

**Planning Inspectorate Reference:** ROW/3308921

**Statement of Case prepared by Leigh and High Stoy Parish Council Objecting to Dorset Council's proposal to classify Bailey Drove (T338) as a Byway Open to All Traffic**

1. The Parish Councils believe that the Order should not be confirmed because:

- a. Critical elements of the evidence adduced in support of the application were never actually submitted or were submitted too late.
- b. Some of the evidence identified in the application was not attached to it.

The application should therefore fail because it does not satisfy the requirements of paragraph 1(b) of Schedule 14 to WCA 1981.

2. In contrast to our position, TRF contend that the Supreme Court has ruled that the application was made in accordance with all the requirements of paragraph 1 of Schedule 14 to WCA 1981.

3. We refer to several judgements etc in making our case. For ease of reference we list them now:

- a. Winchester College v Hampshire CC. [2008] ECWA Civ 431; [2009] 1 WLR 138. Referred to hereafter as *Winchester*.
- b. Maroudas v SSEFRA. [2010] EWCA Civ 280. Referred to as *Maroudas*.
- c. TRF v Dorset CC. [2015] UKSC 18 [2015] 1 WLR 1406. Referred to as *Supreme Court*.
- d. Supreme Court Registrar's Order and Declaration of 13 April 2015. Referred to as *SC Order*.
- e. Dorset Council's letter to Supreme Court of 14 June 2019. Referred to as *DC to Supreme Court*.
- f. TRF v Dorset CC. [2013] EWCA Civ 553. Referred to as *Appeal Court*.
- g. Order issued by the Court of Appeal on 20 May 2013 (Court 72, Appeal No C1/2012/2689). Referred to as *AC Order*.
- h. TRF v SSEFRA. [2016] EWHC 2083 (Admin). Referred to as *Hareput*.
- j. The Wildlife and Countryside Act 1981. Referred to as WCA 1981.
- k. The Natural Environment and Rural Communities Act 2006. Referred to as NERC.

Copies of all but WCA1981 and NERC are attached.

## **Brief History.**

4. On 7 October 2010 Dorset County Council refused an application from TRF to classify Bailey Drove (and four other applications) as BOATs because:

*“The applications in question were accompanied by computer-generated enlargements of Ordnance Survey maps and not maps drawn to a scale of not less than 1:25,000. In each case none of the other exemptions [from extinguishment of vehicular rights] in the 2006 Act are seen to apply and so the applications should be refused.”*

5. TRF appealed the decision, the process concluding when the *Supreme Court* found in TRF’s favour on 18 March 2015, by a majority of 3 to 2. Lord Clark provided the lead opinion:

*[33]. For all these reasons I would dismiss the appeal on the first issue. The question posed in para 17 above was this. Does a map which accompanies an application and is presented at a scale of not less than 1:25,000 satisfy the requirements of paragraph 1(a) of Schedule 14 of being “drawn to the prescribed scale” in circumstances where it has been “digitally derived from an original map with a scale of 1:50,000”? I would answer the question yes, provided that the application map identifies the way or ways to which the application relates.*

6. The Supreme Court therefore appeared to confirm only that the map complied with the requirements in paragraph 1 to Schedule 14. In the record of proceedings, the Court’s majority obiter opinion upheld *Winchester* – which requires “strict compliance” with all the requirements of paragraph 1 to Schedule 14.

7. Paragraph 1 has two sub-paragraphs:

- a. Paragraph 1(a) is concerned with the map accompanying an application.
- b. Paragraph 1(b) details the documents that must accompany an application.

8. On 22 January 2019 the renamed Dorset Council (DC) informed the Parish Councils that it intended to investigate whether the application for Bailey Drove complied with the requirements of paragraph 1(b) of Schedule 14 of WCA 1981.

9. Shortly thereafter TRF drew DC’s attention to the wording of the *SC Order* which at [4] records the application as being made in accordance with paragraph 1. TRF maintain that this precludes further investigation as paragraph 1(b) is included within that wording.

10. Dorset Council sought to have the wording amended to refer only to paragraph 1(a) (see *DC to Supreme Court*) but Lord Carnwath, to whom the matter was referred, is reported as saying:

*“The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the 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.”*

11. Dorset Council and Mr Plumbe did not accept Lord Carnwath's assertion that they had agreed the application complied with all the requirements of para 1 to Schedule 14. Their disagreement is made clear in *DC to Supreme Court*. The Parish Councils note additionally that Lord Clark confines his lead opinion to para 1(a). He makes no mention of para 1(b).

12. When initially considering the five applications it was clear both to Dorset Council and Mr Plumbe that a ruling on para 1(a), the map scale issue, would bear not only on the five applications in Dorset but would have wide application across England. It was therefore sensible to treat this issue on its own, dealing later with para 1(b), which would apply in only two of the five cases, should the Courts decide in favour of TRF on map scales.

13. Lord Justice Maurice Kay in *Appeal Court* at [3] states in full the provisions of para 1 Schedule 14. In conclusion he states:

*[3] .....The present dispute is concerned with the maps submitted with the applications*  
(Note for clarity: Ground 1 of the Appeal).

14. The AC Order states:

*[1] The appeal is allowed on Ground 1.*

*[5] .....that the five applications.....were made in accordance with paragraph 1....*

The AC Order further states:

*[6] The First Defendant (DC) will proceed to determine such applications in accordance with the provision of Schedule 14 Wildlife and Countryside Act 1981.*

The Parish Councils note that this order was not set aside by the Supreme Court. In deciding to investigate compliance with para 1(b) Dorset Council was simply complying with the Appeal Court's Order and, indeed, with the Supreme Court's obiter opinion, confirming the need for "strict compliance".

15. What amounts to strict compliance with the requirements of paragraph 1(b) has never been considered let alone decided by DC nor was it an issue considered during any of the three appeal hearings. The Parish Councils contend that it cannot reasonably be claimed that the original application complied with all the requirements of paragraph 1 without examining those of paragraph 1(b).

.....  
Note: Not being copy addressees the Parish Councils had no knowledge of the existence of the two Court Orders until TRF's intervention discussed in paragraph 9 above. Nor were they involved in DC's exchange of correspondence with the Supreme Court seeking to vary the order. This is therefore the first occasion on which the Parish Councils have been able to raise their concerns arising from those Orders and DC's subsequent Modification Order.

## **Compliance with Paragraph 1(b)**

### **The Law regarding the submission of Documents.**

16. The application to reclassify Bailey Drove as a BOAT was made by the Friends of Dorset Rights of Way (FoDRoW) on 14th July 2004 under Section 53 (2) of WCA 1981. The procedure to be used is covered in Schedule 14 of WCA as amended. Section 1 states that:

*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.*

17. Only two items of evidence were listed in the Application as being relied on - the Leigh Inclosure Map and Award and the relevant Finance Act map.

18. An undated statement headed "Byway Claim for Bailey Drove, Batcombe & Leigh" is held on Dorset Council's file. This document analysed the evidence referred to in the Application and it is apparent that a copy of the Inclosure Award map was attached to it. However, no copy of the text of the relevant section of the Inclosure Award was attached. The document stated that "A CD containing various Finance Act maps has been sent to DC's Rights of Way Department". The CD is dated 25 September 2004 so cannot have been received by DCC before then, some 10 weeks after the application was submitted. Indeed, it appears from the details of another application (T339) that it was not submitted until 11 December 2004, some 5 months after the application. It is accepted that the relevant Finance Act map was on the CD. The text of the relevant section of the Inclosure Award was NOT included on the CD. It is not clear whether the Inclosure Award map was received by DCC at the time of submission (14th July 2004) or with the CD at least 10 weeks later. To summarise:

a. The Finance Act map was not attached to the Application but was included on the CD dated 25<sup>th</sup> September 2004 but it appears that the CD may not have been received by DCC until 11 December 2004. It follows that it cannot have been submitted less than 10 weeks, and quite possibly 5 months, after the Application was lodged.

b. It is not clear whether the Inclosure Award map was received by DC at the time of submission (14th July 2004) or with the CD.

c. No copy of the text of the relevant section of the Inclosure Award is listed as being on the CD, nor was a copy attached to the application. It therefore appears that none was ever submitted.

19. Accordingly, it is clear that significant elements of the documentary evidence adduced were either submitted at least 10 weeks after the application or were never submitted at all.

20. The *Winchester* judgement concluded that strict compliance with the requirements of paragraph 1 of Schedule 14 was necessary. Dyson LJ's judgement [45] and [46] includes the following passages:

*[45] As a matter of construction, it seems to me that, in order to be made in accordance with the paragraph, an application must be accompanied by both a map and copies of documentary evidence or neither. It is impossible to spell out of paragraph 1 that an application may be made in accordance with it if it is accompanied by one but not the other.*

*[46]. In my judgement, as a matter of ordinary language an application is not made in accordance with paragraph 1 unless it satisfies all three requirements of the paragraph. Moreover, there are two particular indications that an application is only made in accordance with paragraph 1 of Schedule 14 if it is made in accordance with all the requirements of the paragraph. First, paragraph 1 is headed "Form of applications". The word "form" in the heading is clearly not a reference only to the prescribed form. It is a summary of the content of the whole paragraph. It is a reference to how an application should be made. It must be made in a certain form (or a form substantially to the like effect with such insertions or omissions as are necessary in a particular case). It must also be accompanied by certain documents. The requirement to accompany is one of the rules as to how an application is to be made.*

21. Dyson LJ in *Maroudas* considered the question of timing in the completion of an application [30] and [36]. He held:

*[30]. I do not find it necessary to define the limits of permissible departure from the strict requirements of para 1 of Schedule 14. In particular, I do not find it necessary to decide 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. That is what para 1 of Schedule 14 says: the application shall be "accompanied" by both a map and copies of any documentary evidence which the applicant wishes to adduce. It is true that the form itself provides that copies of the documentary evidence referred to in the form are required to be "attached" to the form. That would appear to mean that the copies of any documentary evidence are required to be sent at the same time as the form. It would be surprising if the map were to be treated differently in this respect from the documentary evidence. But it is not necessary to decide whether submitting the map and documentary evidence, say, later the same day on which the application form itself was lodged or even a few days later, is to be regarded as a departure from the strict requirements of para 1 sufficient to invalidate the entire application even for the purposes of section 67(3)*

*[36]. ..... The fact that the application was unsigned for some 10 weeks in this case is of itself strong reason for holding that there was a substantial departure from the strict requirements of para 1 of Schedule 14.*

22. Gilbert J in *Hareput* examined the omission of documents in light of both *Winchester* and *Maroudas*. At [39] - [41] he concluded:

*[39]. In my judgement, the two passages cited above from Winchester and Maroudas (set out in paras 6 and 7 above), can leave one in no doubt that it is the policy of this legislative*

code, as interpreted and applied by the Court of Appeal, that applications must be made in full accordance with paragraph 1 of Schedule 14. The argument in the Supreme Court in *TRF v Dorset CC* (Supreme Court) between the different Justices was not about the interpretation and application of *Winchester and Maroudas* but about whether they were rightly decided. The Supreme Court's obiter dicta (from both sides of the argument) make it entirely plain that the approach in *Winchester and Maroudas* is a strict one, from which any departure in the making of the application from the statutory requirements will render it defective unless it is *de minimis*.

[40]. I do not regard the requirement that the documents accompany the application as unimportant. Its purpose is to enable those affected by the application to know the strength of the case they have to meet.

[41]. This application sought to rely on documents which did not accompany it. No reader of the application and its enclosures would have been able to test the supportive material for himself or herself.

23. Gilbart J in *Hareput* also pointed out [42] that the flexible approach of Lord Carnwath in *Supreme Court* to the line to be drawn between matters which are *de minimis* and those that are not:

[42].....while it attracted sympathy from Lord Clarke, but no commitment, was rejected by Lord Neuberger PSC, and Lords Toulson and Sumption JJSC.

## **Conclusion**

24. In respect of TRF's application under consideration now, the Finance Act map was the only evidence identified by the applicant that provides an indication that the Inclosure Award may have been implemented. The Finance Act map and the text of the Inclosure Award are of such importance that the submission of the first at least 10 weeks, or possibly 5 months, late and the complete omission of the second cannot be considered *de minimis*.

25. The application to classify Bailey Drove as a BOAT does not comply strictly with the requirements of para 1(b) of Schedule 14. It is therefore not a qualifying application which would preserve a public right of way for mechanically propelled vehicles from extinguishment by the operation of section 67(1) of NERC.