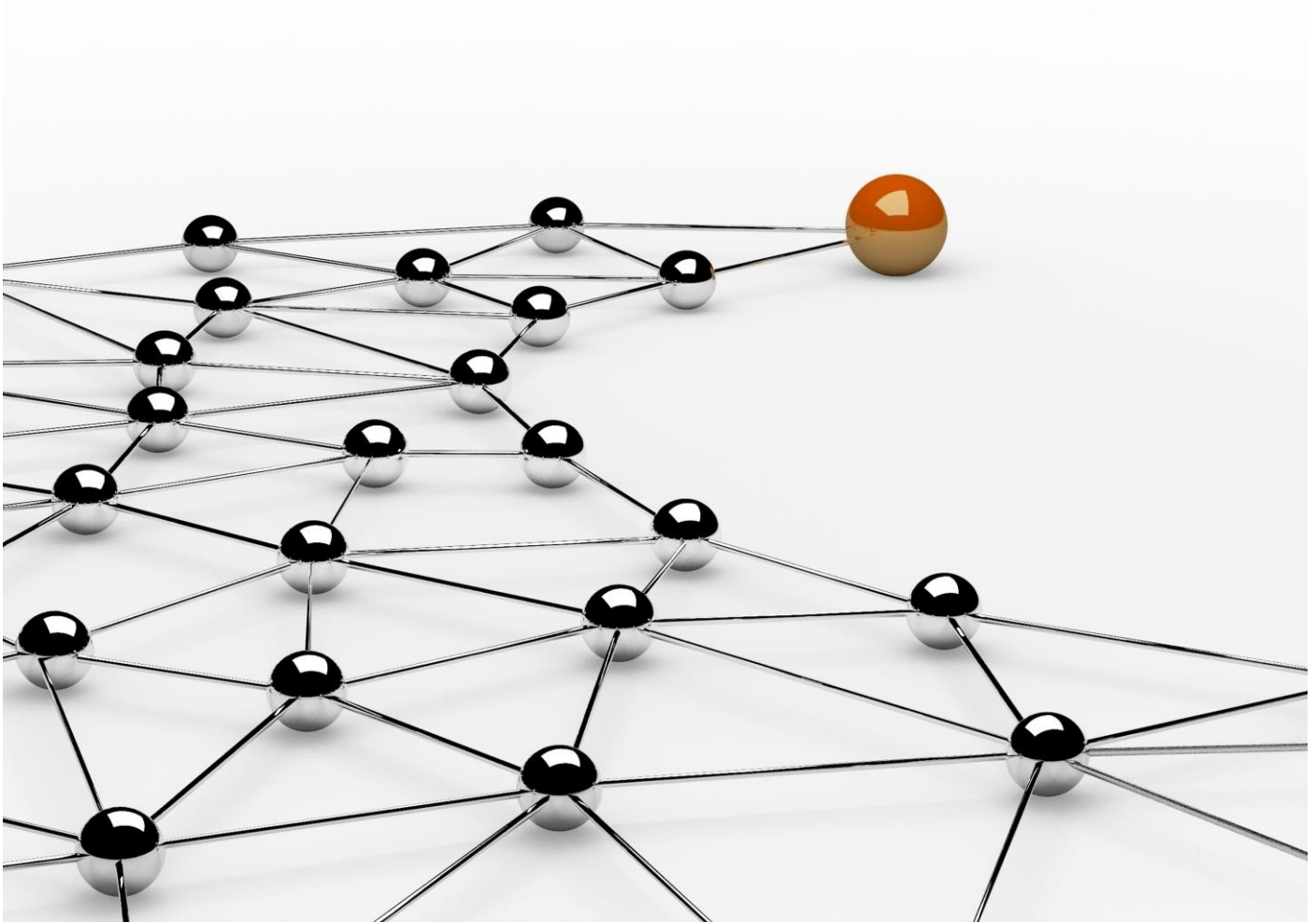


# Outcomes from the Objection and Closure of the 2013/14 Audit

City of York Council – year ended 31 March 2014

September 2015



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*Our reports are prepared in the context of the Audit Commission's 'Statement of responsibilities of auditors and audited bodies'. Reports and letters prepared by appointed auditors and addressed to members or officers are prepared for the sole use of the audited body and we take no responsibility to any member or officer in their individual capacity or to any third party.*

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## 01 Executive summary

A local government elector exercised his right to object to the Council's 2013/14 accounts in relation to the penalty charge income collected on the Lendal Bridge and Coppergate traffic schemes. In summary, the objection was that the income was unlawful, and that the auditor should apply to the Courts for a declaration to that effect. It also asked the auditor to issue a public interest report.

We determined the objection on 31 July 2015. Our decision was that we were not persuaded that the item of account was unlawful and therefore we would not seek a declaration from the Courts. We also concluded that, if we had been persuaded that the item of account was unlawful, we would still not have been minded to seek a declaration from the Courts.

Although not an issue raised by the objector, we also considered whether it was reasonable that the Council had made settlement payments relating to penalty charge notices where the Council contended that the income was lawful. On this point, we provisionally concluded that we would not be minded to challenge the Council's actions.

This report provides more detail of our decision in relation to the objection and the reasons for that decision.

The report also explains the process for closing the 2013/14 audit. A certificate was issued closing the audit on 7 September 2015.

The costs relating to the objection are required to be borne by the Council. The cost is £33,381 plus VAT, made up of our fees of £25,666 plus VAT and specialist legal advice of £7,715 plus VAT.

## 02 Outcomes from the Objection to the 2013/14 Accounts

### Background to the Objection to the accounts

In Appendix A, we have summarised in general terms the basis for an objection to the accounts, the procedures the auditor must follow and the possible outcomes. The remainder of this section relates to the specifics of the case at City of York Council in relation to the 2013/14 audit.

On 12 September 2014 we were notified by a local elector of an objection to the Council's accounts in relation to the receipts arising from penalty charge notices for Lendal Bridge and Coppergate. The local elector asked that we apply to the Courts to seek a declaration that an item of account (ie. the penalty charge income) was contrary to law, and that we made a report in the public interest on this matter.

The income relating to the penalty charge notices was £1.8m, which was below the level of materiality for our opinion on the financial statements. In view of this, we issued an unqualified opinion on the 2013/14 financial statements on 30 September 2014, but we were unable to certify completion of the audit until the objection had been determined.

During October 2014 and November 2014 we collected representations from the objector, their nominated representative, the National Motorists Action Group (NMAG), and the Council, and we took our own preliminary legal advice.

On 17 November 2014, the objection that had been made to the accounts was withdrawn.

On 25 November 2014, another local elector has made an objection on similar grounds, using the same nominated representative.

We continued with our work to determine the objection. We also had to respond to events as they unfolded. For example, following a change in political leadership in the Council in December 2014, the process for making settlements in relation to the Lendal Bridge scheme was reviewed in January 2015, and the Chief Adjudicator of the Traffic Penalty Tribunal published an important review decision in relation to Coppergate on 24 April 2015.

The issues raised were complex and we needed to take our own legal advice.

On 25 June 2015 we shared the Material Documents and Statement of Facts and Chronology with the objector, their representative and the Council.

Following consideration of further representations from the objector and their representative, we issued a Decision Letter and Statement of Reasons on 31 July 2015. This letter is attached in Appendix B, although some personal details have been redacted.

### Summary of outcomes

Our Decision Letter and Statement of Reasons sets out the outcomes of the objection in detail, including the decisions reached and the reasons for those decisions.

In summary:

- on balance the objection did not provide sufficient reason to consider that the penalty charge income received by the Council in relation to the Lendal Bridge and Coppergate schemes in the 2013/14 financial year was unlawful. In particular, the Council did have the powers to make the traffic orders, the traffic orders were valid, and the Council was entitled to issue penalty charge notices and account for this income in its 2013/14 financial statements. The Traffic Adjudicator's findings about the inadequacy of the signage were not in our view a sufficient basis to conclude that the traffic order was generally unenforceable, or, even more so, that there were any unlawful items of account in relation to penalty charge income;
- consequently, we determined not to apply to the Courts to seek a declaration that an item of account is contrary to law because our discretion to do so only arises where we have identified an item of account contrary to law, which is not the case here; and
- even if we had considered the item of account to be contrary to law we were not minded to exercise the discretion to apply to the courts because of the subsequent actions taken by the Council and our view that the benefits that might be secured by such an application would be disproportionate to the costs to public funds which would result.

We also considered the question of whether the Council could legitimately make settlement payments to individuals who subsequently contended their penalty charge notices when the income collected was not unlawful.

Our comments in relation to this are a provisional view, as we are unable to fetter our discretion should an objection subsequently be made to the 2014/15 accounts in relation to these issues or new information subsequently come to light. Our provisional view was that, based on the information at hand, we would not be minded to challenge the Council's decision to make settlement payments to motorists who contested their penalty charge notices.

### **Wider considerations**

Our decision in relation to the objection was based on a consideration of the specific issue of whether the penalty charge income was a lawful item of account, and not the broader issues around the governance and management of the schemes. The Council suffered reputational damage and incurred significant officer time and other costs in dealing with the Lendal Bridge and Coppergate traffic schemes.

We noted that the Council commissioned an independent review of the governance and management of the Lendal Bridge closure scheme in April 2014, the results of which became publicly available in November 2014. The review, conducted by Crown Management Solutions Ltd, was critical of aspects of the governance of the decision-making process, consultation and project management.

The findings of the review and officers' response to them has fed into wider action to improve the governance and management of major projects and this area of risk has been a focus for attention by the Audit and Governance Committee in 2015. More widely, following the formation of a new administration after the May 2015 local elections, revised governance arrangements have been put in place, with the stated intention of increasing transparency of decision-making on major issues.

In view of our work on the objection and these wider developments, we included the governance and management of major projects as a significant risk that would be addressed in our 2014/15 audit work on the Council's arrangements for securing economy, efficiency and effectiveness in its use of resources.

We report the results of that work in our 2014/15 Audit Completion Report elsewhere on the Committee's agenda.

## 03 Closure of the 2013/14 Audit

As highlighted in the previous section, we issued an unqualified opinion on the 2013/14 financial statements on 30 September 2014, but we were unable to certify completion of the audit until the objection had been determined.

Now that the objection has been determined, we have been able to issue our certificate which formally closes the 2013/14 audit.

The certificate was issued on 7 September 2015 and a copy is attached at Appendix C.

The certificate needs to be added to the Council's website alongside the certified version of the 2013/14 financial statements published on 30 September 2014. The Council is also required to advertise the completion of the audit and officers have the arrangements for this in hand.

## 04 Costs of the Objection to the 2013/14 Audit

The costs relating to an objection have to be met by the Council, including the costs of our legal advice. The total cost is £33,381 plus VAT. Of this, £25,666 plus VAT relates to our audit fees and £7,715 plus VAT relates to the costs of our legal advice.

All of our fees in relation to this matter are subject to approval by our regulator, Public Sector Audit Appointments Ltd, which has undertaken this role since the closure of the Audit Commission.

# Appendix A – Background to an Objection to the Accounts

## Introduction

This appendix sets out the basis for an objection to the accounts, the procedures the auditor must follow and the possible outcomes. It is drawn from the Audit Commission publication *Councils Accounts, A Guide to Your Rights* and separate guidance provided to auditors when they are considering a challenge to the accounts.

## What is an Objection to the accounts?

It is a legal right for any local government elector to ask the external auditor to apply to the High Court for a declaration that an item of account is unlawful, or to issue an immediate report in the public interest.

The local government elector can only object to a specific item in the accounts.

They must tell the external auditor which item in the accounts they object to and why they think the item is unlawful, or why they think that a public interest report should be made about it.

They must provide the external auditor with the evidence they have to support their objection.

Simply disagreeing with income or spending does not make it unlawful. An unlawful item of account is one, for example, that records spending or income that the council:

- had no right to spend or receive;
- spent or received without powers to do so;
- took from, or added to, the wrong fund or account; or
- spent on something that they had the power to spend on, but the decision to spend the money was unreasonable or irrational.

'Unreasonable' has a special meaning in law. A council acts 'unreasonably' or 'irrationally' when its actions are so unreasonable that no reasonable person could have made that decision.

## Background and the role of the auditor

Citizens' rights to question the auditor about a local government body's accounts and/or object to items of account are a unique feature of the local government audit regime.

The elector must be a local elector of the council in question. However, they have a right to appoint a representative who does not have to meet this requirement.

In determining objections and exercising their statutory powers, auditors are acting in a quasi-judicial capacity. Their decisions may be challenged through the courts.

Given the quasi-judicial and statutory nature of these functions, the auditor must comply with public law requirements and therefore:

- adopt a fair and impartial process;
- where exercising discretion, consider all relevant considerations and discount irrelevant considerations;
- ensure he or she has properly understood the relevant law; and
- ensure the decision is rational and that adequate reasons are given to explain it.

It is essential in terms of procedural fairness that the audited body and the individuals involved are able to see the material information on which the auditor will make his or her decision and make comment and representations on that material. Sharing material information and inviting representations on it is required in public law as the auditor is exercising quasi-judicial powers.

Sharing information enables relevant parties to:

- comment on the information;
- identify any gaps or inaccuracies; and
- make further submissions on the issues in the light of this information.

In deciding the issue or objection the auditor will usually proceed in two stages:

- first, the auditor is considering the substance of the issue or objection itself. For example, considering whether there is an unlawful item of account, because the audited body acted ultra vires, or that the audited body breached standing orders; and
- secondly, the auditor decides what, if any, action should be taken in response to the issue or objection.



The auditor's decision must have followed a fair process, be broadly reasonable and based on the relevant evidence. Auditors must have taken into account the relevant factors, ignored irrelevant ones and taken into account any submissions and representations received.

The relevant factors the auditor should consider when deciding what action (if any) to take include:

- the cost, against the benefits, of taking a particular course of action;
- the significance of the issue;
- what the proportionate response would be;
- whether there are any issues of principle or legal interpretation that need to be determined;
- which action would be in the public interest;
- whether the issue is likely to reoccur; and
- what course of action (if any) would make a difference for the future.

The possible outcomes from deciding on an issue or objection may include one or more of the following:

- take no action;
- refer the issue to an appropriate body to consider;
- write a letter to the audited body setting out matters which the auditor wants to draw to the audited body's attention;
- include matters in the Annual Audit Letter so that they are brought to the attention of the council's elected members and officers;
- make statutory recommendations (Section 11 of the Audit Commission Act 1998, as transitionally saved (the Act));
- issue a public interest report (Section 8 of the Act);
- apply to the court for a declaration (Section 17 of the Act);
- serve an advisory notice (Section 19 A-C of the Act); or
- seek judicial review of a decision of the audited body (Section 24 of the Act).

The auditor must record the reasons for the decision and must also inform the objector, involved parties and the council of the reasons for the decision. Common law may require in certain circumstances that reasons for a decision are given to those affected by it. This is in addition to the right in a formal objection procedure to ask for a Statement of Reasons under Section 17(4) of the Audit Commission Act 1998.

Please note that strictly speaking a Statement of Reasons may only be requested by an objector who sought a declaration under Section 17 or at least raised the issue of an alleged item of account contrary to law. Strictly speaking moreover it may only be requested after receiving the auditor's decision. However, in practice, most auditors dealing with objections choose to provide a Statement of Reasons at the point of decision, without one being requested, so as to simplify the process and at the same time to ensure that the common law requirements as to reasons are met.

### **Is there a right of appeal against an auditor's decision?**

If a local government elector has asked the auditor to issue a report in the public interest and they decide not to do so, there is no right of appeal against that decision.

If a local government elector has asked the external auditor to apply to the court for a declaration that an item of account is unlawful and disagrees with the external auditor's decision not to do so, they do have the right of appeal but they would have to take the matter to court themselves. There are time limits that apply for an appeal to be filed with the High Court.

## Appendix B – Decision Letter and Statement of Reasons

Name and address of Local Elector has been redacted

Direct line +44 (0) 191 383 6300

Email [gareth.davies@mazars.co.uk](mailto:gareth.davies@mazars.co.uk)

31 July 2015

Dear Name of Local Elector has been redacted

### **City of York Council: audit of accounts for the year ended 31 March 2014 Objection to the Accounts – Decision Letter and Statement of Reasons**

I am writing to advise you of my decision and the reasons for my decision on your objection to the accounts of City of York Council for year ended 31 March 2014.

#### **Your objection**

Your objection is set out in your e-mail of 25 November 2014 and has been the subject of subsequent correspondence between us and your representative, the National Motorists Action Group.

Your e-mail complied with the statutory requirements for a notice of objection to the Council's accounts for the year ended 31 March 2014 and it asked that:

- I apply to the court under section 17 of the Audit Commission Act 1998, as transitionally saved, for a declaration that all penalty charge income arising from traffic restrictions to Lendal Bridge and Coppergate are an unlawful item of account, because the penalty charge notices were wrongly issued to motorists for an alleged contravention of an invalid bus lane and therefore without lawful power to do so; and,
- I issue a public interest report in relation to these matters.

#### **Work carried out**

In the course of my enquiries I have considered:

- the written submissions of you, your representative and the Council, whether specifically referred to in this letter or not;
- the material documents as previously shared with you and other interested parties;
- relevant legal advice obtained by the Council; and,

- relevant statute and case law.

I have also taken my own legal advice on the powers and duties of councils involved in these matters.

## Background and sequence of events

In the following section I discuss matters that occurred both during and after the financial year 2013/14. Although your objection only relates to the accounts ending 31 March 2014, some subsequent events are relevant to the view I have taken on those accounts. Insofar as I have expressed a view in relation to events that took place in the financial year 2014/15, these are provisional only as I have yet to finalise the audit for that year of account.

In 2013, City of York Council introduced two Traffic Orders in relation to restrictions in Coppergate and Lendal Bridge respectively. The York (Coppergate) (Local Bus Priority) Traffic Order 2013 came into effect on 1 August 2013 (hereinafter referred to as the Coppergate traffic order or scheme). The York (Station Avenue / Lendal Bridge / Museum Street) (Local Bus Priority) (Experimental) Traffic Order 2013 was an experimental measure to try and reduce city centre congestion and improve traffic flows, and came into effect on 17 August 2013 (hereinafter referred to as the Lendal Bridge traffic order or scheme).

After a short grace period, the Council began to enforce the traffic restrictions and issued penalty charge notices where the restrictions were contravened by motorists. Over the whole period of the Lendal Bridge traffic restrictions the Council issued 48,525 penalty charge notices.

A number of appeals were made by motorists to the Traffic Penalty Tribunal in relation to both schemes.

On 28 March 2014, the Traffic Adjudicator issued a decision in an appeal brought by Mr Nigel Rhodes. The decision was in favour of Mr Rhodes who was consequently not liable to pay the penalty charge which had arisen in relation to Coppergate. Given the number of appeals in relation to Lendal Bridge and Coppergate, the Traffic Adjudicator sought to “issue a consolidated decision dealing with generic issues common to both restrictions and the particular issues about the signing at each of them”.

In the decision, the Traffic Adjudicator stated that:

*“In my judgement notwithstanding the designation in the Traffic Order neither Coppergate nor Lendal Bridge can sensibly be described as a bus lane, street or gate but rather the roads are part of a general traffic scheme from which non-exempt vehicles are restricted at certain times and where buses are just one of the excepted categories or classes of vehicle.*

*Clearly the Council has power to impose these restrictions but because Schedule 7 of the TMA [refers to the Traffic Management Act 2004] has not been fully implemented civil enforcement does not apply and there is no power to issue a PCN.”*

This decision was widely interpreted as questioning the legal basis for the scheme, and the decision and its consequences received considerable press and media coverage.

The Council continued to contend that it had acted lawfully, that the two Traffic Orders were valid and that they had been properly enforced.

On 1 April 2014, the Council instructed Mr Timothy Straker, QC to advise on the Council's response to the Traffic Adjudicator's decision. The Council's legal advice concluded that the Traffic Adjudicator's decision 'appears defective'. The Council then applied to the Traffic Penalty Tribunal for an internal review of the Traffic Adjudicator's decision of 28 March 2014. The review request was made on 10 April 2014.

However, on the 8 April 2014, the Council Leader, under delegated powers, decided to lift the restrictions on the Lendal Bridge scheme from 12 April 2014. In effect, the Lendal Bridge trial was ended and enforcement ceased.

Enforcement activity also ceased on the Coppergate scheme, although this Traffic Order and the traffic restrictions were left in place.

On 5 August 2014, the Cabinet received a report on the Lendal Bridge and Coppergate Traffic Regulation Orders, which highlighted there were no statutory deadlines for the Traffic Adjudicator to reach a review decision, that the Lendal Bridge scheme had ended 3 months ago and that the passage of time and "uncertainty" was creating an ongoing impact on individuals and on the reputation of the Council.

As a result of this report, the Cabinet determined:

- to withdraw the application to the Traffic Adjudicator to review the decision in relation to Lendal Bridge, but to continue as regards Coppergate; and,
- that, where members of the public contested their penalty charge notice in relation to the Lendal Bridge scheme, arrangements would be made to make a settlement payment equivalent to the value of the fine paid.

The Council sought and followed legal advice from Mr Timothy Straker QC before taking this course of action.

On 11 December 2014, a new Council Leader was elected and a Council motion was passed "to ask Cabinet to extend the 31<sup>st</sup> December deadline and to instruct officers to put in place a system for automatically repaying all Lendal Bridge fines."

The Council sought additional legal advice from Mr Timothy Straker QC, who advised that it would not be appropriate to seek out and automatically repay all of the Lendal Bridge fines, not least because of the Council's contention that it had acted lawfully.

As a result of this advice, Cabinet received a report on 20 January 2015, and decided to write to everybody who had received a penalty charge notice to make them aware of the settlement process, but not to introduce a system of automatic repayments. The deadline for motorists to contest a penalty charge notice was extended to 31 December 2015.

Subsequently, on 24 April 2015, the Chief Adjudicator of the Traffic Penalty Tribunal published the review decision in relation to Coppergate. The Chief Adjudicator found that the Coppergate Traffic Regulation Order was valid and that the Council was in principle entitled to enforce the Order. However, the Chief Adjudicator still found errors in the signage, and consequently, the appeal by the Council was dismissed.

In financial terms, the gross penalty charge income from the Lendal Bridge and Coppergate schemes reflected in the 2013/14 accounts was £1,802,000, with costs of £718,000, resulting in net income of £1,084,000. In the 2013/14 financial statements, the Council set aside the full gross penalty charge income figure of £1,802,000. Of this amount, £708,000 was established as a provision and the remainder as an earmarked reserve.

By the end of May 2015, the Council had repaid 30,287 of the 48,525 penalty charge notices it had issued in relation to the Lendal Bridge scheme.

Of the £1,802,000 penalty charge income, £387,000 relates to the Coppergate scheme.

## Findings

In order to determine your objection I have considered whether the penalty charge income received by the Council in relation to the two schemes in the 2013/14 financial year was lawful.

Your reason for challenging the lawfulness of the penalty charge income as stated in your email of 25 November 2014 was that “all of their penalty charge notices issued may well be contrary to legislation, having been issued for an alleged contravention of a non-existent bus lane, and therefore without lawful power”, which is a reference to the Traffic Adjudicator’s decision in the Rhodes appeal of 28 March 2014. Your representative also raised various points about the inadequacy of the signage used in the schemes, which it argued also rendered the income unlawful. In addition, you sought a public interest report about what you saw as the Council’s misuse of the penalty charge income that it had collected, in that there was an “attempt to confiscate as much as possible of their unlawfully-derived penalty charge income for the Council’s own purposes”.

I sought the Council’s representations in response to your objection, and the Council’s response stated that:

*“The key issue relevant to the Notice of Objection is whether the monies obtained through issuing Penalty Charge Notices (PCNs) under the Coppergate and Lendal Traffic Regulation Orders were lawfully obtained. The Council maintains that the monies were obtained lawfully.”*

The Council states that the traffic orders were valid, and that the penalty charge notices were therefore lawfully issued. The Council’s view is that the Council would be within its powers to retain all of the monies it had obtained, apart from those from the small number that have been successfully appealed to the Traffic Penalty Tribunal and which the Traffic Penalty Tribunal has directed the Council to repay.

I have also sought evidence on the relevant steps taken by the Council in relation to its decision. I found that:

- the Council sought appropriate legal advice at each stage from Mr Timothy Straker QC;

- the substance of this legal advice was that the Traffic Adjudicator's decision of 28 March 2014 appeared inadequate and did not provide good reason to consider that the Council's Traffic Orders in respect of both the Lendal Bridge scheme and Coppergate Scheme were invalid or unenforceable. In particular, the advice was that the Adjudicator had erred in concluding that the relevant highways could not be categorised as bus lanes because of the number of other types of vehicle permitted to use them, which was contrary to the relevant legislation and case law. The advice also concluded that in any event it was beyond the Adjudicator's jurisdiction to question the validity of the relevant traffic orders, which is not one of the statutory grounds of appeal that the Adjudicator may consider; and,
- the Council followed the legal advice that it received.

I also note the Chief Adjudicator's review decision on 24 April 2015. Although it relates specifically to the Coppergate scheme, it is also of relevance to the Lendal Bridge scheme, as similar issues apply to it in respect of the judgement of whether or not the traffic orders were enforceable as a bus lane.

The Chief Adjudicator's decision states that:

*"It follows that I dismiss Mr Knapp's ruling that Coppergate is not a bus lane and his finding that the enforcement of the contraventions of the TRO [Traffic Regulation Order] cannot be effected through the civil enforcement provisions of the Bus Lane Contraventions (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2005."*

I sought my own legal advice in relation to these matters. My legal advice highlighted that:

- the Council does have the power to introduce traffic schemes such as those in Lendal Bridge and Coppergate;
- the Council has sought legal advice at appropriate times which confirms the validity of the traffic orders and consequently its power to enforce the restrictions through the issue of penalty charge notices; and,
- generally speaking the actions of local authorities are taken to be lawful unless a court declares otherwise. Even if the validity of the traffic orders had been considered by a court and had been struck down, it is not certain that penalty charge income would be unlawfully held.

Your representative has also raised various points alleging the inadequacy of the signage used for both schemes, and as noted above the Chief Adjudicator found the signage to be inadequate in the case of the appeal that she was considering. I also sought legal advice in relation to this. The effect of inadequate signage has been considered by the courts, in particular in the case of *Herron and others v Parking Adjudicator* [2011] EWCA Civ 905. Although the facts in the *Herron* case were not identical, the general principle from the case which is relevant here is that only a material flaw with the signage which resulted in a failure to achieve substantial compliance with the statutory requirements would affect the legality of the traffic order. Even where such material defects have been found, I am advised that there would still be an argument that any resulting penalty charge income would nevertheless be held lawfully. The Chief Adjudicator's findings in the appeal about the inadequacy of the signage are not in our view a sufficient basis to conclude that the traffic order was generally unenforceable, or, even more so, that there were any unlawful items of account in relation to PCN income.

Taking all of these considerations into account, I have concluded on balance that your objection has not provided me with sufficient reason to consider that the penalty charge income received by the Council in relation to the two schemes in the 2013/14 financial year was unlawful. Consequently I have not identified any relevant items of account which I consider to be contrary to law. In particular I consider that the Council has followed proper processes in relation to its decisions at each stage, the Council did have the powers to make the Lendal Bridge and Coppergate traffic orders, the traffic orders were valid (I accept the Council's legal advice that it was beyond the Adjudicator's jurisdiction to question the validity of the relevant traffic orders), and that consequently the Council was entitled to issue penalty charge notices and account for this income in its 2013/14 financial statements.

### **Other considerations**

I have considered the actions taken by the Council in the following financial year 2014/15 in relation to making settlement payments equivalent to penalty charge notice fines where motorists contest their penalty charge notice.

There were two key decisions made by the Council in relation to settlement payments:

- 5 August 2014, where Cabinet determined that it was prepared to make settlement payments where motorists contested their penalty charge notice; and,
- 20 January 2015, where the Cabinet determined that the Council would write to everybody who had received a penalty charge notice to make them aware of the settlement process, but not to introduce a system of automatic repayments.

The question I have addressed is, if the Lendal Bridge and Coppergate traffic orders were lawful and properly enforceable, which the Council has contended throughout and is consistent with its own legal advice and with my own findings, on what basis could the Council then legitimately make settlement payments to individuals who subsequently contended their penalty charge notices?

My comments in relation to this are a provisional view, as I am unable to fetter my discretion should an objection subsequently be made to the 2014/15 accounts in relation to these issues or new information subsequently come to light. My provisional view is that, based on the information at hand, I would not be minded to challenge the Council's decision to make settlement payments to motorists who contested their penalty charge notices.

The key points leading me to this provisional view are:

- when the Council made settlement payments in relation to income it considered to be lawful, the Council was seeking to act pragmatically to a situation that had arisen from the Traffic Adjudicator's decision of 28 March 2014;
- the Council was concerned about the uncertainty that was resulting from the delay in the Chief Adjudicator's review decision and also as to the perceived legality of the traffic schemes and the damage that this was creating both for individuals and for the Council's reputation;

- it was a balancing act for the Council to weigh the foregone penalty charge income against the negative impact in terms of uncertainty if continuing to resist refunds, but in retrospect, the Council's concerns around the length of the delay were supported by the fact that the Chief Adjudicator's review decision in relation to Coppergate was not made until 24 April 2015, almost nine months after the first decision by the Cabinet to make settlement payments on 5 August 2014; and,
- although it is possible to question aspects of the Council's actions, I do not find that the actions were so unreasonable as to render the decision to make settlement payments irrational.

### **Application to Court: decision**

My decision is that I will not apply to the Courts to seek a declaration that an item of account is contrary to law under Section 17 (1) of the Audit Commission Act 1998, as transitionally saved. The reason for this is that my discretion to do so only arises where I have identified an item of account contrary to law, which is not the case here.

For your information, if I had found that the penalty charge income was unlawful, I would have to consider whether there was any merit in me applying to the court for a declaration that the item is contrary to law. Under Section 17(1) of the Audit Commission Act 1998, as transitionally saved, I have discretion as to whether or not to seek such a declaration. Based on the information I have considered, I would not have been minded to seek a declaration in relation to the penalty charge income in the accounts to which you have objected. The reasons for this include:

- the Council ceased enforcement activity on both schemes in the light of the Traffic Adjudicator's decision of 28 March 2014 and has abandoned the Lendal Bridge scheme and hence the issue is largely historical and unlikely to be repeated;
- the Council has sought appropriate legal advice throughout and followed that advice, and has taken care to proceed responsibly as issues have developed;
- although the Council included the penalty charge income in its 2013/14 accounts, it also set aside and provided for the repayment of the gross amount, if that was subsequently shown to be necessary; and
- the benefits that might be secured by such an application would be disproportionate to the costs to public funds which would result.

### **Public Interest Report**

Whether or not to issue a report in the public interest is a matter for me in the exercise of my discretion.

In this instance I do not intend to issue a report in the public interest. The principal reason for this is that I have concluded that the penalty charge income that was the subject of your objection is not an unlawful item of account.



I also note that any recommendations that I do intend to make to the Council in relation to these matters can be made in a normal audit report. I therefore intend to report my findings in relation to the objection directly to the Council's Audit and Governance Committee and this report will be made publicly available through the agenda papers for this committee in due course.

In addition, I will summarise my findings in my Annual Audit Letter, which I will issue to the Council in October 2015, and which will also be a public document.

### **Rights of Appeal**

You have a statutory right of appeal to the court against my decision not to make an application to the court for a declaration that an item of account is contrary to law, see Section 17(4) of the Audit Commission Act 1998 as transitionally saved.

Any appeal must be commenced in the High Court. If you are considering making an appeal then you should seek your own legal advice, including as to the relevant procedure and time limit that apply.

I have copied this letter to City of York Council.

Yours sincerely

Gareth Davies  
*Partner*

cc: City of York Council

Name redacted, objector's representative

## Appendix C – Certificate closing the 2013/14 audit

### CITY OF YORK COUNCIL

#### **Certificate on the 2013/14 audit**

In our report dated 30 September 2014 on the 2013/14 statement of accounts, we explained that the audit could not be formally concluded on that date until consideration of matters brought to our attention by local authority electors had been completed. These matters have now been dealt with. No other matters have come to our attention since that date that would have a material impact on the financial statements on which we gave an unqualified opinion or on our value for money conclusion.

We certify that we have completed the audit of the accounts of City of York Council for 2013/14 in accordance with the requirements of the Audit Commission Act 1998 and the Code of Audit Practice issued by the Audit Commission.

Gareth Davies

For and on behalf of Mazars LLP

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7 September 2015