

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**Dorset Council (A Byway Open to All Traffic, Batcombe and Leigh at Bailey Drove)**

**Definitive Map and Statement Modification Order 2021**

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**STATEMENT OF CASE OF THE  
TRAIL RIDERS FELLOWSHIP**

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## DEFINITIONS AND ABBREVIATIONS

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1. The following definitions and abbreviations are adopted:

TRF	Trail Riders Fellowship
Dorset	Dorset Council
BOAT	Byway Open to All Traffic
DMS	Definitive Map and Statement
WCA 1981	Wildlife and Countryside Act 1981
[ <b>DSoC</b> ]	A reference to the specified paragraph of Dorset’s Statement of Case [ <b>DSoC/###</b> ] or to a page from an appendix to that [ <b>DSoC/App###/###</b> ]
[ <b>TRFDoc/</b> ]	Documents appended to this Statement of Case
Order	Dorset Council (A Byway Open to All Traffic, Batcombe & Leigh at Bailey Drove) DMMO 2021[ <b>DSoC/App1</b> ]
Order Plan	The Plan annexed to the Order at [ <b>DSoC/App1</b> ]
A-B-C-D-E	Points marked on the Order Plan

## INTRODUCTION

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2. An application was made by Friends of Dorset Rights of Way (FoDRoW) (‘the Original Applicant’) on 14 July 2004 (‘the Application’) to:
- 2.1. upgrade to a Byway Open to All Traffic (‘BOAT’) part of Footpath 11, Batcombe;
  - 2.2. upgrade to a BOAT Bridleway 59, Leigh; and
  - 2.3. add a BOAT between the two.
3. The TRF took over conduct of the Application from FoDRoW [**TRFDoc/8**].
4. This Statement of Case is accordingly lodged in support of the Application.
5. Dorset rejected the Application, deciding that the requirements of para. 1 Schedule 14 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. The TRF sought judicial review proceedings challenging that decision (unsuccessful, at first instance [TRFDoc/1] , but succeeding in the Court of Appeal [TRFDoc/2], whose decision was upheld by the Supreme Court [TRFDoc/4]).

6. Dorset proceeded then to determine the Application, deciding the application route should be recorded on the DMS as a BOAT. The order has been submitted for confirmation and objections have been made.

## THE TRF'S POSITION

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7. The TRF:

- 7.1. Invites the Inspector to confirm the Order, the effect of which is to record the Order Route as a BOAT.

- 7.2. Adopts Dorset's Statement of Case insofar as it finds a public right of way for all traffic subsists over the Order Route and supports confirmation of the Order to record a BOAT.

- 7.3. Refutes the objections which cannot stand in the face of the decision of R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [TRFDoc/4]. As respects, Mr Plumbe the TRF considers the objection to be unreasonable conduct: Mr Plumbe knows that it is not open to him to argue that the Application was not made in accordance with the requirements of para. 1 Schedule 14 WCA 1981, having been a party in those proceedings and this having been specifically confirmed by the Supreme Court following an attempt to revisit that final order; and moreover confirmed in the context of the confirmation of another route which was subject to the decision of the Supreme Court (see further below). Mr Dennis' objection is misconceived for the same underlying reason and if it is maintained any further in the face of Mr Dennis seeing the order of the Court of Appeal [TRFDoc/3], Supreme Court [TRFDoc/5] and Lord Carnwath's communication 5 November 2019 [TRFDoc/6], it may constitute unreasonable conduct.

- 7.4. For the avoidance of doubt, the TRF does not accept that there was any departure from para. 1 Schedule 14 WCA 1981 and Dorset has already determined the Application on the basis that it was compliant.
- 7.5. Further, the whole Route is recorded on the List of Streets. The TRF maintains that this engages the exception in s. 67(2)(b) NERCA 2006 as respects not only B-C (which is not recorded on the DMS) but the whole of the Route, even though there is a recorded footpath at A-B and a recorded bridleway at C-E. Any other interpretation would result in an absurd situation where there was a discontinuity in public rights such that an MPV could not even reach the vehicular route B-C for which public rights for MPVs unarguably remain.
8. Although the effect of the Order is to record the Order Route as a BOAT (as is apparent from the title of the Order and the Order Plan, with references to ‘byway’ in Schedule 1, presumably intended to be taken to be references to BOATs), Dorset’s Statement of Case repeatedly refers to recording the Order Route as a Restricted Byway. Thus (emphases in bold have been added to the original):
- 8.1. [DSoc¶2.5] states ‘*The effect of the Order, if confirmed, would upgrade part of Footpath 11, Batcombe (A-B), upgrade Bridleway 59, Leigh (C-D-E) and record the entire Order Route as a restricted byway on the definitive map and statement.*’
- 8.2. [DSoc¶2.6] states ‘*The Council asserts that the documentary evidence submitted in support of the Order is sufficient to establish, on the balance, that the Order Route ought to be shown on the definitive map and statement as a restricted byway.*’
- 8.3. [DSoc¶11.4] states ‘*Unless an exemption applies, the public rights for mechanically propelled vehicles have been extinguished under NERC 2006. There is no evidence of an exemption in relation to the Order Route. Accordingly, the Council submit that the correct status of the Order Route is restricted byway.*’
- 8.4. [DSoc¶12.1] states ‘*The Council asserts that the evidence supports the existence of public vehicular rights along the Order Route. With the application of NERC the Council submits that the Order Route should be recorded as a restricted byway.*’ But [DSoc¶12.1] states ‘*The Council requests that the Inspector confirm the Order as made.*’

9. These references appear to be an error (or at least Dorset’s Statement of Case is hopelessly inconsistent) Dorset has rightly made an order to record the Order as a BOAT and elsewhere in its Statement of Case it records the correct analysis which underlies the Order made and submitted for confirmation: viz. that the Application was properly made in accordance with para. 1 Schedule 14 WCA 1981 and therefore section 67(1) NERCA 2006 did not extinguish rights for MPVs since section 67(3)(a) applied (the Application was made under s. 53(5) WCA 1981 before the relevant date). See:
- 9.1. [DSoC¶4.11] ‘*On 18 March 2015 the Supreme Court dismissed an appeal by Dorset County Council against this decision. The Supreme Court order declared that the Application was made in accordance with paragraph 1 of Schedule 14 of the WCA 1981*’.
- 9.2. [DSoC¶4.12] ‘*The Application is therefore made in accordance with Schedule 14 of the WCA 1981...*’.
- 9.3. [DSoC¶4.12-4.15] describes the investigation and determination carried out by Dorset CC (i.e. premised on its acceptance that the Application had been properly made).
- 9.4. [DSoC¶4.14] records ‘*Confirmation was sought from the Supreme Court in 2019 that its Declaration of 2015 did mean that this application was deemed fully compliant with paragraph 1 of the Act. This was confirmed (Appendix 6).*’
- 9.5. [DSoC¶4.15] records Dorset’s reports recommendation ‘*The Application be accepted and an order made to modify the definitive map and statement of rights of way by recording Bailey Drove as shown between points A – B – C – D – D1 – E on Drawing 18/07 (appendix 1 to Appendix 4) as a byway open to all traffic.*’
- 9.6. [DSoC¶5.3] states ‘*The Order was made on the basis that the documentary evidence demonstrated that Bailey Drove as shown between points A – B – C – D – D1 – E on Drawing 18/07 (appendix 1 to Appendix 4) as a byway open to all traffic.*’.
- 9.7. [DSoC¶6.20-23] specifically addresses NERCA 2006 stating at [DSoC¶6.22-23] ‘*This application was rejected by the County Council on 7 October 2010 on the basis that the application map did not comply with the statutory requirements. The TRF judicially reviewed this decision and ultimately the Supreme Court found that the*

*map did meet the statutory requirements. ... The Supreme Court's Order went further and stated that the applications complied with all of the requirements of paragraph 1 of Schedule 14 to the Wildlife and Countryside Act.'*

9.8. [DSoC¶6.26] further correctly confirms the effect of the decision of the Supreme Court: '6.26.1 The court decided that the maps supplied in this application complied with the requirements of paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981. 6.26.2 The court also declared that this application was made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 i.e. that it was duly made in all respects. This was confirmed by the Supreme Court in November 2019. Thus, the application can be considered to trigger an exception to the Natural Environment and Rural Communities Act.'

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

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10. In the proceedings which the TRF brought to challenge Dorset's refusal to accept the application as having been validly made, the relief which the TRF sought and successfully 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)

11. 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*

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)

12. Therefore, 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.*

13. 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. Mr Plumbe was an interested party in the proceedings and took and participated at all stages (first instance, Court of Appeal and Supreme Court).

14. 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.’*

15. 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, not reserved their position. In those circumstances, it was too late to take any such point after the conclusion of the proceedings.

16. Nevertheless – and 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 even 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 the 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.*’.



17. It, therefore, defies comprehension, and must be unreasonable conduct, that Mr Plumbe seeks to advance in his objection dated 6 April 2021 the very same argument which is not open to him on the plain wording of the orders of the Court of Appeal [**TRFDoc/3**] and Supreme Court [**TRFDoc/5**], as further confirmed in no uncertain terms by Lord Carnwath [**TRFDoc/6**] and, moreover, in the face of this being spelt out repeatedly in correspondence and, again, in the decision of the Planning Inspectorate on one of the other applications.

## Documents

1. R (Trail Riders Fellowship) v Dorset CC [2012] EWHC 2634 (Admin) [2013] PTSR 302
2. R (Trail Riders Fellowship) v Dorset CC [2013] EWCA Civ 553 [2013] PTSR 987
3. Order of Court of Appeal 20 May 2013
4. R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406
5. Order of Supreme Court 13 April 2015
6. Email from Registrar of the Supreme Court 5 November 2019, conveying Lord Carnwath's response to a proposed application to vary the order of the Supreme Court
7. Brain Chase Coles (for the TRF) letter to the Planning Inspectorate 16 December 2019
8. Planning Inspectorate decision 31 July 2020
9. Letter of 4 October 2010 from Jonathan Stuart, who made the application on behalf of the Friends of Dorset Rights of Way on 14 July 2004, appointing the TRF to be his agent in this case.