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.

Applicant's Final Response to Kirklees Council's (as Objector) Response to the Applicant's Costs Application

(Submitted 25th February 2022)

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1. The Applicant responds as follows to the Council's "Costs Response on Behalf of Kirklees MBC (Objector)" dated 9th February 2022, compiled by Mr. Gill on behalf of the Council (the "**Council's Response**"). The Application for Costs on behalf of the Applicant dated and submitted 28th January 2022 is referred to herein as the "**Costs Application**".

2. Mr. Gill has identified, principally at paragraphs 2, 3 and 4 of the Council's Response, that proceedings are not necessarily bound by "normal" Inquiry Rules (which we would hopefully reasonably infer would mean a more usual planning inquiry conducted under Section 78 TCPA, for example). However, Mr. Gill on behalf of the Council does not offer anything by way of further application of this point. Accordingly, we submit that Mr. Gill's observations are nothing more than this – observations. There is no subsequent applicability or even complaint. Mr. Gill's observation does not provide a reason to deny the position as submitted by the Applicant.

3. It is noted that Mr. Gill on behalf of the Council does not state that or refer to an alternative position on what constitutes unreasonable behaviour, as submitted by the Applicant principally in paragraphs 3 and 4 of the Costs Application.

4. Mr. Gill is himself at pains to identify that this is an application under the Town and Country Planning Act 1990. It would and in our submission does surely follow that it is not unreasonable to refer to relevant items identified in paragraphs 3 and 4 of the Costs Application. There surely cannot be any dispute about the underlying first principle of what the word "unreasonable" means in such a context, which is directly applicable in the Applicant's submission.

5. It is of course entirely possible that the Inspector may be working to a different set of parameters. However, the first principles of a claim for costs following a public inquiry setting are establishing unreasonable behaviour. Mr. Gill does not dispute the starting point for this, as is set out in paragraph 4 of the Costs Application. We submit that the principles established by the Applicant in the Costs Application are a sound starting point and basis for continuation for the Inspector and that the Council observes a possible peculiarity given the type of proceedings but does not actually dispute this. It is therefore submitted that there is nothing incorrect or untoward about the principles underpinning the Costs Application, which again is not actually disputed by Mr. Gill.

6. Mr. Gill correctly identifies at his paragraph 4 of the Council's response that there are criticisms of other third-party objectors. This is simply for context and the purposes of elimination. The Costs Application is against the Council as Statutory Objector in this case.

7. We now move on to the four grounds for the Costs Application, which are as set out in headline terms at paragraph 9 of the Costs Application.

Ground 1: Officers Acting Beyond Their Authority

8. We view and submit that paragraphs 6 to 13, inclusive, of the Council's Response as attempted conflation and distraction, largely through making the issue more complicated than it is. More particularly, it departs from the clear evidence drawn from the Inquiry, particularly that of Mr. Phil Champion following cross-examination.

9. Paragraph 14 unhelpfully and unfoundedly suggests that the Applicant and his representatives do not understand the law and parameters around Committee proceedings. Inaccurate, remiss, baselessly condescending, and unworthy of a serious response considering the experience of the Applicant's representatives. This is because, as drawn out in cross-examination of Mr. Champion and as stated at paragraph 231 of the Applicant Closing (CD13.6), it is ridiculous to conceive that because this is not a conventional planning decision and there is no requirement to provide reasoning or parameters, that officers would have *carte blanche* to advance any reasons they would wish in objection. It is simply impossible that a Committee of duly elected would simply give officers open ended instructions to do what they would wish.

10. Paragraph 14 of the Council's Response states that Mr. Champion would be bound to give the Inspector "their professional opinion". However, this would depart from the much-promoted concept of the "officer body", which of course itself was found wanting in cross-examination of Mr. Champion. As identified in **paragraph 238** of the Applicant's Closing Statement (CD13.6) in that he clearly stated that he could "not answer for Mr. Cheetham" who was "the author of the Statement of Case". A clear departure by the Council's witness from the concept of the 'officer body' so frequently championed before and during the Inquiry by the Council prior to acknowledgements to the contrary by Mr. Champion in cross-examination.

It is of course noteworthy that in the *'Final Comments on Respective Closing Submissions' (*the **'Final Comments Document'**), which appears to have been included at 13.25 of the Core Document list and thereby slightly out of sequence (if indeed that is the final allocation in the CD List; the Inspector knows the document submitted with original Closing

Statements on 31st December 2021), Mr. Gill does not dispute this fact in **paragraph 238** of the Applicant's Closing Statement. This is because there is no question that this occurred under cross-examination of Mr. Champion.

11. There is no suggestion at all that the Secretary of State Inspector is bound to exclude relevant evidence. We are not sure from where this arises. We are unable to understand this submission by Mr. Gill on behalf of the Council, or indeed any connection to the Costs Application.

12. Paragraph 16 of the Council's Response states that the Applicant relies on cross-examination in the Costs Application. The Applicant relies on evidence, including that obtained following cross-examination at the Inquiry. Paragraph 16 of the Council's Response attempts to promote that Mr. Champion has not acknowledged or affirmed the Applicant's contention in this Ground 1.

13. Mr. Gill's rather unbecoming assertion (which unfortunately appears to have become an unbeoming theme, though this is a matter for he and the Council) that: *"Despite Mr. Scanlon's apparent pleasure in his cross-examination, he did not secure such a concession".* Mr. Gill would in our view have been better served in not directly targeting his opponent with condescension, *ad hominem* as he puts it himself, in a seeming attempt to distract from the facts. This is because it is a fact that, to the contrary, Mr. Scanlon did secure precisely that concession in cross-examination of Mr. Champion.

14. As set out at **paragraph 232** of the Applicant's Closing (CD13.6):

"232. Mr. Champion did eventually acknowledge in XX that instructions must have come from the reporting to Committee. Therefore, the only reason for objecting is the earlier decision of the Sub-Committee in January 2020 on the Section 257 Application to the Council. On this basis Mr. Champion agreed in XX that on this basis, one would have to look to the earlier reasons for overturning Mr. Cheetham's recommendation in his reporting (which was a recommendation to make an order; i.e. support for the proposal) on 30th January 2020, which we saw earlier. Mr. Champion accepted that this followed logically in XX."

15. This is elaborated and reinforced in the paragraphs following paragraph 232 in the Applicant's Closing (CD13.6). It is noted that in the Final Comments Document, Mr. Gill states: *"The Council does not have any record of Mr Champion accepting this."* This is not a dispute by the Council, or a denial that Mr. Champion did 'accept' this position in cross-examination. It is simply a lack of recollection hoping that this is received as a denial.

16. We simply refer the Secretary of State Inspector to **paragraphs 233 to 242** of the Applicant's Closing (CD13.6), which we would note again that Mr. Gill, having had every opportunity to state so in the Final Comments Document, has not disputed or even commented on these in the Final Comments Document (CD13.25).

17. Paragraphs 17 of the Council's Response go to the basics of costs principles, which is that unreasonable behaviour must have led to wasted expenditure by the Applicant. The Council attempts to promote that the Applicant will not have incurred additional cost due to the objections of others. More simply: the Applicant would have had to cover this

anyway. This is wrong. The simple fact is that the Council, as Highway Authority and a statutory objector, has objected on the grounds of highways safety. As Mr. Gill frequently advocates, it is for the Applicant to 'make the case'. The maximum of engagement was required as a result, as any reasonable practitioner would expect, but the Council has not actually substantiated its objection; it in fact did not put anyone forward to do so, which we are again very surprised about considering instruction to officers by its duly convened Committee.

18. Mr. Champion's presence attempted to distract from this issue and attempt to steer this towards an examination of the impact of PROW network. However, Mr. Champion conceded in cross-examination that the effect of the diversion was in fact "neutral", as did the Peak and Northern Footpaths Society. There was arguably no need at all for Mr. Champion to attend on this basis, given that there was helpful agreement from the main statutory objectors and the Applicant in this respect. Why this was not stated in correspondence rather than having to be drawn with relative ease from Mr. Champion in cross-examination we do not understand. Such a fact again goes to the disorganised, very confusing, and unsubstantiated objection by the Council.

19. Accordingly, a great deal of wasted expenditure has been incurred by the Applicant in preparing for, inviting professional expert witness evidence, and adjustment because of withdrawal and construction of evidence as proceedings progressed. Such considerable expenditure could have been avoided if the Council has prepared and substantiated its objection, within the parameters mandated to it by its constituted Committee.

20. The Applicant is not required to directly quantify its additional expenditure (not at this stage) because of the Council's unreasonable behaviour as part of its Costs Application.

21. Paragraph 19 of the Council's Response is completely irrelevant. The amount of time taken, nature and methods of examination and comments in relation to them are neither a matter for the Council nor the Inspector, particularly in the determination of the Costs Application. This is nothing more than a personal attack on Mr. Scanlon (ironic, considering again Mr. Gill's references to alleged but unfounded *ad hominem* advances by Mr. Scanlon against witnesses), which is unfortunate but is a matter for Mr. Gill and the Council. However, more pertinently and specifically here, this is of no relevance whatsoever to the Costs Application.

22. The simple fact is that it is without officers straying way beyond the authority given to them, such unnecessary expenditure on the part of the Applicant would not have been required. The Council, it has to be said through its officers, has accordingly acted unreasonably and the Applicant has incurred considerable expense as a result, which clearly did not need to be the case.

Ground 2: Substantive Objection

23. We view paragraphs 20 to 27 of the Council's Response as being of little if any use to the Council. In any event, aside from what has been covered in response to Ground 1 in this Applicant's Final Response, to which we refer the Inspector, we simply refer the Inspector to the original Costs Application at **paragraphs 16-18** inclusive and the references therein.

24. This expense was not "required in any event". This is as explained in relation to Ground 1, above. The Council can also not seek to hide behind other objectors in these circumstances. Whilst extensive preparation against all objections, general and specific, was carried out, the fact is that the Council as a statutory objector made a significant objection concerning safety. The Applicant was not to know that the Council would (i) put no person or other evidence forward to the Inquiry to address this; and (ii) would in fact deviate so significantly away from those parameters. Both are demonstrable of unreasonable behaviour on the part of the Council as a significant statutory objector, which has not at all substantiated its objection. Again, in the words of the Inspector following Examination-in-Chief of Mr. Champion: "*"I do not understand what the Council's fundamental objection actually is".*

25. The Applicant has had to prepare extensively but seemingly unnecessarily and has had to adjust, incurring significant expenditure that clearly could have been avoided.

Ground 3: Procedural Impropriety

26. We firstly refer the Inspector to the original Costs Application and the references therein.

27. However, we shall say that we find some of the content of this section quite incredible and even audacious, given that this is such a serious matter. The Council appears to have performed a *volte-face*, from profound apology for its mistake, to suggesting that there is nothing wrong and even further, now apparently stating that this was in fact done with forethought on the part of the Council.

28. The Council's Response is disingenuous in this respect and not a reflection of the facts. Mr. Gill now states that it was not manifestly unreasonable for the Council's legal officer to be in the same room as the witness (paragraph 28 of the Council's Response). The subsequent argument from Mr. Gill is that there was no specific guidance on whether Mrs. Haigh should have been in the same room as Mr. Champion during examination (paragraphs 33 to 35 of the Council's Response). Sir, some things, clearly go without saying, particularly for such experienced practitioners. Relying on this being absent from guidance is an incredible position to take in the circumstances.

29. In particular, the final sentence of paragraph 35 of the Council's Response reads:

> *"That the Council's legal officer considered this acceptable conduct in a virtual inquiry is not manifestly unreasonable."*
>
> (NB. Our emphasis)

It appears from this that Sandra Haigh, a not inexperienced Legal Officer, has clearly informed her/the Council's instructed counsel that she had considered this position beforehand and felt that this was acceptable conduct. This is a departure from the events of the day when Mrs. Haigh left the room and duly apologised vigorously to the Inspector. This is not something that would have occurred from an experienced officer who considered that their conduct was acceptable.

30. The Secretary of State Inspector clearly did not think that this was acceptable conduct on the day, hence why you had to intervene at the Inquiry and take the action that he has so far. In fact, the Secretary of State will receive reporting on this specific incident, which will

determine the status of Mr. Champion's Evidence-in-Chief and whether in fact it should even carry because of this incident.

31. Whilst rebuttal strategy in relation to the Costs Application is understood, this is quite an incredible statement to make and position to make, in writing to a clearly experienced Secretary of State Inspector that must report this incidence to his Secretary of State. This is because this states on behalf of the Council that Mrs. Haigh in fact did not make a mistake, but actually carried out and managed this process deliberately and with forethought. As if this was normal conduct and entirely reasonable.

32. This seeming doubling-down and attack being the best form of defence, is nothing but a sign of desperation on the Council's part in the Applicant's view and submission. To suggest that it is not manifestly unreasonable for the Council's Legal Officer to be in the same room (hidden, at the other side of his laptop) as their instructing lay-client officer witness, whilst providing evidence to a Public Inquiry and then being 'caught' passing notes to their officer witness, is beyond any reasonable comprehension. This is an incredible position to take and is indeed a complete reversal from the profound apologies offered by the Council's Legal Officer on the day.

33. Mr. Gill as the instructed counsel may or may not have had knowledge of the management of this position prior to his Examination-in-Chief of Mr. Champion (we say again that we suspect not and would be very surprised) does not even offer apologies to the Inspector or the Inquiry on behalf of the Council. This simply adds to a brazen and now it would seem incredibly arrogant position, that the Council now believes not only that it has not done anything wrong but was even cognisant of the position beforehand and considered such conduct to be acceptable. The Secretary of State Inspector clearly disagrees, as does the Applicant.

34. The Applicant does wish to take issue with paragraph 39 of the Council's Response. Mr. Gill seeks to position that the Applicant (or rather specifically Mr. Scanlon on behalf of the Applicant) is *gilding the lily* and deliberately incurring unnecessary expenditure in having to deal with this matter in Closing; the reference that "*the advocate should seek to make prolix"* being clear and direct evidence of this. The Applicant could of course do no other, particularly given the Inspector's guidance and instructions in relation to this occurrence. Furthermore, reference to *ad hominem* attacks on officers being a matter of Mr. Scanlon's conduct clearly is intended to mean 'misconduct', rather than being a "resultant expense", is in fact (and again ironically) an *ad hominem* attack on Mr. Scanlon, rather than being a defence to the Costs Application. Either way, paragraph 39 is entirely without basis, entirely irrelevant for the purposes of the Costs Application, but is unbecoming of counsel for the Council, who is effectively in a condescending way hoping or seemingly believing that this would be missed through attempted wordcraft, actually stating that Mr. Scanlon is deliberately and seemingly intentionally embellishing costs.

We would ask the Inspector to recall that this situation is one entirely of the Council's own making. **Mr. Gill, or indeed the Council (Mr. Gill is of course or should be acting on instructions) is invited to apologise and/or at least write immediately to withdraw paragraph 39 of the Council's Response.**

35. In response to paragraph 40 of the Council's Response, it is of course agreed that separate complaint to the Council does not and more importantly could not form part of the claim for costs. The Applicant has never stated that it would. The Applicant has already stated in the footnote with the Costs Application that provision of this information to the Inspector would not be appropriate.

36. The Council, possibly deliberately it would now seem, has acted unreasonably. The Council again attempts to promote that even where it is discovered to have acted unreasonably, this has not led to wasted expense on the part of the Applicant. This is again wrong. We refer again to the Costs Application and the references therein. Significant adjustment has had to be made because of this incidence. Such adjustment has led to abortive expenditure of significant preparation by the Applicant prior to the Inquiry, as well as having to make contingency and adjustment after witness examination.

Ground 4: The UU Issue

37. The Council's Response states at paragraph 40 that the Council is under no obligation to assist and facilitate in relation to a UU. This we find and submit is obtuse in this situation. Unfortunately, this requires a chronological breakdown to respond to paragraph 46 of the Council's Response and the associated accusations elsewhere within it.

38. The verge is part of the adopted highway. The Council would be in receipt of monies to carry out works to this verge under its control. For that reason, whilst the Applicant is itself clearly advised and is following evidence drawn from the Inquiry, the Applicant has reached out and asked the Council whether it agrees or not. Where it does not, the Applicant has requested alternative input on alternative works that are not a by-the-book 2m-wide kerbed pavement, which the evidence submitted has shown that Council's own engineers have previously said that this would create drainage difficulties further down Wolfstones Road.

39. Legal and PROW officers at the Council have not sought to professionally challenge their engineers about an alternative form of verge works, as the evidence from the Inquiry is that a by-the-book pavement is totally unsuitable in this case and may well have further unintended consequences. "Challenge" is used for all-encompassing brevity in this sense. What "challenge" means here is conveying to engineers, who themselves have informed the Applicant that they have their own reservations principally due to consequential drainage issues, that the evidence before the Inquiry as that a by-the-book pavement is unsuitable in this location and therefore what alternatives can be considered instead of what the Applicant proposes.

40. Contrary to paragraph 51 of the Council's Response, it would have been entirely appropriate for the Council to at least ask the questions of engineers; There is of course nearly always more than one engineering solution. In no reasonable or even realistic way could this be described as gagging or fettering the decision of those officers, which is an overstatement by the Council as well as an indication that officers have seemingly deliberately constrained their own engineers by not asking questions. This is itself is an example of deliberate unwillingness to assist and engineer an answer that was only in the interests of its position to prevent such an occurrence coming forward. This is further reinforced by the fact that the Council would not answer further questions on this matter (e.g. CD13.23).

41. The timing of the submission of the draft UU was delayed as a result because the Applicant was waiting for the Council's input in this respect. However, the submission of the draft UU was also delayed due to having to communicate with Mrs. Haigh's Head of Legal Services colleague as to whether the Applicant should continue to deal with Mrs. Haigh given the issues around Ground 3, above. Subsequent exchanges dealt with the fact that the Applicant was waiting for input from the Council on assistance from its engineers, but the Council eventually explaining on 23rd November 2021 that it would not comment without seeing a draft, whereas the Applicant could only issue a speculative draft without the Council's input (see email items within CD13.20.5 to CD13.20.9 inclusive).

42. The Council was clearly under the misapprehension that the Draft UU had to be submitted with Closing Statements on 31st December 2021, which was of course incorrect. According to Inquiry Note 1, this was to be submitted in draft two weeks before the Inquiry reconvened (which at this point was an unknown date). The Applicant wrote to the Council on 26th November 2021 (CD13.20.10) to outline the position moving forwards.

43. The Applicant submitted the first Draft UU on 2nd December 2021 (CD13.20.11). The Applicant received no further correspondence, and the Council did not actually respond further or state its position until 23rd December 2021 (CD13.20.12) enclosing an Emergency Delegated Decision issued a week earlier on 15th December 2021, which the Applicant had until 23rd December 2021 had no knowledge of.

44. The Applicant wrote to Mrs. Haigh to clearly outline the position and where the Council may still assist on 27th December 2021 (CD13.20.13). The Applicant was still reaching out to the Council for assistance, given that it would be using the resultant monies to carry out works on its adopted highway. No response was received. However, on 4th January 2022, the Programme Officer Mrs. Parker arranged the reconvened Inquiry date of 28th January 2022. Accordingly, Mrs. Haigh was contacted on 4th January 2022 and issued a holding response to the Applicant on 5th January 2022 (CD13.20.14).

45. Mrs. Haigh issued a response and tracked changes and commented Draft UU on 10th January 2022. It transpired from savings that this had in fact been ready since 15th December 2021. It is not understood why this was only sent to the Applicant on 10th January 2022 (see CD13.20.15). The Applicant had no choice at this point other than to relay on its own drafting and professionally costed estimates for the proposed work to arrive at the most suitable level of contribution, which was submitted to the Inspector on 14th January 2022 (CD13.20.16).

46. Following this, the Applicant has consistently sought assistance from the Council and reached out/invited the Council to input into the UU, given that works would be undertaken by it (see CD13.20.17 to 13.20.21). The Inspector will even note that Costs Application itself on 28th January 2022 still invited the Council to the proverbial table. This was not taken up and the Applicant completed and submitted the final version of the UU (CD13.22) and issued its final response to the Council's comments on the UU (CD13.23).

47. This is not a conventional UU. It provides money to the Council to carry out works on its own adopted highway. It was entirely appropriate and even right to reach out to the Council for input. The Applicant has done nothing but reached out to the Council. The Council did not have to assist in the compilation of the UU, but it did not actually state its 'final' position to the Applicant until 23rd December 2021. However, even following this 'final' position, the Council has still issued several pieces of correspondence simply criticising the UU, rather than meaningfully engaging with it. Where the Council has established a final position, then there was not need for further correspondence for the Applicant to consider and respond to. The Council has simply obfuscated and attempted to prevent the UU from coming to fruition, to its satisfaction in the event that the Secretary of State would see such works as necessary in making the final order.

48. The Council has elected a strategic position of hiding behind this with the simplicity of promoting that it will not provide any input and that this was a UU, not a bi-lateral agreement, which was resisted by the Council.

49. The Applicant now simply re-refers the Inspector to the Costs Application following the above. Ever since its strategic (in our view) but ill-conceived (in our view) withdrawal of paragraph 4.6 of its Statement of Case during the Inquiry, the Council has produced a confusing position on the verge, especially following cross-examination of Mr. Champion, which notwithstanding the withdrawal of 4.6 found Mr. Champion sticking to his proverbial guns on the rest of the paragraphs referencing the verge remaining in the statement, save for only one.

50. The Council's resistance and persistent obfuscation follows a confusing position on the part of the Council since during the Inquiry in late August 2021.

51. The Applicant has persistently and consistently reached out as it would ultimately be the Council spending the monies and doing the work. The Council has strategically resisted and has not conveyed its full and final position until 25th January 2022, with the issue of its 'final' Emergency Delegated Decision (CD13.20.20.1). The Applicant has acted in nothing but good faith attempting to always collaborate with the Council, even up to and beyond the Costs Application itself.

52. The Applicant has provided its comments on the Council's position on the UU to the Inquiry on 11th February 2022 (CD13.23) and does not need to restate these for the purposes of the Costs Application.

53. Any further information of correspondence can be provided at any time. Otherwise, the Applicant has nothing further to add in relation to the Costs Application.

NOEL SCANLON, DIRECTOR & CONSULTANT
FOR AND ON BEHALF OF NSCL, FOR THE APPLICANT
24TH FEBRUARY 2022