

**The Metropolitan Borough of Solihull (Footpath U26, Haslucks Green Road, Shirley) (No.2)
Public Path Stopping Up Order 2007**

Public Inquiry

Further statement by Rodney Pitham an objector to the Order

This is a further statement by me in response to the Council's Statement of Grounds for confirming the Order submitted to the Government Office for the West Midlands on 6 November 2007. My original objection to the Order of 28 August 2007 and sent to the Council stands without amendment. I have no comments to make in respect of the Compulsory Purchase Order or the Highways Order.

The Inspector is well aware of the background to this matter but I draw to her attention certain issues which need to be emphasised. Arguably the most important of these issues is the basis upon which planning permission was granted for the development which gives rise to the stopping up of the footpath U26 and alternative provision. The Council's UDP was approved in 2006. Part of the new Shirley Town Centre boundary in the UDP is in fact Footpath U26 at the location under consideration. If the Council had stood by its proposals for development in this area there would have been no need for the stopping up of the footpath or for any diversion. However, despite strong and numerous objections to the proposal submitted by Shirley Advance, the Council's development partner, the Council, only a matter of a few months after approval of the UDP, breached its own UDP and the policies and proposals therein and allowed the development to encroach onto a substantial area of the well established Shirley Park. The only reason advanced for this was that it made the development financially viable.

Next in order of priority is the 100 page development agreement between the Council and Shirley Advance, the contents of which have never been made available for public scrutiny, other than half a page setting out the principles of development to be taken into account. Local government is about transparency and openness which is sadly lacking in the present case. It is of vital importance in this case since the Council is acting in three distinct roles – it owns the majority of the land, it is the development partner and is the local planning authority. It is an insult to democracy that the people of Shirley have had their views wholly ignored in respect of one of the most significant developments to have occurred in the area for decades. It is also an insult to be told by the Council that Shirley has no supermarkets and by Shirley Advance that they were negotiating with all major foodstores for the role of anchor store when no evidence has been produced to support this assertion. It came as no surprise to local residents, but caused a great deal of anger, when it was announced that Asda had been selected. The consultation processes from beginning to end have been risible. The final point of significance concerns the sudden and mysterious disappearance from the Council's web site of an area of land considered by most residents, and up until that time by the Council, to have been part of Shirley Park. No satisfactory evidence has been adduced for the disappearance. Just as mysteriously as it disappeared it has now come back at <http://www.solihull.gov.uk/parks/mapofparksandgardens.htm>

The perception is that the whole of the development is a done deal.

I now turn to the procedural issues upon which I have objected to the Order. I use the Council's summaries of my objections and their response:

(i) Objection: The Council's Planning and Regulatory Committee had no power to make the order.

Response: The Council's position is that its Planning and Regulatory Committee have been authorised specifically to make orders under Section 257 of the Town and Country Planning Act 1990 by resolution of the full Council.

Comment: As there is no disclaimer or caution on the Council's web site that the Constitution set out therein cannot be relied on for accuracy and as the Monitoring Officer has a duty to keep the Constitution up to date I am entitled to rely on its provisions as to the powers of the Planning and Regulatory Committee. If the Constitution is incorrect then it is misleading, the Monitoring Officer has failed in his duty and maladministration has occurred. No evidence has been produced to support the Council's assertion that the Committee has the power. The Council must be put to strict proof and produce a copy of the resolution. However, it cannot now come to the party with this assertion since it is estopped from doing so.

(ii) Objection: The Committee's decision only authorised a draft order.

Response: It is quite clear that, notwithstanding the word "draft" in the resolution, the decision of the Committee was to approve the making of the Order.

Comment: It is far from "quite clear". In the report to the Committee for its meeting on 29 March 2007 the Head of Planning Services said, unequivocally, in paragraph 1.2.4: "the Council is required to publish a draft order". The resolution repeats the words "draft Order". It is quite clear that, contrary to the assertion now made by the Council, in the minds of the Officer and the Committee what was required was not an Order but a draft Order.

(iii) Objection: That the Committee's decision only referred to a proposal to divert footpath U26 and not stop up U26.

Response: The reference to diverting the footpath in the Committee's resolution is not material because it is clear from the plan submitted to the Committee that footpath U26 is to be replaced by the alternative path proposed in the Order.

Comment: It is not clear from the plan. The plan simply shows three lines. The thick continuous black line is indicated as a footpath to be diverted; the two others show paths to be retained and provided. There is no indication that the black line is Footpath U26 or how it is to be diverted. It certainly has no indication that it is to be stopped up. The report to the Committee and the plan must be read together. Both talk of diversion. The language in the legislation is clear and distinguishes between stopping up and diversion. The Committee wished to divert Footpath U26. If it wanted it stopped up it should have said so.

(iv) Objection: That the Order includes matters not authorised (i.e. the payment of costs by Shirley Advance).

Response: It is not necessary for the Committee to specify all the matters to be contained in the Order as this is implied by the general authority given to the Chief Executive to make the Order under the statutory provisions.

Comment: This assertion is not supported by the terms of the legislation. The then Chief Executive acquired her powers to make the Draft Order from the resolution of the Committee. There is nothing in that resolution which confers expressly or by implication a general authority to include other matters not expressly taken into account or authorised by the Committee. The Council produces no legal authority to support this assertion. It must be put to strict proof and produce such authority. At paragraph 6.5 of the Council's Statement of Grounds for Confirming the Order the Acting Chief Executive avers that the alternative route will be 2 metres in width with a 25mm tarmac wearing course, a 100 mm sub-base course and a 50 mm base course. He then concludes at paragraph 6.6 that in all the circumstances the Order meets the requirements of Section 257 of the Town and Country Planning Act 1990. In linking these two together (with other issues) the Council acknowledges that the specification is an essential element of the Order, which directly contradicts the earlier assertion.

Section 257 of the Act of 1990 provides that an Order may, if the Council are satisfied that it should do so, provide for the creation of an alternative highway for use as a replacement for the one authorised by the Order to be stopped up or diverted. There is no evidence on the face of the record that members of the Committee were satisfied that the Order should provide for the creation of an alternative highway or that they even considered it. If they had been so satisfied the resolution should have included a reference to that satisfaction so that the Chief Executive would have clear and unambiguous instructions to include provision for an alternative highway in the Order. The resolution of the Committee is silent on the issue. It is clear that the Council has to make this decision; the Chief Executive had no power to do so.

Likewise Section 257 of the Act of 1990 says that if the Council are satisfied that it should do so they may in the order require any person named in the order to pay, or make contributions in respect of, the cost of carrying out any works, which include the creation of an alternative highway. There is no evidence on the face of the record that members of the Committee considered this issue. There is no expression of satisfaction in respect of this included in the resolution of the Committee. The author of the report to the Committee did not request that the costs of the construction should be borne by any third party and certainly not by Shirley Advance LLP. Again the resolution of the Committee is silent on the issue. It is clear that the Council has to make this decision; the Chief Executive had no power to do so. Officers of local authorities acquire powers to act from the Council by express terms of delegation either generally or on specific occasions.

There is no evidence on the face of the record in this case or generally that the Chief Executive could specify other matters in this draft Order or any other Order. She has acted ultra vires.

(v) Objection: That there is nothing in the Order to show how the stopping up will be undertaken what works will be required and who will pay the costs. (vi) That Shirley Advance do not know the required specification for the works or how much they will have to pay in costs.

Response: The Council is not required to specify in the Order the full construction specification for the alternative path and the fact that it has not done so does not render the Order invalid or justify non-confirmation of the Order.

Comment: This appears to be a response to both points. This is an Order of the Council and the costs and specifications must be set out in its terms so that the developer *and the public* know what is required.

They are not matters to be negotiated outside the terms of the Order and in secret. See also the comment in (iv) above.

(vii) Objection: That no provision is made for the repeal of a first order.

Response: The Order is within the authority given by the Planning and Regulatory Committee. The fact that there was an earlier abortive order is not relevant. The first Order, made on 17th July 2007, arguably did not fall within the terms of the Committee's decision and it was open to the Chief Executive to proceed with the No.2 Order.

Comment: We have to remember that this is a form of local legislation. If the first Order is not clear and unambiguous in its terms then it should have been repealed to avoid any legal challenges. Authority for the repeal and a new Order should have been obtained from the Committee. The Chief Executive once again exceeded her powers for reasons already given.

(viii) Objection: That there is no evidence that the Planning and Regulatory Committee have given authority for the making of the Order.

Comment: this point is covered above.

(ix) Objection: That the Common seal has not been affixed in the name of the Council.

Response: The Order is correctly made under the common seal of the Council which is entitled "Metropolitan Borough of Solihull".

Comment: The Council acts in its name as a body corporate not in the name of a place. It is strange that its Constitution is in the name of the Solihull Metropolitan Borough Council.

(x) Objection: That the majority of the costs of processing the Order will fall on the Council Tax payer and not the developer.

Response: The costs of the Order including any costs in relation to a public inquiry are to be borne by the developer, Shirley Advance. The Council is relying upon its agreement with Shirley Advance as to costs and has no need to exercise its power to charge under the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993.

Comment: Once again the Council hides behind and relies upon a secret agreement which the public have not seen. It had been assumed that the Council in line with most responsible authorities like its neighbour the City of Birmingham would have invoked the Regulations. Shirley Advance will be delighted to be presented with a bill for abortive and wholly unnecessary expenditure for the first Order. The Council must produce the agreement so that their assertion may be seen to be supported.

The Council has also submitted that matters relating to the vires of the Council's decision making process or the terms of the enabling resolution are not matters for the Secretary of State in considering confirmation of the Order. The Council says that it would have been open to the objector to apply to the courts in an action for judicial review for a declaratory order but this the objector has failed to do. The Council submits that the Order is valid and that subject to consideration of objections on the merits of the Order, there is no legal reason why the Order should not be confirmed.

Comment

It is beyond comprehension that the Council should seek to make this point. The first issue for consideration by the Inspector and the Secretary of State must be the validity of the Order. If it is invalid then nothing further remains to be considered. It is no coincidence that by virtue of the provisions of the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 a local authority shall, on application by the person who requested them to make the public path order, refund a charge where the public path order is not confirmed by the authority or, on submission to the Secretary of State, by him, on the ground that it was invalidly made. It is clear from this that the Secretary of State must be satisfied about the validity of an Order made under s257 of the 1990 Act before she proceeds to consider the merits. It is not necessary in the circumstances to apply for judicial review.

Rodney Pitham

3 April 2008