

**RE: APPEAL BY HELIOSLOUGH
LIMITED: SITE AT LAND IN AND
AROUND FORMER AERODROME,
NORTH ORBITAL ROAD, ST.
ALBANS**

**OPENING STATEMENT ON
BEHALF OF THE APPELLANTS**

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**RE: APPEAL BY HELIOSLOUGH LIMITED: SITE AT LAND IN AND
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OPENING STATEMENT ON BEHALF OF THE APPELLANTS

INTRODUCTION

1. These Opening Submissions do not attempt to traverse in any detail the issues which will be debated at the Inquiry. The appellants have made clear their view as to what should be debated at the inquiry. The relevant details with regard to the appeal site, its planning history and the proposal are all covered in the Statement of Common Ground [9/CD/7.1]. There is a separate position statement addressing the Highways Agency highways issues and also a Statement of Agreed Facts with Network Rail [9/CD/7.4].

BACKGROUND

2. The appeal proposal has been the subject of an earlier application refused planning permission on the 20th February 2007 for 14 reasons. The refusal was the subject of an appeal to the Secretary of State, the appeal was conducted by way of Inquiry which sat for some 26 days between the 6th November 2007 and 20th December 2007.
3. As a consequence of the Council's Reasons for Refusal every possible aspect of the proposal was examined with very great care. The Reason for Refusal were in some instances many faceted with the result that, as the Inspector's Report (IR)(9/CD/8.2) shows there were a considerable number of issues to be considered. The matters

considered ranged over matters which included the role and function of the Green Belt, the extent to which the proposals would produce coalescence between settlements, the need for SRFIs and alternatives that might be available, landscape and restoration issues, environmental impacts of a variety of different kinds, ecology, employment and economic impacts, transportation issues and so the list could go on.

4. The IR is a testament as to the range of issues which had to be addressed. It runs to over 200 pages and gives some indication of the depth and breadth of the concerns which the earlier Inquiry was engaged with. It is relevant to note that the Inspector in that instance, Mr Andrew Phillipson, had relatively recently completed an Inquiry into a proposal for an SRFI at Howbury Park and came, as is evident from the report, well informed as to the issues surrounding such proposals.
5. As the IR and Secretary of State's Decision Letter (DL)(9/CD/8.1) demonstrate the Council's views on the inadequacy of the alternative sites assessment which had been undertaken were upheld. In respect of every other single issue raised both the Inspector and Secretary of State concluded that nothing had been identified which would have prevented the grant of planning permission had the appellant demonstrated that there were no other alternative sites for the proposal. The DL is, we submit, perfectly clear at paragraph 58 that provided there was a demonstration that no alternative site existed which was either not in the Green Belt or which taking all matters into consideration did not perform materially better than the appeal site then planning permission would have been forthcoming.
6. In these circumstances in the appellant's view the proper approach to a consideration of the present application involves a consideration of whether or not there has been any material change of circumstances with regard to any of the issues raised since the Secretary of State's earlier determination and whether or not the alternative sites assessment presented with the current application satisfactorily demonstrates that there is no alternative either non Green Belt location or Green Belt site which would perform materially better than the appeal site. Such an approach is, we submit,

correct both as a matter of practice and law. We set out our views in that regard in the note put before the Inspector at the pre-Inquiry meeting. We do not repeat those views in Opening. Such an approach properly respects the earlier findings of the Inspector and Secretary of State.

THE COUNCIL'S APPROACH

7. The Council's approach has been quite the contrary. It does not fully respect the views of the Inspector and Secretary of State with the result that when planning permission was refused for the current proposal it was again refused for some 14 reasons. By a process of what has essentially been attrition and when faced with overwhelming evidence some of the issues have been resolved and others have been narrowed. The process has neither been graceful nor timely in the way in which it has been done. Most recently we have been advised that the Council will no longer present evidence to support the fourteenth Reason for Refusal with regard to highways issues. We observe that the basis for that change of stance set out in a paper on transportation issues for St. Albans CBC Planning Referrals Committee on the 12th November 2009 (9/CD/3.12) was (see Section 4) that the new planning application is virtually identical to the previous proposal considered at the public Inquiry 2007 and the highways issues were accepted by the Inspector and agreed by the Secretary of State. It is noted that a thorough review of the proposals has been carried out and apart from changes at M25 junctions 21a and 22 no significant material change in circumstances since the last Inquiry has been identified. We are heartened to see that such an approach should have been adopted by the County Council and that it has led to the appropriate conclusion that there is no basis to advance such a case. We could only wish that such an approach had permeated other aspects of the District Council's case.

8. What remains by way of issues between the Appellants and the Council has generated a mountain of paper. Most of that paper is not directed appropriately to the matters which require consideration in relation to the single issue which was identified by the Secretary of State and Inspector as requiring further consideration i.e. the alternatives

issue but seeks to raise again issues which were thoroughly covered at the earlier Inquiry, for example, issues related to access to the rail network and train pathing, whether or not the proposal would function as an SRFI, whether or not the guage clearance works had been properly considered. One has only to consider the IR from the last appeal to see that these are not new issues but ones that the Council wishes to reopen having on this occasion found a different witness to present essentially the same arguments but in a different form. For example, the issue as to whether or not the site would operate as an SRFI is considered in the IR in the context of the conditions relating to the rail works, accepted, then as now, by the Council as appropriate, with a clear conclusion that there was no reason to suppose that if planning permission were granted the proposed SRFI would become an essentially road based operation or otherwise fail to operate as an SRFI [IR16.157]. In the same vein issues are raised with regard to the location of the facility on the Midland Main Line (MML). Essentially the Council's case is that such a location is a poor location in comparison to others and would have consequences with regard to the journey length and time and the requirement to travel through London. Once again the IR [para 16.70] addresses the issue, the site and its location have not changed and there has been no material adverse change with regard to any of the rail aspects since the earlier Inquiry.

9. With regard to the consideration of alternatives, this is plainly a matter that the Inquiry should engage with. That is not to say however that we accept that the Council's approach or the voluminous material produced in support of it is either appropriate or necessary. That is in part because much of what the Council is seeking to do in the consideration of alternatives is not only to revisit all the rail issues (see above) but also a significant issue which was clearly determined on the last occasion as to the ambit of the alternative sites assessment in geographic terms. That issue was addressed in detail and considered by the Inspector [IR16.123 to 16.127] with a conclusion which was not in any respect half-hearted. The Inspector described the Appellants' approach of restricting the assessment to the northwest sector as having considerable merit notwithstanding the lack of policy support for it and being an

approach which was further supported by the Secretary of State's grant of planning permission at Howbury Park. In that context the Inspector described the approach as sensible and pragmatic as a response to the anticipated requirement for 3 or 4 SRFI's to serve London and the South East. The Secretary of State made clear [Para 42 DL] that in the circumstances of this case it was sensible and pragmatic to restrict the search for alternative sites to broadly the northwest sector studied by the Appellant. No amount of play on the words used can avoid the obvious conclusion that the Appellant's sectoral approach was being endorsed. The words will not stand a construction which would now make it legitimate to consider the whole of London and the South East as being an appropriate search area for alternative sites. In connection with alternatives it is to be noted that as soon as the Council disclosed the report from SDG (9/CD 3.9) containing criticisms of the approach adopted the Appellants responded in full (9/HS 1.5). We received no response to that report and its contents appear in large measure to have escaped notice in the councils evidence.

10. With regard to landscape issues the Council's approach has two aspects worthy of comment at this stage. One is to suggest, now rather weakly apparently, that there have been material changes of circumstances, and the second to suggest that the Inspector and Secretary of State were simply wrong on the last occasion in the conclusions that they reached. As to the material change of circumstances, that is addressed by Mr Kelly in his statements (9/HS 5.1/3) and as to the Inspector and Secretary of State being wrong, we have already set out our view as to the illegitimacy of such an approach in the absence of any material change of circumstances. That approach also impinges on the Council's approach to the Green Belt and the extent to which such considerations now need to be engaged with again.
11. With regard to noise issues the IR makes clear the very considerable care which the Inspector took in considering these matters. He did so against the background of evidence from two very experienced consultants and with what was very obviously a clear understanding of the technical issues involved [see: IR 16.41 to 16.55]. The Council now on its third noise consultant (relatively recently appointed) suggests that

the Inspector was wrong in a number of material respects but particularly with regard to his acceptance of the appropriateness of imposing the condition suggested by the Appellants. There has been no change which would make it appropriate to revisit that issue. Mr Sharp's statements (9/HS 6.1/3) address the relevant matters.

12. With regard to ecological issues very much the same approach is evident. There was a full consideration on the last occasion of all relevant aspects. It is of course true that the Inspector, as he was bound to do, drew attention to the absence of any designation [IR16.25] but one cannot read that reference without also noting that he was fully aware that in respect of the grassland interest in the site met the criteria for designation as a County resource: see IR16.27. The Hertfordshire Wildlife Sites Partnership (HWSP) has now decided that in respect of both the botanical interest and also the bird interest, parts of area 1 should be designated as County Wildlife Sites (9/LPA/3.4). The Appellants do not and indeed have not since the last Inquiry disputed that the grassland interest would merit designation. Then as now, they point out that it is capable of translocation, a process which Mr Hicks, the Council's ecological witness, had conceded in cross examination at the earlier Inquiry could be undertaken given good planning and resources: see IR para 16.28 . Accordingly translocation and the success of it, was not then and, ought not now to be an issue. With the grassland interest of course goes the essentially mobile invertebrate associated with the interest.

13. The position is otherwise with regard to the bird interest and in this respect we express some dismay that the County Council through Mr Hicks and the HWSP should be so intent on designation as to completely ignore the relevant criteria for designation set out in Mr Goodwin's Appendix 2 at page 16 and Appendix 8 (9/HS/7.2). In essence the HWSP and County Council rely for designation on data collected in 2004 and 2005 against the background of a requirement that species should only be included in the final score if they have been recorded as "*probably breeding* in a majority of recent years, **provided information is available to support that statement**. Species *regularly using a site for essential activities* (such as

feeding whilst breeding) may also be included even if they nest outside the site” (emphasis in the original). As to what is meant by “regularly using a site”, regularly is defined as qualifying in four out of the last five years. What is essence then the HWSP has done is to take old data and in the face of a criteria which requires the majority of recent years to be considered ignored the absence of data of any detailed kind for the recent years. This is an abuse of the designation process, prone to devalue the designation and should be firmly discouraged. We shall in the circumstances invite consideration of the evidence available to support designation or not and invite the conclusion that so far from the interest in the site increasing or being capable of being confirmed at the earlier level the interest has declined and on the evidence designation is no longer appropriate.

14. We have note that the council once again raises a prematurity issue this time, at least initially, on the grounds that were raised last time with an added reference to National Policy Statements. Recognising we think the hopelessness of that position in the light of what the Government has said about NPS’s and there position in the planning system as non-development plan documents the Council ahs now decided that it will run an argument related to prematurity related to its Core Strategy. This is a late reason for refusal which is unreasonable not only as to its timing but also its substance with the CS at such an early stage.
15. We do not propose in Opening to examine further the range of issues raised by the Council’s evidence but can effectively summarise the crucial difference been the Council and the Appellants as being the approach to the Inspector and Secretary of State’s findings arising from the earlier Inquiry. For the Appellants we have taken the view that those findings and conclusions represent an appropriate starting point for a consideration of the appeal proposals. Where there have been material changes, that is changes which would make a real difference to the findings or conclusions reached, they must of course be taken into account and we have done so. In the area of alternatives, the same approach is appropriate accepting of course that this is an issue which needs examination but its examination and in particular the consideration of

the appeal site ought to start from the findings and conclusions of the Inspector and Secretary of State on the last occasion. For the Council the position is quite different. They have chosen on a range of issues not to respect the findings and conclusions of the Inspector and Secretary of State on the previous occasion and insist on what amounts to having another go at the same issues irrespective of the absence of any material change of circumstances simply because they disagree with the conclusions reached. That approach permeates not only a consideration of the merits of the appeal proposal but also their approach to a consideration of the appeal site in the context of any available alternative.

THE HIGHWAYS AGENCY POSITION

16. We have now reached the position with the Agency where all technical issues are we think resolved and where there are no issues of principle which remain to be resolved. A final audit of the mitigation proposals is being completed. All of the Agency's concerns can, we think, be appropriately addressed by conditions/obligations which are under discussion and which the Statement of Common Ground with the Agency will set out. Accordingly we do not anticipate that it will be necessary for either the Appellants or the Highways Agency to give evidence with regard to strategic highways issues. With regard to the local highway issues we have set out the position earlier as a consequence of which there is now an agreed position as between the Appellants and all of the relevant highway authorities that there are no sustainable highways objections to the proposal.

NETWORK RAIL'S POSITION

17. Network Rail's position appears from the Statement of Agreed Facts [9/CD/7.4]. We do not propose to rehearse the content of that document in Opening but it is also necessary to point out that Network Rail have made the open offer to deal with any questions that anyone might have of them adopting the procedure which was adopted at the earlier Inquiry that is that questions should be formulated in writing and would be answered within a reasonable period of time by Network Rail employing its full

resources across whatever departments or disciplines were necessary within the organisation.

18. Whilst there are clearly some somewhat surprising attempts to denigrate Network Rail's role or their support in principle for this scheme, the fact is that, as to their position, they were described on the earlier occasion by the Inspector [IR para 16.71] as the guardians of the rail network and so they are. In that connection it is, we respectfully submit, inconceivable that they should offer support in principle in the way and to the extent indicated in the Statement of Agreed Facts if the appeal proposals were in fact to be either unimplementable because of their impact on existing or planned services on the MML or because gauge enhancement works were not practicable. All of these issues were of course examined on the last occasion (IR16.63-16.71 and 16.150-16.157) and whilst there have been some changes with regard to some aspects of the rail issues, none of those is a change which could possibly be reasonably construed as adverse to the appeal proposal or the ability to implement it. In the circumstances we invite the view that Network Rail's support in principle provides precisely the same comfort on this occasion as it did on the last occasion with the result that there is, in the circumstances, no basis for concerns as to either impact on passenger services or the ability to otherwise access the appeal site by rail. We have noted of course that First Capital Connect (FCC) is once again giving evidence with regard to the appeal proposal. They were separately represented at the earlier Inquiry and gave evidence to the inquiry (IR 10.1-10.32) in very great deal of detail (much more so than on this occasion) as to the likely frequency of the Thameslink service and its potential impacts, all of which was carefully considered by both the Inspector and Secretary of State. Then as now there is no working timetable for the enhanced service (and it will be some time before there is one) but the absence of a timetable did not at the earlier Inquiry and should not now, prevent the conclusion standing that there is the ability to accommodate the required freight paths for the appeal proposal.

STRIFE

19. We have noted STRIFE's concerns but we do not think that they raise anything beyond the matters of concerns raised by the Council and hence already covered in this opening.

CONDITIONS AND OBLIGATIONS

20. After a very slow start progress has now been made with regard to discussion of the conditions and the obligation and the current draft of suggested conditions and the obligation has been circulated. The Appellants would welcome early consideration of the content of both documents in order to ensure that there is the opportunity for all parties to comment on them and an appropriate opportunity to consider what, if any, amendments might be made in order to address any outstanding concerns. The combined conditions and obligations address the concerns expressed on the previous occasion as to the enforceability of Condition 30. A variety of options are presented in order to address the Secretary of State's concern notwithstanding the Appellants' view that it would have been possible with further submissions to have satisfied the concerns raised by the Secretary of State in the DL.

CONCLUSIONS

21. The appeal proposals are for a strategic form of infrastructure which is important in the delivery of a sustainable distribution system for freight. They are part of the means by which Government policy will be delivered. The proposals have been exhaustively examined on an earlier occasion and been found to be acceptable on their merits in all material particulars. The only concern was with regard to the potential availability of an alternative which would have performed materially better with regard to its impacts on the Green Belt. That deficiency in the earlier material has now been corrected as a result of which there is, we respectfully submit, now no reason why planning permission should not be granted.

Martin Kingston Q.C.

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20th November 2009

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