

DPI/Z4718/21/6

Draft order NATTRAN/Y&H/S247/4337

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

Town & Country Planning Act 1990 – section 247

Statement of case – Kirklees Council

1 Introduction

- 1.1 Kirklees Council (“the Council”) received an application from Mr Butterfield in April 2019 to divert part of public footpath Holmfirth 60 at Wolfstones Heights, Holmfirth, under Section 257 of the Town & Country Planning Act 1990. This followed two previous versions of diversion proposals in a previous application to divert footpath 60, dealt with by the applicant’s original agent. In January 2020, following a third round of informal preliminary consultations, Council officers considering the application, prepared a report to the relevant Council committee. Documents supplied to the Council in April 2021, by the Department for Transport (“DfT”), show that a copy of this officer-body report was submitted to the DfT in the s247 application to the DfT by the applicant (ref: DPI Z4718 21 item 43). Appendices to that report are linked within the report at item 43. The Council committee decision (vote of 11-0-1) was made not to make a s257 Order.
- 1.2 The DfT subsequently received an application under section 247 (“s247”) of the Town & Country Planning Act 1990 (“the 1990 Act”) and published a draft s247 Order in August 2020. The Council became aware of this application when a DfT notice email was received regarding the publishing of a draft s247 Order in an email of 19 August 2020. Upon enquiry to the DfT, the Council was informed that “*the stopping up application was submitted via Noel Scanlon Consultancy Limited*” (“NSCL”). At this time, the Council had

not seen any of the application papers submitted to the DfT by NSCL and the DfT did not identify the applicant. DfT consultation on the draft s247 Order started on 1 September 2020.

- 1.3 Council responses to section 247 orders are a delegated power under the Council's scheme of delegation, however a report was taken to a relevant committee for it to consider the Council's stance on the draft Order. The Council's committee decision and opposition on the s257 proposal had been clear and delegated officers would have looked to object to the s247 draft Order. Notwithstanding delegation, the relevant Strategic Director asked officers to report to committee for members' view on the Council's position. The Strategic Committee of the Council decided unanimously on 16 September 2020 at agenda item 8, to oppose the draft s247 Order.
- 1.4 The Council's website notes "*That the Council object to the Town & Country Planning Act 1990 section 247 draft order and oppose the public footpath proposal in the Secretary of State's determination.*" A brief outline objection from the Council was submitted to the National Casework Team at the DfT on 16 September and clarified on 17 September 2020 (ref: DfT Library item 24b). In correspondence with the Council, NSCL has appeared to tell the Council what its objections are and appeared to claim that the Council's objections are restricted or limited to certain points, in essence that objections are restricted to words uttered by members at committee meetings regarding the s257 and s247 applications. These arguments would not be accepted by the Council. (Appended to this report as an example NSCL/KC correspondence October 2020 **KC1**). The Council emailed the DfT National Casework Team on 16 September 2020, noting: "*Of course, the Council would look to expand on its objection at the appropriate time, and I understand that, under section 252 of the 1990 Act, a public inquiry would have to be called if it is intended to progress the applicant's proposal. We look forward to receiving further details in due course.*" The Council has very recently

been made aware of a NSCL letter to the DfT of 27 January 2021, which had not previously been brought to the attention of the Council. The Council received this letter copy by email late on the afternoon of Friday 30 July, one working day before the pre-inquiry meeting. The Council may look to expand comment on this correspondence further in future, however, in essence, the claims therein are refuted. In brief, the cited decisions of both Kirklees committees (January and September 2020) are not subject to or limited by a recorded reason. Among the various negative comments of the author, there is further allegation in the January letter that the Council's objection is limited to being based on a few words spoken by some Councillors at the meeting(s). The Council's objection to the DfT clearly stated that the reasons for the Council's objection would be expanded upon. Professional, specialist officers of the Council have prepared documentation for the s247 determination process affecting this public footpath, and professional officers will attend and give their professional opinion. It has been the agent's modus operandi to tell people what the situation is as far as the agent sees it, and then based on this presented information, to claim that something else is not possible or must be done, depending on the circumstances. For the moment, lastly on this point, the determination by the Secretary of State is in relation to a s247 proposal, not a s257 proposal. This was made clear to Strategic Committee members in the September 2020 s247 report papers, including the report summary appended to this statement (**KC2**). NSCL appears to be claiming that the Council's s247 objection can only be on the basis of a s257 decision, i.e., on a different order process, under different legislative provision and different factual circumstances. The response from Ms Moody to the original s247 objection from the Council was to ask for a reason beyond the Order not satisfying the legal criteria – the Council responded by citing failure under Vasiliou and had specifically noted that further expansion would be submitted. The DfT did not warn the Council to limit the scope of its comment, the DfT asked the Council to clarify why it was objecting, because saying “it fails to satisfy the criteria” was deemed

insufficient to determine if the Council objection was considered by the DfT to be valid. The current s247 process is not the previous s257 process, so the Council is unclear on what basis an allegation of restricted reasons in the s257 decision would restrict the Council's objection argument going forward on a different order made by a different order-maker. Generally, in public rights of way cases, if the Council takes a position, it is taken forward on that position – it does not fetter its case by limiting the breadth of its arguments, and it would clearly be against the Council's interests and that of the public it represents to restrict its position in such a way. The January 2020 s257 officer body report (section 6 etc.) clearly identified that members could reasonably refuse the s257 application, and gave information on the potential, relevant basis for doing so, relating to the legal arguments of necessity and merit – it is quite clear that members at the January committee, and the one in September thought the diversion unacceptable on its merit. Members considered the application, weighed up the information and reached a conclusion in each case, to refuse, and to oppose, respectively. NSCL seeks to limit the Council's case to words uttered by members, but this point is misplaced. This is not a case where committee members are asked to provide reasons to support their decision made against the information presented to them, in the face of professional comment, as can happen in planning application determinations, when those member reasons are subsequently the only ones proffered by an authority. On the contrary, these committee decisions, including the s257 refusal, were specifically described as open to members in the officer-body reports before them. Each decision, to refuse and later to object, was appropriate and the availability of that option clearly communicated by officers to members.

- 1.5 The draft Order and plan showing the stopping up and provision of alternative was received from the DfT in August 2020. Copy extracts of the definitive map and statement of public rights of way concerning the surrounding public rights of way

network are appended to this statement (**KC3**). Whereas the definitive map modification order (“DMMO”) contains a modification to record a greater width for Holmfirth footpath 60, the draft Order does not include or concern the stopping up of the full extent of public rights noted in the associated ongoing definitive map modification order. The notice of the DMMO is appended to this statement (**KC4**) and, at time of writing, we are in the formal period for objections and representations to be made. NSCL’s claims at the pre-inquiry meeting that, “by fact and law”, the s247 process would extinguish any and all relevant part of footpath 60 (e.g., up to 4 metres width) even if the DMMO modifies and increases the recorded width of path 60 are incorrect. The s247 application and the draft s247 Order clearly do not affect or propose to affect any public footpath width beyond 1.2 metres. NSCL’s claims that the s247 process would mean that the DMMO would be “of no relevance” are also incorrect. The Council considers that the inquiry this month should be postponed until such time as the DMMO is at a point to be determined for this very reason, the s247 process as promoted does not consider or deal with the potential additional width, whether the DMMO is unopposed, or if it is opposed and referred to the Secretary of State at DEFRA. As the inspector indicated at the 3 August 2021 pre-inquiry meeting, tripling the public footpath to be stopped up is not a minor matter. In refusing the Council’s request that the inquiry be postponed, the DfT wrote that it had consulted other parties. These parties were not identified, nor reason given for the refusal. Whilst acknowledging that the DfT has not asked the inspector for the inquiry to be postponed. The Council still considers that the inquiry should be postponed. Whether by the Council or on behalf of the SoS at DEFRA, if the DMMO is confirmed increasing the recorded width of path 60, then a different s247 proposal would be required, not the current one subject to this draft Order which would leave public path on the driveway. The Council discovered on 3 August 2021 that NSCL had written to the DfT on 2 August 2021 regarding the Council’s request for postponement of the inquiry. The Council will look to respond appropriately to the wide-

ranging claims in NSCL's letter in our later rebuttal statements, given the very late availability of this NSCL letter and the nature of its contents.

2 Consultations

2.1 The Council understands that the draft s247 Order consultation by the DfT attracted responses both in favour of, and against the proposed change to the alignment of Holmfirth 60 (part) at Wolfstones Heights. The Council, as relevant highway authority, asked both the applicant's agent and the DfT for copies of the consultation responses, which neither party supplied to the Council until the DfT had decided to take the matter to a public inquiry.

The DfT had supplied the s247 applicant with consultation responses, apparently throughout the notice period. The Council was contacted by various parties who were concerned at correspondence received from the applicant agent about their consultation responses. The concerns are reflected in DfT Library item 37, an objection where Mr Rooks describes "bullying/intimidatory tactics".

3 The Legal Test

3.1 In making an Order under section 247 of the 1990 Act, there are legal tests to be considered and satisfied. They are set out below for convenience.

3.2 Necessity – Section 247 (1)(a) of the Act states that a stopping up must be necessary to enable development to be carried out in accordance with planning permission granted by the Council (or relevant government department) under Part III of the Act. The site has planning consents issued by the Council. The route proposed to be stopped up is shown in the s247 draft Order plan and schedule. The route is said to conflict with the proposed site layout for relevant planning consent and an order under s.247 is reportedly sought to stop up relevant recorded public rights of way to enable

implementation of the proposed development as granted. The development allegedly requiring stopping up of the s247 draft Order route would appear to be:

- 3.2.1 a raised bed and wall retaining the foundations of the boiler house to the west of the track,
 - 3.2.2 excavations and levelling requiring the above and construction of a new north-south retaining wall allowing for “proposed parking area for two vehicles to be macadam”,
 - 3.2.3 steps to the north of that wall connecting east-west and
 - 3.2.4 “existing wall to be stopped up by continuation of drystone wall to boundary” (as shown in ADP drawing 13072D-200-P02).
- 3.3 NSCL’s claims in the application submissions regarding the precise location of the public footpath 60 to be stopped up, i.e., that it lies only to the northernmost part of the track, have not been substantiated, nor are they appropriately or sufficiently reflected in the draft s247 Order and plan.
- 3.4 This point regarding the alleged location of footpath 60 came to further attention by the landowner’s actions to fence off part of the width of the track carrying public footpath Holmfirth 60 between buildings at Wolfstones Heights Farm and Wolfstones Hall. NSCL informed the Council that its client had undertaken works. The works effectively reduced the width of track available to the public, restricting access to approximately four feet on the northern side of the track. NSCL effectively gave the Council forewarning of the potential fallout a ‘heads-up’ on the actions of the landowner, predicting that complaints from the public may result, but that they ought to be resisted by the Council, if received. Posts and mesh were erected to prevent access to or along the southern extent of the track. See Photos One, Two and Three appended to this statement (**KC5**). When the

Council made enquiries in response, NSCL and its client failed to provide the Council with sufficient explanation or evidence to support its claims regarding the location of the footpath 60 within the track or to support its actions in erecting fencing to limit the available width to 4 feet to the northernmost side of the track. The Council did receive various reports that Holmfirth footpath 60 had been obstructed by the fencing works. The matter of potential enforcement action by the Council for obstruction or encroachment of the highway (footpath 60), regarding this change on the ground, was placed in abeyance by the Council, pending the outcome of the s247 process. In other words, officers decided not to pursue highways enforcement action at that time, bearing in mind the ongoing formal process, and decided to reserve its position. The receipt of the DMMO application and its investigation and making of a DMMO have also placed the matter of the extent of highway rights beyond a recorded four feet width at this location in serious dispute.

3.5 The landowner's fencing actions appear to have had unintended consequence; in October 2020 the Council received an application for an order to modify the definitive map and statement of public rights of way, under section 53 of the Wildlife & Countryside Act 1981. As required under section 53B of the 1981 Act, the Council registered the DMMO application, which was asking the Council to make an order to vary the particulars of the public footpath 60 at Wolfstones, specifically to record a greater width.

3.6 It is incumbent on the Council to make orders further to the provisions of s53 of the 1981 Act. The s247 application agent has gone to great lengths to try to delay and prevent the investigation and determination of the s53 application and subsequently the making of a definitive map modification order under s53 by the Council, including threat of High Court action if a DMMO were to be made by the Council. The s247 applicant's agent has also sought Council officer removal from Wolfstones public rights of way

matters. These and many other exhortations have been made to very senior officers of the Council. The s247 applicant's agent has been unhelpful and provocative in dealings with the Council, causing delays to the determination of the DMMO application, making unsubstantiated claims and repeated threat of legal action against the Council if it does not agree with NSCL. The Council and its officers have been subject to repeated allegations of unlawful action, *ultra vires* decisions, bias, prejudice, collusion etc. NSCL's 'confidential' letter to the DfT is one example of this. NSCL's claims, for example, that it is reaching out to people, have not been so received and have caused concern to numerous correspondents in this process who do not support NSCL's case.

3.7 The effect of the DMMO, if confirmed, would be to record a greater width for Holmfirth 60 along the s247 Order route and beyond. The claimed width of the route in the DMMO case has been challenged by the s247 applicant's agent on behalf of his client during the ongoing DMMO process, and it has argued that there is no public right of way beyond that currently recorded in the definitive statement. The width of public footpath Holmfirth 60 is a matter of dispute and subject of formal DMMO consultation at the time of writing; the draft s247 Order and its consultation does not reflect the DMMO width of footpath 60. The draft s247 Order does not include the same extent of land as the DMMO. If an order were to be proposed for the stopping up of Holmfirth 60 which included the extent of the DMMO width, that order would affect land not affected by the draft s247 Order. The DMMO concerns land which has not been subject of any relevant s247 proposal or associated consultation, even allowing for any lack of clarity in the s247 application and draft Order papers. See 1.5 above regarding the NSCL claim that the s247 is for all potential width of Holmfirth 60.

3.8 The proposed development described in planning application submissions appears to affect two very short lengths of public footpath Holmfirth 60. The construction of a wall at the western end without interruption would block path 60. Additionally, a cut and retain

proposal creates a path level discrepancy and then refills part of that hole with a raised plant bed and wall to retain the boiler room, which apparently refills in where the boiler room gable is apparently undermined by the 'cut'. There is also a note on submitted plans that there would be parking for two vehicles, which would not specifically require grant of planning permission, which is already "macadam" and where generous similar provision exists within the landholding of the applicant. (See Kirklees Planning officer note attached to this statement). The development work concerned appears of little value or merit when looking at the balance to be judged against the negative effect of the proposed change to the footpath on public user. Mr Kersey, (whose s247 objection is at DfT library item 10), when considering the proposed development and path diversion under s257, responded in July 2019 as appended to this statement (**KC6**), for him the development appears to serve little purpose as a development except to purport to justify closure of the highway, public footpath 60.

- 3.9 The stopping up proposed in the s247 draft Order does not appear to need to be so extensive to implement works that required planning permission. The s247 proposal is to close 150 metres of public footpath, whereas the works that would demonstrably require planning consent are within a much more limited length.

3.10 The provision of alternative route to Wolfstones Road proposed in the s247 draft Order fails to provide the required improvement to the verge of Wolfstones Road identified in lengthy discussions with the applicant and in the January 2020 report to committee on the s257 application proposals. The equivocal support offered to the proposed diversion in the officer body report of January 2020 was dependent on the provision, under separate legislative process, of an improved verge to create a constructed footway (see different circumstances, referred to above).

3.11 The negative effect of the diversion proposal was considered in the s257 officer report to be unacceptable without such additional provision for pedestrian benefit, a position supported by the Council's highway safety team, despite the applicant's agent's claims to the contrary, repeated in NSCL emails to s247 objectors provided to the Council by the DfT. For highways safety officer comment, see App D of the Council's January 2020 report linked at DfT Library item 43 (page 1 and 2 - App D is appended to this statement for convenience **KC7**) There is no such proposed footway benefit in the s247 application or the DfT draft s247 Order. The Council determined that even with this mitigation the proposed diversion was not acceptable due to the negative effect, the s247 proposal has no such mitigation. The benefit of enabling the development to go ahead does not outweigh the negative effects on the highway (public rights of way) network.

3.12 Alternative routes – Section 247 allows for the provision of alternative routes. The draft Order plan identifies an alternative route connecting to Wolfstones Road approximately 120 metres from the current Holmfirth 60 terminus with this public road. Account must be taken of the effect of the order on those entitled to the rights which would be stopped up. Paragraph 7.15 of DEFRA's circular 1/09 states that "*The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway*

should be weighed against the advantages of the proposed order.” The proposed development of the land would clearly affect the historic public use, and the character of the route. Objectors have noted that the proposal interrupts the flow of the route of Holmfirth 60 following along the ridge from Netherthong.

3.13 The proposed development would provide some minor benefit to a single household, there is no evident additional housing, public or societal benefit from the proposed development connected with any local and national targets. It is not clear from planning submissions that planning permission would be required to continue the wall at the roadside across the top of the drive. Similarly, although the engineering works to change the levels of the driveway may require planning permission, the use of the changed level as a parking area for two cars would not require planning consent. Similarly, the change of the western driveway to a lawn within the curtilage of the dwelling house would not require planning consent. See appended comment from KC planning officer (**KC8**). The extent of the proposed diversion is greater than would be required to implement development works that require planning permission. In comparison with the broad range of developments looked at by public authorities, the relevant development works here would be considered of a low degree of benefit and importance. Overall, there is disbenefit to the public due to the amenity impact of the loss of the route to be stopped up, where the Council is conscious of the assessment of benefits of the development and disadvantages of the proposed footpath provision.

3.14 This is not a case where a Council has refused to consider a proposal or chosen to ignore or delay it. The Council has assisted the applicant from pre-application discussions, with three preliminary consultations, much officer time, and report to

committee for a decision. The Council reasonably and appropriately opposes the draft s247 Order.

3.15 The cases of Vasiliou v SoS Transport [1991] 2 All ER 77 and R (Network Rail) v SoS Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin) relate to matters of necessity and merit in considering the stopping up of public highway for planning development reasons.

3.16 The Council would highlight (**our emphasis**) Mr Justice Holgate's words at paragraph 49 of the Network Rail judgement.

"In summary, it was decided in Vasiliou that: -

(i) The Secretary of State cannot make an order under section 247 or confirm an order under section 257 unless satisfied that a planning permission exists (or under sections 253 or 257(1A) will be granted) **for development and that it is necessary to authorise the stopping up** (or diversion) **of the public right of way by the order so as to enable that development to take place in accordance with that permission** (see also language to the same effect in section 259(1A)(b));

(ii) But even **if the Secretary of State is so satisfied**, he is not obliged to confirm the order; **he has a discretion as to whether to confirm the order** and therefore may refuse to do so;

(iii) In the exercise of that discretion **the Secretary of State is obliged to take into account any significant disadvantages or losses flowing directly from the stopping up order which have been raised**, either **for the public generally** or for those individuals whose actionable rights of access would be extinguished by the order. In such a case **the Secretary of State must also take into account any**

countervailing advantages to the public or those individuals, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such disadvantages or losses are of such significance or seriousness that he should refuse to make the order.

(iv) The confirmation procedure for the stopping up order does not provide an opportunity to re-open the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision.

As a form of shorthand **it is convenient to refer to** the test in (i) above as a **“necessity” test** and the test in (iii) above as a **“merits” test.**”

3.17 It is the Council's case that even if the stopping up is considered necessary to implement some of the described works, for the development requiring the diversion of the footpath, overall, the disadvantages or losses are of such significance or seriousness that the s247 Order should not be made, considering any “countervailing advantages” and would ask the Inspector to recommend that the Order not be made.

3.18 The proposed footpath route would be circuitous and not provide a direct link to the Wolfstones Holme Valley Land Charity (“HVLC”) land, which is recorded by HVLC as being held for informal public recreation, (see record appended to this statement **KC9**). No provision for improvement of the Wolfstones Road verge is proposed. The width of the proposed alternative route would be less than that in the ongoing DMMO. The s247 does not address the DMMO and the s247 has not been consulted upon the basis of the DMMO width and so cannot be amended to address the DMMO.

3.19 In report to relevant committee, the proposed diversion of the public footpath with the provision of a footway on the verge of Wolfstones Road was given as an option, as was the reasonable potential to refuse the application. Committee members voted against the diversion proposal, even with the prospect of an additional footway provision being secured by other formal process. The Council has had to form a view on these various public rights of way matters, and these have been challenged.

3.20 The Council would ask the DfT to endorse, in its consideration, the Council's decision on this matter, supported by local organisations, such as the Parish Council, the Holme Valley Civic Society, the Holmfirth Harriers, Holmfirth Walkers are Welcome, as well as local representatives of nationally recognised user groups such as The Ramblers and the Peak and Northern Footpath Society.

3.21 On consideration of these issues, there are significant disadvantages and losses to the public and it is not expedient to make the s247 Order.

4 Draft Order publishing

4.1 The Council was notified of the draft order publishing by email of 19 August 2020 from the National Casework Team at the DfT. After the expiry of the notice period and upon decision to take the matter to public inquiry, the Council was provided with some copy documentation including objections made to the Order. Copies of supporting comments were also supplied to the Council, but with correspondents' information removed, meaning that the applicant was generally able to communicate with responding parties on all sides, whereas the relevant local highway authority has not.

4.2 The Council was made aware by various parties that they had been contacted by the application agent seeking the withdrawal of their draft s247 order comments/objections

and variously citing, potential applications for costs to be made against them, and/or insistence that they appear at public inquiry to substantiate their comments/objections and face cross-examination and/or that they take legal representation if they intend to pursue objection or to attend an inquiry. Examples are noted in the DfT library objection papers.

5 Objections

- 5.1 The Council was provided with copies of objections made to the s247 draft Order after the draft s247 Order consultation period. A number of informal objections were raised at the time of the Council's consultations on the s257 applications which had similar intended effect.
- 5.2 In essence, it is noted that there is a preference amongst objectors for the route of footpath 60 to remain on its general alignment along the ridge to Wolfstones Road, taking it to a point opposite the access to the Holme Valley Land Charity ("HVLC") land, held for informal recreation and containing Wolfstones "trig point" (Ordnance Survey Triangulation pillar T049 – S4400). Contrary to assertions by the applicant's agent that the trig point is modern, the trig point dates from the nineteenth century and appears on the 1893 OS 1:2500 County series First Edition mapping. The pillar has also been subject of improvement works by HVLC to make a "collar bench" or "stone throne" to celebrate the current monarch's Diamond jubilee. An unofficial onward route is promoted by signs on site. The applicant informed the Council that efforts had been made but were unsuccessful, to make arrangements with the HVLC potentially to connect between his proposed Hol/60 terminal point, directly across Wolfstones Road to the 'trig point land' – the council understands that the applicant tried to do this to deal with concerns raised about the proposed change of the western terminal point of the public footpath 60.
- 5.3 Many consultation respondents to the various path proposal processes have noted the negative effect of moving the terminal point of Holmfirth 60 further north, a concern supported by the Council's highways safety team, despite the applicant agent representing this as Council support for the change of path terminal point location. (appended at **KC7** for convenience, see pages 1-2 of App D from the January 2020 s257 committee report).

5.4 The s247 draft Order new path length total is described in the draft Order as 226 metres. The proposed length to be stopped up is shown in the draft Order as 151 metres.

It appears that the site could be developed without the need to divert quite so much of footpath 60 in quite such a significant way over such a length. It was also apparent that a number of respondents to early diversion consultations could not identify that the development would require any diversion of path 60.

In addition to the objections made to the draft s247 Order published by the DfT, objections were made to the broadly similar proposal in the form of the s257 application(s) to the Council for a public path order. There were three Council preliminary consultations on proposals to divert path 60 at Wolfstones, generally speaking, this resulted in far greater public response than the planning applications at this location. Summaries of these concerns are appended from the committee report of January 2020 (**KC7**).

- 5.5 The responses of many parties reflect the Council's concerns about the public footpath proposals, including those presented in the draft s247 Order.
- 5.6 The application submissions to the DfT for a s247 order are incorrect or incomplete in various ways, or otherwise merit response. More particularly in the statement of reasons, and the following are some examples.
- 5.7 At paragraph 1.6, the statement declines to note that members of the sub-committee were informed that it was reasonable and appropriate to refuse to make the s257 Order after its consideration. It was a matter for members to determine whether to make the order and it was open to them to refuse, and this is clear in the report.
- 5.8 At 1.7 it notes a consideration of seeking a judicial review of the Council's decision, noting that a less acrimonious approach was to apply for a s247 order, the applicant and agent's approach to the Council has been acrimonious and threatening. This approach of the agent is demonstrated, for example in the "confidential" letter by NSCL to the DfT of January 2021, shared with the Council on 30 July, and also in its letter to the DfT of 2 August 2021. The s247 approach to the DfT is simply an attempt to bypass a reasonable, appropriate decision by the local authority.
- 5.9 At paragraph 2.4 it is claimed that the recorded path 60 is to the north side of the driveway land, this claim is not substantiated or agreed.
- 5.10 At paragraph 2.5, regarding the term "serviceable" at the time it was used by the Council's rights of way officer, simply meant that it wasn't an evident 'ankle-breaker', it was serviceable as a verge, not that it was appropriate or a suitable alternative to reach the same end point via Wolfstones Road, or an adequate replacement or alternative for an off-road public footpath or for this public footpath in particular.
- 5.11 The trig point is not recent, even with the caveat "relatively". It is shown in the 1893 Ordnance Survey mapping.
- 5.12 It is not suggested that the "Charity Land" is a PROW, however it is clearly a place of popular resort, and the owner, HVLC records it as land for informal recreation. It is

mentioned in many comments and objections over the years that path 60 diversion has been mooted, including this s247 draft Order process. There is no indication or suggestion that HVLC, of which HVPC is the trustee, intends to prevent public access to this land, indeed they have discussed improving access to the land and trig point with Council officers. HVPC also objects to this s247 draft Order.

- 5.13 Regarding paragraph 2.11, there is no indication in the s247 draft Order and plan that the new highway (public footpath) is to be 4.3 metres wide, or even 3 metres wide.
- 5.14 There is no indication in the draft s247 Order papers that the highway (new public footpath) would be 3 metres wide or would include benches.
- 5.15 The application makes a point regarding the proposed created footpath width being better than the 1.2 metres of the recorded path Hol/60. The draft s247 order and the application do not address or give comparison with the ongoing, undetermined DMMO width for the footpath Hol/60.
- 5.16 At paragraph 3.3, the application agent again notes costs, it is noted that, further to section 252 of the 1990 Act, a public inquiry must follow an objection by the local authority, unless the DfT determines to abandon the draft Order, which would be the Council's preferred option. Together with the previous comment regarding judicial review, these veiled threats are rejected by the Council as an attempt to undermine the Council's legitimate position and its reasonable and appropriate decisions to refuse the earlier s257 application and to oppose this draft s247 Order.
- 5.17 Regarding 3.4, the council would note that the recommendation in the January 2020 report was not the recommendation of the rights of way officer, but the recommendation of the officer body of the Council, also that the recommendation was heavily caveated with a requirement to construct a footway on Wolfstones Road to link the 'old and new' terminal points of footpath 60, that it was for members to determine the balance, and that it was clearly explained that it would be reasonable and appropriate for committee members to decide to refuse the application. This is not a case where deciding

committee members (i) have gone outside the professional comments of officers and (ii) have made a decision contrary to officers to take a position that officers did not or would not countenance (see January 2020 s257 report at 6.3. and 6.5 as well as 2.20 – this document was submitted to the DfT with the application).

- 5.18 Regarding 3.6, the council's good reason to refuse the s257 application is that it was in receipt of far more information than at the time of the planning application decision regarding path 60. Many members of the public apparently were unaware that the planning proposals would be over path 60. Upon commencing consultation for the diversion application, the Council received more objections than any diversion proposal in the previous 20 years. The grant of consent cannot be revisited, but the subsequent and requisite process for diverting the path must take into account the negative effect of the proposal and any purported advantage of the development requiring the public path change. Even if a diversion would be necessary, it doesn't mean that any proposed diversion is appropriate or should be completed.
- 5.19 Regarding 3.11, the executive summary of the Councils' Rights of Way Improvement Plan ("ROWIP") is appended to this statement (**KC11**).
- 5.20 Regarding 4.2 the current route of Hol/60 could cease its role as vehicular access without the diversion of the public footpath. This is demonstrated by the landowner's proposal to concentrate use on the northern access to the property.
- 5.21 Regarding 4.3, visibility for pedestrians is not poor at the western end of path 60, there is a verge to separate public path users from the carriageway when they reach the top of the path and users can see clearly in each direction. The removal of vehicle access is not relevant, the northern access point again being chosen by the applicant as a preference.
- 5.22 The Council would note that the applicant has recognised issues inherent in their diversions and has sought to address them without success. These efforts have been couched in terms of goodwill, that they are not necessary, or that they are beyond some

requirements, or beyond what the authority may expect. Alternatively, the agent notes that his client is open to various possibilities which are then not provided, or simply repeats assertions that everything is fine about the proposals.

- 5.23 At 5.1., the statement again erroneously notes the report as being the rights of way officer's report. In following paragraphs, the statement again ignores that the proposed diversion identified in the s257 committee report would have required the provision of a footway in order to have been suggested as possibly acceptable by officers, as the s257 report recommendation clearly stated at section 6 and elsewhere.
- 5.24 At para 5.5, the PROW unit planning comment was written without the benefit of public report or comments, and before any consultation on any path diversion proposals.
- 5.25 At 5.6 NSCL appears to have overlooked correspondence with the Council's highways safety team, which clearly supported a requirement for a footway provision if the diversion were to be in any way considered supportable. The officers of the Council mentioned in para 5.8 of the NSCL statement were highways 'strategy and design', who raised other issues that would require addressing, these did not over-ride or bypass concerns raised by highways safety colleagues. The Council did not consider that the footway provision would form part of the s257 order if one were made, but that it would be reasonable and appropriate to insist on a footway provision which would be secured by other means, e.g., section 278 Highways Act 1980, and that without it the diversion would not be supported. The applicant/agent's repeated legal threats and challenges throughout have not come to fruition. They have generally been addressed to, and appear designed to persuade, senior managers of the Council, perhaps to take an easier ride, and perhaps to appeal to them to agree with the applicant and avoid all that trouble.
- 5.26 Regarding 5.9, the applicant has made no approach to provide a footway to Wolfstones Road to make the diversion proposal more palatable, and the s247 draft Order contains no such provision or mitigation to the harm. Although the Council opposes the stopping

up of path 60, and asks that no Order be made, in the event that the Secretary of State is minded to make a s247 Order to move the terminal point of Holmfirth path 60 as shown in the draft s247 Order, then the Council would request that no such Order come into effect, until such time as a footway is provided between the proposed terminal point on Wolfstones Road and Holmfirth 60's current terminal point on Wolfstones Road.

5.27 The s257 applicant's submitted survey was criticised in consultation responses regarding its timing and the concentration in its reporting on people who are not using path Hol/60 at all. The applicant has pre-emptively built the alternative route at his own risk, and the applicant has sought to dissuade use of path Hol/60, by constructions, restrictions to use, and also during the Covid-19 period, where Hol/60 was blocked and then subject to notices requesting people to use the built alternative. The general resulting obfuscation about the route is evidenced by various supporters to the draft s247 Order considering that the diversion has already taken place and wondering why this is all continuing. Anecdotally, across the country, public use of paths has increased during the Covid-19 pandemic. In its communications with the Council, NSCL was quite insistent that the Council close Hol/60 by order, due to the pandemic, public use and the alleged risk to the occupiers from people now coming onto the land carrying the highway (Holmfirth public footpath 60). Approaches were again made on the applicant's behalf at Strategic Director level, criticising specialist officers' advice and alleging various legal failures by the Council – the requests were dealt with by officers just the same as other similar requests across the Council area for path closure, following DEFRA-produced advice on the provision of temporary alternatives and the possibility of an offer for people to choose to use them instead of the definitive route of public footpaths, which should continue to be open and available. NSCL notes in its recently shared letter to the DfT of 27 January 2021 (described in paragraph 1.4 above) that it has undertaken another survey. The Council was not otherwise aware of this. The survey apparently took place during the Covid-19 period, which included the promoted

re-direction of users at Wolfstones away from path Hol/60. The Council will look to address the survey in a rebuttal statement, as appropriate.

- 5.28 Regarding 8.7, the Council would refute a suggestion that officers supported the diversion proposals from the early stages.
- 5.29 At 8.11, the track carrying Hol/60 is at least 3.2 metres wide and was only “sandwiched” to approximately 1.2 metres by the erection of the fence mentioned elsewhere after the s247 application was made. See appended photos at **KC5**.
- 5.30 Regarding statement at 8.12, enforcement action at footpath Hol/60 is held in abeyance, the NSCL claims regarding limitations on Hol/60 are not accepted in any case, and would be further queried by the ongoing DMMO, which would remove reference to some of the recorded limitations as shown in its schedules. The electric gate(s) at the Wolfstones Road end is not authorised and is an unlawful obstruction.
- 5.31 Discussions took place with the applicant’s agent regarding steps that could be taken to prevent access by 4-wheeled motor vehicles used in the commission of reported thefts at the property, Council suggestions were not taken up by the applicant.
- 5.32 Mr Butterfield’s “voluntary” actions are reported in the statement at 8.12.3, however these actions were further to a Highways Act 1980 S130A notice and were what prevented formal service of notice by the Council under the Highways Act 1980 for removal of the electric gates; this was part of an informal stance taken by the Council’s Strategic Director after he had been lobbied directly by the applicant landowner. The S130A-D process allows a party to seek a court order against the highway authority for not removing obstructions to the highway. Mr Butterfield had not accepted the detailed explanation by public rights of way officers, steadfastly refusing to address the obstruction by his electric gates. In the s130A-D process the Council is obliged to inform relevant parties, including the complainant and the relevant landholder of what it is going on. Again, the NSCL statement’s reference to “northernmost side” is not substantiated or accepted. For information, this stance by the landowner on the precise

position of path 60 has not been accepted further to the Council's investigation and consideration of the DMMO application affecting Hol/60, which is ongoing and outstanding as a DMMO. The public rights of way officer dealing with the DMMO investigation and report is not the same one who has dealt with the s257 and s247 applications.

5.33 NSCL repeatedly plays down the importance of the HVLC land; HVPC member trustees of the HVLC have expressed their desire to improve and increase public access to the 'trig point land' from opposite the current end of Hol/60 which has been used as an access point for very many years. Users, in objecting, have noted their own use and those of people they know and have seen, the applicant's survey information is not unchallenged. The survey report was published by a well-known local firm, that works predominantly for developers engaged in planning applications and it was employed by the applicant.

5.34 Regarding 8.15.6 etc. the council's highways safety team did not support the change of terminal point, and clearly not without the provision of a footway along Wolfstones Road, which was identified in the January 2020 report, along with the clear officer explanation that it was open to members to determine that the diversion even with a footway provision was not acceptable and could be refused.

5.35 Many claims of the NSCL s247 application statement of reasons are refuted and they, and the draft Order do not address the ongoing DMMO matter. Similarly, many claims given in NSCL response to objectors are also refuted.

6 Conclusion

6.1 The Council does not support the making of a s247 Order. The Council considers that the Order would not meet the legal tests in every respect.

- 6.2 The objections have been carefully considered along with an examination of the legal tests. The Council believes the order should not be made as the tests that must be satisfied have not been met.
- 6.3 The Council would therefore respectfully ask that a section 247 order not be made. In any case the Council would ask that no Order for the stopping up of footpath 60 be made until the matter of the associated relevant DMMO is determined. The draft s247 Order does not accurately reflect the current or potential extent of Holmfirth 60, and if made as proposed would not include land affected by the DMMO. This statement is drafted before the end of the notice period for the DMMO and it is not yet clear what effect there would be or what point in the DMMO process would be reached by the date of the proposed public inquiry commencing on 24 August 2021.
- 6.4 In the event that the Secretary of State is minded to make a s247 Order to move the terminal point of Holmfirth footpath 60 as shown in the draft s247 then the Council would request that no such Order would come into effect until such time as a footway is provided between the proposed terminal point on Wolfstones Road and its current western terminal point on Wolfstones Road, where such works may be considered as some mitigation against the negative effects of the proposal. The land carrying the verge is not within the red line boundary of the application, and proposals considered in the January 2020 report to committee were that such a footway would be subject of a required separate agreement, e.g., under s278, Highways Act 1980.
- 6.5 The Council brings attention to its emailed letters on this matter to the DfT of June and July 2021 (appended to this statement at **KC10**). The Council seeks the postponement of the scheduled public inquiry into the draft s247 Order before the inquiry opens.

Appendices

KC1 NSCL/KC emails Oct 2020

KC2 S247 KC strategic committee report and summary report and decision.

KC3 Copy extract of definitive map and statement

KC4 DMMO notice and order

KC5A Photo One - photo of Holmfirth 60 and track Oct 2019

KC5B Photos Two and Three - photos of landowner works of splitting the driveway Sep 2020 and later

KC6 Kersey s257 proposal objection

KC7 App D from January 2020 s257 committee report appendices – including highways safety comment

KC8 Kirklees planning officer statement

KC9 HVLC record for Wolfstones Heights land: The site is referred to in the charity's approved Action Plan dated 14 November 2016. http://www.holmevalleylandcharity.org.uk/wp-content/uploads/2012/10/14_11_16-Action-Plan-Approved-by-Trustee.pdf The action plan includes the following in relation to land in title no. WYK821600:

KC10 KC letters to DfT regarding postponement of inquiry June/July 2021

KC11 ROWIP extract executive summary

Judgements:

Vasiliou v SoS Transport [1991] 2 All ER 77 and

R (Network Rail) v SoS Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin)