June 2023

Note: This submission is made in a personal capacity. It takes over from reps by the Green Lanes Protection Group (GLPG) which recently has been disbanded.

Dear Inspector **PINS Ref ROW/3308921**
Dorset Council Ref T338 (Bailey Drove)

1. I submit that the order should not be confirmed. In summary, the reasons are:
    1. Evidence Identified in the application was not attached;
    2. Evidence that was submitted was too late;

    The application therefore fails to gain exemption under s67(3) NERCA 2006 as it does not satisfy para 1, Sch 14 of WCA 81 (text Appx 1); and:

    3. Officers have seriously misinterpreted the Declaration by the SC Registrar as to what the the Supreme Court decided and have misled the Executive Director as to his decision to make a BOAT order accordingly (see Appx 2).

Facts:

2. The application was made on 14 July 2004. The applicant is named as FoDRoW on whose behalf the form was signed by Mr J Stuart. Two items of evidence were relied on in the application - the Leigh Inclosure Map and Award, and the relevant Finance Act map. An undated statement headed "Byway Claim for Bailey Drove, Batcombe & Leigh" was submitted which sought to analyse the evidence referred to but was meaningless without the actual evidence being referred to. It is apparent that a copy extract from the Inclosure map was attached but not the award. The application stated "A CD containing various Finance Act maps has been sent to Dorset County Council's rights of way department" That CD is actually dated 25 September 2004, but according to the details of another application (T339), was not submitted until 11 Dec 2004, ie nearly 5 months after the application. The contents of the CD are listed but the list does not include Leigh Inclosure Award. The relevant FA map may have been on the CD but without sight of the CD we have no means of checking.

3. Also to be noted is a passage in the application which says:

FoDRoW believes enough evidence is being submitted to justify this claim. Further evidence does exist and may be submitted at a later date. However, having considered the volume of claims likely to be submitted in the coming years this claim is being submitted now to avoid a future flood of claims when they are all fully researched.

The *Winchester* judgment (Winchester College & Anor, R (on the application of) v Secretary of State for Environment, Food and Rural Affairs [2008] EWCA Civ 431 (29 April 2008))

includes these passages:

42. I cannot accept that an application which is not accompanied by a map (subparagraph (a)) or by copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application (subparagraph (b)) is made in accordance with paragraph 1 of Schedule 14. …..

46. ……. 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.

47. Secondly, Schedule 7 to the 1993 Regulations shows that the prescribed form itself requires the route to be shown on the map "accompanying this application" and the applicant to "attach" copies of the following documentary evidence (including statements of witnesses) in support of the application. This language reflects the content of subparagraphs (a) and (b) of paragraph 1. It is artificial to say that, in order to be made in accordance with paragraph 1, an application must be made in the prescribed form or a form to substantially like effect; but that it need not be accompanied by a map or have attached to it the documentary evidence and witness statements to be adduced even though these are referred to in the body of the prescribed form itself. The language of the form shows that an application is only made in accordance with paragraph 1 if it is made in the prescribed form and is accompanied by a map and the documentary evidence and witness statements to be adduced.

56. ……The applicant is required to identify and provide copies of all the documentary evidence on which he relies in support of his application.

The Appeal judgment in Maroudas v SoSEFRA [2010] EWCA Civ 280 considered the question of timing in the completion of an application. It was held:

30. I do not find it necessary to define the limits of permissible departures from the strict requirements of para 1 of 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. 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 prescribed 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 a strong reason for holding that there was a substantial departure from the strict requirements of para 1 of Schedule 14.

4. There can be no doubt at all that claim T338 is not a qualifying application for NERCA exemption purposes, (a) because the documentary evidence does not appear to have been complete, (b) it was submitted some 5 months after the application and (c) because the applicant deliberately held back some of the evidence in order to advance the timing of the claim.

Side Issue

5. The Bailey Drove application was one of five in Dorset that used maps that were enlarged rather than drawn to the prescribed scale as required by law. Dorset Council (DC) rejected the claims but were challenged. DC won in the High Court but lost in the Appeal Court, so appealed to the Supreme Court which found against them. The Registrar issued a Declaration (written by the Deputy Registrar) as to the judgment which was loosely worded thus:

"AFTER HEARING Counsel for the Appellant [Dorset County Council], Counsel for the First Respondent [TRF] and the Intervener [Graham Plumbe obo GLPG] on 15 January 2015

THE COURT ORDERED THAT

1) The appeal be dismissed
2) The claim for judicial review of the Appellant's decision of 2 November 2010 succeeds
3) …. [costs] and

IT IS DECLARED that

4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref. T339), 21 December 2004 (ref. T350), 21 December 2004 (ref. T353) and 21 December 2004 (ref. T354) made to the Appellant under section 5.3 (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."

Issue

6. This has been interpreted by the TRF as saying that the relevant applications were compliant with the whole of Sch 14, para 1 (ie both subparas 1a and 1b) even though that is factually wrong. Dorset Council has made the same mistake in its Report to the Executive Director as to the making of a DMMO. Extracts from the report are recorded in Appx 2. With the support of GLPG, DC made an application to the Supreme Court Deputy Registrar (Ian Sewell) to amend the Declaration to reflect accurately what the Court had in fact ordered. In support of DC, GLPG submitted to the Deputy Registrar (i) that the error was simply an ambiguity, (ii) that the TRF were attaching words that aren't there, (iii) that the offending text is simply a Declaration of what the Court ordered and is not an 'order' per se, and (iv) that the TRF's interpretation amounts to a disregard of the law re compliance as found by the Court of Appeal in the *Winchester* case. DC's submission together with that of GLPG to the Deputy Registrar are attached as Appx 3. As identified in para 6 of GLPG's submission, it is ridiculous to suggest that an ambiguity in a Registrar's Declaration can be treated as giving the TRF (or the Registrar) the authority to disregard the law as determined by the Court of Appeal in the *Winchester* case, the correctness of which was confirmed by the Supreme Court. As noted above, it is implicitly saying (wrongly) that sub-paras 1(a) and 1(b) were both satisfied. DC agreed with GLPG that the wording was wrong but regarded the Declaration as an order by which the Council was bound.

7. It is highly relevant that when the underlying issue was considered by the Court of Appeal [R (TRF) v Dorset CC [2013] EWCA Civ 553 (20.5.13)] - Lord Justice Kay (giving the leading judgment) said this:

16. For all these reasons, I conclude that a map which is produced to a scale of 1:25,000, even if it is digitally derived from an original map with a scale of 1:50,000, satisfies the requirements of paragraph 1(a) of Schedule 14 provided that it is indeed "a map" and that it shows the way or ways to which the application relates. I would therefore allow this appeal.

The other two judges expressly agreed. Given that this judgment is confined to the map scale issue and was the foundation of all that transpired (ie the Supreme Court and the Registrar issue), the fact that the original findings were misquoted must be taken into account.

Supreme Court Response

8. The Deputy Registrar referred the matter to the SC. It was considered by Lord Carnwath who 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."

GLPG's submission to PINS

9. GLPG does not accept the validity or relevance of Lord Carnwath's response for the following reasons:

10. (i) It is highly likely that Lord C has not read the papers in full, particularly the submission by GLPG. DC has stated: "I confirm that all the papers filed in relation to the application were sent to Lord Carnwath, who also had the benefit of all the case papers including the core volume" (my emphasis). Lord C makes no reference to any papers/submissions made to support DC's application, and appears to be relying solely on his recollection of the case. That view is further supported by the errors made by Lord C as detailed below.

(ii) Lord C's response is purely a negative comment as to not finding a reason to vary. It is not a ruling of law, as to achieve that the Supreme Court would need to sit as 5 or more judges. It cannot therefore be binding on an Inspector who is entitled to reach his/her own conclusion as to the law having considered the SC judgment and the correctness or otherwise of the Declaration in recording what the Court in fact ordered. In particular Lord C does not state that the TRF interpretation is correct.

(iii) Lord C does not identify what he means by *'the order'*. He could be referring to (i) the order made by the Appeal Court (which was limited to the map scale question); (ii) the SC judgment/order which confirmed the CA findings; or (iii) the Declaration if he too refers to that as being an order. Taken in context, he appears to mean the SC judgment, as the Declaration is that which was subject to the application by DC to vary.

(iv) It is incorrect to refer to *'the terms of the order'* having been *'agreed*

between the parties'. At no stage were the terms of any of the orders listed under para (iii) above so agreed. I speak as one of the parties.

(v) The statement *'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.'* is misconceived. Assuming *'these proceedings'* refers to the whole litigation from the High Court upwards, the original challenge was in fact by the TRF against the findings of DCC. The High Court judgment opens with the passage 'The Claimants [the TRF] challenge the decision of Dorset County Council, the Defendant, to reject five applications made under section 53(5) of and Schedule 14 [to the 1981 Act]'. It would have been wholly inappropriate for DCC to address the Court as to matters not listed as being in dispute given the limitations of the challenge by the TRF.

(vi) The *'form of the relief sought in the original claim'* was the Court's endorsement that an application was valid even if based on maps which were drawn to the wrong scale. That relates solely to the first limb of Sch 14 para 1(a) ('a map drawn to the prescribed scale'); it does not relate to the 2nd limb ('and showing the way or ways to which the application relates) nor to para 1(b) (copies of any documentary evidence ….).

(vii) The passages '*Had the council wished to challenge the validity of these applications'* and '*… it is too late to raise such issues at this stage'* are also misconceived. The endorsement by the SC of the validity of the original applications on the map scale issue means that these 5 cases have had to be reopened, partly because of the need to consider whether other grounds are relevant. Furthermore, applications are of course challengeable by landowners and members of the public, and the need to re-open the cases and start again necessitates renewed public consultation. That process is currently in hand and reason has been identified to dispute the validity of claims other than just T338.

(viii) The onus of proof is on the claimant of rights (confirmed by Defra). The absence of legal substance in Lord C's response raises the question of whether the TRF have produced any legal reasons for an interpretation of the ambiguity which is contrary to the findings of the Court of Appeal as to compliance. This is of vital importance.

11. Those reasons apart, GLPG submits that the first part of Lord C's response does in fact endorse the GLPG position. The *'terms of the order'* (ie the SC judgment - see para (iii) above) were that para 1(a) had been satisfied. The *'form of the relief sought in the original claim'* (ie by the TRF in the High Court) was exactly that -

ie that the scale of the maps used satisfied the law and the applications should not be disqualified.

12. **Conclusion** Given Lord C's unreasoned disregard of the application to vary the Declaration, the Inspector is invited to reach his/her own conclusions as to what was meant by the recorded ambiguity, and whether it carries any authority to overturn the findings of the Court of Appeal in the *Winchester* case as to compliance, noting the obiter confirmation by the Supreme Court that the *Winchester* case was correctly decided.

Yours sincerely

Graham Plumbe - cc Interested parties

Appx 1 - Text of Para 1 Sch 14 WCA 81

Appx 2 - Errors in the Delegated Report (5.10.20) due to the ambiguity by the Deputy Registrar in the Declaration

Appx 3 - Submissions by DC and by GLPG to the Deputy Registrar on 15.6.19 seeking an amendment of the Declaration