

THE NORTHUMBERLAND LINE ORDER

PUBLIC INQUIRY 9-12, 16-19, 23-26 NOVEMBER, 30 NOVEMBER - 3 DECEMBER 2021

REBUTTAL OF COLIN COTTAGE

**ON BEHALF OF THE NORTHUMBERLAND ESTATES (OBJECTOR 21) AND THE RIGHT
HONOURABLE DELAVAL THOMAS HAROLD LORD HASTINGS BARON HASTINGS
(OBJECTOR 12)**

PLANNING INSPECTORATE AND PLANNING CASEWORK UNIT REFERENCE:

(DPI/P2935/21/19)

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Appendix CCR1	Letter to Addleshaw Goddard LLP on behalf of the Estate dated 21 October 2021
Appendix CCR2	Letter to Addleshaw Goddard LLP on behalf of Lord Hastings dated 21 October 2021
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1. INTRODUCTION

- 1.1 This rebuttal is a response to the statement prepared by Mr James Holdroyd MRICS, dated 11 October 2021. I have addressed the points made by Mr Holdroyd in the order presented in his statement, using the same subject headings.
- 1.2 Where any point raised in Mr Holdroyd's statement is not directly addressed in this rebuttal, this should not be taken to be an acceptance of that point. Where I agree with Mr Holdroyd on any particular point, I have made my agreement clear.
- 1.3 Any abbreviations used in this rebuttal correspond with those used in my proof of evidence.

2 SUMMARY

- 2.1 At paragraph 2.2 of his statement, Mr Holdroyd confirms that it is *'the formula for the calculation of rents due in the Wayleave Leases'* that he considers to be unclear and inadequate in the modern context. He raises no concerns with any of the other provisions within the wayleave agreements, nor does he suggest that the wayleave agreements should be extinguished altogether. It therefore appears clear that Mr Holdroyd and Network Rail only consider the rent calculation provisions in the wayleave agreements to be unclear and inadequate and in all other respects the agreements remain fit for purpose.
- 2.2 At paragraph 2.3 of his statement, Mr Holdroyd says that in providing for the payment of a capitalised sum of compensation Article 35 will provide certainty for all parties. However, as I confirmed in my proof of evidence¹ the Article 35 compensation provisions do not provide a clear link to statutory compensation, which creates considerable uncertainty for the Estate, Lord Hastings and Network Rail. I note that Mr Holdroyd provides no explanation of how compensation would be calculated under Article 35, or how the statutory compensation provisions would be engaged.
- 2.3 Even if, as Mr Holdroyd says, it is Network Rail's intention to compensate the Estate and Lord Hastings *'for any loss arising'*² from the proposal to abrogate the payment of rent under the wayleave agreements, then any uncertainties that exist in relation to the calculation of those rents will still need to be resolved. This is because the compensatable loss arising from the cessation of the rents can only be measured if the

¹ See paragraphs 3.20 – 3.30 of my proof of evidence

² See paragraph 6.1 of Mr Holroyd's statement and I also note that Article 35 refers to compensation for any loss arising

rents are calculated. Article 35 will not remove any uncertainty over the issue of rent and, if anything, will only increase the likelihood of ongoing dispute, uncertainty and risk for all parties.

- 2.4 If any uncertainty does exist over the rent calculation provisions this can only be resolved through constructive discussions between the parties, but in the absence of agreement being reached the wayleave agreements make adequate provision for any uncertainty over rent to be resolved through an arbitration process, which can be agreed between the parties. However, to date, Network Rail has chosen to neither enter into meaningful discussions with the Estate or Lord Hastings over the rent calculation provisions, nor invoke the arbitration proceedings provided for by the wayleave agreements. As noted in my proof of evidence,³ this calls into question whether there is a compelling case for the inclusion of Article 35 in the Order.

3 FORMULA FOR THE CALCULATION OF RENTS

- 3.1 Despite saying the provisions for the calculation of rents in the wayleave agreements are unclear, Mr Holdroyd sets out a straightforward and unambiguous summary of the provisions at paragraphs 3.1 – 3.5 of his statement. I agree with this summary, as do the Estate's and Lord Hastings's legal advisors and there therefore appears to be no dispute over the underlying basis on which the wayleave agreement rents should be calculated.

4 COMPLEXITIES RESULTING FROM THE CURRENT ARRANGEMENTS

- 4.1 At paragraph 3.6 of his statement, Mr Holdroyd suggests that the rent calculation provisions do not recognise that the nature of goods transported on the railway will change over time, or that the way that railway services are delivered is subject to changing political trends and new, innovative, ways of delivering services. As I explain below, I do not believe that the rent calculation provisions are as inflexible as Mr Holdroyd suggests. I also do not consider that the way railway services are currently delivered prevents calculation of the wayleave rents.
- 4.2 Moreover, I am aware that on 20 May 2020 the Government announced plans to reform the rail industry and that in late 2023 a new public body, Great British Railways (“GBR”), will integrate the railway service by owning the infrastructure, collecting fare revenue, running and planning the network and setting most fares and timetables.

³ See paragraph 3.16 of my proof of evidence

Network Rail will be absorbed into GBR to bring about a single, unified and accountable leadership for the national network. This new structure appears as if it will make provision of the information necessary to calculate the wayleave rents more straightforward.

- 4.3 At paragraph 4.5 and 4.6 of his statement, Mr Holdroyd queries whether biomass should be included in the description ‘*Coals, Coke, Culm or Cinders*’ (“***the Four Cs***”). However, the answer to this question appears obvious. The wayleave agreements are clear in terms of what is included in the first limb of the rent calculation payments and it is not necessary to debate whether biomass or any other goods transported on the railway fall into this description. They clearly do not.
- 4.4 Biomass does fall under the description of ‘goods’ (other than the Four Cs) and so falls under limb 2 of the calculation. Indeed, although Mr Holdroyd says that the rent calculation provisions in the wayleave agreements fail to recognise that the nature of goods transported on the railway will change over time, the wide scope of limb 2 achieves this. Limb 1 covers the coal and associated products that were primarily transported on the railway at the times the wayleave agreements were entered into, while limb 2 takes into account the prospect of passengers, livestock and other goods being transported.
- 4.5 At paragraph 4.4 of his statement Mr Holdroyd says that assessing how the formula “*2% of the gross amount payable in respect of the passing and conveying of such passengers*” is very difficult. He then goes on (at paragraphs 4.8 and 4.9) to question what the gross amount payable might be and the possible complications with its assessment. However, while the practical difficulties he raises are recognised, it is quite clear that they are just practical issues, not, as has been suggested, issues around the clarity of the wording of the rent calculation provisions in the wayleave agreements. These practical issues are not insurmountable and the Estate and Lord Hastings are both willing to work with Network Rail in order to agree a mutually acceptable approach. There is no reason to believe that if Network Rail had proactively engaged with the Estate and Lord Hastings in the past, or relied on the arbitration provisions in the wayleave agreements, that a practical solution could not already have been identified.
- 4.6 Paragraphs 4.10 - 4.17 of Mr Holdroyd’s Statement refer to the dispute between Network Rail and the Estate over the non-payment of rent since 2018 and the amount of rent to be paid under the wayleave agreements. I note from Ward Hadaway’s letter

of 9 July 2021⁴ that, at the Estate's request, attempts have been made to discuss the wayleave agreement rent provisions since 2013, but officers at Network Rail have failed to properly engage with the Estate over the matter.

4.9 At paragraph 4.7 of his statement, Mr Holdroyd says that

'...the claims made by the Trustees and the likelihood of further significant [rent] claims would have a significant adverse impact on the viability of the Scheme and the threats of forfeiture and an injunction would further prevent its operation'

However, no evidence has been provided to demonstrate the extent to which the viability of the Scheme would be impacted if Network Rail had to pay rent under the wayleave agreements. Moreover, if the payment of rent would significantly impact Scheme viability, the payment of compensation for loss of rent is likely to have a similar impact. The payment of full and fair compensation for loss of rent in the form of a capital sum would have to represent the net present value of the loss of rents over the remaining term of the wayleave agreements. Assuming that Article 35 will be modified so that full and fair compensation is paid, the value of the rents would still be a cost incurred by the Scheme. It would just be represented in the form of a single capital payment, rather than ongoing annual payments.

4.10 In relation to the threat of forfeiture or injunction, as confirmed in my proof of evidence,⁵ both the Estate and Lord Hastings have confirmed that they are prepared to consider and discuss potential variations to the wayleave agreements that would remove these provisions. I am also advised that there are statutory and common law rules and limitations that would in any event restrict the exercise of those rights. Furthermore, if the issue between the parties were simply to be the amount of rent to be paid, rather than a failure or refusal to pay an agreed rent at all, the Estate's and Lord Hastings' remedy would be to invoke the arbitration proceedings within the wayleave agreements, rather than claim forfeiture or seek an injunction. NCC's own advice, which has been disclosed to the Estate, confirms that the wayleave agreements provide for arbitration in the event of such a dispute. There is therefore no risk that a dispute over the amount of rent to be paid would prevent operation of the railway.

⁴ See Appendix D to Mr Holroyd's statement

⁵ See paragraph 3.14 of my proof of evidence

5 IMPACT ON THE PROPOSED SCHEME

- 5.1 At paragraph 5.1 of his statement, Mr Holdroyd says that the uncertainty with the existing rent provisions in the wayleave agreements creates risks to the successful implementation of the Scheme and Network Rail's ability to comply with its statutory duties. However, Network Rail has had (and still has) the ability to remove any risks it considers exist by proactively engaging with the Estate and Lord Hastings over the calculation of rent, or entering into arbitration as provided for in the wayleave agreements. Without exploring these options the implementation of compulsory powers to abrogate the rent is premature and undermines the case, let alone any compelling case, for the use of compulsory powers.
- 5.2 At paragraphs 5.2 and 5.3 of his statement, Mr Holdroyd again refers to rent claims made by the Estate and threats of forfeiture and an injunction. However, I understand that the rent 'claims' were only made in an effort to initiate discussions over the payment of rent, in the absence of Network Rail providing requested information. Any references to forfeiture or an injunction appear to have been born out of frustration at Network Rail's record of non-payment and refusal to discuss the payment of rent in a constructive way. Network Rail was clearly not held to ransom and it would be surprising if it genuinely believed an injunction or forfeiture to be a risk. The wayleave agreements have been in place for almost 170 years and have never been a cause of disruption to the railway. Both the Estate and Lord Hastings have made it very clear that they are prepared to consider and discuss potential variations to the wayleave agreements that would remove the provisions in the wayleave agreements that would lead to any risk at all of an injunction or forfeiture.

6 PROPOSED ARTICLE 35

- 6.1 At paragraph 6.2 of his statement, Mr Holdroyd says that compensation under Article 35 is intended to '*fully compensate beneficiaries of the Wayleave Leases for the loss of rents in the manner contemplated by the Land Compensation Act 1961*'. However, as I explain in my proof of evidence, Article 35 as drafted is not fit for purpose and fails to provide a clear basis for full and fair compensation. The Land Compensation Act 1961 does not provide a mechanism for assessing compensation for the abrogation of rent. If Article 35 is included in the Order, the Estate and Lord Hastings face the very real risk that they will not be properly compensated for any loss they incur as a result of its implementation.

- 6.2 For this reason, and also because there is no compelling case in the public interest for its inclusion, Article 35 should be deleted from the Order, together with any consequential amendments.
- 6.3 If Article 35 were to be included in the Order and Network Rail, as it says, intends to fully compensate the Estate and Lord Hastings for any loss arising from the abrogation of rent then the compensation provisions should be amended to reflect the proposal set out at paragraph 3.32 of my proof of evidence.

7 FURTHER DEVELOPMENTS

- 7.1 Since submitting my proof of evidence Ward Hadaway has written to Addleshaw Goddard further clarifying the Estate's and Lord Hastings' position in relation to the outstanding wayleave agreement rents and copies of those letters are attached at Appendix CCR1 and CCR2. The Estate and Lord Hastings have also submitted a freedom of information request to Network Rail and this is attached at Appendix CCR3.
- 7.2 There has also been a without prejudice meeting between the parties which took place on 1 November 2021.

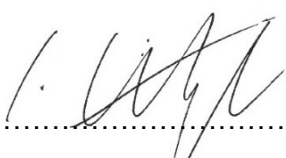
8. DECLARATION

- 8.1 I believe that the facts stated in this report are true and the opinions expressed are correct. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
- 8.2 I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
- 8.3 I am aware of the requirements set out in Part 35 of the Civil Procedure Rules and the accompanying Practice Direction, the Guidance for the Instructions for Experts to give Evidence in Civil Claims and the Practice Direction for Pre-action conduct.
- 8.4 I confirm that this report has drawn attention to all material facts which are relevant and have affected my professional opinion.

- 8.5 I confirm that I understand and have complied with my duty to the Public Inquiry as an expert witness which overrides any duty to those instructing or paying me, that I have given my evidence impartially and objectively, and that I will continue to comply with that duty as required.
- 8.6 I confirm that neither I, nor my firm, are instructed under any conditional or other success-based fee arrangement.
- 8.7 I confirm that I have no conflicts of interest.
- 8.8 I confirm that my report complies with the requirements of the RICS – Royal Institution of Chartered Surveyors, as set down in the RICS practice statement Surveyors acting as expert witnesses.

9 STATEMENT OF TRUTH

I declare that the evidence set out in this proof for the inquiry is true and follows accepted good practice. The opinions expressed are my own and are formed from professional judgements based on my experience.

Signed.....

Colin Cottage BSc (Hons) MRICS
Managing Director, Compensation
Ardent

2 November 2021

THE NORTHUMBERLAND LINE ORDER

PUBLIC INQUIRY 9-12, 16-19, 23-26 NOVEMBER, 30 NOVEMBER - 3 DECEMBER 2021

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Your Ref:
Our Ref: AJC.NOR103.425
Doc No: 33143444v3
Date: 21 October 2021

By email: charles.jagger@addleshawgoddard.com

Dear Sirs

Our Client: The Trustees of the Duke of Northumberland 1972 Settlement (Grandchildren's Appointment)

Your Client: Network Rail Infrastructure Limited

Blyth & Tyne Railway Wayleave Agreements and Northumberland Line Transport and Works Act Order

This letter is sent further to our letter of 30 September 2021 to your Marnix Elsenaar and the discussion the previous week between Marnix Elsenaar and our Frank Orr but more particularly to respond to your letter of 12 August 2021 in respect of the above.

We are indeed aware that Northumberland County Council ("NCC") has applied for an Order pursuant to the Transport and Works Act 1992, the Northumberland Line Order, and we note from your letter of 12 August 2021 that your client has indicated that it supports the application that has been made. As you have noted in your letter, we have lodged an objection on behalf of our client in respect of the application for the Order. Please also note that we have now also been instructed by Lord Hastings, the landowner under the other wayleave agreement referenced in the proposed Article 35 of the Order, although for the purposes of this letter references to our client are solely to our client as identified above.

As you will no doubt have now seen, on behalf of our client (and Lord Hastings) we have lodged a Proof of Evidence in support of our client's objection which has been prepared by Colin Cottage of Ardent Management Limited, an independent firm of property consultants specialising in compulsory purchase and compensation. That Proof of Evidence includes a supporting statement from our client.

Our client's principal objection to the Order is in relation to the inclusion of the proposed Article 35. Article 35 would, as drafted, amend three wayleave agreements that were entered into at or around the time the Northumberland Line was originally constructed. Our client is a party to two of these wayleave agreements, the first dated 10 May 1853, which was subsequently varied by way of a "grant of alteration" on 29 July 1867, and the second dated 30 July 1867.

Although our client has objected to the scheme being promoted by NCC, it should be noted that it fully supports its broad objectives and it is a huge disappointment to our client that it has been left with no opportunity but to object to the scheme. The very simple reason that our client has been put in this position though is as a result of the extensive failings on the part of your client, failings to

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engage with our client for a number of years and failures to comply with very clear and unambiguous obligations contained in the wayleave agreements. The manner in which your client has acted over the years, failing consistently to respond to communications, failing to engage, failing to provide information it is contractually obliged to provide and avoiding contractual liabilities to pay rents under the wayleave agreements, is deplorable particularly given its status as a public sector arm's length body and before taking account of the proposal to include Article 35 in the Order. That proposal, which we are advised was at the behest of your client rather than NCC, places an even clearer obligation on your client to engage with our client and as a body which seeks to rely upon draconian public powers of compulsion makes its conduct even more unacceptable.

Turning specifically to the matter raised in our letter of 9 July 2021, we note that in your response you state that your client refutes that there are any arrears of rent. Whilst it is acknowledged that your client has made a payment of £6,243.95 for the period up to and including 28 September 2021 this is no more than and has quite clearly only been accepted by our client as a payment on account of rents due under the 1853 Wayleave Agreement. Ultimately, the amount of rent due will be dependent upon what has been transported over the line in the relevant year and will need to be calculated and assessed in accordance with the provisions set out in the wayleave agreement. In that regard, we would simply refer back to our letter of 9 July which summaries the key elements to the rent calculation.

We have noted that the statement submitted by Mr Holdroyd of Network Rail to the Inquiry cites alleged uncertainty as to the meaning of some of the provisions of the wayleave agreements as a justification for the inclusion of Article 35. This alleged uncertainty was not however communicated to our client in advance and could readily have been, and could still be, resolved by arbitration. In any event, it is not accepted that they are uncertain.

Despite the age of the wayleave agreements, the mechanics of the rent calculation provisions set out in the agreements are not, in our view, complex; in fact, they are very much akin to a modern day royalty rent (in relation to the coal based rent) and a turnover rent provision (in relation to the none coal based rent). However, the operation of these provisions relies upon your client complying with the obligations contained in the wayleave agreements to disclose relevant records and financial information and the failure by your client to do so is the root of the issues that have arisen in recent years. In fact, it is of note that in 2018, your client was eventually able to provide the information required and the calculation of the rents due was then relatively straightforward.

We therefore repeat the request contained in our letter of 9 July, that your client provides a full disclosure of its accounts and records in relation to its operation of this line and in particular copies of the agreements it has with all freight operators running trains on the line and all charges levied to those operators for the use of the line for the relevant period. Our client will also need to see all supporting accounts, invoices, records and other supporting documentation on a full open book basis to enable it to verify and determine the correct amount of rent that should have been paid.

The above is separate to and without prejudice to any separate claim our client may have to rental payments under the 1867 agreement in respect of which no payment of rent has been received.

All of the above said and as our client has made clear on numerous occasions before, our client is more than willing and would welcome the opportunity, on a without prejudice basis, to engage with your client and discuss potential options for updating the basis for calculating rent under the wayleave agreements but it is essential that your client actively and seriously engages with such a process.


Although you suggest, in the penultimate paragraph of your letter, that your client is willing to negotiate with our client regarding the payments due under the wayleave agreements, our client has understandable doubts as to how genuine your client's intentions are in this regard based on its track record of failures to engage to date. Indeed, there had been no follow up to the discussion between your Marnix Elsenaar and our Frank Orr and the proposal that was put forward on behalf of our client

(and availability) for a meeting until yesterday, with only a limited time now before the Inquiry is due to start. Up until the response we received yesterday, our client found itself in a position where your client was unable to commit to meeting or indeed to determine who should attend. Yet, you suggest that "threats" (as you put it) to forfeit the wayleave agreements and/or to seek an injunction are unhelpful and misconceived. Perhaps your client should consider why our client has felt it necessary to make a formal demand for payment through solicitors given the continuing failings? The need to send our letter of 9 July was entirely avoidable and would have been unnecessary had your client taken simple steps to engage with our client and honoured its contractual obligations under the wayleave agreements. For the record, our client does not have any desire to take such steps to forfeit the wayleave agreement but in any event avoiding such action is very much in the gift and control of your client. That said, and as has been set out in our clients Proof of Evidence, our client is, as part of a wider discussion, prepared to consider and discuss potential variations to the wayleave agreements that would remove the re-entry provisions.

It is interesting to note the very stark difference in approach that our respective clients have taken in relation to the operation of the wayleave agreements. On the one hand, our client has actively sought to engage with your client and taken a graduated and measured approach to the continued failures on the part of your client, with formal legal proceedings being left as a last resort. On the other hand, your client has consistently ignored our client and sought to invoke public powers of compulsion without any attempt whatsoever to engage.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ward Hadaway LLP', written in a cursive style.

Ward Hadaway LLP

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Your Ref:
Our Ref: AJC.NOR103.425
Doc No: 33188405v1
Date: 21 October 2021

By email: charles.jagger@addleshawgoddard.com

Dear Sirs

Our Client: Lord Hastings
Your Client: Network Rail Infrastructure Limited
Blyth & Tyne Railway Wayleave Agreements and Northumberland Line Transport and Works Act Order

We have been instructed by Lord Hastings to act on his behalf in relation to the application made by Northumberland County Council ("NCC") for an Order pursuant to the Transport and Works Act 1992, the Northumberland Line Order.

You are already aware that we act on behalf of and have lodged an objection on behalf of The Northumberland Estates ("the Estate") in respect of the application for the Order. For the purposes of this letter references to our client though are solely to our client as identified above.

On behalf of our client we have lodged a joint Proof of Evidence in support of their objection and that of the Estate (both objections being in relation to the same issue). That Proof of Evidence has been prepared by Colin Cottage of Ardent Management Limited, an independent firm of property consultants specialising in compulsory purchase and compensation and the Proof includes a supporting statement from our client.

Our client's principal objection to the Order is in relation to the inclusion of the proposed Article 35. Article 35 would, as drafted, amend three wayleave agreements that were entered into at or around the time the Northumberland Line was originally constructed. Our client is a party to one of these wayleave agreements, dated 20 May 1853.

Although our client has objected to the scheme being promoted by NCC, it should be noted that it fully supports its broad objectives and it is a huge disappointment to our client that it has been left with no opportunity but to object to the scheme. The reason that our client has been put in this position though is as a result of the extensive failings on the part of your client to engage with our client. In particular, it should be noted that there was no advance warning of or attempt by your client to engage with our client in relation to the proposal to include Article 35 ahead of the submission of the application despite the compulsory nature of Article 35.

In addition to our instruction in relation to the application for the Order, we have also now been instructed by Lord Hastings to act on his behalf in the recovery of outstanding rents due under the wayleave agreement. We are advised that despite the very clear contractual obligations in the

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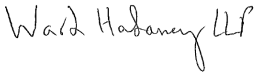
wayleave agreement for your client to pay such rents your client has failed to do so and that no rent has been paid for some considerable time.

In the first instance, we would request that your client provides a full disclosure of its accounts and records in relation to its operation of this line and in particular copies of the agreements it has with all freight operators running trains on the line and all charges levied to those operators for the use of the line for the relevant period. Our client will also need to see all supporting accounts, invoices, records and other supporting documentation on a full open book basis to enable it to verify and determine the correct amount of rent that should have been be paid.

Similarly to the position of the Estate, our client would be more than willing and would welcome the opportunity, on a without prejudice basis, to engage with your client and discuss potential options for updating the basis for calculating rent under the wayleave agreements.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, appearing to read "Ward Hadaway LLP", written in a cursive style.

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Manchester
Newcastle

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Information Governance
Northumberland County Council

Your Ref:
Our Ref: FMO.NOR103.425
Doc No: 33145313v1
Date: 19 October 2021

By email: FOI@northumberland.gov.uk

Dear Sir or Madam

**Freedom of Information/Environmental Information Regulations 2004
The proposed Northumberland Line Transport and Works Act Order
Article 35 – proposed cessation of wayleave agreement payments**

Can you please provide copies of all documentation, including letters, e-mails, file-notes, notes of meetings and otherwise, and including all relevant drafts, relating to Northumberland County Council's communications to and from and discussions with Network Rail, and the County Council's consideration thereof, in respect of the proposed cessation of wayleave agreement payments (as subsequently manifested in Article 35 of the above Order).

We look forward to hearing from you.

Yours faithfully



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