

Agenda Annex

KIRKLEES METROPOLITAN COUNCIL

PLANNING SERVICE

UPDATE OF LIST OF PLANNING APPLICATIONS TO BE DECIDED BY PLANNING SUB-COMMITTEE (HEAVY WOOLLEN AREA)

9 FEBRUARY 2023

Application for an order to divert public footpath Spenborough 24 (part) and 42 (part) at Whitechapel Road, Cleckheaton. Town & Country Planning Act 1990, Section 257 Item 9 – Page 9

The Council has received further response from the Peak & Northern Footpaths Society (“PNFS”) and the Open Spaces Society (“OSS”).

In correspondence with Public Rights of Way (“PROW”) officers, PNFS made the following comments:

“I have not commented on the detail of the proposal to date (on behalf of PNFS) because I believe that the Town & Country Planning Act cannot be used in this case. The development has begun ahead of the discharge of at least one planning precondition. As such the development is not being carried out in accordance with a valid planning permission. The necessity test for use of the TCPA is therefore not met.

In granting temporary closures on this path officers have acted outside of the delegated decision made by the planning committee re planning precondition 10. The precondition clearly states that an agreed scheme relating to how the paths will be protected during the development must be submitted and approved in writing by the council prior to works on site starting. Phil confirmed in a previous email (copied to you today) that this has not been done.

I would hope that this does not go to the next committee, as if an order is made under these circumstances PNFS would likely object. This is avoidable subject to the council following the correct procedures.”

“Any further information regarding discharge of planning preconditions in this case as we discussed. I note it is off to committee next week.”

[...] planning permission was granted subject to a number of conditions. Condition 10 is a precondition and clearly states that it must be complied with prior to development commencing. I attach for your information the decision notice issued on 24th June 2021.

The development was underway on site in February 2022 when our inspector visited the site regarding the proposed diversion. The development is therefore being undertaken outside of the permission granted in 2019/62/93658/E. The necessity test for a s257 order cannot be met.

The nature of the precondition cannot be met retrospectively. The development has been ongoing for at least a year. The paths have been damaged and closed for some periods during the last year. At other times closure orders have expired and not been renewed on time. In any event the closures themselves were outside of precondition 10. The point of the precondition was clearly to avoid this type of chaos, ensure a safe site and protect the paths.

I am not available to attend the sub committee but I do feel that members of the committee should be aware of the points I am making.”

“The planning permission was conditional. A key precondition was no 10 which clearly had to be met prior to development commencing. As it has not been met the development is not in accordance with the planning permission granted. It therefore fails the necessity test. How can this be rectified when it is a precondition? It can't and the damage on site has been done.

The developer applied for discharge of the condition in December 2021. Government advice is that conditions should be discharged without delay and recommends 2 weeks. Developers can appeal if timescales are not met.

Despite the condition not being discharged the developer went ahead with building works and Kirklees granted a number of emergency and temporary closures on the paths in the knowledge that the development was going ahead in breach of condition 10.”

The Council has also received further comment from the Open Spaces Society (“OSS”).

[...] if to a large degree, development has already been carried out, it raises the question as to whether an order can still be made under s.257.

That said, is it not the case that such an order could not be confirmed until planning permission has been granted (s.259(1A)). Before confirming an order, the confirming authority would need to be satisfied that the order meets the relevant legal tests, which case law has identified as the necessity test and the merits test. An order here would not meet the necessity test if there is no valid planning permission at that stage.

Is it not the case that, whether or not development should have commenced, would be a planning enforcement matter?”

Officer comment: PROW has responded to both user group representatives, citing Rights of Way Advice Note 9 and noting that although works have started on site, the development is not “substantially complete”. A s257 order cannot be made or confirmed if relevant development is “substantially complete”.

Rights of Way Advice Note 9 notes as follows:

<https://www.gov.uk/government/publications/rights-of-way-advice-note-9-general-guidance-to-inspectors-on-public-rights-of-way-matters/rights-of-way-advice-note-9-general-guidance-on-public-rights-of-way-matters>

“4.1.7. The power contained in section 257 is only available if the development, insofar as it affects the path or way, is not yet substantially completed (see *Ashby and Dalby v Secretary of State for the Environment* [1980] 1 WLR 673 and *Hall v Secretary of State for the Environment* [1998] JPL 1055). If the development has been substantially completed another type of order would have to be made (e.g. under sections 116, 118 or 119 of the HA 1980).”

PROW has also noted to the representatives that the process allows for the making of orders under section 257, even if no planning permission whatsoever has been issued. (Report paragraph 2.1). Planning portal website notes as follows, on this point:

<https://www.planningportal.co.uk/permission/responsibilities/other-permissions-you-may-require/footpaths-bridleways-or-restricted-byways-stopping-up-or-diverting>

“Alternatively, following the amendment of Section 257 by the Growth and Infrastructure Act 2013, an order may be made in anticipation of planning permission. However, an order made in advance of planning permission cannot be confirmed by either the authority or the Secretary of State until that permission has been granted.”

Officers also noted to the representatives that Legal Governance and Monitoring officers would generally check if there was a relevant planning permission in place before making such an order.

Officers also informed the groups that the temporary closure of the public paths on site, under a temporary traffic regulation order (“TTRO”), was to allow for construction of a sewer system and for regrading of the land; no above ground superstructure works affecting the paths was authorised by this closure. The current TTRO closure expires in late February 2023.

Officers have been in discussions with the applicants and further submissions have been made for the discharge of public footpath conditions 8, 9 & 10.

<https://www.kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/detail.aspx?id=2021%2f94536>

Notwithstanding allegations of breach of planning condition and premature works on site, PROW is not of the view that the necessity test for a s257 order “cannot be met” (Report paragraph 2.1a).) and the officer report recommendation for committee to give authority remains.

Officers would continue to work on details connected with the associated delegated discharge of conditions for the development.

PROW has brought these matters to the attention of planning enforcement and planning development management colleagues.

Change of use of building and land from equestrian to dog care centre

Land off, Liley Lane, Grange Moor, Huddersfield, WF4 4EN

This application has been **withdrawn** after officers received a written request from the applicant's agent via email dated 6th February 2023. The agent states that they are looking to address the two issues set out within the Committee Report and to re-submit a new application on this basis in due course.
