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Our Ref: EM/LM/4093
Your Ref: APP/B1930/A/09/2109433

Christine Symes
Department for Communities and Local Government
Zone 1/H1
Eland House
Bressenden Place
London
SW1E 5DU

12 October 2011

Dear Ms Symes

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: 5/09/07/08

I am writing on behalf of Helioslough the appellants in the above appeal, to submit written representations as requested in your letter.

I duly attach a statement of written representations.

I look forward to receiving copies of any other written representations made by other parties in due course.

Yours sincerely

Erica Mortimer
Director

Enc.

LAND IN AND AROUND FORMER AERODROME, NORTH ORBITAL ROAD, UPPER COLNE VALLEY, HERTFORDSHIRE APPLICATION (DCLG Appeal Reference: APP/B1930/A/09/2109433)

REPRESENTATIONS ON BEHALF OF HELIOSLOUGH LIMITED

1. These Representations are made in response to the DCLG letter of 15th September 2011 in respect of the redetermination of the above appeal following: (1) the Order of the High Court dated 4th July 2011 ("the 2011 Order") quashing the decision of the Secretary of State ("the SoS") dated 7th July 2010 ("the 2010 Decision"); and (2) the subsequent decision of the SoS, the City and Council of St Albans ("the Council"), STRIFE and Goodman ("the Interested Parties") not to appeal that Order.

The Position following the 2011 Order

2. As the SoS will be aware, the 2010 Decision was challenged in the High Court on two substantive grounds: (1) failing to compare the Proposal with the Goodman's proposal at Colnbrook on a like for like basis; and (2) the interpretation and application of the Strategic Gap ("SG") policies at Colnbrook.

3. Helislough ("HS") was successful on the second ground and no party sought to appeal the consequent quashing of the 2010 Decision. On this redetermination, therefore, the SoS is required to come to a fresh decision in accordance with the judgement of the Court on the second ground. We return to the implications of this below.

4. On the first ground, in the absence of an appeal against the Order by the SoS, the Council or the Interested Parties, the rules of Court precluded HS from appealing to the Court of Appeal against the judge's conclusions (it having been successful in having the 2010 Decision quashed). For the avoidance of doubt, HS does not accept the reasoning or conclusion of the judge on the first issue. Any repetition of the failure to compare like with like will be the subject of a further challenge. In these Representations we explain, again, how the SoS should proceed in any comparison of the Proposal with the much smaller proposal at Colnbrook.

Proposed Timetable

5. It is understood from the DCLG letter of 15th September 2011 that all parties' responses will be circulated to other parties for comment after 14th October 2011. HS requests, in accordance with the normal approach in planning decision making, a right of final reply. It is therefore proposed that the other parties be given three weeks to respond to these Representations after 14th October with HS being given a further three weeks thereafter to respond to all points made by the Council and the Interested Parties (and others) by way of final reply.

The Issues on Re-determination

6. These Representations address matters in the order they are raised in your letter. It is convenient to deal with issue (a) and (b) together ("the S.106 and Conditions Issue").

Issues (a) and (b) – The S.106 and Conditions Issue

7. For reasons set out below, condition 33 taken with the s.106 obligation dated 17th December 2009 ("the 2009 S.106") properly understood ensures that no development will be undertaken unless and until the entire Site is bound by all the relevant obligations in the 2009 S.106. HS has proposed, and the inspector has endorsed, two alternative structures which are lawful, in accordance with all relevant policy and to which no sustainable objection can be maintained.

Position of Hertfordshire County Council

8. Whilst Hertfordshire County Council ("HCC") did not appear at the Inquiry, given the position of the Council, it is understandable why it is not at this stage willing to enter into S.106 obligations to facilitate the development. However, when permission is granted, there is no reason to suppose that HCC, as landowner, "like any other landowner, would maintain its current stance in the face of significant financial benefits which would occur were planning permission to be granted for the scheme" : 2010 IR 12.24.

Appropriate use of Grampian conditions

9. In those circumstances the SoS's current policy on *Grampian* conditions (as set out in the letter from the ODPM of 25th November 2002 – "Circular 11/95: Use of Negative Condition" - annexed) applies. The advice prior to this letter had been that *Grampian* conditions should only be imposed if there were reasonable prospects of delivery but following various decisions of the High Court the test is now – as set out in the November 2002 letter – that *Grampian* conditions should not be imposed when there are *no prospects at all* of the condition being satisfied. That is clearly not the case here.

10. Consequently, given the conclusions of the Inspector (above) with which the SoS has not disagreed, the imposition of *Grampian* conditions in the circumstances here is in accordance with current government policy.

11. In addition, of course, in the light of the current emphasis on economic growth (see below), the approach of the SoS will be to find solutions to facilitate delivery and not to create obstacles to such delivery. The solutions offered by HS and endorsed by the Inspector provide a straightforward means of addressing this issue (and is an approach adopted by the SoS in at least one other recent appeal decision namely *Crystal Palace Park* APP/G5180/V/09/1098454 December 2010).

Alternative 2: Grampian Condition and Rail Works

12. The only objection to Alternative 2 of condition 33 in the 2010 Decision was that it would fail the test of precision "unless the "approved rail works" can be properly identified and defined" [2010 DL33].

13. This concern is based on a misunderstanding of the draft condition and the documents supporting the proposed Permission. Condition 33 Alternative 2 reads:

> ***"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."***

14. The draft conditions define "Area 2" and "Area 1". The approved rail works in Area 2 are those works authorised by the proposed Permission ("forming part of the development") which are included in the description of the development as described in paragraphs 3.4 and 4.10 of the Development Specification Document dated March 2009 and as shown on Capita Lovejoy figure 4.44 titled "Proposed Area 2". The Council, other objectors and the Inspector had no difficulty understanding what "approved rail works" meant in the light of these documents and there is no scope for any misunderstanding.

15. However, on the assumption that the SoS is still of the view that greater clarity is required, in order to overcome that sole outstanding concern of the SoS on Alternative 2, HS proposes the insertion of a definition of "approved rail works" in the definitions section of the 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".***

16. The relevant pages from the Development Specification Document and the Capita Lovejoy figure are attached.

17. It follows from the above, that either as currently proposed or as to be amended, HS has provided through Alternative 2 an appropriate mechanism to secure that the relevant obligations bind the whole site. It is therefore not necessary to consider the other alternatives in detail.

Alternative 1:

18. Alternative 1 was criticised by the SoS on the basis, as argued for by the Council, that it would infringe paragraph 13 of Circular 11/95 [2010 DL 33]. The Inspector, having had the benefit of full representations on the issue, did not share that concern [2010 IR 12.23].

19. Fundamentally, Alternative 1 is not a "condition that the applicant enters into a planning obligation under section 106" but a *Grampian* condition (consistent with the current SoS's

policy set out in the 2002 letter - see above) preventing the development unless and until a planning obligation is entered into. That is a fundamentally different situation from that which para 13 of Circular 11/95 was designed to and does address. The reasoning in 2010 DL33 in respect of Alternative 1 is based on a misunderstanding of the nature of the proposed condition.

Alternative 3:

20. HS has nothing further to add on alternative 3 to that set out in the detailed representations to the Inquiry.

Issue (c) – New Matters and Material Changes in Circumstances

Approach to decision making

21. In the 2010 Decision, the SoS has set out clearly and correctly the approach to be taken in respect of earlier decisions and reasoning on identical applications [2010 DL12] and [2010 IR 13.16]. In short, he will only depart from earlier decisions of the Inspector or the SoS if there are "very good planning reasons" to justify him doing so. There can be no justification for him adopting a different approach on this redetermination.

22. Therefore where in the 2008 DL and/or the 2010 DL clear conclusions have been reached in respect of which: (1) there was no High Court challenge; (2) there has been no material change in circumstances ("MCC"); and (3) no new relevant and material issues are raised, the SoS would have to demonstrate (supported by evidence) very good planning reasons for any change of view. There are no valid (never mind good or very good) planning reasons for a change of view.

23. There are, in essence, two substantive issues here: (1) the merits of this Proposal including need; and (2) alternative locations for it. We consider alternative locations below.

Merits of the Proposal

24. In respect of the merits of this Proposal, given that all issues have now been addressed in detail in two prolonged and expensive inquiries (at which the Council and opponents left no stone unturned[1]) and in respect of which there are two detailed inspectors reports on which the SoS has reached clear conclusions, it is inconceivable that the SoS could now rationally and fairly reach contrary conclusions to those already clearly expressed on the merits of this Proposal including need.

[1] including the Council and STRIFE going over again in 2009 a range of issues on which clear conclusions had been reached in 2008.

25. This is especially so given that HS was given a very clear direction in the 2008 DL as to the limited issues which it needed to address on a fresh application. There was no suggestion that HS needed to re-consider any aspect of the Proposal (including need and scale) and the only outstanding issue was whether there was an alternative location for the proposal which would cause less harm to the GB. The SoS cannot now lawfully "move the goalposts" so as to re-raise matters conclusively determined in HS's favour on two occasions.

26. The SoS in both 2008 and 2010 raised no other issues which would lead to a refusal of permission. On the contrary, in the absence of an alternative which would cause less harm to the GB, the requisite very special circumstances ("VSC") would "almost certainly" exist [2008 DL 58] and permission would therefore have been granted.

27. In those circumstances it is not rationally open for the SoS to revisit matters other than alternative sites for the proposal.

Alternative Locations

28. HS has addressed the one outstanding issue – namely the alternative location issue - fully and carefully in a way which led the 2010 IR to conclude that there were no better alternatives and that "... it cannot be rationally concluded that Colnbrook would meet the needs for an SRFI in a less harmful way than the appeal site": [2010 IR13.103].

29. It is clear from the 2010 DL that the SoS accepts that the sole outstanding matter is whether one site – Colnbrook – is an alternative location for the proposal which would cause significantly less harm to the GB[2].

30. Even on that very limited (Colnbrook) issue, it is clear that the SoS has concluded that it is only a "significantly smaller scale" of development at Colnbrook ("the half size SRFI") which "might" cause significantly less harm to the GB [2010 DL23]. It is self evident that after two inquiries and huge volumes of evidence on alternative sites, the SoS is clear that there is no alternative site for an SRFI of the scale of the Proposal which would cause significantly less harm to the GB. 2010 DL 23 is only explicable on that basis. Nothing has changed to justify a revisiting of this conclusion and indeed, in so far as there have been changes since the 2010 DL, they further support the case for a permission here.

31. As is shown below, it therefore follows that unless something substantial has changed, or there is some new issue of substance, the SoS cannot, consistent with previous decisions, do other than grant permission.

Green belt

32. Since the 2009 Inquiry and the 2010 Decision Letter, there has been no material change in:
    (a) GB policy;
    (b) the Proposal (and in particular its scale); and

[2] the approach articulated by the SoS in 2010 DL23

(c) the GB impacts of the Proposal.

33. In respect of (a), PPG2 remains the extant national policy to which there has been no change. There has been no change in the relevant policy framework in the development plan. As the Government has repeatedly stressed, the draft NPPF re-affirms the existing national policy in respect of GB protection.

34. The GB tests against which the acceptability of the Proposal fall to be assessed are identical to those against which it has previously been tested.

35. Clear conclusions have been reached on the application of those tests on the facts[3]: [2008 DL 58]; [2010 IR13.112 – 13.114] and [2010 DL 29]. Despite the acknowledged harm to certain GB purposes, the need and other benefits would "almost certainly constitute" the requisite VSC if there was no better alternative[4]. There is no rational basis for the SoS to revisit those clear conclusions.

36. In respect of (b), the Proposal remains exactly the same as that which was considered at both earlier Inquiries and in both earlier Decision Letters and for which VSC would "almost certainly" have been found to exist in the absence of a better alternative.

37. In respect of (c), two inquiries have assessed in detail the impact on GB purposes. In 2010, the Council and others sought without success to demonstrate harm to GB purposes where clear conclusions had been previously reached in 2008.

38. In promoting its alternative site at Colnbrook, Goodman has made assertions of harm to the GB at Radlett which: (1) it did not make at the 2009 Inquiry and which are inconsistent with its approach then; and (2) more importantly, are inconsistent with and directly contrary to clear conclusions of the SoS on those same GB issues following two public inquiries.

39. On the fundamental issue in this case, namely whether VSC would exist for development of this scale in the absence of a better alternative, nothing has changed and the SoS can have no rational basis for revisiting his earlier conclusions or disagreeing with his Inspectors.

Other Matters

40. There are a number of other MCCs or other matters which strengthen the case for granting permission and none which undermine it.

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[3] The only reason why the VSC test was not satisfied in 2010 was the claimed possibility of an alternative site for a much smaller proposal at Colnbrook which could cause less harm to the GB

[4] Where reference is made in this letter to a better alternative, this is short hand for an alternative location for the Proposal which would cause less harm to the GB.

Correct understanding of SG Policies

41. The sole basis on which the SoS declined to grant permission in 2010 was based on a misunderstanding of the SG policies at Colnbrook which, as the High Court has confirmed, deliberately and carefully, impose an added layer of policy protection there ("essential in that location") [HCJ para 78 – 87]. This was not a subsidiary point [HCJ83] but fundamental.

42. Had the SoS: (1) properly understood the up to date SG policy; (2) recognised that far from being just an old saved policy [2010 DL 22] the SG policy at Colnbrook had recently been endorsed through the statutory processes (without objection by the SoS); and (3) recognised the fundamental underlying rationale for the policy (as explained in detail to the Inspector and not rebutted[5]), on his own logic, he would not have been able to "give less weight" to the SG policy than did the Inspector and/or to rationally conclude that Colnbrook might meet the needs for an SRFI in a less harmful way than Radlett [2010 IR 13.103]. Thus once one inserts into the SoS's decision a correct understanding of the role and function of SG policies in the Colnbrook location, on the SoS's own logic, Radlett is to be preferred.

43. Further, plainly it is impossible to meet the CP2 "essential in that location" test when there is an appropriate site at Radlett. There has been no answer to this basic point in any of the evidence or submissions of any party either at the 2009 Inquiry or since despite the point having been fully and fairly raised at all stages by HS.

44. The conclusions of the High Court on the policy framework are thus highly material to the approach the SoS is required to take to the SG policies at Colnbrook. In the light of those conclusions the Inspector was correct in his approach and there is no rational basis for reaching a contrary conclusion.

"Like for Like"

45. Having misapplied SG policies, the basis of the 2010 Decision was that a much smaller site at Colnbrook might cause significantly less harm to the GB.

46. In reaching that conclusion (contrary to the approach of the Inspector) the SoS erred and HS now explains why a decision based on that approach is not lawfully open to the SoS. HS does so in order to ensure that on re-determination the SoS does not fall into the same error again. This repeats the substance of the argument which was made in the High Court and which would have been made in the Court of Appeal on a cross appeal had there been an opportunity to do so.

47. First, axiomatically, the conclusions of the SoS have been based on the Proposal:
    (a) the Proposal is and always has been not just for any size of SRFI but for an SRFI of this scale;

[5] and repeated in Paul Stimpson's evidence to the High Court

(b) the scale of the Proposal was put in issue by the Council and STRIFE at the 2007 Inquiry on the basis that the policy/need did not justify the scale[6] (with the necessary consequence that the VSC necessary to justify development <u>*of that scale*</u> could not be made out);

(c) the issue of scale was resolved in favour of HS in the 2008 IR and the 2008 DL[7]. It necessarily followed that the Proposal was not too big in the light of the policy/need[8]. Had the Proposal been of an excessive scale to meet the policy/need it would *necessarily* have been rejected on that ground without consideration of alternatives. The SoS can hardly conclude that VSC "almost certainly" exist for a development in the GB which is too big to meet the need and which thus unnecessarily takes up GB land. In short, in 2008, HS had successfully justified the scale in the light of the prevailing policy and need. Nothing has changed to undermine that;

(d) the SoS's conclusions on VSC and in particular at 2008 DL 58 were reached having considered the impacts of the Proposal on GB and visual aspects [2008 DL 53]. The conclusions were based on the scale and impact of this Proposal as part of the "Green Belt Balancing Exercise" [2008 DL heading at para 53] and not any scale within the range 40 – 400 ha. It was that scale of SRFI to which the VSC conclusions applied;

(e) the SoS thus gave an entirely clear indication as to the issue which HS had to address (*South Bucks v. Porter (No.2)* [2004] 1 WLR 1953 at [36]) namely was there any better alternative location for an SRFI of that scale. There was no indication that HS should pursue a smaller application or search for sites for smaller developments elsewhere. It was simply not open to the SoS to subsequently move the goalposts;

(f) in the light of the clear direction in the 2008 DL, HS's 2009 Alternative Sites Assessment ("the 2009 ASA") compared sites on the basis of a consistent scale [para 8.12] without criticism from the Inspector who adopted the same approach; and

(g) it is necessarily implicit in the SoS's reasoning in the 2010 DL that on the basis of an equivalent scale there is no better alternative.

48. Second, the reason for refusing Radlett was that a much smaller scale of development there might cause less harm to the GB. It is axiomatic that a much smaller scale of development might cause less harm to the GB. Thus a much smaller scale of development at *Radlett* might cause less harm to the GB than the Proposals but that was not the issue. The Proposal was not rejected on the basis that it was too big. The 2008 DL had established that the scale of the Proposals was not objectionable having regard to the policy objective underlying the SRFI Policy and the need. Scale was no longer in issue.

49. It necessarily followed that the question for the SoS was whether there was an alternative location for development of the scale of the Proposal which would cause less harm to the GB. It was not to establish whether there might be a much smaller site elsewhere which

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[6] see e.g. [2008 IR para 7.191 and 7.291 – 296 esp 7.293 and 7.296.

[7] 2008 IR para 16.148 and 2008 DL para 47

[8] HS justified the scale by reference, amongst other things, to the policy objective of maximising the proportion of rail related warehousing in the SRA Policy 2004 (2008 IR 6.84]

could deliver a much smaller SRFI with less harm to the GB albeit with much lesser environmental and economic benefits.

50. We therefore consider that the SoS's refusal of permission in 2010 was thus plainly based on asking himself the wrong question. There is a basic fallacy and illogicality at the heart of the SoS's reasoning which, when corrected, makes it impossible for the SoS, on his other findings, to do other than grant permission. Given that there was no objection to the scale of the Proposal and/or given the underlying policy objective of maximising the proportion of rail related warehousing, it was (and would be) irrational to seek to compare the possible impacts of a development of half the size with the impacts of the Proposal.

51. In any event, there is no rational basis for the implicit inference that a smaller scale of development would equally well meet the need. Such an inference is wholly inconsistent with a correct understanding of the policy framework and the evidence (as repeatedly explained in evidence to the inquiries and in the High Court challenge).

52. The "like for like point" is thus a further fundamental point which the SoS has to take into account and which he did not take into account in the 2010 Decision. On the SoS's own conclusions in the 2010 DL, it is plain that it is accepted that there is no better location for Proposals of this scale. There is no MCC in respect of Colnbrook (or any other site) which affects the position adversely to Radlett[9]. Consistent with his own earlier reasoning therefore, there is no sustainable basis for refusing permission on this redetermination.

Planning for Growth

53. It remains the position that not a single square metre of SRFI capacity has been constructed to serve London and the South East since the SRA Policy was introduced in 2004[10]. Whilst the network of SRFIs expands elsewhere in the country there remains a fundamental and huge gap in provision - a gap which all the evidence and the earlier conclusions of the SoS demonstrate Radlett can make a major contribution to filling. The Government cannot continue to proceed on the basis that something else might turn up to fill that gap.

54. Since the 2010 Decision, the imperative of promoting private sector led economic growth (including through planning) has been repeatedly emphasised and is now at the heart of all government decision making. This is an MCC of considerable importance in favour of permitting development at Radlett now.

55. It is not necessary to set out the detail which will be well known to the SoS. The SoS has confirmed that he will attach substantial weight to the growth agenda in his planning decision making. HS refer in particular[11] to:

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[9] Indeed as we shall show below, the position re: Colnbrook has changed substantially adversely to Colnbrook and in favour of Radlett since the 2010 Decision.

[10] Shellhaven serves a port related purpose and is not one of the 3 – 4 SRFIs to serve this region.

[11] most recently repeated in various ministerial speeches

(a) "Planning and the Budget" published by the DCLG on Budget Day 23rd March 2011 and the Ministerial statement of the same day which are unambiguously pro-growth, prioritising growth and jobs[12], removing impediments to development (which naturally includes artificial and unnecessary requirements in respect of the form of s.106 obligations) and requiring immediate robust action as the government's top priority; and

(b) the DCLG letter to Chief Planning Officers dated 31st March 2011 which makes clear that the growth agenda should inform decisions "now".

56. Those policy statements (which were not in existence at the time of the 2010 DL) provide obvious and very substantial additional policy support to the Radlett proposals.

57. The Proposal will be a major construction project (circa £185m) and when complete will employ around 3400 FTE in a wide range of roles all funded and led by the private sector. In the current economic climate that constitutes a major additional benefit of the Proposals which goes right to the heart of the key thrust of current government policy.

58. In terms of delivery, we have addressed the position of HCC above. There is no other impediment to delivery and the demand is self-evidently very strong – see the evidence of DB Schenker to the 2009 Inquiry and the increasing unmet demand from major companies for SRFI capacity to serve London (and the south east).

59. As the DfT will no doubt confirm (and as DB Schenker made clear in evidence), major companies are increasingly seeing the substantial potential of rail freight and are extremely frustrated by the lack of capacity in London and the south east. There is every reason to conclude that following the grant of permission, the development of an SRFI at Radlett will quickly be making major contributions to the economy.

The draft NPPF

60. We do not ask the SoS to place considerable weight on the draft NPPF at this stage. However the following points are to be noted.

61. The draft NPPF does not affect, and confirms, GB policy. The GB policy position has been addressed above.

62. The draft NPPF is capable of being a material consideration and thus an MCC. It reaffirms and strengthens existing government policy and stresses the importance of sustainable transport developments as a means of facilitating sustainable economic growth as part of the growth agenda. Paragraph 82 emphasises the need for the transport system to favour "sustainable transport modes" and paragraph 85 emphasises the importance of

[12] "The Government has today made clear its expectation that every council should be firmly on the front foot in encouraging and supporting growth". The policy imperative necessarily covers the SoS too in his decision making. "Councils [and the SoS] must ensure they are not imposing any unnecessary burdens in the way of development."

infrastructure to support sustainable economic growth. Unsurprisingly, the first example given is of large scale rail freight interchanges ("SRFI").

63. SRFIs are thus once again recognised as central elements in: (1) delivering sustainable transport modes; (2) contributing to sustainable economic growth; and (3) thus furthering the growth agenda.

64. It is thus plain that the growth agenda and the draft NPPF are pointing in the same direction. An SRFI development which can demonstrate VSC in the GB is to be very strongly encouraged. Of course, through his decision making to date, the SoS has accepted that there is no suitable site for an SRFI to serve the north west sector outside the GB and it must therefore be recognised that any such SRFIs to serve London will have to be in the GB.

Colnbrook

65. The proposals at Colnbrook have now been refused permission on a significant number of fundamental grounds (including on grounds which have nothing to do with the existence of a better alternative at Radlett). No appeal has yet been lodged.

66. Even ignoring scale, in order to seek to demonstrate that Colnbrook was better in GB terms than Radlett, in its ASA, Goodman seriously mis-stated and misapplied GB policy, ignored the conclusions of the SoS in respect of GB harm at Radlett and ignored the correct thrust of the SG policy as explained in the HC Judgment.

67. In the 2010 DL, the SoS proceeded on the basis that a smaller scale of development at Colnbrook might, through an ASA, be shown to cause less harm to the GB than the Radlett Proposals. Goodman has now undertaken that exercise and has patently failed to demonstrate, on a correct basis, that which the SoS assumed it may be able to demonstrate.

68. The errors in the Goodman ASA approach to GB policy are legion and have not been remedied through the application process (leading to the refusal by Slough Borough Council).

69. The simple fact is that in order to seek to demonstrate that a much smaller SRFI at Colnbrook causes less harm to the GB than the Proposal at Radlett, Goodman have had to ignore the conclusions of the SoS in (now two) decision letters relating to Radlett and have had to seriously mis-state, mis-apply and downplay basic GB principles whilst misunderstanding the SG policies applicable there.

70. The work envisaged by the SoS in the 2010 DL (namely a GB analysis and an alternative site assessment in respect of Colnbrook) has now been done and Goodman have had another opportunity to put their best case forward. Having failed to demonstrate that which the SoS assumed they may be able to demonstrate, the SoS cannot sensibly continue to rely on the assumption re: Colnbrook which led to his 2010 Decision.

The Overall Position

71. The overall position is thus as follows:

(a) there has been no change in GB policy or the appropriate application of it to the facts of this case;

(b) the position which has been reached through two major inquiries is that the only impediment to the grant of permission at Radlett for this scale of development was the assumed possibility of a much smaller scale of development at Colnbrook being found through a robust ASA to cause less harm to the GB than Radlett;

(c) that position was reached on the basis of:

i. a seriously flawed understanding of the SG polices at Colnbrook – when those policies have been properly understood the only logical conclusion is that "it cannot be rationally concluded" that Colnbrook would cause less harm than Radlett;

ii. a failure to compare like for like, ignoring the fact that the SoS has now twice decided that there is no objection to the scale of development at Radlett, and a failure to take into account the self evident fact that a development of half the size would meet the policy objective and need to a much lesser extent than the Proposal at Radlett; and

iii. an unsubstantiated assumption that a much smaller development at Colnbrook might cause significantly less harm;

(d) since that position was reached, the High Court has corrected the SoS on the approach to SG policy and HS has again demonstrated why the SoS's approach on like for like was wrong;

(e) on the SoS's own logic (corrected by reference to the SG issue and/or "like for like") the single impediment to the grant of permission has been removed;

(f) even if this is not accepted, Goodman has had an opportunity to demonstrate through its ASA that which the SoS assumed it might be able to demonstrate and has patently failed in every respect to do so;

(g) there are a number of MCCs which strongly favour development at Radlett and none which undermine it;

(h) the development would deliver a substantial economic boost in accord with recent government policy on growth (and would fulfil an obvious need for SRFIs given added policy support in the draft NPPF).

72. Permission must therefore be granted.

12th October 2011

3.0 DEVELOPMENT CONTENT

Total Development

3.1 The outline planning application proposes a scheme for:

"Construction of a Strategic Rail Freight Interchange comprising an intermodal terminal and rail and road served distribution units (331,665 m² in Use Class B8 including ancillary B1/ B2 floorspace) within Area 1, with associated road, rail and other infrastructure facilities and works within Areas 1 and 2, (including earth mounds and a Park Street/Frogmore relief road) in a landscaped setting, and further landscaping and other works within Areas 3 to 8 inclusive to provide publicly accessible open land and community forest."

The Development Site

3.2 The overall total floorspace (gross internal) proposed for the Development Site as a whole is 331,665 square metres.

3.3 The indicative Masterplan at **Plan 2** shows how the Development Site could be laid out to contain five units (ranging from 44,592 sqm to 111,480 sqm), and six Vehicle Maintenance Units and a recycling unit (totalling 11,613 sqm).

Access and Circulation (see Key Parameters Plan)

3.4 Train access would be provided from the Midland Main Line Railway via a new chord line that would diverge from the main line in a NE direction, before turning to pass through the existing railway embankment via a new underbridge and into the Development Site from east to west. Each distribution unit would have its own railway siding to allow direct transfer of goods to and from the train to on-site storage and onward distribution, as well as on-site access to an intermodal terminal, to allow direct transfer of containers from trains to road vehicles for delivery to either the on-site distribution units and/or the surrounding area.

Proposed Finished Site Level

4.7 The Key Parameters Plan shows the finished site level proposed for the building plateaux within the Development Site as being 73 to 74 metres AOD. Re-profiling works will be carried out to achieve this level at the commencement of the construction operation, which would include any necessary site remediation works.

Earth Mound Height

4.8 The maximum height of the earth mounds would range from 79 to 93 metres AOD, as shown on the Key Parameters Plan.

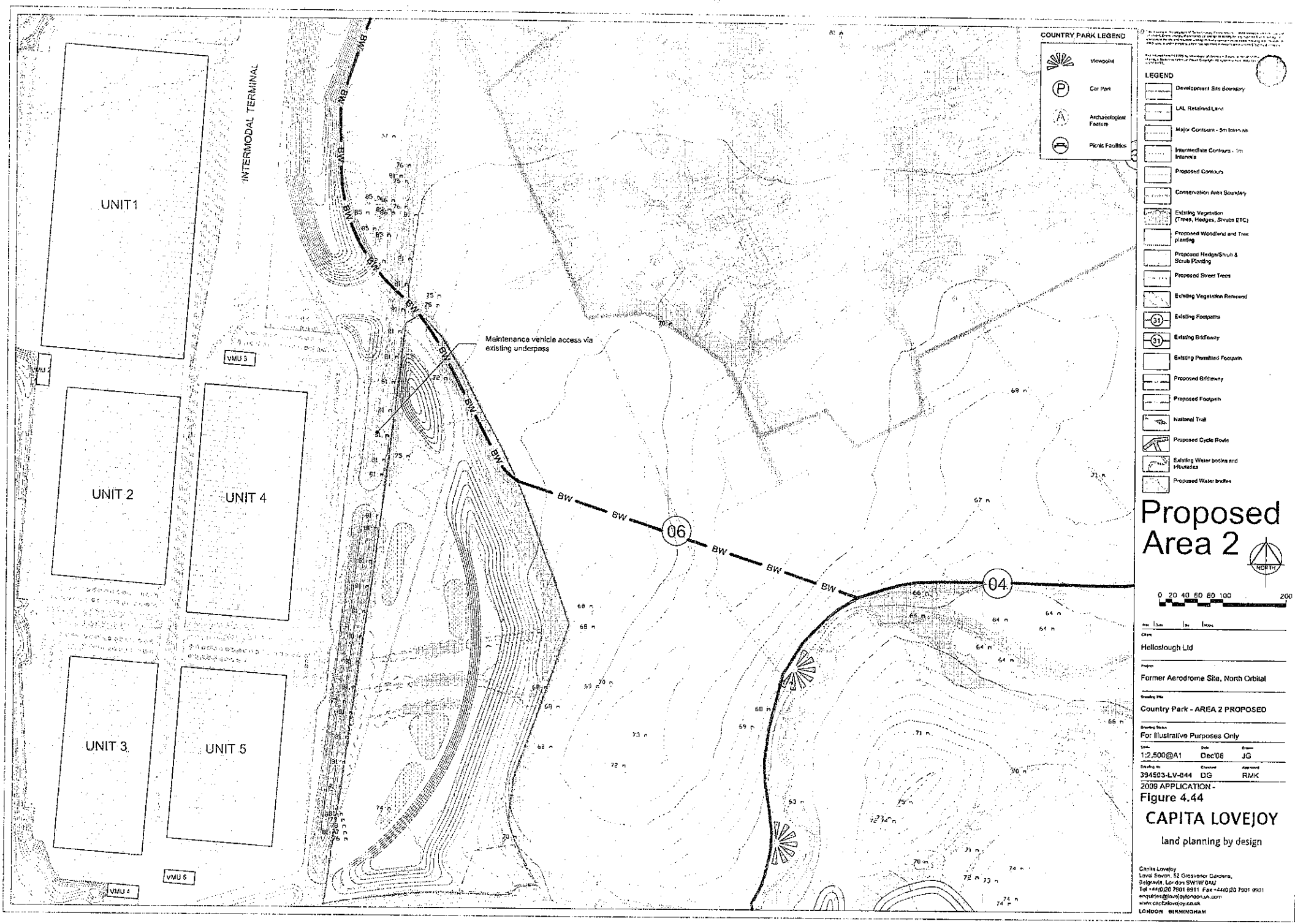
Access and Circulation

4.9 The Key Parameters Plan identifies various access and circulation routes that are proposed, as part of the site's comprehensive development. Each of the routes and other site features (earth mounds) would be developed in the form and location identified on the Parameters Plan and described in Section 3 above.

4.10 The width of the new railway chord line is 10 metres. The maximum width of the relief road (including pavement and other margins) is 12 metres. The junction with the A414 would incorporate a 75-100 metre diameter roundabout. The location of the roundabout would fall within a 200m stretch of the A414 as shown on the Key Parameters Plan.

Vehicle Parking and Servicing

4.11 Access to lorry and car parking/storage areas would be via the access routes as shown.


UNIT1
UNIT 2
UNIT 4
UNIT 3
UNIT 5
INTERMODAL TERMINAL
VMU 3
VMU 5
VMU 4
Maintenance vehicle access via existing underpass
BW
06
04
COUNTRY PARK LEGEND
Viewpoint
Car Park
Archaeological Feature
Picnic Facilities
LEGEND
Development Site Boundary
LAL Retained Land
Major Contours - 5m Intervals
Intermediate Contours - 1m Intervals
Proposed Contours
Conservation Area Boundary
Existing Vegetation (Trees, Hedges, Shrubs ETC)
Proposed Woodland and Tree planting
Proposed Hedge/Shrub & Scrub Planting
Proposed Street Trees
Existing Vegetation Removed
Existing Footpaths
Existing Bridleway
Existing Permitted Footpath
Proposed Bridleway
Proposed Footpath
National Trail
Proposed Cycle Route
Existing Water bodies and tributaries
Proposed Water bodies
Proposed Area 2
NORTH
0 20 40 60 80 100 200
Client
Heliosiough Ltd
Project
Former Aerodrome Site, North Orbital
Drawing Title
Country Park - AREA 2 PROPOSED
Drawing Status
For Illustrative Purposes Only
Scale
1:2,500@A1
Date
Dec'08
Drawn
JG
Drawing No
394503-LV-844
Checked
DG
Approved
RMK
2009 APPLICATION -
Figure 4.44
CAPITA LOVEJOY
land planning by design
Capita Lovejoy
Level Seven, 52 Grosvenor Gardens,
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Our Ref: PDC 31/2/1

25 November 2002

Dear Colleague

CIRCULAR 11/95: USE OF NEGATIVE CONDITIONS

I am writing to draw your attention to the advice in paragraph 40 and the footnote on page 16 of the Annex of Circular 11/95 on The Use of Conditions in Planning Permissions. The advice is on conditions worded in a negative form, prohibiting development until a specified action has been taken.

Following the High Court case *Merritt v SSETR and Mendip District Council* we need to amend the advice in Circular 11/95. Until we are able to amend the Circular, please would you note the following advice when imposing negative planning conditions.

The advice in Circular 11/95 on conditions depending on other's actions (Annex paragraphs 38 and 39), says that 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. Similarly, conditions which require the applicant to obtain an authorisation from another body should not be imposed.

Although it would be *ultra vires* to require works which the developer has no powers 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.

The way the advice is currently worded in paragraph 40 is that such a condition should only be imposed on a planning permission **if there are at least reasonable prospects** of the action in question being performed within the time-limit imposed by the permission.

As a result of the Judgement in *Merritt*, paragraph 40 should be amended 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."

The foot note at the bottom of page 16 should be replaced with: "A policy of refusing permission where there was no reasonable prospect of planning conditions being met could be lawful, but sound planning reasons for the refusal should be given and it should be made clear that this was only a starting point for consideration of cases."

Yours sincerely,

JOHN STAMBOLLOUIAN