

National Infrastructure Planning
Temple Quay House
2 The Square
Bristol BS1 6PN

Date: 14th March 2024

Our ref: 140703.00010

Your ref: TR010032

E-mail: [REDACTED] [@gateleyhamer.com](mailto:[REDACTED]@gateleyhamer.com)

Dear Sirs,

**THE A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER
POST EXAMINATION WRITTEN SUBMISSION ON BEHALF OF
TARMAC BUILDING PRODUCTS LTD ('TARMAC') IN RESPECT OF TARMAC LINFORD BLOCKS PLANT**

1. Introduction

- 1.1. As proposed in Tarmac's Deadline 8 written submissions (copy appended to this letter), we write to provide the ExA with an update on the progress of negotiations with the Applicant.
- 1.2. The ExA may recall that there are four issues in relation to the Tarmac's Site, these are:
 - 1.2.1. The Permanent Rights included in the DCO to enable the Applicant to undertake works to existing utility apparatus.
 - 1.2.2. Temporary Rights of Access included in the DCO to enable works to the utility apparatus.
 - 1.2.3. The impact of both temporary and permanent acquisitions of land on planning conditions for the landfill area.
 - 1.2.4. The impact of both temporary and permanent acquisitions of land on an Environment Agency (EA) permit for the use and remediation of the landfill site and the future surrender of the EA permit.
- 1.3. In the following sections of this letter, we take each of the above issues and provide the ExA with an update of the position.

2. Permanent Rights to undertake works to existing utility apparatus

- 2.1. Tarmac's issues with the proposed CA powers for new permanent rights are set out in their Deadline 8 submissions. However, in summary, the Applicant is seeking these powers to resolve the following issues:

ISSUE ONE

- 2.1.1. The Applicant is not itself a party to the existing agreements and so is not able to undertake the proposed works to the utility infrastructure. To resolve this problem, Tarmac has offered the Applicant a temporary licence agreement but in reply the Applicant has since advised that there is a contractual commitment between the Applicant and the utility operators that sets out the utility operator's requirements for new modern permanent rights and so the offer of a temporary licence will not satisfy this commitment.

ISSUE TWO

- 2.1.2. The existing legal agreements are also not considered to be drafted wide enough to allow the scheme works to be undertaken because they do not include the words "replace" and "alter". Tarmac's legal advisors do not agree with this but nevertheless have offered to vary the agreements to incorporate these words.
- 2.2. The Applicant has shown no appetite to progress with any of the voluntary agreements / variations offered to address the two issues outlined above and so no progress has been made. For the record, Tarmac remains willing to enter into such agreements / variations to allow the scheme to proceed.

Post-Examination Update

- 2.3. There is one matter that has changed post-examination, which is that Tarmac is now willing to consider agreeing a new voluntary easement with NGET. Tarmac advised the Applicant of this decision on 8th January 2024, and have made numerous subsequent requests for a draft easement plan to move this matter forward. Unfortunately, negotiations regarding the easement are painfully slow with the Applicant seemingly happy to kick this into the long grass.
- 2.4. It therefore appears that the ExA is going to need to make a decision on the proposed CA powers for permanent rights taking into account both whether confirming powers that the utility operators have asked for without any engagement with Tarmac represents appropriate justification and also whether the threshold test of last resort has been attained when alternative voluntary solutions have been offered, remain available but which have not been engaged with.

3. Temporary Rights of Access to enable works to the utility apparatus

- 3.1. Tarmac's issues with the proposed CA powers for new temporary access rights are set out in their Deadline 8 submissions. However, to remind, the proposed rights present a 'spaghetti' of access corridors through a busy operational site both under overhead gantries and in some parts the wrong way down a one-way estate road which poses significant operational and health and safety concerns to any users of the access routes and / or surrounding operational land.

Post-Examination Update

- 3.2. Despite advising the ExA in Deadline 8 and 10 submissions that negotiations around agreeing less disruptive temporary access arrangements were progressing, the Applicant now appears to have also kicked this into the long grass.
- 3.3. A request was made for the Applicant to circulate their final HOTs, including relevant plan for approval on 8th January 2024 and has been chased on two occasions since (18th January and 20th February). Nothing has been issued and it is understood that the Applicant may now also be trying to introduce further temporary occupation rights into the agreement despite Tarmac clearly stating this is not agreeable.
- 3.4. This voluntary access agreement matter and Tarmac's proposed alternative solution around the perimeter of the site has been under negotiation for a long time with Tarmac first proposed their less disruptive alternative route on 1st March 2022. Given the length of time it is taking the Applicant to progress this matter and now seemingly the Applicant's stated intention to include other provisions into the agreement despite Tarmac's clear opposition there is now little confidence in the Applicant's ability to conclude the voluntary access agreement.
- 3.5. The ExA must therefore be prepared to again decide whether the last resort threshold test has been met before confirming the proposed CA powers when Tarmac are willing to agree an alternative solution and have been for over 2 years.

4. Impact of both temporary and permanent acquisitions on land subject to an Environment Agency (EA) permit and subject to Local Authority restoration conditions

- 4.1. A satisfactory position was reached during the Examination regarding mitigating the adverse impacts of the temporary and permanent acquisitions of land concerning the landfill and EA permit area.
- 4.2. Regarding the Applicant not making any endeavours to acquire the permanent acquisition land by private treaty agreement, the Applicant has still not made an offer. Instead of treating this as an isolation point and offering a monetary consideration, the Applicant has sought to make the consideration conditional on reaching agreement over the NGET easement, but this is out of Tarmac's hands – it is with the Applicant who is delaying. So in short, no offer has ever been made.
- 4.3. The ExA may therefore also need to be prepared to decide whether the Applicant's conditional approach to acquiring Tarmac's land has exhausted all reasonable steps to acquire by agreement and again whether the threshold test of last resort has been attained.

5. Conclusion

- 5.1. Tarmac remains willing to negotiate voluntary agreements with the Applicant that will allow the scheme to proceed but a similar level of meaningful engagement from the Applicant is required to conclude such agreements.
- 5.2. If the ExA wish to discuss any of the content of this letter with Tarmac or their representative, we would be happy to hear from the ExA.

Yours faithfully,

[REDACTED]

For and on behalf of Gateley Hamer Limited

Cc:

Jason Moore [REDACTED] [\[REDACTED\]@lowerthamescrossing.co.uk](mailto:[REDACTED]@lowerthamescrossing.co.uk)

National Infrastructure Planning
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Date: 5th December 2023
Our ref: 140703.00010
Your ref: TR010032

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Dear Sirs,

**THE A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER
DEADLINE 8 WRITTEN SUBMISSION ON BEHALF OF TARMAC BUILDING PRODUCTS LTD ('TARMAC')
IN RESPECT OF TARMAC LINFORD BLOCKS PLANT**

1. Instruction

- 1.1. Since Tarmac's Deadline 7 submission we write to provide the ExA with an update on the progress of negotiations with the Applicant.
- 1.2. The ExA may recall that there are four issues in relation to the Tarmac's Site, these are:
 - 1.2.1. The Permanent Rights included in the DCO to enable the Applicant to undertake works to existing utility apparatus.
 - 1.2.2. Temporary Rights of Access included in the DCO to enable works to the utility apparatus.
 - 1.2.3. The impact of both temporary and permanent acquisitions of land on planning conditions for the landfill area.
 - 1.2.4. The impact of both temporary and permanent acquisitions of land on an Environment Agency (EA) permit for the use and remediation of the landfill site and the future surrender of the EA permit.
- 1.3. Progress has been made on addressing some of the issues, but not all, and therefore we wish to highlight to the ExA the remaining areas of dispute and areas where discussions are ongoing discussions. Whilst Tarmac remains willing to negotiate so as to avoid the need for CA and TP powers, it now appears unlikely that the Applicant will be able to provide a satisfactory resolution. Accordingly, the ExA is likely going to need to determine whether to confirm powers.

2. Permanent Rights

- 2.1. Based on comments in the Applicant's post-CAH3 submissions, and comments set out in recent email correspondence, there are perceived to be two issues that warrant the



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proposed Permanent Rights in order to undertake works (OH4 and OH5) to existing pylons PAB18, PAB19 and ZJ016:

ISSUE ONE

- 2.2. If the works are to be undertaken by the Applicant, there are no existing legal agreements that would enable the Applicant to work on the existing utilities infrastructure and therefore the Applicant needs these powers to deliver the scheme. See paragraph 3.13.3 of the Applicant's post-CAH3 submissions.
- 2.3. Tarmac recognises this issue and has offered the Applicant a temporary licence agreement (HoTs were issued 13th November) to undertake the required works to Pylons PAB18, PAB19 and ZJ016. The Applicant has stated they would be willing to enter into such an agreement, but this does not resolve the requirement for the CA and TP powers as the Applicant has agreed contractual commitments with UKPN and NGET which set out the utility operator's requirement for new modern permanent rights.
- 2.4. Tarmac have never been party to the agreement of these contractual commitments and would suggest that the imposition of CA and TP powers at the request of a third party is not appropriate justification for granting the Applicant powers, particularly where the parties for whom powers are being sought (as the Applicant has agreed that a license would be sufficient for them) has not sought to engage with Tarmac to see if CP and TP powers can be avoided either via the existing agreements or a temporary licence.
- 2.5. Tarmac do not consider that the threshold test of last resort has been achieved and there is no justification for the use of the powers. The Applicant is merely acting as a puppet for UKPN and NGET to achieve powers that are not required for the delivery of the Scheme.

ISSUE TWO

- 2.6. If the works are to be undertaken by UKPN and / or NGET (as is expected) the existing legal agreements are not considered to be drafted wide enough as they do not incorporate the words "replace" and "alter" – see paragraph 3.13.4 of the Applicant's post-CAH3 submissions.
- 2.7. Tarmac's legal advisors do not share this view but nevertheless Tarmac has offered (HoTs were issued 13th November) to vary the existing agreements with the inclusion of rights to replace or alter.
- 2.8. Unfortunately, the Applicant has advised that this is not acceptable as it would present a risk to the delivery of the project. This is despite it being clear in the Applicant's post-CAH3 submissions that the omission of these words was the reason why they felt the existing agreements were unsuitable.

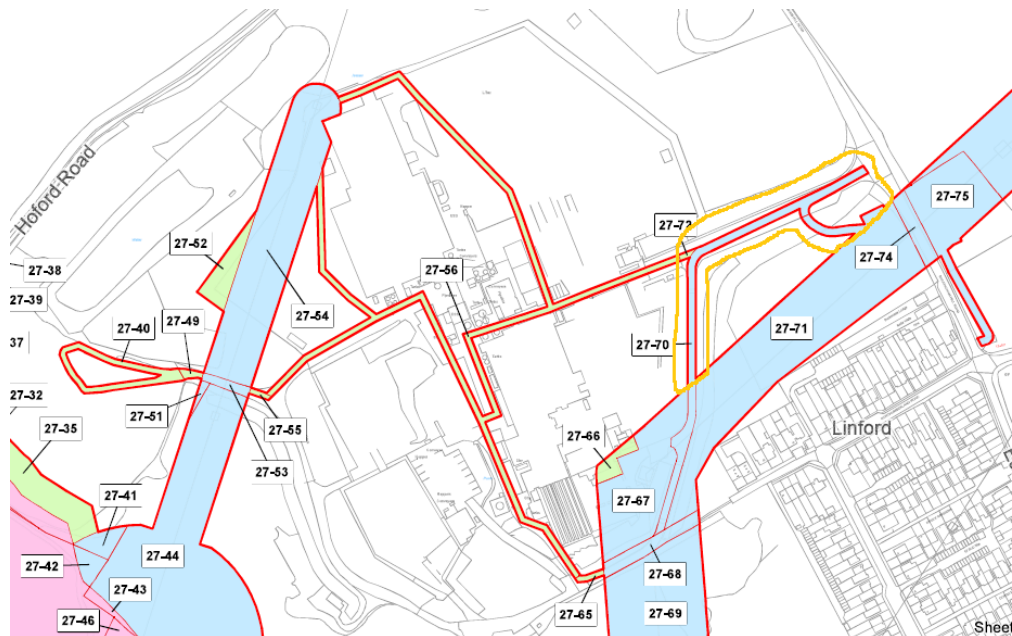
3. Temporary Rights of Access

- 3.1. The ExA may recall that the parties have been trying to agree less disruptive temporary access arrangements, but which will still allow the Applicant to proceed with the scheme, and this is intended to be legal documented following agreement of HoTs.
- 3.2. Tarmac and the Applicant have continued to engage on this matter and the Applicant responded to the travelling draft terms on 29th November 2023. The response is now being considered by Tarmac. Whilst matters appear to be moving in the right direction, there are material outstanding issues to resolve before the parties seek governance approval.

- 3.3. The outstanding issues are:

PERMANENT RIGHTS FOR TEMPORARY ACCESS

- 3.4. Tarmac would like the Applicant to confirm that subject to DCO confirmation, the promotor will not exercise powers over the area edged in orange below (effectively plot 27-72).



- 3.5. The Applicant has provided an in-principle agreement to this but their agreement is conditional. Tarmac has asked for further clarity around the conditionality and is awaiting a response. This is therefore unresolved and outstanding.

APPLICANT COMMITMENT NOT TO EXERCISE POWERS

- 3.6. The Applicant is insisting on a clause that will allow the promotor (and by extension UKPN and NGET) the ability to exercise all rights set out in the DCO, subject to confirmation. Tarmac have previously raised this concern – see paragraph 2.8 of Tarmac’s Deadline 7 written submissions.
- 3.7. The Applicant has advised that the purpose of including this clause is so that the promotor can retain the ability to “fall back on and exercise their statutory powers” as nothing must fetter the deliverability of the scheme.
- 3.8. This reservation brings into question any weight any agreement may have and whether it will sufficiently safeguard Tarmac from the Applicant exercising CA / TP powers in the future.

4. Impact of temporary and permanent land acquisitions of governed by land planning conditions and an Environment Agency (EA) permit

- 4.1. Tarmac has continued to liaise constructively with the Environment Agency (EA) and Applicant over the wording of DCO Article 68 (interface with waste operation permits) seeking to adequately address the consenting and permitting issues for Tarmac’s Linford landfill arising as a result of Applicant’s scheme.
- 4.2. Tarmac is grateful to the EA and the Applicant for sharing with Tarmac previous drafts of Article 68. If the anticipated amended Article 68 that Tarmac understands is now agreed

between the EA and the Applicant is submitted and included in the DCO, Tarmac considers that version of Article 68 is clearly preferable from Tarmac's perspective as a permit holder.

- 4.3. Tarmac will need to check the version that is submitted to the Examining Authority at Deadline 8.

5. Conclusion

- 5.1. Subject to the anticipated amended Article 68 being submitted and included in the DCO, Tarmac is content with the drafting and the protection afforded and this is a positive step forward.
- 5.2. However, Tarmac is far less content with the direction of travel concerning the proposed permanent rights. The Applicant has stated that it is prepared to engage with voluntary terms that would allow the works to proceed, and the scheme to be delivered without recourse to powers, but we are advised that this does not negate the requirement for the CA and TP powers because we understand the Applicant has separately agreed contractual commitments with UKPN and NGET to effectively replace the existing documented rights with new modern permanent rights on the utility operators standard templates.
- 5.3. Tarmac is also displeased with the outcome of offering to vary the existing agreements with the inclusion of words which were said to be missing that would hinder the ability to undertake the works to the utility infrastructure and effectively 'moved the goal posts' when Tarmac has offered to accommodate perceived shortcomings with the existing legal agreements.
- 5.4. Negotiations regarding the permanent rights to allow the Applicant (and UKPN and NGET) appear to have run their course. The ExA is therefore likely going to need to make a decision on this matter taking into account whether confirming powers that the utility operators have asked for without any engagement with Tarmac represents appropriate justification particularly in regard to the need for the scheme and if the threshold test of last resort has been attained.
- 5.5. Finally, progress continues to be made in respect of an agreement for the temporary access rights, but an early steer from the ExA with regards to whether it considers it appropriate for the Applicant to necessitate the inclusion of provisions in a legal agreement that will effectively allow the promotor to ignore what it agrees to in favour of exercise statutory powers, is a fair and reasonable.
- 5.6. Tarmac will endeavour to update the ExA on the progress of voluntary negotiations with regards to the temporary access rights.

Yours faithfully,



For and on behalf of
Gateley Hamer Limited