Costs Decision

Inquiry held on 3 March 2009

by Alan Beckett **BA, MSc, MIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

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Costs application in relation to Order Ref: FPS/C4615/5/1 & FPS/C4615/5/2

- The application is made under the Town and Country Planning Act 1990, section 257/258 and Schedule 6 and under the Local Government Act 1972, section 250 (5).
- The application is made by Dudley Metropolitan Borough Council for a full award of costs against Dudley Borough Local Access Forum, the Halesowen Abbey Trust, the Monarch's Way Association and Hagley Parish Council.
- The inquiry was in connection with the Borough of Dudley (Stopping Up of Footpath S73, Treherns Farm, Worcester Lane, Hagley, Stroubridge) Order 2008 and the Dudley Borough Council (Diversion of Footpath S75, Treherns Farm, Worcester Lane, Hagley, Stroubridge) Order 2008.

Summary of Decision: The application fails and no award of costs is made.

The Submissions for Dudley Metropolitan Borough Council

1. The preparation of the proof of evidence for the inquiry, the consideration of the material presented by all sides, the work that had gone into full preparation for the inquiry and the length of the inquiry was dictated by the four live objections heard at the inquiry. There appeared to have been no practical consideration given to the effect of pursuing the objections to the inquiry; Dudley Borough Local Access Forum ("DBLAF") in particular were content to deluge the Council with emails and letters on the subject of the Orders without considering whether it was appropriate or necessary to appear at the inquiry to make the points that had been made.

2. In this context it is relevant as to whether the four bodies that were represented at the inquiry were in fact objectors. Only DBLAF contends that it was not an objector, but was acting in its statutory advisory capacity. DBLAF have fully participated in the inquiry as an objector and in submitting its documentation to the Inspectorate complied with the timetable set out for objectors. DBLAF claimed that they acted in an advisory capacity to the Council and now acted in the same capacity to the Planning Inspectorate. It is not accepted that DBLAF have any such advisory function to the Secretary of State. The claim that DBLAF were offering advice appears to be little more than a convenient cloak to hide behind when faced with the consequences of pursuing its "advice" at the inquiry.

3. The extent of the officer time taken up by the objection made by DBLAF was estimated by Mr Jacobs as being around 50% of the time spent dealing with the proposed extinguishment and diversion. All the objectors have been informed that many of the points they wished to raise were misconceived,

flawed or irrelevant to the Orders. Despite such notice being given, all except the Halesowen Abbey Trust insisted on pursuing points that were not relevant to the inquiry. Such actions have wasted inquiry time and put the Council to unnecessary expense.

4. None of the objectors appeared to have taken advice prior to the inquiry, and each demonstrated an ignorance of both the law and inquiry procedure. Despite this, each ploughed on regardless.

5. It was wholly unreasonable for each objector to maintain that they had no indication of the proposed location of the diverted footpath. The final layout plan had been approved as part of the planning permission in August 2007 and although this plan had been revised to take account of a revision of the hedgerow management plan required under condition 16 of that permission, there had been no material change to the location of the diverted footpath S75. It was unreasonable of the objectors to pursue their objection vigorously and vociferously without having made any effort to view plans which had been freely available in the public domain for approximately 18 months prior to the inquiry. To suggest that the publication of such maps and plans on Council websites, on site, in planning agendas was insufficient for the objectors to determine the impact of the diversion unless a copy of the plans were personally handed to them is unreasonable.

6. The attitude towards these matters displayed by the objectors has resulted in the Council wasting time and money at the inquiry. It was apparent at the inquiry that any substantive challenges to the tests of “necessity” and “amenity” melted away; in reality, there were no such challenges and yet the inquiry took all day to conclude. Counsel would not have been required by the Council had the four objections not been made and pursued. Although the objectors contend that once the inquiry procedure had been determined all parties were committed to it, this was not the case; the objections made could have been amended or withdrawn or re-considered so that they only referred to relevant matters. This did not happen.

7. The proceedings could have been avoided, but were not and the unreasonable behaviour of the four objectors led the Council to incur expense unnecessarily. The Council were aware that if the costs application were successful, the proportion claimed from DBLAF would ultimately be sourced from public funds as DBLAF was funded by the Council. Nonetheless, the application was justified in the circumstances; it may be that there would be further repercussions for DBLAF and its leader.

The Response on behalf of DBLAF, Halesowen Abbey Trust (“HAT”), the Monarchs Way Association (“MWA”) and Hagley Parish Council (“HPC”)

8. The Chairman of HPC had been expected to attend the inquiry and speak against the Orders; no excuse could be offered as to why the Chairman had not been present. On reflection, it may have been naïve of Mr Bache to take part in the inquiry. No defence was offered for the Parish Council’s actions.

9. It was understood that in right of way cases, where an objection to an Order had been made by a Parish Council, the Secretary of State has to call a public inquiry so that the objection can be heard. The HAT had not requested a public inquiry and it was a matter of record that HAT had requested that the matter

be dealt with by way of written representations. Similarly the MWA had requested that its objections be dealt with by way of written representations; the objections raised by the MWA were of a technical and administrative nature regarding errors and flaws in the Orders. The four organisations had not been notified by the Planning Inspectorate that the matters raised were considered to be irrelevant; they therefore had an expectation that the points raised were relevant and could be pursued at the inquiry.

10. DBLAF had a statutory advisory role under the Countryside and Rights of Way Act 2000 which the Council has difficulty with. In February 2008 DBLAF was consulted on the draft orders; it was noted at that date that the Order plans did not show the location of the diverted path in relation to the intended topography of the sports pitch development. Since that date, DBLAF had repeatedly requested that the Council produced better and more transparent documents in relation to the Orders to prevent confusion arising as to the impact the development would have on the rights of way network. This was not forthcoming. Although the Council contend that the revised plan had been available on its website, the file is too large to download. A copy of the revised plan was only made available on 25 February 2009. Many of the objectors are therefore unlikely to have been able to assess the impact of the proposed diversion on the public's interest.

11. Had such additional documentation been received and had the Council given notification that the section 25 agreement relating to two footpaths around the development site had been completed, then it was likely that some of the points aired at the inquiry could have been resolved at an earlier date, but the Council had not approached any of the groups that participated in the inquiry to try to resolve the objections prior to the inquiry.

12. None of the groups involved were experts in matters relating to the 1990 Act, it was not believed that they had acted unreasonably in pursuing the points made earlier in writing or that they had attended the inquiry to deliberately waste the Council's time and money. The process could have been shortened had the Council taken the advice that had been offered and responded to it. However, as the Secretary of State had decided that an inquiry was required following an objection having been made by HPC, the process could not have been avoided.

13. The Council was wrong to suggest that a Local Access Forum could not offer advice to the Planning Inspectorate or the Secretary of State. The remit given by statute to Local Access Forums was a wide remit. DBLAF had legitimately offered its advice throughout the process, and had continued to offer advice at the inquiry. If a costs award was made against DBLAF, any award would be funded by the Council as DBLAF was a Council body which received secretarial and officer support.

14. The costs application made against those who appeared at the inquiry appeared vindictive and attempted to silence legitimate concerns about the Order by threatening groups and individuals with financial or other penalties.

Reasons

15. I have considered this application for costs in the light of Circular 8/93 and Circular 1/09 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who

has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

16. Following the publication of the Council's statutory notice of the making of the extinguishment and diversion Orders, 16 objections or representations were received. Three of these objections had been withdrawn in writing prior to the opening of the inquiry. The objectors contend that as an objection had been made by the parish council, the inquiry was arranged by the Secretary of State to hear the objection, despite none of those who appeared on the day having requested it.

17. Paragraph 3 (2) of schedule 14 to the 1990 Act states that "*If an objection is made by a local authority the Secretary of State shall, before confirming the Order, cause a local inquiry to be held*". For the purposes of section 257 and 259 of the 1990 Act, a "local authority" is defined in section 336 as a "*charging authority, a precepting authority, a combined police authority or a combined fire authority*". In the 1990 Act, a parish council is only defined as being a "local authority" in respect of those orders made by the Secretary of State under section 247, 248, 249 or 251. The inquiry was not therefore held because of the objection made by Hagley Parish Council.

18. Although the objectors are incorrect in submitting that the Secretary of State caused the inquiry to be held because of the objection made by HPC, the inquiry was arranged in response to 16 objections having been made following the notice of the making of the Order, 13 of which remained unwithdrawn at the commencement of the inquiry.

19. Paragraph 9.4 of Circular 1/09 states that "*In general, and consistent with the statutory and policy framework for rights of way explained in this circular, the principal parties (that is the local authority, a statutory objector or any persons making statutory representations in support of and order) will not be at risk of an award of costs being made against them unless the proceedings could reasonably have been avoided….and as a consequence this results in unnecessary, additional expense to the party applying. Similarly, objectors who exercise their right to be heard but subsequently fail to appear at the hearing or inquiry will be at risk of an award of costs against them for unreasonable behaviour*".

20. The inquiry was arranged so that the 16 objections which had been made to the Orders could be heard. None of the objectors who appeared at the inquiry had exercised their right to be heard and both HAT and MWA submitted prior to the inquiry that they would have been content for the matter to be dealt with by way of written representations. Despite HAT and MWA stating that they would have been content with the written representations procedure, the large number of unwithdrawn objections meant that an inquiry was required to allow the objections to be aired. I therefore agree with DBLAF, MWA, HAT and HPC that the proceedings of 3 March 2009 could not have been avoided, although for different reasons to those advanced by the objectors.

21. Although Mr Bache appeared in his capacity as a Parish Councillor, I formed the impression that he had little prior knowledge of the issues and appeared to be labouring under the belief that the inquiry related to footpath matters in general as opposed to S73 and S75 in particular, or to other aspects of the

development scheme for which permission had already been granted. These matters were clearly irrelevant to the proceedings. Be that as it may, the non-appearance of a more appropriate member of the parish council at an inquiry which had not been requested by them or at which they had not requested to be heard, cannot be regarded as unreasonable behaviour.

22. I consider that it was unreasonable for the objectors not to have taken the opportunity to seek out the approved development plans prior to the inquiry; as the Council pointed out, these had been available as part of the planning application, and had been in the public domain since August 2007. By the same token, if the Council had wished to ensure that the impact on S73 and S75 of the proposed development had been fully comprehended by those who sought to use the paths at issue and to minimise the likelihood of objections based on misconceptions or misinformation, it could have used the approved plan as a base map for the Orders; this would have conveyed to all those who were interested in the matter what the impact of the development on footpaths S73 and S75 would be.

23. It is probable that had the objectors sought out the information regarding the design or had the Order plan been drawn to reflect the approved design, then some of the objections would have been modified or withdrawn. The inquiry may, in those circumstances, have been of a shorter duration. However, as the inquiry was required by the Secretary of State, the expense to which the Council claims it has been put in preparing and attending the inquiry would have had to have been met in any case. In my view, the Council did not incur unnecessary costs as a result of the objectors' behaviour prior to the inquiry.

Conclusions

24. For these reasons I conclude that unreasonable behaviour, as described in the Circular, resulting in unnecessary or wasted expense, has not been demonstrated.

Formal Decision

25. I refuse the application for an award of costs.

Alan Beckett

Inspector