WELWYN HATFIELD BOROUGH COUNCIL

LAND AT THE FORMER HATFIELD AERODROME

STATEMENT OUTLINING CASE (para 6 of Inspector's Supplementary Note)

1. WHDC set out its position in its Position Statement. As requested in that Position Statement and as encouraged by the Inspector in para 21 Inspector's Post Conference Note, negotiations are now underway in respect of a deed of variation to the 2000 Agreement ("the DoV"). Through a DoV, WHDC seeks to ensure that the scheme of provisions for Ellenbrook Park ("EP") with the mineral permission are (at least) equivalent to those under the existing 2000 Agreement without the mineral permission. It is hoped that those negotiations will be successful and that WHDC will not need to attend the s.106 roundtable.

2. However, in case no DoV can be agreed, WHDC sets out its position. There are two issues: (1) enforcement of the existing 2000 Agreement if there is no DoV; and (2) the implications for the delivery and acceptability of this planning application if no DoV is provided. The issues raised are relatively complex and involve legal issues (which are in dispute) but for the reasons which follow are relevant to the determination of this appeal and cannot be ignored. Those issues arise because the mineral permission is being pursued outside of and inconsistent with the legal framework established through the 2000 Agreement.

3. On enforcement, whilst this is not directly a matter for the Inspector, WHDC intends to seek to enforce all its rights under the 2000 Agreement - by injunction if necessary including to prevent implementation of any mineral permission. It will not passively accept the continued failure to deliver that which the 2000 Agreement requires. The mineral permission with a DoV has, for a long time, been seen as the last chance to resolve outstanding matters without recourse to litigation.

4. Such enforcement then leads to the question of the implications on it for delivery of the mineral permission. On delivery, WHDC considers that implementation of a minerals permission is not possible under the 2000 Agreement for reasons addressed

below. It is understood that HCC will address the significance of this in mineral planning terms for the decision as to whether to grant permission.

5. On the implications of the obligations under the 2000 Agreement for the acceptability of the proposed development, it is, of course, accepted, that obstacles to delivery of a development are not normally a good reason for refusing permission. However, where compliance with existing obligations could prevent the delivery of key parts of the development as proposed and assessed or significantly impact that which is proposed then that risk will be relevant to the planning merits of the proposal.

6. Here, on the conditions/s106 framework as currently proposed, the development as whole could go ahead but, by way of example, on WHDC's case:
   (1) would, consistent with the 2000 Agreement, not be able to deliver the processing plant which is an integral part of the overall proposal and a central part of the basis on which it was promoted (in EIA/TIA and impact terms). The mineral extraction without the processing plant is for obvious reasons unacceptable. A framework of conditions must be imposed which prevents any development or extraction unless and until the processing plant is delivered. That in turn necessitates a variation to the DoV to allow delivery of it;
   (2) would have to accommodate the existing footpaths fixed under clause 4.90. There is no ability to move them under that clause or at all. Those footpaths go through the middle of various phases of extraction. The mineral extraction would have to work round those footpaths but has not been designed to do so and one would be left with an unacceptable situation where the mineral extraction and existing paths had to co-exist despite (and as an addition to) the approved plans on the permission. Thus, any permission would have to require the removal of those paths before the development commenced and that in turn would require a DoV.

7. The submissions on enforcement/delivery are to show the Inspector the headline arguments that will be run. He will not need to resolve these debates but to note that they potentially impact delivery. The issues on the impact of compliance with the 2000

Agreement on the acceptability of the planning permission go to the planning merits resolved.

A: Enforcement

8. The 2000 Agreement remains in force and is not subject to any s.106A application.

9. Its enforceability is not undermined by a grant of a mineral permission here (or the 2024 s106).

10. The history and failure to deliver the essential elements of the 2000 Agreement are well known and not repeated here. WHDC intends to enforce the obligations in the 2000 Agreement including by way of an injunction application to prevent:
    (1) mineral processing;
    (2) closure of existing footpaths;
    (3) the grant of any mining lease to Brett inconsistent with the obligation to grant a lease to the Trust;
    (4) uses other than those in clause 4.128; and
    (5) any works (mineral extraction or processing) inconsistent with the obligations to deliver and maintain the establishment works, the requirements of the LFD and/or to deliver the lease to the trust in accordance with the EW and LFD requirements.

11. Further it will enforce the positive obligations under clauses 4.83, 4.84, 4.87 and 4.90 of the 2000 Agreement.

12. The matters in para 10 above are addressed after the overall context, coverage and applicability of the 2000 Agreement is assessed.

The 2000 Agreement does not cover or enable a mineral extraction world and mineral extraction is inconsistent with it

13. The 2000 Agreement was entered into in association with the 2000 Permission and to secure the obligations necessary to make *that permission* acceptable (see recitals).

14. The fundamental obligations in the 2000 Agreement in respect of EP are to lay it out, maintain it and make it available for public use pending a lease to the trust with the endowment. All the drafting at 4.81-4.90 is to secure that[1].

15. The 2000 Permission did not include mineral extraction. Unsurprisingly, therefore, the 2000 Agreement (as part of the package with that 2000 Permission) taken as a whole is not drafted in such a way as to accommodate a later, separate, mineral permission. Instead it establishes what is to be done independently of any mineral permission (and in advance of implementation of any mineral permission).

16. The relevant parts of the 2000 Agreement are about delivery of EP as such and securing the long-term retention of it as such.

17. The essential framework of obligations is as follows:

    (1) Landscape management document ("LMD") based on Landscape Framework Document in appx 21 ("LFD") to be approved– 4.81;
    (2) Establishment Works ("EW") to be completed across the whole of EP– 4.82/3 – in accordance with LFD and Framework Plan
    (3) Public access to be provided across the whole of EP- 4.83;
    (4) A network of paths as set out in LFD "as though there were public footpaths maintainable at public expense" – to be provided and maintained at all times (4.90)
    (5) The whole of EP to be maintained as an amenity space with the EW during the maintenance period - 4.84 – and until provision of the lease - 4.86;

[1] Under 4.81, the LMD was to be based on the principles in the LFD (Appx 21). The Establishment Works are defined (p8) as all the works necessary to establish EP "in broad accordance with the provisions of section 2" of the LFD which cover the whole of EP and provide for the whole to be laid out as a park. "EP" is defined as covering the whole of the land now comprising EP. The obligation to maintain (4.84) applies to the whole EP in accordance with EW and LFD up to the grant of the lease, the lease is of the whole EP as a park to be maintained and used as such (subject only to the reservation re: mineral extraction – see below).

(6) The whole of EP to be the subject of the grant of a lease to the trust with the contribution - 4.85 – 4.86; and

(7) The acceptable uses to be limited to park related uses (not minerals) - para 4.128.

18. The ***only*** reference in the 2000 Agreement to the possibility of a separate, future mineral permission impacting the framework of obligations is in the last line of clause 4.83[2]. Those words only apply to ***public access*** to parts of EP (under that part of 4.83). Those words do not apply to any of the other obligations in the rest of 4.81 – 4.90 - there being no equivalent provision/carve out in respect of the obligations for maintenance or management of EP, provision and maintenance of footpaths of EW or acceptable uses etc….

19. On the Appellant's approach, the 4.83 words would caveat all the other EP obligations as if for each of the other obligations were subject to the caveat - "save in areas where mineral extraction is being carried out" (or similar) – with the result that the EW only had to cover area non-mineral areas; the 4.90 paths were not to be maintained "at all times" in mineral areas, the maintenance as a park obligation did not apply to the mineral areas and mineral extraction was permitted in the mineral areas. The list goes on.

20. It is impossible to read the very specific and limited words in the last line of 4.83 as having that very broad effect.

21. Further, the fact the mineral permission is mentioned in only one place and not in any of the other relevant places where it would be necessarily required to accommodate a mineral permission is important and telling and defeats any attempt to imply the words above across the 2000 Agreement.

22. Thus the words in 4.83 should be interpreted as simply flagging up a future possible situation which may arise and which may have future impacts ***for access*** if it does arise.

[2] and see also para 4 of Part 3 of the First Schedule to the draft lease to the Trust in sch 10 to the 2000 Agreement.

It does not caveat or detract from all the other obligations and does not indicate that the 2000 Agreement addresses a world with a minerals permission.

The Lease

23. The lease has a reservation of rights of access for mineral extraction [para 4 Part 3 First Schedule to the lease in sch 10 to the 2000 Agreement]. That only reserves a right to access the land. It does not authorize works in breach of all the above covenants and is thus consistent with the analysis above.

The Result

24. The result is that mineral extraction is not possible consistent with the 2000 Agreement. A DoV is required to enable it.

25. It is of course correct that mineral extraction at some future point was anticipated – see SPG and LFD (appx 21). But the 2000 Agreement has not been drafted to accommodate it – because the 2000 Agreement was not concerned with mineral extraction but with the 2000 Permission.

26. Thus, the issue as to how to properly accommodate mineral extraction within EP through an appropriate s.106 framework was left to later and now falls to be addressed via a DoV. This is not a surprising outcome. All parties would have appreciated that the three councils are public bodies who could be relied upon to agree a DoV in a reasonable manner in response to application for minerals extraction which had been judged to be in the public interest.

27. Therefore an injunction would be sought to prevent any implementation of a planning permission which was inconsistent with compliance with any or all of the obligations in the 2000 Agreement – which prevented EW across the whole; which meant the paths were not open to public use at all times; which did the opposite of maintaining the EW and of amenity space use during the maintenance period and which was for uses prevented by 4.128.

28. It is notable that the 2000 Agreement does not provide any adequate structure for the control and minimisation of impacts on the accessibility of the extraction areas during the works. The SPG at 9.27 is clear that the MPA should seek to "strike a balance" between maximising use of resource and protecting amenity of residents and users. The absence of any measures for regulating phases of mineral extraction is another indication that the 2000 Agreement did not anticipate that a minerals permission could be delivered without amendment - what we have is only an indicator that the parties anticipated that future amendment of the 2000 Agreement would be likely to be acceptable in order to enable beneficial mineral extraction.

Other Matters (para 10 above)

29. "*Mineral Processing*": Even if all the above is wrong, clause 4.83 only covers "mineral extraction". That term is not defined in the extensive glossary to the 2000 Agreement and thus means what it says. "Extraction" is the process of winning material out of the ground. The processing of mineral is not winning material out of the ground (and, if relevant, is not "ancillary" to that). It is a separate stage of the overall process of bringing mineral to market – cleaning and sorting extracted material; and then storing and dispatching that processed material.

30. The lease uses the same term and the context there makes it clear that the "extraction" is meant in this sense – "enter onto those parts of the demised premises from which minerals are authorised to be extracted (but not otherwise).".

31. The Appellant relies on *Europa Oil and Gas* [2013] EWHC 2643 (Admin) to give a wider meaning to extraction. That case turned on the interpretation of planning policy and whether oil exploration was included in the policy term extraction. Based on a careful analysis of the policy wording in its wider context, it was held that extraction included exploration [44]. It did not address the issue as to whether processing of extracted oil was part of extraction. It clearly is not.

32. The rights of the public to use the processing area cannot therefore be excluded under clause 4.83. Therefore an injunction would lie against implementation of the

processing area. But that processing area is intrinsic to the acceptability of this application not least in terms of how it is designed to operate and the HGV flows and traffic and amenity impacts of it – for the short reason that the extraction lorries are assumed to stay on site.

33. The draft conditions do not require delivery of the Processing Plant before extraction. They need to do so. But that then hits a delivery impediment given the 2000 Agreement.

34. *Closure of Footpaths*: clause 4.90 requires footpaths to be laid out in accordance with the LFD/EW. Those are shown on the LFD plan. The clause 4.90 obligation is not caveated by any mineral override. Therefore for those paths, public use must be permitted at all times as though they were maintainable at public expense. The public cannot be excluded from them.

35. But they run through the phases of the mineral extraction. The mineral extraction phases have not been designed around them. An injunction would thus be sought to prevent their closure. The mineral activity would have to work round them. But that has not been applied for and would introduce a major planning impediment – potentially impacting phasing; design; delivery and sterilization. Those implications have not been considered because it has been assumed those paths can just be closed.

36. *Mining Lease:* We are told that a mining lease will be granted to Brett. There is a prior obligation in the 2000 Agreement to grant an unencumbered lease of the whole EP to the Trust once certain conditions precedent are overcome. It is not therefore possible for the lease to be granted to Brett because it is inconsistent with the obligation to grant a lease to EP and an injunction would be sought to prevent it. This may just go to delivery timelines under the current structure but WHDC will listen carefully to the evidence to ensure that there is no overlap between the lease structure and the merits of the planning application.

37. *Other Uses:* Clause 4.128 restricts uses of EP. There is no carve out for mineral extraction. Clause 4.128 is consistent with the analysis concluding in paragraph 26 above. The 2000 Agreement does not provide the framework for mineral extraction because mineral extraction is not within the permitted uses of EP. The Appellant has to say the words in clause 4.83 somehow override 4.128. That is incorrect. The uses are expressly limited under the 2000 Agreement. Mineral extraction cannot go ahead under it without consent. Such consent is not given.

38. *Mineral works inconsistent with other obligations:* as already noted, the 2000 Agreement has wide ranging obligations which are not subject to a mineral carve out[3]. If necessary, WHDC will consider seeking an injunction to prevent any development which impedes compliance with the obligations in the 2000 Agreement.

B: Delivery

39. Any injunction will prevent delivery. It is understood that HCC will address the planning policy implications of this.

C: Compliance with 2000 Agreement inconsistent with the Planning Application and causing harmful, unassessed impacts – delivery would be different from that assumed

40. For the reasons given in respect of "processing plant" and "footpaths" above, the necessity of compliance with the 2000 Agreement has implications for the planning acceptability of the proposals. There will be (or may be) no processing plant with all the above implications. There will be (or may be) no opportunity to close the footpaths making it necessary to accommodate them with obvious and wide ranging implications and which have not been assessed under the Environmental Statement.

41. These impacts arise because the Appellant has wrongly proceeded on the assumption that the 2000 Agreement is somehow subject to mineral workings and that its clauses cannot be enforced against mineral workings. On those matters it is wrong.

[3] For example to deliver and maintain the establishment works, to deliver the amenity space and make it available during the maintenance period; and/or to deliver the lease to the trust in accordance with the EW and LFD requirements.

42. A DoV is required to overcome these planning harms (under this section C) and to enable delivery under section B above.

14th November 2024