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| **Costs Decision** |
| Second Inquiry held on 8 November 2022 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date:15 February 2023** |

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| **Costs application in relation to case ref:** **ROW/3238626M1** |
| * This application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, Section 250(5).
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| * The application is made on behalf of Devon County Council (“the Council”) for a partial award of costs against Mr R. Berry in relation to the second inquiry.
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| * The inquiry was held in connection with the Devon County Council (Bridleway No. 48, East Down and Bridleway No. 48, Marwood) Definitive Map Modification Order 2017.
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**Summary of Decision**

1. An award of costs is made.

###### Submissions on behalf of the Council

1. The Council applies for a partial award of costs against the principal objector, Mr R. Berry. This is in respect of the costs incurred in preparing for and attending this resumed part of the Inquiry on 8th November 2022.
2. The Planning Inspectorate’s rights of way guidance booklet explains in paragraph 8.2: “*… if the order is decided by way of a hearing or an inquiry, anyone can apply for an award of costs against another party. To be awarded costs, you need to show that you incurred unnecessary or wasted expense because another party acted unreasonably. The costs must be quantifiable and incurred in the hearing or inquiry process*.”
3. ‘Reasonableness’ is an ordinary English word and here used in its ordinary meaning. It takes its meaning from its context which in this case are the issues, and the evidence produced to deal with them, at the Inquiry.
4. Accordingly:
* There must have been a hearing or inquiry. There has been an inquiry.
* The other party has acted unreasonably. Mr Berry and those representing him have acted unreasonably. This will be explained below.
* There has been unnecessary or wasted expense. This will be explained below.
1. As is evident from the Planning Inspectorate’s letter of 31st March 2022, Mr Dunlop objected to the Inspector’s proposed amendments to theOrder and asked for the inquiry to be reopened, asserting not merely objections but the existence of new evidence that should be heard.
2. It is always possible for objections to modifications to an Order to be dealt with more expeditiously, and less expensively, by way of written representations. Parties who insist on the re-opening of an Inquiry must think long and hard before doing so and be able to show that an Inquiry is necessary.

***Unreasonable behaviour***

1. There was no sensible reason for re-opening the Inquiry; there was no new evidence which required consideration at an inquiry. What has been asserted in the objections and statement of case of Mr Dunlop could easily have been dealt with by written representations and in most cases at the first part of the Inquiry.
2. Thus, the objections to the Interim Decision (“ID”) put forward by, first, Mrs Masters were all matters which should be the subject of legal challenge in the court (irrational decision or failing to give proper weight to evidence). Where it was said new evidence was to be brought none was provided nor was the nature of the evidence stated. Hence it was simply absurd to suggest this required a re-opened inquiry.
3. Mr Dunlop’s objections raised alleged misrepresentations and mis-directions; the unsatisfactory nature of the ‘blended’ event (i.e., the remote hearing); and, in some way, re-examining ‘modern user’ claims. These are all matters which could and should be the subject of legal challenge in the court – in the unlikely event they have any validity. They all relate to the ID which has already been made.
4. Insofar as there is a suggestion that ‘new’ evidence will be brought, there was no indication (and, at the time of writing, still is no indication) of what that new evidence might be and therefore why a re-opened inquiry would be necessary. The need for a site visit simply misses the point. One was carried out, as noted in paragraph 1 of the ID.
5. So far as Mr Dunlop’s statement of case is concerned, no new evidence has been supplied and hence the need for the re-opened inquiry is not clear.
6. Furthermore, various suggestions are made about mapping, including tithe maps, and whether the claimed route is a new route. These are all matters which have been, or should have been, investigated at the original inquiry or which are matters that could have been dealt with easily by written representations. That they could have been dealt with by written representations is easily demonstrated by looking at Section 8 of Ms Gatrell’s proof of evidence. Similarly, the issues of mortgages were dealt with in the Council’s opening statement for the original inquiry and also in paragraph 46 of the ID.
7. In short, there is no new evidence and nothing which could not have been dealt with by the written representations procedure. The Council has therefore been put to unnecessary expense and costs by having to take part in an inquiry and incur the cost of witness attendance and legal representation.
8. The Council therefore asks for a partial award of costs to cover the matters referred to in paragraph 14 above. These are sought for the period from the date of the proof of evidence onwards.

**Response by Mr Dunlop on behalf of Mr Berry**

1. During the process following the ID he has had detailed correspondence with the Planning Inspectorate over this event.
2. He raised the issue of the misinterpretation of maps, the unsatisfactory use of the blended processand the fact that a site visit had not occurred. Indeed, Ms Gatrell had not measured the site and was unfamiliarwith the stone ditch hedge, as was the case for the Inspector. It was suggested that a reopening would be the best way forward. The Council were appraised of this and made no adverse comment.
3. It was the Inspector who decided that written representations were not suitable, and they agreed. The Council did not object.
4. Late yesterday, new claimed evidence was brought forward by Mrs Baxter and her son. Today, a number of people have come forward to listen and have had the opportunity to take part. If this had been dealt with by written representations the Baxter's would have been denied that opportunity, as would the public here today.
5. Mr Berry’s claim for costs remains. This has been an unfortunate series of events that started in 1996. It has been going on for 26 years. The Council has had ample opportunity since then to run the matter and have failed twice. They altered their stance again and again and had no duty nor reason to raise the issue again. The claim of modern common law dedication has no weight and should not have been tested.

**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 covering letter sent by the Planning Inspectorate with the ID provided guidance in relation to the process. Paragraph 7 outlines that where there are few objections and/or the issues could be dealt with by written representations the parties will be asked whether a final decision can be reached on that basis rather than an inquiry. It also states that an inquiry will be held where anyone asks to be heard by an Inspector. These matters were also set out in a letter from the Planning Inspectorate on 2 December 2021.
3. Two objections were made in response to the ID which were deemed to have been duly made. I expressed an initial view to the case officer within the Planning Inspectorate that these objections could be considered by way of an exchange of written representations. This view did not alter in light of the response from Mr Dunlop in an email of 7 February 2022. It is apparent from looking at the papers on file that the second inquiry was held at the request of Mr Dunlop. The issue of whether this request was reasonable needs to be determined from the evidence and/or submissions made following the ID and at the second inquiry. It needs to be shown that the request was not unreasonable by way of the case presented on behalf of Mr Berry.
4. The reasons given for the request for an inquiry were the nature of virtual events, the introduction of new evidence and the need to cross-examine witnesses who spoke at the first inquiry. There was also considered to be a need for an accompanied site visit.
5. Nothing has been provided to substantiate the need for a further inquiry in light of the previous one being held virtually. There was very little by way of new evidence provided at the second inquiry. It is also apparent that a number of points were made by Mr Dunlop that were the same or similar to matters presented at the first inquiry. Additionally, no submissions were made which cast doubt on the user evidence to warrant the need to recall any of those witnesses who spoke at the original inquiry.
6. In terms of the letters submitted by two members of the Baxter family and the attendance at the inquiry by some members of the public, these factors have no bearing on whether the request for an inquiry was reasonable. The letters were sent shortly before the commencement of the second inquiry and add little to the evidence these people gave previously. Furthermore, there is the potential where cases are determined from the written representations of the parties to undertake a site visit (whether unaccompanied or accompanied) to look at any particular features. I had originally undertaken an unaccompanied visit to the site and the ID addressed the issue of the Devon hedges.
7. Overall, I find on balance that the request for a public inquiry has not been shown to be reasonable by way of the case presented on behalf of Mr Berry in relationto the second inquiry and accordingly this was unreasonable behaviour. This unreasonable behaviour led the Council to incur unnecessary expense in relation to the second inquiry.
8. It follows from the above that I conclude that a partial award of costs should be made in favour of the Council.  I consider that these should be limited to those incurred by the Council following the submission of Ms Gatrell’s proof of evidence.

**Costs Order**

1. In exercise of the powers under Section 250(5) of the Local Government Act 1972, the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and all other enabling powers in that behalf, **IT IS HEREBY ORDERED** thatMr R. Berryshall pay Devon County Council the costs incurred following the submission of Ms Gatrell’s proof of evidence, 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 Council is now invited to submit to Mr Berry, 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**