



**Cheshire West
and Chester**

**Cheshire West and Chester Council's Representation Made at
Deadline 7**

Submitted at Deadline 7 – 5 September 2023

1. Introduction

- 1.1. This document sets out the latest submissions of Cheshire West and Chester Council (**the Council**) provided at Deadline 7 of the Examination into the DCO.

2. Change of position

- 2.1. The Council has reviewed the submissions made by National Highways at Deadline 5 [**REP5-050**], the legal opinion provided by Ruth Stockley dated 4 July 2023 [**REP5-051**], the Applicant's comments on submissions received at Deadline 5 [**REP6-035**] and the discussions between the Examining Authority and the Applicant at ISH3 held on 9 August 2023.
- 2.2. The Council has taken the opportunity to review the information available and make these representations accordingly. The Council has reviewed all representations which has informed a change of approach in relation to the application of the New Roads and Street Works Act 1991 (**NRSWA**) in a DCO context.

3. Ruth Stockley's Legal Opinion

- 3.1. The Council fundamentally supports the legal opinion given by Ruth Stockley dated 4 July 2023 to National Highways [**REP5-051**] on the application of the New Roads and Street Works Act 1991 (as amended). Ruth Stockley is a highly respected experienced barrister who specialises in and is the eminent authority on the application and practice of highways law. Ruth Stockley has been an Editor of the Highway Law and Practice Encyclopaedia for over 25 years, is the co-author of Highway Law 6th edition and regularly provides training and talks on the subject of highway law.

4. Support for National Highways

- 4.1. The Council agrees with National Highways that the advice provided by Ruth Stockley is very reliable, accurate and is the correct application of the NRSWA in a DCO context. It is on this basis that the Council is making this further representation.

5. Land Acquisition for Strategic Road Network

- 5.1. The Council has undertaken a review of its land ownership pursuant to this DCO. It has been noted that an anomaly exists in relation to land ownership of Plot 7-05 which is owned by the Council rather than National Highways. In light of the close working relationship that the Council has with National Highways, the Council as a public body with statutory responsibilities and obligations to act in the public interest has taken steps to resolve this anomaly and is taking steps to transfer the land to National Highways.
- 5.2. In advance of the land being transferred, the Council has confirmed to National Highways that it would provide the necessary consents for the works beneath the M53 subject to the Applicant applying for the necessary licences. Similarly, National Highways would be willing to provide the necessary consents for works beneath the Council's highway network subject to the Applicant applying for the necessary licences.

6. Status of works in the subsoil under the highway and NRSWA

- 6.1. The depth of a highway is not consistent and is not determined by a certain distance beneath the carriageway. It is instead based on many factors but ultimately is whatever depth is necessary to serve the relevant function, whether that be to support the carriageway or to provide drainage apparatus or for any other reason. There is a lack of information in the DCO and uncertainty regarding the depth of the pipeline, in addition the uncertainty regarding the extent of the limits of deviation in Article 6 of the draft DCO. Synergies can be made with the concerns regarding the derailment of a freight train at Stoke Lane Level Crossing, near Nottingham on 27 August 2013 and the impact on the Strategic Highway Network and local highway infrastructure.
- 6.2. The Council supports National Highways and the legal opinion provided by Ruth Stockley. Works to tunnel beneath a highway clearly are **street works** and NRSWA is clearly relevant to the works proposed by the Applicant.
- 6.3. The Applicant must accept that the NRSWA applies as the Applicant in Article 12 has specifically applied parts of the legislation.
- 6.4. If the Applicant's view was correct in that the tunnelling works beneath the highway are not street works then it would mean that highway authorities across the country may, depending on the ownership situation of the subsoil, have no ability to govern works taking place beneath their network. This would result in obvious public safety issues. NRSWA is written as it is to ensure that cannot happen. The legislation cannot be any clearer on the point.
- 6.5. The definition of "street works" is then of particular note. It includes any works executed in any highway pursuant to a statutory right or street works licence involving placing apparatus in the highway and any incidental works. Significantly, the reference to works "executed in a street" must be interpreted in accordance with the definitions provision for the purposes of Part III, namely s.105(1), which provides as follows:
- "in a context referring to works, apparatus or other property in a street or other place includes a reference to works, apparatus or other property **under, over, across, along or upon it**" (Emphasis added).*
- That is consistent with the definition of "street works" including "tunnelling or boring under the street". Hence, it matters not whether the works in question are physically in, over, on or under the highway; they are still "street works" governed by Part III of NRSWA (See paragraph 6 of [REP5-051]).
- 6.6. The Council notes that the Applicant has concerns that should it be held that tunnelling beneath a highway is street works (which it clearly is) this would have ramifications for the entire DCO and require extensive modifications to both the drafting and plans. The law is clear that these works should be categorised as street works and therefore, should the Applicant carry out such works, without the DCO providing the necessary street works authority, then an offence will be committed. As such, the DCO is currently flawed in this respect. A simple solution to this would be for the Applicant to agree to enter into a street works licence with the street authority prior to carrying out such works.
- 6.7. Unless these works are listed as street works in the DCO then the Applicant will not benefit from section 48(3) as it contends because the DCO would not provide them with the statutory right. The Applicant therefore has a choice, it can either include the works as street works within the DCO; or it can agree to follow NRSWA in respect of these works as a separate consent outside the DCO.

7. Anomaly with the draft DCO

- 7.1. The draft DCO at Article 12 is confusing. The Applicant has sought to apply under Article 12(2) certain parts of the NRSWA and disapply under Article 12(4) other parts of the NRSWA.
- 7.2. The Council's position is that the NRSWA applies unless specific sections and/or subsections are disapplied. Therefore, the draft DCO is defective on its face. It is unclear in the current draft how the sections and/or subsections not specifically referred to are being dealt with.
- 7.3. The Council would urge the Examining Authority to clarify the legal position of the NRSWA in a DCO context.

8. Protective Provisions

- 8.1. The Council has provided the Applicant with an acceptable set of protective provisions for the protection of the local highway authorities.
- 8.2. The Council has not been able to agree the content to date with the Applicant and the Applicant has not provided a list of highways affected by the DCO and the extraordinary traffic thereon. Therefore, the Council would urge the Examining Authority to include its preferred version of the protective provisions in the DCO and in the event that the Applicant does not provide a list of highways affected, then the Council will be more than happy to provide a list of highways in its administrative area. The tracked changed version of the protective provisions is at Appendix 1 and the clean version of the protective provisions is at Appendix 2.
- 8.3. For the avoidance of doubt, the Council has no wish to remediate any work undertaken by the Applicant in any street in its administrative area. If there are any defects which need to be rectified, the Council would expect the Applicant to make good these defects at its own expense to the Council's agreed specification pursuant to the requirements NRSWA unless such deviation is agreed in the first instance with the Council.

Appendix 1 – Tracked changed Protective Provisions for the benefit of the local highways authorities

Appendix 2 – Clean version of Protective Provisions for the benefit of the local highways authorities