner) to provide access to the development site over the Council's land. The Secretary of State accepted the inspector's recommendation, but stated that he required the section 52 agreement to have been completed before he granted planning permission. The Board was unable to secure the Council's agreement to provide the access land within the deadline set by the Secretary of State. The Board nevertheless argued that planning permission could lawfully be granted subject to a Grampian condition prohibiting construction of the dwellings prior to completion of the access road to base course level. The Secretary of State refused to take that course, on the basis that he was precluded in law from granting planning permission subject to a condition which appeared (in the light of the Council's refusal to sell its land for access) to have no reasonable prospect of fulfilment with the five year life of the permission (see page 128D-F).

40. The Board's application to quash the Secretary of State's decision succeeded before the House of Lords. At page 132G, Lord Keith observed that an application for planning permission may be made by a person who does not own the land to which it relates. At page 133D-H he said this -

    The owner of the land to which the permission relates may object to the grant of planning permission for reasons which may or may not be sound on planning grounds. If his reasons are sound on planning grounds no doubt the application will be refused. But if they are unsound, the mere fact that the owner objects and is unwilling that the development should go ahead cannot in itself necessarily lead to a refusal. The function of the planning authority is to decide whether the proposed development is desirable in the public interest. The answer to that question is not to be affected by the consideration that the owner of the land is determined not to

allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That does not mean that the planning authority, if they decide that the proposed development is in the public interest, is absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. For example, if there were a competition between two alternative sites for a desirable development, difficulties of bringing about implementation on one site which were not present in relation to the other might very properly lead to the refusal of planning permission for the site affected by the difficulties and the grant of it for the other. But there is no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of planning permission for a desirable development. A would-be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are.

41. Lord Keith went on to apply that reasoning and (page 134E) to hold that –

    .....the Secretary of State misdirected himself in law in considering that imposition of the proposed condition regarding the access road to the development would be invalid.

42. On the basis of Lord Keith's approach, I can see no good reason to doubt that it would be lawful for the Secretary of State to grant planning permission for the SRFI scheme subject to a condition either in the form of alternative 1 or alternative 2. In each case, the condition would be imposed for a planning purpose, be fairly and reasonably related to the proposed development and reasonable. In particular, the imposition of either alternative form of condition would enable the Secretary of State to grant planning permission for a scheme that he has judged to be desirable on its planning merits; but to ensure that development only proceeded in circumstances in which the LPA was able effectively to secure performance of the planning obligations that he judged to be relevant and necessary for the delivery and operation of the scheme.

43. Although the position of HCC as landowner of a part of the land comprised in the appeal site gives rise to uncertainty as to the implementation of the planning permission, in itself that is not a proper basis for questioning the lawfulness of the proposed conditions: see Lord Keith at paragraph 41 above. Indeed, on the evidence before the Secretary of State, the stated position of HCC in the present case presents a significantly greater prospect of the terms of the proposed Grampian condition (whether alternative 1 or 2) being fulfilled within the lifetime of the planning permission than was the position in the British Railways Board case. Although here (as there) the position of HCC as landowner has been governed by its stance in respect of the planning merits of the SRFI scheme, there is clear evidence that HCC is willing to review its position now that the Secretary of State has decided that planning permission is merited.

44. In paragraph 12.24 of his report, the Inspector reported that –

    ...there is no reason to presuppose that the County Council, like any other landowner, would maintain its current stance in the face of the significant

financial benefits which would occur were planning permission to be granted for the scheme.

45. The Inspector's view on that point has since been supported by a letter written by HCC's Chief Legal Officer to the Head of Legal and Democratic Services of the LPA on 13 October 2011, where HCC's position is stated thus –

    The County Council's position remains that until such time as there either a decision to grant planning permission or a "minded to grant planning permission" decision in relation to any proposal for the Former Radlett Aerodrome site, the County Council does not consider it is appropriate for the County Council to provide any view on what its future decision on a request to join in an Undertaking might be.

    However, if there is either a decision to grant planning permission or a "minded to grant planning permission" decision in relation to any proposal for the site, the County Council would then give very careful consideration to its position, as landowner, in relation to the matters raised by the prospect of planning permission being granted. The County Council understands that should those circumstances exist there would then be a matter of regional importance for the County Council to consider.

    I also confirm that the County Council would negotiate in good faith to enable the County Council to consider joining into a s.106 Undertaking if the Secretary of State was in fact minded to grant planning permission.

46. In summary, in the light of the evidence before the Secretary of State it would, in my opinion, be both lawful and in accordance with the established policy on the imposition of Grampian conditions for planning permission to be granted for the SRFI scheme subject to a condition in the terms of alternative 1 or alternative 2. There is at least a reasonable prospect of the action required under either alternative condition being taken during the lifetime of that planning permission.

47. Indeed, it seems clear to me that the legal and practical effect of planning permission granted subject to either of those alternative conditions would be to restrain commencement of the authorised development, unless and until planning obligations in substantially the same terms as are set out in the UU shall have been entered into which bind all those with an interest in the appeal site, i.e. including the interest of HCC as owner of the majority of Area 1. It is the clear intention of the Secretary of State that the development of the SRFI scheme should not be permitted to proceed unless and until the planning obligations in the UU are able to be enforced against all of the land comprised in the appeal site, he having judged those planning obligations to be both relevant and necessary to the proposed development of the SRFI scheme. That being the case, I can see no real advantage to be gained by insisting on HCC's land being bound prior to the grant of planning permission. Imposition of a condition in the form of either alternative 1 or alternative 2 will achieve the Secretary of State's desired result, which is that the SRFI scheme should not proceed until the substance of the planning obligations set out in the UU are able to be enforced against the appeal site as a whole.

Given alternatives 1 and 2, is there any lawful or reasonable basis for the Secretary of State to refuse planning permission for the SRFI scheme in the event that Helioslough is unable to obtain HCC's agreement or undertaking to bind its land by the deadline set by the Secretary of State?

48. It is undoubtedly reasonable for the Secretary of State to require that Helioslough seek to negotiate HCC's agreement or undertaking to bind its land to the planning obligations prior to the deadline he has given for his final decision on the planning appeal. It does not, however, follow that in the event of such negotiations not having produced a successful outcome, it would then be lawful or reasonable for the Secretary of State to refuse planning permission on that basis.

49. In order for the Secretary of State to justify so doing, he must explain why he has chosen not to grant planning permission based on the imposition of a condition either in the terms of alternative 1 or alternative 2. For the reasons I have already given, his sole, stated reason in the minded to grant letter for declining to grant planning permission on that basis (in paragraph 42) is not a proper, adequate or intelligible basis for his rejection of that approach. On the contrary, he is able lawfully to grant planning permission on the basis of either alternative condition. To do so would not bring him into conflict with the policy guidance in Circular 11/95. The evidence before him supports the conclusion that there is at least a reasonable prospect of the action required under either alternative condition being taken during the lifetime of the planning permission.

50. It is important to note that the test to be applied in determining the validity of such a condition is not whether there is a reasonable prospect of the action required being taken. Following the decisions in the British Railways Board case and the case of Merritt v Secretary of State for Environment, Transport and Regions and Mendip District Council [1999] EWHC 783 Admin, such a condition may be imposed unless there is no prospect at all of the action required under the condition being performed during the lifetime of the planning permission. Following the decision in the Merritt case ODPM (as it then was) wrote to Chief Planning Officers on 25 November 2002 amending the advice in paragraph 40 of Circular 11/95 to read '*It is the policy of the Secretary of State that such a condition may be imposed on a planning permission. However, when* ***there are no prospects at all*** *of the action in question being performed within the time-limit imposed by the permission, negative conditions should not be imposed. In other words, when the interested third party has said that they have no intention of carrying out the action or allowing it to be carried out, conditions prohibiting development until this specified action has been taken by the third party should not be imposed.*' Patently, it is not the case here that there are no prospects at all of the action in question being performed within the time-limit imposed by the condition. Imposition of a condition in the form of either alternative 1 or alternative 2 will achieve the Secretary of State's desired result, which is that the SRFI scheme should not proceed until the substance of the planning obligations set out in the UU are able to be enforced against the appeal site as a whole.

51. I would also draw attention to paragraphs 186, 187 and 203 of the National Planning Policy Framework, which state that local planning authorities should approach planning decision making in a *'positive way'*, look for *'solutions rather than problems'* and *'consider whether otherwise unacceptable development could be made acceptable'* through the imposition of conditions. These general principles of national planning policy seem to

me to apply with particular force in the present case, given the points set out in paragraph 25 above. Paragraph 2 of Circular 11/95 states that if used properly, conditions can –

> *...enable many development proposals to proceed where it would otherwise have been necessary to refuse planning permission.*

Once one has set aside the flawed reliance on paragraph 13 of Circular 11/95 in paragraph 42 of the minded to grant letter, there is now no suggestion that the imposition of a condition either in the form of alternative 1 or alternative 2 would be other than the proper use of conditions. The inspector has recommended their imposition as the basis of overcoming the difficulty otherwise presented by the unwillingness of HCC to bind its land in Area 1 to the planning obligations.

52. In the circumstances, given that he is able lawfully to grant planning permission for the SRFI scheme subject to the imposition of a condition either in the form of alternative 1 of alternative 2, I am not able to see any legitimate or reasonable basis upon which the Secretary of State may justify refusal of planning permission.

In the event that HCC decides to enter into the UU, is HCC able lawfully to contract with itself as highway authority?

53. As I have mentioned, the UU includes a number of specific planning obligations in the form of covenants entered into for the benefit of HCC as highway authority. In my opinion, it is not possible in law for HCC as landowner effectively to enter into a contract or undertaking with itself or for its own benefit as highway authority. HCC's legal personality as landowner and highway authority is not divisible in that way. A mechanism therefore needs to be found to enable HCC effectively to bind its land in Area 1 to perform those obligations contained in the UU that are given for the benefit of the highway authority.

54. It has been suggested that this could effectively be achieved through HCC entering into a covenant with the LPA that HCC will not dispose of any part of its interest in Area 1 to any person, unless that person enters into a planning obligation in favour of HCC as highway authority binding the land disposed of to the obligations for the benefit of HCC set out in clauses 4 to 8 and 13 of the UU. It is also proposed that alternative condition 2 be imposed on the planning permission in order to ensure, on the face of the planning permission, that the development authorised by the planning permission shall not commence unless and until planning obligations in substantially similar terms to those set out in the UU bind HCC's land in Area 1. The conditions would include the proposed definition of the 'approved rail works' which explicitly cross refers to the submitted application documents.

55. In my opinion, these proposed arrangements would both fall within the ambit of section 106 of the TCPA and be an appropriate and precise basis for securing that HCC's land in Area 1 is effectively bound to fulfil the planning obligations set out in the UU, thereby achieving the objective of the Secretary of State in paragraphs 41 and 42 of the minded to grant letter.

My Opinion

56. For the reasons I have given, I consider it to be neither legitimate nor reasonable for the Secretary of State to have rejected the Inspector's recommended solution to the problem presented by HCC's unwillingness to bind its land to the planning obligations set out in the UU; i.e. the imposition of proposed condition 33 in the form of alternative 1 or alternative 2. In the light of HCC's stated position in its Chief Legal Officer's letter of 3 October 2011, Helioslough should now negotiate to secure HCC's agreement to bind its land in Area 1 to the planning obligations, within the timescale set by the Secretary of State for his final decision on the planning appeal. Nonetheless, in the event that those negotiations do not succeed, for the reasons I have given in paragraphs 48 to 52 above I can see no sustainable basis upon which the Secretary of State may properly reject the Inspector's recommended solution and refuse planning permission.

57. I am aware that it is proposed to submit this opinion to the Secretary of State in the context of the determination of the appeal.

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STRATEGIC RAIL FREIGHT INTERCHANGE

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