



Ms. Sandra Haigh, Legal Officer, Kirklees Council

**By email only:** [sandra.haigh@kirklees.gov.uk](mailto:sandra.haigh@kirklees.gov.uk) (Your ref: PLA/SJH/GDM/D114-163)

24<sup>th</sup> January 2022

Dear Mrs. Haigh

**Application under Section 247 Town and Country Planning Act 1990 ('TCPA') for Stopping Up and Diversion of Part of Holmfirth Footpath 60 – S. 106 UU for Contribution to Verge Works**

Thank you for your email and letter dated 21 January 2022. It would seem helpful to the Inspector and the Inquiry to reply and invite you to respond on behalf of the Council before the Inquiry reconvenes, this Friday 28<sup>th</sup> January 2022, to avoid any confusion.

It is probably helpful to very briefly respond to the "Conclusions" listed in your letter.

- (i) The Council disagrees on the appropriateness of Section 106 use in this matter as there appears to be no legal interest in the land to be purportedly bound by the applicant.**

HMLR Registration WYK448872 shows the Applicant as the owner of the relevant land. Mr. Butterfield very obviously does not own the highway verge. The verge is part of the adopted highway. Mr. Butterfield's land is bound in the UU to secure a sum of money to be paid to the Council to contribute to the specific purpose for works to the verge.

This is respectfully not a difficult concept in planning law. The fact that the verge is not on the land which is bound is irrelevant. Where for example there was a contribution to education, highways, public open space, sums in lieu of affordable housing, etc. these are all 'off-site'; the site is bound through the obligation to secure the provision of the monies.

Unless I have completely misinterpreted your letter (and please of course do let me know if I have), this is again not a difficult concept in planning law.

- (ii) The Council considers that the applicant has no interest in the highway verge since his title and interest in the land is merely adjacent to the verge and as drafted the unilateral would be registered against his property which is next to the highway verge.**

Mr. Butterfield has no such interest in the ownership of the highway verge. I am not sure how this is relevant. I refer you again to no. (i) above.

- (iii) Disagree on the use of bi-lateral obligation in the purported unilateral undertaking.**

There is no bi-lateral obligation in the Draft UU. It is simply conditional (perfectly legal and normal practice under Section 106(2)(a) TCPA 1990), as identified in the tracked changes version sent in an email to you dated 14<sup>th</sup> January 2022, which is enclosed with the covering email by way of reminder.

In any event, not that it is relevant here in our view, there is a traditional ‘severance’ provision in the UU at Draft Clause 12. Moreover, for a Council to receive monies, not spend it for the purposes specified and still retain it, would constitute financial irregularity and potentially place the Council’s ‘Section 151 Officer’ (i.e. Chief Finance Officer) at risk of criminal investigation, as well as obvious civil challenge.

**(iv) The obligation is insufficient due to lack of technical proposals.**

Once again, we are fundamentally disagreed on the works. Sufficient detail is provided for the works proposed in the Second Schedule of the Draft UU, upon which legitimate quotes from contractors that have carried out this kind of work (including for Kirklees Council) have been provided.

As we have said in previous communications, some of which are enclosed/attached, we are clearly way apart on the extent of works required. The Council requires a by-the-book pavement, whereas the advice to the Applicant and the evidence before the Inquiry is that this is “*totally unsuitable*” in this location and that the Council needs to “*inject some common-sense*” into this situation, because such a solution was clear “*over-engineering*” (quotes from the Applicant Closing at 13.6, directly quoting Mr. Appleton’s evidence, which the Council has not disputed). We comment on this further below.

**(v) The lack of technical detail submitted with the Unilateral Agreement make it impossible for the Council to assess the development proposed, nor its costings, nor any proposals for its maintenance.**

It is not possible in law or in fact to have a “Unilateral Agreement”. However, this is possibly a *Freudian*-slip of sorts, if the Council is in fact looking for a bi-lateral Section 106 Agreement instead of a UU, which hitherto it has not raised.

It is otiose to state that it is “impossible” for the Council to assess the “development proposed”, when two contractors have been able to provide legitimate quotes on that basis. There is again no lack of technical detail. This is again simply a case of the Council disagreeing with the physical works.

**(vi) The sum of £12,000 does not reflect the cost of a footway designed and installed to Kirklees Highways Standards (see Appendix A).**

We note that the Council does not dispute the quotes provided (CD13.10.3 And CD13.10.4) for the works proposed by the Applicant, which are clear in the Second Schedule.

The Council again disagrees with the extent of works and continues (unless it can tell us otherwise) to identify that nothing but a by-the-book 2m sealed pavement will suffice. However, on this basis, knowing what it requires and the measurements, then the Council is clearly in a position to state how much a by-the-book pavement would cost here. In other words, the Council has a clear chance to tell the Inquiry how much it would actually require.

Clearly, as it is able to at least estimate that it is more than £12k (if indeed that is the position), it is able to quantify what figure does reflect such a cost. This enables the Inspector to determine just how far short £12k would fall should the Council introduce an alternative scheme with the monies, as is envisaged in the flexible Draft UU (Paragraphs 2 and 3 of the Second Schedule to the present Draft UU).

The final paragraph in your letter refers to a tracked unilateral undertaking on 10<sup>th</sup> January 2022. The date is in fact incorrect, and the relevant document was sent by email to you on 14<sup>th</sup> January 2022 with all tracked changes and comments. The covering email correspondence attaching the said Draft document in tracked changes and with responses to Council comments, is attached.

I would now like to identify some other facts before asking questions.

In January 2020, as identified at CD15.8 (specifically 15.8.7), which is not disputed, I personally met with your engineers on site and had subsequent exchanges. Your engineers clearly stated that it would not consider anything but a by the book 2m non-permeable sealed pavement. However, they did clearly state that this would give rise to a position whereby it would impact on drainage further down Wolfstones Road. For that reason, the preference of the engineers (your engineers) was to 'do nothing'. Clearly, your engineers have either forgotten this, or in the alternative may be providing a response to its officers for expediency and convenience for the purposes of this Inquiry.

The Applicant's engineer has suggested that the Council's engineers do appear to be unusually intransigent here, but further considers that officers may not actually be providing engineers with the fullest extent of information.

Therefore, we are confused as to how the Council's Highways Engineers would suddenly require a by-the-book 2m sealed pavement, knowing that it would narrow a rural road and cause drainage difficulties further northwards (downhill) on Wolfstones Road.

We are still apart, insofar as your Highways Engineers would like nothing but a hard sealed by-the-book pavement. Our advice and the evidence before the Inquiry is that this would be totally unsuitable. Not least and simply, it would narrow a rural road, given the current verge is considerably less than 2m.

You have not said whether there is any departure from the Delegated Authority note dated 15<sup>th</sup> December 2021 (sent to us on 23<sup>rd</sup> December 2021). It is of course accepted that it is a matter for the Council as Highway Authority and the law, as to what it may or may not do on the highways.

The Council is presently saying that notwithstanding what is said, given that your engineers clearly know what is required in their mind (i.e. a by-the-book 2m sealed pavement), they must have an idea of the extent of a contribution. This would obviously be useful for the Inspector.

However, given your letter, along with the Delegated Authority dated 15<sup>th</sup> December 2021, sent to me on 23<sup>rd</sup> December 2021, which is again enclosed by way of reminder, we remain confused as to the Council's position. It seems that the Council's position is:

- (i) it would accept nothing but a by-the-book 2m sealed pavement and nothing else, even though its Engineers have informed that this will cause drainage difficulty further down Wolfstones Road; **but...**
- (ii) £12,000 is not enough towards this (but it has not specified what is); **but, in any event...**
- (iii) the Council will not use the monies anyway, because *"The Council would not accept and apply the monies for the proposed purpose bearing in mind the advice from others"* (Delegated Authority document dated 15<sup>th</sup> December 2021, enclosed).

This being the case, particularly point no. 3, above, as is clearly stated in the enclosed Delegated Authority, we would have to question why the Council would wish to comment on the UU at all. Further, we would question why the Council would wish for the Inspector to take account of these comments.

You also seem to be concerned at the matter being a UU, as opposed to bi-lateral agreement. Whilst the Applicant feels that this seems to be a rather convenient get out, because all that this is conditionality for a monetary contribution on trust for works to the verge, which is entirely lawful (Section 106(2)(a) TCPA 1990) the fact is that this could be changed to a bi-lateral obligation; i.e. Agreement, as opposed to UU.

Please do inform the Applicant and the Inspector if the Council would be prepared to do this. The UU can be changed to a bi-lateral document immediately, within hours, not days.

However, we are still working on the basis that, notwithstanding the clear shortcomings of the Council's enclosed/attached Delegated Authority (sent previously to the Inquiry with Closing Statements (CD 13.6), we remain very confused as to the Council's position overall.

On the one hand the Council is saying that it is not interested and will not entertain this position and will not spend the monetary contribution, relying its withdrawal of paragraph 6.4 of its Statement of Case (CD14.1) and the delegated authority in the attached. On the other, it is now (after the Inquiry) providing commentary that the UU is defective, that it wants a by-the-book 2m sealed surface pavement and in fact that the contribution is not enough. The Council cannot respectively have it both ways.

Therefore, in order to assist the Applicant, but more so the Inspector and the overall Inquiry, we invite the Council to answer the following questions before the Inquiry reconvenes on Friday 28<sup>th</sup> January 2022, in order to avoid any further confusion:

1. **Does the Council's position remain as per the Delegated Authority enclosed, or is it different now?**
2. **Does the Council's position remain that it will only see a by-the-book non-permeable pavement in replacement of the current verge (i.e. Kirklees Highways Standards)?**
3. **If the answer to 2, above is 'yes', the Council clearly knows what it requires and can provide a cost estimate, so what contribution is the Council actually seeking please?**
4. **Does the Council want the UU to be a bi-lateral Agreement instead of the UU? If not, please kindly explain why not for the Applicant and the Inspector.**
5. **Would the Council's position be different if any alleged 'clawback' provisions were removed from the final UU? Please explain.**
6. **If yes, can the Council obtain a delegated authority to enter into such a document? It has done so in relation to resistance of the present UU. If not, please can you clearly explain why not.**
7. **What will be the Council's position when monies are paid under the UU, which they are going to be? Please be clear for the Applicant and the Inspector.**

The Applicant, and I am quite sure the Inspector would be grateful for answers to the above questions in advance of the Inquiry re-convening on the 28<sup>th</sup>.

Yours sincerely

*Noel Scanlon*

**Noel Scanlon** *Solicitor, BA(Hons), MSc, MCIWM*  
**Director & Consultant for and on behalf of NSCL**  
Tel: 07921 385901 / Email: [noel.scanlon@nsconsult.co.uk](mailto:noel.scanlon@nsconsult.co.uk)

**Encs:** KMC Delegated Authority (already at CD 13.6); email correspondence 21.1.22 attaching tracked and commented Draft s106 UU submitted to the Inquiry in 'clean' Draft form (CD13.10)