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Your Ref:

Our Ref: ROW/3174201 & 3174202

Date: 2 May 2018

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Dear Madam

**LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)  
HIGHWAYS ACT 1980 – SECTIONS 118 & 119  
WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53A(2)  
THE WILTSHIRE COUNCIL CITY OF SALISBURY (STRATFORD SUB CASTLE) SALISBURY  
FOOTPATH No.6 DIVERSION ORDER AND DEFINITIVE MAP AND STATEMENT  
MODIFICATION ORDER 2016<sup>1</sup>  
APPLICATION FOR AWARD OF COSTS**

1. I am directed by the Secretary of State for Environment, Food and Rural Affairs to refer to the Inspector's decision of 13 February 2018 confirming the above orders subject to modification. The effect of the orders was as stated in the preamble to her decision and as described in the order schedule and shown on the order plan. An inquiry into the orders was held on 23 & 24 January 2018. Wiltshire Council, as order making authority, made an application for an award of costs against Ms Penny Fulton, the sole statutory objector to the orders, before the inquiry was formally closed. The application was made on 3 grounds (as cited in the Inspector's costs report – see paragraph 5 & 6 below). A full award of costs was sought in respect of ground 1. In the alternative a partial award of costs was sought on grounds 2 & 3 on the basis of procedural unreasonableness. This decision letter deals with the Council's costs application.

### **Summary of costs decision**

2. The costs application succeeds to the extent that a partial award of costs is being made. The formal decision and costs order are set out in paragraphs 10 & 11 below.

### **Basis for determining the costs application**

3. The application for costs has been carefully considered in the light of:
- the relevant costs guidance in the Government's Planning Practice Guidance (PPG) which is applicable to rights of way cases by analogy with planning proceedings

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<sup>1</sup> The orders are as stated in the Inspector's costs report (enclosed) and in the Inspector's order decision dated 13 February 2018

- relevant published policy guidance on awards of costs in section 9 (“applications for costs”) in Defra Rights of Way Circular 1/09
- the Inspector’s decision on the orders
- her costs report
- the parties written costs submissions
- the order papers
- and all the relevant circumstances.

4. In public path diversion and extinguishment order proceedings, as for planning proceedings, the parties are normally expected to meet their own expenses irrespective of the outcome. Costs are awarded only on the grounds of unreasonable behaviour by one party resulting in unnecessary expense to another party.

### **The Inspector’s costs report**

5. The application for costs is summarised in paragraphs 3 to 16 of the Inspector's costs report a copy of which is enclosed and forms part of this decision letter. Ms Fulton’s initial response (made in writing prior to the costs application being heard) is summarised at paragraphs 17 to 22 and the Inspector’s reasoning and considerations, on the information available at the time, are at paragraphs 23 to 42. She recommended that a partial award of costs be made in respect of expense associated with the second day of the inquiry (24 January 2018).

6. At paragraph 23 of the costs report the Inspector explained that Ms Fulton was not present at the inquiry when the costs application was heard. Ms Fulton’s written costs rebuttal was therefore a preliminary response – she had not been present when the costs application was heard. This situation gave rise to further costs submissions, made in writing, following the close of the inquiry. The Planning Inspectorate provided both parties with a copy of the costs report and invited Ms Fulton to submit further written comments on the costs application. She replied via e-mail correspondence dated 22 February and 1 & 8 March 2018. The Council had no further comments to make. The parties’ costs submissions have been cross-copied and have been taken into account, along with all the other relevant information, in the determination of this costs application.

### **Reasons for decision**

7. The Inspector’s costs report concluded that an award of costs was not justified with regard to grounds 1 & 2 of the costs application. However, with regard to ground 3 the Inspector concluded that without the delays and interruptions caused by Ms Fulton the inquiry could have been concluded within one normal sitting day.

8. Having carefully considered the costs report and the parties’ written costs submissions, along with all the available evidence, the Secretary of State agrees with the Inspector’s conclusions. No award of costs is justified on grounds 1 & 2 of the costs application. But the Secretary of State also agrees with the Inspector’s conclusions regarding ground 3. He concludes that Ms Fulton’s actions prolonged the inquiry and amounted to unreasonable behaviour. As a result the Council incurred unnecessary expense in the order proceedings. The Inspector’s recommendation, that a partial award of costs be made for expense associated with the second day of the inquiry, is therefore accepted.

9. For the avoidance of doubt, the Secretary of State does not decide the amount of costs payable. This is for the parties’ agreement or, if necessary, via application for a detailed assessment in the Senior Courts Costs Office.

### **FORMAL DECISION**

10. For these reasons the Secretary of State has decided that a partial award of costs be made in favour of Wiltshire Council as set out in the costs order below.

## **COSTS ORDER**

11. Accordingly, the Secretary of State for Environment, Food and Rural Affairs, in exercise of his powers under section 250(5) of the Local Government Act 1972, and sections 118 & 119 of the Highways Act 1980 and section 53A(2) of the Wildlife and Countryside Act 1981, and all other powers enabling her in that behalf, **HEREBY ORDERS** that Ms Penny Fulton shall pay to Wiltshire Council their costs of the order proceedings before the Secretary of State limited to the expense incurred in respect of the second day (24 January 2018) of the inquiry into the orders; such costs to be assessed in the Senior Courts Costs Office if not agreed. The subject of the proceedings was the rights of ways orders more particularly described in the Inspector's decision on the orders.

12. Wiltshire Council are now invited to submit to Ms Fulton, to whom a copy of this decision letter has been sent, details of those costs with a view to reaching agreement on the amount.

Yours faithfully

*John Gardner*

Authorised by the Secretary of State  
to sign in that behalf

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# **Costs Report to the Secretary of State for Environment, Food and Rural Affairs**

**by Helen Slade MA FIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Date: 13 February 2018**

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Highways Act 1980  
and  
Wildlife and Countryside Act 1981

## **WILTSHIRE COUNCIL**

The Wiltshire Council City of Salisbury (Stratford sub Castle) Salisbury Footpath No.  
6 Diversion Order and Definitive Map Modification Order 2016

The Wiltshire Council Stratford sub Castle Footpath Linking Salisbury 24 with  
Salisbury 6 Extinguishment Order 2016

Inquiry held on 23 and 24 January 2018

File Refs: ROW/3174201 and 3174202

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**Order Refs: ROW/3174201 and ROW 3174202**

- I held a public local inquiry on Tuesday 23 and Wednesday 24 January 2018 at the Reading Room, Stratford Road, Stratford sub Castle, Salisbury, SP1 3LL into two Orders: The Wiltshire Council City of Salisbury (Stratford sub Castle) Salisbury Footpath No. 6 Diversion Order and Definitive Map Modification Order 2016 and The Wiltshire Council Stratford sub Castle Footpath Linking Salisbury 24 with Salisbury 6 Extinguishment Order 2016.
- This application was made by Wiltshire Council for either a full or partial award of costs against Ms Penny Fulton, 31 Primrose Road, Salisbury, SP2 9JR.
- The report gives details of the application.

**Summary of Recommendation: Subject to any further comments received from Ms Fulton, I recommend that a partial award of costs be made.**

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**The Submission for Wiltshire Council:**

1. The application was made by Mr Trevor Ward, Counsel, on behalf of Wiltshire Council ('the Council'). He explained at the outset that it was extremely unusual for him to make such an application in a Rights of Way case.
2. The application was made before the end of the inquiry and in relation to unreasonable conduct on the part of the sole statutory objector, Ms Penny Fulton, which had caused unnecessary costs to the Council.

**Ground 1 – Full award**

3. The matter was originally scheduled to have been determined by way of written representations which would be the expected procedure where there was just one objector. It was then arranged as a Hearing, and finally, as a result of Ms Fulton's late request to raise legal submissions by way of an inquiry, it was rescheduled as an inquiry.
4. Whilst costs are not awarded purely on the basis that someone has asked for a right to be heard, that right must be exercised in a reasonable manner, and where objections are founded on matters of law, those objections must be on a reasonable basis.
5. It is submitted that there was no reasonable basis whatsoever to the legal submissions which Miss Fulton has confirmed are her principal reasons for challenging the Orders. The basis of her legal arguments are fundamentally flawed and incorrect in law.
6. She wrongly believes that the Purple Route has been legally diverted onto the Red Route and as a result she wrongly considered that the diversion order sought should be from the Red Route to the Green Route.
7. Furthermore, Ms Fulton, has made unreasonable submissions that the Order Making Authority has not followed the correct procedure and that the Orders are legally invalid. None of her submissions have any reasonable basis.

8. Accordingly it is only as a result of those unreasonable submissions and her request for an inquiry to deal with them, that the matter has needed to be dealt with by way of a public inquiry rather than written representations.
9. This has caused the Order Making Authority to unnecessarily incur expenses that it would not otherwise have incurred. A full award of costs is respectfully requested.

### **Ground 2**

10. Alternatively in June 2017 The Planning Inspectorate informed the Order Making Authority that as neither party wished to be heard the matter would be dealt with by written representations, and a timetable was set.
11. Subsequently, in July 2017 The Planning Inspectorate received a late request from Ms Fulton indicating that she now wished to be heard. The Order Making Authority was informed to prepare for a Hearing, with a timetable being set.
12. Then in August 2017 Ms Fulton belatedly and unreasonably changed her mind yet again and requested an inquiry. The Planning Inspectorate duly informed the Order Making Authority and a further timetable was set.
13. Those changes, at the request of Ms Fulton, were procedurally unreasonable and caused wasted costs which the Order Making Authority respectfully submits should be paid by her. Whilst identifiable, such costs would not be large.

### **Ground 3**

14. Further, or alternatively, uncooperative behaviour is an example of unreasonableness leading toward an award of costs. The Order Making Authority respectfully submits that the behaviour of Ms Fulton in the conduct of the inquiry has been uncooperative and unreasonable.
15. The result of that was the need to go into a second day when matters could have been completed on the first day, even if there had perhaps been a need to conduct the site visit on the second day.
16. Accordingly there have been wasted costs attributable to the need for the inquiry to sit for a second day, and those costs should be paid by Ms Fulton.

### **The initial submission by Ms Penny Fulton (made in writing prior to the costs application being heard in her absence)**

17. The Planning Inspectorate allows an inquiry to take place only after a proper scrutiny of a 'relevant persons' documents for valid legal challenges. Only after approval in meeting those legal requirements will any objector's legal submission be deemed to justify a public inquiry.
18. The inspector would be exercising personal discrimination in considering the costs application to have been validly made.

19. Ms Fulton believes that this attitude set the tone of the proceedings from the start and she claims she was prevented from speaking; was treated as interrupting whenever she said anything; and felt bullied and unwelcome. She feels that should have been invited to speak in the first place.
20. Ms Fulton read the 15<sup>th</sup> Revision January 2018 'Guidance for Considering Objections to Definitive Map and Public Orders, England' (*sic*) before the inquiry began and followed its recommendations as to when the appropriate time to speak and what matters would occur during procedure. She believes that she knows that she had the right to speak at the times she tried to do so, about matters which were relevant to the stage reached and what had been said. But she was constantly castigated for 'speaking out of turn'.
21. It made it extremely difficult to maintain any thread and disadvantaged her ability to put a clear and coherent contribution.
22. She states that it should be obvious that she has an extremely modest income and this threat of costs is an injustice and totally unjustified.

### **Inspector's Considerations**

23. Ms Fulton attended both days of the inquiry but declined to wait and hear the costs application. Her rebuttal is therefore preliminary as she did not hear the grounds. However, having regard to the advice on dealing with applications heard in the absence of the relevant party, I consider it is appropriate for me to make some observations to assist in determining the matter.
24. An award of costs can only be made against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily. The decision in the associated Order is not relevant to any decision on costs.
25. The application for costs was implied before the inquiry started, and was made before I closed the inquiry. It is a validly made application.

### **Grounds 1 and 2**

26. The procedure for determining the type of event which is held in such cases is set out in internal procedural guidance. The letters inviting participants to agree to using the written representation procedure were sent out by The Planning Inspectorate on 7 June 2017. The papers on the file show that two parties, one of which was Ms Fulton, did not receive that communication. When letters were sent on 26 June 2017 setting out the timetable for the written representation procedure, both parties responded on 3 July 2017 seeking copies of the earlier letter. Details were sent to Ms Fulton on 4 July 2017 and she responded the following day asking to be heard.
27. Although the numbers involved in the case would have suggested that a public inquiry was the relevant procedure in those circumstances, it was decided by The Planning Inspectorate to initially offer a Hearing. Letters to that effect were issued on 7 July 2017, by which time a second party had also asked to be heard.



28. On the same day, having by then had the chance to read the Guidance Booklet properly, Ms Fulton emailed The Planning Inspectorate to say that she wanted a public inquiry, having not previously realised that there was a difference between a hearing and an inquiry.
29. There was subsequently an exchange of emails between The Planning Inspectorate and Ms Fulton, resulting in the final decision to hold an inquiry being made on 13 July 2017, the procedure being initiated by The Planning Inspectorate on 26 July 2017, with the new timetable being issued on 2 August 2017. Ms Fulton indicated that her legal submissions (eight points) would require an inquiry length of two or three days.
30. The Council objected to the use of the inquiry procedure, but the decision was made by The Planning Inspectorate.
31. It is regrettable that the original letter offering a choice of procedure did not reach Ms Fulton. Having been made aware of her right to choose, she exercised it without delay. As soon as she had acquainted herself with the guidance and realised that she had misunderstood the nature of the two oral procedures, she clarified her intention to The Planning Inspectorate. I therefore consider that the use of the inquiry procedure was determined as soon as it could have been and that The Planning Inspectorate was entitled to make that decision based on the information provided by Ms Fulton.
32. Although the Council considers that the basis for her legal arguments was flawed, and she was certainly mistaken on a number of issues, there were legal issues which it was reasonable to pursue. I examine briefly in my decision the fact that the Orders could have been made in a different way which might have been less confusing for the public.
33. Given the facts of the case, I am satisfied that an inquiry was the most appropriate way of dealing with the matter and being able to address the legal concerns expressed by Ms Fulton. Furthermore, a Hearing is usually best conducted when there are only a small number of participants or members of the public present. In this case there was considerable local interest and a Hearing would have been difficult to manage.
34. It follows that I do not consider that the costs application should succeed on Ground 1 or on Ground 2.

### **Ground 3**

35. Ms Fulton was late arriving at the inquiry due to her unexpected need to return home. Although I opened the inquiry on time at 10.00am I was unable to commence the inquiry proper until 10.15 am. Furthermore, there is no doubt that the inquiry took longer than it needed to largely as a result of the time that was spent in trying to focus Ms Fulton on the correct procedural behaviour. Her written submissions were rather difficult to follow and littered with references for which no copies were provided, and when contributing verbally she frequently digressed from the topic in hand. On one occasion during the afternoon I had to adjourn the inquiry for 10 minutes to try to focus Ms Fulton's mind on the task in hand.

36. My opening announcement took nearly twice as long as usual as it was necessary to repeatedly explain the procedure to Ms Fulton. However I was also required to spend some time exploring a legal issue with the Council which no-one else had identified earlier in the process, and this also took a little time to resolve.
37. Despite the difficulties, I managed to conclude hearing all the witnesses by 4.30pm and sought the views on the parties with regard to finishing the inquiry that day. The venue was not available during the evening, and Counsel for the Wiltshire Council confirmed that there would be a costs application, in addition to closing submissions.
38. Given that I would have had to allow reasonable time for Ms Fulton to consider a response to the Costs Application I decided that it was more appropriate to return the following day to hear both the closing submissions and the costs application. We agreed to resume at 9.30am the following day.
39. Having had the time to reflect, Ms Fulton presented a lucid and more flowing closing submission which was helpful in clearly identifying her final position. Having heard the remaining submissions I adjourned the inquiry at 10.50am to carry out the site visit; Ms Fulton having agreed to accompany us, and then leaving before we returned to the venue. She had already given me an initial written response to the impending costs application.
40. I returned to the venue at 11.45am to hear the costs application and closed the inquiry at 11.55am.
41. Without the delays and interruptions caused by Ms Fulton's lack of understanding of the procedures and the law, I consider that the inquiry could have been concluded within one normal sitting day. However, the overnight break did provide an opportunity for her to re-focus and her oral and written submissions the following morning were clearer and more helpful. It is regrettable that she was unable to achieve this earlier in the process.
42. As to the conduct of the inquiry, I am satisfied that it was handled in accordance with the relevant Rules and Regulations and that I made every attempt to assist Ms Fulton without causing prejudice to other parties. I have dealt with this issue in my Order decision.

### **Recommendation**

43. Subject to any further comments which Ms Fulton may now provide, I recommend that a partial award of costs be made against her in favour of Wiltshire Council in respect of their costs associated with the second day of the inquiry.

*Helen Slade*

**Inspector**