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Dear Mrs Harvey

Helioslough Limited/Strategic Rail Freight Interchange ("SRFI") at Radlett

We act for Helioslough Limited in connection with the above development.

We write further to the Inspectors' letter of 14th April 2020 ("the Inspectors' Letter") and following the Planning Policy Committee meeting on 9th June at which the Council determined that it would promote main modifications to exclude the Park Street Garden Village ("PSGV") and include the SRFI in the Local Plan. We set out below how, with that main modification, the Plan can – in our view - now continue

What we set out below is the case we had intended to put forward via Counsel in weeks 2 and 3 of the Examination hearings on the Local Plan as to the appropriate way forward. We consider that it provides a clear route to legal adoption of the current Local Plan with main modifications. It is clear from the Inspectors' letter that the exclusion of the SRFI from and the inclusion of the PSGV in the Local Plan was not appropriate. As we will explain in more detail below, the core problems which the Local Plan faces can *all* be remedied by reversing that approach as envisaged in your main proposed main modification.

Continuing to exclude the SRFI

It appears that the Council now accepts that the fundamental starting point is that it is now clear that any Plan (whether the current or any future Plan) which does not include an allocation for the SRFI will fail on legal and/or soundness grounds.

Inclusion of the SRFI

Given that the Council now accepts that the Plan should provide for the SRFI to meet the national need for an SRFI to serve London and the South East at the Radlett site, we consider (having taken Leading Counsel's advice) that there is a lawful and sound route to saving this Plan and moving forward via main modifications to adoption. Our client supports the Council's wish to pursue this route.

1. The concerns of the Inspectors on the duty to co-operate on the SRFI can be overcome by:

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(a) the Council accepting that, in the light of all the history of alternative site searches, planning appeals and judicial reviews, there was only one properly available and rational answer to the question as to where an SRFI should go,

(b) the Council following through on that with a main modification and an allocation, and

(c) thus, being able to demonstrate that, whilst the legal Duty to Co-operate ("DTC") was engaged, there was *no content* to the legal DTC on the SRFI once the Council has accepted this was the only place for it;

2. On the existing housing allocations in the green belt and the DTC, we draw an important distinction between the legal requirements under the DTC and the policy and guidance requirements. The failings identified by the Inspectors are breaches of the policy and guidance requirements and not of the legal requirements. A compelling case can be made that the legal requirements are met, even though there were procedural gaps under the policy and guidance requirements. The latter can be remedied through the remainder of the process;

3. As to meeting the full OAHN without PSGV, the "gap" can be planned for through the green belt review to which we refer to below;

4. In this way the *legal* impediments to adopting the Local Plan are overcome; and

5. The soundness issues can be addressed through the remainder of the process.

Thus, resolving the SRFI issues unlocks the solution to the current hiatus.

The Duty to Co-Operate on the SRFI

We take as our starting point that the DTC is engaged on the SRFI for reasons given in our Note on Matter 2 just before the Examination hearings commenced and accepted by the Inspectors.

We consider that the central question then becomes, *in all the circumstances,* what did compliance with the *legal* duty require here – what was the content of the duty in the circumstances here? The context is fundamental in addressing that question.

The 2014 Permission was the end of an extremely protracted process through which the availability of any alternative sites across a large swathe of the South-East was necessarily a central consideration. Cutting a very long story short (all of which has been addressed in our Core Note and supporting appendices) that process did not identify any other appropriate site to meet the compelling national need for an SRFI to serve London and the South-East which national policy required to be met. The whole process (including the Colnbrook inquiries and the two inquiries on the Radlett site) was extremely thorough and based on wide ranging inputs from multiple sources and the result conclusive.

It is telling that the Council in its Re-Evaluations correctly did not attempt to revisit that conclusion. It had thus accepted prior to the submission of the Local Plan that if the SRFI to meet that compelling need was to go anywhere it would have to go here. The Council's approach was not to say it could or should go elsewhere but only that it should give way to housing need. The Inspectors can thus proceed on the uncontested basis that if the need for an SRFI is to be met it must be met here.

The DTC is to co-operate in maximising the effectiveness with which the Local Plan is prepared on strategic matters and the question the Inspectors have to ask is whether in all the circumstances it is reasonable to conclude that the duty was complied with. The *content* of the co-operation will inevitably be a function of the context and the surrounding facts.

Fundamentally, given the history there was nothing left to engage with others on. The debate as to location was over.

Further, the means to appropriately accommodate an SRFI here had been fully and appropriately addressed including consideration of cross-boundary issues (highways, railway capacity, markets and similar) through the 2014 permission (including through the conditions on the permission).

Thus, the error of the Council was *not* in failing to engage with other authorities as to how the need for an SRFI was to be met. Had it asked itself "what is the content of the DTC on the SRFI?" it would inevitably have concluded that there was nothing to co-operate on *because* it already knew all the answers which had been provided through the exhaustive process referred to above and which dictated an allocation here for an SRFI.

The error of the Council was not in failing to engage with others under the DTC but in not following through on the inevitable answers which it already knew from the exhaustive history - namely to allocate for an SRFI. Engaging constructively, actively and on an ongoing basis does not require one to ignore the overriding and fundamental starting point or to re-examine that starting point.

We therefore consider that it is possible to remedy the current difficulties by accepting that the Local Plan should always have included the SRFI, that that was the only available option and that, therefore, there was no content to the DTC on the SRFI.

Duty to Co-Operate - Existing Housing Allocations

The Inspectors' core point is that the documentation does not "mention" any attempt by the Council to persuade other authorities to meet part of its housing requirements and thus to save the green belt. It is a criticism of the absence of documentation to *demonstrate* compliance with the legal duty to co-operate and not a conclusion that there has not been compliance with the legal duty. The *legal* adequacy of co-operation and the extent of engagement to satisfy the legal DTC is intrinsically dependent on the context.

We consider that the Council can make a compelling case that on the facts the legal duty to co-operate was amply met here (even though the necessary and underlying context it is not expressly mentioned in the meeting notes). We understood that Mr Briggs sought to explain that essential context in his oral response on day 1 of the hearings but in any event the historic context is a matter of public record.

All the surrounding local authorities had a very long history of facing huge impediments to meeting even their much lower historic housing land supply requirements. Having reviewed the history back to the early 2000s, the context to discussions in 2018 seems to us to provide a compelling explanation as to why the meetings in 2018 started from the unstated but essential premise that there was no scope for other authorities to meet part of the Council's Objectively Assessed Housing Need ("OAHN"). From the South East Plan ("SEP") and the issues with London Arc which led to that part of the SEP being quashed, through the debate on the Housing Market Area (which led to the first failure of the DTC here), to the basic problems all surrounding authorities were having in meeting their Housing Land Supply ("HLS") requirements given their green belt constraints as evidenced by the significant difficulties with their own Local Plan processes and examinations, the central and short point is that all officers and members from all relevant authorities knew the severity of the issue and the immense pressures all authorities were under just to meet their own OAHN. That was the essential starting point. Engagement under the *legal* DTC does not require one to ask the impossible or to go back over well-established ground without any reason for thinking there was scope for a different answer. The short point is that the history shows that even when faced with much lower housing numbers all relevant authorities were having significant difficulties meeting even their own OAHN never mind providing for the needs of adjoining authorities.

The Duty to Co-Operate - housing "displaced" from PSGV

It may be said that given the mistake on the SRFI referred to above there has been no legal compliance with the DTC in relation to the "displaced" PSGV 1600 units. We consider that the general analysis above as to the context for any consideration of the DTC would equally apply to that element. That element of OAHN could be planned for through the process described below.

But even if that is not correct, the shortfall could be addressed in an early review through which the DTC would arise afresh with other authorities being asked to share the burden of SADC meeting the SRFI need here. To "park" that (in context, small) part of SADC's housing requirement to later, would not impact the 5 year HLS in the meantime (because PSGV was not anticipated to deliver any housing until much later in the Plan period).

Conclusion on the DTC

The above provides a clear and legally robust way through the current problem. All that is required is for the Council to explicitly accept that there was nothing left to discuss with other authorities on the SRFI - the issue as to the location of the SRFI and what was required to make its cross boundary impacts acceptable having been settled by the 2014 permission. On housing allocations, the Council would provide the full historic context as to why there was no renewed attempt to get other authorities to take some of the housing - given that all authorities were in substantially the same position as it. If that was not a complete answer to the housing allocations and DTC point in respect of PSGV, the Council could agree to a main modification to accommodate any "displaced" housing from PSGV in an early review which itself would trigger the DTC.

Further Legal Consequences

Further, the inclusion of the SRFI would remove the outstanding legal points raised by our client. The Council would identify the SRFI as a strategic priority and have the policies to meet it thus removing a central legal flaw. Including the SRFI would, further, remove a central legal flaw in the sustainability appraisal by correcting the flawed omission of the SRFI in the consideration of "alternatives".

Statement of Community Involvement ("SCI")

The Inspectors criticise the absence of the two stages of the Local Plan. We endorse the comments of the Council on this issue and note in particular that the Local Development Scheme ("LDS") referred to a single stage reg 18. Given that it would be impossible for any person to assert that they legitimately relied on the SCI two stage process. In legal parlance, the LDS adjusts any "legitimate expectation" from a two stage to a one stage process. Further, as the Inspectors also make clear, whether that legal error is of any significance will depend on those claiming to be affected being able to show substantial prejudice. Of course, process is important, but we consider that given the history, the representations to date and the further opportunity for representations in response to main modifications and on resumption of the examination, it is very difficult to see what prejudice anyone could have suffered by absence of the two (much earlier) stages as provided for in the SCI.

The Result

The result would be that there was no *legal* impediment to the Plan proceeding through further hearings with appropriate main modifications being promoted.

We have specifically considered whether this approach would be consistent with the basic principle that the legal DTC had to be complied with *at the point* of submission and have concluded that it is. The error of the Council on the SRFI was not on failing to engage with other authorities on it (and thus a failure of the legal

DTC) because there was nothing to engage on given there was nowhere else for the SRFI to go, but failing to follow through on the inevitable result - namely to allocate the site for the SRFI and not for PSGV – which is now to be cured through a main modification.

We have also considered whether it would be possible for the Council to pass the legal requirements of the DTC without including the SRFI. At that point there would be a straight rationality clash between the logic for not engaging on the SRFI (nowhere else for it to go) and the failure to plan for it and the Plan would fail on that basis.

Soundness

Having overcome the legal hurdles, it would then fall to the Council to demonstrate that the Plan with the main modifications was sound. At this stage, a degree of leeway is afforded to Councils – perfection is not required. The key soundness failure to date is the omission of the SRFI and the allocation of the PSGV. That will be remedied by the main modification referred to above. It would remove all of our client's legal and soundness objections. It would make our client a strong supporter of the Local Plan rather than a party whose interests are irreparably damaged by it.

In terms of the *policy* guidance on DTC, a Statement of Common Ground setting out the position to date including the full contextual history referred to above would explain why the starting point for local authority discussions was that there was no scope to take housing requirements off the Council. Other procedural failings under the *guidance* on DTC can be remedied through the remainder of the process.

In terms of housing allocations and green belt, the obvious (indeed overwhelming) planning logic for development of land east of Hemel would be sustained – that secures several of the strategic sites and the overall spatial strategy of the Council which has obviously very strong logic. The four green sites from the Green Belt Review ("GBR") would go forward unaffected for the simple reason that they score highest in green belt terms.

In terms of the concern on the 500 threshold and automatic rejection of smaller sites and parcels (para 33 – 45), as a result of the Inspectors' letter, the scope for smaller sites to be preferable to larger sites *on their specific facts* would need to be examined prior to resumption of hearings including in an iteration of the Sustainability Appraisal ("SA") and through a GBR. But alternative parcels have already been identified through the earlier GBR and sites within them have been identified through the call for sites and work to date. A review of the parcels to catch any other possible sites would be required. The testing and adoption of a robust methodology to weigh the advantages and disadvantages of various green belt sites including by reference to size and speed of deliverability would then be justified in the SA and GBR and then applied.

This may simply result in some small sites being identified which can be added so as to replace PSGV or it may result in some currently allocated sites (other than those east of Hemel sites) losing out to smaller, better sites. It is by no means uncommon for inspectors to highlight methodological flaws and to ask the Council to consider whether main modifications are required to remedy them.

This process would overcome all the Inspectors' remaining concerns:

(1) adoption of a robust methodology and rigorous application of it would overcome the concerns at paras 49 – 53. The issue of compensatory improvements (para 54 – 56) simply requires greater clarity;
(2) a similar re-evaluation would be required for previously developed land (para 46 – 48 of the Inspectors' Letter).

(3) including the SRFI and producing a methodology to assess smaller sites and their respective advantages and disadvantages against larger sites would overcome para 59 - 77.
(4) inclusion of the SRFI and meeting other needs elsewhere would overcome paras 78 – 87;
(5) the gaps in the evidence base can be filled during the above work overcoming paras 88 – 91.

We thus see no insuperable obstacle to adoption of this Plan subject to main modifications if but only if the SRFI is included as a first step. Everything else can fall logically into place behind that.

We do not see the need for a further hearing to address these matters. If, as we think, the above is legally robust, there is no need for such a hearing and the Inspectors can consider the issue on the papers. If there is a need for a hearing, it can and should be organised remotely at the earliest possible opportunity.

Further, now that the issues appear to be settled between the Council and Helioslough we consider that there is an overwhelming imperative to contribute to the vital national economic recovery by removing any procedural issues facing a vitally significant infrastructure project and encouraging the Council to put its Local Plan in place as soon as possible

Yours sincerely

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