St Albans City & District Council

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Date: 28 March 2013

BY EMAIL AND POST
Ms Christine Symes
Decision Officer
Department for Communities and Local Government
Zone 1/H1
Eland House
Bressenden Place
London SW1E 5DU

Dear Sir/Madam

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

Further to the letters of Hogan Lovells dated 28 February and 7 March 2013 and the Council's request of 13 March 2013 for the opportunity to provide representations on the matters raised in those letters, I now write to set out the Council's response.

The Council remains of the view that the Secretary of State's interpretation of paragraph 13 of Circular 11/95 ("the Circular") is correct. That paragraph is couched in broad terms which are clearly intended to prevent any conditions which require, directly or indirectly, an applicant to enter into a planning obligation under s.106 of the Town and Country Planning Act 1990 or an agreement under other powers. The contention that the paragraph does not apply to conditions which achieve this result but which are formulated in negative 'Grampian' terms is simply not tenable given the broad and clear wording of that paragraph. Where 'Grampian' conditions are deemed to be acceptable this is made expressly clear in the Circular (see for example paragraphs 28 and 39). The fact that no express qualification is made in the context of paragraph 13 demonstrates that no qualification is in fact intended. The purpose of the provision within paragraph 13 is to ensure that the relevant obligations and their effectiveness are determined at the appropriate stage, namely, when the decision is being reached as to whether permission should be granted.

The policy is, therefore, quite clear. There can be no reasonable justification for departing from it in this case. Indeed, Helioslough have not sought to advance any such justification. They merely seek to argue that the policy is not applicable to alternatives 1 and 2 of their proposed condition 33.

In any event, even if either of the alternatives proposed by Helioslough were policy compliant, any grant of permission subject to condition 33 would have the effect of creating significant uncertainty over whether that permission would in fact ever be implemented given the current stance of Hertfordshire County Council ("HCC") as landowner in respect of the outstanding planning obligation required by the Secretary of State.

Helioslough themselves are of the view that the *"Secretary of State can have no confidence that there will be any substantial progress by the HCC on the Section 106 obligation in a reasonable timeframe and until permission is granted and all challenges are disposed of."*

Indeed, even in the hypothetical situation that all current challenges were unsuccessful and permission was granted subject to the proposed condition, there would remain significant doubts about HCC's willingness to enter into the required obligation given the contents of paragraphs (b), (c) and (d) of the recent resolution of the Council dated 26 February 2013. There can be no certainty that the obligations required by the Secretary of State will be entered into within the life of the permission.

In the legal opinion submitted by Helioslough to support their position reliance is placed on the case of *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125 to demonstrate that the proposed condition would be lawful notwithstanding any uncertainty over the position of HCC. However, that case expressly recognised that the improbability of a permission being implemented is capable of being a material consideration in the determination of a planning application which could lead an authority to conclude that it was appropriate to refuse permission. To illustrate the type of case where this would be so, an example was given of a situation where there is *"competition between two alternative sites for a desirable development"* (see page 133). That example is directly relevant to the circumstances of the present case.

Throughout the long history of this appeal the issue of alternative sites has been a principal issue. The existence of a potential alternative site for an SRFI has been treated as crucial to the question of whether "very special circumstances" sufficient to justify the harm caused to the green belt by the development of an SRFI at Radlett exist. As a result, the relative harm associated with the Goodman proposal for the development of an SRFI at Colnbrook was a significant material consideration in the Inspector's report, the previous quashed decision and the 'minded to grant' letter.

The Secretary of State has, in effect, treated the Colnbrook proposal as a potential alternative to Radlett throughout his consideration of this appeal. In the quashed decision his view that the Colnbrook proposal might meet the need for an SRFI in a less harmful way than Radlett led directly to the conclusion that very special circumstances had not been demonstrated. Conversely, in the 'minded to grant' letter his view that there was little reason to conclude that Colnbrook would be less harmful than Radlett was a factor which led him to conclude that very special circumstances had been made out. The two schemes have effectively been treated as mutually exclusive and their relative harm has been seen as the factor determining if Radlett should be permitted.

Now that the Colnbrook scheme has progressed to the stage where both proposals are currently before him for determination, the Secretary of State has recognised the essential inter-dependence of the two appeals. In his letter of 19 September 2012 proposing to re-open the Radlett inquiry and conjoin it with the forthcoming inquiry into the Colnbrook proposal it was stated:

"the two schemes raise similar and inter-related issues. He considers it likely that their comparative merits will be a significant material consideration in his determination of the Radlett proposal. Furthermore, he considers that a decision on the Radlett proposal and the reasoning for that decision may have a significant bearing on his determination of the Colnbrook proposal. Given this, he is of the view that re-opening the inquiry into Radlett and conjoining it with the planned inquiry into the proposed SRFI at Colnbrook is likely to lead to a more coherent and consistent decision making process overall."

Despite the eventual decision not to conjoin (which the Council asserts was unlawful) the Secretary of State did not resile from the position that the Radlett decision may have a significant bearing on the Colnbrook appeal.

In these circumstances, the likelihood that any permission granted for the Radlett scheme will in fact be implemented is a material consideration to which the Secretary of State must have regard. Any decision to grant permission at Radlett subject to an uncertain condition which could lead directly to a refusal of the Colnbrook appeal could give rise to a situation in which neither of the sites currently proposed to meet the need for SRFIs in London and the South East are delivered. This amply demonstrates the potential flaws in the decision making process that were sought to be avoided by the proposal to hold conjoined inquiries. The approach now advanced by Heliosiough completely undermines the overall coherence and consistency of the decision making process. The approach taken in paragraph 13 of Circular 11/95 is a policy which, when (as in this case) is properly applied, can avoid such problems arising.

Consequently, the Secretary of State must, if he is to entertain a grant of permission subject to the proposed condition, take into account as a material consideration the further uncertainty created by that condition and the severe adverse consequences that would result for the overall decision-making process as outlined above. A failure to do so would render any subsequent grant of permission unlawful.

Once these matters are fully understood and appreciated by the Secretary of State it is clear that it would be inappropriate to grant permission subject to the proposed condition in the circumstances of this case and be lawful and appropriate even if it is concluded that the paragraph 13 of Circular 11/95 does not apply to this case. Should HCC fail to enter into the planning obligation required by the Secretary of State by the deadline set then, in the absence of a conjoined inquiry which fully addresses the comparative merits of the two competing schemes, permission should simply be refused.

Yours sincerely

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Head of Legal, Democratic and Regulatory Services

CC: Hogan Lovells International LLP
Wayne Leighton, Solicitors for STRIFE
Hertfordshire County Council