

IN THE MATTER OF AN APPEAL AGAINST THE REFUSAL OF PLANNING PERMISSION BY  
THE CITY AND DISTRICT COUNCIL OF ST ALBANS IN RESPECT OF LAND AT NORTH  
ORBITAL ROAD, ST ALBANS

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OPENING STATEMENT ON BEHALF OF THE LOCAL PLANNING AUTHORITY

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1. The Council has determined that the proposals are seriously damaging to the area and should be rejected; there is simply no acceptable basis, once considered appropriately, and in the light of all the evidence, for the proposals to come forward. It was unacceptable when it was considered by Inspector Phillipson in 2007 and determined by the Secretary of State in 2008; it is unacceptable now.
  
2. The Council's objections to the proposal are set out in its reasons for refusal and statement of case as modified following a further report to its planning referrals committee on 14 October 2009. The position is, therefore:
  - (a) The proposal is within the Metropolitan Green Belt, is inappropriate development and the harm caused to it by reason of such inappropriateness and other harm is not clearly outweighed by very special circumstances.
  
  - (b) The size, height, bulk, massing and scale of the proposed development would be highly damaging to, and seriously diminish, the open character and visual amenity of this part of the Green Belt; it provides an important gap between Park Street and London Colney.

- (c) The Appellant has provided an inadequate analysis of alternatives, the conclusions of which are wrong and provide no confidence that there is no better site than Radlett to meet any policy support in favour of the proposals.
- (d) The development is premature in advance of the production of NPSs, the completion of a trans-regional assessment of the location of strategic rail freight interchanges (SRFI) in London and the Greater South East and until demand has been shown to exist through the implementation and occupation of available SRFI capacity.
- (e) The development will not operate as an SRFI. There is inadequate evidence of sufficient paths to serve the proposed number of freight trains, whether on the wider network or the Midland Mainline. There is no evidence that the necessary gauge clearance work which is required to access the site will be viable when it is required. There is no unique demand shown for an SRFI in “northwest sector”.
- (f) The development will not operate as an SRFI and its development will therefore lead to increased HGV movements. In the light of the revised guidance on the importance of achieving sustainable transportation, the proposals would more seriously contravene national and regional policies seeking sustainable transportation than was the position before Inspector Phillipson. It would prevent the opportunity of other,

better sites coming forward in the light of the limited support for SRFIs.

- (g) The development of Area 1 of the development site on which the main buildings will be sited fails to secure and enhance the quality and appearance of the landscape in this area.
- (h) The development would lead to high noise levels experienced by residents within housing developments to the east and west of the site.
- (i) The harm done to the ecology of the area will not be adequately mitigated by these proposals.
- (j) The landscaping proposed as part of the development and the proposals for a country park will be limited and will not offset the harm caused by the proposals.
- (k) The unilateral undertaking offered by the Appellant under section 106 of the Town and Country Planning Act 1990 does not join all landowners of the appeal site and is, therefore, defective and little weight can be placed on it.
- (l) Consequently, as a result, the proposals are contrary to the development plan and national policy.

3. While the Council has sought to set out its case in its reasons for refusal, the essence of its objection is that the proposals would, ultimately, be a wholly inappropriate development in the green belt and will cause significant harm which, when that which is relied upon

by the Appellant in support of the development is properly assessed, is not outweighed by very special circumstances.

### Green Belt and Other Harm

#### *Harm to the Green Belt and Landscape and Visual Impacts*

4. The Council's case is that the proposal is severely harmful to the Green Belt. This part of the Green Belt is important. Inspector Phillipson at the previous appeal made clear the degree of harm that would be caused by the proposals – the Council agrees with that overall conclusion.
5. The impact of the proposals on the openness of the Green Belt would be “substantial” (see para. 16.7 of Inspector Phillipson's report); such harm was “fundamental” that could not be mitigated. As for undermining the purposes for which land is identified in the green belt, Inspector Phillipson considered it would contribute to urban sprawl and would do some harm to the setting of St Albans (see paragraph 16.11).
6. In relation to landscaping, there would be significant landscape impacts, even at year 15, a matter agreed by Inspector Phillipson at the last inquiry, and considerable visual impacts (see paragraph 16.4 of the Inspector's Report, accepted by the Secretary of State, para. 25 and 26).
7. The Council agrees with these points. Mr Billingsley on behalf of the Council will provide evidence to explain the Council's case and supplement the Inspector's reasoning on these issues.

### Harm to Ecology

8. The development would have two significant effects on the ecology of the area; first, it would require the translocation of acid grassland; and, second, it would have an effect on ground-nesting and over-wintering birds which use Area 1.
  
9. The ecological mitigation proposed for the site would not be sufficient to overcome the harm. In relation to the acid grassland issue, Inspector Phillipson considered that the proposals to translocate should not tell against the proposal, though he agreed that the translocation, if not carefully planned and executed could fail and the resource would be lost (see paragraph 16.28 of the Inspector's report). This site has now been identified as a county wildlife site and its importance has been emphasised by the small heath butterfly, which is a priority species under the UK Biodiversity Action Plan. The wildlife designation finds protection under policy ENV2 of the RSS and policy 106 of the Local Plan.
  
10. As for ornithological value, Inspector Phillipson took the view that, at present, Area 1 is of value for over-wintering waders and breeding birds (see paragraph 16.33 of the Inspector's Report) and concluded that the proposed mitigation offered by other sites would "not be sufficient to fully offset the likely losses" (para 16.36). He ultimately considered that the lack of adequate mitigation "should tell against the proposal" (para. 16.179 of the Inspector's report).
  
11. He also took the view that the weight which should be attributed to such an assessment would be diminished by (a) the absence of ecological or other designation which would operate to protect the current habitat of interest on Area 1 and (b) the uncertainties as to

the restoration proposals for Area 1 (para. 16.37 of the Inspector's Report).

12. Again, since the time of the last inquiry, the site has now been designated in respect of its bird interest as a county wildlife site by Hertfordshire County Council. This was undertaken in the light of the survey information provided by the Appellant's consultants (which survey was inadequate). The lapwing, which was one of the birds identified as using the site, is also now included in the UK Biodiversity Action Plan. As for the uncertainty apparent in relation to the restoration proposals, these remain, but they are capable of being easily reversed.
13. Given the enhanced significance of the site in a number of ways since the last inquiry, the degree of harm to the area caused by these proposals and the extent to which the lack of mitigation "should tell against the proposal" should also increase. These are important issues that have arisen since the last inquiry and require a re-balancing of the previous assessment on this issue.

#### Sustainability

14. There has been an increased emphasis in government policy on the requirement to achieve sustainable development since the last inquiry (including the supplement to PPS1 on climate change<sup>1</sup>). This increased significance makes the requirement to achieve development which is truly sustainable all the more important. Should the development (as the Council believes) not achieve its stated aim of transferring road-based freight movements to rail, this missed opportunity will be all the more damaging.

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<sup>1</sup> Although this was before the Secretary of State, there was little consideration of it, in the light of her decision to reject the proposals.

## Noise

15. There would be unacceptable noise caused by these proposals to local residents, particularly within Napsbury and Park Street/Frogmore. Inspector Phillipson previously accepted the Council's argument that the proposals should be assessed against BS4142; on this basis, taking into account the need to make a correction for tonal quality, the Council's assessment was that complaints were likely. Mr Stephenson will give evidence that this is also true with the current proposals.
16. Inspector Phillipson's conclusion on the question of noise was ultimately that, with the proposed condition, "there should not be unacceptable noise" (see para. 16.180 of the Inspector's decision, agreed by the Secretary of State, paragraph 30).
17. The Council's case on noise in this inquiry is wider than it was at the last inquiry. It is of the view that there will be potential noise effects from short duration peak noise events from the site. This is likely, when measured against the WHO guidance, to lead to noise disturbance at night when considered against the WHO LAmax guideline figure. Additionally, the noise climate experienced by residents will significantly increase as a result of the proposals.
18. The condition which was offered by the Appellant at the last inquiry which seeks to limit noise from the site will not be achievable and will not protect residents. There has been no detail given as to how such mitigation can take place. Further, Inspector Phillipson's satisfaction in the last inquiry as to the achievability of the condition was based, in part, on the degree to which he considered that the noise model which had been used by the Appellant's noise consultants (ISO 9613)

over-predicted noise levels. The Council will present evidence as to why there would not be such over-prediction. The assessment of this issue is also assisted by the recent publication of WHO guidance on night noise. Finally, it will be contended that the question of construction noise should be dealt with under BS5228.

### Prematurity

19. The proposals are premature. There is in policy terms a finite requirement for SRFI and it is imperative that the right sites are located if inappropriate developments are not to be carried out when other, better sites are available. Inspector Phillipson considered that such an analysis could lead to an argument that the application is premature in accordance with the terms of PPS1:

*There is not doubt that (i) the proposal is for significant development and (ii) is of such a nature that only a very limited number of SRFI (three or four<sup>2</sup>) are required to serve London and the South East. Accordingly, granting planning permission for a SRFI at Radlett, in addition to the permission already granted for a SRFI at Howbury would reduce the number of further SRFIs required to serve London and the South East to one or two only and hence materially prejudice the outcome of any regionally based study to determine the optimum sites for them. In this sense it could be argued that the application is premature.*

20. Inspector Phillipson's view, however, was that this argument only held good if there was a reasonable prospect of such a study being undertaken and its findings accepted as binding on the various

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<sup>2</sup> It should be noted that the Council's position in this case that, looked at on a floorspace basis, the requirement has been met.

authorities within a reasonable timeframe (see paragraphs 16.111-112).

21. There are a series of new matters since Inspector Phillipson's conclusion that the proposals were not premature.
22. The Department for Transport has indicated in its guidance to the regions on delivering a sustainable transport system that it envisages sustainable transport options being brought forward by way of joint working (see Appx 34, JH).
23. Policy T10 of the East of England Plan was adopted after the close of the inquiry and identified a different requirement from the draft that was before Inspector Phillipson – it introduced a policy that allowed the development for one SRFI unless more suitable sites exist elsewhere; that policy envisages a comparison between sites.
24. The South East Plan was in draft form at the time of the last inquiry. It was adopted in May 2009 and policy T13 makes clear that SEERA will work jointly with DfT rail, Network Rail, the Highways Agency and other bodies for the identification of sites. The policy envisages a process of regional study which, in the light of Howbury having been granted permission, may lead to the take up of the full requirement for SRFI (even discounting London Gateway).
25. Following correspondence from SEERA (along with EERA) on 5 December 2007, the assessment of, in part, the location of SRFIs for London and the South East has been acknowledged by the DfT (in July 2008) as an issue which will be “picked up” as the government moves towards the production of National Policy Statements (JH Appx 20).

26. Considered together, these matters provide a clear indication that regional or inter-regional studies of the appropriate locations for SRFI for London and the South East will take place.
27. In addition, the National Policy Statements to be used by the Infrastructure Planning Commission have the potential to identify site specific locations for SRFI. The relevant NPS on National Networks is due to be issued shortly.
28. Given that Howbury Park now has permission and London Gateway has commenced implementation, there is no pressing need which requires an urgent solution which should override the production of studies which will carry out a comprehensive analysis of the appropriate location for sites to serve London and the South-East; that is a process which should not be prejudiced.
29. In summary, the proposals will lead to considerable harm to the Green Belt, to landscape, to ecology, to the amenity of local residents and the proper process for identifying sites which it is said the present proposal will become.

#### The Existence of Very Special Circumstances

30. In such circumstances, the question is, ultimately, whether the Appellant can establish that very special circumstances exist to outweigh this harm.
31. The Appellant lists a number of measures in favour of its case which I deal with.

Rail

32. The primary matter relied upon by the Appellant is the degree to which this development will create an SRFI that meets the aim of government policy to provide 3-4 SRFI for London and the South East.
33. The position is clear: the proposals, if developed will not, ultimately, become an SRFI. Due to the numerous disadvantages which the development has, it will ultimately operate as a road-based distribution centre.
34. The location of the development is one distinctly ill-suited to the promotion of rail freight. It is not in a favourable location to receive any of the freight which it is predicted by the Appellants will come to the Site. Amongst other matters, it is not in a good location for deep sea port traffic and is currently unable to receive intermodal containers except on modified and uneconomic wagons; it is unable to receive Channel Tunnel intermodal traffic and is ill-suited to receive the domestic non-bulk market. Paths cannot be obtained to gain access to the terminal in the off-peak period and there has been no analysis against the upgraded Thameslink service. While a rail promotion fund is offered to subsidise the use of modified wagons, this will be of limited use and available for a limited duration. The result is that rail will not be attractive to the occupiers of the site. The development will, however, be an attractive location for road-based use.
35. The conditions which are offered will not avoid the failure of the site in rail terms. The conditions only prevent occupation of the development until the connection to the mainline is carried out, not the development's construction. So long as the relevant connection works are undertaken, the units may be constructed and occupied up

to 175,000 square metres without any gauge enhancement works having been completed and without a single train having entered or left the site (indeed the same is true if gauge enhancement is later undertaken).

36. In the light of all of these matters, the development will fail to achieve the Appellant's stated aim.

### Alternatives

37. Turning to alternatives, the Appellant says that it has shown that there is no better site in which to locate the development. Inspector Phillipson placed the burden squarely on the Appellant to show that this was the case; he was not convinced of the outcome at the first inquiry and the Council say that the current alternatives assessment should not be accepted either: it is defective and cannot be relied upon.

38. A primary limitation, amongst other matters, is that the analysis has been undertaken only within an area it has called the "north-west sector". It has done so because Inspector Phillipson acknowledged this to be a pragmatic approach. The Council will contend that the correct conclusion is that alternatives to Radlett may appropriately be sited in numerous locations within London and the South east, well outside this north-west sector. The Council will provide substantial evidence to this inquiry, which was not before Inspector Phillipson, to establish its position that the occupiers of the SRFI will operate distribution centres designed to service London and the South-East (in general terms) and they, consequently, will not need to be centred in a theoretical north-west sector. The Council has undertaken its own alternatives analysis which has shown that, when looking at this wider area, there are a significant number of other, better locations than

Radlett. In fact, two of these, Colnbrook and Littlewick Green, were considered by the Appellant in its analysis. Further, if such a need exists in policy terms, such a need is limited and, given that Howbury Park has permission and London Gateway has commenced implementation, there is a very limited need for alternatives.

39. There are a number of other issues between the parties relating to the Appellant's alternatives, including the approach taken by the Appellant towards the availability of sites. In that regard, the Council takes the position<sup>3</sup> that an alternative is available if there is a reasonable prospect that it is likely to be available for and could be developed at a specific point in time (consonant with the degree to which any need is urgent given the availability of other permitted sites). This means that a number of sites not identified by the Appellant, like employment sites that are not derelict (as well as others), could have been available for consideration. The point the Council emphasises is that it would be wrong in principle to discount a site because it may have some deliverability constraints or issues which, if the site was identified as suitable for an SRFI, may well lead to it coming forward. The approach towards availability should be inclusive in that regard, not exclusive.

40. Finally on this point, the purpose of the Appellant's alternatives analysis is to show that there are no other better sites. It is not enough to establish that the analysis is "good enough" or "fit for purpose", but that it achieves the aim of establishing what it is said it will achieve, namely, that Radlett is better than other sites; it simply does not do that.

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<sup>3</sup> It is intended that this provides a view to you, Sir, of the degree to which alternative sites should be available for the purposes of the *Mid-Essex Gravel Pits v SoSE* [1993] JPL 229.

County Park, Bypass and other considerations

41. The Appellant also prays in aid the existence of the Country Park and the provision of a by-pass for Park Street/Frogmore in support of its case. The Council acknowledges these are benefits but, like Inspector Phillipson, takes the view that they, in themselves and without more, cannot lead to the grant of permission. Further, the “country park” is not a significant issue but is in reality a series of open spaces with access in many cases that is provided to a similar extent as is currently available.

42. In any event, each of the matters sought to be offered in mitigation of the development (including, for example, improvements to Park Street Railway Station and St Albans branch line, the countryside management plan, cycleway, footpaths and bridleway improvements) are all to be provided through a section 106 unilateral undertaking which does not include all the landowners of the appeal land, notably the County Council. The appellant relies on no different arguments, it appears, to those that it relied on at the last inquiry to establish that this apparent contravention of Circular 11/95 and 05/05 is acceptable. The Secretary of State’s view was clear that very limited weight should be given to the section 106 undertaking - there is no reason why that conclusion should not now apply.

Other matters – Highways

43. The Council will, in the light of the information it has now received, not be proceeding with a highway objection; that decision has, it is hoped, now reached you, Sir.

### Changes to the Council's Case

44. It will be apparent from these submissions that, as a result of the issues that were raised in the pre-inquiry meeting, the Council considered it was necessary to restrict its case to this inquiry. It has, quite responsibly done so, in respect of the deliverability of the country park, the sustainability of the site in respect of employee travel, ecology and footpaths.
45. The Council will, on a number of the remaining points, including particularly noise, rail need and the suitability and appropriateness of identifying the north-west sector, seek to persuade you, Sir, that the previous conclusions in the first inquiry were not the correct conclusions. It has provided, as I have said, significant additional evidence on these issues; this evidence is, the Council says, persuasive and significant. The appeal is before you as though it were before you in the first instance. The Appellant failed at the last inquiry and no part of the development (save for the country park) was found to be acceptable. The proposals are, the Council says, required to be considered against the proper green belt test which will entail an examination of the benefits of the Appellant's case, against the harm that it causes. That judgment, of course and with respect, is for you, Sir, and it is only by an examination of those issues by you, taking into account all the evidence before you, that you can reach your judgment on that central issue. It is right that Inspector Phillipson reached the judgments he did. However, it is well within your remit to reach a different decision.
46. The Appellant appears to seek to contend, in respect of at least a number of issues, that it is appropriate only to look as to whether there has been a change of circumstances since Inspector Phillipson's consideration of the matter when deciding what approach should be

taken on each of the matters which need to be considered. The Council says that is wrong; the question is whether you are persuaded, on the basis of all the evidence, as to the strength of the Appellant's case, which it has to establish.

47. The Council's submission will respectfully be, ultimately, that on the basis of all of the evidence that there be rejection of this development.

**MATTHEW REED**

**Landmark Chambers,  
180 Fleet Street,  
London,  
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**24 November 2009**

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**SCHEDULE OF APPEARANCES ON BEHALF OF THE LOCAL PLANNING AUTHORITY**

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**Matthew Reed, Counsel, instructed by the Head of Legal Services of the Local  
Planning Authority, will call:**

**Jonathan Billingsley, MA(Oxon), BPhil, MLI on landscaping and visual issues**

**Simon Stephenson, BSc Hons, MIOA, C Eng on noise matters**

**John Hargreaves, DipTP, MRTPI on planning issues**

**Benjamin Wilson, CEng, BSc Hons, MIMechE, on rail issues and alternatives**