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BY FAX AND POST

15 December 2003

Colin G MacKenzie Esq
 Senior Solicitor
 The City of Edinburgh Council
 Department for Corporate Services
 Legal Services Division
 City Chambers
 High Street
 EDINBURGH EH1 1YJ

Dear Colin

EDINBURGH TRAM BILLS

I refer to your letter to me of 26 November and to the draft Bill, Bill papers and other documents which you subsequently copied to me by various means. I also refer to our telephone conversation on 2 December when I gave advice in response to the questions raised in your letter of 27 November. I undertook to put that advice in writing to you and that is the purpose of this letter.

The Promoter

1. In my view, the Council should be the sole promoter of the Bills which, in any event, provide that the powers to construct, maintain and operate the tram system should be conferred solely on the Council.
2. You state in your letter of 27 November that TIE was formed "for the purpose of introducing a Road User Charging System as well as assisting in the delivery of the Council's Local Transport Strategy". TIE is not an independent entity, and should be treated as what it is, namely a creature of the Council and one of whose functions is to assist the Council in delivering the Council's Transport Strategy including the two Bills.

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3. Assuming that TIE's staff have the requisite qualifications and expertise, its role should be to act as the project manager for the promotion of the Tram Bills and TIE should be given a formal brief to that effect. The consultants so far engaged for the promotion of the Bills should be re-engaged by the Council as the Council's consultants having a duty of care, and being accountable, to the Council. However TIE, as project manager, would manage the consultants on behalf of the Council and they would, unless the Council should otherwise decide, receive and act in accordance with instructions given by TIE. That approach should avoid any confusion as to the identity of the Promoter i.e. the Council. If the Operating Agreement, dated 3 May 2002, should conflict with that brief, the Operating Agreement should be amended or even cancelled. I should add that I have not seen a copy of that Agreement but, since TIE is the creature of the Council, there is no reason why the Agreement should not be amended or cancelled at the discretion of the Council.

Design Manual

4. The Design Manual seems to me to be somewhat similar to a Code of Construction Practice. Such a Code would commit the Council to ensure that the tram system is constructed in such a way that it will minimise the adverse effects of construction upon the local population. Such a Code is an evolving document and seldom - if ever - reaches a final sign-off. I would expect the Design Manual to be framed so as to underwrite the Council's commitment to design excellence and if the Manual - or a draft of it - is produced to the Scottish Parliament it would provide substantial evidence to demonstrate the Council's commitment to design excellence.

Liability

5. I assume that the Council is the roads authority for all of the roads over which the tram system is to be constructed. If, therefore, the Council employ contractors to construct the tram system, there is no reason why the Agreement with the contractors should not require those contractors to indemnify the Council for any undue damage caused by the construction of the tram system.
6. If the Council should decide to dispose of the tram system pursuant to section 64 of the draft Bill which you copied to me, the Council may wish to include a provision for the protection of the Council along the lines of the attached extract from a draft Order which we are promoting on behalf of two local authorities in England. The terms used would, of course, need to be adjusted for the Bills. I should add that the expression "Councils" used in the protective provision refer to the transferees; and I think that you may find that paragraph (17) could give particular reassurance to the Council.
7. Incidentally, I should mention that the list of contents at the beginning of the draft Bill which you copied to me does not quite match up to the substantive provisions subsequently set out in the draft Bill.

Human Rights

8. I do not believe that section 55 of the draft Bill is incompatible with the Convention right of freedom of assembly and association.

My firm's position

9. To put the position of my firm in context, I told you when we spoke that it would be in the Council's interests - particularly having regard to the costs involved - to engage Bircham Dyson Bell as the parliamentary agents to continue with the promotion of the Bills. My firm's instructions are limited, in effect, to giving an overview as requested in your letter of 26 November. It may be that one or more third parties may wish to instruct my firm to object to one or other of the Bills or to some of the provisions in one or other of the Bills; and we would wish to reserve our position to act for that party or those parties.

Yours sincerely



Joe Durkin

~~(3) In the event that the Councils proceed with the demolition of the accommodation bridges, all of the powers and obligations conferred or imposed upon the Councils by the 1855 Act shall in relation to the accommodation bridges cease to have effect.~~

~~(4) Except as may otherwise be provided in this Order any enactment by which the former railway was authorised shall have effect subject to the provisions of this Order.~~

Power of Councils to make agreements

~~50. The Borough Council and the County Council may enter into and carry into effect agreements with the other in respect to the construction, maintenance, use and operation of Translink or any part or parts thereof and as to any other matters incidental or subsidiary thereto or consequential thereon.~~

For the protection of the Councils in the event of transfer

51. If the powers of the Councils under this Order to construct the authorised works or any part of those works are transferred to another person by virtue of a transfer agreement under article 44, the provisions of Part VI of Schedule 11 to this Order shall apply for the protection of the Councils.

Protective provisions

52. The provisions of Schedule 11 to this Order shall have effect.

Certification of plans etc.

53. The Councils shall, as soon as practicable after the making of this Order, submit copies of the book of reference, the deposited sections and the deposited plans to the Secretary of State for certification that they are, respectively, the book of reference, sections and plans referred to in this Order; and a document so certified shall be admissible in any proceedings as evidence of its contents.

Service of notices

54. —(1) A notice or other document required or authorised to be served for the purposes of this Order may be served by post.

(2) Where the person on whom a notice or other document to be served for the purposes of this Order is a body corporate, the notice or document is duly served if it is served on the secretary or clerk of that body.

(3) For the purposes of section 7 of the Interpretation Act 1978 (a) as it applies for the purposes of this article, the proper address of any person in relation to the service on him of a notice or document under paragraph (1) is, if he has given an address for service, that address, and otherwise—

- (a) in the case of the secretary or clerk of a body corporate, the registered or principal office of that body, and
- (b) in any other case, his last known address at the time of service.

(4) Where for the purposes of this Order a notice or other document is required or authorised to be served on a person as having any interest in, or as the occupier of, land and his name or address cannot be ascertained after reasonable enquiry, the notice may be served by—

- (a) addressing it to him by name or by the description of "owner", or as the case may be "occupier", of the land (describing it), and
- (b) either leaving it in the hands of a person who is or appears to be resident or employed on the land or leaving it conspicuously affixed to some building or object on or near the land.

(5) This article shall not be taken to exclude the employment of any method of service not expressly provided for by it.

~~(4) Subject to the terms of any agreement between Network Rail Infrastructure Limited and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail Infrastructure Limited shall promptly pay to each train operator the amount of any sums which Network Rail Infrastructure Limited receives under paragraph (3) which relates to the relevant costs of that train operator.~~

~~(5) The obligation under paragraph (3) to pay Network Rail Infrastructure Limited the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to paragraph (4).~~

~~40. Network Rail Infrastructure Limited shall, on receipt of a request from the Councils, from time to time provide the Councils free of charge with written estimates of the costs, charges, expenses and other liabilities for which the Councils is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 39 and with such information as may reasonably enable the Councils to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).~~

~~41. In the assessment of any sums payable to Network Rail under this Part of this Schedule there shall not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the councils under this Part of this Schedule or increasing the sums so payable.~~

~~42. The Councils and Network Rail Infrastructure Limited may enter into, and carry into effect, agreements for the transfer to the Councils of—~~

- ~~(a) any railway property shown on the deposited plans and described in the book of reference;~~
- ~~(b) any lands, works or other property held in connection with any such railway property; and~~
- ~~(c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property.~~

~~43. In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail, shall—~~

- ~~(a) co-operate with the Councils with a view to avoiding delay and securing conformity as between any plans approved by the engineer and any requirements resulting from those procedures; and~~
- ~~(b) use best endeavours to avoid any conflict arising between the application of railway operational procedures and the proper implementation of the authorised works pursuant to this Order.~~

PART VI

PROTECTION FOR HIGHWAY AUTHORITIES

44. —(1) For the protection of the highway authorities concerned, the following provisions of this Part of this Schedule shall, unless otherwise agreed in writing between the Councils and the highway authority concerned, have effect.

(2) In this Part of this Schedule—

"highway" means a street vested in or maintainable by the highway authority;

"highway operations" means the construction of any part of the authorised works which will involve interference with a highway or the traffic in a highway and any temporary stopping up, alteration or diversion of a highway;

"plans" includes sections, drawings, specifications and particulars (including descriptions of methods of construction).

(3) Wherever in this Part of this Schedule provision is made with respect to the approval or consent of the highway authority, that approval or consent shall be in writing and may be given subject to such reasonable terms and conditions as the highway authority may require in the interests of safety and in order to minimise inconvenience to persons using the highway, but shall not be unreasonably withheld.

(4) Prior to seeking approval under paragraph (3), the Councils shall consult the highway authority concerned as to any works to and changes in the management of the highway network which may be required to ensure the effective integration of the authorised busway with other forms of highway traffic and, within 28 days of being requested in writing by the Councils so to do, the highway authority shall provide the Councils with its opinion on the subject.

(5) Without prejudice to the application of sections 59 and 60 of the 1991 Act (duty of street authority to co-ordinate and undertakers to co-operate) before commencing any highway operations, the Councils shall submit to the highway authority for its approval proper and sufficient plans and shall not commence the highway operations until such plans have been approved or settled by arbitration.

(6) If, within 56 days after any plans have been submitted to a highway authority under subparagraph (5), it has not intimated its disapproval and the grounds of disapproval, it shall be deemed to have approved them.

(7) In the event of any disapproval of plans by a highway authority under paragraph (6), the Councils may re-submit the plans with modifications and, in that event, if the highway authority has not intimated its disapproval and the grounds of disapproval within 28 days of the plans being re-submitted, it shall be deemed to have approved them.

(8) In submitting plans under paragraph (5), the Councils shall—

- (a) ensure that the design of any lighting for new station areas is such as not to cause confusion to highway users operating under normal highway lighting;
- (b) ensure that the design and positioning of any poles and brackets required for overhead line equipment and the design of foundations, platforms, road islands, substations, electric lines and other apparatus are compatible, so far as reasonably practicable, with street furniture vested in the highway authority; and
- (c) ensure that the design of any traffic signaling system for the authorised busway is fully compatible with traffic signaling for other traffic users whilst achieving priority signaling for guided buses using the authorised busway wherever practicable.

(9) Except in an emergency or where reasonably necessary to secure the safety of the public no direction or instruction shall be given by the highway authority to the contractors, servants or agents of the Councils regarding the highway operations without the prior consent in writing of the Councils.

(10) The highway authority shall not be liable for any additional costs which may be incurred as a result of the giving of instructions or directions pursuant to this Part of this Schedule.

(11) To facilitate liaison with the Councils, the highway authority concerned shall provide so far as is reasonably practicable a representative to attend meetings arranged by the Councils respecting highway operations.

(12) So much of the authorised works as forms part of or is intended to become public highway, or part of any such highway, and which are not street works as respects which the provisions of Part III of the 1991 Act apply, shall be completed in accordance with the reasonable requirements of the highway authority or, in case of differences between the Councils and the highway authority as to whether those requirements have been complied with or as to their reasonableness, in accordance with such requirements as may be approved or settled by arbitration.

(13) The Councils shall not, except with the consent of the highway authority, alter or interfere with any sanitary convenience, refuge, sewer, drain, lamp column, traffic sign, bollard, bin for refuse or road materials or apparatus connected therewith, or any other property or work belonging to, or under the jurisdiction or control of, the highway authority on or under any highway or repairable by them or the access thereto.

(14) The Councils shall not, except with the consent of the highway authority, deposit any soil or materials or stand any vehicle or plant on or over any highway so as to obstruct or render less safe the use of the highway by any person or, except with the like consent, deposit any soil or materials on any highway except within a hoarding.

(15) The Councils shall, if reasonably so required by the highway authority, provide and maintain during such time as the Councils may occupy any part of a highway for the purpose of the construction of any part of the authorised works, temporary ramps for vehicular traffic or pedestrian traffic, or both, and any other traffic measures required to protect the safety of road users in accordance with the standard recommended in Chapter 8 of the Traffic Signs Manual issued for the purposes of the Traffic Signs Regulations and General Directions 1994 (a) in such position as may be necessary to prevent undue interference with the flow of traffic in any highway.

(16) The Councils shall not place any hoardings on any part of any highway except for such period and in such manner as may be reasonably necessary.

(17) The Councils shall indemnify the highway authority against any claim which may arise as a result of any subsidence of, or damage to, any highway or any sanitary convenience, refuge, sewer, drain, lamp column, traffic sign, bollard, bin for refuse or road materials or apparatus connected therewith or any other property or work belonging to, or under the jurisdiction or control of, the highway authority on or under any highway, or maintainable by them, which may be caused by, or in consequence of, any act or default of the Councils, its contractors, servants or agents.

(18) Unless otherwise agreed between the parties any difference arising between the Councils and the highway authority under this Part of this Schedule (other than a difference as to its meaning or construction) shall be determined by arbitration.

PART VII

FOR PROTECTION OF CERTAIN LAND NEAR JEANS WAY, LUTON

45. —(1) For the protection of certain land off Jean's Way, Luton the following provisions of this Part of this Schedule shall, unless otherwise agreed in writing between the Councils and the authorities concerned, have effect.

(2) In this Part of this Schedule—

"local authority", "parish council" and "designated land" have the same meanings as in article 19 of this Order.

(3) The Councils may enter into agreements with either South Bedfordshire District Council or Dunstable Town Council or both of them for the carrying out, and subsequent maintenance of any landscaping and ecological mitigation works to be undertaken on designated land.
