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| **Costs Decision** |
| Second Inquiry opened on 26 November 2024 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 05 June 2025** |
| **Costs application in relation to case ref: ROW/3227322M1** |
| * 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 by Mr Dunlop on behalf of Mr and Mrs Scott 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 (Thompson, Pockthorpe Lane) Modification Order 2018.
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**Summary of Decision**

1. A partial award of costs is made.

**Procedural Matters**

1. Inspector Sue Arnott held a public inquiry into the Order and proposed in her Interim Decision (‘ID’) of 27 March 2023 to confirm the Order with modifications. I have been appointed to consider the objection made in response to the advertisement of the proposed modifications and I held a second inquiry in accordance with paragraphs 7 and 8 of Schedule 15 to the Wildlife and Countryside Act 1981 (‘the 1981 Act’).
2. Two costs applications were made at the first inquiry and Inspector Arnott prepared separate decisions in relation to these applications. One of these involved a full application for costs made on behalf of Mr and Mrs Scott against Norfolk County Council (‘NCC’). I outlined at the second inquiry that any additional costs application should focus on matters following the issuing of the ID given that there are extant applications in relation to the first inquiry.
3. It remains my view that two separate applications for a full award of costs cannot be made by a party against the same party. The full application made to Inspector Arnott covers the period between the making of the Order and the close of the first Inquiry. I have therefore considered the second application made by Mr Dunlop in light of the conduct of NCC between the issuing of the ID and the close of the second inquiry. This means I have only set out below the submissions that relate to matters that occurred after the date of the ID.

**The Relevant Submissions of Mr Dunlop**

1. This Order was originally made by NCC to add a byway open to all traffic to the definitive map (DM). It has been modified to now show a public footpath. Whether the Order is confirmed or rejected remains to be seen. Whatever the outcome they believe they have been put to unnecessary costs by the actions of NCC.
2. Their extensive research had suggested the route was likely to have originally been recorded on the DM but removed by a legal event. NCC vehemently denied this, despite knowing it was true. This unreasonable behaviour by NCC misled the original Inspector to modify the Order to show a footpath.
3. As a result of the ID, they were forced to do more research. This led to the discovery of an original DM that showed the route and the original base tracing map that showed the route had been removed during a review completed in 1983. This information was shared with NCC, and they were invited to withdraw their case for confirmation of the Order. NCC declined and this led to the inquiry being reopened for the evidence to be heard.
4. At the start of the re-opened inquiry the Inspector advised on expected timescales and made it clear that he was available should the inquiry run into a second day. No-one raised any issues, but towards the end of the first day NCC said it could not move into a second day because of the unavailability of their lawyer and requested an adjournment. This caused additional expense on Mr and Mrs Scott’s part.
5. Once again, towards the end of the second day when it became apparent the proceedings would run over into another day, NCC again said it could not move into the next day. This forced yet another adjournment. Just prior to adjourning, NCC expressed an intention to seek costs against Mr and Mrs Scott. Last Friday evening NCC withdrew its intention to seek costs - but by then the threat of a costs claim had itself caused unnecessary stress and work for Mr and Mrs Scott.
6. When the original Order was abandoned in favour of a footpath, NCC changed tack again and moved to a position of modern dedication. NCC falsely denied the route had ever been recorded on the DM and subsequently removed. If NCC had not adopted that position, it is more likely that the first Inspector would not have modified the Order to record a footpath. NCC is directly responsible for this reopened Inquiry and the cause of unnecessary costs and expenses to Mr and Mrs Scott.
7. Further investigations have found, after some great expense and having to review all that had gone before, the true facts, (which were known to NCC all along) the route had been on the DM but removed. For whatever reason NCC failed to correct the definitive statement after the removal of the route from the DM and furthermore failed in its duty to inform the Ordnance Survey. This led to there not being a period for fresh, post removal, dedication but NCC rejected this evidence incorrectly and despite the evidence adduced from their own records, claimed the date of challenge was 2013 and not 1998.
8. NCC now argues, without a shred of evidence, that the removal of the route from the DM should not have occurred - seemingly forgetting that whatever the event was that caused the removal, it is now well out of time to now lodge that defence.
9. The whole process has been a waste of not only two appointed Inspectors and Planning Inspectorate officers time, but it has also placed a heavy and unnecessary costs burden on Mr and Mrs Scott. They have had to uncover documents which NCC denied existed in the full knowledge that they did. NCC have obfuscated and told mistruths and when under threat of the truth emerging ask for an adjournment. Mr and Mrs Scott and their advisors have spent years and 100s of hours of their time seeking the truth. Their combined research has been painstaking, thorough, and involved delving into archives going back through the centuries in their quest for the truth. It has been unfair and unnecessary. NCC knew the facts from the start but chose to try bullying a pair of retired schoolteachers and brow beat them into submission with NCC’s unlimited access to funds and no time constraints. NCC have been deliberately heavy- handed; unfair; and overbearing.
10. In terms of the need for the inquiry, they made it clear that they wanted to cross-examine NCC officers, but these refused to speak to them. Additionally, Mr Malyon was not very helpful when he was cross-examined.

**The Response by Norfolk County Council**

1. Ahead of the second Inquiry on the matter being closed, an application for costs against NCC was made on behalf of Mr and Mrs Scott. Previously, at the first Inquiry, Mr and Mrs Scott made an application for costs against NCC, which the Inspector at the second Inquiry informed the parties has been assessed. NCC therefore responds to Mr and Mrs Scott’s costs application in respect of the second Inquiry.

***Delay***

1. Had NCC been able to locate the 1964 DM before the first Inquiry took place then that may have meant the second Inquiry would not have been necessary. However, the period of record-keeping on the matter is considerable and locating all documentation has been a sizeable task for NCC, especially as the record-keeping has been undertaken by various officers who have come and gone during the relevant period. It is therefore submitted that it is not unreasonable behaviour by NCC to have been unable to locate sooner the DM of 1964.
2. Furthermore, it is clear from communications between parties, and parties’ communications with the Planning Inspectorate, as well as from both the first Inquiry and second Inquiry, that Mr and Mrs Scott have been resolved in their objection to the Order route having any public right of way status. Had it been considered at the first Inquiry that the Order route had been recorded on the DM of 1964, then presumably, as seen at the second Inquiry, Mr and Mrs Scott would have challenged NCC’s view that the post-1964 removal of the Order route from the DM had not been in accordance with due process.
3. The second Inquiry considered the issue of due process, as well as further considering the issues of dedication. Subject to what is subsequently said in these submissions about whether there has been a need for the second Inquiry, NCC submits that the time spent at the second Inquiry in examining the evidence is about the same time that would have had to have been spent considering that evidence at the first Inquiry, had that evidence been available at the first Inquiry. This is therefore a further reason why NCC submits that it has not acted unreasonably and that the second Inquiry has not caused unnecessary or wasted expense to Mr and Mrs Scott.

***The need for a second inquiry***

1. At the Case Management Conference held on Friday 1 March 2024, the Inspector asked of the parties in attendance, namely the representatives for NCC, the Ramblers and Mr and Mrs Scott, whether it was suitable for the outstanding issues to be dealt with by an exchange of written representations rather than by a further public inquiry. Both NCC and the Ramblers were of the view that written representations would be appropriate, but on behalf of Mr and Mrs Scott it was stated that a further inquiry would be necessary, particularly to enable cross-examination of witnesses.
2. With the second Inquiry closed, NCC’s view remains unchanged that the matter could have been further dealt with by way of written representations.
3. In summary, Mr and Mrs Scott were the only party of the view that the second Inquiry was necessary. Their main reason for wanting the second Inquiry was tactical, because by an inquiry they could apply for costs against NCC. Whilst NCC has decided not to apply for costs against Mr and Mrs Scott, it nevertheless submits that such behaviour by Mr and Mrs Scott is an abuse of the process and thereby unreasonable.

***Extent of costs liability***

1. If the Inspector is minded to award costs to Mr and Mrs Scott, then NCC submits that should not effectively mean a ‘blank cheque’ outcome. Mr and Mrs Scott provided several electronic files of documentation for the second Inquiry, but which they did not rely upon, and more than one version of Mrs Scott’s proof of evidence was submitted, when just one version ought to have sufficed. Consequently, should the Inspector decide to make an award of costs in favour of Mr and Mrs Scott, then NCC submits that their responsibility for those costs should be in part rather than in full.
2. However, to reiterate, NCC’s primary submission is that they have not acted unreasonably and therefore should not be responsible for Mr and Mrs Scott’s costs, whose application should be dismissed.

**Reasons**

1. I have considered this application for an award of costs in light of the Planning Practice Guidance and other published 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 amount of any costs arising from a successful application is not a matter for me to determine. I have outlined above that I consider this application should be considered in relation to the period between the issuing of the ID and the close of the second inquiry. In terms of the request to be heard this has been justified by way of the cases presented by the parties at the second inquiry. However, clearly NCC were content for the matter to be dealt with by way of an exchange of written representations.
3. Inspector Arnott reached her conclusion that a public footpath subsists on the understanding that the route was not originally shown on the DM. This conclusion was based on a finding that the route had been dedicated by the middle of the twentieth century. I have found this conclusion is supported by the information now available which reveals that the route was originally included on the DM. However, consideration would then need to be given to the matters placed before the second inquiry involving the removal of the path from the DM. I have concluded that the evidence is sufficient to warrant the confirmation of the Order with the modifications previously proposed in the knowledge that the route was originally shown on the DM. Therefore, the case made by NCC at the second inquiry cannot be viewed as unreasonable.
4. The second inquiry was originally estimated to take one day to complete. Additional matters took up some time, such as dealing with the issue of the documents mentioned in Mrs Scott’s proof of evidence.Nonetheless, it became apparent that a second day would be required in order to complete the inquiry. This meant it was not considered appropriate to commence the cross-examination of Mrs Scott during the middle of the afternoon on the first day of the inquiry.
5. It would have been useful had NCC informed me early on the first day that their advocate would not be available the following day in the event that a second day was required. Instead I was not made aware of this issue until lunchtime. However, this would not have prevented the need for the inquiry to continue into a second day and the resultant costs. Overall, I do not find that it can be considered unreasonable for a party to have other commitments which means they are unable to attend beyond the anticipated duration of the inquiry. The final day was only required to hear this costs application.
6. In terms of the potential application by NCC for costs this did not materialise. It is not unreasonable for a party to signal that they are considering making a costs application but later choosing not to do so. Nor is it evident to me how this matter could lead to any significant degree of work being undertaken in the absence of details of the reasons for the potential application.
7. In respect of the research undertaken by, or on behalf of, Mr and Mrs Scott there is an expectation that parties should bear their own costs in presenting their case at an inquiry. However, for whatever reason, NCC were under the impression at the first inquiry that the route was not shown on the original DM. This issue is a relevant consideration, and it was Mr Dunlop who alerted the parties that this was not in fact the case after further research was undertaken.
8. I do not consider that NCC deliberately misled the first Inspector. However, the Inspector placed reliance on NCC’s evidence regarding the records in relation to the DM for which they are the relevant surveying authority. I therefore consider that there is some merit in this aspect of NCC’s conduct being viewed as unreasonable. Further, it prompted another party to spend time and expense in conducting research on the matter. It is evident that this issue was central to the case pursued by Mr and Mrs Scott following the proposal to modify the Order to record the route as a footpath.
9. It cannot be concluded that the time spent at the second inquiry considering issues around the removal of the path from the DM would not have been incurred if the issue had been known earlier.However, clearly some costs have been incurred by Mr and Mrs Scott due to them being placed in the position of having to undertake further research given NCC’s original view on this issue. This is significant given that NCC are the surveying authority with the responsibility for the DM.For this reason I conclude that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated.
10. Although the determination of the amount of costs arising out of this matter is not for me to determine, the extent of these costs should relate only to those reasonably incurred in seeking out and obtaining the information in relation to the depiction of the path on the original DM.

**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** thatNorfolk Council Countyshall pay Mr and Mrs Scott’s costs incurred in locating information in relation to the original definitive map for the area, 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. Mr and Mrs Scott are now invited to submit to Norfolk County 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**