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Executive Director, Graham Hughes

**Transport and Infrastructure Policy & Funding**

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Dear Sirs,

### **A14 Cambridgeshire to Huntingdon Examination Issue Specific hearing on the DCO – Post Hearing Documentation**

Item references refer to the items in the Examining Authority's questions published before the Issue Specific hearing on the DCO on 4 September 2015 (EV-043).

#### **Item 2.3**

The principle area of disagreement with respect to de-trunking is the proposed legal agreement with Highways England. The Council and Highways England are working to agree an acceptable definition of abnormal maintenance that protects the Council from unplanned expenditure and is the best use of public funds. A meeting will take place on 11 September to try to conclude the matter.

The Council is also resisting clauses in the legal agreement that require the Council to withdraw its objections. Firstly, the Council is not objecting to the scheme, and secondly the clauses could restrict the Council's ability to comment on detailed design of local roads and discharge its statutory duties.

It remains the intent of the Council to reach agreement with Highways England for Deadline 10.

The Council is working with Highways England to resolve differences relating to borrow pits and archaeology. Further details are below.

#### **Item 4.1**

The Council believes that South Cambridgeshire District Council actually made the comments attributed to the Council.



The Council accepts the position of Highways England that the CoCP is a certified document in a statutory instrument, and hence commitments in the CoCP to consult with respect to the LEMP are binding. If the Examining Authority considers an alternative drafting of Requirement 4 was desirable on the lines suggested by South Cambridgeshire, the Council would not object.

The Council understands now that the CEMP is primarily QA and management processes and is not for consultation. Highways England has agreed to supply the CEMP for information along with the draft LEMP for review. The Council is content with this proposal.

#### **Item 4.2**

Highways England has addressed the comments made in the Council's representation (REP3-006), in the table in paragraph 9.1.3, regarding the Code of Construction Practice, in its response (REP4-011).

#### **Item 5.1**

The Council would accept the Borrow Pits Restoration Plan as a certified document in the DCO being a binding commitment by Highways England to consult with the Council in detailed design of the development, operation and restoration of the borrow pits.

#### **Item 5.3**

The Council accepts the "three tier" approach as being an acceptable way forward, subject to agreement of the detail. A meeting is scheduled for 14 September to progress this.

#### **Item 6.1**

If it were not possible to put the legal agreement between the Council and Highways England in place before the end of Examination, the Council would consider it essential to secure the date of de-trunking to be by agreement.

The Council does not accept the position of Highways England that the private legal agreement between the parties controls the matter of de-trunking. Advice from Counsel is attached to this submission for the assistance of the Examining Authority. The Council does not see why the wording the Examining Authority has suggested could not be included in Article 12(4) of the DCO.

#### **Item 6.2**

The Council accepts the position of Pinsent Mason expressed at the 4 September hearing that a Section 106 Agreement is not a suitable vehicle. Further to discussions with Highways England, the legal agreement between the Council and Highways England will include provisions for monitoring and mitigation.

The precise detail of this has yet to be resolved; the Council hopes that it can reach final agreement with Highways England by Deadline 10.

## **Item 8.1**

The Council has accepted the protective provision in respect of disapplication of the Land Drainage Act. A map of watercourses affected was supplied to Highways England on 2 September.

## **Item 9**

### Article 3

The Council is content with the drafting of Article 3 in the revised DCO submitted for Deadline 7.

### Article 7

At the hearing, the Council raised the ambiguity regarding consultation between Article 7 and Requirement 3. Highways England offered to refer to consultation with the relevant planning authority in Article 7. The Council would be satisfied with such an amendment.

### Article 11

In a teleconference on 2 September, Pinsent Mason for Highways England undertook to take on board the Council's comments relating to Article 11.

### Article 13

With respect to stopping up of streets in Article 13, the Council accepts the position of Highways England.

### Article 14

With respect to Article 14(6) the Council withdraws its objection to deemed consent.

### Schedule 1

Highways England has addressed the Council's comments in REP3-006, relating to Schedule 1 of the DCO.

### Schedule 2

Highways England has clarified that references to standards in Requirement 14 are in respect of environmental impact in the ES. The Council is content with the principle of this Requirement, but does not wish to approve or comment on lighting that is not specific to its function as local highway authority. As it appears that the intent of Requirement 14 is to consult on environmental impact, the Council considers that Requirement 14 should more properly refer to the relevant planning authority.

### Schedule 4

With respect to Schedule 4, the Council accepts Highways England's position on terminology. However, discussions on PROW are continuing in respect of:

- FP4/FP5 at Girton, Highways England paying CCC costs to enhance the PROW network. HE has agreed to consider further.
- BW6 Stukeleys, use of the PMA to extend BW6 alongside A1 being discussed.

With respect to widths of rights of way, the Council considers that the method proposed by Highways England of post-construction update of the definitive map is not best practice, notwithstanding the precedence of other DCO cited by Pinsent Mason. Detailed design drawings are not legal events that can trigger a legal event modification order. The Council wished to avoid what it considers to be poor practice on other strategic road projects being perpetuated on the A14. This poor practice has in the past required the Council to scale off drawings marked "do not scale" and similar, in order to raise legal event modification orders to update the definitive map. Not only is this manifest bad practice, but it has the effect of making the precise route and width of PROW open to challenge at a later date. The Council saw an opportunity to get this right on the A14. Gregory Jones QC in his advice to the Council has made several key points regarding the desirability of including widths of PROW on the face of the DCO, of which the Council hopes that the Examining Authority and Pinsent Mason will take note.

It is the view of the Council that it is desirable and preferable that the DCO include widths of PROW for the reasons above, and for the reasons outlined by Counsel. The Cambridgeshire Local Access Forum has expressed similar views. However, Pinsent Mason for Highways England has stated that it is not possible to provide this information as it is a matter for detailed design. The Council hopes as a matter of principle that were the data available, Pinsent Mason would agree with the desirability of a DCO including this information. Given that DCO are an area of evolving policy and practice, the matter of precedence should not preclude the application of good practice on future DCO, nor restrict the options of highway authorities and developers.

With reluctance, the Council accepts the position of Highways England that it is not physically possible to include the widths of PROW in the A14 DCO itself. However, it will require Highways England to assist the Council to establish PROW in the definitive map as robustly and as accurately as reasonably possible. Highways England must consult with the Council regarding the detailed design of PROW, construct the PROW to that design (or agree variations with the Council), allow the Council to verify that the PROW has been constructed to the agreed design, and provide to the Council accurate as-built digital map data.

The Council will then raise the necessary legal event modification order to update the definitive map. This normally requires payment of a charge by developers. Due to pressure on local government finances, many departments are dependent on funding from charges, as the cost of providing the service cannot be met from the Council budget alone. The Council would therefore expect these charges to be applicable to Highways England.

### Opportunities

With respect to Opportunities in section 20 of REP3-006 the Council does not require any changes to the DCO. Discussions regarding a technology strategy are taking place; the Council merely did not want these opportunities overlooked in scheme development.

### **The Applicants Revised Scheme**

The Council has no representations to make regarding the revised scheme submitted by the Applicant on 30 July 2015.

Yours faithfully

**AJ Munro**

A14 Project Manager – Cambridgeshire County Council

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**SUBMISSIONS ON BEHALF OF CAMBRIDGESHIRE COUNTY  
COUNCIL**

Issue Specific Hearing on the A14 DCO 4 September 2015

**Summary of Advice by Counsel**

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1. The Examining Authority has asked:

**If the suggested legal agreement for de-trunking arrangements referred to at para 4.23 of Deadline 4 is not in place by the end of the examination, would A12(4) need to be amended to ensure that CCC are content with any arrangements?**

**At Article 12, Cambridgeshire County Council proposes amendments to the wording of this Article to include reference to ‘a date to be agreed with the County Council’ (REP4-006). The applicant has now confirmed that it does not propose to include this wording (REP7-030). If CCC and the applicant are agreeing the de-trunking date outside the DCO in a legal agreement, it is not clear to the ExA why the words ‘to be agreed between the parties’ should not be included in the DCO as a point of clarification. Can the applicant please comment?**

2. This gives rise to three questions; which are addressed in turn.

**Will the legal agreement between HE and CCC regulate how HE exercises its power to de-trunk under the DCO and hence prevent HE from determining the date of de-trunking if there was a dispute between HE and CCC over the extent of remedial works?**

3. There is a real risk that to the Council that any subsequent agreement would not be enforceable. The order should not be made in the terms sought by Highways England (HE) for the following reasons.
4. If the promoters (HE) have their way, the power to de trunk granted in the DCO would be unfettered. It is a power given to the government (HE) by a statutory instrument.
5. The general principle of public law is that a government cannot bind its future power to govern by contractual arrangements, the practical effect of this principle

is that if an agreement purports to curtail such powers the agreement may be held by the courts to be ineffectual to the extent that it purports to do so (see e.g. *Attorney-General (NSW) v Quinn* (1990) CLR 170 per Mason CJ). The Privy Council put the matter thus:

“[T]he freedom of a minister or an officer of the Crown responsible for implementing a statute to make decisions or exercise discretions cannot be validity fettered by anticipatory action and if the Minister or officer purports to do so by contractually fettering himself or herself in advance such action exceeds his or her statutory powers” (*Cudgen Rutile (No 2) v Chalk* [1972] AC 520).

6. Article 12(4) as currently proposed by HE sets out a mechanism for de-trunking by which HE has complete discretion as to the day upon which that would occur and without any pre-conditions of notice provision to CCC as the relevant highways authority upon de trunking. There is thus no power to precondition to exercise that power by e.g. by requiring HE to give notice to any particular body. Lord Wilberforce had said in *Cudgen*:

“It follows as a logical consequence that when a statute, regulating the disposal of Crown lands, or of an interest in them, prescribes a mode of exercise of the statutory power, that mode must be followed and observed.”

This *dicta* has been recently applied by the Land Court of Queensland Australia.<sup>1</sup>

7. Article 12(4) as currently drafted is unsound both in terms of general public law principles and, in particular, in respect of the DCO consent procedure which was intended to expand and improve the ‘one stop shop’ approach for consents.<sup>2</sup> The intendment of the DCO procedure is that as much as possible should be governed by the provisions of the DCO provision. The DCO hearing is also the most appropriate forum for the powers to be tested before an expert panel of inspectors and for the public and other parties to participate.
8. The proposed wording by CCC addresses these concerns since the power given in the DCO will be one which is expressly limited by the terms of the agreement and therefore there could be no question of a an unlawful fetter of statutory power. The proposed amendment also reflects what HE is saying to the Panel that it will do. Given that the proposed agreement between HE and CCC goes beyond

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<sup>1</sup> *Sykes v Minister for Mines and Energy and Queensland Gas Company Limited* [2008] QLAC 0201.

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/138292/Major\\_infrastructure\\_planning\\_-\\_expanding\\_and\\_improving\\_the\\_one\\_stop\\_shop\\_approach\\_for\\_consents\\_-\\_Summary\\_of\\_responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/138292/Major_infrastructure_planning_-_expanding_and_improving_the_one_stop_shop_approach_for_consents_-_Summary_of_responses.pdf)

simply fixing a date the wording might be improved by saying that the “de -trunking should take place on a date and in a manner agreed between [HE and CCC].”

9. The Council has received no explanation advanced as to why article 12(4) should properly reflect what HE is saying to the Examining Authority and CCC will happen. Indeed, the only conceivable basis for HE objecting to the proposed amendment of article 12(4) is that it entertains some doubt as to whether or not the de-trunking would take place in accordance with the agreement. If that were the case then there would it would plainly be quite wrong to allow the DCO to proceed on that basis.

**If HE were in breach of the Legal Agreement and CCC sought arbitration, would the DCO be likely to take precedence, and hence give HE the power to determine the date of de-trunking unilaterally even if the works in the handover plan had not been completed?**

10. For the reasons set out above, as currently proposed by HE, there is a real risk that the DCO would take precedence giving HE the power unilaterally to decide the date of de-trunking without more. As currently proposed this is precisely the power which HE seeks *viz* a power to set the date of de-trunking without any pre-condition or agreement with CCC (or anyone else). That would apply even if the handover plan had not been complete. If that is the power which the HE seeks under the DCO it must justify the case for so doing. HE has made no case which would justify the granting of such a power in the terms currently sought.

**Would the response by Pinsent Mason give CCC adequate comfort that de-trunking cannot occur until the handover plan has been approved and complied with?**

11. The response from Pinsent Mason (by email dated 3 September 2015 09:33hrs from George Wilson *ultra vires*) gives little, if any, additional comfort to CCC. If the agreement with CCC is then any letter from HE cannot make it enforceable (See by analogy *Sykes v Minister for Mines and Energy and Queensland Gas Company Limited* [2008] QLAC 0201). The fact that a similar process has been done elsewhere does not mean that it is lawful; and the letter refers to no case authority in support of the arguments which it makes. In short, the email adds nothing of real substance in terms of comfort
12. If HE were to act in breach of their agreement and the terms of this letter then a number of legal possibilities might arise in which the email might add something by

way of factual background. In addition to seeking to enforce the agreement through arbitration CCC might consider judicial review of HE's exercise of its statutory powers, depending on the circumstance it might argue that this was an abuse of power or that HE was estopped from exercising its statutory power in the terms granted by the DCO. Such an action by CCC would be very novel and, there is a very real risk that CCC would be unsuccessful, since the DCO will have given HE a power to set the date of de-trunking without pre-condition or the need to obtain the agreement of any third party.