



## Costs Decision

Inquiry held on 17 December 2019

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 19 NOVEMBER 2020**

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### **Costs application in relation to case Ref: ROW/3210139**

- This application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, Section 250(5).
  - The application is made on behalf of Mr Padley for a partial award of costs against Lincolnshire County Council.
  - The inquiry was held in connection with the Lincolnshire County Council, addition of Public Footpath Number 1147 Middle Rasen, Definitive Map Modification Order 2017.
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### **Summary of Decision**

1. The application for an award of costs is refused.

### **The Submissions on Behalf of Mr Padley**

#### ***Unreasonable behaviour***

2. Lincolnshire County Council ("the Council") has behaved unreasonably in two key respects:
  - (a) By allowing/failing to prevent the 30-year delay between its resolution to make the Order and the making of the Order; and,
  - (b) By changing its position from (i) its resolution to make the Order (at which time it must have been satisfied that the right of way was, at the lowest, "*reasonably alleged to subsist*") to (ii) its initial opposition to its own Order, followed by, more recently, its change of stance to a neutral position.

#### ***Unreasonable delay***

3. On any objective consideration, an almost 30-year delay between determining to make the Order (2 September 1988) and actually making the Order (12 June 2017) is manifestly unreasonable.
  4. Whilst it might be considered reasonable for the Council to seek to divert a footpath in an attempt to forestall objections to a Modification Order, and that this could account for a temporary delay, it is not possible for it to rely on any initial attempts it may have made to negotiate such a diversion in the early 1990s. Such attempts cannot explain the ongoing delay which then lasted for decades.
  5. That surveying authorities are expected to conduct the review of the definitive map in a timely fashion is evidenced in the terms of the Wildlife and Countryside Act 1981 ("the 1981 Act"). Not only does Section 53(2) of the Act provide that the authority "*shall*" "*as soon as reasonably practicable*" make
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such modifications as appear requisite, but it further provides for an appeal to the Secretary of State in circumstances where the application has not been determined within 12 months. The intention behind this statutory framework was clearly to ensure that applications would be efficiently processed through to their conclusion.

6. It cannot be disputed that a delay of 30 years is unreasonable in the circumstances.
7. Attention is drawn to paragraph 4.13 of Defra Circular 1/09, which states that "*authorities should make the order as soon as reasonably practicable after they have concluded that one should be made*".
8. The delay in this case is particularly unreasonable given that it is accepted that the path fell into disuse a number of decades before the application was made. This meant that speed in processing the Order was important due to the age of the witnesses at the time of the application. The unreasonable delay has caused upset to the objectors (Mr and Mrs Parker).
9. It is notable that during the lengthy period of delay, Mr Padley made various efforts (many of which were successful) to hold the Council to account for its failures to deal with applications in a timely manner. In particular, two complaints were taken to the Ombudsman in 2002 and 2005. In both cases, the Ombudsman found that there had been maladministration by the Council.
10. The wholly unreasonable delay has left Mr Padley in a position where he cannot call live witnesses in support of the user case. It has been necessary to engage professional representation in light of the Council's hostile and then neutral position. Had the Council dealt with the matter in an expedient manner he would not have been placed in this position. Indeed, it is likely that if the Council had made the Order in 1988 or in 1991, it would itself have made the case for confirmation.
11. By reference to the Planning Practice Guidance ("the Guidance"), Mr Padley considers the initial resolution by the Council to grant the Order to be equivalent to the determination of a planning application. The Council's unreasonable delay in making the Order took place after the determination of the application and it has led to what would otherwise have been unnecessary expense being incurred by Mr Padley during the inquiry proceedings. It is evidently behaviour that can be the subject of an application for an award of costs.

***Unreasonable decision not to support the order***

12. It is recognised that authorities are able to object or to take a neutral stance regarding Orders they have made, provided they have a reasonable basis for doing so. As is made clear in the Planning Inspectorate's Advice Note 1, this will usually occur when an authority has been directed to make an Order, or new evidence has come to light that leads the Council to take a different view.
13. No new evidence has come to light that contradicts the case to that before the Council when it determined to make the Order and no relevant evidence has been put forward by any objector to the Order. The Council was aware of this when it undertook, without reference to the applicant or Mr Padley, to review its case in respect of the Order. Such new evidence that has been produced to the Council since it determined to make the Order over 30 years ago is wholly

supportive of the legal existence of the footpath. Mr Padley can see no reasonable basis on which the Council changed its position to one of hostility and then neutrality to the confirmation of the Order.

14. The Council's decision to oppose its own Order amounts to unreasonable behaviour that has caused Mr Padley unnecessary expense in seeking additional supportive evidence, bearing in mind it now fell on him to make the case in support of the Order. This involved him obtaining further documentary evidence by inspecting the national records in Kew.
15. Mr Padley contends that in the circumstances brought about by the Council's own delay in making the Order it would be reasonable for them to explore any evidence that might have been available in the 1910 Finance Act field books. The Council did not do so. Moreover, when it was provided with this evidence, it did not properly evaluate the evidence within the context of the other available relevant evidence. It has failed to properly discharge the duties placed on it by the 1981 Act. As a result, it merely amended its stance from hostile to neutral. This left Mr Padley in a position where he was obliged to seek professional advice and legal representation.

#### ***Unnecessary and/or wasted expense***

16. As a result of the unreasonable behaviour of the Council, Mr Padley has incurred costs he would not otherwise have had to incur. Namely, the costs of travelling to the national records office and being represented by counsel at the inquiry.
17. Mr Padley seeks a partial award for the costs incurred in relation to the above.

#### **The Response on Behalf of the Council**

18. The length of time taken to make the Order arises from the large number of applications and an insufficient number of staff at the time, although some work was undertaken to sound out several of the affected and interested parties on the feasibility of diverting the claimed route. No consensus on an alternative route was reached with the parties at that time.
19. In accordance with the Definitive Map Modification Order Application and Case Priority Schedule ("the Priority Schedule"), which was adopted by the Council in 2006 to manage the order in which applications and cases are progressed, work on the case recommenced in 2017 and the Council made the Order on 12 June 2017 in line with its determination of September 1988. It is believed that the Ombudsman reports led to the formulation of the Priority Schedule.
20. In mitigation, the Council points out that no correspondence has been received from any party chasing for the Order to be made since the process of investigating the feasibility for diverting the claimed route was abandoned in 1992. Correspondence was sent to the applicant in relation to the application on four separate occasions: October 1996, March 1998, November 2006 and May 2009. On the penultimate occasion the Council informed the applicant of the adoption of the Priority Schedule, and on the final occasion the Council informed the applicant of a revision to the Priority Schedule by way of the addition of an exception criterion point by which an application may be given higher priority if it is shown to meet any of the other exception criteria. None of these letters were replied to or invoked a response from the applicant or any

- party to chase for the Order to be made or to appeal against the standing of this case in the Priority Schedule.
21. It should be noted that in November 2006 the Council also wrote to the supporter and every other party who had made applications to modify the definitive map regarding the implementation of the Priority Schedule. It wrote again in May 2009 informing them of the revision to the Priority Schedule. Anyone can appeal the standing of an application or case in the priority Schedule. The Council has no record of Mr Padley making an appeal against the standing of this case in the Priority Schedule.
  22. The Council believes that it has not acted unreasonably or inappropriately in making the Order or during the inquiry process.
  23. The decision by the Council to make the Order was made because it considered the evidence was sufficient to demonstrate that a public right of way was "*reasonably alleged to subsist*".
  24. The Council initially determined to oppose the confirmation of the Order because it took the view that the evidence on the whole fell short of the balance of probability test required for the confirmation of the Order. However, the Council's decision did not take into account the length of time it took to make the Order. In May 2019, the Council reviewed its initial position to take into account other extraneous factors, namely the length of time it took to make the Order, and the discovery of further evidence by Mr Padley and determined to adopt a neutral stance in respect of the confirmation of the Order.
  25. The change in stance, the informing of the applicant and Mr Padley about this and the submission of its revised statement of reasons to the Planning Inspectorate were carried out prior to the issuing of the inquiry timescale. This means that all parties would have been aware of the Council's neutral position either leading into the inquiry process or at the relevant stage of the process when they received the Council's revised statement of reasons. This stance is one the Council is entitled to take as there is nothing in the legislation or case law which requires an authority to support an Order. This is also supported by the Planning Inspectorate's Advice Note 1 and several decisions on behalf of the Secretary of State for Environment, Food and Rural Affairs.
  26. Due to the neutral stance adopted by the Council, its revised statement of reasons merely provides a summary of the documents which have been submitted or discovered in relation to the Order. It is for the parties supporting and opposing the Order to promote the confirmation or non-confirmation of the Order.
  27. For the record, the Council also points out that it suggested that the written representations process be used to determine the Order due to the lack of witnesses who would be available to attend the inquiry.

### **Supplementary Statement for the Council**

28. It has been suggested that Mr Padley has incurred the unnecessary costs of engaging a professional rights of way consultant as a result of the change in the Council's stance.

29. Whilst the Council adopted a position to oppose the Order in its decision of 19 July 2018, this was not communicated to anyone outside of the Council as it was recognised, prior to submitting the case to the Planning Inspectorate, that the decision did not take into account the length of time it had taken to make the Order. As a result, at the end of August 2018 the parties concerned, including Mr Padley, were informed about the submission of the Order, representations and necessary documentation to the Planning Inspectorate and that the Council was taking a neutral stance in respect of the quasi-judicial process which would be used to determine the Order.
30. Mr Padley would not have been aware of the Council's initial decision to oppose the confirmation of the Order until 20 March 2019 when he was furnished with a copy of the decision at his request, by which time it appears he had already engaged the services of a consultant.
31. In his email of 17 February 2019 sent to the Clerk of Middle Rasen Parish Council, which the Council was copied into, Mr Padley states that: *"I am myself a party to the above order as a supporter of it and have decided to engage the services of a professional rights of way consultant to make the case for me and present the evidence"*.
32. The use of the words *"I have been asked"* and *"we"* in the subsequent emails of 19 February 2019 and 20 March 2019 suggest that he was already acting under the guidance of a professional rights away consultant at that stage.
33. The Council submits that Mr Padley has not been disadvantaged or incurred any *additional* costs as a result of any change in stance because at the time he engaged a consultant he would have understood the Council's stance was a neutral one and he would not have been aware that the Council had ever considered opposing the confirmation of the Order.
34. As pointed out above, the Council maintained that it was adopting a neutral position in May 2019, before the public inquiry timetable had been issued, and it has continued to maintain this stance throughout the inquiry process.

### **Reasons**

35. I have considered this application for an award of costs in light of the Guidance. This advises that costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense.
36. The nearly 30-year delay between the Council reaching a decision to make an Order and the making of the Order is clearly unreasonable. As set out in my interim decision, it leads to difficulties for applicants and other interested parties. It is contrary to the advice contained in paragraph 4.13 of Defra Circular 1/09. I also agree with Mr Padley that such a lengthy delay cannot be explained by reference to exploring the potential diversion of this route in the early 1990s. Nor is it reasonable to argue that the lack of responses by particular parties to the delay in this case or the formulation of the Priority Schedule is a mitigating factor.
37. Surveying authorities should put in sufficient resources to undertake their statutory duties. I also find it significant that the Council had done the hard part by evaluating the evidence and reaching its decision. All that was required

was for the administrative process involved in the making of the Order to be undertaken. Although the complaints made to the Ombudsman do not involve this case, they suggest that the delay involving the making of the Order was not an isolated incident. Nonetheless, the issue to be determined is whether the delay in this case has led to unnecessary expense being incurred by Mr Padley. Before considering this issue, I address the stance taken by the Council in respect of the confirmation of the Order, which forms the second limb of this application.

38. There is no requirement for surveying authorities to support an Order at an inquiry. This is the case even if they take the view that the evidence supports the confirmation of an Order by reference to the existing evidence or the presentation of additional evidence. Therefore, a decision to take a neutral stance is unlikely to be viewed as unreasonable behaviour. However, there will be cases where the change in stance of a party may lead to an award of costs. In terms of Mr Padley's assertion that the Council is likely to have taken a different stance regarding the Order, if it had been made sooner, this cannot necessarily be presumed to be the case.
39. The Council submitted the Order to the Planning Inspectorate for determination by the Secretary of State on 24 August 2018. The covering letter and the original statement of reasons<sup>1</sup> both express the view that the Council did not consider the Order should be confirmed. However, the letter also states that the Council wished to take a neutral stance. I note that the Council says Mr Padley and others were informed in August 2018 that it would adopt a neutral stance.
40. From looking at the available correspondence it is apparent that the Planning Inspectorate had generally understood that the Council were taking a neutral stance and this view was communicated to the applicant (Middle Rasen Parish Council) during the early part of 2019. Mr Padley notified the Planning Inspectorate on 21 March 2019 that it appeared that the Council would be objecting to the confirmation of the Order. This corresponds with the Council's assertion that it was around this time that Mr Padley was first provided with a copy of its resolution regarding the Order.
41. The Council informed the Planning Inspectorate on 3 May 2019 that formal authorisation had been granted to oppose the confirmation of the Order, but after further consideration it had formally resolved to take a neutral stance. The original statement of reasons had been withdrawn and a revised statement would be submitted. This email also states that the Council had informed Mr Padley of the change in stance. The Planning Inspectorate issued its start date notice for the inquiry in June 2019.
42. It is apparent from the above that the parties had previously been informed that the Council was adopting a neutral stance. Mr Padley was only made aware in March 2019 that the Council had actually resolved to oppose the Order and this resolution was formally changed by 3 May 2019. The inquiry was organised on the basis that the Council were taking a neutral stance. Even if there was no reasonable basis for the Council to oppose the Order, this position has not been maintained.

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<sup>1</sup> The statement is dated 19 July 2018

43. As outlined above, there is no requirement for surveying authorities to take an active role in supporting Orders at public inquiries. The Council's position at the time of the issuing of the start date notice by the Planning Inspectorate was clearly one of neutrality. The parties looking to prepare their statement of case would have been aware of the Council's stance and prepared their cases accordingly. If this change in position had occurred later there may be some justification for an award of costs. However, there was a relatively short period between Mr Padley being informed of the Council's resolution to oppose the confirmation of the Order and its subsequent neutral stance. It follows that I do not consider the Council's neutral stance to have been unreasonable. Nor, in light of its timing, can the Council's change from its original stance be seen as unreasonable behaviour.
44. In light of my conclusions above, the issue to be determined is whether the Council's unreasonable behaviour arising from the lengthy delay in making the Order led to Mr Padley incurring unnecessary expense. The case in support relied upon the consideration of documentary evidence supported by evidence of use. Such a delay in bringing the matter forward for a final determination invariably, as arises in this case, disadvantage parties in respect of the consideration of user evidence. However, significant reliance was placed on the documentary evidence and it was not disputed that the route had been used in the manner set out in the evidence forms.
45. It was the Council and the applicant's view that this Order could be determined from an exchange of written representations. However, Mr Padley requested that a public inquiry be held. Mr Padley's proof of evidence sets out his experience in rights of way matters and it is apparent that he engaged the services of a consultant to prepare the statement of case in support of the confirmation of the Order. In addition to the submissions on behalf of Mr Padley and the neutral comments of the Council, a letter was sent by Mrs Parker on 19 January 2019. Whilst Mrs Parker raises concerns about various matters affecting her property, it is acknowledged that these are not relevant considerations in relation to my decision on the Order.
46. Mr Padley is seeking the costs for the work undertaken by counsel in respect of the inquiry. Whether he needed to additionally engage the services of a barrister in the circumstances is not relevant to this application. He was entitled to seek whatever representation he considered appropriate, but for him to be awarded costs it needs to be shown that the unreasonable behaviour led to these costs being incurred. In my view he has not demonstrated that the unreasonable delay led to the need to instruct counsel to present the case at the inquiry.
47. In terms of the additional research undertaken at the national records office, he chose to make the case in support of the Order. His decision to seek further evidence is what might be expected of someone taking such an approach. It cannot be viewed as arising from the unreasonable conduct of the Council.
48. The costs regime is in place to discourage parties acting in an unreasonable way and award costs where this behaviour has led to a party incurring unnecessary expense. I have accepted that the Council acted unreasonably regarding the time taken to make the Order, but I do not find that this led to Mr Padley incurring unnecessary expenses.

49. For these reasons I do not conclude that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated.

*Mark Yates*

**Inspector**