WILDLIFE AND COUNTRYSIDE ACT 1981

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

OBJECTION TO PROPOSED MODIFICATION
on behalf of the
TRAIL RIDERS FELLOWSHIP

DEFINITIONS AND ABBREVIATIONS

1. The following definitions and abbreviations are adopted:

A-B-C-D-E-F-G-H-I	Points marked on a plan prepared by Dorset CC **[DSOC/App4/20]**, which is understood to be an antecedent of the Order Plan (which does not have points A-B marked).
J	A point at 'DIRTY GATE' on the Order Map (where a continuation of the Order Route in a south-easterly direction from point I meets FP36).
DMS	Definitive Map and Statement.
Dorset	Dorset Council.
GLPG	Green Lane Protections Group
Inspector	Mr A Spencer-Peet, an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs.
Interim Decision	Interim Order Decision dated 27 July 2023.
Modified Order	The Order as proposed to be modified following the Interim Decision.
NERCA 2006	Natural Environment and Rural Communities Act.
Order	Dorset Council (A Byway Open to All Traffic, Beaminster at Crabb's Barn Lane) Definitive Map and Statement Modification Order 2020 **[DDoc/2]**.
Order Plan	The Plan annexed to the Order at **[DDoc/2]**.
TRF	Trail Riders Fellowship.
WCA 1981	Wildlife and Countryside Act 1981.
[DDoc/]	A reference to documents in Dorset's submission for confirmation (as referenced in the **[DSoC]** as **Document Reference** ##).
[DSoC]	A reference to the specified paragraph of Dorset's Statement of Case **[DSoC¶###]** or to a page from an appendix to that **[DSoC/App##/###]**.

[ID¶]	A reference to a specified paragraph of the Interim Decision.
[TRFDoc/]	Documents appended to the TRF's Statement of Case or this Objection (this Objection continues the number sequence of the documents attached to the TRF's Statement of Case).
[TRFSoC¶]	A reference to a specified paragraph of the TRF's Statement of Case.

INTRODUCTION

2. On 21 December 2004, Mr Jonathan Stuart, for Friends of Dorset Rights of Way, made an application to have recorded A-B-C-D-E-F-G-H-I as a BOAT (parts of which were already recorded as bridleways, BR17 and BR35) **[DSoC/App2/2-3]**. Cf. **[DSoC¶4.3]**. On 4 October 2010, the TRF took over conduct of the application.

3. Dorset rejected the application, deciding that the requirements of para. 1 Schedule 14 WCA 1981 had not been met, in that the maps submitted were not at a scale of not less than 1:25,000. Broadly speaking, Dorset reached that view because the maps, although presented at a scale of not less than 1:25,000, had been printed to that scale from a digital product derived from an OS 1:50,000 map.

4. The TRF bought judicial review proceedings challenging that decision (unsuccessful, at first instance, but succeeding in the Court of Appeal, whose decision was upheld by the Supreme Court). As set out in more detail below, the proceedings claimed relief which included a declaration that the application complied with para. 1 Schedule 14 WCA 1981 (i.e. as to both limbs of that para., not just the scale of the map). The proceedings were defended by Dorset who argued that the application was not compliant with para. 1 Schedule 14 because the maps were not drawn to the prescribed scale, not arguing that para. 1 had not been complied with in any other respect. Mr Plumbe, for GLPG, who joined the proceedings as an interested party, supported Dorset's argument. The Secretary of State was a party to the proceedings (originally as a second defendant but became by agreement an interested party) and took a neutral stance, choosing not to participate actively. The relief which the TRF obtained in the Court of Appeal, upheld in the Supreme Court, included a

declaration that the application complied with para. 1 Schedule 14 and a mandatory order that Dorset determine the application.

5. Dorset proceeded then to determine the application, deciding that C-D-E-F-G-H-I (only, and not A-B-C) should be recorded on the DMS as a BOAT. The Order was submitted for confirmation.

6. The TRF objected, submitting that A-C should also be recorded on the DMS as a BOAT, while supporting Dorset's determination that C-D-E-F-G-H-I should be recorded on the DMS as a BOAT.

7. By the Interim Decision of 27 July 2023, the Inspector proposed to confirm the Order, subject to modifications to reflect the findings of the Interim Decision that (i) C-D-E is a vehicular highway over which rights for MPVs have not been extinguished; (ii) there are no vehicular rights over C-D-E-F-G-H-I; and (iii) there are no vehicular rights over A-C.

DORSET'S DETERMINATION AND SUBMISSION FOR CONFIRMATION

8. Dorset's Statement of Case, reflecting its earlier determination, and comments **[DDoc6]** on the objections, made the following principal points in support of confirmation of the Order:

    8.1. The documentary evidence as a whole was sufficient to demonstrate, on balance, that the claimed public rights subsist over the Order Route (viz. a BOAT, C-D-E-F-G-H-I) **[DSoC¶10.7]**[1].

    8.2. The user evidence showed sufficient use by MPVs to:

        8.2.1. Establish rights for vehicles, including MPVs, by presumed dedication under s. 31(2) HA 1980 **[DSoC¶10.12, 10.13]**; and

        8.2.2. Establish rights for vehicles, including MPVs, by common law prescription / implied dedication **[DSoC¶10.16]**.

[1] **[DSoC/App5]** contains analysis by Dorset of specific documents, and includes extracts from some of those documents. Dorset has provided to the TRF copies of the documents referred to there, which were not included in the extracts: these are appended to this Objection as **[TRFDoc/21B]**.

8.3. The application complied with the requirements of para. 1 Sch. 14 WCA 1981 **[DSoC¶10.17-10.18]** and cf. **[DDoc6¶29-30]**.

8.4. The outcome of the proceedings R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406 precluded the validity of the application being challenged by reference to the requirements of para. 1 Sch. 14 WCA 1981 **[DDoc6¶37]**.

9. Each of Dorset's conclusions described at paras. 8.1, 8.2.1 and 8.2.2 was an alternative basis sufficient to establish vehicular rights over C-D-E-F-G-H-I.

10. Each of Dorset's conclusions described at paras. 8.3 and 8.4 was an alternative basis sufficient to establish the validity of the application (and thus prevent MPV rights from having been extinguished by reason of section 67 NERCA 2006).

THE INTERIM DECISION

11. The main structure and conclusions of the Interim Decision is tabulated. The Inspector has come to the opposite conclusion on each and every one of principal conclusions of Dorset as respects the Order Route.

[ID¶1-14]	Procedural matters.
[ID¶15]	Issues (i) compliance with para. 1 Sch. 14 WCA 1981; (ii) whether public vehiular rights exist over Order Route; (iii) whether public vehicular rights exist over Bridleway 17, Beaminster (i.e. A-C).
[ID¶16-31]	Compliance with para. 1 Sch. 14 WCA 1981. • The application was not compliant because evidence was submitted later: **[ID¶20-28]**. • R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406, was only concerned with map scales: **[ID¶28-30]**.

	• Therefore, the application did not comply with para. 1 Sch. 14 WCA 1981: **[ID¶31]**.
[ID¶32-69]	Whether public vehicular rights exist over the Order Route. • Documentary evidence **[ID¶37-53]**. • User evidence **[ID¶54-59]**. • Conclusions on the documentary and user evidence: **[ID¶60-69]**. C-D-E should be recorded as a BOAT: **[¶69]** (cf. **[¶60-61]** as to Inclosure Award and **[¶66]** as to its appearance on the List of Streets). Insufficient evidence to support confirmation of the remainder of the Order Route, E-F-G-H-I, as an RB.
[ID¶70-79]	Whether public vehicular rights exist over Bridleway 17 Beaminster (i.e. A-C). • Conclusions on the evidence for A-C**: [ID¶76-81]**. Insufficient evidence to support upgrade from BR to RB.
[ID¶82]	Other matters.
[ID¶83]	Conclusion.
[ID¶84]	Formal decision.

PARA. 8 SCH. 15 WCA 1981 (MODIFICATION PROCEDURE)

12. As to the scope of the further inquiry, see Marriott v Secretary of State for the Environment, Transport and the Regions [2010] 10 WLUK 264 [2001] JPL 539 at [84-86] **[TRFDoc/16]**; Whitworth v Secretary for Environment, Food and Rural Affairs [2010] EWCA Civ 1468 at [14] **[TRFDoc/17]** and Elveden Farms Ltd v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 644 (Admin) at [42] **[TRFDoc/18]**. The Inspector is not precluded on the further inquiry from considering new evidence, even as to matters not relating to the modifications proposed. As per Marriott **[TRFDoc/16]** at [84], it would

be '*most undesirable*' for an Inspector to be obliged to reach his decision '*on an incomplete or inaccurate basis*'. Those comments are directed at '*new information*', an example of which is given at [85] as being '*new, cogent evidence*'. But an Inspector's ability and/or obligation to revisit an interim decision is not so limited: cf. Elveden Farms Ltd v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 644 (Admin) **[TRFDoc/18]** at [42] per Charles J '*It seems to me, and it seemed to me on the earlier versions of paragraph 8 without the final paragraph, that the process under paragraph 8 did not limit objections that could be made, and does not limit them to the modifications proposed by the inspector.*'. In this context, it should be borne in mind that, as here, so far as the TRF is concerned as respects the Order Route, it will not infrequently be the case that a person may have no objection to the order proposed to be confirmed but that may be changed very significantly by a modification. Here the modification is radical: the Order as made, subject to confirmation, was to record a continuous BOAT (i.e. a public right of way including for MPVs), being a through-route C-D-E-F-G-H-I (where it continues I-J (Dirty Gate), a public vehicular highway). The order as modified envisages recording only C-D-E as a BOAT: i.e. not only a significant departure from the order as sought to be confirmed as respects extent, but moreover a very different outcome qualitatively, in that the outcome will be cul-de-sacs as respects vehicular rights.

13. The TRF submits further evidence and information to demonstrate, among other things, that the Interim Decision proceeds on the basis of a misapprehension as to what was decided in R (Trail Riders Fellowship) v Dorset CC and also a misapprehension as to the course of the investigation undertaken by Dorset.

THE TRF'S POSITION

14. The TRF objects to the modification proposed by the Interim Decision:

    14.1. The decision that the Application did not comply with para. 1 Sch. 14 WCA 1981:

        14.1.1. Is contrary to the declaration of the Court of Appeal of 20 May 2013 **[TRFDoc/2]** and of the Supreme Court of 13 April 2015 **[TRFDoc/4]** in the R (Trail Riders Fellowship) v Dorset CC proceedings. The Inspector's reasoning misunderstands those proceedings and the effect of the declaration. It is unlawful for the Secretary of State to

purport to make a decision contrary to the declaration and not give effect to the declaration. See para. 15 et seq. below.

14.1.2. Moreover and in any event, the Application complied with para. 1 Schedule 14 WCA 1981 in all respects. See para. 32 et seq. below.

14.2. The Inspector was wrong to decide that there are no vehicular rights over E-F-G-H-I.

14.2.1. The Inspector accepted that C-D-E was a public vehicular highway (as was inevitable given particularly the evidence of the Inclosure Award).

14.2.2. There was extensive evidence that C-D-E-F-G-H-I has existed as a physical through-route for centuries. Moreover, all of C-D-E-F-G-H-I is known to be a public right of way (with at least equestrian rights). The Inclosure Award itself indicated that the public vehicular highway continued beyond E (the marking '*to Hook Village*' at point E together with the description in the award[2]). There was no evidence of any other relevant continuation of C-D-E as a public vehicular highway.

14.2.3. The natural conclusion on the evidence was that E-F-G-H-I is the continuation of the public vehicular highway C-D-E, as the Applicant contended, as Dorset after its investigation concluded, and as the TRF also contended.

14.2.4. The conclusion that there was a public vehicular highway which ended at a cul-de-sac for vehicles at point E is an overwhelmingly

[2] The Inclosure Map naturally only showed the part of the route (C-D-E) which was affected by the Inclosure. There is no inconsistency in the terms of the award ('*one other public carriage road and highway 30 feet wide leading from the northeast end of White Sheet Lane to its usual entrance on Langdon Farm in the Parish of Beaminster and adjoining the south side of the said open and common arable fields called the South Fields the same being part of the public highway towards the village of Hook…*') as appears to be suggested by **[ID¶61]**: it is on the one hand describing that part of the route which was part of the area subject to inclosure and on the other hand indicating that this was part of a longer route to the village of Hook. The 'village of Hook' is presumably identifiable with the present 'Hooke': i.e. to the south-east of the Order Route, consistently with the general alignment of the Order Route. The longer route will naturally have been of the same status as C-D-E (as is also implicit in the description of the award) and cf. moreover '*Note that pre-1835 the term "highway" did not usually include footpaths or bridleways*. ' PINS Consistency Guidelines para. 7.2.3.

improbable interpretation of the evidence, particularly where there is a compelling and natural conclusion available on the evidence viz. that the public vehicular highway continued E-F-G-H-I. The conspicuous oddity is further illustrated by considering that – on this conclusion – an equestrian user can travel from C-D-E and continue E-F-G-H-I enjoying public rights over a route which has existed for centuries, but a vehicular user can travel from C-D-E but no further and is to be thought of as not being entitled to use the existing further continuation which equestrians could use and which existed on the ground.

14.2.5. The Inspector recognised that his conclusion resulted in a cul-de-sac C-D-E as respects public vehicular rights but offered no explanation as to why such a conspicuous oddity should have arisen. The terms of that acknowledgment **[ID¶69]** itself shows that the Inspector did not approach the evidence as a whole, but rather approached the question as if there were some threshold of direct documentary evidence of public vehicular rights as to E-F-G-H-I which had to be crossed before the order could be confirmed.

14.2.6. The Inspector failed to recognise another conspicuous oddity: that his conclusion results in another cul-de-sac as respects public vehicular rights as respects Dirty Gate (defined above as point J) to I. I is described in the Order as '*the junction with the D11205 Road at the Corscombe parish boundary at S50680165*' was described by Mr Stuart as '*the point where the claimed road becomes a county road*' **[DSoC¶4.6]**. I to J is an unclassified county road (see extracts from List of Streets) at **[TRFDoc/21]**.

14.2.7. Not only was it far more likely from these facts alone that C-D-E-F-G-H-I was (part of) a continuous public vehicular highway, but there was further evidence directly showing this: in particular, but not limited to, Greenwoods Map which showed A-B-C-D-E-F-G-H-I-J as a 'cross-road' linking public vehicular highways passing through A,

C and J (i.e. implying a public highway of the same status). For the above points, see further para. 54 et seq. below.

14.2.8. The Inspector was wrong to conclude that there was insufficient user evidence to support vehicular rights. Despite the fact that such a route by its nature will have been infrequently used, the user evidence showed quite extensive use by MPVs over period stretching back decades (and the evidence available will naturally have been only a proportion the actual use). It is unclear why the Inspector has here come to opposite conclusion to the evaluation of Dorset as to deemed dedication (it may be noted that Dorset, as both order-making authority and highway authority has no positive interest in having higher rights recorded, which can only increase its maintenance burden). Further, the Interim Decision seems to only address deemed dedication under section 31(2) HA 1980: see '*Consequently, in respect of section 31(2) of the 1980 Act, the relevant period is from 1984 to 2004*' **[ID¶54]**; '*the full twenty year period*' **[ID¶56]**; and in his conclusion, '*overall and during the relevant period*' **[ID¶58]**. No separate consideration has been given to common law prescription. Dorset expressly and separately treated common law prescription and was satisfied that the level of use was sufficient to establish common law prescription as a separate basis for establishing vehicular rights **[DSoC¶10.14-10.16]**.

14.3. On a proper interpretation of Dorset's List of Streets, all of C-D-E-F-G-H-I-J (J being 'Dirty Gate') is, and was as at 2 May 2006, recorded as unclassified road. The current list (in distinction to any accompanying map), includes at least all of C-D-E and H-I-J. The descriptions in the list are most apt to be interpreted as recording a continuous route meeting at or around Higher Langdon: any other interpretation is absurd. Thus, (1) the list of streets is further evidence of a continuous vehicular through route – direct evidence as to not just C-D-E but also H-I (and beyond) and by natural interpretation a continuous route; and (2) even if – contrary to the above the application could be found to be invalid or

was invalid – MPV rights will have been saved by s. 67(2)(b) NERCA 2006. See para. 51 et seq. below.

14.4. The Inspector was wrong to decline to propose a modification to upgrade A-C to a BOAT. See para. 58 et seq. below.

R (TRAIL RIDERS FELLOWSHIP) V DORSET CC [2015] UKSC 18

15. The TRF brought proceedings to challenge Dorset's refusal to accept the Application (and four others) as having been validly made.

16. Mr Plumbe, for the GLPG, was an interested party in the proceedings and took and participated at all stages (first instance, Court of Appeal and Supreme Court). Mr Plumbe was represented by Counsel at first instance. Thomas Eggar LLP was instructed by Mr Plumbe throughout, although he appeared in person at the hearings in the Court of Appeal and Supreme Court.

17. The Secretary of State was an interested party (originally a second Defendant), but chose to take no active part in the proceedings.

18. The relief sought included not only the quashing of Dorset's decision to refuse to accept the Application (and four others) but moreover *'(1) A declaration that the five applications under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981; (2) A mandatory order requiring Dorset CC to determine those five applications*' (see section 6 Claim Form N461 **[TRFDoc/22]**). The declaration sought was as to compliance with para. 1 Schedule 14 WCA 1981 generally, rather than just para. 1(a). The mandatory order was premised on this: to require Dorset to determine the applications necessarily entailed that there was a valid application. Dorset could have sought to rely on matters other than the issue as to the scale of the maps. If it wanted to resist a declaration in those terms and the mandatory order by reference to other matters, it had to do so then. Mr Plumbe also followed Dorset's course in relying only on para. 1(a) Schedule 14 WCA 1981.

19. At first instance, the claim was unsuccessful, with the substantive part of the order only being to dismiss the claim.

20. The TRF's Appeal Notice to the Court of Appeal, again, at section 8 set out the relief sought corresponding to that in the claim form: '… *(2) It is declared that the five applications… were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981*; *(3) Dorset CC be ordered to determine the five such applications.*' **[TRFDoc/23]**.

21. The relief obtained in the Court Appeal included the following **[TRFDoc/3]**:

'*5. It is **declared** that the five applications dated 14/7/04 (ref. T338), 25/9/04 (ref. T339), 21/12/04 (ref. T350), 21/12/04 (ref. 353) and 21/12/04 (ref. T354) under section 53(5) Wildlife and Countryside Act 1981 **were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981***.

*6. The First Defendant **will proceed to determine such applications** in accordance with the provisions of Schedule 14 Wildlife and Countryside Act 1981*.' (emphasis added)

22. That order, which reflected both the relief sought in the Claim Form **[TRFDoc/22]** and by the Appeal Notice **[TRFDoc/23]**, was agreed between the TRF and Dorset, and then by Thomas Eggar LLP for Mr Plumbe. See **[TRFDoc/24]** – the order as agreed between the TRF and Dorset was sent in draft to the Court of Appeal before Thomas Eggar LLP had commented on the draft previously provided, with the Court of Appeal being so notified (email 11:36 17/5/13). Thomas Eggar LLP then indicated that it was content with the order, when providing to the other parties submissions to the CA on the question of permission to appeal (email 16:35 17/5/13)[3].

23. The order in the Supreme Court, upholding the decision of the Court of Appeal, included **[TRFDoc/5]**:

'*THE COURT ORDERED THAT*

1) The appeal be dismissed

…

*IT IS **DECLARED** that*

[3] For the TRF, Adrian Pay, Counsel, instructed by Brain Chase Coles, solicitors (Margaret Stevenson). For Dorset, George Laurence QC, instructed by Sarah Meggs, solicitor, of Dorset).

4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref T339), 21 December 2004 (ref. 350), 21 December 2004 (ref 353) and 21 December 2004 (ref. T 354) made to the Appellant under section 53(5) of the Wildlife and Countryside Act 1981 ***were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981****.'* (emphasis added)

24. The form of order was again agreed between the parties[4]: see **[TRFDoc/25]**.

25. Therefore, the Court of Appeal and the Supreme Court unambiguously declared that the applications were compliant with paragraph 1 Schedule 14 WCA 1981, which provides:

1 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.

26. After the Supreme Court decision Dorset and Mr Plumbe sought to suggest that the order should be varied so as to only refer to paragraph 1(a) Schedule 14, on the purported basis that the point taken in resisting the TRF's claim by Dorset (and supported by Mr Plumbe) was the point in relation to the scale of the maps.

27. That attempt was misconceived, given the plain terms of the final order of the Court of Appeal and Supreme Court. It was unambiguously rejected by Lord Carnwath, on whose behalf by email to the parties (including to Mr Plumbe) on 5 November 2019 **[TRFDoc/6]**, the registrar of the Supreme Court conveyed the following:

'The court sees no reason to vary the terms of the order which was agreed between the parties and reflected the form of relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para. 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage.'.

[4] For the TRF, Adrian Pay, leading Thomas Fletcher, Counsel, instructed by Brain Chase Coles, solicitors (Margaret Stevenson). For Dorset, George Laurence QC, leading Kira King, Counsel, instructed by Sarah Meggs, solicitor, of Dorset).

28. Thus Lord Carnwath was making a number of cumulative points which each illustrated that the attempt was misconceived: (1) the terms of the order had been agreed (this also having been the case as respects the Court of Appeal order); (2) the relief reflected that which had been claimed; (3) Dorset (and also Mr Plumbe) had not sought to defend the proceedings by impugning the validity of the applications on other grounds, nor reserved their position. In those circumstances, it was too late to take any such point after the conclusion of the proceedings.

29. The Inspector refers to the Supreme Court decision **[IOD¶29-30]**, in particular, '*However, it appears that the views of the Supreme Court Judges expressed in the Trail Riders Fellowship Judgment, did not concern the requirements applicable to the submission of supporting documentary evidence*'. The Interim Decision misunderstands the point. Notwithstanding that the arguments and issue in the appeal concerned the scale of the maps accompanying the application (i.e. para. 1(a) Schedule 14), the proceedings themselves addressed the validity of the applications as a whole. The declaration that the applications comply with para. 1 Schedule 14 (i.e. as to both limbs) is conclusive. It is not open to Mr Plumbe to gainsay the declaration (nor would it be open to Dorset to do so, as it rightly recognises).

30. Moreover, the Secretary of State (and therefore the Inspector), who was a party to the proceedings, must give effect to the declaration. Cf. Craig v HM Advocate [2022] UKSC 6 [2022] 1 WLR 1270 at [46] per Lord Reed:

> '**The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution**, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. **But trust depends on the Government's compliance with declaratory orders in the absence of coercion**. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an e›ective remedy… Furthermore, a declaratory order itself has important legal consequences. First, the **legal issue which forms the subject matter of the declaration is determined and is res judicata as a result of the order being granted**: St George's Healthcare NHS Trust v S [1999] Fam 26, 59—60. In addition, a minister who acts in disregard of the law as declared by the courts will normally be acting outside his authority as a Minister, and may consequently expose himself to a personal liability for wrongdoing: Dicey, Introduction to the Study of the Law of the Constitution, 10th ed (1959), pp 193—194.'. **[TRFDoc/33]**

31. Notwithstanding Lord Carnwath's trenchant explanation of the position, Mr Plumbe sought in the context of the confirmation process as respects another of the five applications encompassed by the proceedings (as respects Bridleway 14, Beaminster – T353) to again revisit the validity of the applications and to purport to criticise Lord Carnwath's reasoning. This resulted in the TRF's solicitors having to write further on 16 December 2019 **[TRFDoc/7]**, laying down the marker that '*The TRF has incurred costs in responding to Mr Plumbe's misconceived collateral attack on a decision of the Supreme Court. The TRF regards Mr Plumbe's submissions as unreasonable conduct.*'. In the context of that application, on an appeal under para. 4 Schedule 14 (following Dorset's determination that the evidence did not meet the threshold for making a modification order to add a BOAT), the Inspector's decision **[TRFDoc/8]** upheld Dorset's decision on the merits but commented as respects attempts to reopen the question of the validity of the applications:

'30. *The declaration [viz. that of the Supreme Court] clearly states that the application is compliant with paragraph 1, which is the matter to be decided in terms of the relevant exemption in the 2006 Act*.'

(going to reinforce that conclusion, by also rejecting that argument on the merits: the application was indeed compliant).

'*Nonetheless, the information provided by the Council indicates that the application was received before the cut-off date and that all of the documents listed in the application form were supplied by the applicant. There may well be additional evidence that is later found to be relevant, but the Council does not consider that the applicant deliberately withheld any evidence.*'.

COMPLIANCE WITH PARA. 1(B) SCHEDULE 14

Legal principles

32. Para. 1 Sch. 14 WCA 1981 provides:

1 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.

33. In R (Wardens and Fellows of Winchester College and anr) v Hampshire CC [2009] 1 WLR 138 **[TRFDoc/26]**, the Court of Appeal examined the effect of paragraph 1 Sch. 14 WCA 1981 and section 67 NERCA 2006 in the context of two applications which listed numerous documents but did not attach copies of any documents at all (see [20-25] for a description of the applications). Dyson LJ held at [42] that an application is not made in accordance with para. 1 Sch. 14 unless it complies with all the requirements – i.e. one cannot separate the requirement that the application be in the prescribed form, from the other requirements as to a map and accompanying documents, to say that an application is nevertheless 'made' for the purposes of para. 1 Sch. 14 even if it is not accompanied by a map or documentary evidence. Dyson LJ further held [54] that:

'…[S]ection 67(6) requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things (*de minimis non curat lex*').'.

34. In Maroudas v Secretary of State for Environment Food and Rural Affairs [2010] EWCA Civ 280 **[TRFDoc/27]**, the Court of Appeal considered the validity of an application which was not signed and which was not accompanied by a map. The Court was prepared to consider subsequent correspondence as potentially making good an otherwise deficient application, rejecting the submission that it should do otherwise [26-28]. At [30], the Court stated:

'I do not find it necessary to define the limits of permissible departures from the strict requirements of para 1 Schedule 14. In particular, I do not find it necessary to decide whether para 1 of Schedule 14 requires that the map, which should accompany the prescribed form, must be sent at the same time as the form. It seems to me that the map and copies of the documentary evidence referred to in the form are required to be treated in the same way.'.

In the particular case, the Court held that the application was invalid: the application remained unsigned for 10 weeks [36], it was unclear as to the extent of the route [37] and it had never been accompanied by a map [38].

35. In Trail Riders Fellowship v Dorset CC [2015] UKSC 18 [2015] 1 W.L.R. 1406 **[TRFDoc/4]**, the Supreme Court considered the validity of applications which were accompanied by maps which were presented at scales of greater than 1:25,000 (as the

legislation requires) but which had been derived from OS 1:50,000 maps. The appeal raised two issues (i) whether such applications complied with the requirements paragraph 1 Schedule 14; (ii) if not, whether Winchester was correctly decided. The Supreme Court held by a majority that the applications complied (Lords Clarke, Carnwath and Toulson; with Lords Neuberger and Sumption dissenting). Accordingly, the Winchester point did not need to be decided. The judgments, however, contain discussion of Winchester and Maroudas which is germane although *obiter*. Lords Toulson [48-50], Neuberger [92-105] and Sumption [108] were of the view that Winchester was correctly decided. Lord Carnwath [69-79], however, with detailed reasons, indicated his view that Winchester was wrongly decided: in particular, Lord Carnwath highlighted [69] that the Court in Winchester had failed to consider that the possibility that an application's validity could be saved by amendment after the cut-off date and had not considered the guidance of Inverclyde DC v Lord Advocate (1981) 43 P&CR 375, HL (referring also to Oxfordshire CC v Oxford CC [2006] Ch 43):

> 'This is not a field in which technical rules would be appropriate, there being no contested *lis* between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon.' (p 397).

Lord Clarke preferred to express no view on the issue, but expressed sympathy with Lord Carnwath's approach [34].

36. In Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs [2016] EWHC 2083 (Admin) **[TRFDoc/28]**, the Court considered an application which listed documents upon which the Applicant wished to rely but which failed to provide a copy of one of those documents. The Court applied Winchester and held that the application did not comply with para. 1 Schedule 14 and that the failure was not *de minimis*.

37. The principles are therefore, briefly:

    37.1. Subject to the below, an application which does not 'strictly' comply with paragraph 1 Schedule 14 WCA 1981 is not an application which has been made for the purposes of section 67(3) NERCA 2006 (Winchester at [54] per Dyson LJ).

37.2. Where departures from the requirements of paragraph 1 Schedule 14 WCA 1981 are minor, that will not invalidate an application (by application of the rule *de minimis non curat lex* (Winchester at [54] per Dyson LJ)).

37.3. Winchester and Maroudas offer examples of minor departures which may be within the scope of the rule *de minimis non curat lex.* These examples suggest that the ambit of the rule *de minimis non curat lex* may be reasonably generous in the present context (e.g. (i) an absence of signature may be cured by a later letter if sufficiently close in time (Maroudas at [28]), (ii) a misdescription of the route may be cured by a later letter if minor and sufficiently close in time (Maroudas at [29]); (iii) supplementary information may be treated as part of the application if provided sufficiently close in time (Maroudas at [30])). The category of such examples is not closed: see especially Maroudas at [30] per Dyson LJ '*I do not find it necessary to define the limits of possible departures from the strict requirements of para. 1 Schedule 14.*'.

Compliance in the present case

38. The Inspector addressed two points taken by Mr Plumbe:

38.1. That an applicant cannot rely upon extracts of a document **[IOD¶26]**.

38.2. That there was non-compliance with para. 1 Sch. 14 because more documents / information were supplied later **[IOD¶27-28]**.

39. Contrary to this, as expanded on below, the application complied in terms with para. 1 Sch. 14 WCA 1981 (even if there could be a live issue as to this in the face of the declarations of the Supreme Court and Court of Appeal). There is, therefore, no need for the TRF to rely on the *de minimis* principle (but the TRF does also rely on that).

Extracts

40. The Interim Decision is unclear as to whether this was a separate basis for finding purported non-compliance with para. 1 Sch. 14. **[IOD¶26]** speaks of sharing '*Counsel's concern*' as to selected extracts and goes on to say that until the provision of '*a set of full copies*' the application cannot be considered to be in accordance with the requirements of para. 1(b)

Sch. 14 WCA 1981, but **[IOD¶27-28, 31]** appears rather to rest on a purported default as respects documents / information supplied later.

41. There is no basis for finding that an application which includes copies of parts of documents as evidence is invalid for that reason:

    41.1. The relevant part of para. 1 Sch. 14 WCA 1981 reads: '*copies of any documentary evidence… which the applicant wishes to adduce in support of the application*'.

    41.2. An extract from a document is also a document in itself (cf. by analogy e.g. Civil Procedure Rules 31.4 " '*document' means anything in which information of any description is recorded; and 'copy', in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly*" and cf. CPR PD 57AD "*2.2 For the purpose of disclosure, the term "document" includes any record of any description containing information*.").

    41.3. Even if, contrary to the above, an extract from a document were not considered to be a document in itself, the wording of the statute uses the phrase '*documentary evidence*'. An extract from a document is plainly '*documentary evidence*'.

    41.4. The Opinion **[DDoc6/App4]** relied on by Mr Plumbe in fact does not support the point which he seeks to make. Para. 12 of that Opinion is there addressing whether para. 1(b) Sch. 14 may be complied with by a list and/or exposition:

    > 'We are asked whether we think compliance is achieved by the **applicant's writing in place of "List of documents attached" such words as "see report", accompanied by a detailed exposition of evidence sources and what they are said to indicate, but no copy documents**. We do not think **that** can be regarded as the equivalent of providing copy documents, or as substantial compliance with the requirement to supply copies. Selected extracts, or summaries, or interpretations, of documents are very different from copies, which give the full picture and enable the reader to form his own impressions of the meaning and significance of the documents.' (emphasis added).

    The authors of the Opinion were addressing a situation where no documents, even partial copies of documents were provided. The reference to 'Selected

extracts' in context is clearly a reference to a hypothetical scenario where the applicant's summary or report e.g. quotes from an original document, without providing a copy or partial copy of it.

41.5. In any event, the Opinion is of no authoritative weight (particularly, an Opinion which has been obtained by the GLPG for their purposes, i.e. to minimise MPV use on minor public rights of way; the Opinion also predates, for example, Winchester and Maroudas, taking no account of the *de minimis non curat lex* principle which featured importantly there; it also happens that one author of the joint Opinion was Leading Counsel in Trail Riders Fellowship v Dorset CC [2015] UKSC 18 [2015] 1 W.L.R. 1406 (whose arguments as to the interpretation of para. 1(a) Sch. 14 WCA 1981 were rejected).

41.6. The suggestion that an applicant must adduce whole documents – for example – a complete enclosure award or maps which may be very large and impracticable to copy / supply – is absurd and contrary to the purpose of the legislation which is to be provide an accessible procedure for members of the public to put into train a process which triggers a fuller investigation by the local authority.

41.7. In the present case, the applicant provided not only (i) copies of the documents (extracts showing the parts relied upon); but also (ii) an explanation of the relevance of the documents. Dorset understood perfectly the applicant's contentions and proceeded to carry out its own investigations (as it was required to do). The further process of confirmation of any order objected to under Sch. 15 allows for a fuller investigation of all the evidence. Even at that more formal stage, it is commonplace for parties, including surveying authorities themselves, to rely on extracts from documents (as indeed happened in the present case: Dorset's own Statement of Case relies on extracts of documents and the Inspector, himself, has relied on extracts of documents).

Further documents

42. The reasoning here is a *non sequitur*. The Inspector reasons that because further documents were submitted later, there was non-compliance with para. 1(b) Schedule 14. But the one does not follow from the other. And, the Inspector misapprehended the factual situation:

(i) further evidence was *solicited by Dorset* in the course of consultation; and (ii) the UEFs to which the interim decision refers were *not* provided by the Applicant, who at that stage remained Jonathan Stuart.

43. Mr Plumbe relies on the same Opinion at para. 14 **[DDoc6/App4]** (as to which, the TRF repeats the point that the Opinion is not authoritative, and was prepared on GLPG's instructions):

> "(1) The criterion for inclusion of documents in the list and set of copies to accompany the application is that they be *"any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application"*. The time at which the applicant's wish to adduce a particular document falls to be tested is at latest the date when he submits his list and set of copies and perfects his application.
>
> (2) If he subsequently discovers other documents or witness evidence which he would like to draw to the surveying authority's attention, that can have no effect on the question whether he complied with paragraph 1 of Schedule 14 when submitting his original batch of documentary evidence.
>
> (3) If after having submitted his original batch of documents he for the first time forms a wish to rely on a document or documents of which he was previously aware, but which he either overlooked or chose not to include for reasons which he has since reconsidered, the submission of that extra material cannot retrospectively undo his compliance with paragraph 1.
>
> (4) However, "*any* documentary evidence" must in the context of paragraph 1 be read as equivalent to "*all* documentary evidence"; so if the applicant deliberately keeps some material back when submitting his original batch, or does not defer his application until he has finished researching and collating material, he is not complying with the requirements of paragraph 1. (There may of course be evidential difficulties in establishing that to be the case, unless it is patent on the face of his application form or list that he has other documents in mind. See further paragraph 17 below).".

44. Propositions (1) to (3) are correct, as a matter of legal reasoning although the TRF would submit if necessary this is evidently an overly technical approach to what is supposed to be a straightforward and accessible procedure. The important point is, as per (1), that para. 1(b) Sch. 14 is expressed in subjective terms: "*...documentary evidence ... which the applicant wishes to adduce...*" rather than requiring any particular threshold of evidence. This is unsurprising: it is not in the nature of a "hurdle" which an applicant must surmount; the applicant deploys the evidence which he wants to deploy; he does so running the risk that those documents will be insufficient to persuade the authority to determine the question in his favour and/or that the authority may decline to consider further material (although again that would be unusual, given the investigatory function of the authority).

45. Proposition (4) addresses two scenarios: (a) where the applicant deliberately keeps some material back when submitting his original batch; (b) where the applicant '*does not defer his application until he has finished researching and collating material*'. Proposition (4)(a) is correct to the extent that if an applicant has formed the view that he wishes to rely on a particular document but deliberately does not include a copy of that, holding it back to rely upon later, then that would probably constitute non-compliance with para. 1(b) Sch. 14 (but that would be a highly unusual scenario, and is qualified by Proposition (3)). Proposition (4)(b) is incorrect: in that scenario, the applicant has made his application with the documents upon which he then wishes to rely.

46. As Dorset rightly reasoned **[DDoc6¶29-30]**, even if further documents are submitted during the course of its investigation that does not invalidate the original application (any more than if, as will very often be the case, the order-making authority itself alights on further evidence, or obtains such evidence from persons other than the applicant), except, possibly, if it were satisfied that the applicant had deliberately held back documents upon which he wished to rely. It was not so satisfied. Rightly so, given the absence of any evidence of such an unusual scenario.

47. The application (with its evidence) triggers an investigative process: see para. 1 Sch. 14 WCA 1981 for the application and then para. 3 Sch. 14 WCA 1981 for the order-making authority's investigation: "the authority shall [para. 3(1)(a)] … investigate the matters stated in the application; and [para. 3(1)(b)] … decide whether to make or not to make the order…". Cf. R (TRF) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406 **[TRFDoc/4]** at [39] per Lord Toulson "*As Maurice Kay LJ pointed out, the application for a modification order triggers an investigation. It is the start of a process*" (cf. Lord Carnwarth at [71], *obiter*, on the Winchester issue); R (Trail Riders Fellowship) v Dorset CC [2013] EWCA Civ 553 [2013] PTSR 987 **[TRFDoc/2]** at [15] per Maurice Kay LJ "*Ultimately, it is for the surveying authority to investigate the matters stated in the application… The application triggers an investigation.*": see paragraph 3(1)(a) of Schedule 14 WCA 1981. It will very often be the case that the evidence after the authority's investigation will be more extensive than that which accompanied the application: that is a main purpose of the authority's investigation. And, at the confirmation stage, the evidence may well, and typically does, range wider still: there is no bar to any person submitting further evidence

either in support of the application (whether that is the applicant or any other person) or against the application.

48. Dorset has ***determined*** the application, as it was bound to do by the mandatory order in the Court of Appeal, upheld by the Supreme Court. Quite apart from the declaration, the mandatory order is premised on an effective application having been made. Again, quite apart from the declaration, Dorset has (rightly and necessarily) treated the application as valid. It is not open to the Secretary of State, or the objectors, to go behind that. There has been no challenge to Dorset's decision to determine the applications, treating them as effective: contrast R (Wardens and Fellows of Winchester College and anr) v Hampshire CC [2009] 1 WLR 138 **[TRFDoc/26]**, which was a claim to *judicially review* Hampshire CC's refusal to reconsider its *decision to make a modification order* (see at [1] per Dyson LJ). Maroudas v SoS for Environment [2010] EWCA Civ 280 **[TRFDoc/27]** was a successful appeal under para. 12 Sch. 15 WCA 1981 against a decision of the Secretary of State to confirm an order which was premised on the order-making authority having treated an application as valid, which the Court of Appeal considered to be valid, but no point appears to have been taken that any challenge to the order-making authority's proceeding to determine the application should have been made by judicial review of that decision. R (TRF) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406 **[TRF/Doc4]** was the converse situation to R (Wardens and Fellows of Winchester College and anr) v Hampshire CC [2009] 1 WLR 138 **[TRF/Doc26]** (and thus also tends to confirm that a challenge to an authority's decision to treat an application as valid or invalid should be by way of judicial review of that decision): Dorset had decided that the applications were invalid and the TRF judicially reviewed that decision. Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs [2016] EWHC 2083 (Admin) **[TRF/Doc28]** originated as an appeal under para. 4(1) Sch. 14 WCA 1981 to refuse an application (see [11]).

49. Moreover, the Inspector has misunderstood the factual scenario: the further material referred to was ***solicited by Dorset*** in the context of ***consultation*** as part of its ***investigation*** under para. 3 Sch. 14. It was not submitted by the applicant by way of expanding his application. In fact, it was not submitted by the applicant at all: the applicant was Jonathan Stuart. Only on 4 October 2010 did the TRF take over the application. Members of the TRF submitted user evidence forms responding to a consultation by Dorset to the public at large.

50. Dorset has confirmed the procedure which it took in an email 14.05pm 19/7/23 directed at one of the other routes with which the R (TRF) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406 was concerned **[TRFDoc/19]**:

'…With regard to the user evidence forms, Dorset County Council (as it was then) undertook a consultation process inviting the public and various interested parties (including the TRF) to submit evidence in January 2006 and also in September 2009. The user evidence forms were submitted to us in Feb/Mar 2010 in response to these consultations and as part of our investigation. They cannot be considered to have been submitted as part of the application by the applicant, as the applicant at that time was still FoDRoW/ Jonathan Stuart. As you know, the TRF did not take over the application until 4 October 2010.'.

Dorset has provided the same confirmation as respects the present route by email 11:44 17/10/23 **[TRFDoc/20]**.

' … With regard to the user evidence forms, you will note from the Council's Committee report that two consultations were undertaken, one in 2009 and one in 2018. The user evidence forms are dated 2008, 2009 and 2010. None of the user evidence forms were provided by the applicant. They were all submitted by individual members of the public and members of the TRF. Most of the forms were received in response to our consultations, however some were received prior to that from people who became aware of the application and wished to provide evidence in support.'

THE LIST OF STREETS

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51. The TRF has been provided by Dorset with what are described as extracts of the List of Streets **[TRFDoc/21]** (an attachment to 11:44 17/10/23 **[TRFDoc/20]**), described as follows:

    51.1. 'List of Streets map as at 2/5/06': this shows C-D-E and J (Dirty Gate)-I marked blue.

    51.2. 'Current list of Streets extract for D11205 and D11206 at Beaminster'. This lists as unclassified roads the D11205 described as '*Junction B3163 Dirty Gate towards Higher Langdon*' and D11206 described as '*Junction C67 White Sheet Hill towards Higher Langdon.*'. The grid references given in that document appear to describe the D11205 as approximating to A-C, but the D11206 as approximating to J (Dirty Gate) to H (grid reference 506019, approximating to the grid reference on the Order Map of ST 5056 0196 for point I). I.e H-I at least, of the Order Route, is shown by Dorset's current records to be a an unclassified road continuing from I-J.

51.3. ‘Current Working (digital) copy extract List of Streets’. This shows C-D-E and J (Dirty Gate) to I marked blue.

52. While Dorset say in their email ‘*The List of Streets was held as a list on 2/5/06 with an accompanying map*’, section 36(6) HA 1980 requires only a list (as had s. 38(6) HA 1959). Thus, it is an open question as to whether for the purposes of s. 36(6) HA 1980 the list of streets comprised only the list, or both list and map (Dorset’s own view is not conclusive). Moreover, in interpreting what is shown on the list of streets, consistently with the statutory requirement, even if Dorset’s ‘*list of streets*’ comprised both list and map, the list should be given natural precedence, and the list should not be interpreted in a way which gives a perverse result: cf. TRF v Secretary of State [2017] EWHC 1866 (Admin) [2018] PTSR 15 **[TRFDoc/29]** (and, further, Fortune v Wiltshire CC [2010] EWHC B33 (Ch) (first instance) **[TRFDoc/31]** and [2012] EWCA Civ 334 [2013] 1 WLR 808, CA **[TRFDoc/13]** as to the question of the form in which a list of streets may be kept).

53. The descriptions of the D11205 and D11206 ‘‘*Junction B3163 Dirty Gate towards Higher Langdon*’ and D11206 described as ‘*Junction C67 White Sheet Hill towards Higher Langdon.*’ (assuming that these reflect the list of streets as at 2/5/06 which is said no longer to be available) would naturally connote routes which met at or around Higher Langdon, rather than the bizarre scenario which the maps seem to contemplate of two stubs of vehicular highway which go nowhere and meet nowhere. This is particularly so where the grid references in the current List of Streets for D11205 is inconsistent with the maps. The overwhelming probability is again that all of at least C-D-E-F-G-H-I-J was a continuous route with the same rights – viz. for all users – along its length. It is possible that confusion has arisen because the route crosses a parish boundary at I (which could have led to inconsistent treatment during the process of compiling the DMS). In those circumstances, the TRF submits that the proper interpretation of Dorset’s list of streets, so far as relevant for the purposes of section 67(2)(b) NERCA 2006, (both now and as it was as at 2 May 2006) is that all of C-D-E-F-G-H-I-J is recorded.

‘CUL-DE-SACS’ AND UNIFORMITY OF PUBLIC RIGHTS OVER A ROUTE

54. In its previous Statement of Case at paras 18-19, in the context of its submission that A-C should be upgraded to a BOAT, the TRF set out submissions to the effect that if part of a longer route has a particular status, it is improbable that the whole route does not have the

same status. These submissions now apply to the Order as proposed to be modified (as well as to the argument as to A-C). In short: first, it is inherently improbable that a public right of way ends in a cul-de-sac (in general and as respects particular classes of user), in the absence of some place of public resort where the public right of way is said to end; second, it is inherently improbable that a through route should have discontinuities as respects the users who may use particular sections. These are related, but distinct, points. The scenario which the Inspector's Interim Decision contemplates engages both points:

54.1. The effect of the Inspector's Interim decision will result in a cul-de-sac at point C as respects public vehicular rights over A-C. The effect of the Inspector's Interim Decision will also result in a cul-de-sac at point I as respects public vehicular rights over J (Dirty Gate)-I (and this in circumstances where Dorset's current list of streets appears to envisage that the unclassified road J-I continues at least as far as point H – cf. above).

54.2. The effect of the Inspector's interim decision will be that there is a continuous public right of way C-D-E-F-G-H-I-J (corresponding to a way with public rights throughout which has been in existence for centuries) but the rights over that are vehicular as to C-D-E; equestrian as to E-F-G-H-I; and vehicular as to I-J.

55. The Consistency Guidelines offer the following at para. 2.4.13:

'**Rural Culs-de-Sac**

2.4.13. The courts have long recognised that, in certain circumstances, culs-de- sac in rural areas can be highways. (e.g. Eyre v New Forest Highways Board 1892, Moser v Ambleside 1925, A-G and Newton Abbott v Dyer 1947 and Roberts v Webster 1967). Most frequently, such a situation arises where a cul-de-sac is the only way to or from a place of public interest or where changes to the highways network have turned what was part of a through road into a cul-de-sac. Before recognising a cul-de-sac as a highway, Inspectors will need to be persuaded that special circumstances exist.

2.4.14. In Eyre v New Forest Highway Board 1892 Wills J also covers the situation in which two apparent culs-de-sac are created by reason of uncertainty over the status of a short, linking section (in that case a track over a common). He held that, where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it.'

56. The Inspector has recognized that his decision has the effect of creating a cul-de-sac (in fact, two cul-de-sacs) **[ID¶69]** but without any explanation as to why that should be (or as the Consistency Guidelines put it '*special circumstances*').

57. The TRF further refers to:

57.1. In Attorney General (at the relation of Hastie) v Godstone RDC (1912) JP 188 **[TRFDoc/15]**, proceedings were brought for a declaration that three ancient roads were maintainable at public expense. The headnote notes:

'The roads in question existed far back into the eighteenth century; they were shown in many old maps, and had for the most part well defined hedges and ditches on either side. They were continuous roads throughout, and furnished convenient short cuts between main roads to the north and south respectively.'

Godstone RDC admitted that part of one road was a public highway maintainable at public expense. Parker J said:

'It is possible, of course, that a public way may end in a cul-de-sac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not. It was suggested that there might be a public carriageway ending in a public footpath and that Cottage Lane and St. Pier's Lane are public carriageways to the points to which they are at admittedly highways, and public footpaths for the rest of their length. I cannot find any evidence which points to this solution of the difficulty, and so far, at any rate as evidence of the user of the road is concerned, there is no difference qua the nature of that user between those parts of the roads which are admittedly highways and those parts as to which the public right is in issue.'.

57.2. In Roberts v Webster (1968) 66 LGR 298 at 305, CA, Widgery J held **[TRFDoc/31]**:

'The authorities clearly show that there is no rule of law which compels a conclusion that a country cul-de-sac can never be a highway. The principle stated in the authorities is not a rule of law but one of common sense based on the fact that the public do not claim to use a path as of right unless there is some point in their doing so, and to walk down a country cul-de-sac merely for the privilege of walking back again is a pointless activity. However, if there is some kind of attraction at the far end which might cause the public to wish to use the road, it is clear that that may be sufficient to justify the conclusion that a public highway was created.'

57.3. In Planning Inspectorate Decision Letter FPS/A4710/7/22 723, of 31 March 1999 as reported in Byway and Bridleway 1999/6/48 & 1999/7/53 **[TRFDoc/14]**, the Inspector relied on Attorney General (at the relation of Hastie) v Godstone RDC (1912) JP 188 in considering that it was '*Improbable for part of a continuous route to be part footpath and part carriageway*'.

57.4. In Commission for New Towns v J J Gallagher [2003] 2 P & CR 3 **[TRFDoc/12]**, it was common ground that there was a public highway, Beoley Lane, for over 275 years (see [78, 79]). The issue was whether it was a public carriageway or bridleway (see [78]). At [91], Neuberger J said:

> 'The Inclosure Award of 1824 is concerned with a relatively small part of Beoley Lane, namely the very south-eastern end. However, given that the issue between the parties concerns whether or not Beoley Lane is a carriageway, it seems clear that the highway status of this part of Beoley Lane cannot be any different from the rest of Beoley Lane. Further, Further, the Inclosure Award does refer to the whole of Beoley Lane at least in one place.'

The Inclosure Award referred to both the relevant part of Beoley Lane '*a private carriage way road and driftway*.' and the whole of it as '*a private carriage road from Beoley to Mappleborough Green*' (emphasis added) (see [92]). This was said to be evidence that the route as a whole was not a public carriageway, since it was described as a private carriage road: i.e. as per [91] making an extrapolation from the part treated in the Inclosure Award to the full route. In the event, the Court found – notwithstanding that – that the full route was a public carriageway (either it had been before the Inclosure Award and some error had been made there, or that it had become one afterwards).

It can easily be seen that, if – as here – an Inclosure Award describes the route as a '*public carriage road*' and '*public highway'* (emphasis added) this would by parity of reasoning be powerful evidence that the whole route is a public carriage road (where, as in that case, there has for a long time been a physical way on the ground; and it is clear that the way has public rights over its full length).

57.5. In Fortune v Wiltshire Council [2012] EWCA Civ 334 [2013] 1 WLR 808 **[TRFDoc/13]**, again it was clear and common ground that Rowden Lane was a public highway, and the Court of Appeal proceeded to address the impact of that common ground:

> '[35] She [sc. the First Claimant] accepts that Rowden Lane is a public highway. It follows therefore that at some time in the past it must have been dedicated as a highway (no doubt inferred by long public use). However, the first claimant says that the public rights of way are limited to use on foot or with animals. The first question is: if it is accepted that the public used the way as of right, where

were they going to? The answer must be either that they were using Rowden Lane as part of a network of highways (i e as a thoroughfare) or they were visiting some particular place simply as members of the public…'.

[36] … If there was public use 'as of right' then it is effectively conceded that an intention to dedicate should be inferred. It would make no sense to conclude that while the landowner intended to dedicate the way as a highway for foot traffic and riders, use by carters was use by mere toleration. So the real question is: was there sufficient evidence upon which the judge could conclude that there was public use of the way with vehicles?

[37] The second question is: given the width and nature of Rowden Lane from the earliest recorded times, how does it come about that there has been a dedication for use by pedestrians and riders but not for horses and carts? The latter question was posed by the judge (paras 673 and 942); but neither the grounds of appeal nor the skeleton argument really provide an answer.'

That question was resolved by the judge on the evidence: it was a public right of way for vehicles. The point for present purposes is – once it is clear that there is and has been for a considerable period of time – a public right of way C-D-E-F-G-H-I-J – it must be inferred that there has been a dedication of public rights and it makes no sense for the dedication to have been of vehicular rights for part of the route (C-D-E and I-J, on the Inspector's findings), but equestrians for only, for the rest of it.

57.6. See also TRF v Secretary of State [2023] EWHC 900 (Admin) at [37-38] [50-51] **[TRFDoc/32]**: the Court there declined to interfere with a finding which had the effect of creating a cul-de-sac, but there (in contrast to the cases referred to above) the Court was exercising a supervisory function (i.e. the question was whether the conclusion of the inspector was one which no reasonable inspector could reach) and the inspector had provided reasons for her view as to why such a cul-de-sac may have arisen: see [50-51] (the reference to a '*field gate*' refers back to [16]). The judgment in that case does not diminish, but rather expressly recognised, the general improbability of such a situation: the decision itself turned on the limits of the Court's supervisory jurisdiction on a judicial review.

MODIFICATION SO AS TO UPGRADE A-C TO BOAT

The power / duty to propose a modification

58. Paragraph 7(3) Schedule 15 WCA 1981 provides '*On considering any representations or objections duly made and the report of [any person appointed to hold an inquiry] or hear representations or objections, the Secretary of State may confirm the order with or without modifications*.'. Paragraph 8 provides for the procedure when an order is confirmed with modifications.

59. If the Inspector is satisfied at the inquiry that a different order should be made to that which is to be confirmed: see Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264 **[TRFDoc/9]** at [23] per Lord Phillips:

> ''*In my judgment, the scheme of the procedure under Schedule 15 is that* ***if, in the course of the inquiry, facts come to light*** *which persuade the inspector that the definitive map should depart from the proposed order* ***he should modify it accordingly****, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be confirming the original order would be undesirable in principle and difficult in practice*.' (emphasis added).

Cf. the Planning Inspectorate's Advice Note 20 (14 October 2021) **[TRFDoc/10]**[5].

The modification to upgrade A-C to BOAT

60. The TRF relies on:

60.1. The conclusions of **Dorset's Report** for a meeting of its Regulatory Committee on 21 March 2019 **[TRFDoc/11/Attachment I]** as respects the application, whose conclusion was to recommend a modification order such that all of the application route – viz. all of A-B-C-D-E-F-G-H-I – be shown on the DMS as a BOAT.

60.2. The **TRF's Grounds of Appeal [TRFDoc/11][6]** against the decision of Dorset to make a modification order such that *only* C-D-E-F-G-H-I (and *not* A-B-C) be

[5] The TRF does not accept as correct section 9 of that advice which cuts across the scheme of the procedure as described in Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264 and imposes an arbitrary and unprincipled restriction on the general power to modify. But the point does not arise in the present case since the Order Map does show all of A-C.

[6] Although this is reproduced as **[DDoc/4 Appendix 4]** as a single .pdf this is appended in full to this Statement of Case, so as to provide the best reproductions of particularly maps contained therein.

shown on the DMS as a BOAT (contrary to recommendation of the Report). The Planning Inspectorate declined to entertain that appeal as not being within para. 4 Schedule 15 WCA 1981 (since an order had been made in respect of the application, albeit only as respects part of the claimed route). That the Planning Inspectorate has declined to entertain this argument by way of appeal, makes it yet more important that this issue is considered and determined at the confirmation stage.

61. The substantive argument as respects section A-C of the route is contained at **¶¶3-7** TRF's Grounds of Appeal **[TRFDoc/11]**. In short, the most compelling interpretation of the evidence is that A-B-C-D-E-F-G-H-I was historically a through-route (a 'cross-road' on Greenwood's map) and given that (i) as such public rights would be expected to be consistent (and not discontinuous) along such a through-route; and (ii) C-D-E-F-G-H-I carries public vehicular rights (as Dorset has concluded), it follows that A-B-C also carries public vehicular rights.

62. The TRF relies on the same principles as set out under the heading '*Cul-de-sacs and public rights of way*' above. While the TRF recognises that the same absurdity does not arise as acutely as respects A-C as it does as respects C-D-E-F-G-H-I-J on the findings of the Interim Decision, since the route meets a public vehicular highway (Whitesheet Hill) at point C (i.e. the exclusion of A-C): see **[ID¶11].** The TRF considers the further observation there to be wrong, if it understands it correctly[7]: the fact that the route intersects with another public highway does not mean that it should not be treated as a continuous route for the purpose of analysis of the evidence: on the contrary, the fact that A-C is naturally to be taken topographically as the further continuation of a route C-D-E-F-G-H-I-J, also being a known highway in that it has public rights for at least equestrians, is an important reason why this part of the route should <u>not</u> be treated in isolation, as it appears to have been in the Interim Decision.

63. Notwithstanding, however, that the same absurdity does not arise so acutely as respects A-C, it is clear on the evidence that A-C is indeed part of the same continuous route which provided a link not only to the public vehicular highway, Whitesheet Hill (the C67 on the

[7] It may be that the only point being made is that the appropriate form of a modification order would probably exclude the physical extent of the route where it intersects Whitesheet Hill (since that part would not be merely a BOAT): however, the Interim Decision does go onto consider A-C effectively in isolation from C-D-E-F-G-H-I.

Order Map), at C but also to the what is now the public vehicular highway labelled C102 on the Order Map, at A. This is apparent from the general network shown on the early maps, but most specifically, Greenwoods Map which shows all of A-B-C-D-E-F-G-H-I as a '*cross-road*' providing links between those roads corresponding to the C67, the C102 and the B3163 (the road at Dirty Gate, J): see [**DDoc4 Appendix 5]** dealing with the Greenwood's Map and TRF v Secretary of State [2023] EWHC 900 (Admin) **[TRF/Doc32]** at [36], and the cases referred to there, for the meaning of the term 'cross-road', including Fortune v Wiltshire CC [2013] 1 WLR 808 at [54-56] (also concerning a Greenwood's Map).