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| **Costs Decision** |
| Inquiry held on 13 April 2021 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 2 August 2021** |

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| **Costs application in relation to case Ref: ROW/3247584**  |
| * This application is made under the Highways Act 1980, Schedule 6 (as amended) and the Local Government Act 1972, Section 250(5).
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| * The application is made on behalf of Spitfire Bespoke Homes Limited (“the Applicant”) for a partial award of costs against Milton under Wychwood Parish Council (“the Parish Council”).
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| * The inquiry was held in connection with the West Oxfordshire District Council Milton Under Wychwood Claimed Footpath (Whole) Public Path Extinguishment Order 2019.
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**Summary of Decision**

1. A partial award of costs is made.

###### The Submissions on Behalf of the Applicant

1. This application relates to the Applicant’s costs of producing a proof of evidence and attending the inquiry. It is made on the basis that the Parish Council has behaved unreasonably thereby causing the Applicant to incur expense unnecessarily.
2. The Planning Inspectorate (“PINS”) gave notice that the Order would be considered at a public inquiry and a timetable was produced. Following provision of the order making authority’s (“OMA”) statement of case (“SOC”) the parties were invited to reconsider the appropriate procedure for determining the Order.
3. An email from PINS, dated 17 February 2021, states “*In accordance with the legislation, as the Parish Council made an objection to the above Order an inquiry has been arranged. However, having received West Oxfordshire DC’s statement of case, the Inspector asks whether parties would be prepared to reconsider the procedure. It is suggested that an exchange of written statements with an unaccompanied visit by the Inspector should be sufficient for him to determine the Order”.* Having received the OMA’s SOC the Inspector had clearly taken the view that a public inquiry was unnecessary to enable a determination of the Order.
4. According to the aforementioned email the OMA had previously indicated its agreement to the written representations procedure and again, by a further email dated 22 February 2021, the OMA stated “*the Council, as Order Making Authority, is agreeable for the matter to proceed with the Written Representation procedure should the Inspector feel the issues can be considered this appropriate*”.
5. By email of 19 February 2021 James Yeoman of Savills, on behalf of the Applicant, said “*I have informed my client, Spitfire Bespoke Homes, of this scenario. For the record, I report that Spitfire support the proposed written reps route and would be content for the change in procedure. I appreciate that this question has not been put directly to us, though I hope this is useful information*”.
6. As a result of the foregoing, a public inquiry has been held solely at the insistence of the Parish Council, despite the Inspector having clearly indicated that he thought the written representations procedure would be an appropriate method of determination and one that would have saved the parties considerable expense.
7. By an email of 22 February 2021 John Pratt of the Parish Council confirmed the unanimous resolution that they would attend the Inquiry on 13 April 2021 (this did not address the point). It was then stated “*We note from the PINS booklet ‘****Wildlife and Countryside Act 1981 DEFINITIVE MAP ORDERS: CONSISTENCY GUIDELINES*** *First issued April 2003’ that it is necessary to offer the same 78 UEFM to PINS for scrutiny as annexed support to the Statement of Case of MUW PC. This will be the third occasion of our having to submit the same 78 UEFM to a public body to uphold our case*”. That email was headed “*Milton under Wychwood Claimed Footpath (Whole) Public Path Extinguishment Order 2019*” and was not in any way concerned with the DMMO.
8. By correspondence dated 2 March 2021 from PINS regarding the scheduled Pre-Inquiry Meeting the parties were reminded of the purpose of the inquiry. The letter states “*The Inspector wishes to make it clear that the inquiry is being held in connection with the order made to extinguish the claimed footpath. This is distinct from the application to add the footpath to the definitive map and statement, which is a matter for Oxfordshire County Council to determine*”.
9. The test for the extinguishment of a public path is set out in Section 118 of the Highways Act 1980. This requires the Inspector to consider the expediency of the Order, including likely future use, and the effect the extinguishment of the right of way would have on properties served by the path. The latter is irrelevant, there being no properties that are served by the claimed path. The Inspector’s only real concern is the expediency question.
10. Against the statutory requirements and the Inspector’s reminder of the purpose of the inquiry the Parish Council has submitted a SOC that begins (substantively) “*This statement is in respect of an application of 11 December 2018 by MUWPC to Oxfordshire County Council (OCC) for establishment of a new public footpath along the Northern perimeter of the field known as Calais Field behind The Sands plots Nos. 33 to 41 and adjacent to Calais Cottage to be adopted under a Definitive Map Modification Order (DMMO) … The MUWPC application to OCC was supported by 78 certified copies of UEFM submitted by local residents in October 2018 demonstrating histories of use, synergy of justification and alignment, and the strongly expressed need for retention of the footpath not least for it still to be used simply because of preference for it, especially in wet months …*”. Not only is the foregoing excerpt clearly referable to the DMMO application, the (very limited) extent to which it makes any reference to future use is also referable to the evidence questionnaires which are concerned with past use.
11. Much of the remainder of the Parish Council’s SOC is concerned with the ability to re-open the claimed footpath, practically speaking. Despite being the only objector, nowhere in their SOC is any attempt made to address the questions that arise under Section 118 of the Highways Act 1980 and the way in which the Inspector should approach the Order. Furthermore, despite the clear direction that anyone wishing to give evidence at the inquiry must ensure their proof of evidence is received by the Secretary of State by 16 March 2021, the Parish Council has produced no evidence.
12. The Applicant had made the point very clearly in its SOC that the Parish Council’s case appeared to be based on user evidence that supported the DMMO (concerned with past use) and did not address the questions that are central to the determination of the Order such as likely future use in light of the changed character of the way (see paragraphs 5.4 to 5.6). The Parish Council has made no attempt to address in evidence the very pertinent issues raised by the Applicant, despite the point having been clearly raised.
13. The only party who required the Order to be dealt with by a public inquiry has not produced any evidence at all in respect of the Order, resulting in the highly unusual procedure being adopted of the Parish Council’s SOC being treated as its evidence, notwithstanding that it is a submission by a member of the Parish Council. That submission is unsupported by any evidence in so far as the relevant legal test is concerned and it is clear that the written representations procedure would, in these circumstances, not only have been far less expensive and more convenient, it would also have been the most appropriate way of determining whether to confirm the Order in light of the documents that have been submitted and relied upon by the Parish Council.
14. As a result of the foregoing the Applicant has incurred expense that could very well have been (and should have been) avoided had the Parish Council not insisted upon a method of determination that every other party, PINS included, considered to be unnecessary. Those expenses include the costs of producing a proof of evidence and attendance at the inquiry by the witness (also the party instructed to deal with matters on a day to day basis) and counsel.
15. The Inspector is invited to conclude that the Parish Council’s insistence on the public inquiry (or at least its complete failure to even address the question very clearly put for the parties’ consideration, resulting in the inquiry procedure progressing) was wholly unreasonable in the circumstances, further exacerbated by the failure to observe the mandatory direction to produce evidence and its failure to observe the reminder that the inquiry was concerned only with the Order and not the DMMO. The fact that the Parish Council is unrepresented should make no difference. It has chosen to participate in a process (despite an alternative being suggested by PINS) and it was incumbent on the Parish Council to understand the implications for all parties of the approach that it preferred despite the indication given by the Inspector in the correspondence dated 17 February 2021.
16. Despite the Parish Council wanting to engage in a public inquiry it did not cross-examine any of the witnesses. An inquiry is the opportunity to challenge the cases of other parties. The Applicant has had to incur excessive costs as a result of this conduct.

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

1. The Parish Council has seen the application for costs, and they expressed dismay at it. They have not been fully aware of how the events have evolved. The Parish Council has sought to pursue the application to add the path to the definitive map. If the Order is not confirmed, they will pursue their application.
2. It is refuted that the Parish Council has behaved unreasonably. They have followed the protocols and guidance of Oxfordshire County Council for claiming lost footpaths. The decision of the OMA to extinguish the path is an obstacle to their application.
3. Their conduct has not been unreasonable. The Parish Council has conducted itself in a reasonable manner.

 **Reasons**

1. Ihave considered this application for an award of costs in light of the Planning Practice 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.
2. The decision to hold a public inquiry was taken by PINS as the objection was submitted by a local authority. However, the letter of 17 February 2021 from PINS asked the parties whether they would be prepared to reconsider the procedure. I had suggested that it should be possible for the case to be determined from an exchange of written representations and a site visit. This letter only raises the possibility that a public inquiry was not needed. The response from the Parish Council did not agree to the written representations procedure. It is open to an objector to pursue their objection at an inquiry but in doing so there is an expectation that they will do so to a reasonable extent.
3. Given the references in correspondence from the Parish Council to their application to add the path to the definitive map, it was made clear by PINS in the letter of 2 March 2021 that the inquiry was to consider the Order made to extinguish this path. I also made this point at the pre-inquiry meeting held on 24 March 2021. Further, it is evident that the SOC submitted on behalf of the Applicant outlined the relevant issues for consideration. Therefore, the Parish Council should have been well aware of the purpose of the inquiry.
4. The failure of the Parish Council to submit any proofs of evidence is not necessarily unreasonable behaviour. It was entitled to rely on any relevant points made in the SOC. In terms of its SOC, this refers to the evidence of use supplied in support of the application to modify the definitive map. Whilst there is the potential for such use to continue, the Parish Council did not rebut the assertion by the supporters that the changes to the site would lead to there being limited public use of the path in the future.
5. I noted in the Order Decision that it is not possible to undertake a comparison exercise in terms of use at the present time due to the whole of the path not being available. The Parish Council’s assertion that the path could be made available is not wholly irrelevant. Further, they challenged the OMA’s suggestion that the reinstatement of the path could lead to anti-social behaviour.
6. As outlined above, the Parish Council addressed a couple of relevant points. However, it appears to me that they did not fully recognise the purpose of the inquiry. This was most apparent in the lack of any questions from Mr Pratt when he had the opportunity to cross-examine witnesses. Whilst I appreciate the difficulties posed by the path presently being unavailable, no case of any note was pursued by the Parish Council on the main issue, namely the extent to which the path would be used in the future if it were available to use. Furthermore, there is nothing in the response of the Parish Council which addresses the particular points made by the Applicant in support of the costs application.
7. Some latitude should be given to unrepresented parties when they conduct cases at public inquiries. Nonetheless, having persisted with the inquiry process, the Parish Council needed to justify its position in objecting to the Order. I do not find that they did so to any meaningful extent, and on balance this constituted unreasonable behaviour.
8. This unreasonable behaviour led the Applicant to incur unnecessary expense in relation to the attendance by Counsel and the witness at the inquiry. However, the same cannot be said to apply to the costs incurred in the production of the Applicant’s proof of evidence. There is a real possibility that costs would have been incurred by the submission of a further statement if the matter had continued by way of the written representations process.
9. It follows from the above that I conclude that a partial award of costs should be made in favour of the Applicant. I consider that these costs should be limited to those incurred when attendance was required in relation to the inquiry.

**Costs Order**

1. In exercise of the powers under Section 250(5) of the Local Government Act 1972, the Highways Act 1980, Schedule 6 (as amended) and all other enabling powers in that behalf, **IT IS HEREBY ORDERED** thatMilton under Wychwood Parish Council shall pay Spitfire Bespoke Homes Limited the costs incurred when the attendance of Counsel and the witness were required in relation to the inquiry, such costs to be assessed in the Senior Courts Cost Office if not agreed. The proceedings relate to those described in the heading of this decision.
2. The Applicant is now invited to submit to the Parish Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Mark Yates

**Inspector**