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**LOCAL AUTHORITY REFERENCE: HGY/2005/0007**

**APPEAL REFERENCE: APP/5420/A/05/1189822**

**BETWEEN:**

**LONDON CONCRETE LIMITED**

**Appellant**

**and**

**THE LONDON BOROUGH OF HARINGEY**

**Respondent**

**CLOSING ON BEHALF OF THE COUNCIL**

**ABBREVIATIONS:**

AD – Appeal Decision

The *Bedford* case - *R (on the application of Aircraft Research Association Ltd) v Bedford Borough Council* [2001] Env LR 40 (Mr Fiumicelli's App M)

Mr Bellamy – Graham Bellamy, LCL's transport witness

BS4142 – British Standard Method for Rating industrial noise affecting mixed residential and industrial areas (Fiumicelli App. D)

The Council - The London Borough of Haringey, the Respondent

Mr Casey – Derek Casey, LCL's Managing Director

XX – Cross-examination

DEA – Defined Employment Area (as defined in the RDDUDP and UDP)

Defra – Department of the Environment, Food and Rural Affairs

EC – Evidence in Chief

EIA – Environmental Impact Assessment

EWS – English Welsh & Scottish Railways Ltd.

Mr Fiumicelli – Dani Fiumicelli, the Council's noise witness

Mr Grant – Alexander Grant, LCL's environmental witness

HGV – defined by Mr Bellamy in this appeal to include concrete mixer lorries, cement delivery lorries and private collections in flat-bed pick up vehicles (see his proof at paras. 5.4 – 5.8)

The IEA Guidelines – the Institute of Environmental Assessment Guidelines for the Environmental Assessment of Road Traffic (see the extract at Mr Bellamy's App. 13, supplemented by the extract at Mr Gurtler's App 6).

Mr Gurtler – David Gurtler, the Council's planning witness

LAPPC – the Local Air Pollution Prevention and Control regime set up by the Pollution Prevention and Control Act 1999

LCL – London Concrete Ltd, the Appellant

Mr Sharps – Doug Sharps, LCL's noise witness

SoCG – Statement of Common Ground (Document 4)

Mr Stephenson – John Stephenson, LCL's employment witness

RDDUDP – Revised Deposit Draft UDP (Gurtler App. 21)

RX – Re-examination

Sllb – Smith lance larcade & bechtol Architects Ltd, agents for the freeholders of the Cranford Way Industrial Estate

The Tesco Ledbury AD – Appeal ref. APP/W1850/A/03/112124 (Mr Fiumicelli's App. I)

Mr Woolner – Michael Woolner, LCL's planning witness

WHO Guidelines – World Health Organisation Guidelines for Community Noise (Fiumicelli App. F)

UDP – Haringey Unitary Development Plan (adopted March 1998) (Gurtler App. 21)

## **INTRODUCTION**

1. If LCL had not appealed against the non-determination of the planning application, the Planning Applications Sub-Committee of the London Borough of Haringey resolved that it would have refused the application at its meeting of 10 October 2005.
2. Of the three deemed reasons for refusal, two (deemed reasons for refusal 1 and 3) relate to amenity (noise<sup>1</sup>, dust<sup>2</sup> and traffic generation), whilst a third (deemed reason for refusal 2 set out above) relates to employment.

## **PRELIMINARY MATTERS**

### ***(1) Numbers of vehicle movements/ fill operations***

3. Of importance to each of the deemed reasons for refusal is the number of additional HGV traffic movements that will be generated by the proposed development.

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<sup>1</sup> LCL has raised a number of what I shall call “jury points” on the noise case. These are points that have no relevance whatever to the merits of the appeal and to the issues that must be determined on the appeal but which are raised for prejudice only to try and discredit the Council. I shall for completeness briefly respond to these points:

First, that the officer report for the 10 October 2005 meeting contained a fundamental error as regards noise and a BS4142 assessment in that it gave a 52dB figure for predicted noise emission whereas the correct figure was 42dB (see e.g. Mr Sharps proof at pp. 4 – 5). However, the error was picked up and corrected orally by officers at the 10 October 2005 meeting (see the minutes, Gurtler App. 12).

Second, that the Council have had “two or three” or “a whole string of” noise consultants. The Council employed RPS to advise on noise prior to the 10 October 2005 meeting. A draft report was produced for the meeting and a final report was provided in November 2005 and has been disclosed. The Council employed Capita Symonds to present its noise evidence at the inquiry. There were never any other consultants employed. Nor is there anything “suspect” about the Council changing its consultants on one single occasion.

<sup>2</sup> LCL in a number of places in its evidence (e.g. in the proof of Mr Grant) seek to suggest that the fact that the Council has maintained its case on dust (albeit limited to track-out and perception or “the fear factor”) is “surprising” given the content of the officer report for the 10 October 2005 meeting. However, as demonstrated in XX of Mr Grant the Council’s case on dust etc. as advanced at this inquiry is firmly based upon matters set out very clearly in that report: see pp. 21, 24 – 25 and 27 of the officer report, Gurtler App. 11.

4. The relevance of the number of additional HGV traffic movements to deemed reasons for refusal 1 and 2 is obvious (both in terms refer to the generation of additional HGV traffic). It is also critical to deemed reason for refusal 3 as demonstrated in XX of Mr Sharps and as considered further below (in short a key input into Mr Sharps BS4142 assessment was an assumption of no more than 56 HGV movements, and 25 lorry fills per day).
5. It is thus necessary to consider vehicle movements as a preliminary matter.
6. LCL's evidence in this regard is as follows (see paras. 5.4 – 5.9 of Mr Bellamy's proof):
  - 50 movements by concrete mixer trucks;
  - 6 movements in relation to cement deliveries (based on 3 per day);
  - 6 movements related to private collections (Mr Bellamy says that such collections are not always by HGV but it is agreed (see para. 5.7) that they are to be treated as such for the purposes of this appeal).
7. The crucial input is the number of concrete mixer movements. The Council's peer review of Mr Bellamy's April 2003 Transport Assessment said this of the information then provided on the traffic generation of the proposed plant: "No independent observations have been provided in the Transport Assessment to allow us to verify the ... predictions ... In the absence of that information, we cannot yet conclude that the above traffic generation predictions are accurate" (see p. 2 of the letter dated 31 August 2005 from Steer Davies Gleave, Gurtler App. 17).
8. LCL's prediction has never been subjected to independent analysis or verification.

9. The 50 movements per day set out in Mr Bellamy's evidence is based on the evidence of Mr Casey who says in his proof at para. 3.42 "[h]aving regard to [LCL]'s experience in Greater London, we anticipate that on average one mixer truck will achieve five deliveries per day" and thus with 5 lorries being based at the appeal site it is contended there will be on average 25 fills per day, hence 50 movements. Mr Bellamy accepted in XX that he undertook no independent analysis for the purposes of the prediction. The prediction is not based on any TRICS or other such data sources. Mr Bellamy carried out no traffic counts at any of LCL's plants.
10. The following is of note:
- in making the planning applications no evidence was provided to support the average number of trips referred to in the April 2003 Bellamy Roberts Traffic Assessment (at section 5);
  - at the time proofs were exchanged no evidence whatever was provided in support of the assertion by Mr Casey as to the average 5 deliveries per day per truck (as Mr Bellamy in XX);
  - the Council's requests for further information on concrete mixer deliveries and private collections (see below) were refused in the lead up to the inquiry (see the e-mails and correspondence referred to in XX of Mr Bellamy, Gurtler App. 20);
  - during the first week of the inquiry following my raising the point LCL provided to the Council graphs purporting to show the average number of loads across 10 LCL plants for 2004 and 2005 (up to June 2005) per month and per year (these are now exhibits MK1 and MK2 to the statutory declaration of Mr Kodia, Bellamy App. 6).
  - At the time that these graphs were provided it was also said that some further evidence would follow explaining the graphs and that some further information (unspecified) for the latter half of 2005 would be

provided in part in response to the Council's 10 November 2005 Wembley traffic survey (Gurtler App. 4);

- this additional information was, in the lead up to the resumption of the inquiry, chased by e-mail and letters in January and February 2006 without success;
- in the course of the February sittings of the inquiry the statutory declaration of Mr Kodia was provided and included a new graph relating to July – November 2005 (Bellamy App. 6). The declaration was dated early January 2006 but was not provided (despite the written requests) until 15 February 2006 when the inquiry resumed.

11. The graphs now provide LCL's primary evidence on HGV movements.
12. At no time has any of the background data upon which these graphs are based been provided. Not even a sample of the data for a particular period (even a single day) has been offered. Accordingly, the correctness or otherwise of the graphs is not something which the Council has itself been able to verify. Mr Harris in the course of Mr Casey's EC said that the Council do not suggest that the graphs "tell a lie about themselves". However, the stark position is this: the Council is unable to express any view on the accuracy or otherwise of the graphs. The process of obtaining the very limited information that is now available has been akin to drawing teeth. And all this notwithstanding that, as Mr Bellamy accepted in XX, trip generation is not just relevant but "essential" to any assessment of all 3 of the Council's deemed reasons for refusal.
13. Mr Kodia's declaration does not so much seek to explain how the averages in the graphs were derived but instead offers reasons why the background data on which they are based has not been provided to the inquiry. The

failure to provide some or all of the background data has been justified by 2 points: (i) the confidential nature of the information (see para. 7 of Mr Kodia's declaration) and (ii) the difficulties in accessing such information (see para. 8 of Mr Kodia's declaration). Mr Kodia also says that information on the number of fills/movements "is not information that is normally required by the company due to the way in which this data is produced ...".

These points are not good ones:

- As regards the confidential nature of the information it cannot be seriously suggested that some or all of the background data could not have been provided in a redacted form. Mr Casey accepted that this was so in XX;
- As regards the accessibility of the data it is submitted that contrary to what Mr Kodia says it is difficult to believe that the number of fills must be not a key piece of data within the business. The lack of accessibility of such material is in any event highly surprising. Defra's LAPPC guidance note on concrete batching plants, process guidance note 3/1 (04) (see Mr Grant's App. 3) states that "good practice" requires accurate and accessible record keeping of deliveries (see para. 3.14) to allow for proper monitoring. Mr Grant in XX accepted that accurate record keeping of lorry fills that was accessible to regulators was a requirement of good practice under the LAPPC regime. It appears LCL do not follow good practice in this regard. The bottom line is that a highly qualified and very experienced computer expert required a "period of weeks" (SEE PARA. 9 OF Mr Kodia's declaration) to access LCL's data.

14. The absence of the background data means that not only can the figures asserted not be verified but the pattern of movements cannot be determined. LCL seek to rely on a finding of the Inspector in the Tolworth AD that the

trips would be spread “relatively evenly” throughout the day (see Mr Woolner’s App 9, para. 34). However, it is plain that the Inspector at Tolworth had no more information on such matters than is available here (indeed it is quite likely he had less given what has been begrudgingly produced during this inquiry). It cannot be assumed the loads will be spread evenly throughout the day. The evidence of Messrs Gurtler and Fiumicelli based on their observations at Wembley was that all the mixer trucks based at the site filled in the first hour of operation. Mr Gurtler’s evidence at para. 5.9 of his proof is also pertinent:

“5.9 Thus, at 07.00 it is likely that all five mixer trucks located at the site will be loaded and leave the site within the first 45 minutes ... As the day proceeds, with lorries frequenting different sites, the arrival and departure times will be more spread out. However, the delivery and laying of concrete is affected by the weather, thus if it is raining sites are unlikely to require concrete, though with improvements in the weather, construction sites will seek to catch up, trying to reschedule deliveries that had been halted. Consequently, concrete mixer trucks will again congregate at the batching plant and leave within a short space of time”<sup>3</sup>.

15. Mr Kodia’s declaration and the graphs provide no information as to the pattern of fills/ and movements throughout a day. The dispute between the parties as to the daily pattern of movements must, it is submitted, be resolved in the Council’s favour. The information required to verify the patterns lay in the hands of LCL and it has chosen not to adduce that evidence.
16. Furthermore, it will be submitted below that the assessment of environmental effects should be undertaken by reference to fills/ movements on a worst case scenario i.e. a day of high production. The monthly averages

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<sup>3</sup> Note also the Council’s Wembley traffic count (Mr Gurtler’s App 4) shows all 9 lorries based at that site filling and exiting in the first hour.

in the graphs do not tell us anything about fills/movements on such days. What can be derived is that looking at, for example, the 2004 figures in MK1 for Battersea for August the average number of fills per vehicle was 6.34 and thus the number of fills/movements per lorry on a day of high production in August would have been higher. How much higher it is simply impossible to tell from the information provided by LCL (see also for Wembley in February 2004 the 6.74 average and for Heathrow in May 2004 the 8.38 average).

17. In terms of the assertion of a 5 delivery average per concrete mixer per day on which the 50 per day average is based it should be noted that:
- First, in the Battersea 2002 AD (Gurtler App. 8) at para. 8 the Inspector noted that the evidence before her was that in Greater London a concrete mixer averaged 7 deliveries but that the particular circumstances of that site dictated a lower average of 5. No explanation has been offered of why the average has decreased from 7 to 5 in the period 2002 – 2005. Mr Bellamy (who was at the 2002 Battersea inquiry) accepted in XX that the natural inference to be drawn from para. 8 of the Battersea 2002 AD was that the Greater London average referred to by the Inspector derived from LCL’s own evidence at that inquiry;
  - Secondly, the Council’s traffic count at Wembley suggested an average of 7.33 fills per mixer lorry. The results of this count were criticised by Mr Harris in XX of Mr Gurtler. It is accepted that there are a handful of errors (at most 6) in the manually entered data<sup>4</sup>. Does that make it “worthless”? No. What is plain from the survey is that there were in total 9 mixer lorries that made 66 trips in and 66 trips out, i.e. 7.33 fills

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<sup>4</sup> The most likely explanation for such errors is that the manual count inaccurately recorded the registration number and so the recorded movement was by Lorry B rather than Lorry A.

per lorry. LCL producing its records for Wembley for that day could have rendered this survey irrelevant. LCL chose not to. More information was promised to assist in this regard but all that was produced were the graphs in MK3 to Mr Kodia's declaration. This does not provide any information about movements at the Wembley plant on 10 November 2005. The best evidence of that remains the Council's traffic survey (Gurtler App. 4);

- Thirdly, in *LB of Richmond v London Concrete Ltd* [2001] EWHC Admin 1077 (Gurtler App 18) the High Court referred to evidence (given on oath in criminal proceedings by amongst others Mr Casey) to the effect that a LCL driver "would do anything between 5 to 8 different jobs a day" (see para. 7). This suggests that 5 fills per day is the lower end of the average number of fills for a LCL concrete mixer. This evidence lends further weight to the Council's case that the average is likely to be closer to 7 than 5.

18. If the average of deliveries of lorries is taken to be 7 not 5 one is looking at 82 not 62 HGV movements per day from the appeal site (assuming in LCL's favour that the cement deliveries and private collections are as estimated by LCL and are not also higher – it is, of course, entirely possible that more fills may require more cement and hence more cement deliveries): see the revised agreed tables at Gurtler App. 15<sup>5</sup>.

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<sup>5</sup> As regards private collections the only evidence is paras. 3.43 and 3.44 of Mr Casey's proof. Again no background data has been provided despite requests (see above). Mr Bellamy assumed 3 collections per day based on the LCL average - asserted to be 2.53. The table at para. 3.44 of Mr Casey's proof shows at Wembley the average is 5.56. Mr Casey says at para. 3.43 of his proof that he sees no reason why the proposed plant would attract more private collections than the company average, however the fact is that it is his own evidence that the appeal proposal is one that is needed in the Borough because of the absence of any other concrete batching plants. This fact may give rise to a higher level of movements in this regard. Also of note is Green N8's evidence based on visits to Battersea that there are in fact many more private collections than suggested by LCL at this site.

19. In any event whatever the position as regards the *average* number of movements the fact is that in terms of assessing the environmental impacts of the proposed development the focus should not be on the average but on the *worst case* scenario in relation to concrete mixer movements.
20. There is strong support for this view in the 1999 (Gurtler App. 8) and 2002 (Gurtler App. 9) Battersea ADs, see especially paras. 8, 11 and 12 of the latter AD. The Inspector in the latter AD accepted that the average number of movements would be lower, that the maximum level of production was unlikely to be achieved on a continuous daily basis but that in assessing the effect on the local environment it was prudent to take the worst-case scenario. That approach is supported by well recognised principles of environmental law such as the precautionary principle. It is also the proper approach mandated by the IEA Guidelines as applied by the Inspector in the 2002 Battersea AD.
21. The worst case based on “favourable conditions” (i.e. favourable to LCL in terms of the concrete market, that is high demand on a construction site close to the appeal site) is 10 fills per lorry per day (see especially para. 8 of the 2002 Battersea AD and para. 30 of the 1999 Battersea AD). On that basis and again assuming no increase in cement deliveries or private collections one is looking at a total of 112 HGV movements (100 concrete mixer movements (i.e. 50 fills), 6 cement delivery movements and 6 private collection movements)<sup>6</sup>: see again the agreed revised tables at Gurtler App. 15.

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<sup>6</sup> It is of note that the “worst case” postulated by the Council assumes on a day of high production no additional cement deliveries or private collections beyond the average asserted by LCL. It is of course possible, if not likely, that there would be more of these movements also on such a day.

22. It might be contended that detailed consideration of the above matters is unnecessary in the light of LCL agreeing to a draft condition (see Document 18, suggested planning conditions) limiting the average number of concrete mixer lorry movements to 50 per day; private collections and cement deliveries to 5 each a day. However, the condition is not an answer. Even leaving aside any issues of enforceability the restrictions operate on the basis of a 50 per day average being assessed “on a 5 day average”. There are a number of points to be made:

- first, in relation to deemed reasons for refusal 1 and 2 the adverse environmental effects in terms of dust, noise etc. from HGV traffic movements must be assessed against the IEA Guidelines and on the basis of the “worst case scenario” (see above). Thus one looks at the net increase of HGV movements on “days of high production” (see para. 18 of the 2002 Battersea AD). Given the provision for assessment on the basis of a 5 day average the worst case scenario mooted above of 50 fills and 100 concrete mixer movements could still lawfully occur under the terms of the condition on any particular day;
- second, in evidence LCL suggested the answer to the issues raised in the first bullet point above was an amendment to the condition to impose a limit on the daily number of concrete mixer movements at say 70 or 75. LCL has though made clear that it does not accept such a condition is necessary. However, even if a daily restriction were imposed as has been suggested by LCL then the worst case scenario on a day of high production would be 82 – 87 HGV movements (70 or 75 concrete mixers movements, plus *at least* 6 cement delivery movements and 6 private collection movements). This would produce a total number of HGV movements of somewhere between the London average and worst case scenarios contended for by the Council and shown in the revised agreed tables at Gurtler App. 15. The Council has proposed a 60

movements a day maximum, at the time of writing LCL's response to this is not known. However, the fact is that the Council's evidence based on trips above and beyond the 50 per day contended for by the Appellant remains highly relevant even if a daily maximum restriction is included;

- third, the condition also does not provide an answer in terms of deemed reason for refusal 3. Noise (during the day) is generally assessed over a 1 hour period (see BS4142) or a 12 hour period (see e.g. Mr Sharps WHO assessment in this case). In any 1 hour period there could still be up to 5 fills without any breach of the 50 a day average. Similarly in any 12 hour period there could be far more than the 25 fills assumed by Mr Sharps without any breach of condition because of the 5 day average. True it is in relation to the latter point that more fills on day 1 than the average would mean less on other days but people are not less annoyed by noise on a Monday at 8am because it is then quieter on a Tuesday afternoon. This is not the real world, nor (happily) is it the way in which technical noise assessments are undertaken.

***(2) The policy context***

23. There are several matters that need to be emphasised under this heading:
24. First, there are a number of policies in both the UDP and RDDUDP aimed at protecting the local environment and residential amenity.
25. Thus in the UDP, see: RIM3, p. 191; DES 5, p. 143 (referring to the protection of the character of existing residential areas from inappropriate forms of development); DES 1.9 p. 153 (and para. 8.57 of the supporting text referring to the aim of protecting the amenity of residents and the local environment from pollution and nuisance resulting from new developments)

and RIM 3.2 and 3.3, p. 198 (dealing with pollution and nuisance from new development and road traffic). And in the RDDUDP, see: UD2 and paras. 2.9a and 2.10. Similarly in the London Plan there are various policies on protection of amenity and environment.

26. Secondly, turning to the employment policies despite the fact that the appeal site is within a DEA the acceptability of a B2 use such as that in issue is subject to the assessment of environmental factors:

- see in the UDP para. 1.11 p. 24; para. 1.25 p. 25 (referring to “ a balance between economic development and environmental quality” and the employment policies supporting “economic development ... where it is appropriate and where it can be accommodated without adverse effects on the amenity and character of the local environment is the guiding principle”); para. 1.27, p. 25; EMP3, p. 29, EMP 3.2 (on bad neighbour businesses), p. 29; and EMP 1.1 p. 25 at para. 1.27;
- in the RDDUDP the appeal site is within an Industrial Location DEA where (see para. 5.11, p. 111) B1, B2 and B8 uses may acceptable in principle but subject to consideration of environmental factors; para. 5.17 p. 112 which recognises that general industrial and warehousing activities “could have a detrimental impact on amenity” and thus require careful consideration.

27. So the bottom line is in that in terms of the RDDUDP a general industrial use is one that *may* be accommodated in an Industrial Location DEA but subject to assessment in each individual case as to the potential adverse impact on amenity and the local environment. This must be right, there are in total 22 DEAs in the Borough (see Schedule 3 p. 193 of the RDDUDP). 13 of these DEAs are Industrial Location DEAs (see again p. 193). Furthermore, a number are quite large. If an Industrial Location DEA

borders housing on one side and not another it is quite possible, having regard to environmental considerations, that a general industrial use is acceptable in one part of that Industrial Location DEA and not on another part. It cannot be that allocation as an Industrial Location DEA means that B2 (as opposed to B1 or B8 use) is acceptable anywhere in the DEA irrespective of environmental considerations. The Atkins report (referred to in XX of MR Stephenson, Gurtler App. 13) provides further support in this regard. Thus at p. 4-5 para. 4.12 Cranford Way is noted as a DEA with poor access “using congested single carriageway routes passing through ... residential neighbourhoods ...” and at p. 4-6 para. 4.17 it is said that in relation to Cranford Way that “[t]he impact of traffic through residential areas” was identified as giving rise to “[r]esidential amenity issues relating to noise dust, odours, visual impact etc. were identified at the same locations”. Cranford Way is one of only a handful of Industrial Location DEAs singled out by the Atkins as giving rise to potential amenity issues.

28. Thirdly, as regards policies supporting rail freight use:

- At the local level Mr Woolner’s proof makes clear that the aim of retaining existing and encouraging new rail freight is subject to the proviso that “these do not give rise to undue local environmental disturbance” (see paras. 7.13 and 7.14 of the UDP);
- Similarly at national level policies encouraging rail freight such as para. 93 of MPG6 (Gurtler App. 22) cited in part by Mr Woolner at 5.13 of his proof goes on to say “*However problems may arise in the local area surrounding rail distribution depots. Planning authorities should, individually or collectively, have regard to these factors when drawing up policies in their development plans on such matters as transport modes and routeing*” (emphasis added).

29. Mr Woolner's assertion (see para. 8.4 of his proof) that the LCL proposals comply with all relevant provisions of the UDP and RDDUDP needs to be assessed, as he accepted in XX, in the light of the above environmental policies. If it is found that the appeal proposals give rise to adverse environmental and amenity impacts then the proposals would not be in accordance with the Development Plan.

***(3) The relevance of fallback/ alternative use arguments***

30. LCL through various of its witnesses have suggested a number of matters that could be seen as fallback arguments: see Mr Woolner's proof at p. 55 and appendices 14 and 15; Mr Grant at para. 6.3.3 of his proof and Mr Bellamy's proof at paras. 8.3 – 8.12 and 8.34. However, all of these witnesses accepted in XX that they were not making a "fallback argument" as such but they nonetheless continue to rely on possible alternative uses of the appeal site in order to try and bolster LCL's case. Accordingly, these issues need some further consideration.
31. For a fallback to be a relevant consideration there are two requirements:
- first, that there is a lawful ability to undertake the fallback use i.e. one is concerned with what the applicant could do *without* any fresh planning permission (see P70.30 of the Planning Encyclopaedia);
  - secondly, that the prospects of the "fallback" actually occurring must be real and not merely theoretical (these tests were also set out by the Inspector in the 1999 Battersea AD at para. 19)
32. Under the Town and Country Planning General Permitted Development Order 1995 ("the GDPO 1995") Schedule 2 Part 17 (Gurtler App. 23) it is provided that the following is permitted development "Development by

railway undertakers on their operational land, required in connection with the movement of traffic by rail”.

33. Relying on this various LCL witnesses mooted alternative uses of the site for: (i) aggregate storage; and (ii) a site “for the transfer of intermodal containers, fmcg<sup>7</sup> and parcels traffic”: see Woolner’s App14, p. 2, and App 15, para. 5.4.
34. There are a number of points to be made (all accepted by Mr Woolner in XX):
- First, LCL is not a railway undertaker and so it could not rely on these permitted development rights (see para. 30 of the 1999 Battersea AD). Thus LCL or any other person seeking to use the appeal site as an aggregates depot or for B8 purposes would require planning permission, and would hence fail the first test and not be a fallback;
  - Second, it is not possible for permitted development rights to be transferred from a railway operator to another party (see para. 21 of the Battersea AD<sup>8</sup>);
  - Third, it is accepted that EWS is a railway undertaker, however:
    - i. EWS could not under its permitted development rights build a concrete batching plant, as excluded from the scope of permitted development by railway undertakers is the construction or

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<sup>7</sup> Fast Moving Consumer Goods (FMCG) are products that have a quick shelf turnover, at relatively low cost and don’t require a lot of thought, time and financial investment to purchase. Fast Moving Consumer Goods is a classification that refers to wide range of frequently purchased consumer products including: toiletries, soaps, cosmetics, teeth cleaning products, shaving products, detergents, other non-durables such as glassware, bulbs, batteries, and plastic goods such as buckets. ‘Fast Moving’ is in opposition to consumer durables such as kitchen appliances that are generally replaced less than once a year. The category may include pharmaceuticals, consumer electronics and packaged food products and drinks, although these are often categorised separately: see <http://en.wikipedia.org/wiki/FMCG>

<sup>8</sup> “Part 17 Class A of [the GPDO] refers only to “development by railway undertakers”. It makes no provision for others acting with the agreement of the undertaker or a tenant, or a party in contractual cooperation with the undertaker to benefit from those rights”.

erection of “a building used for an industrial process” unless located in a station;

- ii. As regards an aggregate depot there is no evidence that such development would be forthcoming were this appeal to be dismissed, the documents provided by EWS (see Mr Woolner’s App. 14 and 15) refer to the existence of lawful use rights on the part of EWS but make no suggestion whatever that this will be exercised. The possibility is wholly theoretical<sup>9</sup>. Further, despite an erroneous suggestion by Mr Harris in XX of third parties there is no evidence of the appeal site ever having been used to unload materials such as spoil/waste related to the King’s Cross development<sup>10</sup>;
- iii. Indeed it is submitted by the Council that an aggregates depot under permitted development rights is only more than a wholly theoretical possibility if this appeal is allowed, not if it is dismissed. If the concrete batching plant is permitted then there would be rationale for having an aggregates depot on the appeal site. It is of note that all other LCL plants (except Watford, as Mr Harris reminded us, in RX of Mr Woolner) have an aggregates depot associated with or adjoining them. Hence if anything this fallback/alternative use argument supports the refusal of this appeal as allowing the appeal is likely to encourage further harmful (albeit *arguably* permitted, see below) development of

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<sup>9</sup> In his proof Mr Casey says “[i]t is not unusual for EWS under their statutory powers to open up a railhead such as Ferme Park to enable a temporary facility to supply aggregates by rail for such schemes as the Pump House” (see para. 2.12). This is suggesting no more than a wholly theoretical possibility. We know that the appeal site was not so used for the purposes of the construction of the Pump House (see para. 2.9 of Mr Casey’s proof).

<sup>10</sup> A note on this was promised but in the end it was accepted that the position was as set out in para. 5.3 of Mr Woolner’s App 15. The use of the appeal site at present is solely for the “stabling” trains (see para. 5.1 of Mr Woolner’s App 5.1). The use of the sidings on the appeal site as a recess for trains during the construction of Kings Cross is all that there is evidence of. NB unloading of spoil/waste etc. would require a waste deposit licence – there is none for the appeal site.

the area which would not be a realistic prospect but for the appeal proposals;

- iv. As regards any use of the appeal site “for the transfer of intermodal containers, fmcg and parcels traffic” by EWS there are a number of points:
  1. despite EWS asserting that the use of Ferme Park as a transfer facility is “a distinct possibility” (see para. 5.4 of Mr Woolner’s App 15) no evidence is provided of this possible development having been given any real consideration, as Mr Woolner accepted in XX;
  2. the Council have not been consulted or approached about such a proposal. The Council’s practice in relation to railway permitted development is to require the railway undertaker to make a s. 192 application in order to establish the lawfulness of what is proposed;
  3. under Art. 3 of the GPDO (Gurtler App. 23) permitted development rights are removed if the development is EIA development. The use of Ferme Park as a transfer facility for North London or indeed as an aggregates depot might well require a site in excess of relevant thresholds in para. 10 of Schedule 2 (Gurtler App 23) and hence not be permitted, as Mr Woolner accepted in XX. The fact is none of this can be known until EWS put forward a firm proposal. They have not done so. The documents at Mr Woolner’s Apps 14 and 15 are no more than an attempt by LCL to bolster this appeal. The possible exercise of

permitted development rights by EWS remains a wholly theoretical possibility<sup>11</sup>.

35. LCL's evidence (see Mr Bellamy's proof at para. 8.5 and Mr Woolner's at paras. 8.39 – 40) also moots the possibility of some other type of B8 use on the appeal site, i.e. not one the subject of permitted development rights. However, this cannot be, and is not said to be, a "fallback" as it would unquestionably require planning permission and as such could be conditioned.
36. Applying the relevant legal tests (see above) there is no fallback that can be taken into account as such. Note that in any event as regards a B8 use of the appeal site, Mr Bellamy's evidence is that such a use would generate 38 HGV trips per day compared to the 62 he estimates for the use proposed by this appeal, i.e. only 60% of the HGV trips. The Council, of course, say the figure as regards the appeal proposal is potentially higher, see above. In the light of all the above matters LCL's fallback/alternative use arguments should be given no weight.

**DEEMED REASON FOR REFUSAL 1 - DISTURBANCE TO RESIDENTS IN NEARBY ROADS, IN PARTICULAR TOTTENHAM LANE AND CHURCH LANE, TO A DEGREE WHICH WOULD UNACCEPTABLY DETRACT FROM THE AMENITY OF THOSE RESIDENTS**

37. The Planning Applications Sub-Committee proposed that the application should be refused on two amenity deemed reasons for refusal. Reason 1 stated that:

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<sup>11</sup> In this regard note should be taken of the evidence of Mr Daniel Smith of Sllb on behalf of the freeholder of the Cranford Way Industrial Estate. His view was that the appeal site has an unused appearance and had since 1996 (when his client acquired the freehold) not much been used for any purposes. He considered the exercise of permitted development rights by EWS to be "specious", a conceptual possibility but not a real possibility given the site size and its history of under-use.

- At least 56 HGV movements would be generated;
- Additional traffic would result in disturbance to residents in nearby roads (especially Tottenham Lane and Church Lane) to a degree that would unacceptably detract from their amenity; and
- Consequently the proposal would be contrary to policies in the UDP and RDDUDP.

### ***Additional HGV Movements***

38. The key focus of deemed reason for refusal 1 is the impact on amenity on Tottenham Lane and Church Lane as a result of the additional HGV movements.
39. LCL's principal answer to this proposed reason comes in the proof of Mr Bellamy, where based on his traffic generation estimate of 62 additional HGV movements he estimated an increase in HGV traffic flows of between 2% on Tottenham Lane south of Church Lane up to 9.8% on Church Lane (see para. 8.21 and table 6 of Mr Bellamy's proof). Mr Bellamy then judged these increases against the IEA Guidelines and expressed the view that the guidelines indicate "that further consideration of the environmental impact of traffic is not normally justified where increases in traffic flow are less than 30%, either in total flow, or when considering HGV activity alone. Even in specially sensitive circumstances changes in traffic flow of less than 10% are not sufficient to justify further consideration of environmental impacts" (see para. 8.22).
40. There are three things that need to be considered at this juncture:
41. First, there was an error in Mr Bellamy's figures (as the XX by Green N8 demonstrated). The result of the correction made in Mr Bellamy's oral

evidence is that the increase in HGVs on Church Lane is in fact 15.98%, see Gurtler App 15 “Tables traffic figures (amended)”.

42. Second, if one takes the average fills argued for by the Council (see above, i.e. based on 7 fills per lorry per day i.e. a total of 82 HGV movements per day) then the increases in HGV traffic are as follows (see further Gurtler App 15 the corrected note produced for the purposes of XX of Mr Bellamy):
- Tottenham Lane (East of Cranford Way): 10.85%
  - Tottenham Lane (West of Cranford Way): 10.41%
  - Church Lane: 19.07%
43. Furthermore, if one takes the position under favourable conditions i.e. as described in paragraph 21 above the worst case scenario in environmental terms, the worst case-scenario which it is submitted is the proper basis for assessing potential adverse environmental effects (see above) then the increases are as follows (again see the revised agreed tables in Gurtler App. 15):
- Tottenham Lane (East of Cranford Way): 14.81%
  - Tottenham Lane (West of Cranford Way): 14.21%
  - Church Lane: 23.71%<sup>12</sup>.
44. The position if a maximum daily limit of 75 concrete mixer movements were applied would be percentage increases lying between those given in paras. 42 and 43 above i.e. in the case of all three routes referred to above increases in excess of 10%.

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<sup>12</sup> As explained above the proposed draft condition on average numbers of movements does not prevent these issues arising.

45. Third, an issue arises as to whether rule 2 of the IEA Guidelines applies the 10% threshold in sensitive areas to increases in HGV movements as well as overall traffic flows. It is submitted that rule 2 should be so read for these reasons:

- First, looking at Mr Bellamy's written evidence it seems tolerably clear (see e.g. para. 8.24 of his proof) that this was his view. His view as expressed in his oral evidence was different but that is not surprising given that using the Greater London average or worst case scenario advanced by the Council increases in HGV movements exceed 10%;
- Second, it is absolutely plain that the 2002 Battersea AD used the 10% threshold for sensitive areas in relation to increases in HGV movements: see especially para. 18 where the Inspector looks at increases in HGV movements of between 9 and 20% on local roads in the context of the IEA Guidelines and a 10% threshold for increases in HGV movements (Mr Harris's intervention in the course of my XX of Mr Bellamy only served to illustrate the point, that the Inspector's reliance on the 10% in the IEA Guidelines can only have been in the context of increases in HGV movements as that is the only evidence referred to both in para. 18 of the AD and indeed the whole AD);
- Third, it would be very odd if in non-sensitive areas a percentage increase in HGVs equal to the percentage increase in overall traffic flows (i.e. 30%) was considered material but in "specifically sensitive" areas there was no such direct correlation between increases in HGVs and overall traffic flows. Indeed given the context i.e. "specifically sensitive areas" the words "large increase in the number of heavy good vehicles" (in para. 3.20 of the IEA Guidelines) without specific mention of 10% should be seen as suggesting that in such areas increases in HGV movements even below 10% might well be material. Note also

that para. 3.19 provides support for lowering the threshold (in that case the 30% threshold) where HGV increases are being considered.

46. On the basis that rule 2 does apply a 10% threshold to increases in HGV movements the position is that:
- On Mr Bellamy's own figures the increase in HGV's on Church Lane exceeds 10%;
  - Using the London average or worst case figures, contended for by the Council, all of the increases are above the 10% indicated as requiring further detailed investigation in sensitive areas.
47. Accordingly, it becomes important to assess whether this is a sensitive area for the purposes of the IEA Guidelines.
48. For the definition of "specifically sensitive areas" (the subject of rule 2 of the IEA Guidelines) one is directed (see p. 26) to paras. 2.4 and 2.5 (see Mr Gurtler's App. 6) which provides a list of relevant matters in determining if an area is sensitive<sup>13</sup>. This involves an assessment of affected groups and special interests such as people at home, people in work places, sensitive groups including children and the disabled, sensitive locations e.g. schools, and recreational sites.
49. It is submitted that the area affected by the additional HGV movements is a sensitive one having regard to:
- Tottenham Lane has the Haringey Boys Club<sup>14</sup> directly opposite the entrance to Cranford Way, this has a play group and nursery and also

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<sup>13</sup> Mr Bellamy in his evidence neglected to adduce this part of the IEA Guidelines.

<sup>14</sup> Mr Grant in XX also accepted that this was a "sensitive user" for environmental purposes.

numerous activities for children aged 0 – 12 (see the website entry produced in XX of Mr Bellamy, Gurtler App. 19);

- On Tottenham Lane near the junction with Church Lane there are residential properties on both sides of Tottenham Lane, and Church Lane itself also has residential properties on both sides of the road. HGVs exiting the site would pass within 6-10m of the front windows of the properties in both Tottenham Lane and Church Lane. The residents of these properties already experience harm to their amenities in the form of noise and general disturbance from the heavy traffic using the one way system;
- Information provided to the Council by Action for Kids (which is close to the exit of Cranford Way on to Tottenham Lane) is that they have 26 - 28 disabled students on site every day (see their letter dated 14 November 2005, a copy of which is on the file of third party correspondence)<sup>15</sup>;
- There are also sensitive employment users: Tradewinds screen printing (see below) and BFP Wholesale, a bakery ingredients distributor. The latter was identified by Mr Grant as a sensitive user in his November 2003 dust assessment.

50. Mr Bellamy fairly accepted in XX that all of these factors were: (i) relevant to the assessment of whether an area was sensitive; and also (ii) that they all *pointed towards* a conclusion that this was a “specifically sensitive area”.

51. Indeed the situation for residents in Tottenham Lane and Church Lane is very similar to that for residents near the Battersea batching plant (the subject of the 1999 and 2002 Battersea ADs). Messrs Grant and Bellamy in XX accepted that the environment surrounding the appeal site had “broad

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<sup>15</sup> Again Mr Grant accepted in XX that this was a sensitive user.

similarities” to that in Battersea as described by the Inspector in the 2002 Battersea AD in paras. 16 and 17:

- Messrs Grant and Bellamy in XX accepted that the following passages accurately described the local environment surrounding the appeal site:
  - i. Mr Gurtler’s para. 5.3: “[n]ear the junction with Church Lane there are residential properties on both sides of Tottenham Lane, and Church Lane itself also has residential properties on both sides of the road. HGVs exiting the site would pass within 6-10m of the front windows of the properties in both Tottenham Lane and Church Lane. The residents of these properties already experience harm to their amenities in the form of noise and general disturbance from the heavy traffic using the one way system”; and
  - ii. Green N8’s proof paras. 12.9 and 12. 10: “many of the properties in the locality are built on streets with narrow pavements and either no front garden or a very narrow front garden”;
- In the 2002 Battersea AD the Inspector found that a number of factors meant that the Battersea local environment was under “some environmental pressure” such that “tall and bulky HGVs such as concrete mixers passing near to front windows, or close to pedestrians, would have a more disturbing effect ...” and that “in these circumstances even small increases in current HGV traffic flows would have a significant cumulative effect on the living conditions of residents<sup>16</sup>” (emphasis added). The Inspector found the environmental pressure to be as a result of a number of factors (see paras. 16 and 17 of the 2002 Battersea AD):
  - i. the close location of residential properties to a large IEA i.e. industrial estate;

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<sup>16</sup> The Inspector referenced her conclusion to para. 3.13 of the IEA Guidelines.

- ii. the relatively large existing volume of traffic on the residential road affected;
  - iii. the dense pattern of development in the immediate area;
  - iv. that “[d]wellings are set near the back of the footway with front windows close to passing traffic, and rear gardens are particularly small” such that there was “little private space in which residents can enjoy quiet moments away from road traffic”;
  - v. the existing dusty conditions on local roads.
- Again Messrs Grant and Bellamy in XX accepted that all of these factors had direct parallels in the environment surrounding the appeal site such as to lead one towards a conclusion similar to the Inspector in the 2002 Battersea AD i.e. that even a small increase in HGV movements from the appeal site could have adverse cumulative environmental effects:
    - i. Tottenham Lane and Church Lane are located close to an Industrial Location DEA and already under “environmental pressure”, something supported by the references in the Atkins report to Cranford Way giving rise to amenity and environmental issues: see pp. 4-5 and 4-6 of the extracts.
    - ii. There has also been a great deal of evidence from third parties as to the heavily trafficked nature of Tottenham Lane with queuing of traffic up the hill a common occurrence.
    - iii. Like the residents in Battersea there is “little private space on which to enjoy quiet moments away from road traffic”.
    - iv. The pattern of residential development is dense and is close to the road (see above).
    - v. Furthermore, both Mr Grant and Casella Stanger (the Council’s dust consultants, see Grant App 8) identified in their reports

dusty deposits in Cranford Way: see p. 4 of the Casella report “[d]uring the course of the site visit, dust deposits were observed on Cranford Way, the likely source of which is re-suspension and entrainment of dust deposited from vehicles (body and wheels) entering and leaving Cranford Way Industrial Estate.” See also para. 6.3.2 of Mr Grant’s proof “I have observed loose potentially dusty deposits on Cranford Way and these can be entrained into the atmosphere by the passage of vehicles, including those travelling to and from the application site”. Note also Mr Grant’s evidence that dust deposition rates locally were at the upper end of those which are typical for suburban areas (see para. 5.1.1, c) p. 4 of Mr Grant’s proof.

- In terms of points of distinction between the environments surrounding Battersea and the appeal site:
  - i. Mr Grant suggested (i) that the Battersea area was more “enclosed”. It is not clear what he meant. Certainly the Battersea batching plant is more enclosed i.e. by railway viaducts but if anything that reduces its impact on its surroundings as compared to the relationship of the appeal site with its local environment; and (ii) that the existing dustiness of the local area was greater at Battersea than it is around the appeal site. Even accepting that to be so, it is a matter of degree;
  - ii. Mr Bellamy sought to suggest that the surrounding residential properties at Battersea were closer to the road than at the appeal site. This is not accepted by the Council. It is of note that Mr Casey when XXd by Ms Walton was asked whether LCL had a plant that had a similar relationship to residential development as would the appeal site to the surrounding residential areas. His

answer was that Battersea was “very similar indeed” in this regard;

- Although the 2002 Battersea AD was ultimately allowed despite the conclusions in paras. 16 and 17 it is important to note that this was on the basis that despite the harm to be caused this was outweighed by (i) the general sustainability benefits of the proposal, *combined* with (ii) the stopping of unnecessary HGV movements between the appeal site and another nearby LCL batching plant which was to be closed if the appeal were allowed (see para. 24 of the 2002 Battersea AD). Crucially, in terms of weighing the environmental pros and cons, that latter factor is wholly absent here (as Mr Bellamy accepted in XX). The Inspector in the 2002 AD considered the latter factor to be “significant” (see para. 24) and to outweigh the harms likely to result. Tottenham Lane and Church Lane do not currently experience to any degree movements of concrete mixers or aggregate delivery lorries which would be removed were the appeal to be allowed (as Mr Bellamy fairly accepted in XX). There are no concrete batching plants in the Borough. Thus the appeal will introduce further traffic in the form of HGVs and in particular concrete mixers to an already stressed local environment.

52. It is thus submitted that the additional traffic (above the thresholds contained in the IEA Guidelines for sensitive areas) would cause further harm to the amenities of the residents of Tottenham Lane and Church Lane.

53. Furthermore, as noted above, LCL calculate the movement of vehicles over a 12 hour period. However, as Mr Gurtler explained in his evidence the nature of the delivery of concrete is that there are peaks and troughs. Construction sites usually require a concrete pour at the start of the day, with demand slackening off towards the end of the working day (with the

last concrete pour around 17.00). At 07.00 it is likely that all 5 mixer trucks located at the site will be loaded and leave the site within the first 45 minutes. At this time of the morning the road is relatively quiet, consequently the movement of these vehicles is likely to adversely affect the residential amenities of occupiers of properties in Tottenham Lane and Church Lane.

54. In addition, Mr Gurtler's evidence is that the movement of concrete mixer trucks is invariably accompanied by the deposit of residue material on the roads, which is likely to be exacerbated by the climb up Tottenham Lane. There are also consequences for air quality (see Mr Grant's proof at para. 6.2.4).
55. It is clear from the Defra process guidance note (Mr Grant's App 3) that vehicle movements and "track out" is an issue in relation to concrete batching: see e.g. para. 4.2, p. 11, 4<sup>th</sup> bullet point; table 4 at p. 18 – 19 and p. 23, paras. 6.15 – 6.17 (as accepted by Mr Grant in XX).
56. The Inspector in the 1999 Battersea AD at para. 42 expressed the view that "even with the best run plant, there could be some track out", Mr Grant in XX accepted that this was so<sup>17</sup>. It is of note that the 2002 AD Inspector because of the stressed environment she found to exist in Battersea (and which is paralleled here, see above) held that there would be adverse environmental consequences even though "the proposed development would not give rise to nuisance in relation to dust". This was because of (see above) the existing dusty conditions and the volume of existing HGV traffic

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<sup>17</sup> If further evidence is required that track-out is inevitable even with the most modern and best run plants then this can be found in the evidence of Eleni Leoussi (given on 10 January 2005, Document 16.5) in particular see in her photographic tour pp. 14 – 18; 19 – 22; 29 - 32.

etc. i.e. the stressed environment into which the proposed use was to be introduced.

57. There is an additional point the Dust Management Scheme contains a number of “generalisations and aspirations rather than requirements which could via a s. 106 be enforced against London Concrete” (see the letter dated 13 February 2006 at p. 56 in Document 17.2, the bundle of correspondence with the Council’s comments on the draft s. 106). LCL’s solicitors’ response was that this was not accepted and that the Scheme contained “binding commitments”. However, Sir, in answer to your questions Mr Grant used the phrase “aspirational” to describe certain of the “requirements” in the Scheme.
58. Also it is of note that the focus of Mr Grant’s written evidence and of the dust management scheme is on concrete mixer collections rather than private collections. The potential for dust generation and hence track out is greater in relation to private collections. This, it is submitted, is for three reasons: first, because the concrete material is dropped from a greater height into a pick-up truck than it is into concrete mixers (Mr Grant accepted in XX that drop heights is a key factor in control techniques for processes covered by the Defra process guidance note, Mr Grant’s App 3); secondly, the material is dryer when subject to private collection (see Mr Grant’s answers in XX); and thirdly, the pick up trucks typically used for private collections do not enclose the collected materials nor are such materials necessarily covered (note that covering of materials is also emphasised as a control mechanism in the Defra process guidance note).
59. The other area where there is likely to be a significant increase in HGV traffic, with adverse impacts on the amenities of residential occupiers, is on

the ‘western loop’ of Cranford Way. LCL indicates that it has no rights of way over this loop such that this branch of Cranford Way will not be used, and they indicate that a condition would be acceptable. However, the Council take the view that there are difficulties about enforcing such a condition. There is no physical restriction on the use of the western loop: see Mr Bellamy’s answers in XX and see also the photographs at Gurtler App. 5.

60. When Cranford Way becomes blocked as it often does (see the photographs in Mr Gurtler’s proof at p. 14) the temptation will be to use the Western loop whatever the niceties of the legal position as regards rights of way. Mr Daniel Smith of Sllb representing the freeholder of the Estate in his evidence made clear his view that the reality was that whatever the planning or rights of way position the western loop would be used by LCL lorries because of the congested nature of the main road.
61. Furthermore, if Cranford Way were at any moment blocked the fact that LCL had a right of way over it would be of no real assistance, the temporary blocking of the route by a lorry manoeuvring could not be dealt with by legal action as was suggested by Mr Harris in XX of Mr Gurtler and the letter from Network Rail dated 2 December 2005 and which was produced in XX of Mr Gutler (Woolner App 17).
62. With rear gardens backing on to Cranford Way, and in some instances being below the road level<sup>18</sup>, the residents of properties in Uplands Road are likely

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<sup>18</sup> See para. 5.22 of Mr Gurtler’s proof “The gardens of nos. 30-54 are elevated above Cranford Way (with a retaining wall to the embankment within the Industrial Estate). The gardens of nos. 56-64 are only slightly above the level of Cranford Way, whilst nos. 66-74 are at the same level as Cranford Way. The gardens of nos. 76-94 are all below the level of Cranford Way, in some instances by 3.5m, thus the first floor level of these properties is at the same level as the estate road. Given the size of these rear gardens, only 8m in depth, and the distance of the rear elevation of the properties from the road, only 10m, it is

to have their amenities detrimentally affected by the proposal<sup>19</sup>. Note that it was the evidence of third party objectors (i.e. Frances Walsh at the first evening session, Document 16.2) that HGV's do currently make use of the Western loop.

### ***Disturbance to Residents Amenities***

63. The nature of the proposed development is that of a general industrial use (class B2), a form of use that would not normally be appropriate in a residential area. The fact that the appeal site is within an Industrial Location DEA (see above) is not determinative as the policy context suggests B2 use to be appropriate on such sites but subject to consideration of environmental factors, see above.
64. As set out in the SoCG, Cranford Way Industrial Estate is predominantly occupied by light industrial (class B1<sup>20</sup>) or warehouse/distribution (class B8)<sup>21</sup>. With the proximity of residential properties in Uplands Road, Tottenham Lane and Church Lane, the Council consider the impact on the amenities of occupiers of these residential premises as a material consideration (see the proof of Mr Gurtler at section 5).

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inevitable that if the HGVs associated with the proposed batching plant use the western loop there will be detriment to the occupiers of these residential properties”.

<sup>19</sup> The residents of Uplands Road have in the past experienced detriment to their amenity as a result of vehicle movements along the ‘western loop’. In this area, the freeholders of Cranford Way have erected signs warning occupiers to respect the neighbouring residents. The Council’s Environmental Health Officers have also made representations on applications for Goods Vehicle Operators Licences, due to the proximity of Units 7-11 to residential properties on Uplands Road.

<sup>20</sup> Class B1 comprises offices, research and development and any industrial process “being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.”

<sup>21</sup> Change of use from either class B1 or B8 to general industry (class B2) does not benefit from permitted development rights, thus the LPA will always be able to determine applications on the Cranford Way Industrial Estate for such proposals.

65. As noted in opening there has been significant opposition from local residents and businesses to the proposed batching plant. Petitions were submitted to the Council with in excess of 2000 signatures as well as 115 individual letters of objection to the application (with 155 to the first application). Numerous objectors have spoken at this inquiry. The sustained and vociferous opposition from local residents and businesses is an indicator that the impact on the amenities of the area will be unacceptable, with the environmental capacity of the area already having been exceeded. There is no doubting the genuine and very real fears of local residents as to the adverse environmental consequences of the proposed development in terms of dust, traffic etc. Indeed the level of public concern was accepted by Mr Harris as justifying the need for this inquiry (this was said at the close of the December sitting in the course of Mr Harris explaining why no costs application would be pursued by LCL). This public concern in itself is a material consideration supporting the refusal of planning permission: see *Newport CBC v Secretary of State for Wales* [1998] JPL 377 CA.
66. Residents in the area and occupiers of the Cranford Way Industrial Estate have indicated that frequently Tottenham Lane is congested. Mr Gurtler's evidence was that on the basis of his experience from other batching plant operations, in order to supply concrete for the start of a working day, many movements will be expected at the peak period (between 07.00 and 09.00), when Tottenham Lane and Church Lane have high traffic flows. There is a potential therefore for the HGVs to have to wait before being able to merge into the traffic. The heavy loads, together with the nature of the load, could increase the amount of noise, dust and fumes in this already polluted area.
67. It is worth recalling that the whole of Haringey had been declared an Air Quality Management Area, with particular concerns in relation to PM10s

(predominantly particulate emissions from diesel engines such as lorries) and NO<sub>2</sub> (predominantly from road traffic).

68. While it may not be possible to quantify these impacts upon the amenities of residents in the area, in terms of either air pollution or noise standards, the impacts need to be considered as part of the overall picture of general disturbance to the residents in the nearby roads.

### ***Amenities and Planning Policies***

69. National policy recognises that the condition of people's surroundings has a direct impact on the quality of their lives, and planning should seek to ensure the effective maintenance of the environment: see e.g. PPS1 and PPG4
70. This is reflected in policies in the UDP and RDDUDP which seek to protect the character of existing residential areas from inappropriate forms of development and ensure that new development in the Borough does not worsen the quality of life for those living and working in Haringey (see above).

### **DEEMED REASON FOR REFUSAL 2 – LOSS OF EMPLOYMENT**

71. The Planning Applications Sub-Committee resolved that were the applicants not to have appealed against non-determination, the Council would have refused the application for three reasons. The second of these reasons relates to employment, raising the following points:
- the additional traffic and its nature would by reason of noise and dust generation be detrimental to current operating and working conditions in Cranford Way;

- Cranford Way comprises predominantly storage and light industrial uses rather than the general industrial use proposed;
  - The proposal would discourage businesses from locating in Cranford way;
  - The proposal may lead to some occupiers moving out of their existing premises;
  - The proposal would lead to a net reduction of jobs in the Defined Employment Area (not offset by the creation of new jobs at the plant); and
  - Consequently the proposal would be contrary to policies in the UDP and RDDUDP.
72. The Council's case is that the nature of the additional traffic volumes arising from the development would, by reason of noise and dust generation, be detrimental to the operating and working conditions of the occupiers in Cranford Way. It is contended that existing and potential occupiers perceive these adverse effects, with the consequence that units on the industrial estate have remained unoccupied for long periods, whilst other existing occupiers have indicated that they are likely to vacate their premises. Consequently, although LCL has indicated that the proposal will generate 12 jobs (10 on site), there is a potential for a net reduction in employment in the DEA.

### ***Additional Traffic***

73. Using LCL's traffic generation figures the increase in HGV's using Cranford Way will be in the order of 50% (see para. 8.33 of Mr Bellamy's proof) well in excess of the 30% threshold in the IEA Guidelines. The percentage figure noted would increase further if either the 'Greater London

average' or the 'favourable conditions' were applied, with an increase in HGV movements on the southern part of Cranford Way of up to 65%<sup>22</sup>.

74. In terms of noise impact Mr Sharps evidence based on LCL's traffic predictions is of a 1.5dB difference in sound level on Cranford Way with and without the proposed development (see section 6, and especially p. 23 of Mr Sharps proof). If the worst case traffic generation figures were used the figure would be higher. On the basis of a 1.5 dB difference Mr Sharps says (see para. 6.10) that by reference to advice in PPG24 a change in noise level of less than 3dB is not perceptible. However, the Design Manual for Roads and Bridges, vol. 11, section 3, part 7 (Fiumicelli App L) on traffic noise and vibration at para. 3.5 suggests that in terms of changes in traffic flow "people may find benefits or disbenefits when the noise changes are as small as 1dB(A) ...". Mr Sharps accepted in XX that this did indeed provide some basis for looking at changes of less than 3dBA in relation to road traffic. The same point is made in the IEA Guidelines at para. 3.17 "[g]enerally, people cannot perceive a change in noise nuisance for changes in noise levels of less than 3 dB(A) ... Recent research (Braughan and Huddart, 1992) is tending to suggest that this threshold is likely to be reduced to 1dB(A)".
75. The nature of the increase in traffic will be predominantly HGVs, primarily concrete mixer trucks. Concerns raised by occupiers of units on the Cranford Way Industrial Estate (including Botswana Meat Commission, WHSmiths, Arsenal) include the increase in HGV movements within the estate. Concerns have also been raised by the freehold owners and long leaseholders of the Cranford Way Industrial Estate (see below).

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<sup>22</sup> LCL in their application did not consider the significance of these impacts upon the occupiers of the various commercial units.

76. A further concern raised by occupiers of the units in Cranford Way relates to the nature of the vehicles that will be using the batching plant. As noted above some track out is inevitable even from the most well run and modern of concrete batching plants (see above in relation to deemed reason for refusal 1).
77. The concern about track out is particularly acute in relation to the Cranford Way Industrial Estate for these reasons:
- First, there are a number of sensitive users located on the estate. At least one occupier (Tradewinds) has indicated that the potential increase in dust will adversely affect their screen printing business, consequently this firm is actively looking to relocate: see their letters in the bundle of objection letters, Gurtler App.10, at tab 6 dated 19 November 2004; 12 December 2004; and the e-mail dated 31 October 2005. Furthermore, notwithstanding the departure of the Botswana Meat Commission there remains BFP Wholesale a bakery ingredients distributor (who objected to the original application, see Mr Gurtler's App. 3 and see also para. 4.6, p. 6 of Mr Grant's original dust assessment submitted with the planning application).
  - Second, amongst the other occupiers who have objected dust is a key feature, see in the bundle of objection letters from the industrial estate: the Botswana letter dated 5 August 2004, at p. 2; the Botswana letter dated 19 August 2004 at p. 1 and 4; the letter from Sllb on behalf of Starmark Enterprises Ltd, the freeholder of the Cranford Way Industrial Estate at p. 1 and also the Sllb letter dated 1 September 2005 p. 1. It is important that the objectors include not just small businesses but large ones such as WHSmiths and Arsenal who have had the benefit of professional planning advice from well established firms (i.e.

Donaldsons and Hephher Dixon - see their letters dated 21 November 2005 and 23 March 2005) in making their objections.

- Third, to the extent that there is “track out” and dust generation as a result of the batching plant operations this is most likely to affect Cranford Way. We know this because Mr Casey tells us it is so in his proof at para. 3.35 where he says that to the extent dust is deposited on trucks while loading “if this was the case then it would be blown off the vehicle either prior to leaving the plant or *certainly before it left Cranford Way and entered Tottenham Lane*” (emphasis added). This echoes (as Mr Grant accepted in XX) something said in the Defra process guidance note (see Mr Grants App. 3) at para. 6.17. If correct this may provide *some* comfort for residents in Tottenham Lane and Church Lane but it provides no comfort to the occupiers and potential occupiers of the industrial estate. These matters impact on the employment deemed reason for refusal.

### ***Nature of the DEA***

78. Although the RDDUDP indicates that class B2 may be appropriate in Industrial Location DEAs, it recognises general industry could have a detrimental impact on the amenity of neighbouring uses and the environment, and this must be considered in each case. The batching plant proposal would fall within class B2, general industry.
79. At present the predominant use of the Cranford Way Industrial Estate is for storage and distribution uses (B8 Uses)<sup>23</sup>: see the evidence of Mr Stephenson at paras. 3.3, 3.9, 6.8 and 6.10 and appendix 1 of his proof and his answers in XX (as well as those of Mr Woolner in XX). The only non-

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<sup>23</sup> The SoCG states that the planning history for the estate encompasses light industrial uses, warehousing and ancillary offices. The current uses also fall almost wholly within these use classes (see e.g. Mr Stephenson’s App. 1).

storage and distribution use referred to by Messrs Stephenson and Woolner is Tradewinds which is said to be a “limited” or “partial” industrial use. Such use is almost certainly an ancillary use, see e.g. paras. 6.9 and 6.10 of Mr Stephenson’s proof<sup>24</sup> and the answers in XX of Mr Woolner.

80. Planning permission would be required for any changes of use from B8 to B2. There are no permitted development rights allowing change of use from B8 to B2 (there are rights that allow change of use from B2 to B8 up to 235 sq m, but not the other way around). Any such application for planning permission would be judged on its merits having regard to, inter alia, environmental and amenity considerations (see above). The Council could thus refuse or alternatively condition such uses where appropriate. Note again here the Atkins reports references to Cranford Way being 1 of only 6 of the total of 22 DEAs considered where environmental and amenity issues are specifically highlighted (see above).
81. The fact is that a potential occupier looking to locate to Cranford Way at the moment would know: (i) the use of the Estate is overwhelmingly for B8 uses; (ii) there were at present no B2 uses; (iii) planning permission would be required for any change of use to B2 and such an application would be assessed in the context of the environmental protection policies set out above notwithstanding the Industrial DEA location. As Mr Stephenson’s proof points out (at para. 5.4) different occupiers have different expectations and requirements and it is possible that some occupiers would be put off by the introduction of B2 uses. Furthermore, the introduction of such a use may well have an impact on the character of the Estate. Thus the clear perception from a number of the current occupiers and letting agents (as recorded in Mr

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<sup>24</sup> He refers to “a partial industrial process” (para. 6.8); the “main function” being “supply and distribution” (para. 6.9) and having regard to the rating list that “the predominate use” is warehousing and distribution (6.10)

Gurtler's proof and the bundle of objections) is that the proposal will be bad for the DEA, bringing in a 'dirty industry' which ultimately will push out existing occupiers and lead to units remaining empty or changing to general industrial use.

***Discourage Businesses Locating***

82. At the time of the submission of the first planning application in January 2004, it would appear that occupancy on the Cranford Way Industrial Estate was at about 95% (see e.g. Mr Stephenson's proof at para. 3.6 referring to the Atkins Haringey employment study 2004 and see also the note at Mr Woolner's App 6, p. 2).
83. At the time proofs were exchanged Mr Stephenson reported occupancy as being at 90% - units 10, 11 and 6a being unoccupied (although actually since November 2005 the large units at No. 15 Tottenham Lane, Botswana Meat have also been unoccupied, so that the actual vacancy level was even higher than 10%).
84. This 10% vacancy level as reported in November 2005 is higher than the Borough average which is 9.9%. This is surprising because as Mr Stephenson rightly points out in his proof at para. 3.7 the Borough average is explained by the fact that there are a number of estates in poor condition and with a poor image where levels of vacancy are higher. In contrast the Cranford Way Industrial Estate is as Mr Stephenson rightly notes in "good" condition and has a "good image" (see table 4.2 in Atkins report put in XX to Mr Stephenson). It is the only DEA rated as "good" for both condition and image. Furthermore, it is noteworthy that the Atkins Report (put to Mr Stephenson in XX) at para. 4.9, p. 4-4 states that there are only 3 DEAs rated as being in good condition, 50% are in fair condition and 35% in poor

condition. Accordingly, one would expect the vacancy level to be lower on a good estate like Cranford Way.

85. It is of note that following units 10 and 11 becoming vacant both remained unoccupied for about 2 years<sup>25</sup>. Unit 11 was let after 2 years, Unit 10 remains vacant and unlet (although apparently the subject of an offer). In XX of Mr Gurtler and in Mr Stephenson's EC it was suggested that the average vacancy period Borough wide for commercial premises was 18 months. Part of the justification for this average was a reference to something in the Council's comments and response to representations on the RDDUDP dated September 2004 (Woolner App. 18). However, the 18 months average therein cited relates only to Council owned properties which consists in large part of retail units. Mr Stephenson could offer no information on how well Council owned stock reflected the market generally. But even taking 18 months as the average vacancy period relevant in this case the vacancy periods in relation to Units 10 and 11 exceed this average. Of course that average includes estates rated as poor where periods of vacancy would be longer on average. One would expect shorter vacancy periods on an estate like Cranford Way that is rated as "good"<sup>26</sup>.
86. Furthermore, the fact that units 10 and 11 were being refurbished is not an explanation of the vacancy period (as was suggested in XX of Mr Gurtler). Refurbishing between lets is common and is doubtless accounted for in the Borough average. There is no evidence to suggest that the refurbishment lasted for a substantial period (which is what Mr Harris seemed to hint at in XX of Mr Gurtler). The e-mail from Tradewinds put to Mr Stephenson in

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<sup>25</sup> Mr Stephenson acknowledges units 10 and 11 are in the least attractive part of the estate, a part of the estate which it would seem is now perceived as even less attractive given the current proposal.

<sup>26</sup> Mr Stephenson's attempts to deny this obvious matter, which in fact arises from what he himself says in his proof, was painful.

XX (Gurtler App. 14) show the refit that took place lasted a month. The chronology (as accepted by Mr Stephenson in XX) shows: units 10 and 11 becoming vacant in February 2004, being refitted in April/May 2004 and being marketed from June 2004 i.e. for a period well in excess of 18 months before they were let<sup>27</sup>.

87. In order to ensure the continued viability of the Industrial Estate and to protect against any loss of employment the units must be readily and permanently lettable to the general run of tenants. The period of vacancy of units 10 and 11 as a result of the shadow of this application is ominous on an estate that is rated as “good” and which should be popular (see above). The period of vacancy in issue has coincided with LCL’s planning applications. The first application was made in January 2004, just before units 10 and 11 became vacant.
88. Mr Daniel Smith of Sllb representing the freeholder of the Cranford Way Industrial Estate referred to units 10 and 11 and the “blight” caused by the present application to the Estate. He also recorded the freeholders concerns about the time taken to let units 10 and 11. He referred to the fear that Cranford Way would become an “estate ghetto”. The long leaseholder (Waterbridge) has also objected through agents, and produced a report (see tab 5 of the objections bundle). The reason given for their objection was that their “land and premises will be directly affected by this proposal” (see the letter dated 17 March 2004).
89. There is no reason why the freeholder and long leaseholder of Cranford Way, who are both commercial investors, would have objected to the appeal

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<sup>27</sup> Furthermore, reference to the 3 year vacancy period specified in the RDDUDP as being required to justify a change of use from employment uses within a DEA is irrelevant. This provides no indication of the healthiness in commercial terms of a DEA. This was a point accepted by Mr Stephenson in XX.

proposals unless they took the view that it had the potential to damage their commercial interests i.e. by making units less easy to let. The objections of the freeholder and long leaseholders of the estate are thus important. It is clear that they perceive an adverse effect on the Estate as a result of the proposed development<sup>28</sup>. In RX of Mr Stephenson it was suggested that the fact that Waterbridge had refurbished units 10 and 11 showed confidence in the market despite the LCL proposals. However, it is plain the works were limited (they took a month or so, see the e-mail from Tradewinds and Mr Stephenson's RX) and took place prior to the 18 months of marketing and vacancy that ensued from June 2004.

90. In addition Tradewinds have been seeking to relocate as a direct consequence of the anticipated adverse impact on its screen printing business. Tradewinds confirmed that its letting agents (SBH Page and Read) have been unable to secure alternative occupiers to take over the company's lease. Tradewinds also state that three firms lost interest once they found out about the proposed batching plant. One firm named is Maxitech a computer software company and another is identified by business i.e. a film facilities company (see tab 6 of the objections bundle, Gurtler App. 10).
91. Finally, the point must be made that if existing occupiers of the stature of WHSmiths and Arsenal are concerned enough about the effects of LCL's proposals to object via professional agents it cannot be a surprise that smaller companies have also been put off by at the very least the perception of adverse affects likely to arise from LCL's proposal.

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<sup>28</sup> Mr Stephenson says in his proof if as the Council and the freeholder and others suggest "some occupiers may be dissuaded from acquiring premises close to an operation as proposed by the appellants then the only impact this would have (in theory) is some slight reduction in overall market demand which "could" ultimately be reflected in the rental or capital value which might be achieved for the property". In the light of that potential adverse impact, as well as the possibility that letting units would become more difficult it is easy to see why the freeholder and long leaseholder are objecting.

92. It is plain that in this context, where what is at issue is loss of employment because potential occupiers would be discouraged from locating, that the perception of adverse effects is itself material even if (which is not accepted) it is found to be unsupported by objective evidence. This goes beyond the point that fears of adverse effects can be a material consideration (see *Newport CBC v Secretary of State for Wales* cited above). In terms of factors influencing a potential occupier's decision a perception of adverse effects from the LCL proposals as much as actual adverse effects could operate (and indeed have done, see above) as a disincentive. Mr Stephenson accepted that but retorted that once constructed and operating the fears would be seen to be unfounded and hence the perception issue is one that can only run in the lead up to the grant of planning permission. This is incorrect. The perception of a concrete batching plant as a "dirty" B2 type industry could persist whatever was happening on the ground. That is to say that some occupiers would be influenced adversely by that type of development being present on the Estate full stop.

### ***Lead to Occupiers Moving Out***

93. Mr Gurtler's evidence is that within the Cranford Way Industrial Estate the occupiers of units 9 (Tradewinds), 15 (BFP Wholesale), 20 (Seltex) and 15A Tottenham Lane (Action for Kids) have indicated that they consider the proposal would adversely affect their businesses as a result of the additional traffic and dust associated with the proposal. Tradewinds specifically state that they are actively looking to relocate as a direct consequence of the proposal, whilst Action for Kids stated that they may relocate due to the

adverse environmental consequences of additional traffic and associated dust<sup>29</sup>.

94. These four occupiers currently employ (See Mr Gurtler's App 3) about 110 people. The LCL proposals would lead to 12 new jobs, 10 on site. Accordingly, in considering the relevant employment policies these factors have to be weighed. Whether such jobs would be replaced by new occupiers and how quickly would then be very much in issue (see above). The Council consider this net reduction in jobs to be unacceptable given the unemployment situation within the Borough.
95. It is submitted that the implication for this DEA is that there would be a loss of jobs, with units remaining empty and being difficult to let.

### ***Employment Situation and Planning Policies***

96. It is the Council's contention that the proposed development is contrary to policies within the adopted UDP and RDDUDP, and does not accord with Government guidance, notably PPG4.
97. The key facts are as follows:
- Haringey is one of five London Boroughs (including Barking & Dagenham, Hackney, Newham, and Tower Hamlets), and only eight authorities nationally, where employment rates are below the already low European average of 63.3%;

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<sup>29</sup> Mr Stephenson suggested that it was unrealistic to suggest Action for Kids would leave because it had 16 years of its lease left. However, as was put to him in XX the lease has an early break clause. Note also that the suggestion made in XX of Mr Gurtler that Action for Kids in fact had plans to add an additional floor to their unit is not accepted. The Council's information (provided by Mr Paul Towney, Finance & Corporate Services Director, Action for Kinds) put to Mr Stephenson in XX was that there were no such expansion plans.

- In July 2005 there were 7,960 Haringey residents claiming Job Seekers Allowance, equating to 7.5% of the labour force, which is considerably higher than the rate for London (4.5%) and is over twice as high as the rate for Great Britain (3.2%). The highest unemployment rate out of all wards in London at 18.2% is found in Northumberland Park (in the north east of the Borough). This is 4.9% higher than the second highest ranking London ward (Harlesden ward in Brent - 13.3%);
- Ward level analysis reveals that, at over 62%, Northumberland Park has the highest proportion of unemployed people who are long-term unemployed or have never worked in London. A further five wards are within the top 13 most deprived wards on this measure. Results from the 2001 Census suggest that long-term unemployment is a serious issue facing Haringey. Over 50% of unemployed Haringey residents have not worked for over two years or have never worked;
- Hornsey ward, which includes Cranford Way, and the adjoining wards of Noel Park and Haringey have levels of unemployment only slightly lower than the five most deprived wards (Hornsey's rate is 7.9%);
- The need to protect employment within the Borough is therefore a very high priority for the Council. The Council considers the promotion and retention of employment within the Borough, and its DEAs, to be a key priority. This is recognised in the Council's Community Strategy, the overarching plan for the Borough, which seeks to improve the quality of life for people living, working, learning, visiting and investing in Haringey

### **DEEMED REASON FOR REFUSAL 3 - NOISE**

98. The Council's case is that LCL has not adequately demonstrated that the proposal will not be harmful to the amenity of nearby residents by reason of noise nuisance.

99. A key matter that requires determination is the appropriate assessment methodology to be used. This issue is considered first.

***Appropriate Assessment Methodology***

100. The Council's reason for refusal contended that BS4142 is the appropriate assessment methodology to be employed in this case. LCL, through Mr Sharps, continues to insist that BS4142 is inappropriate and that reliance should principally be placed on an assessment under the WHO guidelines. In his oral evidence (in EC and in XX) Mr Sharps expressed the view that one should look at all the possible assessment methodologies (i.e. an absolute noise limits assessment under WHO, a change comparisons relative methodology and a BS4142 approach). The view he expressed in his original April 2003 report (quoted at pp. 7 – 8 of his proof, see pp. A 15 – A17 of Mr Sharps Appendix A) was rather different. There he took the view that the use of the WHO guidelines alone was *the* appropriate assessment methodology and that both a change comparisons relative methodology and a BS4142 approach were “not applicable in this case” (see paras. 2.4 – 2.5 at pp. A15 – 16). Despite his strenuous denials in XX it seems Mr Sharps has shifted his ground.
101. Although, Mr Sharps in his proof (belatedly) carried out a BS4142 assessment he maintains that it is not the appropriate methodology. Its relevance he says is at best as a “comparison with the analysis undertaken using the WHO Guidelines” (see Mr Sharps proof at paras. 2.15 and 4.10). In XX Mr Sharps confirmed that his view was in effect that primarily reliance should be placed on the WHO Guidelines. He was not content to rely on a BS 4142 assessment alone.
102. Mr Sharps puts forward 2 reasons why the use of BS4142 is inappropriate.

103. First, he says that the noise in issue in this case is not “industrial in nature”.
104. Secondly, he says that BS4142 is better suited to the assessment of steady noise, and the noise in issue here is not steady or continuous.
105. It is submitted that both of these reasons are misconceived.

**(i) Noise of an industrial nature**

106. BS4142 “describes a method of determining the level of noise of an industrial nature” (see the foreword), that includes “noise levels from factories, or industrial premises, or fixed installations, or sources of an industrial nature in commercial premises” (see para. 1).
107. The noise in issue is the noise generated by the operation of a concrete batching plant. This is a process/ installation as defined by the Environmental Protection Act 1990 and Pollution Prevention and Control Act 1999: see Mr Grant’s App. 3, p. 1, para. 1.1 and footnote 1. The two main sources of noise are agreed to be lorry movements and the loading of vehicles (see Mr Sharps proof at para. 1.7). However, those operations take place as part of the concrete batching process.
108. Mr Sharps’ key point in this regard in his written evidence (see para. 2.14 of his proof) was that “[t]he examples in BS4142 relate to noise from factories and fixed plant and equipment within factory premises” whereas with the appeal proposal “the noise sources are principally vehicle movements

around the site and of the varying noise of the vehicle engine and exhaust”<sup>30</sup>.

109. This approach is wrong for these reasons:

- First, as regards Mr Sharps’ purported reliance on the examples given in BS4142 it is of note that these are prefaced with the words “[t]hese examples are merely meant to illustrate how the standard could be applied and are not to be taken as a definitive interpretation of how it should be used” (emphasis added). Mr Sharps accepted in XX that the examples were merely illustrative.
- Second, that BS4142 has a wider ambit than this is illustrated by the Orchard Lane, Ledbury appeal decision (Mr Fiumicelli’s App. J) where the Inspector held that BS4142 could be applied to noise generated by deliveries made to a retail store on the basis that where a “delivery is extended in duration and it includes noises of the operations which are undertaken after the lorry has arrived and before it departs, the activity takes on the nature of an industrial process” (see para. 11 of the AD). Despite Mr Sharps’ strenuous denials in XX it is submitted that if the Ledbury AD is correct<sup>31</sup> this case is a fortiori as the concrete mixer lorries are, while on site, an active and integral part of what is clearly an industrial process for the mixing of concrete, see below.
- Third, as Mr Sharps’ evidence makes clear (see para. 4.1 of his App A, p. A20) the noise of the lorries filling is different in nature and character to road traffic or vehicle movement noise “the fill operation is the noisier due to the requirement for the vehicle engine to operate at fast idle, in order to power the rotating mixing barrel on the vehicle during

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<sup>30</sup> In XX Mr Sharps shifted position. He based his defence principally on matters related to BS4142 not being suited to the assessment of non-steady noises. The shift in position is understandable as the suggestion that the noise sources in issue are other than industrial in nature is indefensible.

<sup>31</sup> It was not subjected to a High Court challenge.

the pour”. Thus when stationary and loading the trucks are different to a stationary vehicle e.g. stopped at traffic lights, as the engine revs hard providing constant noise at a steady high level for 5 to 7 minutes i.e. the length of the filling operation.

- Fourth, when loading vehicles are stationary and effectively become part of the concrete mixing plant rather than road traffic. This is illustrated by the Defra Guidance Note (Mr Grant’s App 3) which clearly shows (see para 3.6 and fig 3.1) that the lorries filling is part of the process/ installation governed by LAPPC, that is to say it is part of an industrial process.
- Fifth, there is no question but that the concrete batching plant is a B2 use in planning terms i.e. it is to be characterised as a general industrial use. This was a matter that Mr Sharps accepted was relevant to the issue of whether the noise in issue is industrial in nature. This factor points strongly to the conclusion that the noise in issue here is industrial in nature.
- Sixth, if Mr Sharps’ view is that the predominate noise sources of the batching operation are to be characterised as road traffic or vehicle movement noise it is surprising that he rejected in his April 2003 report (as did Mr Fiumicelli in his proof, see para. 3.4.2) any assessment of the noise “by considering the change in noise level, that would result from the proposal, against advice in guidance documents” (see para. 2.2 (ii) of Mr Sharps proof). That is the methodology best suited to road traffic noise (see the first para. on p. 8 of Mr Sharps’ proof and also Mr Fiumicelli’s proof at para. 3.4.2.3). Yet Mr Sharps’ view as expressed in his report was that this type of methodology was “not applicable in this case” (see again the first para. on p. 8 of Mr Sharps’ proof). In XX he confirmed that the use of a change comparisons – relative methodology was “not a good method of assessment of the site noise in issue”. This

indicates clearly that characterising the noise in issue as road traffic noise is not a proper characterisation.

**(ii) Steady versus unsteady noise**

110. Mr Sharps also asserts that the BS4142 is “better suited to the assessment of steady noise” (see p. 8 of his proof, and also para. 2.14). It is a matter of agreement between the parties that the noise in issue is a non-steady noise, Mr Sharps refers to the noise sources in issue “constantly changing”. Accordingly, he says that the WHO guidelines are more appropriate in this regard. The noise in issue is “intermittent”. Mr Sharps proof helpfully provided a list of four noise sources into which most environmental noise sources fall. The only one of the four noise sources that the noise in issue in this case can fall into is “intermittent noise”<sup>32</sup>. Mr Sharps in XX was unable to accept the noise in issue was intermittent. He tried in vain to create a new fifth category. The fact is that the noise in issue is intermittent.

111. Mr Sharps’ case on BS4142 not being appropriate for the assessment of non-steady or intermittent noise sources is misconceived for these reasons:

- First, previous versions of BS 4142 prior to the current edition did refer to “steady noise”, but the second paragraph of the foreword to the latest version of BS 4142 (1997) specifically refers to the term now being deleted following revision of the standard.
- Second, the text of BS4142 makes several references to using the standard to assess the impacts of noises that are not steady and are instead “intermittent or cyclic” – e.g. sections 6.3.1.3 and 6.3.1.4, and the note to section 6.3.8; or “fluctuates at random” – e.g. section 6.3.11. Furthermore section 8.2, a key section of BS4142 states that the 5db

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<sup>32</sup> That this is so is illustrated by the example of an intermittent noise source Mr Sharps provides, namely “when a single vehicle ... passes”.

correction is to be applied to a noise which is “irregular enough to attract attention” i.e. it is by definition non-steady, furthermore the 5db correction is applied to noises containing distinct “impulses (bangs, clicks, clatters or thumps)” i.e. non steady noises. Mr Sharps candidly accepted in XX that the wording of BS4142 provided no justification for his view that the standard was not appropriate for the assessment of non-steady noise. Indeed he accepted that the text supported the opposite view.

- Thirdly, contrary to Mr Sharps assertions about BS4142 it is in fact fixed limits methodologies such as the WHO guidelines which are not well suited to the assessment of non-steady noises such as that in issue.

Thus:

- i. The 50 – 55 db WHO criteria relied upon by Mr Sharps (see e.g. paras. 2.4 and 2.7 of his proof) is explained at p. 8 of the Executive Summary (Mr Fiumicelli’s App F) as being set “to protect the majority of people from being seriously annoyed during the daytime, the outdoor sound level from steady, continuous noise should not exceed 55 dB LAeq on balconies, terraces and in outdoor living areas. To protect the majority of people from being moderately annoyed during the daytime, the outdoor sound level should not exceed 50 dB LAeq” (emphasis added). Thus the WHO guidelines qualifies its advice on external noise levels and annoyance by stating that the noise in question should be “steady, continuous noise”, which is clearly not the case in regard to this development proposal where the noise emissions are likely to be variable and intermittent. Whatever may be the position relating to other aspects of the guidelines (as was sought to be demonstrated in RX of Mr Sharps) the very guideline adopted for use in this case i.e. 50 – 55 dBA (see para.

2.7 of Mr Sharps' proof) is expressly qualified as being applicable to steady, continuous noise which the noise in issue is not<sup>33</sup>;

- ii. Further BS8233 which is another fixed limits methodology based on the WHO guidelines (see Mr Fiumicelli's App F) (and upon which Mr Sharps places some reliance, see for example, section 7.3 of BS 8233:1999) is explicit in stating that its recommended guideline noise levels should only be used to assess noise sources which are "steady such as road traffic, mechanical services or continually running plant". Additionally section 7.6.1.2 of BS 8233:1999 goes on to advise that residents will usually tolerate higher levels of anonymous noise, such as that from road traffic, than noise from non-anonymous sources, and that the guideline noise levels it recommends are for anonymous noise only.

112. Mr Sharps in his evidence (EC and XX) sought to make the point that BS4142 breaks down when applied to irregular noise (even if one accepts, as Mr Sharps did that on its plain wording it is intended to be so applied, see above). This is he says because of the conversion of the current version of BS4142 to LAeq levels which he says when combined with the +5dB to the rating level (see section 9 of BS4142) means that irregular/ non-steady noises are subject to a double penalty. In his oral evidence Mr Sharps put this argument at the forefront of his case against BS4142. It is of note that the argument is nowhere mentioned in his proof or either of his two earlier reports. This gives us perhaps some indication of the strength of this argument. The argument runs contrary to the express wording of BS4142

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<sup>33</sup> The counter-argument sought to be deployed in RX that this view would make the 50 – 55 dBA guideline inapplicable to any of the community noise sources mentioned in the WHO Guidelines is not correct as road traffic (the principal subject of the sources underlying the WHO Guidelines) is, rightly or wrongly, seen as a steady noise source (see e.g. what is said in BS8233:1999 set out below) to which those guidelines would apply

and also its use in practice: see the Ledbury AD (Mr Fiumicelli's App J) and also the *Bedford* case considered further below. Furthermore, the argument is a strange one. Sir, as your questions to Mr Sharps illustrated there is nothing odd or unusual in using LAeq in noise assessment methodology. It is not unique to BS4142. Mr Sharps accepted that LAeq was now widely used in methodologies and assessments of irregular noise under both domestic and international standards.

113. Mr Sharps' complaint that when combined with the +5dB correction it double penalises noise is simply unsustainable. Mr Sharps may have a very firm opinion on this but it seems he is firmly out of line with present thinking. He seems to stand as a man alone in this regard. Mr Sharps' reservations appear to be based upon the fact that applying BS4142 leads to an indication of there being noise issues in too many cases. In other words his complaint is that it is not developer friendly. With respect it is not intended to be. It is a tool in environmental decision making and one directed at a type of noise (i.e. industrial) which in terms of the response to such noise is the subject of a relatively limited amount of research and study (see above). Mr Sharps saw BS4142 as applying a precautionary approach. That may be so but it does not make BS4142 unworkable. Indeed Mr Sharps frankly accepted in XX that in relation to noise of an industrial nature (which we are concerned with here, see above) PPG24 was clear in urging the use of BS4142, see Annex 3, para. 19 and the last note in Annex 1. The Secretary of State does not share Mr Sharps' reservations about BS4142, nor have numerous other inspectors and decision makers (the Tesco Ledbury AD and the *Bedford* decision are but two examples).

### **(iii) Conclusions on methodology**

114. Mr Sharps in EC made a number of other points in favour of the WHO Guidelines and against BS4142:
- First, that the WHO guidelines were more up to date than BS4142. Both documents are revisions of earlier documents. However, in fact both are up to date and relatively contemporaneous, the latest version of BS4142 being 1997 and the latest WHO Guidelines 1999;
  - Secondly, that it is difficult for the purposes of BS4142 to determine the “typical background noise level”. Whether or not that is true in the generality of cases it is a non-point here as the parties have in fact agreed the typical background noise level based on Mr Sharps’ June 2005 measurements.
115. It is this clear that both these additional reasons asserted by Mr Sharps in oral evidence as being against the use of BS4142 are simply not sustainable.
116. The proper assessment methodology in this case is clearly BS4142.

***The result of a BS4142 Assessment in this case***

117. There are a number of important preliminary points to be made:
118. First, as the third paragraph of the forward to BS4142 makes clear, response to noise is subjective. None of the various methodologies available allow for the quantification of “general community annoyance” or the assessment of nuisance, although they may have a role to play in any case in determining whether nuisance/ annoyance is likely. It is of note that BS4142 in the foreword says that the response to noise is affected by many factors, acoustic and non-acoustic, such as “the margin by which it exceeds the background noise level, its absolute level, time of day, change in the noise environment etc. as well as local attitudes to the premises and the nature of

the neighbourhood.” Similar points about the subjectivity of response to noise are also made in PPG 24, App A para. 11, BS8233 p. 1 and the Defra research document which is Mr Fiumicelli’s App H at pp. 2 – 4. Accordingly, while BS4142 is the most appropriate methodology to employ in this case its limitations (and the limitations of any quantitative methodology) must be borne in mind when consideration is being given to whether there will be harm to amenity as a result of noise. Mr Sharps in XX accepted that none of the quantitative assessment methodologies could assess subjective or what he called confounding or situational factors<sup>34</sup>. This is important and the Council would urge consideration be given to the following matters even if they are outwith any technical assessment methodology:

- first, the appeal site and its surroundings are quieter than one would expect given its urban location and its proximity to railway lines and an industrial estate. Similarly, the rear of Chettle Court and the gardens on Uplands Road are quiet locations. This is borne out as regards Chettle Court by the low background noise levels recorded by Mr Sharps and agreed by the experts;
- second, although in technical terms the principal noise sources are the lorry fills and lorry movements associated with concrete mixers (and

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<sup>34</sup> However, Mr Sharps tried to suggest nonetheless that by reference to the range of sources upon which the WHO Guidelines are based (including various social studies) that it constituted the methodology best able to take into account subjective factors. There are however difficulties with this view: first, when one looks at the bibliography to the WHO Guidelines (Fiumicelli App K) it is clear that industrial noise was not the focus, most of the studies the subject matter of which can be ascertained from their title are focussed on transportation noise in various forms. Mr Sharps in XX declined to point to any of the studies referred to which dealt with industrial noise sources, he was asked to carry out this exercise in writing but came back with nothing; and secondly there is generally recognised to be a dearth of research material on industrial noise. This is a point made in PPG24 Annex 1, para. 3 and is a major theme of the Defra report (Mr Fiumicelli’s App H) “[i]t is clear that, compared to the number of surveys of the effects of transportation noise – aircraft, road traffic and railways – far fewer surveys have been conducted into industrial noise”. The recommendations of the Defra report (see p. 7) are focused on the need for further work on response to industrial noise. Finally, in this regard it is of note that the “most useful” work on response to industrial noise (see p. 3 of the Defra report) is not referenced by the WHO bibliography, other studies by Miedema are, but not the 1992 study referred to in the Defra report.

assessed by Messrs Sharps and Fiumicelli) there will be other on-site noise sources. The cumulative effect of which need to be considered (i.e. cement delivery, aggregates delivery, and washout etc.) in so far as they can be heard and they impact on amenity. Note that in relation to cement delivery Mr Casey referred to “concerns” about the noise related to this activity leading to the adopting of new methods of compressed air. Sir, you recall also that in relation to washout your questions to Mr Casey established that at the end of the day vehicles will generate the same noise levels as when filling albeit for a short period and in a location closer to residential properties than the batching plant and without any acoustic screen;

- third, the surroundings to the appeal site are, it is submitted, quieter and more noise sensitive than the other LCL sites visited as part of the site visit;
- fourth, as explained further below, the Council’s case is that the greatest level of activity is likely to occur between 7 – 8am when Mr Sharps noise monitoring recorded the lowest background noise levels;
- fifth, the evidence of local residents as to the way in which noise travels in the vicinity of the appeal site including the effect Chettle Court has in reflecting and amplifying noise as heard by the residents of Uplands Road.

119. Second, in terms of the assessment method provided by BS4142 it involves (see section 9) an assessment of the likelihood of complaints by subtracting the measured background noise level from the rating level with the result that the “greater the difference the greater the likelihood of complaints”. The guidance given is that a difference of around +10dB or more indicates that complaints are likely with a difference of -10dB being “a positive indication that complaints are unlikely”. There is thus a difference of 20 dB between

the positive indications that complaints are either likely or unlikely (it will be recalled that a difference of 10dB is generally perceived as a doubling of noise, and an increase of 20db a quadrupling of noise). Between those two indications (i.e. + and – 10dB) the mid-point is of course a result showing no difference between the rating level and background noise levels. However, BS4142 in section 9 also provides the following guidance that “[a] difference of around +5dB is of marginal significance”. A difference of around +5dB cannot be assumed to constitute a clean bill of health. On the scale indicated (i.e. between +10db complaints likely and -10db complaints unlikely) +5dB is considerably closer to the level at which complaints are indicated to be likely. It certainly is a long way (15dB, i.e. more than a doubling of the sound) from any positive indication that complaints are unlikely. The language used is also of note, “marginal *significance*”, such a result is thus significant but on the scale only just, and as the difference climbs closer to +10dB the significance increases.

120. Third, and this is a related point, model condition 17 in App 4 to PPG24 which deals with BS4142 contemplates a condition providing that the rating level be lower than the background noise level, i.e. that a BS4142 assessment provides a negative result. What this indicates is that there are circumstances where it is *necessary* and *reasonable* (applying the test in the Conditions Circular) to seek a negative difference under BS4142 notwithstanding that a difference of around +5dB is of marginal significance. The Council’s proposed noise condition reflects the guidance in the Appendix to PPG24.
121. Fourth, it was not until he prepared his proof that Mr Sharps undertook a BS4142 assessment. Mr Fiumicelli has also undertaken such an assessment. Despite the view expressed time and time again by Mr Sharps in his oral

evidence that on both his and Mr Fiumicelli's BS4142 assessment the proposed development was acceptable it is interesting that (as noted above) he was not content that to rely solely on his BS4142 assessment and hence to leave aside the WHO Guidelines. The reason why not is clear when one inputs into Mr Sharps assessment an increased number of lorry fills and movements (see further below) and the results become far less palatable to LCL.

122. Furthermore, in RX of Mr Sharps it was said that the Council's suggestion that looking at BS4142 as an assessment methodology without reference to fixed limits such as those in the WHO Guidelines in isolation could lead to absurd results. Thus Mr Sharps was asked in RX whether one could have a situation of a +10dB difference between the rating level and the typical background noise level applying BS4142 notwithstanding the noise in issue fell significantly below the WHO Guidelines. Mr Sharps said that this was possible if one had a typical background noise level of 20dB during the day and a rating level of 30dB, and that this would give rise to an "absurd" result so as to suggest that the application of BS4142 alone was not appropriate. However, this is misconceived. There are two points that need to be made:
- First, there are numerous situations where the BS4142 methodology is used in isolation: see e.g. the Tesco Ledbury AD as one example;
  - Secondly, the example postulated by Mr Sharps is in fact outside the scope of BS4142. Section 1 of BS4142 says it is not suitable for assessing noise "when the background and rating noise levels are both very low" and the note to this section explains "background noise levels below about 30dB and rating levels below about 35 dB are considered to be very low". Thus Mr Sharps' example in fact falls outwith BS4142 and the absurdities sought to be demonstrated do not arise.

123. Turning now to the *substance*, the following points can be made about the result of Mr Sharps BS4142 assessment.
124. First, Mr Sharps assessment in relation to Chettle Court shows a difference of +4db (see para. 4.15 of Mr Sharps proof), which can be said to be a difference of around 5dB and thus not insignificant in itself (see above).
125. Second, Mr Sharps says his assessment is “robust” because, inter alia “the background noise levels are understated because part of the industrial estate is vacant” (see para. 4.17). This is not accepted. It appears to be predicated on the fact that Mr Sharps’ first survey in 2003 showed much higher background noise levels than his second survey in June 2005. There are several points:
- the second survey has been agreed between the noise experts;
  - the difference between the noise levels on the two surveys is not explained solely by the vacation of units 10 and 11 on the Cranford Way Industrial Estate by TNT. At para. 3.15 of his App A, p. A6, para. 3.15 Mr Sharps puts the difference down to two factors: (i) TNT vacating; *and* (ii) wind direction. In relation to the latter the wind direction on the second survey was from the south (See Mr Sharps’ proof at para. 3.5) which is the prevailing wind direction (see Mr Grant’s proof at para. 5.1.1.b). So if anything the lower readings are more typical.
  - furthermore in his EC and in XX Mr Sharps accepted that the lower 2003 readings may be explained by the fact that the measurements on that occasion were taken not at the rear of Chettle Court but at the front outside the entrance gates (see para. 3.2, of Mr Sharps’ App A at p. A18). Thus as he acknowledged in his EC the 2005 survey was undertaken from a “better” location.

126. Accordingly, contrary to Mr Sharps' assertion his assessment in relation to Chettle Court should not be seen as robust by reason of underestimating the background noise level.
127. Third, in relation to Wightman Road Mr Sharps BS4142 assessment produces a +3db difference. This is in no small part a result of the high background noise level (49 dB) recorded. That assessment is not wholly reliable for the reasons explored in XX of Mr Sharps. His survey location was very close to a railway depot which may have affected the noise levels. The properties on Wightman Road closest to the proposed batching plant are further from this source of noise (see Mr Sharps App B). Also road traffic noise from Wightman Road played an important part (see Mr Sharps' proof at para. 3.10). His readings were taken from a location open to Wightman Road, whereas the rear of the Wightman Road properties closest to the proposed batching plant would be shielded from such road traffic noise by the unbroken terrace of housing. Furthermore, the survey at Wightman Road only covered a two hour period 11:30 to 13:30 on one day. Consequently, it does not show information in regard to the probably lower baseline noise levels at the start of the operation of the plant e.g. 0700 to 0800 hrs. Additionally the relatively short snapshot nature of the sample of noise measurements raises uncertainties as to whether the reported noise levels are representative of typical noise levels in the locality.
128. Fourth, Mr Sharps' BS4142 assessment is predicated on 2.1 lorry fills per hour, that is 25 over a 12 hour day and a total of 56 HGV movements (see para. 5.11 of Mr Sharps' proof and his App A, p. A22). The number of vehicle movements and fills is thus a critical factor. The more noise events in any reference period the higher the noise levels that will be produced. That is not, and cannot be, disputed. Focusing on Chettle Court it is

important to note what effect an increase in fills/ movements (see above) would have on Mr Sharps' BS4142 assessment (see Mr Sharps App A, p. A22 for the methodology, thus (see the detail in the Sharps XX note, Fiumicelli App. J):

- For 35 fills/ 76 movements over 12 hours: the result is + 5.7 dB
- For 50 fills / 106 movements over 12 hours: the result is + 6.3 dB
- For 5 fills/ 10 movements in any one hour<sup>35</sup>: the result is + 8 dB.

129. It is submitted that these figures, show a difference approaching the +10dB where BS4142 tells us categorically complaints are likely and the significance of these results cannot be ignored. Furthermore, the Council's case is that it is likely that all 5 lorries based at the plant will fill when the plant first opens so between 7am and 8am (see the EC of Mr Fiumicelli, based on his observations of the Wembley plant). During this time the background noise levels at Chettle Court are lowest, 40 dB: see p. A 43 of Mr Sharps App A. Accordingly, the greatest noise will be generated by the plant at the quietest time of the day, increasing the potential for annoyance.

130. There are some further points to be made on the effect of an increased number of fills/ vehicle movements on Mr Sharps' BS4142 assessment and the calculations shown in the Sharps' XX note:

- first, in XX Mr Sharps confirmed his view that the calculations were correct, they were also checked (as I said in XX) by Mr Fiumecelli;
- second, in RX of Mr Sharps it was sought to be suggested that there were errors in the calculations. Mr Sharps then took the view that *at most* they might be subject to rounding errors;

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<sup>35</sup> The XX note assumes only concrete mixer lorry movements in the hour reference period and no cement deliveries. This is an assumption in favour of LCL. It also leaves out of account private contractor movements. This explains why Mr Sharps' evidence proceeds on the basis of a lower number of HGV movements than does Mr Bellamy's.

- third a note was promised on a number of occasions showing the arithmetical errors but in the end it was said that any errors were so small as to make no difference.

Accordingly, the figures in the XX note can be relied on as being accurate. |

131. Finally, in this regard a condition such as draft condition proposed by the Council which seeks to limit the average number of vehicle movements to 50 per day from the appeal site over a 5-day period would not prevent there being 35 fills/ 76 movements or 50 fills / 106 movements over any one day. Even if a daily limit is set at 75 or even 60 the rating level difference would lie somewhere between those shown for 35 and 50 fills in the XX note (see above).
132. Furthermore, none of the draft conditions prevent the filling of all 5 concrete mixers based at the site in the first hour of operation or in any one hour during the remainder of the day (i.e. 5 fills and 10 movements in 1 hour). Accordingly, the alternative BS4142 results set out above and in the Mr Sharps' XX note remain relevant. Given the time reference used in the noise assessments (be it 12 hours, 1 hour or 5 minutes) the draft condition (whatever its benefits in other contexts) does not prevent the adverse noise consequences set out above.
133. Fifth, BS4142 allows for the use of a shorter reference time than one hour in the day, see the *Bedford* case:
  - in that case what was in issue was a transonic noise tunnel, the noise it created was irregular occurring for short bursts, it was held by the Magistrates in that case that the rating level (i.e. having applied the + 5dB from BS4142) should not exceed 48dB leq 5mins;

- the decision was challenged on the basis that applying BS4142 (and in particular para. 6.2) the appropriate reference time was 1 hour in the day and the Magistrates erred in applying a 5 minute reference time;
- the High Court held that “the justices were entitled if they thought fit not to follow paragraph 6.2. The freedom to choose not to adopt the reference time intervals stated in paragraph 6.2 is implicit in the terms of the British Standard itself” (see para. 39). The Judge placed particular reference on the foreword to BS4142 in reaching this conclusion (see para. 35 of the judgment).

134. Mr Sharps attempted in XX to distinguish the *Bedford* case on two bases:

- **First, that on the facts in that case it had initially been agreed by the parties (prior to the Magistrates Court hearing) that a 5 minutes reference time be used:** This is not a basis for distinguishing the case. Whatever the procedural history of that case the fact is that by the time the Magistrates came to make their decision the reference time was very much in issue. Furthermore, this was a key issue on the case stated to the High Court. One of the main grounds of challenge was that BS4142 and its guidance on reference time had been ignored by the Magistrates. The interpretation of BS4142 supported by the Judge is wholly unaffected by such factual matters as was eventually conceded in XX.
- **Secondly, that it was not clear that the *Bedford* case was concerned with BS4142 at all:** This is a nonsense, see the following references in the judgment: paras. H4 and H10; para. 6 recording the Magistrates decision and referring to the rating level (a concept that Mr Sharps accepted arises only under BS4142); para. 25(b); the correspondence quoted at para. 26; para. 27; paras. 35 – 42 (and especially para. 38 “[t]here is no dispute between the parties that BS4142 was referred during the evidence ...”).

135. It is also of note that Mr Sharps did not in XX try to suggest the case was distinguishable on any other basis i.e. the type of noise in issue (namely a transonic tunnel); the level of the noise in issue (which was around 48 dB, not too different from what is concerned here) or the nature of the proceedings (i.e. that *Bedford* was a nuisance case).
136. Mr Fiumicelli's oral evidence was that because the noise in issue in this case is irregular and in terms of the noisier filling operations is intense for 5 minute periods, that a 5 minute period was an appropriate reference time. That view is one that the Council strongly urges should be adopted in this case.
137. If such an approach is taken then (see the detail in the Sharps XX note, Mr Fiumicelli App J), there is a difference of about + 10 db between the rating level and the background level indicating clearly that complaints are likely. That is to say when using a 5-minute reference period the proposed development indisputably fails the BS4142 test. The calculations in this regard as set out in the XX note were accepted by Mr Sharps as correct, and have not been subject to any subsequent challenge even by Mr Harris.
138. Accordingly, based on this analysis the Council submit that in terms of noise the proposed development will plainly have a negative impact on amenity. It is the Council's case (as explained by Mr Fiumicelli in XX and in RX<sup>36</sup>) that there will be a negative impact not just that the absence of harm has not been proved.

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<sup>36</sup> Mr Fiumicelli's proof at para. 3.5 states "using appropriate methodology and criteria indicates that unacceptable impacts on the amenity of nearby noise sensitive premises are likely should the development go ahead as per the application subject to this inquiry".

**CONCLUSIONS**

139. For these reasons the Council submit that this appeal should be dismissed.

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**Monday, 20 March 2006**

**LOCAL AUTHORITY REFERENCE: HGY/2005/0007**

**APPEAL REFERENCE: APP/5420/A/05/1189822**

**BETWEEN:**

**LONDON CONCRETE LIMITED**

**Appellant**

**and**

**THE LONDON BOROUGH OF HARINGEY**

**Respondent**

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