



**DURHAM COUNTY COUNCIL COMMENTS AND SUPPLEMENTAL NOTES
REGARDING THE UNILATERAL S106 RELATING TO THE NATIONAL GRID
ELECTRICITY TRANSMISSION PLC (SCOTLAND TO ENGLAND GREEN LINK 1)
COMPULSORY PURCHASE ORDER 2023**

Compulsory Purchase (Inquiries Procedure) Rules 2007

Dated 4th December 2023

These comments are submitted on behalf of the County Council of Durham (“the Council”) in regard to the Inspector’s email dated 13th November 2023, requesting that the Council offer their comments on the unilateral S106 (“S106”), and other supporting documents attached to the email, which have been prepared by National Grid Electricity Transmission PLC (“NG”) in relation to the National Grid Electricity Transmission PLC (Scotland to England Green Link 1) Compulsory Purchase Order 2023 (“the Order”).

The Inspector raised two specific queries (as follows), and requested that the Council addresses them: -

- 1. The extent to which the proposed modifications and/or Unilateral Undertaking would address your (the Council’s) objections to the Order; and**
- 2. The Council’s views on the practicality of enforcing the Undertaking.**

The Council now sets out its reply to each query as follows: -

- 1. The extent to which the proposed modifications and/or Unilateral Undertaking would address your (the Council’s) objections to the Order.**

1.1. The Council’s objections to the Order were set out clearly in both our letter dated 20th February 2023 and the Council’s Statement of Case dated 24th August 2023. The Council raised objections to the Order, and clearly stated their reasons. As the Inspector has specifically stated that they are not seeking comments which simply repeat the objections already made to the Order, the Council will not repeat its objections to the Order and instead invites the Inspector to refer to the Council’s

letter dated 20th February 2023 and Statement of Case dated 24th August 2023. The S106 does not address or alleviate any of the Council's objections to the Order. The S106 and proposed modifications do not confirm that NG will not acquire compound rights over plot 7-27, and access rights over plot 6-17, nor do they confirm that the cables will be installed at a depth of 1.2 metres instead of 0.9 metres. Further, the S106 and supporting documents which include the notes on modifications to the Order, does not stipulate that the alternative site that the Council has offered to NG, instead of NG acquiring compound rights over plot 7-27 (the "Alternative Plot") is formally agreed.

1.2. There are also fundamental problems with the S106, which are set out as follows:-

- 1.2.1. The statutory basis for entering into a planning obligation (such as proposed by NG in the S106) is set out within section 106 of the Town and County Planning Act 1990 ("the 1990 Act"). Section 106(1) of the 1990 Act provides that "any person **interested in land** (our emphasis) in the area of a local planning authority may, by agreement or otherwise" enter into a planning obligation. For the reasons set out below, the Council does not consider that a planning obligation is capable of legally securing the obligations contained within the S106.
- 1.2.2. The purpose of the Order (if confirmed) is to permit NG to compulsorily acquire sufficient rights over the Order Land to enable NG to undertake its Green Link Project. The Council understands that NG does not currently have any legal interest in any of the Order Land. For the Inspector to afford any weight to the S106 in the decision on whether to confirm the Order, in order to ensure that the obligations contained within the S106 are secured, the Council respectfully submits that the Inspector will need the S106 to have been completed before a final decision regarding whether or not to confirm the Order is taken. Given that the requirement in s106(1) of the 1990 Act states that a person/body entering into a planning obligation must have an interest in the land is not met, the Council does not consider that the S106 is legally capable of constituting a planning obligation. This means, that the S106 would be (at best) a contractual obligation between NG and the Council (although given the unilateral nature of the S106, it is not clear whether the requirements for the creation of a contractual relationship have been or indeed can be, established). The S106 will not be capable of binding the land as a planning obligation (or be enforceable against successors in title to NG) and the Council will not be able to rely upon the wide enforcement powers available to it in respect of planning obligations. Therefore, the Council considers that the S106 is fundamentally flawed.

2. The Council's view on the practicality of enforcing the undertaking (S106).

- 2.1 Notwithstanding the fundamental issues set out above regarding whether the S106 is legally capable of constituting a planning obligation for the purposes of section 106 of the 1990 Act or whether the S106 is capable of being a contractual obligation, the S106 is proposed to be made solely between the Council and NG. In some instances, NG will not be acquiring the freehold ownership of certain plots. This raises two issues. Firstly, it is the Council's standard practice to require any person/body with an interest in the relevant land to enter into a planning obligation (when one is required). This is to ensure that all of the legal interests are bound by the obligations and ensure ease of enforcement by the Council in the case of any breaches. In the case of the S106, there are likely to be instances where the freehold owner is not a party to the S106. The Council is concerned that, in the event of any breaches of the s106 obligations, this might make it more difficult for the Council to enforce the obligations. Secondly, NG appear to be envisaging that the Council will enforce any breaches of the s106 obligations across the whole of the Order Land (irrespective of whether the land was originally owned by the Council or a third party. The Council does not consider that this would be appropriate, reasonable or proportionate. This would mean that a third party land owner would be reliant upon the Council to agree to take action to enforce any breaches of the S106 obligations. This could lead to decisions of the Council not to enforce any breaches being challenged by way of judicial review. Both the risk of challenge and having to enforce third party rights would impose an unnecessary, inappropriate and disproportionate financial and resource burden upon the Council and deprive third party landowners of a right of action. It is not clear to the Council whether this would have any Human Rights implications. The Council remains firmly of the view that if assurances are to be offered to third party landowners, then these assurances ought to be given to/secured with those landowners directly.
- 2.2 As previously stated in point 1 above, the Council is firmly of the opinion that the S106 is fundamentally flawed from a legal perspective in that it cannot constitute a planning obligation due to NG's lack of interest in the land purported to be bound by the s106 obligations. This raises an additional issue: if the S106 is not a planning obligation for the purposes of section 106 of the 1990 Act, the Council does not see how it can be expected to enforce third party obligations which are given in a document made solely between the Council and NG, especially where it is unclear whether the document even creates any binding obligations.
- 2.3 It would also be open to NG to apply to discharge or modify the S106 at any point pursuant to the provisions of S106A of the 1990 Act. Given the Council's concerns over the S106, it is not clear how the Council could reasonably resist an application to discharge the S106 on the grounds that it does not achieve its stated aims. Furthermore, there is also a right of appeal available to a developer pursuant to S106B of the 1990 Act if the Council refused to modify or discharge the S106,

which inevitably would introduce an element of uncertainty as to the future enforceability of the obligations contained in the S106.

2.4 For all of the above reasons, the Council does not consider that the submitted documentation is fit for purpose and would respectfully ask the Inspector to fail to afford any weight to the proposed S106.

FOR AND ON BEHALF OF THE COUNTY COUNCIL OF DURHAM