



The Planning Inspectorate

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Your Ref: CT/WCA517/12577

Our Ref: FPS/B0800/7/211

Date: 6 October 2009

Dear Sir

**LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)
WILDLIFE AND COUNTRYSIDE ACT 1981 - SECTION 53
CORNWALL COUNTY COUNCIL (ADDITION OF BYWAY FROM BYWAY
NO.48 TO BYWAY NO.49 PERRANZABULOE) MODIFICATION ORDER 2008
APPLICATION FOR AWARD OF COSTS**

1. I am directed by the Secretary of State for Environment, Food and Rural Affairs to refer to the Inspector's letter of 6 May 2009, notifying her decision to confirm the above-mentioned order. Its effect was to modify the definitive map and statement for the area by adding to it a section of byway open to all traffic (BOAT) as shown in the order plan and described in the order schedule.

2. This letter deals with your Council's¹ application for an award of costs against Mr A R Jayaraj, the sole statutory objector to the order, as made at the inquiry held on 7 April 2009. Mr Jayaraj did not attend nor was represented at the inquiry. The Inspector reported the costs application, as heard, to the Secretary of State for determination. As the Inspector could not hear any response to the costs application she could not make a recommendation. A copy of the costs report (CR) is enclosed and forms part of this decision letter.

3. The Planning Inspectorate copied the costs report to the parties and invited Mr Jayaraj's comments on the costs application. He replied in a letter and enclosure dated 20 June 2009. As a copy of the letter was sent to the Council it is not proposed to provide a detailed summary. All the available evidence has been carefully considered.

Summary of the decision

4. The formal decision and costs order are set out in paragraphs 16 and 17 below. The application succeeds to the extent that a partial award of costs is being made in the Council's favour.

¹ the order making authority (OMA)



Basis for determining costs application

5. The costs application has been considered in the light of:

- relevant published costs policy guidance on awards of costs in:

DOE Circular 8/93 (the "Costs Circular"), which is applicable to rights of way cases by analogy with planning proceedings; and

Section 9² of Rights of Way Circular 1/09;

- the Inspector's order decision dated 6 May 2009;
- her costs report;
- the objector's response of 20 June 2009 to the costs application;
- the order papers; and
- all relevant circumstances.

6. In definitive map modification order proceedings, as for planning proceedings, the parties are normally expected to meet their own expenses irrespective of the outcome of an order objection. Costs are awarded only on the grounds of "unreasonable" behaviour by one party, resulting in "unnecessary" expense to another party.

Reasons for decision

7. On examination of all the available evidence, the decisive issue in this case is whether Mr Jayaraj behaved "unreasonably" by failing to attend, or arrange to be represented at, the scheduled public inquiry, causing the Council to incur unnecessary expense³.

8. Mr Jayaraj's "duly made" written objection to the submitted order was in response to the Council's publicity and was not withdrawn. The Council therefore submitted the order to the Secretary of State for determination in accordance with Schedule 15 to the Wildlife and Countryside Act 1981. Paragraph 7(2) of Schedule 15 states that, when an order has been submitted, the Secretary of State shall either:

"(a) cause a local inquiry to be held; or

(b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose."

In this case it is evident from the order papers that the Planning Inspectorate decided that, in the light of the objection to the order and for user-evidence to be tested via cross examination, it would be appropriate to hold an inquiry.

² "applications for costs"

³ The Council are seeking an award of costs in relation to expense incurred on the day of the inquiry.

9. The Inspectorate's letter of 23 September 2008 (from the Rights of Way Section) informed Mr Jayaraj that arrangements would be put in hand for an inquiry and that he would be told about those arrangements. The letter explained that all parties to the inquiry would be expected to abide by the Rights of Way Inquiries procedure which could be found to in the booklet (enclosed with the letter) *Definitive Map and Public Path Orders*. The Inspectorate's further letters of 25 September 2008 informed the parties that a provisional date had been booked for the inquiry and asked if the date was acceptable. In the event of no reply the date might have to be imposed. Although the Council confirmed that the date was acceptable to them there was no reply from Mr Jayaraj. The Inspectorate's subsequent letter of 9 October 2008 confirmed that an inquiry date of 7 April 2009 had been imposed upon him. The parties proceeded to submit their statements of case in readiness for the inquiry.

10. Paragraphs 3 to 7 of the Inspector's order decision explain what happened on the day of the inquiry. Mr Jayaraj did not attend, nor was represented, and attempts to contact him were unsuccessful. The Inspector considered that the previously submitted written evidence was sufficient for her to base her decision on the order and the inquiry was closed at 11.00 am (having opened at 10.00 a.m.). Mr Jayaraj's views on the proposed way forward for determining the order were subsequently sought but no response was received.

11. Mr Jayaraj did, however, reply to the costs application. He stated that he had been too ill to attend the inquiry and was unable to inform the Inspectorate. He did not consider that an award of costs should be made against him because he claimed a disability living allowance. He also asked to awarded compensation⁴ as a result of the confirmation of the order.

Conclusions

12. While it is open to objectors, in general, to attend an inquiry it is noted that Mr Jayaraj was the sole statutory objector in this case. As the owner of the land, over which the alleged BOAT crossed, he evidently wished to demonstrate that the order should not be confirmed. It was therefore to be expected that he would attend the inquiry in order to give evidence and to cross-examine user evidence. It is also apparent (CR7) from a file record of a telephone call with Mrs Frost, who appears to have been assisting Mr Jayaraj in this matter, that Mr Jayaraj was nervous about the forthcoming inquiry. Nevertheless, following the guidance and assurance given to Mrs Frost, there was no suggestion that she and Mr Javaraj would not be attending the inquiry.

13. In the particular circumstances of this case the view is taken that, when first informed that an inquiry was to be held, the onus was on Mr Jayaraj as the sole statutory objector to ensure that he was prepared to attend or otherwise to be represented (at the inquiry). As an alternative (CR9) Mr Jayaraj might, if he had concern about the inquiry process, have asked the Inspectorate if the order could be decided on the basis of written submissions. In the absence of any such request the inquiry took place as arranged.

14. While Mr Jayaraj has stated that he was too ill to attend the inquiry the nature of the illness has not been disclosed and he did not, for instance, forward any medical certificate. Furthermore, it has not been clearly explained why he could not have telephoned the Inspectorate (or the Council) to warn that he would

⁴ The Inspectorate's procedural letter of 24 June 2009 (copied to the Council) explained to Mr Jayaraj that there was no statutory right to compensation in definitive map order cases.

be unable to attend. Neither has he explained why, in his absence, he could not have been represented at the inquiry – an indication had been given that Mrs Frost would be attending the inquiry to assist him. The Secretary of State therefore agrees with the Inspector's observations at paragraph 9 of the costs report.

15. In the circumstances described, and on the information available, the Secretary of State concludes that Mr Jayaraj acted unreasonably by failing to attend or to be represented at the inquiry and that this put the Council to unnecessary expense as stated at paragraph 10 of the costs report. An award of costs will therefore be made to reflect this. For the avoidance of doubt, the Secretary of State takes the view that he is not precluded from making an award of costs against a party on the grounds that the party in question is in receipt of a disability living allowance.

FORMAL DECISION

16. For these reasons, the Secretary of State has decided that a partial award of costs in favour of the Council, limited to the expense incurred in attending the inquiry and hire of the venue, is justified in the particular circumstances.

COSTS ORDER

17. Accordingly, the Secretary of State for Environment, Food and Rural Affairs, in exercise of his powers under section 250(5) of the Local Government Act 1972, and section 53 of the Wildlife and Countryside Act 1981, and all other powers enabling him in that behalf, **HEREBY ORDERS** that Mr A R Jayaraj shall pay to Cornwall County Council their costs of the definitive map modification order proceedings before the Secretary of State limited to the expense incurred by the Council in:

- attending the inquiry (held on 7 April 2009)
- connection with the hire of the inquiry venue

such costs to be assessed in the Supreme Court Costs Office if not agreed. The subject of the proceedings was a definitive map modification order made by the Council, more particularly described in paragraph 1 of this letter.

18. Cornwall County Council are now invited to submit to Mr Jayaraj, to whom a copy of this decision letter has been sent, details of those costs with a view to reaching agreement on the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

19. There is no statutory provision for a challenge to a decision on an application for an award of costs. The procedure is to make an application for judicial review. This must be done promptly.

Yours faithfully



JOHN GARDNER

Authorised by the Secretary of State
to sign in that behalf



Costs Report to the Secretary of State for Environment, Food and Rural Affairs

by Helen Slade MA FIPROW

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

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Date
6 MAY 2009

Wildlife and Countryside Act 1981

THE CORNWALL COUNCIL

THE COUNTY OF CORNWALL (ADDITION OF BYWAY FROM BYWAY NO. 48 TO BYWAY
NO. 49 PERRANSABULOE) MODIFICATION ORDER 2008

Inquiry held on 7 April 2009

File Ref: FPS/B0800/7/211

Order Ref: FPS/B0800/7/211

- I opened a public inquiry on Tuesday 7 April 2009 at Perranzabuloe Parish Council Offices, nr Perranporth, into The County of Cornwall (Addition of Byway from Byway no. 48 to Byway No. 49 Perranzabuloe) Modification Order 2008.
- The application for costs has been made by The County of Cornwall for a partial award of costs against Mr A R Jayaraj.
- This report gives details of the application.

Summary of Recommendation: No recommendation is made.

The Submissions for The Cornwall Council

1. The general position in inquiries of this kind is that the parties will bear their own costs. However, The Cornwall Council ('the Council') and the taxpayer at large have met the costs of this inquiry.
2. The Council submits that the non-appearance at the Inquiry of Mr Jayaraj, without notice, is unreasonable conduct and The Cornwall Council consequently asks for its costs in relation to the day's Inquiry to be met by the objector.

The Submissions for Mr A R Jayaraj

3. Mr Jayaraj did not attend the Inquiry.

Inspector's Considerations

4. Owing to his absence from the Inquiry there has been no submission from Mr Jayaraj. However, having regard to the guidance provided by Government Circular 8/93¹ as applied to Rights of Way procedures and Government Circular 1/2009, I consider that it is possible for me to make some observations.
5. The advice is that, irrespective of the decision on an Order, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.
6. Mr Jayaraj was the only objector in this matter. A representation in support of the Order was made by Perranzabuloe Parish Council. The Council had expressed the view, when submitting the case for determination, that the matter could be dealt with by way of written representations. The decision to hold an Inquiry was made by the Planning Inspectorate because of the existence of user evidence. It is often beneficial, and sometimes necessary, for such evidence to be tested through cross-examination.
7. One week prior to the Inquiry a telephone call was made to the offices of the Planning Inspectorate on behalf of Mr Jayaraj during which it was explained that he was nervous about appearing at the Inquiry. Reassurance was given to the caller (Mrs Frost) that Inspectors are familiar with the difficulties faced by

¹ Still valid in relation to this matter

inexperienced participants and take great care to minimise them. At no time was the impression given by Mrs Frost that Mr Jayaraj was not going to attend the Inquiry.

8. The Inquiry Rules provide for the full exchange of documentation prior to the Inquiry itself, and thus the costs associated with providing Statements of Case and Proofs of Evidence would be the same, whether the matter had been dealt with by written representations or by way of Inquiry or Hearing.
9. Although the procedure was determined by the Planning Inspectorate, it was open to the objector to decline to attend an Inquiry; attendance is not compulsory. Had he advised the Planning Inspectorate sufficiently in advance of the day that he was not going to attend, it might have been possible to alter the procedure. However, in the absence of any explanation for his behaviour, I consider that it was unreasonable on the part of Mr Jayaraj not to attend the Inquiry, and to fail to inform the Planning Inspectorate or the Council that he was not going to appear.
10. The additional costs incurred by the Council, and thus by the taxpayer, are those connected with the hire of the venue for the Inquiry, and the expenses of the Officers of the Council in attending the Inquiry.

Recommendation

11. Notwithstanding my observations, in the absence of a submission from objector, I make no recommendation.

Helen Slade

Inspector