DPI/Z4718/21/6

Draft order NATTTRAN/Y&H/S247/4337

Town & Country Planning Act 1990 – section 247

Proposed stopping up of highway at Holmfirth footpath 60, Wolfstones Road, Holmfirth, West Yorkshire, HD9 3UU

COSTS RESPONSE ON BEHALF OF KIRKLEES MBC (OBJECTOR)

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1. This document is the costs response of Kirklees MBC ('the Council') to a costs application made on behalf of the applicant (Mr Richard Butterfield) by his advocate at the close of the s.247 inquiry on Friday 28th January 2022. Paragraph references are to the applicant's written costs application. The inquiry originally sat from 24th August 2021 with the Inspector closing the evidence sessions on 27th August 2021. The Inspector was not available to hear closing submissions till 2022 so directed that final closings (with factual matters to be agreed in so far as possible) be submitted by 31st December 2021. The inquiry resumed for closings only on 28th January 2022. The inquiry did not formally close as the applicant has yet to submit their Unilateral Undertaking under s.106 of the TCPA 1990.

2. The applicant makes an application for costs. The applicant has been at pains to emphasise throughout the inquiry that the proceedings are not bound by normal inquiry rules under any particular statutory instrument. However, in the written application the applicant relies upon the principles applying to applications made within the planning inquiry process (paras.2-4). Those principles being, that unreasonable conduct has occurred and that the applicant for costs has incurred wasted expense because of that unreasonable behaviour.

3. The Inspector has invited a response by the Council to the application but has not confirmed whether he will apply the planning inquiry principles or otherwise.

4. Having placed reliance upon the principles arising from planning case law and then the Planning Practice Guidance (PPG), the applicant proceeds to outline criticisms of other third-party objectors and their conduct (paras.6-7)

5. The applicant applies for costs on four grounds (para.9):
   i. That officers have strayed beyond their authority in making the objection on grounds other than 'safety';
   ii. The Council has failed to substantiate any objection;

iii. That the Council legal officer's presence in the same room as the Council witness during XIC was unreasonable; and,
iv. The Council has failed to assist the applicant in completing an Unilateral Undertaking that the applicant intends to make.

Ground i – authority

6. The applicant maintains that the Council was bound in pursuing its objection by the decision of the Council's Planning Sub-Committee (Huddersfield Area) of 30th January 2020 to refuse the applicant's previous application made to the Council under section 257 of the TCPA. The applicant claims that the Committee's decision to refuse that application was because of 'safety' concerns and as such the officers were bound in this inquiry to make objections predicated only on road safety. In opening the Council's advocate addressed this contention and refuted it. That refutation is repeated now.

7. The applicant relies upon comments made in a meeting relating to the s.257 application, a completely separate and different legal process to the s.247 application. As a matter of **procedure,** it is unmaintainable to argue that the Council decision on the s.257 application binds its conduct in regard to the s.247 application. The applicant relies upon the fact that the Committee determining the Council's position on the s.247 application followed the s.257 decision. The applicant's approach is simply inarguable and the chain relied upon so convoluted as to make the applicant's application in this regard *unreasonable*.

8. The applicant relies upon comments made by one member of the Committee during discussion of the s.257 application. The comments of one member of the committee during the discussion of a matter cannot bind the whole committee. It is simply nonsensical to suggest so. Indeed, the comments of one member during a discussion cannot be relied upon as evidence of what that individual member's thinking was at the time of voting. There is clear High Court case law to this effect which has been cited by the Council in opening and which the applicant has sought to distinguish.

9. The applicant's attempt to distinguish this case law is on the basis that the cases are planning case law when the applicant refers to the s.247 application as a highways matter. The reasons requirements of planning decisions by Council's have always been higher than other areas of local government law: statutory instruments have required the giving of reasons in planning decisions in ways which have not been required in other areas of local government law. Therefore if, even in planning where having a reason for a decision is an even more elevated requirement, the Courts have not found it lawful to rely upon members' debate to impute a reason, then it is doubly true that members' reasons cannot be inferred from one member's comments in this s.247 application. The distinction the applicant makes if correct actually supports the Council's contention.

10. The applicant has emphasised that this is a 'highways decision' and not a planning decision. That is to ignore that, of course, this is a decision under the Town and Country Planning Act and is (*at least*) a hybrid decision which engages both user commodiousness, and planning necessity and merits. The attempt to distinguish established case law on committee decision making is hopeless.

11. As well as being procedurally distinct, the s.257 and s.247 applications are substantively different matters. The s.257 application was accompanied by an undertaking to improve the highway verge component of the diversion. At the time of the committee's resolution on the s.247 this had not been offered. So, the Committee was considering a **substantively** different matter which does not allow the conclusion that the s.257 decision can be read across to the s.247 resolution.

12. The Committee resolution on the s.257 contains no reason and the minutes do not record a reason. This is not a planning application where a reason is necessarily provided (see above).

13. Even if the member had said *as they voted* 'I vote against the s.257 because of safety' (which they did not) that would not equate to the Committee's reason. The Committee is an unified body taking a decision, the statement of one member does not bind the Committee.

14. The officers preparing the objection and giving evidence were PROW professionals and are bound to give the Inspector their professional opinion in this matter irrespective of the Council's resolution (with reasons or not). To allege otherwise as the applicant has, is to advocate for professionals to ignore their duties to the inquiry.

15. The Inspector is bound to consider the s.247 application and all the relevant tests. He is entitled to listen to any evidence relevant to those tests and is not bound, as implied by the applicant, to exclude relevant evidence.

16. The applicant relies upon cross examination in his cost's application. The applicant's advocate maintains that answers of Mr Champion as to the two committee determinations support the applicant's contention. This contention is wrong on two counts:

    a. Whatever concession Mr Champion may have made as to a logical connection between the s.257 decision and the s.247 resolution, **he did not concede** to the applicant's contention that one member's raising of safety as an issue equated to the Committee's reasoning. Despite Mr Scanlon's apparent pleasure in his cross examination, he did not secure such a concession.
    b. Further, the legal effect of a council's committees' decision making and debate is a matter of law which cannot fruitfully be cross examined from a highways officer or any non-lawyer. This is a basic principle of inquiry advocacy. **What the law is, is a matter of submission**. Submissions were

made in opening and have had to be made again following the applicant's wasteful costs application.

17. Further applying the planning costs principles, it is submitted it is not readily identifiable as to what additional cost the applicant has incurred. Other parties have raised various grounds of objection beyond road safety including the relative commodiousness of the current route and the applicant's proposal. These were not simply concerns of the Council.

18. Further, the Inspector was not bound simply to consider *only* Mr Scanlon's purported reasoning for the Council and as such inquiry time would have been taken up in any event. The amount of time taken up with the cross examination of the Council's witness is a direct result of Mr Scanlon's approach to cross examination which was repetitive in the extreme. If there was any basis in the applicant's argument as to officer authority (which is denied) the point could have been made in cross examination far more expeditiously than through Mr Scanlon's prolix cross examination. To apply the causal test, *but for* Mr Scanlon's instruction the inquiry would not have run into five full days.

19. The applicant's application under its first ground should be refused.

Ground ii – the substantive objection

20. Under ground ii. the applicant relies upon paras.247 and 262 of the applicant's closing submissions (para.16). The first of these two paragraphs proceeds on the basis that it is established that the Council could only object on 'safety' grounds. The second refers to the submission of Mr Earnshaw's second proof of evidence on 28th December 2021.

21. The relevance to the costs application of Mr Earnshaw submitting late evidence is entirely unclear. It may be another typographical error. The relevance of paragraph 247 is disputed. As submitted with regard to ground i. above, the applicant's submission that the Council was limited to only objecting on safety grounds is refuted.

22. The substance of the Council's objection has been made clear. The applicant seeks to close a public right of way. The application is therefore a matter of significant gravity under English law. The applicant's application is insufficient. The applicant has the **burden** of providing satisfactory evidence to justify the closure of a public right of way. The Council found the applicant's previous application under s.257 insufficient. The applicant has not improved his case before bringing an application to the Secretary of State.

23. The highways safety evidence provided has been tested and it has been demonstrated that the applicant's advisors have sought to submit i) evidence which does not address the vehicles which the application will bring users of the

diversion into contact with, ii) evidence which does not address the true extent of user of this route across the day, and iii) evidence which surveyed the route at limited times of year.

24. Further, the Council has submitted that when tested the merits of the applicant's application are not sufficient: the disbenefits outweigh the benefits. The applicant's application has been insufficient in circumstances where he seeks to close a public right of way and divert users along alternative routes which will increase pedestrians' conflict with motorised traffic going to 2 of 3 destinations. The diversion is not very dangerous but it is, *a priori*, more dangerous to divert pedestrians from a footpath to a route along the side of a highway.

25. The applicant maintains that he has been put to work on addressing objections beyond the purported 'safety only' objection that he argues the Council was bound to. However, the majority of evidence put forward by the applicant and the majority of cross examination of the applicant's witnesses has been on the sufficiency of the applicant's highways evidence. Indeed, the majority of evidence heard might well have been on matters of technical highways evidence but for the extended *ad hominem* cross examination of Mr Leader of the PFNS which took up so much inquiry time.

26. The Council submits that the applicant has not been put to wasted expense. The application has been objected to by several objectors including the Parish Council and the PNFS. The applicant has had to seek to address those objections, including the detailed PNFS objection. The Council obviously maintains that the applicant has failed in this. But in any event, in seeking the order under s.247 the applicant has had a duty to address the multiple objections. The Council's objection, if it were considered insufficiently clear, has not caused the applicant additional expense. That expense was required in any event.

27. This ground should be refused.

Ground iii – procedural

28. The Council denies that any claim for costs is made out in this ground. The Council maintains that it was not *manifestly unreasonable* for the Council's legal officer to be in the same room as the witness.

29. It is now accepted that this was regrettable considering the acrimony in this matter and suspicion apparent in the applicant's case (e.g. attempted inappropriate personal questions regarding the PNFS witness). However, there was no direction in the pre-inquiry materials against participants, including witnesses, being in the same room.

30. The link for the CMC provided only 'Guidance for those Attending a Planning Inspectorate Virtual Event' of June 2020. That guidance proceeds on the basis of 'teams' sitting in one room when it states:

'Use of Speakers

If there is more than one person attending an event, situated near one another, please use headsets as multiple speakers will lead to audio feedback and interference'.

31. The email sent with the link to join the inquiry sessions on Mon 23/08/2021 at 09:54 did not include a link to any other guidance.

32. No other note was produced ahead of the main hearing sessions in August 2021 and it was only following the events of 28th August 2021 that the document 'Guide to participating in a Planning Inspectorate virtual event' was referred to in the pre-inquiry session email for the 28th January 2022 session.

33. The Council notes that at the time of the initial hearing sessions there was no guidance from the Inspector on this point. As the applicant has repeatedly noted this particular application is not bound by any particular rules.

34. The Council's legal officer is an experienced officer in good standing. It would not occur to her to seek to unduly influence or undermine the inquiry process. Nor did it occur to her that anyone would suspect or be concerned as to such conduct. That she failed to take account of guidance she was not aware of is an error but is not unreasonable.

35. As was noted on the day, the passing of documents to a witness to assist them with the marshalling of documentation is a normal practice in inquiries. Indeed, it has been a *duty* required of this officer many times in inquiries over the years. That the Council's legal officer considered this acceptable conduct in a virtual inquiry is not manifestly unreasonable.

36. In any event **it is denied that this incident has led to additional expense** on the part of the applicant.

37. The 'incident' itself and the subsequent discussion of what should be done (i.e. closings to be drafted with clear reference to any time Mr Champion's XIC was relied upon) was perhaps a little over half an hour of inquiry time on day four of the inquiry. By that point the hope of closing the inquiry in four days instead of five was slim at best. In the end it has turned out to have been a completely forlorn hope. The inquiry ran to five whole days including the applicant's closing which was over 50 pages in length and took over four hours for the applicant's advocate to read.

38. The point is clear, the inquiry irrespective of whether or not the incident had occurred would have run over its four allotted days. The presence of the legal officer in the same room has not led to further expense on the applicant's part. The applicant's closing contains a number of attacks upon the officers and their conduct with regard to this incident.

39. The preparation of a closing is not an additional expense for the applicant, and that his advocate should seek to make prolix and *ad hominem* attacks upon individual officers is matter of the advocate's conduct rather than a resultant expense.

40. The applicant has made a separate complaint to the Council regarding the officer's conduct. This has generated extended correspondence on the applicant's advocate's part. However, that complaint and any expense on the applicant's part in making it is not within this inquiry process and not within the Inspector's jurisdiction. Any expense on the applicant's part in making that complaint is matter for that process and, lest it be suggested otherwise, it would be wrong for that expense to be part of the applicant's costs application.

Ground iv – the unilateral undertaking

41. The applicant alleges that the Council has obfuscated and not assisted or facilitated their 'compilation' of a s.106 unilateral undertaking.

42. The Council denies that it has failed to facilitate the applicant in preparing his unilateral undertaking. It will be clear that in fact the Council has sought to engage with the applicant ever since the substantive hearing sessions closed on 28th August 2021.

43. But this submission by the applicant is, in of itself, absurd. The applicant has chosen to submit a **unilateral** undertaking to the inquiry. The Council is under no obligation whatsoever to assist and facilitate the submission of a s.106 deed that it has not sought nor considers is satisfactory.

44. A unilateral undertaking is, by definition, a matter for the applicant to prepare and satisfy the decision maker of its utility. The applicant's submission is equivalent to suggesting it is unreasonable for me to refuse to let someone view my house when they knock on my door and demand to buy it. The applicant may desire to submit an unilateral undertaking, that is a matter for him. Its preparation is also a matter for him and to suggest that the Council is unreasonable in not bending to the applicant's will and making good an otherwise insufficient s.106 is ridiculous.

45. In any event the **Council has not failed to assist or facilitate the applicant**. The applicant raised his intention (via his advocate) to submit a unilateral undertaking during the substantive inquiry sessions of August 2021.

46. There followed extended correspondence between the applicant's advocate and the Council in which the Council made clear its willingness to review a draft unilateral undertaking when provided.
    a. Mr Scanlon wrote to the Council on 17/09/21 at 15:19 – in a two-page letter he states that a draft s.106 will be submitted 'next week'.
    b. Mr Scanlon wrote to the Council on 29/09/21 at 15:09 – in his email he refers to the s.106 being just about ready to send.

c. Mrs Haigh wrote to Mr Scanlon on 06/10/21 at 16:07 confirming that the Council will review any draft s.106 but that the drafting must be done by the applicant as their document.
d. Mr Scanlon wrote to Mrs Haigh on 06/10/21 at 16:48 – in the correspondence states that the UU is just about drafted and waiting for feedback from you/your engineers to include.
e. Mrs Haigh responds to Mr Scanlon on 06/10/21 at 17:33 to confirm that feedback on the draft UU will include Council engineers' response.
f. Mr Scanlon wrote to Mrs Haigh on 08/10/21 at 13:27 stating that the architect has been commissioned and the plan will arrive next week and the draft UU will be sent.
g. Email sent to the Council on 26th October 2021 at 21:39 stating that the draft will be with the Head of Legal on Friday morning.
h. In response to correspondence from Mr Scanlon regarding closings, Mr Gill wrote to Mr Scanlon on 10/11/21 at 22:45 stating that the Council is still awaiting the UU and will need to address them in closing submissions.
i. Mr Scanlon wrote to Mr Gill on 11/11/21 at 18:32 regarding closings and that a draft UU will be sent on Monday 14th December (sic).
j. Mrs Haigh wrote to Mr Scanlon on 23/11/21 at 17:18 to point out that if the applicant is intending to submit a UU it will need to be with the Council in sufficient time to consider it. Query whether it will arrive in November.
k. Mr Scanlon wrote to Mrs Haigh on 26/11/21 at 12:35 to confirm that he awaits instructions and that the draft will be submitted by the end of the month.
l. Mr Scanlon wrote to Mrs Haigh on 01/12/21 at 08:11 apologising that the draft was not yet submitted.
m. Mr Scanlon wrote to Mrs Haigh on 02/12/21 at 08:20 attaching the first draft of the UU.
n. Mrs Haigh wrote to Mr Scanlon on 23/12/21 at 16:07 enclosing delegated senior officer decision and Highway Design team comments on draft UU.
o. Mrs Haigh send Mr Scanlon response on first draft UU on 10/01/22 at 12:10

47. It should be clear that the Council remained willing to review a draft UU through the Autumn of 2021 and made clear that any draft must be submitted in good time to allow all the relevant officers (including Highways Design) to consider it.

48. The applicant criticises the Council for refusing to respond to further queries in an email of Mrs Haigh of 27th January 2022 (para.30). This criticism is misplaced. By that time the Inspector had made clear that the Council was not to make any further comment on the draft UU outside the resumed inquiry session (email from Programme Officer on Inspector's behalf at 15:11 on 18/01/22).

49. In that context it was appropriate for Mrs Haigh to respond when pressed the day before the resumed inquiry thus: 'the Council will not be responding to any queries unless requested to do so by the Inspector'.

50. This guidance from the Inspector is entirely understandable in the context of the applicant's advocate's correspondence of January 2022 which repeatedly raised the issue of potential procedural unfairness if he did not receive the 'last kick of the ball' on any issue.

51. The Council in correspondence provided the Highways Design engineers' response to the applicant's proposed verge works (email of Mrs Haigh of 23/12/21 and 10/01/22). Those comments were provided as an appendix rather than in the text of the correspondence. They are the professional views of the relevant internal expert consultees. Despite correspondence from Mr Scanlon of 11/01/22 15:04 that legal officers should challenge the highways engineers' engineering response, it would not have been appropriate for the Council to seek to gag or fetter the professional opinion of those officers.

52. The Council has sought to engage with the applicant on the UU. The applicant had four months between the inquiry sessions. The applicant failed to provide any draft UU for over three months (28/08/21 to 02/12/21). The Council had warned the applicant of the need to provide the UU in good time. The Council provided the professional opinion of the highways design team and the legal critique of the draft UU. The Council considers that the UU is insufficient both in the verge works to be provided and in its legal preparation. The Council has engaged, it is not for the Council to do Mr Scanlon's drafting for him. To suggest otherwise with regard to a **unilateral** undertaking is irrational.

53. This ground should be refused.

54. The Council submits that none of the applicant's grounds for costs are made out.

ANTHONY GILL
9th February 2022
KINGS CHAMBERS
MANCHESTER, LEEDS, AND BIRMINGHAM