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Our Ref FCC/B10119.0004

4 October 2021

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By hand delivery and email:
*Andy.Johnstone@gov.im; and
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Dear Sir

**The Highways Act 1986 - Section 117
 Inquiry - The Donkey Track**

We write to respond to the Inspector's note dated 10/9/21.

Documents

We have access to those materials that have been placed online at <https://www.gov.im/about-the-government/departments/cabinet-office/u72-andreas-public-right-of-way-inquiry/>. We wish to ensure that the documents to which we have access are the same as those referred to by the Inspector in his note dated 10/9/21.

The Inspector has	We have	Query
From Dol: proof of evidence	Statement of Tracy McQuillan 14/7/21 and statement of Timothy Cowin 16/7/21. [Found in file 5, part 1, from page 55.]	Are we correct to assume that one of both of these statements is what is meant to stand as Dol's proof of evidence?
From Dol: timeline	We have the timeline in the online file "Maps", part 1.	
From Dol: 5 folders of appendices	We have folders marked "file 1" to "file 5" on the online source and assume this to be the 5 folders of appendices.	
From Landowner: Proof of evidence by Balasseyr Stud Limited and appendices	We have the affidavit of Ms Revitt dated 13/10/20.	
From Third parties: 28 other representations for and against highway status (one folder)	A folder placed online called " U72 Donkey Track, Andreas " contains 27 (not 28) numbered representations, albeit that number 21 says "please see table below for U72 Donkey Track, Andreas 21".	(1) We appear to be missing one submission (having access to a folder of 27 rather than 28). (2) All of the representations have been redacted to remove the names of

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		the person providing information or argument. We consider that to be inappropriate. Interested parties should be able to see who is providing representations.
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We note that the Inspector does not say that he has received the submission made on behalf of Ballaseyr Stud Ltd (the landowner) dated 14/7/21. We note that that was not initially placed online with the other material for the Inquiry, but it has now been added by way of folder called "**U72 Donkey Track, Andreas 21 – Callin Wild for Ballaseyr Stud**" (in 9 parts). The Inspector will need to see that. It includes a detailed submission, another copy of Ms Revitt's affidavit, and 10 further witness statements. Those statements have all been redacted to conceal the identity of the person making the statement. As above, we consider that the identity of witnesses should not be hidden.

We note that part of the statement of the redacted individual who lives at Staward Farm has been omitted (part of paragraph 10).

Whilst we find duplication and irrelevant material within the bundles, our strong preference would be for the papers to remain organised into files and with pagination as they currently exist to avoid any need to repeat work to go through varied bundles.

That in mind, and with the hope that any documents that need to be added can be added as lettered pages (for example as page 150A-E), we observe that the affidavit of Ms Revitt dated 13/10/20 which appears at file 4 part 5 pages 135 to 144 has been included with 2 pages missing. We suggest that they are added as pages 141A and 141B. We are mindful that another copy of Ms Revitt's affidavit appears in the file labelled online as "**U72 Donkey Track, Andreas 21 – Callin Wild for Ballaseyr Stud**". The missing pages (pages 8 and 9 of the affidavit) are present in that location, but since page 7 of the affidavit has been omitted in that location, there is no complete copy of the affidavit in one place within the bundles.

Within the Inspector's note 10/9/21 is the line "*NB I have no document from the DOI which amounts to a which I*". We think it likely that what slipped through the proof-reading or was otherwise mangled by a computer was an observation that the Inspector has no submission from the DOI setting out their case as to why they contend that Donkey Track is highway maintainable at public expense. We have no such document either. We do understand from correspondence (for example letter 29/10/20 at file 5 part 1 page 3) that Dol's case is that Donkey Track is hm@pe because, whilst not falling within s.3(2)(a) to (ka) of the Highways Act 1986, it was, immediately before the coming into force of that Act, a highway repairable by the Department or a local authority. A document setting out Dol's basis for that contention would assist the parties and the Inspector. In particular we do not understand what basis (if any) Dol advances to suggest that what was an occupation road in 1869 was subsequently (a) dedicated; (b) accepted; and (c) adopted as maintainable at public expense.

Witnesses

We have 27 representations (the Inspector has 28). We also have statements/ affidavits from Ms Revitt, Ms McQuillan, Mr Cowin, and from 10 redacted individuals. That is potentially 41 witnesses (assuming that there is no duplication of witnesses between the redacted representations and the redacted statements). If 41 people were to give evidence, whether cross-examined or not, we see no chance that the Inquiry could be completed within 2 days as is currently proposed. Many of the statements serve to introduce documents, and we see no real benefit to witnesses being required to do that. We are aware of no challenge to the *genuineness* of any document, albeit that it is inevitable that the Inquiry will conclude that at least some documents are factually wrong. The origin of the map showing Donkey Track as U72 is particularly important, but no-one gives evidence on how that map came to be created. Aside from

introducing documents, it seems to us that there are various themes that can be distilled from the statements, broadly speaking as follows:

From those broadly opposed to Donkey Track being opened up as highway

- Donkey Track is impassable.
- Donkey Track has not been used for a very long time.
- It would be harmful to the environment to open up Donkey Track.
- Opening Donkey Track would serve no useful/ welcome public purpose.
- It would be dangerous to open up Donkey Track given the roads at either end.

From those broadly supportive of Donkey Track being opened up as highway

- Donkey Track is not impassable.
- There has been at least some use of Donkey Track.
- It would be beneficial to the public to open up Donkey Track.
- Voluntary work has been undertaken to open up Donkey Track.

We do not know how many of the 41 people who have put evidence forward would wish to give live evidence in relation to one or more of the above points. Our thinking is as follows:

- 1) Whilst there is obviously strong feeling on both sides about the environmental damage that may be caused if Donkey Track was opened up, about the benefit of opening it up to users (or otherwise), and about the danger that use of Donkey Track would pose, these matters are really of peripheral relevance to the Inquiry. They should not be ignored altogether, but we see no point in the Inquiry seeking live evidence to supplement that which has been given in writing on such matters save, perhaps, that if it is right that use of Donkey Track would be dangerous, it tends to support the proposition that it is not highway, albeit that that is not a major part of the overall picture.
- 2) Rather, so far as witnesses are concerned, the Inquiry needs to focus on the question of whether or not sufficient public user is demonstrated from which dedication ought to be inferred. That issue is dealt with by many of the witnesses, but many of them say effectively the same things: (i) that Donkey Track is or was impassable; (ii) that they were not aware of anyone ever using Donkey Track; or (iii) they used Donkey Track or were aware of others who did.
- 3) There is tension between what the witnesses say. There are many of them. Our primary position is that even if all of the evidence of occasional use of Donkey Track is accepted, it falls very far short of suggesting that the way was dedicated by the landowner. If that is right then hearing from the witnesses is not required, save to meet the obligation of a public hearing.
- 4) If, provisionally, the Inspector's view is the same as ours – namely that there is so little evidence of use that dedication cannot be inferred from it, we suggest that it is probably not necessary to hear from witnesses. If the Inspector takes a different view, it seems to us difficult for the issue to be resolved without hearing from the majority of the witnesses.

Time estimate

Because of the above we find ourselves struggling to assist in relation to time estimate. If the Inspector wishes to hear from relevant witnesses, at our count that is nearly 30 witnesses. Whilst many will be quick (say 15-20 minutes each assuming that formalities are dispensed with), not all will be, and we suspect that we would still be looking at a full week for the Inquiry.

If the Inquiry is, essentially, an on-paper analysis of documents and what witnesses say, 2 days will be sufficient.

If the Inquiry steers a middle course, then by our reckoning time estimate will probably be somewhere between 2 and 5 days.

We recognise that this is not as helpful as the Inspector would have liked. The basic problem is that we see issues upon which many people could give evidence without merely repeating what someone else has said, but question the value of that. That turns on our reading of the situation that there is such limited evidence of public user that dedication cannot be inferred. We can see that others might well take a

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different view.

Given what we say below about date of Inquiry we invite the Inspector to take one of the following courses:

- (1) If the Inspector provisionally agrees that the evidence of user is of such modest user that dedication cannot be inferred from it even if it is taken at its highest, list for 2-days commencing 9/11/21 with a view to this being predominantly an "on paper" exercise with only a modest level of formality.
- (2) If the Inspector takes the view that the heart of the Inquiry is to test the competing evidence on how passable Donkey Track is and the extent of use that has been made of it (with some witnesses saying "some" and some saying "none"), list for 4 days with a view to managing the Inquiry in a way that gets it finished within that time: confining witnesses to the absolute essentials.

Date of Inquiry

A start date of 9th November as proposed is manageable. We would not be able to accommodate an earlier start date (on 8th). If the Inquiry were listed for 9-11/11/21, that would pose no problems for us. If it were listed to run 9-12/11/21, that would require some diary management but ought to be achievable. If a full and clear week is sought then, regrettably, we would need to seek a delay to the Inquiry which we recognise that no-one wants.

Inquiry procedure

We agree with the proposal in the note 10/9/21: DoI assert that Donkey Track is highway maintainable at public expense and have the burden of providing as much. They should present their case first and close last.

We are unclear as to whether or not the Inquiries (Evidence) Act 2003 applies to this Inquiry. So far as we are aware Tynwald has not resolved that it does. Please confirm. We are unaware of what procedural rules might be applied in such circumstances and would be grateful if the same could be clarified.

Relevant legislation

The note 10/9/21 appears to us to identify the correct legislation, namely the Isle of Man Highways Act 1986.

Scope of Inquiry

The note 10/9/21 identifies the essential question as being whether Donkey Track is maintainable at public expense. With respect we consider that there is a preliminary vital question: is it a highway at all? If not, the question of whether or not it is maintainable at public expense does not arise. Given the published terms of reference for the Inquiry we suspect that this is common ground.

Should the Inspector have any questions in respect of this letter then please do not hesitate to contact our office.

Yours faithfully



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