

## **Document Reference 6**

### **Dorset Council County of Dorset Definitive Map and Statement of Rights of Way**

#### **Dorset Council (A Byway Open to All Traffic, Beaminster at Crabb's Barn Lane) Definitive Map and Statement Modification Order 2020**

### **Statement Containing the Authority's Comments on the Objections to the Order**

- 1        Following publication of the Order three objections were duly made.
- 2        The objections are made by Mr. Graham Plumbe, on behalf of the Green Lanes Protection Group, Mr. B. Dupont and Beaminster Ramblers. Copies of the objections are included with this submission as **Document Reference 5**

#### **Objection from Mr. G. Plumbe, Green Lanes Protection Group.**

- 3        Mr. Plumbe sent a letter dated 5<sup>th</sup> March 2020 objecting to the modification order.
- 4        Mr. Plumbe's reasons for objecting to the modification order, and the Council's comments, are as follows.
- 5        Mr. Plumbe states that '*I endorse and adopt the submission by Mr Cheal of Mogers Drewett LLP (formerly of Thring Townsend) on 21 July 2005 as to lack of historic evidence, inadequacy of user evidence to justify implied dedication and other reasons*'.

Comments of Dorset Council. On 21 July 2005 Mr J Cheal of Thring Townsend, Solicitors, sent to the Council a detailed submission inviting the Council to 'dismiss the claim and make no order'. This submission contains documentary evidence and other information regarding the status and use of the path in question, and an analysis of the evidence that has been submitted in support of the application. In this, Mr Cheal is acting for the following:

- Langdon (Dorset) Farms (Mr C W Dupont)
- Mrs T Mackenzie Green
- Mr G Streatfield of Denhay Farms Ltd.

6 Mr. Cheal's submission of 21<sup>st</sup> July 2005 is included in full at **appendix 1**. The issues raised by Mr Cheal in this submission are discussed below.

7 Mr Cheal questions whether it is technically possible for 'two parts of the claimed route to be modified to byway status if it is the case that either or both of these is already a publicly maintainable road'.

Comments of Dorset Council: The effect of a modification order would be to record the route in question as a byway open to all traffic on the definitive map. There is no reason why the way should not appear in the Council's records as both a publicly maintainable highway and a byway open to all traffic.

8 Mr Cheal notes that, if the application for the recording of a byway open to all traffic is to succeed, 'the standard of proof is on the balance of probabilities. It is not a question of whether or not public vehicular rights have been reasonably alleged to subsist.'

Comments of Dorset Council: Where the addition of a right of way is being considered, to make an order, the surveying authority must be satisfied that the evidence shows on the balance of probabilities that the right of way exists, or has been reasonably alleged to exist (section 53 (3) (c) (i)) and where the upgrading is being considered the surveying authority must be satisfied that the evidence shows on the balance of probabilities a highway shown of a particular description ought to be there shown as a highway of a different description. (section 53 (3) (c)) (ii)). Mr Cheal's observation in that different tests of standards of proof must therefore be applied in considering the evidence relating to those parts of the claimed route which are recorded on the definitive map (that is, Bridleways 17 and 35) and that over the remaining, unrecorded, parts of the way, is correct. To confirm an order to add a right of way, the evidence must show that the rights of way exists (not only that it is reasonable alleged to exist).

9 Mr Cheal says that if a route is presumed to be dedicated under section 31 of the Highways Act or at common law, it must be accepted and used by the public as of right with vehicles. He also says that vehicular use exercising a private right of way is not public use.

Comments of Dorset Council: Mr Cheal is correct in that both dedication and acceptance are required. Where there is a presumed dedication based on use of the route, the evidence of that use can be evidence of acceptance by the public. Evidence of use by those exercising a private right of way does not count as evidence of either a presumed dedication or of acceptance by the public.

- 10 Mr Cheal has supplied a copy of a plan of 1907 in respect of the Langdon Estate. This is based on the 1903 Ordnance Survey map. The northern boundary of the estate is drawn across the south-eastern end of Crabbs Barn Lane, at point E on plan 18/13/1. Mr Cheal refers to the 'wide double-fenced area' which contains Crabbs Barn Lane, terminating at this point, and how the claimed byway continues south-eastwards as an unfenced track or path within the fields. Mr Cheal's assertion is that 'these two contrasting ways when viewed together in this way do not give the impression of the whole being a through route, certainly not at least for motor vehicles.'

Comments of Dorset Council: Ordnance Survey maps do not provide any indication of the status of a route but show what was on the ground at the time of the survey. Mr Cheal's observation that the width of the track shown on the OS map as it enters the field is 'less than a quarter of the width of the gateway at the end of Crabbs Barn Lane' does not provide any substantial evidence that the unfenced track to the south-east was not used, or could not be used, by motor vehicles. The track within the field was unfenced and there is no indication on the map that there was anything to constrict its use by vehicles. It is noted too that a track of similar width as that running in the field is also depicted on the map within the enclosed area of Crabb's Barn Lane itself. The double-pecked line representing a track is no more than an indication of a worn path on the ground.

- 11 Mr Cheal has supplied copies of plans contained in conveyances of 1925 and 1939 relating to the Langdon Estate. These plans show the claimed byway as it passes through the estate, partly in the form of a walled or fenced lane, and partly as dashed line, in the form of a track or path. Mr Cheal has also referred to a 1980 conveyance in which Higher Langdon was split from Langdon Farm, and explains that the title to Higher Langdon 'also includes the express grant of private access rights on the Claimed Route.' Mr Cheal has expressed his view that 'If the Claimed Route as a whole had historically been dedicated to the public use with motor vehicles, it is highly unlikely that the central section would have been within private ownership and occupation and been the subject of detailed provision as to private access and repair.'

Comments of Dorset Council: It is indeed possible that, had the way in question carried vehicular rights, there may have been no requirement for a conveyance providing for such private use and maintenance. Nonetheless, routes carrying public rights of all kinds commonly pass over private land, and a landowner may transfer land subject to whatever conditions they think fit. It cannot be asserted with any degree of confidence that private provision for the use and maintenance of the way was due to the absence of public rights over it.

- 12 Mr Cheal has supplied a plan dated June 1951 from deeds relating to Beaminster Down. The plan shows the section of path C-E in green, which is described as bridleway. Mr Cheal makes reference to *Godmanchester Town Council and Drain v DEFRA, 2004*, and points out that a provision in a written tenancy agreement by which the landlord obliges the tenant to prevent trespass and the acquisition of public rights of way is good evidence of his lack of intention to dedicate.

Comments of Dorset Council: The implications of the existence of any tenancies is discussed in considering Mr. Cheal's comments with regard to user evidence, below.

- 13 Mr Cheal makes reference to the various classifications of highway which lie over the route of the claimed byway and asserts that this suggests the absence of public vehicular rights throughout the route rather than the presence of such rights. Two parts of the route are recorded as public bridleway, one part carries no recorded public rights, and part of it is shown in the County Council's records as an unclassified county road (UCR). Mr Cheal points out, correctly, that the showing of a way as a UCR in these records does not confirm the extent of public rights over it. Records of unclassified highways are kept by highway authorities for purposes relating to a way shown therein, but they are not a legal record of public rights. The records of the preceding highway authority are not available.

- 14 Mr Cheal describes the topography of the claimed route and makes several observations. The name 'Crabb's Barn Lane', the fenced nature of the lane, and the fact that the barn itself lies towards its southern end, Mr Cheal suggests, indicates that the lane gave access from the road at its north-eastern end to the barn, but not to the land lying to the south-east. Mr Cheal also notes the presence of a number of gates across the length of the claimed byway and suggests that this 'indicates the absence of a public through-route'.

Comments of Dorset Council: Caution should be exercised in drawing any assumptions from this. Crabb's Barn lane may have the physical make-up of a lane, in that it is fenced on both sides; the reasons for this are unknown but may be a result of the inclosure processes the land was subject to. It is not uncommon for vehicular highways to be unenclosed, nor for gates to exist across them.

15 Mr Cheal has commented in detail on the evidence that has been submitted by FoDRoW in support of the application for the modification order. The points made by Mr Cheal have been taken into account in analysing the documentary evidence in the Council's Statement of Case, **Document Reference 4**.

16 Mr. Cheal refers to *Eyre v New Forest Highway Board* 1892. In making the application for the modification order FoDRoW assert that the *Eyre* case is a key precedent in that a highway which entered a common and emerged the other side with no record of a highway across the common could be presumed to exist. Mr Cheal questions the relevance of this, in that in the *Eyre* case there was no doubt of public use across the common. Mr Cheal believes this is not a 'key precedent', nor is it a true interpretation of *Eyre*, to assume with confidence that 'a public carriage way must exist in the gap.' In making this point Mr Cheal says that whilst a way approaching a ring-fenced farm or estate might be approached at either end by ways carrying public vehicular rights, it does not follow that any such public rights must continue through the estate or farm.

Comments of Dorset Council: This is acknowledged, and in drawing conclusions from the available evidence no presumption has been made with regard to the ruling in the *Eyre* case.

17 Mr Cheal has referred to the Ordnance Survey Object Names Book, and notes that the Object Names Book entry for Crabbs Barn Lane records the lane as being 32 chains (0.4 miles) in length, and that it terminated at a gate.

Comments of Dorset Council: This coincides with the awarded carriage road in the Inclosure award, but it should be noted that the object names book was to record the names of physical features to be shown on Ordnance Survey maps, and had no role recording the legal status of any ways described. Referring to spot heights and bench marks shown on Ordnance Survey maps, in particular that of the 1903 25 inch OS map, Mr Cheal rightly points out that these have no bearing on the status of a way. Included with Mr Cheal's appendix is a copy of a letter from the Ordnance Survey dated 6<sup>th</sup> April 2005 in which this is made clear. Mr Cheal makes reference to correspondence from 1971 between the County Surveyor and the District Surveyor, in which the former asked the latter for information as to whether the County Council had maintained the route between E,F,G,H and I 'as a through road and (whether there was) any evidence that it is used by the public as a through road.' The County Surveyor further asks whether there were any obstructions on the route and explains that 'At present no public status exists but it is necessary that some public status is given to it at Review to link up bridle roads.' The response from the District Surveyor gives details of the physical make-up of the section of route referred to, and suggests that it should be recorded as a 'Byeroad (sic) open to all traffic', but fails to give any evidence as to why the route should be so recorded.

- 18 In drawing conclusions on the available documentary evidence, Mr Cheal states that ‘Since this claim must be decided on the balance of probabilities, it must surely be the case that on balance it is more likely that the Claimed Route as a whole has never been public vehicular ....., and thus this claim must fail.’
- 19 Mr Cheal has made comments with regard to user evidence. User evidence is considered in the Council’s statement of case, **Document Reference 4**.
- 20 The user evidence considered by the Council in making the modification order had not been sent to the Council at the time of Mr Cheal’s submission in 2005. Mr Cheal makes the point that the route between Point C at Whitesheet Hill and Dirty Gate *‘is subject to public vehicular use very infrequently, probably no more than once or twice a year at most.’* Mr Cheal explains that whenever the objectors see anyone attempting to use the route, they challenge them by ‘pointing out that it is not a through-route for vehicles, and the visitor then leaves.’ When Landgon (Dorset) Farms owned Beaminster Down, they pursued the same policy. On one occasion, about 15 years ago, permission was given for a motorcycle club to use the route as part of a rally. Mr Cheal emphasises that in relation to the A-B-C stretch there is ‘no evidence of public vehicular use at all’, and this has been confirmed by the tenant and farm manager, who would have ‘immediately challenged’ any attempt to use this section with a vehicle.’ Mr Cheal’s point here is that ‘This evidence of challenges is good evidence of the lack of intention to dedicate.’

Comments of Dorset Council: This must be considered alongside the statements of those who have completed the user evidence forms in support of this application. None of the witnesses refers to having been challenged whilst using the route, and there are no references to any attempts to deter them from using the way.

- 21 Mr Cheal refers to the case of *Bakewell* (2004). The background to that case was that before it, the Courts had held that long use by vehicles of a footpath or bridleway would not create public vehicular rights because it is a criminal offence to use a motor vehicle on a footpath or bridleway without lawful authority. The House of Lords in *Bakewell* reversed that line of cases and held that long use by vehicles could create public rights if that use did not cause a nuisance to footpath or bridleway users. Mr Cheal argues that in the present case use by motor vehicles would have been a nuisance to lawful users of the way on horseback. Mr Cheal suggests that use of mechanically propelled vehicles on a bridleway may constitute the common law offence of public nuisance if that use prevents the convenient use of the way by lawful users. Mr Cheal also submits that in order to fall within the decision, there had to be someone with capacity to dedicate the route which is not the case if the land is leased. He points out that ‘it is clear that capacity to dedicate rests in the hands of the freeholder who also occupies the land crossed by the way in question, so that in the present case all the time the farm was the subject of a tenancy, no dedication could have taken place.’ Mr Cheal refers to a tenancy over the land between points F and E

on the Order Plan, and also maintains that the land crossed by the length of the route between E and I was subject to a tenancy, and refers to the Finance Act Valuation Book entry for hereditament 342 which makes reference to the occupation of the land by a tenant.

Comments of Dorset Council:

- 22 The relevance of this is that, if vehicular use would have caused a nuisance or the owner did not have the capacity to make a dedication, evidence of use of the way by motor vehicles could not be considered in determining whether public vehicular rights had been established. If this is so, any evidence of use of the way by the public with vehicles after 1930 could not be taken into account.
- 23 The existence of a tenancy does not prevent a deemed dedication under section 31 of the Highways Act. It may though prevent an implied dedication under common law. For a common law dedication, the landowner must have the capacity to dedicate, but this need not be throughout the whole period of the use of the way by the public. Any periods of capacity, however short, may be sufficient for dedication to be implied. There is no evidence that the landowner acquiesced in dedication of the route; there is, equally, no evidence that they did not.
- 24 It would not have been open to the landowner to dedicate the way as a vehicular highway if use by vehicles would have constituted a public nuisance to lawful users of the way. Mr Cheal argues that use of the route by motor vehicles would have been a nuisance to lawful users of the way on horseback, and that such use may constitute the common law offence of public nuisance in that it prevents the convenient use of the way by lawful users. Due to the physical characteristics of the route, the Council does not consider the public vehicular use would have constituted a nuisance. Many routes of a similar physical nature carry public vehicular rights and there are no exceptional circumstances that might apply in the case of the claimed byway presently under consideration.
- 25 Mr Cheal has supplied a plan dated June 1951 from deeds relating to Beaminster Down. The plan shows the sections of path C-E in green, which is described as bridleway. Mr Cheal makes reference to *Godmanchester Town Council and Drain v DEFRA, 2004*, and points out that a provision in a written tenancy agreement by which the landlord obliges the tenant to prevent trespass and the acquisition of public rights of way is good evidence of his lack of intention to dedicate.

Comments of Dorset Council: The 'Godmanchester' case was appealed to the House of Lords where it was held that in order for a provision such as the one in this case to show a lack of intention to dedicate a highway it must be drawn to the public's attention. There is no evidence that it was.

- 26 In subsequent correspondence with the Council Mr Cheal has said that in his view the exception in the 2006 Act is not available to preserve any public vehicular rights due to the deficiencies in the evidence accompanying the applications. **(Appendix 2)**

Comments of Dorset Council: The Council does not agree that this is the case for the reasons set out in its Statement of Case, **Document Reference 4.**

- 27 In referring to Crabb's Barn Lane, Mr Cheal maintains that it was always a farm access road, accommodating the farm.

Comments of Dorset Council: private use would not affect the existence of any rights of the public to use it.

- 28 In his objection letter of 5<sup>th</sup> March 2020 Mr. Plumbe states that *'The Committee and Officers agree to exclude the section A-B-C from the Order, ie about 25% of the BOAT applied for. Arguably that makes the way that is the subject of the DMMO a substantially different entity to that applied for. That raises questions as to whether in law a different application should have been made relating to the shortened route (it is too late for a new Council proposal), taking into account (a) the question of whether exemption under s67(3) NERCA can apply to what is only part of the route applied for, and (b) the fact that public consultation prior to the making of the order related to a different route.'*

Comments of Dorset Council:

The decision of the Regulatory Committee to exclude the section of the claimed byway between A, B and C on the plan contained in the Committee report was based on Members views that the evidence indicated that this part of the route did not carry vehicular rights. **(Appendix 3, Document Reference 4** contains the Report of the Service Director, Environment, Economy and Infrastructure and minutes of this meeting). Consultations were carried out on the whole length of the route subject to the application, and the Committee's decision and exclusion of part of the claimed route from the modification order does not invalidate the application.

- 29 Mr. Plumbe refers to the validity of the application for the modification order and the supply of evidence in support of it. Mr. Plumbe notes that *'sch 14, para 1 of WCA 1981 says 'An application shall be made in the prescribed form and shall be accompanied by (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application. Under Winchester, it was held by the Court of Appeal that to be valid, applications must*



*conform strictly to the requirements of Sch 14. The Supreme Court held in the Dorset case that Winchester was correctly decided.'*

- 30 Mr. Plumbe continues by referring to his letter of 6 August 2018 **(Appendix 3)**, in which he *'submits that FoDRoW deliberately withheld evidence which, as Leading Counsel advises (copy available on request), makes the claim invalid. DC has the letter which will be copied to PINS when we get to that stage. It is considered at Report para 11.3/4. DC argues that omitting the submission of incomplete evidence in order to beat the clock is not 'deliberately holding back evidence'. I disagree – a point which will be developed.'*

Comments of Dorset Council. The application for the modification order was made on 21<sup>st</sup> December 2004, and thus before 20 January 2005. All of the evidence listed on the application form was supplied by the applicant. The Council does not consider that the applicant deliberately held back evidence or submitted the application before it had been researched. The Council is therefore satisfied that the application has been submitted in accordance with the requirements of the Wildlife and Countryside Act 1981, and that that the exceptions in the Natural Environment and Rural Communities Act are capable of applying.

- 31 Mr. Plumbe refers to paragraph 13.15 of the report to the Regulatory Committee of 19<sup>th</sup> March 2019, which says *'For an objection to override an otherwise valid claim, an objector must show that the landowner had no intention of dedicating public rights over the path in question and had taken steps to prevent the accrual of such rights.'* Mr. Plumbe maintains that this is wrong. Mr. Plumbe says that *'para 9.5 correctly paraphrases s31 HA80, including '.....unless there is sufficient evidence that there was no intention during that period to dedicate it.'* Mr. Plumbe points out that *'there is no requirement in law to 'take steps to stop use' or 'to prevent the accrual of such rights'. All that is required is evidence of non-intent, and ensuring that the public are aware of that fact. The fact that a number of vehicular users were stopped and warned, together with the erection of a finger post saying no through road' (presumably with liaison between the landowners and the highway authority) indicates satisfaction of both requirements (contrary to DC views at Report para 11.42). So does the grant of private consent to a motor cycle club.'*

Comments of Dorset Council. Paragraph 13.16 of the Report addresses this point: *'The evidence submitted and/or discovered suggests that the landowners took no effective steps to prevent the public from using the way with mechanically propelled vehicles. Alongside the statements of those who have used the path in motor vehicles, must be considered the statements of the landowners who have taken steps to prevent use of the way by the public with motor vehicles. These actions may be evidence of a lack of intention to dedicate the path as a vehicular highway. However, neither the applicant nor any of the witnesses refer to having been challenged or obtaining permission to use the way, and neither the landowners nor objectors have provided direct evidence of attempts to prevent such use which overcomes the user witness evidence. It is therefore concluded that there has been a presumed dedication of the route under section 31.'*

The granting of permission to a motorcycle club for the use of the way would not affect any public rights that exist over the way.

- 32 Mr. Plumbe states that *'The assertion at Report para 9.15 as to the absence of locked gates was due to the fact that most of the way has been a footpath or bridleway'*

Comments of Dorset Council: This is noted, but the absence of locked gates would also have given access for motor vehicles.

- 33 Mr. Plumbe refers to the Finance Act evidence that is considered in paragraphs 8.24 and 8.25 of the Committee Report of 19<sup>th</sup> March 2019, and holds that this *'is not indicative of a vehicular way in respect of the section E-I. FA evidence is regarded as strong, and the deduction of a £100 non-attributed allowance is not compatible with a public vehicular way. (Report paras 8.24 and 13.5)*

Comments of Dorset Council. The limitations of the value of the Finance Act maps in providing evidence of the status of a way has been considered and acknowledged by the Council in making the modification order. The analysis of this evidence contained in the committee report is correctly interpreted.

- 34 Mr. Plumbe says that *'The point has been made that evidence relying on extracts from documents is incomplete, which invalidates that evidence. This view was wrongly said to be my view, whereas it is advice contained in the Joint Opinion of Leading Counsel (available on request). Although the point has not been tested in law, advice from Leading Counsel must be the best legal authority available. Officers were questioned on this point (Minute 19) and were wrongly advised that the applications were 'in accordance with the necessary requirements'.*

Comments of Dorset Council. Mr. Plumbe is referring to the Joint Opinion dated 26<sup>th</sup> January 2007, a copy of which is at **Appendix 4**. Dorset Council

consider that the evidence which was submitted in support of the application raises a prima facie case that the claimed public rights exist. Accordingly, the exemptions in section 67 of the Natural Environment and Rural Communities Act 2006 do not apply.

- 35 Mr. Plumbe refers to paragraph 13.22 of the Report of 19<sup>th</sup> March 2019, which says: *'The County Council must make a modification order if the balance of evidence shows either (a) that a right of way subsists or (b) that it is reasonably alleged to subsist. It is considered that the evidence described above is sufficient to satisfy (b)'*. Mr. Plumbe notes that *'As is rightly said at Appx 2, para 1.4, the evidence necessary to satisfy (b) is less than that necessary to satisfy (a). The distinction between the two functions and appropriate tests is considered in Todd + Bradley v SoS/DEFRA [2004] EWHC 1450 (Admin)'*. Mr. Plumbe continues to refer to paragraph 11.9, which *'correctly state(s) 'To confirm an order to add a right of way, the evidence must show that the right of way exists (not only that it is reasonably alleged to exist).'* DC has rightly made a DMMO based on the lower test but would only be confirming if there were no objections – which is not the case. As matters stand, the Order will have to be referred to PINS for confirmation or otherwise.

Comments of Dorset Council

This is noted by the Council in submitting the order to the Secretary of State for confirmation.

- 36 Mr Plumbe refers to the update which was presented to the Committee addressing points raised by those who had made comments following publication of the Agenda. **(Appendix 5)**. *it is said that I was wrong as to the map not showing the way. The map I was referring to is that which is recorded in the Council's Statutory Register under the T354 application, and shows in green only the section F – I ('unrecorded') plus part of the section shown as 'road', but stopping short of Dirty Gate. There is no marking at all on the rest of the route. if the actual application map (as shown to the C'tee) is different, then the register is wrong and the public and landowners have been misinformed. That invalidates the consultation process.*

Comments of Dorset Council

An update note was presented to the Committee giving brief details of representations that has been received by the Council following the publication of the agenda. The note contained the following paragraph, referring to the point made by Mr. Plumbe in his letter of 18<sup>th</sup> March 2019 **(Appendix 6)**: *'Mr. Plumbe makes reference to the map accompanying the application, and maintains that it only shows a short section of the claimed route. The map submitted with the application was marked in a way that referred to the whole length of the claimed footpath, and members will be shown this map at the Committee meeting.'*

Mr. Plumbe's point is noted, but the process of the making and advertisement of the Modification Order has been carried out in accordance with the requirements of the Wildlife and Countryside Act 1981.

- 37 *'It was reported to the Committee (Appx 2, para 6.4) that application had been made the Supreme Court for clarification of its so called 'Order' (in fact an ambiguous Declaration by the Registrar of what the Court had ordered). Officers reported that the 'Order' found that the applications 'complied with all of the requirements of para 1 of Sch 14', which is wrong. The ambiguity in fact lay in the Registrar's wording which was that they had been 'made in accordance with Paragraph 1 of Schedule 14' without recognising that only one small part of Para 1 had been in issue. The TRF are making the same mistake as DC in claiming that the Declaration was an Order which ordains that 'all' the requirements were met, which effectively argues that the Registrar had authority to overturn the findings of the Court of Appeal given that at least some of the 5 applications most certainly did not comply fully with Para 1, Sch 14. The Supreme Court did not make a ruling in response to the Council's application for clarification and the matter will fall to be decided by the Inspector when the Order is referred to PINS. A letter from me dated 16 Nov 19 under ref FPS/C1245/14A/10 (Dorset Ref T353) is already with PINS and will be referred to when appropriate. '*

#### Comments of Dorset Council

For purposes of clarification, it is necessary to refer here to the background to Mr. Plumbe's comment on the scale of the maps which accompanied the application for the modification order. On 7 October 2010 Dorset County Council rejected the application on the ground that the map that had accompanied the application had been by computer generated enlargements of Ordnance Survey (OS) maps drawn to a scale of 1:50,000 and not by maps drawn to a scale of not less than 1:25,000. The respondents' application for judicial review was dismissed by the Administrative Court, but the appeal was allowed by the Court of Appeal, Civil Division 23/4/13. In dismissing the authority's appeal, the Supreme Court (heard 15/1/2015) held that a map which accompanied an application, and was presented at a scale of no less than 1:25,000, satisfied the requirement in para1(a) of Sch14 of being 'drawn to the prescribed scale' in circumstances where it had been digitally derived from an original map with a scale of 1:50,000. (Judgment on 18/3/2015). In accordance with its duties under the Wildlife and Countryside Act 1981 the Council investigated the application. A copy of the Supreme Court's decision is at **Appendix 7**

On 5th November 2019 the Deputy Registrar of the Supreme Court confirmed that it is too late at this stage to raise issues relating to the validity of the application for the Modification Order. **(Appendix 8.)**

In making the modification order, the Council has acted in accordance with the ruling of the Supreme Court.

- 38 Mr. Plumbe refers to the user evidence considered by the Council, and makes the following points in objection to the modification order.

*1. '...the UEFs were orchestrated to refer only to section C - I, ie they did not thereby relate to the application as made, and (ii) they were not submitted until 2008 – 2010 (4 – 6 years after the application) and so did not meet the requirements of Sch 14 which specifically require that the application shall be accompanied by (a) ..... (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application. This again appears to be the consequence of deliberately omitting the submission of known evidence in order to beat the clock.'*

Comments of Dorset Council

- 39 As has been noted, the Council is satisfied that the documentary evidence accompanying the application is sufficient for the purposes of Schedule 14. In investigating the application, the Council has correctly taken into account all available evidence, including that contained in the user evidence forms submitted by the Trail Riders Fellowship in 2008-2010.

- 40 *Prior to 1985 (ie within the 20-year dedication period) there were only 4 people who claimed to have used the way. That is not enough to justify implied dedication, and the Committee was right (as minuted) to 'not consider that the user evidence was sufficient to demonstrate that vehicular rights had been dedicated', contrary to the Officer recommendation (Report 13.14).*

Comments of Dorset Council

The relevant period of use of the way by members of the public, as of right and without interruption, in order to establish rights by presumed dedication under Section 31 of the Highways Act 1980, is taken to be 20 years, or more, prior to 2004. There is evidence of use by the public with vehicles, predominantly motorcycles, contained in the user evidence forms that were submitted in support of the application. The user evidence fulfils the requirement of 20 or more years use by the public, as of right and without interruption, prior to the date that public rights were brought into question. It is therefore concluded that there has been a presumed dedication of the route under section 31.

In considering the common law test, the Council is satisfied that the landowner had capacity to dedicate the way and the evidence of use of the route is sufficient for implied dedication of public vehicular rights under common law.

- 41 Mr. Plumbe refers to the conflicting statements of those who claim to have used the way in motor vehicles, and those who have stopped motor vehicle users:

*‘There is no mention of DC interviewing the witnesses to assess their reliability (all it says is that Officers didn’t interview all of them). That is particularly relevant as to the 4 whose use is said to span the full 20 years. It needs to be ascertained whether they had records and what their historical reports are based on given a span of 32-37 years between start of use and completion of forms. Officers according to the minutes advised the Committee that “The objectors stated that they had taken steps to stop use, but none of the user evidence confirmed that.” That is predictable and meaningless when the evidence is from occasionally visiting members of the applicant group. Evidence from local residents is far more cogent. Eg, see Report para 11.35 re evidence from Mrs Jones.’*

#### Comments of Dorset Council

Paragraph 9.3 of the Committee report of 19<sup>th</sup> March 2019 states that *‘Not all witnesses have been personally interviewed. The information has been taken from the forms of evidence which have been signed by each witness stating: “I hereby certify that to the best of my knowledge and belief the facts that I have stated are true”.*

Alongside the statements of users, the Council has considered the comments of those who have not seen motorised vehicles using the route. It is evident from the statements of those whose use has been taken into account that they have used the way. Whilst it is equally the case that there are people who have never seen the route being used by motorised vehicles, that does not mean that it was not so used.

- 42 Mr. Plumbe notes that: *‘It is relevant that those attending the Committee gave evidence as to stopping such few vehicular users as there were, and that much of this information was not available to Officers when preparing the Report.’*

#### Comments of Dorset Council

The Committee report at paragraph 13.16 addresses this point:

*The evidence submitted and/or discovered suggests that the landowners took no effective steps to prevent the public from using the way with mechanically propelled vehicles. Alongside the statements of those who have used the path in motor vehicles, must be considered the statements of the landowners who have taken steps to prevent use of the way by the public with motor vehicles. These actions may be evidence of a lack of intention to dedicate the path as a vehicular highway. However, neither the applicant nor any of the witnesses refer to having been challenged or obtaining permission to use the way, and neither the landowners nor objectors have provided direct evidence of attempts to prevent such use which overcomes the user witness evidence. It is therefore concluded that there has been a presumed dedication of the route under section 31.*

The fundamental point is that, whilst there are statements to the effect that motor vehicular users of the way have been stopped whilst using the route, none of those who were stopped were those who completed the user evidence forms that have been considered by the Council.

#### **Objection from Mr. B. Dupont, Director, Langdon Dorset Farms.**

43 Mr. Dupont sent a letter dated 5<sup>th</sup> March 2020 objecting to the modification order.

44 Mr. Dupont states that he bases his objection on the detailed submission of Mr. Cheal, dated 21<sup>st</sup> July 2005. **(Appendix 1)** Mr. Dupont refers to Mr. Cheal's disagreement with paragraph 13.8 of the report to the Regulatory Committee of 19<sup>th</sup> March 2019 regarding the Council's conclusion as to the historical evidence. Mr. Dupont emphasises Mr. Cheal's view that *'on the balance of probabilities there is not sufficient documentary evidence in favour of public vehicular status on the claimed route as a whole to prove this claim'*. Mr. Dupont's view is that *'the Regulatory Committee chose to accept the evidence of a number of motorcyclists, who had used the route on an unauthorised basis from time to time in recent years rather than the weight of historical evidence contained in the submission.'*

Comments of Dorset Council.

Paragraph 13.8 of the Committee Report concludes that *'the documentary evidence as a whole is sufficient to demonstrate, on balance, that the claimed public rights exist.'*

Mr. Cheal's submission of 21<sup>st</sup> July 2005, and the Council's analysis and conclusions from the documentary and user evidence, is discussed in detail above. Mr. Dupont's use of the word 'unauthorised' in describing the use of the way may support the establishment of public rights through use of the

way in its implication that those who used it did so without receiving permission.

- 45 Mr. Dupont refers to fencing adjacent to the claimed byway, and states that *'there has never been a public right of way for vehicles to pass along the route and any vehicle which did so did not have the landowner's authority'*. Mr. Dupont adds that *'in the period of 20 years leading up to 2004, a number of motorists have been stopped and cautioned that they have no vehicular rights.'* Mr. Dupont refers to his statement to the Committee that *'whenever motorcyclists had been seen, they were turned away and I had two witness statements to confirm that challenges had been made to those using the route'*. Mr. Dupont mentions that that 20 or so years ago a motorcycle club had been granted permission to use the route for a rally.

#### Comments of Dorset Council

As noted above, whilst there are statements to the effect that motor vehicular users of the way have been stopped whilst using the route, none of those who were stopped were those who completed the user evidence forms that have been considered by the Council.

- 46 Mr. Dupont refers to the Council-installed sign at Dirty Gate, at the eastern end of the claimed route, which says 'Langdon No through Road.'

#### Comments of Dorset Council

The existence of this sign is discussed in paragraph 11.42 of the Committee report. The sign may have discouraged some potential users of the way, but it does not refer to the existence or otherwise of public rights over the route, nor request that it is not used by motor vehicles.

- 47 Mr. Dupont points out that the *'responsibility for the maintenance of the tarmac on the road from point I on the map to point F is shared between Langdon Dorset Farms and the owner of Higher Langdon Farm, and is evidence of the private ownership of the route and the private (not public) rights which affect it.'*

#### Comments of Dorset Council

Any maintenance carried out to maintain the way for use by those with private rights would not affect any public rights that exist over it, nor would such action or arrangements affect the duty of the highway authority to maintain it for the exercise of public rights.

- 48 Mr. Dupont refers to the use of the way by motor vehicles as being 'harmful to the use of the public including local residents' Mr. Dupont adds that such use could be regarded as 'a public nuisance'.



Comments of Dorset Council

This concern is noted, but does not assist in determining the public status of the way in question.

### **Objection from Beaminster Ramblers.**

- 49      Beaminster Ramblers sent an e mail on 19 March 2020 objecting to the Modification Order. The objection is based on concerns for the use of the way by motor vehicles, and does not provide any information or evidence relating to its status.

50      **Concluding Remarks**

Dorset Council is satisfied that the application for the modification order has been made in accordance with the requirements of section 53 of the Wildlife and Countryside Act 1981. The objections from Mr. Plumbe and Mr. Dupont do not provide grounds for the order not to be confirmed. Beaminster Ramblers have not provided any information that assists in determining the status of the way subject to the order. The Council concludes that the objections should be dismissed and the order confirmed.

### **Appendix**

1.      Submission from Mr. J. Cheal, 21<sup>st</sup> July 2005.
2.      Letters dated 23/10/2008, 11/11/2008 and 15/1/2010 from Mr. J. Cheal.
3.      Letter from Mr. G. Plumbe, 6/8/2018
4.      Joint Opinion 26/1/2007
5.      Regulatory Committee Meeting Update Sheet, 21/3/2019
6.      Letter from Mr. G. Plumbe, 18/3/19
7.      Supreme Court Judgement, 18/3/2015
8.      Registrar's letter, 5/11/2019