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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). | | |
| * The application was made by Mr Dunlop on behalf of Mr and Mrs Scott for a full award of costs against Norfolk County Council. | | |
| * 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 Mr and Mrs Scott against Norfolk County Council (‘NCC’). Although I have noticed one reference to a partial application for costs in the decision prepared by Inspector Arnott, elsewhere reference is made to it being a full application for costs and this is my understanding of the application.
4. 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.

**Submissions by Mr Dunlop on behalf of Mr & Mrs Scott**

1. The application was made orally before the close of the inquiry on 17 November 2022 by Mr Dunlop on behalf of Mr and Mrs Scott, objectors to the Norfolk County Council (Thompson, Pockthorpe Lane) Modification Order 2018.
2. The claim was made against the order-making authority, NCC on the basis that they had behaved unreasonably.
3. When Mr and Mrs Scott bought their property, they were assured by a Land Charges search by NCC that no public right of way affected it. Later it became clear that a route was claimed to exist across their garden. It was even signposted by NCC. NCC provided information to the Ordnance Survey (‘OS’) and, relying on these maps, ramblers used the route.
4. NCC’s position changed, first regarding the way as a footpath, then a BOAT as proposed in the Order and, during the inquiry, changing back to considering it a footpath. At various stages NCC has served notice on Mr and Mrs Scott demanding the way was opened up to the public.
5. Mr Dunlop has been representing Mr and Mrs Scott for over 6 years to challenge NCC’s claims. The dispute is the result of a variety of officers failing to recognise that the National Parks and Access to the Countryside Act 1949 (‘the 1949 Act’) provided a number of methods for claiming and crucially defeating claims for public rights of way. Clearly the striking out of the Order route on the provisional map indicated it was not to be included, but a simple error left it on the statement.
6. Even with the Order route being absent from its list of streets in 2006 (admitted in its 2016 notice), NCC persisted in its assertion that the way was first a footpath, then a BOAT, or possibly a restricted byway, then back to footpath.  Further NCC failed to consider relevant points of law and fact, including matters that had been proven before the High Court.
7. After two days of the inquiry, NCC’s case collapsed. Their Counsel advised against proceeding with the case for a BOAT. However, NCC still persists with re-adding a footpath that they themselves deleted 6 years ago, instead of querying why it was deleted at the time of the Provisional map. This displays a wonderous failing in the understanding of the 1949 Act and the process adopted.
8. It was research by Mr and Mrs Scott that led to this process. They have spent years trawling record offices, locally and nationally, for documents that the Council declined to disclose and even asked Mr and Mrs Scott to provide.
9. Mr and Mrs Scott have a limited budget and have undergone years of stress and expense. Yet NCC is defending its own failings and expecting Mr and Mrs Scott to pay for it. Whilst it is accepted that each side should normally cover their own costs, this claim has been made because of flawed interpretation by NCC, a failure to understand the 1949 Act and what the evidence actually showed, by faulty record keeping and an unwillingness to accept that their premise was wrong – until the eleventh hour. NCC has been unreasonable, until halfway through the inquiry.
10. Consequently, Mr and Mrs Scott seek an award of their full costs covering their research and representation expenses from the time the Order was made.
11. They are not seeking punitive damages, but simply the cost of mounting their defence to the case NCC withdrew. Mr Dunlop recognised that local authorities should be encouraged to pursue valid cases where rights of way are claimed but in this case their behaviour has been unreasonable since it was based on a false argument.

**The response by Mr Fowles on behalf of Norfolk County Council**

1. In response to Mr Dunlop’s assertion that NCC’s behaviour has been unreasonable, Mr Fowles submitted that there was absolutely no basis for the claim.
2. Mr Fowles firstly noted that an award of costs cannot address matters that should be put before a local government ombudsman, nor was it a remedy for all grievances.
3. He accepted that some of Mr Dunlop’s submissions were relevant but not all. In his view, NCC had bent over backwards to be reasonable in exercising its statutory duties in relation to highways. In such matters, it is the evidence that must be examined; the feelings of individuals cannot be taken into account in the process.
4. Having discovered evidence that a highway was missing from the definitive map and statement, NCC was obliged to act to address the issue. Throughout its research, NCC was guided by the evidence before it. Initially this had led to a conclusion that the way should be classified as a BOAT.
5. To suggest that Mr and Mrs Scott had provided all the evidence is simply untrue; in fact, the opposite is closer to the truth. For 2 years, NCC sought a proof of evidence from Mrs Scott for this inquiry but no such document was forthcoming; it was not until the inquiry reopened on 15 November that it was made clear that Mrs Scott was not giving evidence.
6. It was a responsible approach for NCC to concede the point as regards BOAT status when it became clear that it was unsustainable, not before. NCC did so once cross-examination of its officer (and further evidence produced during questioning) made it apparent that the balance had changed. To award costs against a local authority in such circumstances would set a worrying precedent in terms of public policy.
7. His advice as Counsel for NCC has been that there was still a reasonable argument that could be made but NCC chose to not pursue it further but to step back at the earliest opportunity in fairness to other parties.
8. If the Order is confirmed, then NCC cannot be blamed for arguing in support of the Order route or for attempting to enforce the public’s rights over it. In fact, NCC’s actions should be encouraged.
9. In Mr Fowles’ submission, there is no basis for an award of costs.

**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. In both sources of guidance, the principles of costs applications and awards, and the examples given, are applicable, by analogy, to rights of way cases.  A claim may relate to the substance of the Order and/or to procedural matters.
3. The costs incurred by a landowner in researching a route that is the subject of a definitive map modification order are not normally covered by this scheme, nor is the cost of professional representation at an inquiry, that is unless unnecessary expense can be shown to have been incurred as a result of unreasonable behaviour.
4. Mr Dunlop claims that NCC has acted unreasonably in several ways:

* The initial assurance through Land Charges that there was no public right of way recorded over the Order route;
* it informed the OS that the Order route was a public footpath and, as a result of it being shown on leisure maps, ramblers subsequently used the route;
* by faulty record keeping;
* by changing its position as regards the status of the Order route;
* it sought to enforce a public right of way along the Order route;
* its officers misunderstood the 1949 Act process and wrongly interpreted the evidence;
* NCC misinterpreted the strict requirement (in the Natural Environment and Rural Communities Act 2006) for the route to be included on its list of publicly maintainable highways on a specific date in 2006 and therefore wrongly identified the Order route as a BOAT;
* failing to consider relevant points of law and fact in reaching its conclusions on the evidence;
* NCC declined to disclose research documents;
* NCC’s case was based on false argument; and
* being unwilling to accept that their premise was wrong.

1. It was noted firstly that any costs arising from alleged unreasonable behaviour by NCC before the Order was made goes beyond the scope of this scheme. Therefore consideration was only given to those points which arise after NCC published the Order.
2. Mr Dunlop criticises NCC for altering its position as regards the status of the way during the inquiry.  However, a surveying authority is fully entitled to change its position in relation to new evidence that is discovered in respect of a claimed public right of way. NCC changed its position at the inquiry in response to new evidence submitted at the inquiry (by Mr Dunlop). That is not an unreasonable response. Had the new material been submitted earlier, it is possible NCC could have altered its position sooner and any further expense avoided.
3. As regards Mr Dunlop’s criticism of NCC’s interpretation of the evidence in this case, her conclusions on the interpretation of the evidence are set out in the Interim Decision. All parties are entitled to submit their interpretation of evidence, and to make submissions based on their interpretation of the law, whether others agree or not. Ultimately, at the order confirmation stage, it is for the Inspector to decide whether that is correct in the context of all the available information.
4. In her view it was not unreasonable for NCC to form the views it advanced at the inquiry in relation to the evidence as a whole or specifically in relation to the 1949 Act records. Neither does she consider it inherently unreasonable for NCC to make submissions about the effect of the Natural Environment and Rural Communities Act 2006 (‘the 2006 Act’) even though these were robustly challenged by other parties in submissions to the inquiry. In fact the point was never fully explored because NCC altered its position as regards the status of the way before it arose.
5. However, even if NCC had accepted that the Order route was affected by the 2006 Act, the result would have been to propose it be recorded as a restricted byway. It was made clear at the inquiry that Mr and Mrs Scott oppose any public right of way across their property. Had that change in status been made by NCC, it would appear that the Order would still have been objected to, requiring a case to be made in any event.
6. There was no evidence that NCC had withheld evidence that was in its possession. Tasked with processing a definitive map modification order, a surveying authority may be expected to examine the most common sources of evidence relevant to the discovery of highways, particularly if in its possession but it is under no obligation to search out more obscure evidence, even if that proves to be pivotal.
7. She therefore found no grounds for judging NCC’s behaviour to be unreasonable, either in relation to the Order or the process that has been followed since it was made, although it appears to have been misguided at times in the past.
8. In relation to Mr Dunlop’s comment that Mr and Mrs Scott are “simply (seeking) the cost of mounting their defence to the case NCC withdrew”, she considered that needed to be qualified. The “case NCC withdrew” was in respect of a vehicular right of way only. It did not withdraw its case that the Order route was (and is) a public right of way.
9. As already noted, Mr and Mrs Scott oppose any right of way and therefore an objection from them would likely have followed in any case.
10. In conclusion, having considered the types of behaviour identified in the relevant guidance that might justify an award of costs, she considered there to be nothing unreasonable about the actions of NCC in relation to the Order or the inquiry. Although it was recognised that Mr and Mrs Scott incurred expense in requiring their agent Mr Dunlop to address the effect of the 2006 Act and that this proved to be unnecessary**.**
11. In these circumstances, and on the information available, it was her view that an award of costs would not be justified in this case.

**Recommendation**

1. I make no recommendation.

Mark Yates

**Inspector**