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| **Costs Decision** |
| Inquiry Held on 12 and 13 November 2024Site visit made on 13 November 2024 |
| **by John Dowsett MA DipURP DipUD MRTPI** |
| **an Inspector appointed by the Secretary of State for the Environment, Food, and Rural Affairs** |
| **Decision date: 06 May 2025** |

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| **Costs application in relation to Order Ref: ROW/3322441** |
| * 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 Mr A Parken for a full award of costs against Suffolk County Council.
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| * The inquiry was held in connection with the Suffolk County Council (Debden Rural District Definitive Map and Statement)(Parish of Playford) Modification Order 2023.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

The submissions for Mr A Parken

1. It was submitted that the Order Making Authority (OMA) behaved unreasonably in the way that it made the Order and the manner in which it had supported it. The OMA’s Development and Regulation Committee went against the advice of its professional officers, who had advised that the evidence did not meet the “reasonable to allege” test, which is all that is required at the order making stage. The Development and Regulation Committee resolved to make the Order on the basis that the evidence was enough to satisfy the “balance of probabilities” test.
2. The OMA’s Development and Regulation Committee fell into error by giving weight to representations that the footpath was desirable and giving undue weight to the historic Ordnance Survey maps in relation to the status of the route.
3. The OMA did not produce evidence to support its position at the Inquiry and ignored the well established position in respect of the weight that can be given to Ordnance Survey Maps with regard to the status of a route.
4. The making of the Order in the face of clear evidence to the contrary led directly to the Inquiry and the costs incurred in maintaining the objection.

The response by Suffolk County Council

1. The OMA pointed out that it is open to its Development and Regulation Committee to not only take into account the advice of its officers but also any other evidence that comes before it, including at the Committee meeting.
2. The OMA also disputed the suggestion that it did not produce evidence to support its position. On the contrary, all of the information relevant to the making of the Order was sent to the Planning Inspectorate. In addition, the OMA encouraged supporters of the Order to attend the Inquiry so that their evidence could be tested.
3. The OMA accepted that Ordnance Survey maps are not definitive proof of a right of way but can provide supporting evidence that a route has existed over time.
4. The OMA refuted the suggestion that the Order was made based on the desirability of the route and re-iterated that the decision to do so was based on all of the evidence.

Reasons

1. The parties in rights of way proceedings that arise when a rights of way Order is submitted to the Planning Inspectorate for confirmation are normally expected to meet their own expenses. Department of the Environment, Food, and Rural Affairs Circular 1/09 advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary costs that they would not otherwise have incurred.
2. In such cases "unreasonable" means unreasonable in the ordinary sense of the word, not unreasonable in a *Wednesbury* sense (see *Manchester City Council v Secretary of State for the Environment and Mercury Communications Ltd* [1988] J.P.L. 774 and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223).
3. Guidance on the principles of costs applications and awards is set out in the Planning Practice Guidance chapter on Appeals and is applicable, by analogy, to the parties in rights of way cases where a public inquiry is held.
4. The application for an award of costs is predicated on the substantive grounds that the OMA failed to produce evidence to support its position in making the Order and that it failed to follow the well-established position in relation to the weight that can be given to Ordnance Survey maps in terms of the status of a route.
5. The OMA’s Development and Regulatory Committee received a detailed report which states that the historical documentary evidence is insufficient to raise even a reasonable allegation of public rights at any status. The report also sets out that the user evidence is insufficient to show dedication has taken place.
6. Although the OMA is not obliged to accept the advice of its professional officers and is entitled to make a decision on all of the evidence available to it including representations made at the Committee meeting, the test set out in Section 31 of the Highways Act 1980 is clear in its requirements. These are that in order for a route to be deemed to be dedicated as a highway it has to be shown that the route has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it.
7. The minutes of the Development and Regulatory Committee do not set out any arguments that were made by the Committee as to why it did not agree with the assessment of the historical and user evidence made by its officers. The minutes indicate that the Committee heard verbal representations from the applicant and from a local councillor in support of making the Order. Neither asserted use of the claimed route during the relevant period. Both speakers relied heavily on map evidence and the desirability of providing a route for recreational and road safety purposes. The representations made by the applicant for the Order do not raise any additional evidential matters that were not previously included in the application for the Order.
8. From the minutes of the Development and Regulatory Committee meeting, in the absence of any references to additional persuasive user evidence, it is clear that the references to the route being shown on maps and the convenience of the route played a large part in leading to the Committee’s decision. This is despite the report that it considered plainly setting out that Ordnance Survey maps are not evidence of public rights.
9. The minutes state that the Development and Regulatory Committee resolved “on balance, there was sufficient evidence that public rights in the form of a public footpath subsisted for the claimed route for a number of years historically” and that the Order should be made. From this there is a clear inference that the Committee considered that the higher “balance of probabilities” test had been met rather than the lower “reasonably alleged” test. This was not gainsaid by the OMA at the Inquiry. It was therefore incumbent on the OMA to support that position and justify it at the Inquiry.
10. In terms of the evidence submitted to support its position, the OMA did forward all of the evidence that had been submitted with the Order together with its Committee Report and the Minutes of that meeting. In addition, copies of statements that were received from users following the making of the Order and it being objected to were also submitted. The OMA also called a witness at the Inquiry who had submitted a proof of evidence.
11. Nevertheless, the OMA’s proof of evidence accepts that officers did not consider the user evidence sufficient to support a recommendation that an Order be made. It also recognises that the Ordnance Survey maps are not determinative as they do not differentiate between public and private rights although they do show physical features that existed at the time of surveying. However, beyond referring to the Committee minutes, it does not offer any further explanation of why the Committee was persuaded that public rights subsisted over the claimed route. The OMA’s position at the Inquiry effectively relied on users coming forward and attending the Inquiry to provide evidence of use.
12. Had the Committee resolved that public rights over the claimed were reasonably alleged to subsist and the OMA adopted a neutral stance at the Inquiry, this would have been a reasonable position, as the onus would have been on the applicant for the Order to make out the case for its confirmation. However, that is not what happened. The OMA supported the Order.
13. No members of the Development and Regulatory Committee gave evidence verbally at the Inquiry. Whilst a written submission was made by the ward Councillor, this largely repeated what was said at the Committee meeting and focusses on the map evidence and the desirability of the claimed route for recreational and highway safety reasons.
14. Although the OMA provided evidence in the form of the basic factual information, it did not produce any further substantive evidence in support of the Order nor did any of the elected members of the OMA who made the decision appear at the Inquiry. The OMA’s sole witness, quite correctly, was not in a position to give evidence contrary to the advice that he had previously given to the Development and Regulatory Committee.
15. It was not reasonable of the OMA to make the Order contrary to the advice of its officers and then not be able to adequately explain its basis for doing so when the Order was contested, and an inquiry held. In the absence of any evidence to the contrary, from the minutes of the Development and Regulatory Committee meeting, it appears that, following representations made to it, the decision of the committee was swayed by factors that were not relevant to the finding that it had to make and that it misdirected itself in respect of the status of routes shown on historical mapping and the weight that can be given to this.
16. For the reasons given above, I find that unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the objector being obliged to maintain his objection at the public inquiry, including the preparation and presentation of evidence, and an award of costs is therefore warranted.

Costs Order

1. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 15 of Wildlife and Countryside Act 1981 (as amended), and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the Suffolk County Council shall pay to Mr A Parken, the costs of the proceedings described in the heading of this decision incurred in preparing and submitting evidence and attending the Inquiry to present the case in respect his objection to the Order; such costs to be assessed in the Senior Courts Costs Office if not agreed.
2. The applicant is now invited to submit to the Suffolk 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.

John Dowsett

INSPECTOR