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# Report to the Secretary of State for Transport

by Joanne Burston BSc MA MRTPI

an Inspector appointed by the Secretary of State for Transport

Date: 15 October 2018

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## TOWN AND COUNTRY PLANNING ACT 1990

## THE DIVERSION OF HIGHWAY (EAST MIDLANDS)(NO.) ORDER 201

Inquiry Held on 26 - 27 June 2018

File Ref(s): NATTRAN/EM/S247/3044 (DPI/D2510/18/9)

**File Ref: DPI/D2510/18/9**

**Diversion of highway at Footpath 18 commencing at the end of Marsh Lane, North Somercotes LN11 7PD**

- This draft order would be made under section 247 of the *Town and Country Planning Act 1990 (as amended)*, and is known as *The Diversion of Highway (East Midlands)(No. ) Order 201*.
- The draft Order was published on 15 November 2017, and there were 48 duly made representations outstanding to it at the commencement of the Inquiry.
- The draft Order would authorise the stopping up and diversion of a length of Footpath 18 (Grainthorpe and North Somercotes) commencing at the end of Marsh Lane, North Somercotes LN11 7PD OS grid reference E:542192 N:399792.

**Summary of Recommendation: I recommend that the Order be made subject to modifications.**

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**Preliminary Matters**

1. I held the Inquiry on 26 and 27 June 2018 at the Kenwick Park Hotel, Kenwick Park, Louth LN11 8NR to hear representations concerning objections made and not withdrawn in relation to *The Diversion of Highway (East Midlands)(No. ) Order 201* (the draft Order). My appointment to conduct the Inquiry was in accordance with section 252(4) of *The Town and Country Planning Act 1990* (the TCPA). I carried out an unaccompanied site visit on 25 June 2018 and an accompanied site visit on 27 June 2018.
2. The purpose of the draft Order published on 15 November 2017 was identified as to enable development to take place in accordance with the planning permission granted by East Lindsey District Council under Ref. N/132/00645/11. It proposes the stopping up and diversion of a length of Footpath 18 (Grainthorpe and North Somercotes) at North Somercotes.
3. At the start of the Inquiry the 46 duly made objections to the draft Order remained. Two letters of support for the draft Order were received from Natural England and Lincolnshire Wildlife Trust.
4. At the Inquiry the applicant confirmed that all statutory formalities had been complied with and this was not disputed by any of the other parties present.
5. This report contains a brief description of the site and its surroundings, a summary of the evidence presented and my conclusions and recommendations. Lists of Inquiry appearances and documents are attached. Statements of evidence are identified; these may have been added to or otherwise extended at the Inquiry through oral evidence.

**Procedural Submissions**

6. During the course of the Inquiry a modification to the draft Order was proposed (Doc 8). I will refer to the Order as drafted as the 'draft Order' and the suggested modification as 'Option 2'. The suggested modification, which was discussed at the Inquiry, would have the effect of reducing the length of footpath

required to be stopped up. I consider it unlikely, under these circumstances, that my taking it into account would prejudice the interests of anyone.

7. At the start of the Inquiry a Permissive Path Agreement was submitted, dated 21 June 2018 (Doc 7) to facilitate permissive access to the remaining limbs of Footpath 18.

### **The Site and Surroundings**

8. Footpath 18 (Grainthorpe and North Somercotes) is located within a coastal plain, known as 'Donna Nook'. It commences at the end of Marsh Lane, travelling broadly northwest along the top of the sand dunes. At the Pyes Hall Tidal Sluice the footpath turns south-west through a pond and fencing, where it then turns north-west onwards to Grainthorpe.
9. To the north, north-east and north-west of the footpath lies the Humber Estuary with its associated intertidal habitat, some of which is also used by the Ministry of Defence as an air weapons target range. To the south, south-east and south-west of Footpath 18 is predominantly agricultural land, punctuated by drainage channels, marshland and natural watercourses. Cottages and farmsteads are dotted across this landscape.
10. The Humber Estuary itself is protected by a number of statutory nature conservation designations<sup>1</sup>, recognising it as an internationally and nationally important site for nature conservation.
11. As I saw on my site visits a proportion of the work required by planning permission N/132/00645/11 has been completed. This includes the new flood embankment which carries the proposed re-alignment of Footpath 18.

### **Purpose and scale of the Proposals**

12. The purpose of the draft stopping up Order is to stop up and divert a section of Footpath 18 to allow a 40 metre breach to be made in the existing flood embankment at Pyes Hall / Somercotes Haven Tidal Sluice. The breach will facilitate the creation of some 106 ha of intertidal habitat, known as the '*Donna Nook Managed Realignment*' scheme. The intertidal area and the breach would develop over time, with the breach predicted to erode and expand to some 40 metres.
13. As background, the scheme forms part of the overall '*Humber Flood Risk Management Strategy*'<sup>2</sup> which proposes to reduce flood risk for 400,000 people, 90,000 ha of agricultural land and nationally significant industry over the next 25, 50 and 100 years. The Strategy also sets out how habitat losses associated with both coastal squeeze and the maintenance and construction of larger flood defences will be compensated to meet the requirements of the Habitat and Species Regulations 2017.

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<sup>1</sup> Humber Estuary: Special Area of Conservation (SAC); Special Protection Area; RAMSAR; Site of Special Scientific Interest and Donna Nook National Nature Reserve

<sup>2</sup> Core Document (CD) 27

14. The scheme forms one of the commitments within the 'Habitat Regulations Assessment for the Humber' (approved by Defra 2011) to compensate for 168 ha habitat losses that arise from maintaining and improving flood defences in the Outer South Estuary Area. Without the delivery of this scheme the Environment Agency could not continue to maintain flood defences which communities rely upon.
15. As a result of these works a maximum of 2,736 metres of Footpath 18 will require to be stopped up. This is the length of footpath between the end of Marsh Lane<sup>3</sup> and the junction between the new flood bank and existing flood bank at the Parish boundary of North Somercotes and Grainthorpe<sup>4</sup>.
16. The diversion route is approximately 3,202 metres and utilises the new flood defence embankment between points B-H-J-K-L-M-N-O on the draft Order plan. Points O-P-Q-R-G continues the diversion behind the sand dunes between the new flood embankment and entrance to the new car park. The proposed diversion route between Points A-B (on the dashed line) follows the crest of the existing embankment to avoid the current footpath obstructions.
17. Option 2 reduces the length of Footpath 18 required to be stopped up, to some 345 metres, between points U and V on the Option 2 plan.

## **THE CASE FOR THE OBJECTORS**

18. The gist of the material points made by the objectors who appeared at the Inquiry in their written and/or oral submissions were:

### North Somercotes Parish Council

19. The Parish Council stated that in England we are blessed, almost uniquely, with a network of public footpaths and bridleways. They are redolent of our history. All of Her Majesty's subjects have the right to pass and repass at any time of the day or night over these paths. They are highly valued by the local communities who they connect and serve. That is why Inquiries such as these give rise to such strong emotions. It is also why the test for closure of a footpath is one of necessity.
20. North Somercotes Parish Council objects to the making of the Order for Stopping up and Diversion of a Length of Footpath 18 (Grainthorpe and North Somercotes) at North Somercotes in the District of East Lindsey. At the commencement of the Inquiry the Environment Agency submitted an alternative Order to the Inquiry (Doc 8), which proposed that a lesser length of Footpath 18 be stopped up.
21. The Order is sought pursuant to section 247 of the Town & Country Planning Act 1990. It is said to be required by the Environment Agency in order to be able to implement planning permission N/132/00645/11 granted by East Lindsey District Council on 8 July 2011. The Order initially submitted, which is the primary Order sought by the Environment Agency, seeks both to stop up the existing footpath

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<sup>3</sup> Point G on the draft Order plan

<sup>4</sup> Point A on the draft Order plan

- completely and to create a new footpath. The alternative order simply seeks to close a 345 metres stretch of the footpath.
22. The power to make the Order is contained within Section 247 of the Town & Country Planning Act 1990, which provides, "*The Secretary of State may by order authorise the stopping up or diversion of any highway [outside Greater London] if he is satisfied that it is necessary to do so in order to enable development to be carried out— (a) in accordance with planning permission granted under Part III [or section 293A], or (b) by a government department.*"
23. In order for the Secretary of State to be able to confirm the Order he must: a) *Identify the development authorised by the relevant planning permission; b) Be satisfied that it is necessary to stop up and/or divert the length of the highway concerned in order to enable that development to be carried out; and c) If satisfied that that threshold condition is met, consider whether to exercise the discretion vested in him to make the order with or without modifications.*
24. It is submitted that the test in section 247 is whether the order sought is "*necessary ... in order to enable the development to be carried out ...*" This is a high test. It requires first a clear understanding of the development permitted. Only if the stopping up or diversion is necessary can the order then be made. It is further submitted that the test of necessity also bears upon the length of path to be stopped up. No greater length should be stopped up than is necessary to enable the permitted development to take place.
25. If it is necessary to stop up the path to enable the permitted development to take place, it is further submitted that the decision maker is then required to balance the overall public interest in interfering with an established right of way, including considering safety and public amenity. In *Vasiliou v SoS for Transport* (1991) 61 P&CR 507, Court of Appeal, it was held that the question for the decision maker was "*whether the disadvantages and losses, if any, flowing directly from the closure order are of such significance that he ought to refuse to make the closure order.*"
26. *Vasiliou* was considered and approved in *R (Network Rail Infrastructure Ltd) v SoS EFRA* [2017] EWHC 2259 (Admin) by Holgate J, who said at paragraph 49, *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.*
27. The Parish Council is fully aware that the Inquiry is not a vehicle to re-visit the merits of the planning permission. However, the Parish Council submits that it is evident that no proper consideration was given during the planning application process to the footpath diversion said to be required. Beyond noting that the footpath would be affected and recommending that a condition be imposed to "hold the ring", the Officer's Report<sup>5</sup> to East Lindsey DC Planning Committee did not consider the merits of the loss of the footpath or alternatives to avoid that from occurring. A bridge is plainly a technically feasible, if expensive, option. If the bridge can in fact be provided, then this is a relevant matter to take into account when exercising the discretion to confirm the order or not.
28. The Parish Council simply does not accept that the Order is necessary to achieve the aims of the Environment Agency. That the Order as originally submitted is not necessary to enable the permitted development to be carried out is evidenced clearly by the fact that a revised Order has been submitted to the Inquiry seeking to stop up a much lesser part of the footpath. That revised Order still seeks to stop up an excessive length of footpath and no real justification exists for seeking to stop up a length of 345 metres of footpath when the breach authorised to be made by the planning permission is around 40 metres. Even allowing for subsequent enlargement of the breach by the action of the tide, it is not likely to widen to this extent, as is evidenced by the ABPmer report to the Environment Agency of 13 October 2008<sup>6</sup> at page 16 where it was considered that a 20 metres breach might over time enlarge to 40 metres. On this basis a stopping up of 345 metres cannot be necessary to enable the development permitted to take place. What is clear and which was accepted by Mrs Rumfitt, it is not necessary to stop up the whole of the footpath between points B and O in order to create a 40 metre breach between points D and E.
29. The fact that stubs or cul de sacs would be left is nothing to the point. Dead end footpaths are common in coastal areas. This footpath would be no different. It would terminate at an area where there is tidal flow.

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<sup>5</sup> CD 47

<sup>6</sup> CD54

30. If satisfied that the threshold condition is met, the Secretary of State is then required to balance the overall public interest in interfering with an established right of way, including considering public safety and amenity.
31. The Inquiry heard from a number of residents objecting to the Order. All spoke of the amenity and enjoyment that they derive from the use of Footpath 18, whether on the definitive map line or on the line indicated by the County Council (Highway Authority) way markers and as in fact used.
32. The beach at Donna Nook is an accreting beach. The sea defences and dunes, which provide protection from the incursion of the sea, are getting further away. The Environment Agency has told the residents that the defences are good for the next 20 years; there is no present sign of stress in the evidence submitted by the Environment Agency. This is supported by the Environment Agency's own documents produced in connection with this scheme<sup>7</sup>. If the defences do fail within that timescale, then the sea will reclaim the land and deliver the habitat said to be required.
33. The purpose of the scheme is to provide compensatory habitat for losses sustained elsewhere in the Humber estuary caused by the construction or improvement of sea defences, which, together with rising sea levels, are resulting in a phenomenon known as coastal squeeze. The Environment Agency say that if Donna Nook does not deliver the habitat required of it, then these schemes can no longer proceed. The evidence before the Inquiry is that Donna Nook is delivering 40-50 years of compensatory habitat. In oral evidence, Mrs Morris said that the Environment Agency was already in habitat deficit and that less than 40-50 years compensatory habitat was being provided, but the Environment Agency has not produced any document to support that assertion, which it is clear is still very much a work in progress. Accordingly it is submitted that the Inquiry should find that this is a project designed to deliver long term benefits compensating for habitat losses over the next 40-50 years. There is no need for the breach to be made now, if at all.
34. Nor has the Environment Agency shared with the Inquiry the work produced by the monitoring required by condition 11 to the planning permission<sup>8</sup>, which should include, amongst other things, information about accretion, deposition, ground levels and vegetation/saltmarsh.
35. The Parish Council has produced various photographs, both aerial and ground level, to show that the site is being widely flooded<sup>9</sup>. Mr McLaren produced a video, which shows that the levels of inundation of 'The Fitties' to the north of the footpath are comparable with those on the site. Mrs Morris' argument that she did not know whether it was fresh water or sea water or rain water on the site is to be contrasted with the ready acceptance by Mr Mason that the water was salt water, which is also the evidence of the Parish Council.

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<sup>7</sup> See EA Environmental Statement Non Technical Summary page 19

<sup>8</sup> CD 1

<sup>9</sup> Doc 3 ref PC 7 and PC 8



36. It is submitted that this, coupled with the absence of the monitoring records or any empirical evidence from the Environment Agency to support the assertion of Mrs Morris that the site is not delivering, shows clearly that the site is in fact achieving the objectives set for it. The habitat is changing to a saline intertidal habitat. Seawater is flowing in and out. If the objectives are being achieved, then the Order should not be confirmed in the exercise of the Secretary of State's discretion.
37. The Parish Council reminds the Secretary of State that the Environment Agency's own documents indicated that the size of breach was not critical to the inundation levels on site<sup>10</sup>.
38. The fact is that the so-called benefits arising from the diversion of Footpath 18 are not benefits at all. When properly understood all that is being offered is the opportunity to view the habitat being created from the other side. There will be views of the newly created habitat from the existing footpath. What was close will be further away and what was further away will be closer. A more easily walkable path is fine for those who like their countryside urbanised. However, that is a scant benefit.
39. The present path, does in fact allow access to the beach or at least is used for that purpose whatever the legal basis for the use is. It is well-established and long standing. There is the well-defined access from Pye's Hall, which is the traditional access which has been used by the inhabitants for a very long time, e.g. the cocklers. Today it is used simply for recreational purposes or for collecting samphire. What is undeniable is that there is a clearly marked and well used line of access which has been there for very many years. Whatever the legal status might be, it is undeniable that there is in fact access to the beach from the present footpath.
40. Furthermore, users of the present footpath enjoy a seaside or coastal experience. They are walking adjacent to the sea or in very close proximity to it. Moving the path away from the sea will not enhance or preserve that experience. Section 297(2) of the Marine and Coastal Access Act 2009 provides that when discharging the coastal access duty the Secretary of State must have regard to, amongst other things, the desirability of that route adhering to the periphery of the coast and providing views of the sea. It is self-evident that moving the present path away from the coast will be contrary to these objectives.
41. What can be experienced, seen and enjoyed from the present footpath? There is the smell, sound and proximity of the sea in all conditions of light and season. There is the view of the Humber shipping. There is the view of the RAF in action on the bombing range. There are seals on the beach. There is the collection of samphire. There are wild flowers growing in abundance. All of this will be lost if the path is closed.
42. In addition, there is the opportunity to pass by the historic Pye's Hall site, the Pye's Hall sluice and the remnants of the WWII fortifications. Merely because

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<sup>10</sup> North Somercotes Parish Council Statement of Case Doc 2 attached to the letter dated 14 May 2018 and CD 54.



they cannot easily be seen does not make them any less interesting or of value to those who know their history.

43. The new path will be a very poor substitute for this. The advantages claimed are not advantages at all. It is set well back from the coast and affords only glimpse views of the sea. It is bleak, cold and windswept and dog fouled. It may have a flat grass top, but, not everyone wants an easy walking surface. Part of the joy of being out in the country is being challenged and to be away from it all. There is no joy or pleasure in walking a modern, manufactured structure.
44. A permissive path agreement (Doc 7) has been made between the Environment Agency and the local Highway Authority (Lincolnshire County Council). It is quite clear that that agreement will a) prevent the acquisition of any future highway rights over the path in question and b) is precarious. It is terminable on three months' notice in writing. No reason is required to be given. Once terminated the Environment Agency will be at liberty to stop up the path permanently.
45. The Parish Council submits that having regard to the use made of the footpath, the history associated with it and the, convenience, benefit and enjoyment it provides to the users thereof the disadvantages and losses to the public are such that the Order should not be made. In all of the circumstances, the Parish Council submit that, the Secretary of State should not exercise his discretion and make the Order.

Mrs Lynda Plater

46. Mrs Plater submitted a written statement to the Inquiry (DOC 11) , which she read. In summary, she stated that the description of Footpath 18 had been misrepresented. The Definitive Map line has never been the path that locals use and is contrary to the line shown on the Ordnance Survey maps. Furthermore, Hawthorne used to be cut and placed along the top of the dunes to prevent erosion and made it impossible to walk along the crest of the bank.
47. There has been historic use of the various paths on foot, bicycle and on horseback as well as evidence of a right of access to the foreshore. The diverted route is inferior and cannot replace the existing alignment of Footpath 18.

Mr Simon Heyes

48. Mr Hayes submitted a written statement to the Inquiry (DOC 12), which he read. In summary he stated that the current footpath is ever changing and makes every walk different. The idea of diverting the path inland which is flat and featureless would be, in comparison, a boring walk.
49. The only reason to stop up the footpath is to create a 40 metre breach to form a wetland. Other options such as a bridge have been dismissed. The area has not flooded as expected as the site is uphill. The only difference the breach will make is the rate of flow.

Mr Melvyn Kirk

50. Mr Kirk stated that we can all appreciate that the local environment is fragile and floods. The Environment Agency provides helpful flood defences across the country, apart from at Donna Nook, where a 40 metre breach will be made.

51. The flood defence here is self-sustaining and the sand dunes daily grow. The Environment Agency's new flood bank has not been tested and given the history of the new car park regularly flooding the local residents have little confidence in the Environment Agency's engineers.

Mrs Rosemary Stanhope

52. Mrs Stanhope confirmed that she had lived in the local area since 1985 and walks her dog every day at Donna Nook along Footpath 18 which is a very busy footpath. The new flood defence wall, used as the proposed diversion for Footpath 18, is a nice walk, but not in the wind and is very muddy in the rain. The diverted path is inaccessible to wheelchairs.
53. The very first meeting that local residents had with the Environment Agency we were told that Footpath 18 would not be harmed. Now that this is not the case it is no wonder that local residents are now so annoyed.

Mrs Chris Belton

54. Mrs Belton submitted a written statement to the Inquiry (DOC 13) , which she read. Following submissions made by the Applicant Mrs Belton agreed to withdraw the comment made on page 3, which was deleted from her statement.
55. In summary she stated that the breach was not required to fulfil the aims of the planning permission as sufficient water already enters the site. Other options have failed to be considered. The scheme will cause access to the beach to be removed and any access to the beach from the Grainthorpe direction will be a round trip of more than 7km.
56. The Environment Agency have changed the advice given to local residents over the course of the planning application process, including access to the new path by horse riders and cyclists.
57. The diverted path has no protection from inclement weather conditions and is a featureless, impractical diversion.

Mrs J Lingard

58. Mrs Lingard submitted a written statement to the Inquiry (DOC 14), which she read. In summary she stated that it is essential that Footpath 18 remains a coastal path. Any visit to the coastline will show the constant amount of shipping, visitors to the beach and activity on the bombing range. Therefore there are concerns relating to emergency access to the beach. The fact that North Somercotes has its own voluntary coastguard speaks for itself.

Mr Andrew McLaren

59. Mr McLaren submitted a written statement to the Inquiry (DOC 20) , which he read. In summary he stated that the scheme would remove a footpath that has existed for hundreds of years. The stopping up would result in the loss of amenity affecting local people and visitors, as well as compromising the England Coastal Path project. The scheme would not improve or secure coastal access or create new access therefore failing to meet the Marine and Coastal Access Act 2009. Natural England has a national fund to support coastal access so why hasn't the Environment Agency applied to fund a bridge or consider reasonable alternatives.

Mrs Jean Corbridge

60. Mrs Corbridge submitted a written statement to the Inquiry (DOC 21), which she read. In summary she stated that Donna Nook is a small oasis of natural beauty where many wild flowers thrive. The Environment Agency had not considered the protection of the local wildlife, and flowers have been lost during the construction works already undertaken. The diversion route is totally bereft of any wild flowers and is a wilderness with nothing of any interest flora wise.

Mr Alwyn Drewery

61. Mr Drewery confirmed that he lived in the local area and worked on a local farm. His family have had a right of access to the beach to collect samphire and cockles. The Environment Agency told him that his access would remain via Stonecourt. However no consultation has been undertaken on the footpath and there is now less accessibility for horses and bicycles.

Written representations

62. The gist of the material points made by the objectors who did not appear at the Inquiry in their written submissions were:
- Views of the sea, ships, Spurn Head, seals and RAF manoeuvres will not be possible from the diverted route.
  - The stopping up of Footpath 18 will lead to a loss of access to the beach for walking and collecting samphire and cockles.
  - Loss of views of historic WWII defensive structures and the ruins of Pyes Hall.
  - The proposed England Coastal Access Path would have to travel inland at Donna Nook which goes against its principles.
  - Footpath 18 provides access to a number of rare plants and animals which would no longer be possible. The creation of the new flood defence banks has little wildlife interest and its construction destroyed a number of rare plants.
  - The Emergency Services would no longer have appropriate access to the beach to assist those caught by rising tidal water.
  - The proposed diverted route is not accessible by bicycle and horseback. It gets very muddy during rainfall and the long grass makes it difficult to walk.
  - The proposed diverted route has no shelter and is exposed to the elements, especially the wind.
  - The breach is not necessary to provide the required habitat as water already enters the site.
  - The coastline here is accreting.
  - The Environment Agency did not consider alternatives such as a bridge or culverts which would avoid the footpath being stopped up.
  - The permissive path agreement does not provide the same security of access as the existing RoW.

## **THE CASE FOR THE APPLICANT (Environment Agency)**

63. The application before the Secretary of State, made pursuant to section 247 of the Town and Country Planning Act 1990 ("the 1990 Act") seeks the stopping up of North Somercotes Public Footpath 18 and the creation of a new public right of way along a new line. The application also includes the diversion of part of Grainthorpe FP18 in order to divert its line away from its current line through a pond.
64. There has been no allegation by any objector that section 247 of the 1990 Act is not an appropriate power to invoke in this case. Further, the North Somercotes Parish Council has confirmed that it has no objection to the diversion of FP18 between points A and B on the Order Plan in order to divert the footpath around, rather than through, a pond. Moreover, no other objector has made specific reference to having any objection to that part of the order.
65. North Somercotes Parish Council has made no valid resolution to object to this application. The only resolution to object was made in April 2012 in respect of a materially different order, made by a different body (East Lindsey DC) and, it seems, on grounds specific to that application.
66. There are two steps in the decision making process in regard to the making of an order under section 247 of the 1990 Act<sup>11</sup>:
- First, a consideration of whether the Secretary of State can be satisfied that it is necessary to stop up or divert any highway in order to enable development to be carried out in accordance with a grant of planning permission; and
  - If he is so satisfied, to go on to consider the discretion that is conferred upon him whether to make the order.
67. The consideration of the application is not an opportunity to revisit the planning merits of the planning permission. The Parish Council say that it recognises that restriction, but much of the argument pursued by the Parish Council is, in truth, an illegitimate attempt to revisit those planning merits. That is clear from:
- The cross-examination of Mr Marshall on the topic of the loss of dune habitat and the creation of salt marsh or mudflats. The alleged tension between those issues has nothing to do with the issue of whether the stopping up and diversion of the footpath ought to proceed;
  - The cross-examination of Mr Mason about the need for a breach in the existing sea defences which is greater than the aperture comprised in the present sluice;
  - The ability to provide an increased height of the existing sluice aperture;
  - The desirability and practicality of the provision of a bridge;
  - The allegations of the lack of a need for the scheme as the issue has been settled by the planning permission; and

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<sup>11</sup> See *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77 and *R (Network Rail Infrastructure Limited) v SoSEFRA* [2017] EWHC 2259 (Admin).

- The scheme is not being undertaken for the residents of North Somercotes is clearly an argument on the merits of the planning permission and is contrary to the evidence.
68. The starting point is to identify what the planning permission provides for. That, of necessity, involves interpreting the planning permission. The permission has to be interpreted by reference to the decision notice, including the conditions and the reasons for imposing them and any documents incorporated into the permission itself. It is only if the permission is ambiguous that recourse to extraneous material is permissible. The Parish Council seem to approach this issue from the wrong starting point. They seem to seek to interpret the planning permission by reference to what they say was said to them in meetings, some of which post-date the permission, or by reference to other applications for orders affecting the footpath, in particular the 2012 application made to East Lindsey DC under section 257 of the 1990 Act. That would be the wrong approach.
69. The decision notice<sup>12</sup> dated 8<sup>th</sup> July 2011, which contained the grant of planning permission is absolutely clear. The development it permits has, as a fundamental component, the breaching of the existing flood defence embankment at Somercotes Haven tidal sluice, so as to allow seawater to flood land in order to create new intertidal habitat. To create the gap, interference with Footpath 18 is unavoidable.
70. Condition 9 of the permission expressly requires that *"Public Footpath 18 must be formally diverted along the top of the new embankment and the necessary works carried out on site to allow this to take place before the existing public footpath is closed"*.
71. There can be no sensible dispute about what this means. It is not the Environment's Agency's case that the condition authorises the interference with Footpath 18. But it is clear that the condition requires the execution of the works to create the line of the new footpath before the existing footpath is closed. The condition also makes it clear that it envisages Footpath 18 being "diverted" onto the new embankment. That is what it says. It does not refer to the stopping up of the 40 metre length on top of the breach and the leaving of two culs-de-sac or words to that effect. It expressly requires diversion, namely the stopping up of a right of way and its replacement on a different line.
72. Further, the recital to the permission requires the development to be carried out *"In accordance with the application and plans submitted"*.
73. The permission lists the approved plans at the end of the decision notice. One of them, Drawing 108898-5000-1002 Rev A<sup>13</sup> clearly refers to and shows the diversion of Footpath 18 onto a new route. The plan shows the location of a public right of way along the new embankment and not on the existing embankment. The note at the bottom of the plan, pointing towards the new path says *"Public right of way diverted along new embankment."*
74. Taken together, the description of development, condition 9 and the plan at CD3 make it abundantly clear that compliance with the planning permission requires

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<sup>12</sup> Core Document (CD) 1

<sup>13</sup> CD3

the closure of Footpath 18 along the old embankment and its diversion onto the new embankment. There is no ambiguity and no justification for recourse to extraneous information. There can certainly be no recourse to material which post-dates the grant in order to interpret what it means. Nor can assertions about what Environment Agency officers may have said at meetings sensibly be used to interpret the planning permission.

75. In short, the permission authorises the breach. The breach cannot be created without interfering with a public right of way. Condition 9 prescribes what has to happen and in what order before the breach can be created. The stopping up and diversion is plainly necessary if the development is to be carried out as required by the permission.
76. The planning permission has been lawfully implemented. Mrs Morris' evidence refers to the discharge of conditions precedent prior to the commencement of development, which has occurred. This was not contested. In cross-examination of Mr Mason, a misinterpretation of condition 11 of the permission was relied upon. The condition does not require monitoring to take place within six months of the permission. It requires the submission of a scheme of management and monitoring to be submitted within six months, to include arrangements for monitoring.
77. Therefore, there can be no doubt that: The permission has been lawfully implemented and thus is extant; and the development is not complete, thus allowing for the making of an order under section 247 of the 1990 Act.
78. Despite the clouding of the issues by the points taken by the Parish Council, the answer to the first question is obvious: it is necessary to stop up and divert Footpath 18 in order to carry out development permitted in the planning permission in accordance with its terms.
79. There is another important respect in which the Parish Council's approach is incorrect. There has been much debate, initiated by the arguments taken by the Parish Council, that it is not necessary to create the breach in order to flood the site to the requisite degree. That contention is wrong on the facts and it is also not the correct test. The necessity test is whether the stopping up or diversion is necessary to allow development to be carried out in accordance with the grant of planning permission. The test is *not* whether the end result of what the planning permission sets out to achieve can be achieved without carrying out the development which the permission allows.
80. The contention is wrong factually in any event:
  - Mrs Morris' and Mr Mason's evidence undoubtedly shows that the retention of the sluice, minus its flaps, would not suffice to create 106 ha of intertidal habitat. The sluice does not allow sufficient volumes of water to enter the site so as to allow a sufficiently frequent and prolonged inundation in order to cover the requisite area of land with salt water. That is demonstrated by the modelling, which has not been seriously challenged; and
  - As was also explained by Mrs Morris and Mr Mason, the aerial and other photographs produced by the Parish Council do not show, when compared to the modelling outputs, that a sufficient area of the site can be covered by salt water without creating the breach. As Mr Mason explained, the aerial



photographs actually relate well to the modelling outputs and are consistent with them. The photographs provide no reason to doubt the modelling. Although document PC7 of Doc 3 shows some areas of land wet which were not predicted to be flooded with the sluice in place, it also shows large areas of blue land which the model predicts should be flooded with the sluice still in place above water. The claims by objectors that the site floods sufficiently now are entirely at odds with the evidence of Mr Heyes that the site does not now flood to a sufficient degree. Further, the video clip shown on day 2 of the inquiry by Mr McLaren and Ms Belton does not advance matters at all. The fact that the site has flooded when The Fitties flood is neither here nor there. The key point is that the site is not covered with sea water to the requisite degree with the requisite frequency with the sluice still in place.

81. The relevance of the Environment Agency's 'Fact Sheet 10' (Doc 17) has not been explained. If it is said to undermine the need for the scheme, that is not the point, for the reasons explained above. In any event, the document has been misunderstood. Donna Nook is not shown for improvement because the scheme of works was for the creation of a new sea defence, not the improvement of existing defences. It is clear from the discussion in the section of the document headed "*The Issue*" that the concern was about the state of the existing defences and paragraph 2 of the section "*The Facts*" states that the Environment Agency had decided to include to the improvement of some defences in the "proposed Donna Nook scheme" i.e. the Managed Realignment Scheme. The document does not undermine the need for the breach at all.
82. On the evidence, there can be no doubt that the removal of the sluice flaps allows a limited but inadequate volume of seawater to cover part of the site. The creation of some additional intertidal habitat has begun, but a greater breach, as authorised by the planning permission, in the embankment is needed if the required area of intertidal habitat is to be created.
83. As proposed, the application, as illustrated on the application plan<sup>14</sup> proposes the extinguishment of Footpath 18 between points A-B-C-D-E-F-G on the order plan; and the creation of a new right of way between points A-B-H-J-K-L-M-N-O-P-Q-R-G. It is to be noted that the new line between points A and B on the Order Plan is not the same line as exists now between those points, to accommodate the diversion around the pond. The lengths of way between points B-C-D and the separate length between points E-F-G on the Order Plan would become permissive paths. An agreement to that effect has been made between the Environment Agency and Lincolnshire County Council (Doc 7).
84. As to the exercise of discretion in relation to that stopping up and diversion, the making of the order is of critical importance in allowing the Government to meet its obligations under the Habitats Directive. There has been no challenge to the Environment Agency's and Natural England's evidence that there is a need to provide additional intertidal habitat to compensate for the effects of coastal squeeze and sea level rises. The fact that part of that pressure occurs as a result of the taking of flood management measures elsewhere by the Environment

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<sup>14</sup> CD29



Agency is irrelevant to the question of whether the need for compensatory habitat exists. There clearly is such a need, however it has arisen.

85. The provision of additional intertidal habitat is not simply a desirable matter. It is a legal necessity. There is an obligation to provide new habitat to offset the losses caused by pressures discussed above. That obligation arises from the Humber Estuary's status as a Special Area of Conservation and Ramsar site and from the status of parts of it as a Special Area of Conservation. Parts of the Estuary are also Sites of Special Scientific Interest. The necessity of the provision of compensatory habitat is a very significant factor in favour of making the order sought.
86. Provision of the compensatory habitat will allow for the continuation of flood management measures in the Humber Estuary. Those are of substantial importance. Mrs Morris sets out that the Humber Estuary Flood Risk Management Strategy sets out to reduce flood risk for:
- 400,000 people;
  - 90,000 hectares of productive agricultural land; and
  - Nationally significant refineries, ports, power stations and local businesses.
87. Further, there is no reason to doubt that the provision of intertidal habitat is already in deficit. There is no question of being able to take a relaxed view to the provision of additional habitat based on some notion of there being a 50 year timeframe for full provision to be made. There is a pressing need to bring about the creation of the full 106 hectares on the Donna Nook site now. There is also no evidence of any other site being available to provide the requisite amount of intertidal habitat if it is not to be provided at Donna Nook.
88. Natural England strongly supports the order on the basis of the environmental necessity for the creation of additional intertidal habitat. Mr Marshall has shown that the principle of the Donna Nook realignment scheme is supported by the National Character Area profile 42: Lincolnshire Coast and Marshes<sup>15</sup>, a point which was not challenged in cross-examination. The scheme is also supported by the Lincolnshire Wildlife Trust<sup>16</sup>.
89. Natural England's support for the scheme is expressed in the context of the obligation to provide a coastal path under the Marine and Coastal Access Act 2009. Mr Marshall sees no conflict between the order and the Act or any relevant guidance and Mr McLaren chose not to ask him anything about that matter. Mr McLaren's contentions about the consistency of the application with the duties under the Act are totally unsupported.
90. There are no objections to the application from the Ministry of Defence<sup>17</sup>, HM Coastguard<sup>18</sup> or Lincolnshire Fire and Rescue<sup>19</sup>.

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<sup>15</sup> CD43

<sup>16</sup> CD33

<sup>17</sup> CD38

<sup>18</sup> CD37

<sup>19</sup> CD36

91. The existing legal line of Footpath 18 is not easy to discern. Indeed, Lynda Plater stated her opinion that the legal line does not follow the top of the bank. This point was also a theme of the cross-examination of Mrs Rumfitt. But the legal line is the line marked on the Definitive Map. It is not in issue that the legal line is not easy to use and it is not possible to use it in some locations. Nor is it possible for the Parish Council to show that any other line has acquired the status of a public right of way, for the reasons explained elsewhere.
92. It is accepted that the current footpath provides for views of the sea, shipping and aircraft activity which are superior to those possible from the replacement path. The length proposed for closure is not the focus for seal-watching activity, as Mrs Morris explained. The reduction in sea views is a disadvantage which weighs against the making of the order, but it is a disadvantage which it is contended should carry very modest weight in comparison to the pressing need for the creation of the breach in order to provide crucial additional intertidal habitat.
93. In cross-examination of Mrs Rumfitt the point, among others, was made that views of the realignment site from the existing path would be comparable to views of the site from the replacement path. That is not right as regards views of the created new habitat. The intertidal habitat, with the ecological and visual interest it would create, will not occur to the fullest extent if the sluice remains in place and the path kept open. It will only occur if the breach is created. As a result, views of the required amount of intertidal habitat will only occur if the path is diverted.
94. Further, whilst the views from the proposed diversionary route are different from those currently obtainable, the intertidal habitat will, when it takes hold, provide interest for observers.
95. The loss of views of the site of the former Pye's Hall is a minor disadvantage of the proposal, given the lack of any discernible visible physical signs of the Hall's former existence, as confirmed by the information in the HER<sup>20</sup>.
96. The current path allows for views of some World War II defences. The proposed footpath provides no such views, but little remains of these structures and the loss of such views is only a very minor disadvantage of the order.
97. The planning permission permits the removal of the sluice. The application to list the sluice was refused. That application was not rejected on the grounds that the sluice had already been partly removed, it was rejected on the basis that the sluice had never been of sufficient special interest.
98. The new line of the footpath (the diversion) would be easier for people with mobility difficulties to use. It is flatter, wider, has a better surface and suitable for a good part of its length for use by people with pushchairs or those who use wheelchairs. The existing legal line is not easy to use for people with any kind of mobility difficulty or those who have a pushchair. The legal line cannot be used by people who use a wheelchair.
99. The proposed footpath arrangement would add only 466 metres onto a journey between points to the north and points to the south of the area affected by the

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<sup>20</sup> CD52, page 2 of 3, 4<sup>th</sup> line on page.

order, adding about 7 minutes to a journey undertaken at a reasonable pace. As the paths are primarily recreational routes, rather than utilitarian commuting ones, this additional length is not materially disadvantageous.

100. The reference by some objectors to an additional 10km length is far-fetched. That is because it assumes travel between points the north-west of the site to the point immediately east of the breach site. It also assumes the right to access the beach or foreshore from the legal line of Footpath 18. There is no such proven right. The mere fact that some members of the public have come to this inquiry saying that they have used a physical way for a twenty year period does not establish that the general public have a right of way along such paths.
101. That point cannot be rejected as “pedantry” as the Objectors seek to do. Although there are physical ways between the legal line of Footpath 18 and the beach, the right of anyone to use them is entirely unproven. Rights of way or other rights cannot be assumed. They need to be established. Mr Drewery believes that he has the right to access the beach by virtue of a legal grant made by Endymion Porter. But the document he relies upon does not establish any particular right in any particular place. It is noteworthy that the October 2016 appeal decision<sup>21</sup> from the failed appeal in respect of the upgrading of Footpath 18 to a bridleway, the Inspector knew of the decree<sup>22</sup> and concluded that it probably related to Marsh Lane and did not support the contention that rights of way were created elsewhere. Further, Mr Drewery’s evidence about use of access tracks in the vicinity expressly stated that such use was with the permission of the landowner. Permissive use obviously cannot be relied upon in establishing a right.
102. Further, there has been reference to historic rights of commoners. Those can be disregarded. Rights of common can only be exercised with reference to common land. The beach is not a common. The Parish Council accepts that no registration as a common took place. The deadline for registration under the Commons Registration Act 1965 has long since passed and registration of rights of common is now impossible. Nor is the beach a registered Town or Village Green.
103. In terms of exposure to weather conditions of the legal line of Footpath 18 compared to the new embankment, there is no reason to conclude that there would be any material disadvantage in the use of the new embankment.
104. The evidence is that samphire grows in other locations other than the location close to the eastern side of the breach site. Even if anyone has a right to pick it, such activity can be carried out wherever it grows.
105. References to use of Footpath 18 by equestrians should be disregarded. There is no right for people to ride (or cycle) along Footpath 18. An attempt to upgrade the footpath to a bridleway failed and an appeal dismissed in October 2016. The appeal decision at CD40 made it plain that the Inspector did not accept that the

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<sup>21</sup> CD40

<sup>22</sup> CD40 paragraphs 11 and 12

user evidence he had seen demonstrated that Footpath 18 should be recognised as a bridleway<sup>23</sup>.

106. Further, the evidence of Mr Kirk was entirely irrelevant to the issues involved in determining the application. His evidence was a complaint about the alleged build quality of the new embankment.
107. Even setting aside the fact that the planning permission does not include the provision of a bridge or culvert, there are sound reasons for not providing either structure at the breach site, namely the need for considerable engineered foundations and armouring and the conclusion that a naturalistic solution is more appropriate.
108. The closure of the full length of Footpath 18 set out in the proposed order as applied for and its diversion onto the new embankment remains the Environment Agency's primary case, as that is to what the planning permission clearly refers.
109. However, should the Inspector and Secretary of State disagree with the approach taken to the closure of the full length of Footpath 18 between points B and G, then the Agency's secondary case (Option 2 Doc 8) is that a 345 metre length of Footpath 18 could be closed, at the site of the proposed breach, leaving the other lengths of Footpath 18 as public rights of way. A draft modified order to that effect has been prepared (Doc 8). The location of the length to be stopped up in this option is shown as points U and V. That is not the Environment Agency's preferred approach because it does not correspond to what the planning permission requires and would create cul-de-sacs.
110. When the relatively limited disadvantages of the proposed changes to the public footpath network are compared to the very considerable benefits of the consequences of the creation of the breach in the existing defences, it is firmly submitted that the benefits easily outweigh the disadvantages. That is so whether one tests the Environment Agency's primary or secondary case. The question of the exercise of discretion comes down clearly and decisively in favour of the order being made, in either variant.
111. Overall, the Environment Agency does submit that the Order, either as made or as set out in the Environment Agency's secondary position has overwhelming merit and ought to proceed to allow important sustainable development to go ahead.

## **THE CASE FOR THE SUPPORTERS**

### Natural England

112. Natural England acted as a witness to the Environment Agency. Their Proof of Evidence was provided to the Inquiry. In summary Natural England fully supports the implementation of the 40 metre breach which is necessary for the proposed managed realignment proposal to take place. The stopping up and diversion of the footpath in this location is therefore necessary to facilitate the breach.

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<sup>23</sup> CD40 paragraphs 17 - 25

113. The breach represents the minimum length required to allow tidal exchange to create the maximum intertidal habitat, which was agreed by the Habitat Regulations Assessment of the Humber Flood Risk Management Strategy. Once the breach has been made the redundant sea wall will be allowed to naturally erode away. This will result in a more naturally functioning foreshore. The provision of a bridge over the breach would remove the ability for the new habitat to develop naturally.
114. Natural England stated that the proposed diversion along the new flood defence embankment would allow an appropriate route for the England Coast Path to follow. This path once developed will represent the new foreshore.

Lincolnshire Wildlife Trust

115. The Lincolnshire Wildlife (LWT) Trust provided a letter of support. In summary they state that it wishes to place its support for the scheme on record. The LWT has been closely involved in the development of the Humber Flood Risk Management Strategy and understands clearly that sea level rise will reduce the extent of intertidal habitat, vital to the wildlife of the estuary.
116. As a result of maintaining and improving the flood defences around the Humber Estuary the Environment Agency has a legislative obligation to maintain the integrity of the internationally important designated nature conservation sites of the estuary. The Donna Nook scheme would enable the Environment Agency to fulfil this obligation.

## **INSPECTOR'S CONCLUSIONS**

117. These conclusions are based on the evidence submitted and given at the Inquiry and the written representations summarised above, and my findings at the accompanied and unaccompanied inspections of the site and surroundings. In my conclusions, numbers in [ ] refer to paragraphs earlier in this report.
118. Section 247(1) of the 1990 Act provides for the stopping up or diversion of a footpath if it is necessary to do so in order to enable development to be carried out in accordance with planning permission already granted under Part III of the 1990 Act [21, 22, 63]. Therefore in making his Order the Secretary of State must be satisfied that planning permission in respect of the development has been granted, and that it is necessary to authorise the stopping up in order to enable the development to be carried out in accordance with that planning permission. This latter requirement cannot be satisfied if the permission has been substantially implemented [23, 24, 25, 26].
119. Even if I were to find it necessary to stop up or divert the paths to allow implementation of the permission my recommendation that the Order be made is discretionary. In exercising this discretion I must consider the merits or disadvantages of the proposed diversion and stopping up in relation to the particular facts of the case, and in particular the effect the confirmed Order would have on those entitled to the rights that would be altered by it.
120. Accordingly, my reasoning will address these three main issues, namely: whether the Order is necessary to enable development to be carried out; whether development is substantially complete; and the effect of the Order on those whose rights would be altered by it.

*Whether the Order is necessary to enable development to be carried out*

121. Planning permission was granted on 8 July 2011 [21] under reference N/132/00645/11 for the:

*"Donna Nook Realignment Scheme which includes the construction and operation of a flood defence embankment 6.0 metres in height (AOD), removal of tidal sluice, existing flood banks and associated infrastructure to create a breach in the existing flood defence embankment, change of use of existing agricultural land seawards of the new embankment to form wildlife habitats, including the creation of intertidal habitat, islands and creeks, reduction in the land levels, refurbishment of the existing Porter's Sluice pumping station to include a surge chamber and pipework, construction of 3no. new head walls, construction of a temporary construction site compound to include handling areas, storage area for plant and materials, portable site offices, welfare facilities and car parking, enclosed by a fence 2.0 metres in height, provision of 6no. temporary satellite compounds across site, construction of an embankment 6.0 metres in height to tie into existing sand dunes, construction of a new car park with existing car park removed, construction of a temporary access road to site compound and construction of replacement paths."*

Planning condition 9 specifically refers to the stopping up and diversion of Footpath 18<sup>24</sup> [70, 71]. The condition states:

*"Public Footpath 18 must be formally diverted along the top of the new embankment and the necessary works carried out on site to allow this to take place before the existing public footpath is closed. The proposed permissive path must be provided before the breach in the existing flood embankment is created and details of measures to be taken to prevent that section of the historic embankment close to Stonebridge Cottages from being used by visiting members of the public must be submitted to and approved in writing by the Local Planning Authority before the breach in the existing flood defence is formed. The development must proceed in accordance with the approved measures."*

122. I have seen copies of the relevant planning permission and the accompanying plans. It is clear that the permission relates to the land crossed by Footpath 18 and its implementation would sever it were the sea defences breached.
123. I have considered the Objectors' comments that there is no need for the tidal sluice and associated infrastructure to be removed as sufficient water already ingresses into the intertidal habitat area [35, 36, 49, 55, 62]. I accept that the photos presented by the Objectors (Doc 3) show that water has entered the site and is coherent with the TUFLOW model [80] used by the Applicant to simulate two-dimensional surface flows. With the current sluice structure in place only approximately 60% inundation is achieved, as depicted by the photographs and video.
124. However, to fully execute the planning permission the required 106 ha of inundation can only be provided with a 40 metre breach. The 40 metre breach

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<sup>24</sup> CD1



and excavation of the ground levels at the inlet will allow a significant amount of water to enter and exit the area at a sufficient flow rate to deposit sediment. It is also likely that the breach will erode further and evolve naturally over time. The current inlet does not provide the necessary flow rate to allow the full area of intertidal habitat to be completed as required by the planning permission and the approved plans [82].

125. I note the comments that the coastline hereabouts is accreting [32, 62], i.e. the process of coastal sediment returning to the visible portion of a beach or foreshore. However, in the Humber Estuary as a whole, studies have shown that water levels are rising relative to land levels at a rate of c.2mm per year and will increase as a result of climate change<sup>25</sup>. The rising sea levels are also causing loss of important intertidal habitats which cannot move inland due to the existing flood defences – a process known as coastal squeeze [33]. As I heard at the Inquiry sea levels are rising faster than the rate of accretion and therefore it is unlikely that such accretion would prejudice the overall scheme.
126. Several Objectors have stated that the breach need not sever Footpath 18 as a bridge or culvert could be provided [27, 49, 55, 62]. Whilst such structures may be technically possible these are not part of the planning permission and would also limit the natural evolution of the coastline as required by the scheme and supported by Natural England [113].
127. It is acknowledged by all parties that the diversion of a section of Footpath 18, between points A-B on the Order Map is not necessary for the development to proceed. However there are no objections to this diversion which would assist footpath users by avoiding the pond and fencing [64].
128. Planning condition 9 [121] clearly sets out that Footpath 18 must be formally diverted before the existing Footpath 18 is closed. Furthermore, the stopping up and diversion is shown on the approved plans listed as part of the planning permission. Accordingly, it is clear that the permission intends the stopping up and diversion of Footpath 18. Nonetheless, I do not consider that reliance could be placed on a condition of this type as the making and confirmation of an Order is a separate statutory procedure, outside the direct control of the developer.
129. The issue of the footpath stopping up and diversion was set out in the Committee Report<sup>26</sup> and I have no evidence that the Planning Committee would not have considered this matter in reaching their decision.
130. In considering whether or not to recommend that the order is made, I must have regard to the circumstances which are present at the time of my determination. The fact remains that there is an extant planning permission in place which cannot be executed in full unless Footpath 18 was stopped up and diverted. I therefore find that it is necessary to stop up and divert the Footpath in order to enable development to be carried out in accordance with planning permission already granted.

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<sup>25</sup> Page 4, paragraph 5.1 of Mr J Marshall Proof of Evidence.

<sup>26</sup> CD47



131. Nonetheless, I do not consider that the 2,736 metres length of Footpath 18, which is shown to be stopped up, is necessary for the development to be fully executed. In this respect the Applicant submitted a further draft Order 'Option 2' (Doc 8) [109]. This shows a reduced amount of Footpath 18 to be stopped up to some 345 metres. From the evidence before me this limited amount of stopped up path would still facilitate the breach in the sea defence and allow the natural evolution of the coastline as required by the planning permission [113].
132. Whilst the Applicant states that 'Option 2' would not correspond to the planning permission, I disagree [109]. Notwithstanding my comments set out in paragraph 128 above, planning condition 9 states "*Public Footpath 18 must be formally diverted along the top of the new embankment and the necessary works carried out on site to allow this to take place before the existing public footpath is closed.*" As shown on the Definitive Map<sup>27</sup> Footpath 18 continues beyond the planning permission red line area. Therefore, it cannot be the aim of planning condition 9 to close the entire length of Footpath 18. Furthermore the drawings referred to in the planning permission do not specifically refer to a maximum or minimum length of Footpath 18 to be stopped up. To my mind this would allow the flexibility to stop up and divert the Public Footpath as required by any subsequent Order.
133. Accordingly, I am satisfied the approved plans show that the development could not go ahead and Condition 9 complied with, unless the relevant part of Footpath 18, passing over the site, was stopped up as proposed in Option 2.

*Whether development is substantially complete*

134. The development permitted under N/132/00645/11 is in progress but has not been completed [77]. I was able to walk both Footpath 18 and the proposed diversion. Accordingly whilst some of the works have been completed a significant part of the permission, namely the breach, has not yet been undertaken. Therefore, I am satisfied that the development is not substantially complete.

*The effect of the Order on those whose rights would be extinguished by it*

135. The footpath (as I walked it) commenced at point G (as shown on the Order Plan) and proceeds along the sand dunes in a north-westerly direction to point F. This section of the footpath is poorly defined on the ground and there are few indications which would alert walkers to its presence.
136. At the Inquiry all parties agreed that the definitive map line of the route could not be easily walked due to vegetation and the natural shifting of the sand dunes. Further, there are a great number of tracks across the dunes made by people and animals which allow walkers to wander from the dedicated Right of Way and venture on to the intertidal habitat and beach [39, 47, 55, 61, 62].
137. A large proportion of the beach and intertidal area is owned by the Ministry of Defence (MOD) and used as an air weapons range (the range) primarily for training UK and USAF pilots in bombing and gunnery. There are 4 permanent

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<sup>27</sup> EA Core Document 39.

beach targets, 1 sea target and a range of tactical targets. When the range is in use access to the area is prohibited [9]. The range is also a National Nature Reserve and has a resident grey seal colony. With no evidence to the contrary access to the MOD land and therefore the beach and intertidal habitat is by agreement rather than any legal right.

138. Indeed at the Inquiry I was told that lengthy discussions and correspondence took place in the late 60s and early 70s with the MOD regarding the reactivation of the Range at Donna Nook and this led to the proposed firing area being re-aligned to allow continued dune access and partial beach access even when the Range was in use. This supports my opinion that whilst there maybe physical access to the beach, there is no legal right of access.
139. In contrast to the above, the diversion is generally well-defined, clearly signposted, generally level topography and runs along the flood defence embankment.
140. At the Inquiry a number of local residents informed me of long held traditions for access to the beach and foreshore. Some residents stated that they collected samphire and cockles, whilst others enjoyed walking out to the beach to watch the ships, seals or the RAF manoeuvres [47, 55, 61, 62]. I was also informed that many tourists visit the area to walk the coast path and take advantage of viewing the seals.
141. The area is not a registered Common or Village Green [102]. However a Royal Decree, dated back to King Charles I, was brought to my attention said to grant access to the sea banks for commoners, fishers, freeholders and others<sup>28</sup> [101]. Nevertheless, the document would appear to be the transcript of a court order agreeing that Endymion Porter (a landowner) would make a way of 40 feet from the sea bank for fishers and fowlers to and from the sea and that the remainder of the land should be divided into four parts, to settle a land dispute.
142. From the evidence before me I see no reason to disagree with my colleague's findings that *".....there is a strong possibility that this way corresponds to the public carriage and drift road included in the 1842 North Somercotes Inclosure Award (called 'Forty Foot Marsh Lane'). This is now the highway known as Marsh Lane which links with Footpath 18."*<sup>29</sup> Accordingly, I have no substantive evidence that legal access to the beach is provided from Footpath 18. In any event given the submission of Option 2 physical access to the beach would still be possible were the Secretary of State to agree with my recommendation.
143. I accept that the diverted route will add an extra 466 metres in length to the existing footpath. I also note that walkers coming from the Grainthorpe direction who wish to gain access to the beach using the 'safe passage' avoiding the Range would have a longer route of some 7km [55], although from all that I have seen and read the number of people using this particular route would be limited. This is, therefore, a disadvantage of the stopping up Order and diversion. Nevertheless, no one has informed me that the route is a functional path for work

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<sup>28</sup> Extract attached to Mr A Drewery's Statement of Case

<sup>29</sup> Decision Letter ref FPS/Q2500/14A/2 found at CD40 paragraph 12

or as a link between settlements. Therefore any disadvantage for recreational users would be slight.

144. Having walked these routes during both my accompanied and unaccompanied site visits I can see that the proposed route may be more inconvenient in some respects for those living in and around Grainthorpe. A direct route, when you are travelling to and from a specific destination, will always feel more natural and preferable. However, I also consider that the diverted route has some advantages in terms of surfacing and reduction in obstructions. Further, it appeared that use was already being made of the proposed diverted route alignment.
145. Natural England has the implementation role in establishing the route of the England Coast Path (ECP). I was informed at the Inquiry by Natural England that the diversion route would be an appropriate route for the ECP to follow, particularly as once the planning permission is fully executed the diverted route would represent the new foreshore [114]. Whilst I acknowledge the objectors comments in this respect [40, 59, 62], the ECP route hereabouts has yet to be established and Natural England will consider various options for the route which do not necessarily have to be along existing Rights of Way.
146. The matter of enjoyment of use of the existing footpath was raised, with respect to the coastal views, alteration of the historic relationship of the footpaths to the various historic assets, use of the footpath to see fauna and flora and walking conditions [40, 58, 59, 60, 62].
147. There can be no disagreement that the proposed diversion does not offer the same coastal views as the existing footpath [41, 43, 92]. However, the diverted route does offer some views of the sea, which may increase as the breach naturally evolves. If the Secretary of State agrees with my recommendation 'Option 2' would still allow some access to the foreshore thus allowing coastal views, including the use of the Target Range, to be appreciated. I accept that in recommending 'Option 2' cul-de-sacs would be created, which is not the Applicant's preferred approach [109]. Nevertheless, such footpaths that terminate at a tidal ingress point are a common feature of the coastal environment [29] and frequently a cul-de-sac is the only way to or from a place of public interest, as is the case here.
148. It was put to me by the Applicant that the Highway Authority will have a maintenance liability for both the diverted route and the cul-de-sacs. However, the Highway Authority is only responsible for the surface of the path and the maintenance is only to a standard suitable for the use to which it is put. Therefore I attach very little weight to this comment. Additionally I see no reason that the cul-de-sacs created via 'Option 2' will be any more dangerous than the current footpath given its coastal location.
149. Although I recognise that many people enjoy the historic relationship of certain routes to various historic assets, I consider that the effects of the development itself would break that link. Moreover, the assets are barely perceptible and can be appreciated within their historic context via the interpretation board provided by the Environment Agency.
150. As was pointed out to me on my accompanied site visit, a walk along Footpath 18 allows appreciation of many rare flowers, insects, the grey seal colony and the

collection of samphire, which would be lost if stopped up as per the draft Order. On the other hand the diverted route will allow appreciation of the newly created intertidal habitat, with its own unique biodiversity. Whilst I accept that Footpath 18 allows some views of this habitat, these are restricted by vegetation [93, 94].

151. The implementation of the draft Order would severely reduce the opportunities to appreciate local wildlife and collect samphire, which would be a disadvantage. However, the Option 2 draft Order alongside the proposed diversion would provide the opportunity for both the foreshore and intertidal habitats to be appreciated.
152. It was put to me that Footpath 18 provides shelter for walkers from the prevailing weather conditions in the Humber Estuary. In particular the sand dunes and vegetation provides shelter from the wind. Nonetheless, the definitive line of the footpath provides a route across the top of the dunes and thus walkers would be exposed to prevailing weather conditions.
153. Given the foregoing, I conclude that the stopping up of the Order route would lead to a slight disadvantage to those whose rights would be extinguished by it.

*The advantages conferred by the Order*

154. The advantages conferred by the Order have been established by the grant of planning permission [86]. These include:
- Secured continuation of flood risk management infrastructure to protect the 400,000 people and businesses in communities around the Humber Estuary;
  - Improved tidal defences to the North Somercotes Area;
  - Creation of terrestrial habitat; and
  - Creation of intertidal habitat.
155. In considering the overall effect of the Order I take account that confirmation would allow the development to go ahead, meeting aspirations set out in the Humber Estuary Flood Risk Management Strategy. I am satisfied that in balancing all the matters raised that the Option 2 draft Order should be made.

**Other matters**

156. Whether the development itself is necessary, or not, is not a matter for me, having already been determined through the planning process. Nonetheless, a number of other matters have been brought to my attention. These included emergency services access and the permissive path agreement [44, 58].
157. I accept that given the history of accidents and incidents at sea in the local area coastal safety is important to local residents. However both Lincolnshire Fire and Rescue and HM Coastguard state that they have no objections to the scheme and it will not affect their ability to respond to all areas along the bank<sup>30</sup>. Without evidence to the contrary I see no reason to disagree.

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<sup>30</sup> CD 36 & CD 37

158. Objectors were concerned that the Permissive Path Agreement (Doc 7) would provide little security to their ongoing use of the existing Footpath 18 [44]. I tend to agree that such agreements provide little long term security for users and as such I only give the agreement limited weight.
159. Additionally, a number of matters were raised which were not relevant to my decision, several of them having already been determined through the planning process, or being relevant to that process, or other procedures, rather than this Order. These included the use of the path as a bridleway and the construction of the flood embankments. I do, of course, understand that these issues are of particular importance and interest to those living locally and others making use of the beach and the local area. However, I have only been able to give these matters minimal weight in this Report [47, 51, 56, 61, 62].

### **Conclusions**

160. I conclude on balance and having regard to these and all other matters raised at the Inquiry and in the written representations, that the draft Order<sup>31</sup> should be made subject to the Option 2 modifications in order to facilitate the implementation of planning permission Ref. N/132/00645/11.

### **RECOMMENDATIONS**

161. I recommend that the stopping up of highway (East Midlands)(No. ) Order 201 (Option 2) be made subject to the Option 2 Modification at DOC 8.

*Joanne Burston*

INSPECTOR

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<sup>31</sup> Option 2

## **APPEARANCES**

### **FOR THE APPELLANT:**

Mr Martin Carter of Counsel, instructed by Mr Tim Ayres, senior Lawyer,  
Environment Agency.

He called

Mr J Marshall BA(Hons), MSc MBA	Operations Manager, Natural England
Mrs D Morris BSc(Hons)	Senior Flood Risk Management Advisor, Environment Agency
Mr J Mason BEng(Hons), MCIWEM CEng, CEnv	Technical Director Black & Veatch
Mrs S Rumfitt BA(Hons) FIPROW	Self-employed rights of way consultant

### **FOR THE OBJECTORS (NORTH SOMERCOTES PARISH COUNCIL):**

Mr Jonathan Mitchell of Counsel, instructed by Mrs Shelia Pearce, Parish Clerk,  
North Somercotes Parish Council

He called

Mrs S Pearce	Parish Clerk, North Somercotes Parish Council
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### **OBJECTORS THAT SPOKE AT THE INQUIRY:**

Mrs Lynda Plater	Local resident
Mr Simon Heyes	Local resident
Mr Melvyn Kirk	Local Resident
Mrs Rosemary Stanhope	Local Resident
Mrs Chris Belton	Local resident
Mrs J Lingard	Local resident
Mr Andrew McLaren	Local resident
Mrs Jean Corbridge	Local Resident

## **DOCUMENTS**

### **Submitted to the Inquiry:**

- DOC 1      Appearances for the Environment Agency, submitted on behalf of the Applicant.
- DOC 2      Appearances on behalf of North Somercotes Parish Council, submitted on behalf of the Objectors.
- DOC 3      List and bundle of additional documents, submitted on behalf of the Objectors.
- DOC 4      Complete Version of Core Document 54, submitted on behalf of the Applicant.
- DOC 5      Letter from Grainthorpe Parish Council, Submitted on behalf of the Objectors.
- DOC 6      Accompanied site visit itinerary, submitted on behalf of the Applicant.
- DOC 7      Permissive path agreement, dated 21 June 2018, submitted on behalf of the Applicant.
- DOC 8      Option 2 Draft Stopping Up Order, submitted on behalf of the Applicant.
- DOC 9      Opening statement, submitted on behalf of the Applicant.
- DOC 10     Opening statement, submitted on behalf of the Objectors.
- DOC 11     Statement by Lynda Plater, submitted on behalf of the Objectors.
- DOC 12     Statement by Simon Heyes, submitted on behalf of the Objectors.
- DOC 13     Statement by Chris Belton, submitted on behalf of the Objectors.
- DOC 14     Statement by Jill Lingard, submitted on behalf of the Objectors.
- DOC 15     Minutes from the Parish Council meeting, 28 November 2011, submitted on behalf of the Objectors.
- DOC 16     Letter from Historic England, dated 22 December 2017, submitted on behalf of the Applicant.
- DOC 17     The Donna Nook Scheme Fact Sheet ten, submitted on behalf of the Objectors.
- DOC 18     Donna Nook Managed Realignment Scheme, Extract from the Environmental Statement Non-Technical Summary, submitted on behalf of the Objectors.



- DOC 19 Minutes from Parish Council meetings, submitted on behalf of the Objectors.
- DOC 20 Statement by Andrew McLaren, submitted on behalf of the Objectors.
- DOC 21 Statement by Jean Corbridge, submitted on behalf of the Objectors.
- DOC 22 Closing Statement of North Somercotes Parish Council, submitted on behalf of the Objectors.
- DOC 23 Closing submissions of the Environment Agency, submitted on behalf of the Applicant.