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| **Costs Report to the Secretary of State for Environment, Food and Rural Affairs**  |
| First Inquiry opened on 22 February 2022 |
| **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** |

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| **Costs application in relation to case ref: ROW/3227322** |
| * This application was 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 was made by Norfolk County Council for a partial award of costs against Mr and Mrs Scott.
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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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**Preliminary Matters**

1. Inspector Sue Arnott held a public inquiry into the Order over the course of 3 days: 15-17 November 2022 with a short pre-inquiry meeting held (virtually) on 9 November 2022. She proposed in her Interim Decision of 27 March 2023 to confirm the Order with modifications. These modifications were to record the Order route as a footpath rather than a byway open to all traffic (‘BOAT’) and amend the widths specified for the route.
2. As Inspector Arnott is no longer employed by the Planning Inspectorate, 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’). I also heard an application for costs at the second inquiry and I have prepared a separate decision.
3. Two costs applications were made at the first inquiry and Inspector Arnott prepared separate decisions in relation to these applications. One of these involved an application for costs made on behalf of Norfolk County Council (‘NCC’) against Mr and Mrs Scott. It is not appropriate for me to reach a decision on this application as it was Inspector Arnott who held the first inquiry and heard the costs application and the response to it. I have therefore set out below the submissions of the parties drafted by the previous Inspector and her conclusions to enable the Secretary of State to reach a decision on this application.
4. There is a little uncertainty in the draft decision regarding whether costs should be awarded. This relates to the text in the summary of decision and recommendation. However, I have noted the Inspector’s comments about the late submission of evidence being unreasonable in her draft decision and her conclusion which are set out in paragraphs 31, 34 and 39 below. The claimed unnecessary expense incurred is set out in paragraph 20.

**Submissions by Mr Fowles on behalf of Norfolk County Council**

1. The application was made orally before the close of the inquiry on 17 November 2022 by Mr Fowles on behalf of the order-making authority, NCC on the basis that objectors Mrs and Mrs Scott (through their agent Mr Dunlop) had behaved unreasonably.
2. The claim is made in respect of two points: that the conduct of the case for Mr and Mrs Scott was unreasonable, and that two points of law put forward by Mr Dunlop in support of their case were entirely without merit and it was unreasonable for him to make these points.
3. In relation to the conduct of the case, Mr Fowles raised five issues.
4. Firstly, as regards the bringing forward of evidence, Mrs Scott had the opportunity to produce evidence for the first inquiry date, for the second inquiry date and, after this was adjourned, when the Inspector invited any further evidence to be submitted before the proceedings began in November 2022. At no point did Mr and Mrs Scott tender their (late) evidence until it was produced during the inquiry.
5. It is not suggested that the new evidence they introduced was not important; indeed, it was helpful to the case. However, it was unreasonable for Mr Dunlop to wait until the inquiry to produce these documents. The minutes from Thompson Parish Council from 1912 raised a whole new point, as did the Public Health Act Order from 1957. Whilst it is obviously for the order-making authority to make its case in support, it is the responsibility of all parties to act fairly towards each other.
6. Further, Mrs Scott’s ‘proof of evidence’ was simply a letter of complaint. Yet at the inquiry, multiple new pieces of evidence were produced, all of which could (and should) have been incorporated into her proof of evidence in advance.
7. Secondly, it is commonplace for advocates to visit the site in advance of an inquiry and, on behalf of NCC, Mr Malyon had requested access for himself and Counsel for NCC, Mr Fowles, to do so. However, permission was refused. That was unreasonable and had impacted on Mr Fowles ability to prepare NCC’s case.
8. Thirdly, in cross-examination, Mr Dunlop had put questions to witnesses based on documents not provided to them. If Mr Fowles had not intervened, these witnesses would have been at a serious disadvantage.
9. Fourthly, Mr and Mrs Scott relied on the *Bradley* case, indeed it was integral to their own case. Yet the opposing party (NCC) had not been provided with these documents until after the closing date for submissions. It is not a published judgment and therefore it could only have been seen if a copy were provided. It is accepted practice that advocates are provided with relevant authorities in advance of proceedings so that they can prepare. Indeed, Mr Fowles had specifically asked for all authorities in advance. Yet in this case he had been denied this information until the end of the inquiry.
10. Fifthly, these matters could all have been avoided if Mr and Mrs Scott, or their representative, had attended the case management conference on 9 November. Many problematic elements of their case could have been resolved in advance. This was the last chance to resolve problems before the inquiry began but was yet another opportunity that was not taken.
11. On the matter of submissions, the first point relates to the delegation of the decision made by NCC to make the definitive map modification order. It is perfectly clear that the Inspector does not have jurisdiction here. Parliament explicitly granted a power to delegate decisions in the Local Government Act 1972.
12. Following Mr Dunlop’s response to this application, Mr Fowles noted the Local Authorities (Functions and Responsibilities)(England) Regulations 2000 refer to “the executive” (as defined in Section 11 of the 2000 Act). This is to be interpreted as the Council leader and cabinet. It does not preclude delegation to officers of the authority.
13. The second point relates to Mr Dunlop’s submission in respect of the Highways Act 1835 and the requirements for adoption of highways. This was an argument entirely without merit. Had this been heard in a civil court, these points would not have endured past the initial stages.
14. Both submissions were clearly wrong in law and lack legal judgement.
15. NCC’s claim is for a partial award of costs against Mr and Mrs Scott. That is in recognition of the fact that NCC changed its position at the inquiry; that does not require NCC to pay all costs for all other parties, but it would be fair to accept a reduction in its own costs.
16. In terms of unnecessary expense incurred by NCC, this included preparing to meet a case that hadn’t been fully explained by Mr Dunlop and therefore the preparation of submissions from Mr Malyon and Mr Fowles was necessarily longer and meant additional work had to be undertaken to respond to Mr Dunlop’s late submissions, over and beyond what would be considered reasonable.

**Response by Mr Dunlop on behalf of Mr and Mrs Scott**

1. In response to Mr Fowles assertion that Mr and Mrs Scotts’ behaviour had been unreasonable, Mr Dunlop submitted that there was no basis for the claim.
2. In relation to Mr Fowles ‘submission’ point, Mr Dunlop argued that far from being wrong in law, it had not been wrong on several occasions. He argued that the Local Government Act 2000 had changed section 101 of the 1972 Act (Arrangements for the discharge of functions by local authorities).
3. In the Local Authorities (Functions and Responsibilities)(England)Regulations 2000 Schedule 1 lists a number of functions which are not to be the responsibility of an authority’s executive. This includes as item 6 decisions made in exercise of the duty to keep a definitive map and statement under review, specifically under section 53 of the 1981 Act.
4. He pointed out that the *Bradley* case would be put before the court in 2023.
5. Mr Dunlop had been unable to attend the case management conference due to being at an inquiry in another case at the time.
6. As regards access for Counsel, the land is private and there is no obligation to allow anyone access to it.
7. In respect of documentation, Mr and Mrs Scott had asked NCC for the 1957 Order; the Council could not find it. Therefore, they had to provide it themselves. They had asked what NCC knew and carried out research to see if they could add extra details.
8. He argued that NCC had a duty to bring forward evidence and it was for Mr and Mrs Scott to rebut it. He had looked at what is relevant and responded. The evidence he had brought forward at the inquiry was to assist the Inspector.
9. Initially Mr and Mrs Scott were fighting a claim against a BOAT but this changed to a footpath. Throughout this case NCC has acted improperly and had to rely on Mr Dunlop to get to the bottom of the matter. In his submission, neither he nor his clients had acted unreasonably.

**The Conclusions of Inspector Arnott**

1. Department for Environment, Food and Rural Affairs Rights of Way Circular 1/09 Version 2 (October 2009) and the relevant Planning Practice Guidance advise that costs may be awarded against a party who has behaved unreasonably and thereby directly caused the party applying for costs to incur unnecessary or wasted expense in this process.
2. The production of two key pieces of evidence during the inquiry and sprung on NCC’s witness during cross-examination without prior notice, was unreasonable. No adequate explanation was given for this timing being unavoidable. She says it was this additional evidence that prompted NCC to change its position as regards the status of the Order route. Had these documents been produced well in advance of the inquiry, time would have been saved by several parties.
3. In terms of Mrs Scott’s proof of evidence she accepts that this was simply a statement, but it is unlikely to have created extra work. It could have been more helpful, but it is not considered unreasonable.
4. She agrees that the refusal of permission for Mr Fowles to access the site was not helpful and not the usual practice when trying to ensure a fair hearing. However, there is no requirement to provide access, and it is considered unlikely that this resulted in extra work.
5. One of the precedents relied on by Mr Dunlop - the *Bradley* case – had not yet been heard through the courts. In those circumstances copies of the relevant case papers should have been provided to other parties in order for the point being argued to be properly understood. It was unreasonable to wait until the end of the inquiry to produce a copy.
6. She agrees that several issues could have been addressed if Mr or Mrs Scott or their representative Mr Dunlop had attended the case management conference. However, there is no requirement for parties to attend and notice was given in advance they were not attending. It may not be good practice to not attend but it is not unreasonable behaviour.
7. As regards the legal submissions made on behalf of Mr and Mrs Scott in relation to the validity of the Order itself, she rejected the argument in the Interim Decision on basis that paragraph 12 of Schedule 15 of the 1981 Act states that the validity of an order that has come into operation may be challenged only through the courts but otherwise  “*shall not be questioned in any legal proceedings whatsoever*”.
8. Although the submissions made in relation to the validity of the Order can be viewed as misguided and without merit, they cannot necessarily be viewed as unreasonable behaviour.
9. On Mr Dunlop’s second point relating to the Highways Act 1835, she interpreted his submission from a slightly different perspective and did not consider it unreasonable in this context.
10. In these circumstances, and on the information available, it was Inspector’s Arnott’s conclusion that a partial award of costs would be justified in this case.

**Recommendation**

1. I make no recommendation.

Mark Yates

**Inspector**