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Your Ref:

Our Ref: **RS/ Green**

Date: **2 May 2011**

Pre-action protocol letter: proposed judicial review of decision to cut all bus subsidy funding

Dear Sirs

1. **To:** Cambridgeshire County Council (“the Council”)
2. **The Claimant:** Jo Green of [REDACTED], Milton, Cambridge, [REDACTED]. Ms Green uses the number 2 bus almost daily and the number 9 regularly. She uses them to access her local area and nearby towns and villages, in particular in order to go to her son’s youth club and for other social activities. She also uses the buses to access medical treatment, in particular Addenbrookes Hospital.
3. **Reference details:** RS/ Green
4. **Details of the matter being challenged**
 - 4.1. The decision of the Full Council on 15th February 2011 to approve its Integrated Plan for 2011/2012, in particular the decision contained therein to cut all funding for subsidised bus services over a four year period (£2.98 m) and replace this with a total of £220k funding towards community transport for 2011/2012 and 2012/2013 only (the “Decision”).

(See Integrated Plan for 2011/2012, Technical Appendix D(i), Table 1 (Overview), paragraph 6.57 on page 135; paragraphs 5.7-8 on page 131)
5. **The issues**

Summary of background

- 5.1. On 25th January 2011, the Council’s Cabinet agreed to recommend to the Council approval of the Integrated Plan and Budgetary Proposals for 2011/2012 (“IP”),

containing, inter alia, the proposal to remove the funding for 100% of subsidised bus services over the four year period from 2011-2015.

- 5.2. The Community Impact Assessment (CIA) on bus subsidies which was reported to Cabinet at this meeting stated that there are “currently around 80 supported services with 1,924,870 passenger journeys on these [subsidised] services. Overall, including commercial services, 22,060,128 passenger journeys per year which has increased by 46% since 2001/2.”
- 5.3. The CIA further stated that *“The [Cabinet] is recommending to the Full Council that funding for all contracted bus routes be removed over four years. This will involve the removal of 20% of journeys in the current bus network.”* There does not appear to have been any further detail before the Council at the time of its Decision (either in the CIA, the Technical Appendix to the IP or any of the other papers before Cabinet or the Full Council) as to what the actual consequences of cutting all subsidies would be on local bus services in Cambridgeshire (such as which services would be affected, the extent to which they would be affected, the specific areas and numbers of people being affected, for example).
- 5.4. Rather, the report before Cabinet on the CIAs carried out, entitled “Assessing the impact of Integrated Planning Proposals on Communities in Cambridgeshire” states (at paragraph 26 on Public Transport), after summarising “the potential for significant impact on rural communities”:
- “It will be important to closely monitor the impacts of phased reductions in tendered services to minimise impacts on communities. Consultation will be carried out prior to any removal of services and community impact assessments undertaken.***
At this stage, we do not know the extent to which bus operators would seek to run currently subsidised services without subsidy, although discussions with operators are underway. Also, by encouraging community transport operators to develop their services, and provide some additional financial support, there is the potential for more flexible services to be provided...” (emphasis added)
- 5.5. The report goes on to say that *“initial service reductions will primarily focus on services that are heavily subsidised and/or under-used. Initially services are likely to be reduced rather than stopped altogether where appropriate. This will allow a thorough review of public transport to be undertaken, working with other authorities and community groups to identify the most effective ways of delivering local transport within the funding constraints.”* (emphasis added)
- 5.6. The minutes of the 25th January 2011 Cabinet meeting record that a petition was presented to Cabinet containing 67 signatures which called for the Council to maintain its financial support for bus services on a number of grounds. Simon Norton, on behalf of the Cambridgeshire Campaign for Better Transport spoke on these issues at the meeting, summarising local opposition to the cuts and concerns

as to their impact on rural communities, and questioning the low level of financial support being provided towards community transport schemes bearing in mind the Council's apparent reliance on this in its decision. The minutes record that Councillor McGuire's responded as follows:

*"Given the background, the Members of Cabinet had to reluctantly propose to make very significant savings in conventional subsidised bus services throughout the County, **although wherever possible it would seek to minimise the impacts on communities by looking very carefully at how services were used, and talking to people to really understand their needs. He was especially keen to see if the County Council could help develop more flexible local transport arrangements and was organising a summit meeting of community leaders, bus operators and community transport organisations to discuss the way forward.**"* (emphasis added)

5.7. The Minutes refer again at page 15 to a transport summit at March Town Hall "to discuss community transport needs". The minutes refer to the various matters which might fall to be considered at that summit in relation to subsidised services.

5.8. On 15th February 2011 (prior, as we understand it, to this March Town Hall meeting), the IP was formally approved by a meeting of the Full Council. The minutes of this meeting record that two further petitions had been received in opposition to the bus subsidy cuts: one of 189 signatures presented by Anna Vine Lott asking the Council not to make cuts to the Whippet Bus Service No. 114; and a petition of 152 signatures presented by Tony Carter stating, 'We believe that the County Council should not make any cuts in funding subsidies to predominately rural bus routes. These routes are vital lifelines to many rural pensioners and the unemployed of the county'.

Issues

5.9. We consider that in taking the Decision to cut funding for all subsidised bus services, the Council has acted unlawfully in the following ways.

Issue 1: Failure to discharge statutory duty to secure public transport under section 63 of the Transport Act 1985.

5.10. Section 63(1)(a) of the Transport Act 1985 provides that:

"(1) In each non-metropolitan county of England and Wales it shall be the duty of the county council-

(a) to secure the provision of such public passenger transport services as the council consider it appropriate to secure to meet any public transport requirements within the county which would not in their view be met apart from any action taken by them for that purpose."

- 5.11. By section 63(5), the county council has a power to secure such provision by entering into a subsidy agreement where the service in question would not be provided, or would not be provided to a particular standard (see s. 63(5A)) without such subsidy. The Council also has a duty under section 63(8) to have regard in the performance of these functions to have regard to the transport needs of members of the public who are elderly or disabled.
- 5.12. The case law on the section 63 duty is clear (see *R v Hertfordshire County Council ex parte Three Rivers District Council* (1992) 90 LGR 526). There is a statutory duty upon a County Council to:
- Identify the public transport requirements within the county which would not be met other than by the council taking action; and;
 - Once these requirements have been identified, secure what it considers appropriate to meet these requirements. The question of what was appropriate was one for the county council. (Page 540)
- 5.13. At p 544-5, Roch J stated that *“I would accept that if the Council had simply looked for a number of service cuts which would save them £75k in the financial year, they would have failed to discharge their duties under section 63(1) and section 63(8) of the Act. Equally, the decisions might have been flawed if it were to be demonstrated that a community within the district having an established public transport requirement had been left without any public passenger transport service at all.”*
- 5.14. We consider that the Council has failed to appreciate in the process of reaching its Decision to cut all bus subsidies that it was seized with a statutory duty to secure appropriate public transport to meet local requirements and, in doing so, it has entirely failed to discharge its statutory obligations under the legislation. The Council appears to have proceeded on the basis that its provision of bus subsidies was purely discretionary – a power rather than a duty.
- 5.15. Neither the minutes of 15th February 2011 nor those of the Cabinet meeting of 25th January 2011 refer to any statutory duty to secure appropriate public transport provision. The IP and its supporting papers make no reference whatsoever to the Transport Act 1985 or to any duty to secure appropriate public transport provision.
- 5.16. In fact, at Technical Appendix D(i) on Environment Services (of which public transport forms part), paragraph 1.3 at page 122-3 summarises the key statutory duties of the service. For example, reference is made to the Highways Act 1980 and the Council’s “responsibility for the maintenance and improvement of public highways”; and to the council’s “duties...in relation to hazardous substance[s] on, over or under land” under the Planning (Hazardous Substances) Act 1990. In relation to local transport, the report makes reference to the Local Transport Act 2008 (*“opportunities for us to deliver high-quality, integrated public*

transport system to meet local needs; includes requirement to have a Local Transport Plan”) and to the Transport Act 2000 (“relates to Local Transport Plans and bus strategies. We must give due regard to the transport needs of older people and people with mobility difficulties when developing plans and policies.”). But there is no reference here or in any of the supporting text to the duty under the Transport Act 1985. There is no consideration anywhere else in the text of the Council’s obligation to identify the local public transport needs or to secure appropriate provision to meet those needs.

- 5.17. Rather, in the report to Cabinet entitled “Assessing the impact of Integrated Planning Proposals on Communities in Cambridgeshire” dated 25th January 2011, at page 18 paragraph 26.1, it states:

*“Most public transport services in Cambridgeshire are provided on a commercial basis. However, the Council has a **discretionary role** in subsidising services that operators will not provide on a commercial basis. The Council also provides some funding for community transport.”* (emphasis added)

- 5.18. This is a clear error of law. Accordingly, the Council has not discharged its statutory duty under section 63(1)(a) or under section 63(8) of the Transport Act 1985 as set out above. It has wholly failed to assess or to understand what the current public transport requirements of the county are (and in particular the particular needs of elderly people or those with mobility problems) or to discharge its statutory obligation to secure appropriate public transport provision to meet those needs. Instead it appears simply to have decided to save £2.7m net from the Environment Services budget and, according to the CIA, “to remove 20% of journeys in the network”. In doing so, as summarised in the background above, the Council deferred any assessment of local needs until a later stage, after it had made the Decision to cut 100% of subsidies. We consider that this error of law vitiates the Council’s entire decision making process on this issue.

Issue 2: Failure properly to discharge its duties under s 71 Race Relations Act 1976, s 76A Sex Discrimination Act 1975 and s 49A Disability Discrimination Act 1995 to have “due regard” to the various identified equalities needs of protected groups

- 5.19. The Council was (at the time the Decision was made) under specific statutory duties under the above equalities legislation (now found under the new Equality Act 2010 from April 2011 onwards).

- 5.20. It is clear from the case law that in order to have “due regard” under the legislation, any equalities impact assessment (EqIA) of the potential impact on protected groups must be carried out in advance of making any policy decision which affects them: (*R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 (CA); *R (Brown) v SSWP* [2009] PTSR 1506 (CA)). The statutes set a clear and unqualified requirement which must be met as a precondition for a valid decision; and so, where for example there had been no proper assessment of equalities

impact at the initial stage of deciding whether to make cuts of 50% or 80% to a welfare rights service, there had not been “due regard” and the decision was quashed: *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin).

- 5.21. It is also clear that once a risk of adverse impact is assessed, it is incumbent upon a local authority to consider the measures to avoid that impact *before* fixing on a particular solution. In *R (Kaur) v Ealing LBC* [2008] EWHC 2062, the council had erred in having recognised the problem whilst merely hoping to assess its extent after it had settled on its criteria.
- 5.22. In this case, the Council’s equalities impact assessment appears to be contained in various “Community Impact Assessments” (CIAs) in respect of various aspects of the changes contained in the IP; and there was a specific CIA in respect of the proposed bus subsidy cuts, referred to above. We consider that this CIA falls far short of the “due regard” that the Council was obliged to have to the need to eliminate discrimination against protected groups and the other identified goals in the legislation.
- 5.23. First of all, the CIA is clearly predicated on the basis that the cuts will be made. It states (under the heading of what the proposed change will be): “*The County Council’s Cabinet is recommending to the Full Council that funding for all contracted bus routes to be removed over four years. This will involve the removal of 20% of the journeys in the current bus network.*” There is no consideration in this CIA of any option *other* than to make the cuts to all subsidised services. This flies in the face of the case law above which emphasises the importance of assessing the impacts at a formative stage of the process prior to fixing on a particular way forward.
- 5.24. Secondly- and fundamentally - there is no actual assessment of what the impact will be of removing all bus subsidies on the groups which the CIA states will be affected. It states at page 2 “This covers a wide group of people but in particular include the elderly, disabled groups, the young, low income families and rural residents where access to a car is restricted.” It then states that there are 1,924,870 passenger journeys on the routes to be withdrawn. The CIA is categorical in its judgment that in relation to all “equality strands” the impact will be “negative”. But despite this, there is no assessment at all of what the actual impacts will actually be. In our view, the exercise is not a genuine assessment of impact because the consequences are simply not assessed.
- 5.25. For example, there is not even a list of affected routes or understanding of which areas they cover, the demographics of the affected areas or any real assessment of which groups will be affected, to what extent and how. Instead the CIA report to Cabinet states “it will be important to closely monitor the impacts of phased reductions in tendered services to minimise the impacts on communities.” The “review” of public transport referred to later in the CIA report and in the minutes referred to above was to take place after the Decision to make the cuts in the first

place. This means that there has been no proper assessment of impact *before* the decision to withdraw all subsidies was made, let alone at a stage where the options were being considered. It is also a clear example of the *Kaur* type of case referred to above: the Council has simply predicted a generic negative impact and appears to plan to assess its extent after its Decision and after the event.

- 5.26. This is all the more stark since the Council has recognised as part of its Local Transport Plan to 2011 and the recent development of its new Local Transport Plan 2011-2016 (LTP) the crucial role of public transport in a county with a dispersed rural population such as Cambridgeshire. In its new LTP the Council there explains that 51% of the population of the county lives outside Cambridge or one of the larger market towns, with 18% of the total population being without a car according to the 2001 Census. Not only does the LTP identify the dispersed rural population as a key challenge for transport in rural areas (page 3-2) but it explains that these issues were raised through public consultation on the LTP in 2010, with public transport improvements seen to be the most important transport intervention (75% of respondents ranking it as either 1 or 2, with 1 being the most important).
- 5.27. The failure to have due regard to protected groups is closely linked to the failure of the Council to understand and therefore discharge its statutory duty under section 63 of the Transport Act 198. The CIA is not based on any understanding at all of what the current requirements of the county are in terms of public transport provision and therefore of what the impacts will be on those protected groups for whom the provision will be reduced/ceased.
- 5.28. Finally, there does not appear to have been any proper public consultation prior to the Decision on any aspects of the equalities impacts on protected groups. The general public consultation exercise undertaken by Research for Today presented to the Cabinet on 25th January 2011 does not appear to have contained any specific reference to protected groups under the equalities legislation or opportunity to give views on impacts on those groups, nor does it appear that there had been any other public consultation on, or input into, of the CIA. In order properly to assess any impacts on, for example, the elderly in rural communities, we consider it was incumbent upon the council (in accordance with the statutory guidance under the Equalities legislation) to consider the views of those groups. This is particularly the case in circumstances where the Council appears to rely heavily by way of mitigation for any impact on a small financial investment towards existing and future community transport. It has failed to consult the affected parts of the community on the feasibility of these proposals or the impacts on them *before* deciding to cut the subsidies.
- 5.29. We consider that the Council has wholly failed to give “due regard” to achieving the various equalities goals in relation to protected groups, despite having appreciated that the impact on rural communities and in particular the elderly, the disabled and the less affluent in the county was “potentially significant”

and “negative”. It has simply deferred the question of how these groups will be affected until after the Decision was made.

Issue 3: Flawed public consultation process/failure to undertake any proper public consultation on cuts to bus subsidies whilst proposals at formative stage

- 5.30. It is clear that for a consultation process to be lawful, first, consultation must be at a time when the proposals are still at a formative stage; second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; third, adequate time must be given for consideration and response; and finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals: *R v Brent LBC ex parte Gunning* [1985] 84 LGR 168 at 189.
- 5.31. We consider that the Council's consultation process, such as it is, in relation to the proposed cuts to (inter alia) bus subsidies is flawed.
- 5.32. First of all, the Council has, as part of its Decision to cut all bus subsidies, decided to conduct a review of public transport and hold a “summit” at which “community leaders, bus operators and community transport organisations” should meet to discuss the way forward (as explained by Cllr McGuire at the 25th January 2011 Cabinet meeting). This was to take place (it appears) in March after the Decision of Full Council on 15th February 2011. The Council has placed some considerable reliance on this “summit” throughout its decision-making process – for example, see the CIA and the minutes of the Cabinet meeting of 25th January 2011. In undertaking this exercise for the purpose of understanding the needs of the community, the impact of the cuts and the possibilities of expanding community transport schemes but doing so *after* the decision to cut 100% of bus subsidies had already been taken was straightforwardly unfair and in breach of the first *Gunning* principle above. The funding cuts were far from at a “formative stage” having already been decided.
- 5.33. Such an exercise ought to have been carried out as a precursor to deciding whether to make any cuts to subsidised services. It appears that such an exercise has been conducted in relation to the Council's library services (as per minutes of 25th January 2011) as part of a Cambridgeshire Library Services Review involving a “major consultation exercise” and a review of the service by external consultants to consider various options. There is accordingly a clear precedent for such an exercise by the Council in relation to these budgetary cuts.
- 5.34. A general public consultation exercise on the cuts carried out by Research for Today (which asked people to consider 15 services and 30 savings options) which was reported to the Cabinet meeting of 25th January 2011, showed that reducing the cuts to bus subsidies was ranked highly by the general public (see Report to Cabinet, 25 January 2011, page 2), just below library closures on the hierarchy index. Similarly, the public consultation exercise carried out in 2010 in

relation to the third Local Transport Plan demonstrated a huge level of support for buses – with public transport improvements seen to be the most important transport intervention. Despite this and the level of opposition demonstrated through the petitions before the Council, the Council decided to approve the cuts to all subsidies without further consultation.

5.35. Its reasons for doing so are inadequate: at page 13 of the Minutes of 25th January 2011 Cabinet meeting, it states “Bus subsidies also featured in the consultation results and therefore there was a need to redouble efforts to find rural transport options that represented better value for money.” There appears to have been no real conscientious taking into account of the results of the consultation or of the views of those petitioners i.e. that the Council should consider not making the cuts at all or only in part.

5.36. Finally, the Council is required to develop a Local Transport Plan and to keep that under review: s 108 of the Transport Act 2000. It must keep this under review and must consult on changes: s 109. The new LTP simply proceeds on the basis that the bus subsidies will be cut. In light of the fundamental nature of the cuts to bus subsidies and their crucial role in the delivery of the LTP2 and the development of the new LTP to 2016, we consider that the failure to consult properly and at appropriate stage on the bus subsidy cuts is a breach of the Council's statutory duties under the Transport Act 2000.

6. Action the Defendant is expected to take

6.1. In light of the issues raised above, we consider that the Decision will fall to be quashed by the Court and the Council will be required to reconsider the entire question of its budget for bus subsidies afresh. Accordingly, we request that:

6.1.1. The Council take no further steps in terms of implementing its bus subsidy cuts until these matters have been resolved.

6.1.2. The Council agree to reconsider the matter afresh and in doing so consent to have its Decision on the IP quashed by the Court.

6.1.3. The Council must then address its mind to its statutory duties under the Transport Act 1985, undertake a proper Equalities Impact Assessment on the various options available to it and full public consultation on these issues before coming to a decision as to how best to secure appropriate public transport provision in the county.

6.2. In light of the short time limits for judicial review, we ask that the Council provide its response to the matters raised in this letter **within 7 days**. If we do not hear from the Council within this timeframe, we will proceed to issue our claim for judicial review.

6.3. We would welcome an opportunity to discuss the best way forward with the Council at its earliest convenience.

7. **Legal advisers:** Leigh Day & Co Solicitors, Priory House, 25 St John's Lane, London, EC1M 4LB (Tel: 020 7650 1200 and Fax: 020 7253 4433)

8. **Interested Parties:** None

9. Information/documents sought:

- 9.1. Please provide us with Council documentation (if any) which demonstrates that the Council properly understood and discharged its duties under section 63 of the Transport Act 1985.
- 9.2. Please provide us with any material which demonstrates that the Council undertook a full equalities impact assessment of the bus subsidy cuts at a formative stage of the decision making process.
- 9.3. Please provide us with any material that demonstrates that the Council undertook full public consultation on the bus subsidy cuts at a formative stage of the decision making process.
- 9.4. Please provide us with any other information or documentation that you consider is relevant to the above proposed claim for judicial review.

10. **Address for reply and service:** as above

11. **Proposed reply date:** as above, **within 7 days.**

Yours faithfully

Leigh Day & Co

Cc: Legal Department