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| **Costs Decision** |
| Inquiry Held on 14 November 2023Site visit made on 15 November 2023 |
| **by Paul Freer BA (Hons) LLM PhD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 7 February 2024** |

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| **Costs application in relation to Order Ref: ROW/3294587** |
| * The 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 by Mrs Sine Garvie McInally for a full award of costs against Norfolk County Council.
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| * The Inquiry was held in connection with the Norfolk County Council (Newton by Castle Acre) Modification Order 2021.
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Decision: the application is refused

The submissions for Mrs Sine Garvie McInally

1. The application sets out much of the background to the eventual making of the Order including, for example, questioning the validity of the Order. I do not propose to rehearse that background here. It is sufficient to say that the essence of the applicant’s claim for costs is that Norfolk County Council (NCC) acted unreasonably by making the Order in full knowledge that there was no public right of access over land at either end of the Order route designated as excepted land under the Countryside and Rights of Way Act 2000 (CROW Act).
2. Specifically, the applicant contends that there was credible evidence arising from statute (namely the CROW Act) to the effect that the relevant tests set out in The Wildlife and Countryside Act 1981 (the 1981 Act) could not be satisfied. It is claimed that NCC could have acted reasonably by accepting that an Order should not be made. Instead, NCC dismissed the applicant’s objection and proceeded to make the Order. NCC’s confusion over the two statutes (the 1981 Act and the CROW Act) added to the unreasonableness of that conduct.
3. The applicant goes on to claim that the admittance of documentary and user evidence prior to the implementation of the CROW Act is a failure by NCC to comply with the rule of law. This lack of knowledge is considered by the applicant to be a further example of NCC’s unreasonable conduct.
4. It is further claimed that in considering all the available evidence, including NCC erecting signage and rerouting the Nar Valley Way, any reasonable person would have concluded that a right of way does not subsist. If the criteria under Section 31 of the Highways Act 1980 are not met, NCC should have considered whether it can be reasonably alleged that a route has been dedicated under Common Law. The applicant considers that NCC acted unreasonably in this respect.
5. The applicant points out that in 2020 she notified NCC that her objections would not be pursued if evidence was provided to the effect that they (NCC) had the authority to overturn their acceptance of excepted land, having disputed it for nearly 20 years. No evidence was disclosed. In short, the applicant considers that the whole issue could have been addressed during the investigation required to assess whether it reasonable to allege the right of way exists in terms of the 1981 Act.
6. In addition, the applicant complains that NCC’s attitude to her and her family has been contrary to common courtesy, has been perverse and has incurred her unnecessary costs.

The response by Norfolk County Council

1. NCC has acted in accordance with its statutory duties under the 1981 Act to keep the Definitive Map under continuous review and make modifications following certain events. In fulfilling its statutory duty, NCC discovered significant documentary and user evidence. These findings were deemed sufficient that a right of way could reasonably be alleged to subsist over the route.
2. In making its decision, NCC respectfully disagreed with the applicant’s interpretation of the law. Objections were made to the Order, which were not subsequently withdrawn, causing the Inquiry to be held in line with statutory requirements. NCC believes that it acted entirely reasonably throughout this process.
3. NCC prioritised this application in front of well over 100 other applications. This was done to bring the matter to a resolution as quickly as possible and thereby provide surety to all interested parties. There was no challenge of the Council’s process, actions or decision by means of judicial review.
4. This case and related matters have been in question for some number of years. Since this matter became subject to statutory process in the form of modification applications in 2020, NCC staff have done their utmost to ameliorate the situation for all interest parties in a professional and courteous manner.

**Reasons**

1. DEFRA Rights of Way Circular 1/09 (the Circular) indicates that in proceedings that arise when a rights of way order is submitted to the Planning Inspectorate for confirmation, parties are normally expected to meet their own expenses. The Circular explains that in these cases, unlike with civil litigation, an award of costs does not necessarily follow the outcome and that costs are awarded only on grounds of “unreasonable‟ behaviour. The Circular goes on to explain that an award of costs may only be awarded against a party where that party has behaved unreasonably and that unreasonable behaviour has caused the other party to incur unnecessary costs that they would not otherwise have incurred (emphasis added).
2. This application for costs is, at its heart, about differing interpretations of the law, specifically the relationship between the 1981 Act and the CROW Act. I found that the interpretation held by NCC was the correct one. The interpretation held by the applicant was, with respect, entirely misplaced.
3. On my reading of the evidence and the background to this case, there is nothing to suggest that NCC acted unreasonably in any respect. There is no merit in labouring the point by going into detail but all of the applicant’s actions for the past 20 years or so stem from her misplaced interpretation of the law in this area. The corollary is that all the costs incurred by the applicant were pursuant to a position that was untenable from the very outset. It follows that the expense incurred by the applicant throughout these proceedings was not as a result of any unreasonable behaviour on the part of NCC. In these circumstances, neither of the two tests necessary for an award of costs set out in the Circular are met. An award of costs is therefore not justified.
4. Similarly, nothing I have read or heard supports the applicant’s complaint that NCC’s attitude to her and her family has been contrary to common courtesy and/or has been perverse. In any event, that is a matter for the Ombudsman and is not a matter that is before me.

Paul Freer

INSPECTOR