

**Name of meeting:** Strategic Planning committee

**Date:** 16 September 2020

**Title of report:** Council stance on the Department for Transport draft order: Y&H/4337 – Proposed stopping up of highway at Holmfirth footpath 60, Wolfstones Road, Holmfirth, HD9 3UU. Town & Country Planning Act 1990, Section 247

**Purpose of report:** Members are asked to consider the Council’s stance on a draft order made by the DfT, which would stop up part of public footpath Holmfirth 60 and provide an alternative route. The public footpath route to be stopped up, and the proposed diversionary route to be created are shown on appended plans. **Members are asked to make a decision** on the Council's stance.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	Not applicable
Key Decision - Is it in the <a href="#">Council’s Forward Plan (key decisions and private reports?)</a>	Not applicable
The Decision - Is it eligible for call in by Scrutiny?	No
Date signed off by <u>Director</u> & name	Karl Battersby 7 September 2020
Is it also signed off by the Assistant Director for Financial Management, IT, Risk and Performance?	Yes. James Anderson on behalf of Eamonn Croston 7 September 2020
Is it also signed off by the Service Director (Legal Governance and Commissioning)?	Yes. Julie Muscroft 4 September 2020
Cabinet member <a href="#">portfolio</a>	Not applicable

**Electoral wards affected:** Holme Valley South

**Ward councillors consulted:** Cllrs. Davies, Firth & Patrick

**Public or private:** Public report

## 1. Summary

- 1.1. The Council has been consulted by the Department for Transport (“DfT”) on its draft order under section 247 of the Town & Country Planning Act 1990, proposing to change the alignment of part of public footpath Holmfirth 60 to enable development to take place to fully implement planning permission(s).
- 1.2. Officers seek a view from members on the Council’s stance in response to the DfT draft order, for example, whether to object or not.
- 1.3. Kirklees Council has already considered a similar proposal regarding the same public footpath and the same development at the same location. By decision of the relevant sub-committee in January 2020, the Council refused a revised application from Mr S Butterfield for an order, to divert part of public footpath Holmfirth 60, under section 257 of the Town & Country Planning Act 1990, to enable the development to take place to fully implement planning permission(s).
- 1.4. There is provision in section 247 of the Town & Country Planning Act 1990 for the DfT to make orders affecting public footpaths. The effect of the DfT order would be the same as the footpath diversion proposal refused by the Council in January.
- 1.5. The effect of the proposed section 247 order is shown on appended Plan S1, which is the DfT’s draft order plan. The public footpath to be stopped up is shown by the bold-shaded area A-B, and the new public footpath to be created by lighter shaded area “C”. The DfT draft order is appended at App SB, and the notice at App SC
- 1.6. The existing public footpath 60 would be affected by the development, as shown in the planning application block plans for 2018/93277 & 2018/93302 at App SA1 and SA2. A location plan is at App SG.
- 1.7. The officer report of January 2020 to sub-committee on diversion of Holmfirth footpath 60 is linked to, at paragraph 9.2 of this report, along with the January appendices, agenda and decision.
- 1.8. Over time, there were slight amendments to the section 257 application proposals to the Council. Three preliminary consultations took place and details of responses were at section 4 and appendix D of the January 2020 sub-committee report. Responses were received in favour of the proposed diversion, and there were various responses by those not in favour. These were reported to sub-committee, and the applicant’s comments on responses were appended at App E1 and E2 of the January report.
- 1.9. The current proposal in the DfT draft s247 order incorporates no improvement to the verge of Wolfstones Road.
- 1.10. Officers have not seen the application submissions to the DfT. The DfT has stated that the application was made via Noel Scanlon Consultancy Limited, which was the agency used in the section 257 application to the Council.
- 1.11. If the Council objects to the s247 draft order, the Secretary of State at the DfT would have to arrange a public inquiry, if he wishes to pursue an order.
- 1.12. If the Council does not object to the s247 draft order, the DfT will consider any other objections and decide whether to proceed with making an order, which may involve a public inquiry or a decision further to written representations.

## 2. Information required to make a decision

Officers have not seen the application submissions to the DfT. The DfT has stated that the application was made via Noel Scanlon Consultancy Limited, which was the agency used in the section 257 application to the Council, refused in January 2020.

The DfT draft order cites planning permissions 2014/62/92814/W and 2017/62/91374/W.

Here are Kirklees planning web links:

<https://www.kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/detail.aspx?id=2014%2f92814>

<https://www.kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/detail.aspx?id=2017%2f91374>

In the application for a s257 order refused by the Council, to divert part of footpath 60 at Wolfstones Heights Farm, Wolfstones Road, Upperthong under section 257 of the Town & Country Planning Act 1990, the applicant cited planning permissions 2014/92814, *“(quoting the related Decision Notice) the formation of a new access and stopping up of existing access, diversion of public right of way and related external works”*, and 2017/91374 *“(again quoting the related Decision Notice) the demolition of a garage building, the erection of garages, garden room and fuel store with associated landscaping works”*, as amended by non-material amendment permissions 2018/NMA/93302 and 2018/NMA/93277.

The following two links are to non-material amendment permissions amending the above planning permissions.

<https://www.kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/detail.aspx?id=2018%2f93302>

<https://www.kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/detail.aspx?id=2018%2f93277>

2.1 The Secretary of State at DfT (“SoS”) may make draft orders and orders under Section 247 of the Town & Planning Act 1990 Act if s/he considers that it is expedient to do so when the following criteria are met:-

- a) it is necessary to do so in order to enable development to be carried out in accordance with planning permission granted.
- b) s/he must also take into account the suitability of the proposal and the effect the change would have on those entitled to the rights that would be extinguished.

2.2 The s247 statutory procedure is a two-stage process which involves the making of a draft order. The draft order is subject to public consultation by way of statutory advertisement and notices posted on site and is currently at this stage. If no objections are received or they are resolved, the SoS at DfT may make the order. If the draft order is opposed and the objections cannot be resolved, the order could only be made after the Secretary of State (at DfT) determines the matter, either following written representations or a public inquiry. If the council objects, the SoS has no discretion to choose the written representations process.

- 2.3 Section 7 of DEFRA's circular 1/09 covers the topic of planning permission and public rights of way.
- 2.4 Weblink:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69304/pb13553-rowcircular1-09-091103.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69304/pb13553-rowcircular1-09-091103.pdf)
- 2.5 At paragraph 7.11, it states: "It cannot be assumed that because planning permission has been granted that an order under section 247 or 257 of the 1990 Act, for the diversion or extinguishment of the right of way, will invariably be made or confirmed. Development, in so far as it affects a right of way, should not be started and the right of way should be kept open for public use, unless or until the necessary order has come into effect. "
- 2.6 Paragraph 7.15 states: "The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. 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."
- 2.7 In January 2020 members of sub-committee decided, after consideration, that an order to divert footpath 60 should not be made.
- 2.8 The applicant's submitted supporting statement was appended to the January report at App B, along with his submitted highways survey. The proposal to develop the site affects the driveway carrying footpath 60, with the public footpath proposed to be diverted to reach its proposed new junction with Wolfstones Road. Also, at the January report's appendix App B were photos and a photo plan submitted regarding the nearby land accessed by the public.
- 2.9 The section 247 draft order proposal would allow pedestrian rights to be stopped up on a section of public footpath 60 and an alternative public footpath provided.
- 2.10 The draft order identifies that the terminal point of footpath 60 on Wolfstones Road would change, moving approximately 115 metres along Wolfstones Road to the north.
- 2.11 In January's report Appendix B, the applicant's statement of 29 March 2019 in support of the diversion application, paragraph 6.3 states, "*Briefly, works that cannot be completed without the diversion of the Footpath are the current stone wall to the south of the Footpath area cannot move and the garden lawn cannot be extended northwards towards the building known as Wolfstone Heights. In addition, the engineering works, levels alterations and connecting steps to the lower garage roof terrace and establishment of parking areas, as well as underpinning engineering and retaining walls, all of which is now more particularly established through the respective NMAs, cannot be concluded. This is because all such works necessitate the removal of the access drive to Wolfstones Heights Farm, part of which is covered by the part of the Footpath intended for diversion.*"

- 2.12 Kirklees PROW did not object to the grant of planning consents. PROW Officer had met the applicant's agent on site at an early stage and identified areas that may be brought up as issues by the public if an application to divert the footpath was made. The PROW officer stated that Wolfstones Road had a serviceable verge between the current and proposed path ends, which was intended to convey that it was walkable without risk of injury underfoot. No relevant objections appear to have been made by the public to early planning applications, but once PROW undertook consultation specifically on the diversion proposal, objections were raised, including those by people who had not realised that the development described in planning applications would affect the footpath 60, or require its diversion. The Council therefore had not been in a position to take these comments and concerns about the public footpath into account when considering the planning applications, where they were raised later. These matters were reported to and taken into account by the January 2020 sub-committee in making its decision to refuse the s257 diversion application.
- 2.13 Preliminary public consultations were held on the proposals that formed the application to the Council. Responses both for and against the proposal were received and the details were listed in section 4 and appendix App D of the January 2020 report to sub-committee. Those January appendices may be reviewed along with the January report using the links at paragraph 9.2 below.
- 2.14 In the officer report of January 2020, members had a number of options in relation to the section 257 order.
- 2.15 In January 2020 members of sub-committee decided, after consideration, that an order to divert footpath 60 should not be made.
- 2.16 For members in making this decision:
- 2.17 **Option 1** is to object to the Town & Country Planning Act 1990 section 247 draft order and oppose this public footpath proposal in the Secretary of State's determination.
- 2.18 **Option 2** is not to object to the Department for Transport section 247 draft Order.

### **3 Implications for the Council**

- 3.1 **Early Intervention and Prevention (EIP).**
- 3.1.1 Providing better facilities for physical activity works towards local and national aims of healthy living.
- 3.2 **Economic Resilience (ER)**
- 3.2.1 **There** is an indirect impact of a welcoming environment which helps promote and retain inward investment.
- 3.3 **Improving outcomes for children.**
- 3.3.1 See 3.1.1
- 3.4 **Reducing demand for services**
- 3.4.1 See 3.5

### 3.5 Other (e.g. Legal/Financial or Human Resources)

3.5.1 The Council is consulted by the DfT on proposals to change the highway network, including public footpaths, in this case to facilitate development already granted planning consent.

3.5.2 Any person may make an objection or representation to the DfT's draft order.

3.5.3 The Council may respond to consultation on a draft order made by the DfT. If a draft order is opposed, any such objection would likely be considered by an inspector appointee of the Secretary of State, who may or may not make the section 247 order. The Council may not recharge the costs incurred by it in the process of determination of an opposed order by the DfT. The Council would have to cover its own costs associated with that decision process, potentially including representation at a public inquiry. Under current legislation, costs incurred by the Council in that determination process would not generally be recoverable, although the DfT is responsible for the costs of holding a public inquiry.

3.5.4 Development proposals, including those given planning consent, may depend on the making and coming into force of public path orders, such as those changing or extinguishing public rights of way. Without such PROW orders, development may well be delayed, prevented or rendered unviable, with the subsequent effects on matters such as the local economy and provision of homes.

## 4 Consultees and their opinions

4.1 In the January 2020 sub-committee decision, on the similar proposal, in a section 257 diversion application to the Council, 11 out of 12 members voted to refuse the application for an order to divert public footpath 60.

4.2 Prior to the January 2020 report, the public rights of way unit undertook three rounds of informal preliminary consultation on the s257 proposal, which included notices posted on site and maintained for 4 weeks, information published on the Involve part of the Council's website, and correspondence with statutory consultees, interested parties including utility companies and user groups, as well as ward councillors.

4.3 **Ward councillors:** Officers have consulted ward members on the Council's stance on the DfT's draft s247 order.

4.4 Cllr Davies believes that the Council should resist the section 247 order, in line with the January sub-committee decision, in which he voted against the earlier, similar proposal to divert this public footpath.

4.5 Cllr Firth and Cllr Davies were members of the January 2020 sub-committee, both voting against the proposal to divert public footpath 60.

4.6 Previously, on the s257 application to the Council, Cllr Patrick indicated support for the diversion at the second preliminary consultation.

4.7 The Council's Highways Safety engineer's comments were reported in January 2020 in full at appendix App D. Conversion of the verge to a formal footway was identified

as the only suitable mitigation measure for the change of the terminal point for Holmfirth 60 on Wolfstones Road. When queried by the applicant's agent, Highways Safety noted that the "*primary concern is the safety of pedestrians on the blind bend between the 2 access points (approx. 100m of verge).*" **Officers note** that proposals for improvement works to the verge, to form part of a formal agreement under section 278, Highways Act 1980, were insufficient to persuade sub-committee members to support the earlier section 257 application to the Council. Highways safety officers were consulted again this month, and noted their previous safety concerns.

- 4.8 In January 2020, the section 257 applicant considered that he had addressed and rebutted the negative comments on the proposed diversion, and that the necessary tests were satisfied.
- 4.9 Officers have informed many interested parties about the DfT draft order.
- 4.10 Peak & Northern Footpath Society, the Ramblers and others have informed the Council of their intention to object to the DfT's draft order.
- 4.11 The DfT is responsible for section 247 draft order notices to be posted on site for 28 days. Generally, they arrange for the applicant to do it. The DfT's consultation ends on 29 September 2020.

## 5 Next steps

- 5.1 The DfT draft order consultation is in progress, it is due to end on 29 September 2020. If objections are received, then the matter would be determined on behalf of the Secretary of State at the DfT.
- 5.2 If the section 247 draft order is unopposed, the DfT may make the s247 order.
- 5.3 In accordance with section 252 of the 1990 Act, if any objections to the draft order are made either by the Council or a relevant "undertaker", and not withdrawn, then the Secretary of State at the DfT, if proposing to make the order, must hold a public inquiry. Alternatively, the DfT may decide not to make the section 247 Order.
- 5.4 If the Council does not oppose the draft order, then the determination of the section 247 process would continue, and the Secretary of State's further decision would then be required on:
  - 5.4.1 Considering objections that are received, and either
  - 5.4.2 Making the s247 order, or
  - 5.4.3 Not making the s247 order.
- 5.5 **If the** SoS at DfT does not make the order, the public footpath would remain on its current alignment and the planning permissions could not be fully implemented as granted.
- 5.6 **If the SoS** at DfT does make the section 247 order, and it comes into force, then the current path would be stopped up (cease to be a public footpath) and the alternative route would be provided by the applicant (and would become a public footpath).

## 6 Officer recommendations and reasons

- 6.1 **Officers ask** members to make a decision on the Council's stance on the Department for Transport's draft order, choosing one of the options identified in paragraphs 2.17 and 2.18 above.
- 6.2 In the previous section 257 application process to the Council, there were many points raised with the Council both for and against the proposal, with views on the perceived advantages and disadvantages.
- 6.3 In January, officers informed members that, after assessing the information, it was reasonable for members to decide to make an order, or to decide to refuse to make an order. The officer report in January 2020 further noted:
- 6.3.1 "Members may consider whether the diversion is required to fully implement relevant planning permission.
  - 6.3.2 Members may consider whether there is good reason to refuse the diversion application despite the grant of planning permission, including consideration of the guidance of DEFRA in paragraphs 7.11 and 7.15 of circular 1/09. Officers consider that the information available to the Council now, that was not available to the Council when deciding the planning applications, may also be taken into account and, on balance, for members, the information as a whole may weigh sufficiently to lead to a refusal, e.g. if they consider that the negative effect of the proposal on public path users outweighs the positive effect of the development and that confirmation should not or would not be sought, so no order ought be made.
  - 6.3.3 Alternatively, in considering this merits test, members may decide that the diversion might be acceptable. This test is described in the judgements in Vasiliou v SoS Transport [1991] 2 All ER 77 and in R (Network Rail) v SoS Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin). Members may resolve that, in taking into account any significant disadvantages or losses flowing directly from the order, for the public generally and also considering any countervailing advantages to the public, along with the degree of importance attaching to the development, any such disadvantages or losses are not of such significance or seriousness that they should not make the Order."
- 6.4 This allowed sub-committee members to consider the development, the part of the development that could not be implemented without change to the public footpath, the effect of the path change on the public path and its users, including their safety, and then weigh those up in making a decision.
- 6.5 In the January 2020 report to sub-committee, improvement works, for the benefit of pedestrian users of Wolfstones Road between the existing and proposed ends of footpath 60, were proposed, which officers advised may be considered by members, along with other factors, in the decision of whether to make the Order.
- 6.6 The current proposal, described in the DfT's draft section 247 order, contains no proposal to improve the verge of Wolfstones Road. The highways safety officer view was that the verge improvement would be a required mitigation for the diversion.



6.7 Members considered these matters, decided that the footpath proposals were not acceptable, even with the verge improvement, and refused the application for an order to divert public footpath 60.

## 6.8 Officers recommend members to

6.8.1 **Choose option 1** at paragraph 2.17 above, that the Council object to the Town & Country Planning Act 1990 section 247 draft order and oppose this public footpath proposal in the Secretary of State's determination.

6.9 With the options available to members in January, and the sub-committee decision, this recommended approach appears to officers to be appropriate. The sub-committee was clear that the similar proposal was not satisfactory for footpath users, and even with the option of securing improvement to the Wolfstones Road verge, they were not persuaded to make an order. Determination of the current section 247 proposal is in the hands of the DfT. If the SoS wishes to pursue an order, he would arrange a public inquiry, where the many arguments may be presented and considered, with opposing views on this contentious matter open to examination before the determining DfT inspector.

## 7 Cabinet Portfolio Holder's Recommendations

7.1 Not applicable.

## 8 Contact officer

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## 9 Background Papers and History of Decisions

9.1 PROW file 872/DIV/6/60 Wolfstones: Rights of Way Improvement Plan

9.2 Kirklees Council weblink to Section 257 diversion application report and refusal 30 January 2020 – item 12

<https://democracy.kirklees.gov.uk/ieListDocuments.aspx?CId=149&MId=5980&Ver=4>

January 2020 officer report: appendices link

<https://democracy.kirklees.gov.uk/documents/s34421/Item%2012.%20Holmfirth%2060%20Wolfstones%20public%20footpath%20diversion%20committee%20report.pdf>

January 2020 appendices link:

<https://democracy.kirklees.gov.uk/ecSDDisplay.aspx?NAME=SD2037&ID=2037&RPID=507121906>

9.3 Planning consents – website links shown at Section 2 above.

9.4 Appendices

9.4.1 Plan S1 – s247 draft order plan

9.4.2 Apps SA1 & SA2 - planning application block plans 2018/93277 & 2018/93302

- 9.4.3 App SB – s247 draft order
- 9.4.4 App SC – s247 draft order notice
- 9.4.5 App SG - location plan

**10 Service Director responsible**

10.1 **Sue Procter** Service Director, Environment; Economy & Infrastructure Directorate