

HELIOSLOUGH LIMITED/RADLETT

Response to CLG's letter dated 14 March 2014 addressing written representations on the Hertfordshire County Council Unilateral Undertaking dated 19 December 2013 (Note 1 of 3)

This note addresses CLG's invitation to respond on the representations submitted in relation to the Unilateral Undertaking completed by Hertfordshire County Council ("HCC") on 19 December 2013 (the "Undertaking") which was submitted to CLG with Hogan Lovells' letter dated 20 December 2013. The note is the first of three separate notes being submitted to CLG in response to its letter dated 14 March 2014. Note 2 addresses the National Planning Guidance published on 6 March 2014 and Note 3 addresses representations on material changes in circumstances since the Secretary of State's minded to grant letter of 20 December 2012.

It is noted that 8 parties responded to CLG's letter of 19 February and that only two parties have made comments on the Undertaking. There is therefore, aside from the representations submitted by those two parties, an absence of comments on the contents of the Undertaking from the other six parties.

A RESPONSE TO SADC'S LETTER DATED 6 MARCH TO CLG

The following is a response to SADC's letter of 6 March to CLG setting out the Council's comments on the Undertaking.

1. By way of a preliminary comment, SADC's comments on the Undertaking appear to have been drafted on the basis of a fundamental misunderstanding of the way in which the Undertaking is structured and is intended to operate. In particular, those comments are based on an assumption that it will be SADC which enforces all of the obligations contained in the Undertaking. In practice, however, certain of those obligations will be enforced by HCC itself. This is recognised in clause 14 of the Undertaking ("Further covenant re Area 1"). Clause 14 requires a successor in title to HCC's land to enter into an undertaking in favour of HCC in relation to the HCC Obligations so that these obligations can be enforced by HCC after it has disposed of its interest in Area 1. This issue was fully explained in point number 2 of our letter dated 20 December. The "HCC Obligations" are defined at recital 1.8 of the Undertaking, namely the planning obligations contained in clauses 4, 5, 6, 7, 8 and 13 of the Existing Planning Obligation (as defined in the Undertaking) i.e. the unilateral undertaking dated 17 December 2009 (the "2009 Obligation"). Accordingly, SADC's comments at point number 1 of its letter in relation to clause 4 and the extension of those comments at point number 3 to clauses 6, 7 and 8 need to be read in the context of clause 14 of the Undertaking and the way in which enforcement of those obligations will take place in practice. It is clear that HCC will not carry out the development and that, in practice, a successor in title (i.e. Helioslough) will ultimately be liable to perform the relevant obligations and will have entered into a Section 106 planning obligation with HCC pursuant to clause 14 of the Undertaking in order to secure that position.
2. Addressing the specific points raised in point number 1 of SADC's letter:
 - (a) The comment that the Council does not have the expertise to approve or put in place the measures addressed in clause 4 is addressed by the explanation at number 1 above.
 - (b) The comment that HCC could refuse to take steps to give SADC "reasonable assistance" is also addressed by point number 1 above. Even if HCC was liable to comply with the relevant obligation, there is no reason to believe that it would not provide the "reasonable assistance" required.

- (c) The comment that the Council has no powers to carry out the works in question is addressed by number 1 above.
 - (d) The comment that there is no financial provision relating to the costs that may be incurred by the Council in carrying the works into effect is not understood. The whole purpose of the Lorry Routing Contribution is to provide the Council with funding for the provision and on-going management and maintenance of the Lorry Routing Contribution Measures, as is specifically stated in clause 4.1(a) of the Undertaking.
 - (e) The reference to clause 15.13 of the 2009 Obligation appears to be misconceived. Clause 15.13 of the 2009 Obligation specifically states that the provision of reasonable assistance on any matters shall not involve the provision of financial assistance or the payment of additional financial contributions. That clause is not repeated in the Undertaking and therefore the provision of financial assistance is not specifically excluded in the Undertaking.
 - (f) The comments at the end of point number 1 of SADC's letter (i.e. from "*The appellant appears to expect, by entering into both the 2009 obligation and the undertaking ...*" onwards) are not understood. The Appellant has not entered into the Undertaking – it is HCC which has entered into the Undertaking. SADC comment that there is no clause within the Undertaking which connects the County Council's obligations in the 2009 Obligation to those contained in the Undertaking. A further comment is made that there should be specific "interrelationship" between the 2009 Obligation and the Undertaking. These comments are not understood. The Undertaking refers to the 2009 Obligation at recital 1.5. Recital 1.8 explains that it is not possible for HCC to covenant with itself in respect of certain of the planning obligations and explains why HCC is entering into the HCC obligations in favour of SADC. Recital 1.9 then goes on to explain the provisions of clause 14. Therefore, to the extent that any "linkage" is required, it is fully addressed in these recitals. The 2009 Obligation and the Undertaking otherwise stand separately which is entirely appropriate as they each bind separate areas of land.
3. SADC raise various comments in relation to clause 5.1 of the Undertaking regarding a scheme which is required for Heavy Goods Vehicles. SADC comment that "*The detailed attributes of the scheme are not specified*". However, clause 5.1 is very specific regarding the matters which the scheme will need to address. As regards SADC's comments regarding the possibility of the scheme being cancelled, that is not possible. Clause 5.2 states that the scheme shall provide for appropriate measures to be taken and penalties to be enforced in respect of Heavy Goods Vehicles which do not comply with the scheme. That quite clearly requires the scheme to be implemented and maintained in perpetuity. Both clauses 5.1 and 5.2 mirror clause 5.1 and 5.2 in the 2009 Obligation, which has of course already been accepted by the Secretary of State (see paragraph 41 of the CLG letter of 20 December 2013).
4. As regards SADC's comments at point number 3, see point number 2 above.
5. SADC's comments in relation to clause 12.1 reflect a misunderstanding of the purpose of the Undertaking. SADC state that HCC should be subject to the provision relating to works on Area 2. However, HCC has no interest in Area 2, cannot bind Area 2 and that explains why clause 12.1 has been adjusted to exclude reference to Area 2.

6. SADC's comments that clause 13.1 is a "*broader provision than that included in the 2009 obligation*" are not understood. Clause 13.1 reflects clause 13.1 of the 2009 Obligation. The reason for the difference in structure as between the two clauses 13 is explained in point number 3 of our letter of 20 December.
7. We consider that it is quite clear as to what is meant by "planning obligation" in clause 14.2 and it cannot sensibly be interpreted as other than a planning obligation under Section 106 Town and Country Planning Act 1990.
8. SADC is not prejudiced by the exclusion of a provision for indexation of payments. The 2009 Obligation contains indexation provisions, thus providing SADC with protection on indexation. This point (i.e. the reference to the significance of the 2009 Obligation) is addressed further in point number 10 below. SADC's comments on this issue also demonstrate further its misunderstanding of the structure of the Undertaking and its inter-relationship with the 2009 Obligation, as explained in point number 1.
9. We do not consider that the reference to "contracting parties" causes any prejudice to SADC. Clause 15.9 is a standard provision in deeds of this type and is simply included to exclude the right for any third parties to seek to enforce the provisions of the deed. Clause 15.9 mirrors clause 15.10 of the 2009 Obligation.
10. There is a further issue which is important to bear in mind when considering the terms of the Undertaking. The development of the SRFI quite clearly requires, as a matter of practicalities, the party developing the SRFI to have control over all of the areas of land which are required for the development. In other words, the developer will require control of each of Areas 1 – 8 in order to be able to deliver the SRFI, the related rail infrastructure and the country park. It is only by the developer having control of all of these areas that the conditions to be attached to the planning permission can be complied with and the terms of the 2009 Obligation can be complied with. In practice, therefore, both SADC and HCC will have the benefit of being able to enforce all of the obligations contained in the 2009 Obligation. As a further layer of control, clause 14 of the Undertaking requires the developer to enter into a further planning obligation in favour HCC pursuant to clause 14 of the Undertaking. That will ensure that HCC has the ability to enforce all of the relevant obligations as regards Area 1. That position is further secured by clause 14 of the 2009 Obligation. Therefore, to the extent that any of SADC's comments in their letter of 6 March have any merit, in practice they do not raise any issues of concern for the reasons explained in this paragraph i.e. the status of the 2009 Obligation and the effect of clause 14 of the Undertaking.
11. Accordingly, we do not accept SADC's contention that the submitted Undertaking is unsatisfactory nor that there is any basis upon which the matter should be referred back to the Appellant for any points to be rectified.

B RESPONSE TO ANNE MAIN MP'S LETTER DATED 5 MARCH TO CLG

The following is a response to Anne Main's letter of 5 March to CLG setting out her comments on the Undertaking. This note addresses Anne Main's comments on the Undertaking. Her comments on material changes in circumstances are addressed in Note 3.

1. Paragraph 3; there is a comment that "*The sums quoted will contribute little to the improvements needed to service the SRFI and to mitigate the harm inflicted*". Response: The contributions contained in the Undertaking are to address the specific issues at which those contributions are directed. They are not provided to deal with rail improvements. It

will be for the developer to secure the provision of the rail infrastructure which is needed to serve the SRFI. The provision of that rail infrastructure is addressed through the conditions to be attached to the planning permission.

2. Paragraph 4; the comment is made that £150,000 is not a "*big enough sum to improve the Park Street Railway Station*". Response: The financial contribution of £150,000 has been accepted by the Secretary of State in his approval of the 2009 Obligation. That sum is adequate to secure improvements to the passenger facilities at Park Street Railway Station and improvements to the street layout in the vicinity of the station (see the definition of "Park Street Railway Station Improvements").
3. Paragraph 5; the comment is made that the "*Rail Subsidy Fund would do little to support the development when one junction will cost at least £6m*". Response: This comment demonstrates a misunderstanding of the purpose of the Rail Subsidy Fund. This is addressed in clause 9.2 of the Undertaking. The fund is available to be applied to measures to promote rail usage at the development as specified in clause 9.2. The purpose of the fund is not to pay for the cost of rail connections to the Midland Mainline.
4. Paragraph 6; the comment is made that clause 5.2 has a lack of detail coupled with "*The small number stated in the Lorry Routing Contribution*". Reference is also made to the difficulty of enforcing the Lorry Routing provision. Response: We refer in this regard to our comments at Section A, number 3 above. As regards the amount of the Lorry Routing Contribution, this has been endorsed by the Secretary of State in his conclusions in relation to the 2009 Obligation. The Lorry Routing Contribution is adequate to secure the provision and on-going management and maintenance of the Lorry Routing Contribution Measures.
5. Paragraph 8; reference is made to the Park Street/Frogmore Environmental Improvements Contribution of £300,000. Reference is then made to the fact that "*There has never been any mention of "grey water", or sustainable green energy solutions, such as solar panels ...*". The comment is made that there is a concern "*about the lack of detail concerning how best to utilise the surrounding environment*". Response: These comments are not understood. The purposes for which the Park Street/Frogmore Environmental Improvements Contribution is to be applied are very clear in the definition of "Park Street/Frogmore Environmental Improvements". These measures relate to the environment surrounding the site. They are completely unrelated to environmental issues relating to "grey water" or "sustainable green energy solutions, such as solar panels" which are not relevant to the issues under consideration.
6. Paragraph 9; the comment is made that the "*Figures quoted in the planning obligation are woefully inadequate*". Response: We assume that this comment relates to the points made above, to which we have responded. The contributions are adequate to secure the measures to which they relate. The amounts of the contributions have implicitly been approved by the Secretary of State in his minded to grant letter of 20 December 2012 (see paragraph 41).

Hogan Lovells International LLP
28 March 2014