SECRETARY OF STATE FOR TRANSPORT

DEPARTMENT FOR TRANSPORT

APPLICATION BY MR. RICHARD BUTTERFIELD FOR AN ORDER UNDER 247 TOWN AND COUNTRY PLANNING ACT 1990

ORDER REF: NATTRAN/Y&H/ S247/4337

IN RELATION TO LAND AT WOLFSTONE HEIGHTS FARM CONCERNING THE STOPPING UP AND DIVERSION OF PART OF HOLMIRTH FOOTPATH 60

PUBLIC INQUIRY (VIRTUAL EVENT)

COMMENCED ON 24TH AUGUST 2021

ADJOURNED 27TH AUGUST 2021 AND RE-CONVENED 28th JANUARY 2022.

SUPPLEMENTARY CLOSING STATEMENT

ON BEHALF OF APPLICANT ('ADDENDUM')

(Submitted 27th January 2022)

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1. On behalf of the Applicant, thank you for inviting the Applicant in your email from the Programme Officer (dated 25 January 2022 at 16:27) to comment on the items left in tracked changes and the 'Post Script' of the Council's Closing Statement (CD13.7 at paragraphs 45 to 53, inclusive), which responds to the Applicant's Closing Statement.

2. I respond as follows.

3. We believe that this addendum should be read as if inserted after paragraph 313 and before paragraph 314 of the Applicant's Closing (CD13.6).

Paragraph 14

4. We would wish to briefly comment on the unsaved tracked changes comments by Mr. Gill in his paragraph 14, as set out in tracked changes. Whether the diversion is a benefit is indeed a subjective judgement, but it is also influenced very significantly by evidence. The evidence falling from the Inquiry is overwhelming in our submission.

5. Mr. Gill does helpfully point out and acknowledge the superior surface compared with the existing line, but simply is relentless on other benefits of the diversion not guaranteed by the making of the final order. Therefore, we shall address this briefly.

6. Sir, where the 'benches' on the proposed diversion route are an issue, then upon the making of the final order, the Applicant can make a DMMO, or should the Council wish it and there is no opposition and whilst it would in some ways be a shame, he could simply remove them. Whilst it is doubtful the Council would require the removal of benches on a leisure walking route, offering

staggeringly good views and a backdrop of superior measure, the Council may do so, perhaps out of spite, for want of deliberately being a killjoy, or frankly for any other reason whatsoever. They are small structures that would be interfering with a PROW where the order is finally made. The Council can require removal of those benches where an order is made. In the alternative, the Applicant can make an application for a DMMO to retain those benches, before or after such an enquiry.

7. The benches undoubtedly add to the experience in our submission, but again, whilst it would be a shame to see them go, their retention is hardly something that the Applicant will be *dying in the proverbial ditch* over here. Sir, you could even recommend adding these officially to the order without legal difficulty, but that is entirely a matter for you and the Secretary of State and this, for the avoidance of doubt, is not in any way expected. It is submitted that retention or not of the benches is inconsequential so far as the overall evidence and the justification for the making of this order is confirmed. Include them, or don't in the final order. The Council on the making of the order, can require them to be removed, or not. The Applicant can remove them or apply for a DMMO to retain them, or not. There could be any number of scenarios, but I deliberately stop myself from going any further.

8. The 'quaint fencing' and the 'current view' and the 'mis-en-scene of the field adjoining' is indeed not a part of the order. We would submit that this could be the case in respect of **any** or certainly many proposed diversion orders. Let us identify a couple of things here. The land is in the Green Belt and within the setting of a Listed Building. Two immediate and important restrictive controls on any proposed development now and in the future (which by the way are not envisaged), though we accept that is headline illustrative and not particularly persuasive.

9. For Mr. Gill to state that there is no wider public or societal benefit of the diversion route, completely flies in the face of the evidence arising before and during the Inquiry. We would politely suggest such a representation by the Council, which although may say what it wishes, is a little sophomoric in the circumstances and should be given very limited consideration.

10. This is mainly because Mr. Gill's paragraph 14 inadvertently but actually serves to highlight just how pleasant and superior a leisure experience the diversion route is, compared with the current section of route that is proposed for stopping up. Whether or not part of the order, one would have to accept, it is fair to say that the diversion route really more pleasant and frankly better, in every way, compared with the current route. To promote that these technicalities are somehow a severe constraint and limit on the benefits, we respectfully submit is very much reaching on the part of Mr. Gill and the Council and should again be given very limited consideration.

Paragraph 45 to 47 of the "Post Script"

11. Mr. Gill has taken a particular position on the process set out in Inquiry Note 1 (CD13.2), whereby presumably to streamline proceedings for the final day of Closings, you Sir asked myself and Mr. Gill to go through a process of exchanging closing submissions and agree these. Or, in the alternative, where agreement could not be reached, state where we disagree.

12. Mr. Gill may or may not directly wish to misrepresent my position on behalf of the Applicant, but what Mr. Gill on behalf of the Council is suggesting, is that there is that there has been something underhand on the part of the Applicant in exchange of draft Closings, which is far from the case. All correspondence can be provided swiftly and without difficulty, should the Inspector wish it. However, the fact is that Mr. Gill on the part of the Council has actually adjusted his own Closing in response to the Applicant's Draft Closing, following draft exchanges over the festive period, including his unsaved "Post Script" section that remains in tracked changes font; an unusual strategy if deliberate, as we have said elsewhere. Ironically, Mr. Gill has done the very thing himself that he has complained about in his “Post Script” references in paragraphs 45 to 47 of his Closing Statement.

13. For simplicity and for brevity, the Inspector asked the parties to agree Closings and imposed a deadline of 31st December 2021. In the alternative, where the respective parties could not agree on the respective facts, then they were instructed that they should highlight where they disagree, which Mr. Gill and I have done in one document, being the Final Submissions on Respective Closings’ which you are taking as read for the purposes of these proceedings. We have therefore adhered to the Inspector's request through Inquiry Note 1, in full. We refer you to the reference to the Applicant’s comments throughout the Final Comments on Respective Closing Submissions” Document submitted with Closing Statements on 31st December 2021.

14. In more 'normal' Inquiry proceedings in more 'normal' times, where there would often be no exchange and 'agreement' of Closings, the Applicant (which is supposed to have the last comment in Inquiry proceedings), would ordinarily *break script* briefly and respond to anything said in Closing by the Council (in this case) immediately beforehand. Where you had wished to manage (indeed, *micro-manage*) exchanges or the specifics of what actually ends up in a final Closing Statement or set restrictions as to what may or may not be included in it, then respectfully you would have set this out clearly in Inquiry Note 1. You obviously have not done that Sir. Nevertheless, the Applicant respectfully cannot take seriously or consider reasonably a position that the Inspector would have intended to specify and manage to the extent promoted by the Council what is and is not included in a party's Closing Statement, or manage specifically how Closings may have been concluded.

15. We have said this in correspondence already (25th January 2022 at 13:00), which you have responded to Sir through the Programme Officer (25th January 2022 at 16:27), albeit I am not sure it is made public in the Document Library. What you Sir may or may not have intended after the event or even now in Inquiry Note 1, is we submit of no relevance whatsoever here. This was certainly **not** referenced in Inquiry Note 1; not even implicitly or indirectly. Mr. Gill has taken a particular position on Inquiry Note 1, the Applicant has taken another. Neither is wrong, but what was wrong, was that the Council an objector, was attempting to have the final word in an Inquiry which is of course for the Applicant. That would of course be contrary to any conventional management of an Inquiry, or even natural justice.

16. To suggest that contents of Closings are somehow limited by Inquiry Note 1 is in our submission hopeless. In inviting this Supplementary Statement Sir, you appear we submit to have understood this position, which deals with Mr. Gill’s complaint on behalf of the Council.

You have clearly recognised that Mr. Gill's complaint (his rather ironic complaint) is inconsequential Sir, as clearly evidenced in inviting this Addendum, for which we are grateful.

For this reason, we see no need to comment further, much as though we could.

Paragraphs 48 to 49 – Mr. Earnshaw

17. Mr. Earnshaw has indeed written to you Sir (CD 13.5) following what he believes are allegations from the Council regarding the accuracy of the Order Plan, as well as the Inspector's Inquiry Note 2 (CD13.4), in which you raised an issue on alignment, but this was not examined further.

18. I would like first to deal briefly with Paragraph 48 of the Council's Closing, whereby Mr. Gill has in exchanges with me prior to submission of Closing Statements, and specifically in paragraph 48 of his final Closing Statement, attempted to rely on an alleged inability to obtain instructions in relation to Mr. Earnshaw's letter (CD13.5). As stated by us in the agreed 'Final Submissions' document, the Council and Mr. Gill had known about the deadline of 31st December 2021 since the end of August 2021; some four months.

19. Where the Council, a large public sector services organisation, with multiple officer representatives, has not made contingency for Mr. Gill, their instructed Counsel, to obtain instructions, this is neither the problem of the Applicant nor the problem of you as the Secretary of State Inspector Sir. That is simply mismanagement by the Council, or Mr. Gill, or both. Either way, it is entirely unreasonable to rely on such a position to attempt to provide further input after the clear and imposed deadline for submission of Closing Statements.

20. However, notwithstanding all the above, the clear irony once again is that Mr. Gill has submitted comment in relation to Mr. Earnshaw's letter in his final Closing Statement and 'Final Submissions' document on behalf of the Council. This means that Mr. Gill either did manage to obtain instructions or has acted without instructions. Either way, this is not a matter for the Applicant or the Secretary of State Inspector here.

21. The Council has attempted in paragraph 49 of the Post Script section of its Closing Statement is not accurate. It has then gone on in its letter dated 5th January 2022 (CD13.8) to suggest that this is Mr. Earnshaw attempting to submit an amended plan. That is not at all what Mr. Earnshaw's letter says or does. It is a thorough explanation from a very experienced professional witness, with a detailed professional knowledge of this site over very many years. It provides an alternative plan to illustrate the problems with scale, leaving matters entirely with the Inspector.

22. You Sir through the Programme Officer have informed Mr. Earnshaw in writing that he did not need to be recalled for re-examination following his letter (CD13.5). The Council has had an opportunity to at least ask for Mr. Earnshaw to be re-examined; it has not done so. The Council does not actually dispute what is in Mr. Earnshaw's letter; i.e. the facts in the letter.

23. I simply refer you to Mr. Earnshaw's letter (CD13.5), as well as my letter (CD13.9) in response to the Council's letter submitting that Mr. Earnshaw's letter should not be submitted.

Mr. Earnshaw's letter is nothing but helpful to the Inquiry and extinguishes any doubt about the order plan. Again, as Mr. Earnshaw said in evidence, it is down to one thing: scale. Despite its opposition to Mr. Earnshaw's letter, let's see that for what it is. The Council very clearly does not dispute what is in Mr. Earnshaw's letter (CD13.5), which is reinforced by the fact that it has elected not to respond further to my letter (CD13.9) as well as not asked to re-examine Mr. Earnshaw.

24. Mr. Earnshaw's letter cannot be ignored, Sir. Mr. Gill's Paragraphs 48 and 49 in the "Post Script" section Closing, is we submit nothing more than faux outrage masking an attempt to distract all concerned, that it does not at all disagree with the content of Mr. Earnshaw's letter (CD13.5), which is nothing but helpful to you and indeed the Inquiry.

Paragraph 50 to 51 – Unilateral Undertaking

25. The Applicant has certainly not submitted the barest of information and all correspondence can be provided. On the contrary the Council has obfuscated and dithered around the UU. This has stemmed from a confusing position on whether it does or does not wish to receive.

26. Given the position that the Council will ultimately be carrying out the works, it has been invited to comment. We are some way apart on the extent of the physical works required, with the Council acting against its own Engineers' advice, but in any event now clearly stating that it will not use the monies to do any works to the verge.

27. In fairness the situation with the UU has moved on since submission of written Closings on 31st December 2021. Therefore, whilst we could, we see no reason to respond further here, but shall do so as invited on the final submission of the final UU by 11th February 2022.

Paragraph 52 to 53 – Case law

28. Sir, Mr. Gill's paragraphs 52 and more extensively 53 are I am afraid simply smoke and mirrors. A useful and I must acknowledge rather clever attempt at distraction, but actually in reality nothing more pertinent or significant than that. In our submission Sir, it actually masks the fact that the Council is reaching for reasoning at this point; almost a representation of the Council 'running out of steam'.

29. Mr. Gill attempts to persuade that what is promoted is extensive detailed and even forensic examination of Holgate J's Judgment in Network Rail, is somehow not allowed to even be mentioned by the Applicant in Closing. Notwithstanding that it is a significant and well-known authority for PROW stopping up and diversion matters, been raised on several occasions in documentation submitted as part of this application. Notwithstanding also the fact that it is mentioned in paragraphs 2 and 3 of my own Closing Statement, but which Mr. Gill clearly does not disagree, with according to the "Final Comments on Respective Closings" document, which was submitted with Closing Statements.

30. In the final paragraph of 53a) Mr. Gill states: *"Holgate J in the High Court is good authority with a helpful discussion of the exercise in which the Secretary of State is engaged, but it is not*

authority for the interpretation Mr Scanlon relies upon, and the Court of Appeal's judgement confirms this."

31. This is we submit an attempt to frame the Court of Appeal Judgment, being of course a higher stage authority, as meaning that paragraph 12 of the Court of Appeal stage Judgment[1], simply because it is the higher stage court authority, somehow supersedes paragraph 49 of the Judgment of Holgate in the lower court decision. This is wrong and further, rather treats the Applicant and the Secretary of State Inspector as if they either had no knowledge of the subject matter or were incapable of simple reading of court judgments.

32. The attempted framing of the simple and narrow narrative that the Court of Appeal judgment effectively trumps the High Court judgment, is rather obliquely (and I have to say not unskilfully) framed. However, it is absolutely nothing more than a distraction from the facts and realities here. I explain very briefly in the following for the Inquiry why Mr. Gill is wrong here and why you Sir would be incorrect in falling into what would be a *trap* in your required reporting to the Secretary of State in this respect.

33. Paragraph 12 of the CA stage judgment[2] is no more than a summary of the correct tests, which is clearly established by Holgate J in paragraph 49 of *R (ex p Network Rail Infrastructure Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin*), to which the Court of Appeal refers. Indeed, paragraph 12 as helpfully set out by Mr. Gill at 53a) of the Post Script section of his closing in tracked changes, simply summarises and establishes that the "necessity test" and the "merits test" as established at the High Court stage, represents good law and are indeed the relevant tests for the Secretary of State.

34. That summary in paragraph 12 of the Court of Appeal stage Judgment, does not somehow dilute or supersede Holgate J's position as set out in paragraph 49. On the contrary, it very firmly reinforces the position. The Court of Appeal Judgment refers the reader to the correct test, which is established through paragraph 49 of the Judgment of Holgate J in the High Court stage[3]. There is quite literally nothing in the rest of the Court of Appeal Judgment which would serve contradict this.

35. This is why Mr. Gill is wrong, which he may or may not have been aware of in compiling his Post Script submission at paragraph 53. Put simply, the correct test is indeed as listed in paragraph 49 of the Judgment of Holgate J. Paragraph 12 and indeed the wider Judgment at the Court of Appeal stage, merely serves to confirm this, which is undeniable.

36. This is in fact reinforced when Mr. Gill himself, again perhaps ironically, set out the relevant test, with multiple emphases in paragraph 7 of his own Closing Statement (CD13.7) as he Applicant has done at paragraph 3 of its Closing Statement. In other words Sir, Mr. Gill and I clearly agree that the relevant test is indeed in paragraph 49 of the Judgment of Holgate in Network Rail, at the High Court stage. However, Mr. Gill in the proverbial next breath in his Post Script section attempts to state that it is not, as it is somehow 'trumped' by paragraph 12 in the

[1] [2018] EWCA Civ 2069, submitted already with Closing Statements (CD13.6)
[2] [2018] EWCA Civ 2069, submitted already with Closing Statements (CD13.6)
[3] *R (ex p Network Rail Infrastructure Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin*),

Court of Appeal Judgment and that the Applicant's "interpretation" of the High Court Judgment is not the relevant authority. This is ironic to say the least given Mr. Gill's Closing on behalf of the Council. This is wrong, confusing, unfounded, illogical, desperate and a case of double standards hoping that the Inspector or other readers would hopefully not notice. In any event Mr. Gill's assertions are simply impossible as an argument here.

37. Judgments are indeed not to be read as if one was reading statute or a contractual agreement. Apparently, according to Mr. Gill, this goes to detailed interpretation of case law, which again I am apparently not allowed to do on the part of the Applicant. And yet, Mr. Gill does exactly this himself in his own Closing.

38. The alleged analysis of the wording of the "merits test" is not in fact an interpretation of the Judgment (though we shall stress that there would be nothing unusual, inappropriate, or untoward in that respect here). It is simply point out the language used in everyday understanding of those words. Ironically again, Mr. Gill himself in the proverbial next breath (in fact the next paragraph being 53b) in the Post Script section of his Closing then goes on to list different synonyms for the word: significant. We agree, there are of course different synonyms; however none of these assist Mr. Gill's case in this respect.

39. This is for the purposes of Closing, setting the detailed context of the legal tests that underpin this application and therefore this Inquiry. The Council is free and is indeed invited to state a contrary position in its Closing; i.e. this is the Council's view of what this means as opposed to the Applicant's. It is in any event not an interpretation of Judgment, but pointing out that the language used in reasonable everyday understanding of those words.

40. **The reason for this Sir, is in fact to assist you and the Inquiry.** The main reason for such identification of the relevant wording in the Judgment of Holgate J at paragraph 49 of Network Rail (High Court stage), is because **this is precisely the test that you have to consider** in arriving at you determination, Sir. The wording of the test matters. These words, everyday words, matter to your considerations and reporting, as I have stated and described elsewhere in the Applicant's Closing Submission.

41. Mr. Gill's paragraph 53c) is in many ways helpful, Sir. This is because it is finally an admission from Mr. Gill, notwithstanding what is said elsewhere in his Closing and again, somewhat ironically, Mr. Gill has gone from promoting that there are no advantages or public or societal benefits, to (when pushed) actually acknowledging that **there are advantages** to the diversion proposal. The "interpretation" of words does not "infringe" on the Secretary of State discretion. In fact, the Applicant's Closing Statement very much facilitates and assists in this respect.

NOEL SCANLON, DIRECTOR & CONSULTANT
FOR AND ON BEHALF OF NSCL, FOR THE APPLICANT
27th JANUARY 2022