

Appendix 11

TRF's Grounds of Appeal and annexures

Application for a definitive map and statement modification order to upgrade Bridleway 17, Beaminster, to a byway open to all traffic

Appeal to the Secretary of State under Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981, against Dorset County Council's determination not to make the order

Grounds of Appeal

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I. Background

- 1.1. This appeal is made by the Trail Riders Fellowship (TRF) acting as appointed agent (Attachment A) of Jonathan Stuart, who made the application on behalf of the Friends of Dorset Rights of Way on 21 December 2004. Mr Stuart by letter of 4 October 2010 appointed the TRF to be his agent in all matters regarding this application, and that letter of agency was accepted by the Supreme Court. (Attachment B)
- 1.2. This application was given the Dorset County Council (DCC) reference RW/T354, and it was under reference T354 that the application became subject to a challenge to its validity, culminating in an Order of the Supreme Court dated 13 April 2015, declaring that application T354 was made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981. (Attachment B)
- 1.3. In a report to the Regulatory Committee (meeting on 21 March 2019) dated 6 March 2019, Matthew Piles, Service Director, Environment, Infrastructure and Economy, advised the Committee that it was "*recommended that an order be made to record the route between Point A and Point I on the plan 18/13 as a byway open to all traffic*" (Plan 18/13 is Attachment C)

- 1.4. At its meeting on 21 March 2019, the Regulatory Committee went against officers' advice and resolved not to make an order in respect of the length shown on plan 18/13 as A-B-C.
- 1.5. In a letter dated 26 March 2019, Vanessa Penny, Definitive Map Team Manager, Planning and Regulation Team, advised the TRF that "*Application T354 should be accepted in part and an order made to record the route as shown between points C and I on drawing 18/13 as a byway open to all traffic*" (Attachment D)
- 1.6. The TRF is therefore exercising its right of appeal to the Secretary of State against Dorset County Council's determination not to make the order sought.

2. Validity of this appeal

- 2.1. The application 'Form A' was actually four applications on one form. Nothing in Schedule 14 states that this cannot be done, and the layout of Dorset County Council's template Form A invites a 'set' of applications to be made together.
- 2.2. The application for the route described by Dorset County Council as A-B-C is to 'upgrade' (i.e. modify) the status of Bridleway 17 Beaminster to byway open to all traffic. This is clear from the entry against (c) "from: I - ST 49105 03415 to: I - ST 49555 03010".
- 2.3. That is a single 'application entity', separate in fact and law from the other three 'application entities' on the same Form A. The reason for setting it out in this way is the commonality of evidence.
- 2.4. PINS' "Schedule 14 Appeal Guidance" states, "*The right of appeal does not exist if the authority issues a refusal notice to make an order for the status applied for but resolves to make an order for a different status or where the authority makes an order which differs from the application in some other way. The right of appeal against the authority's determination is only valid if that determination is not to make an order at all.*"
- 2.5. Firstly, we say again that the application for what is now termed A-B-C is a stand-alone application in its own right, was rejected by DCC, and is therefore amenable in its own right to an appeal under Schedule 14.
- 2.6. Secondly, we respectfully say that this guidance is wrong, or at least misleading. In the matter of *Dorset County Council (Bridleway 3 (part) and Bridleway 4, Piddlehinton) Definitive Map and Statement Modification Order 2010*. PINS Ref'n FPS/CI 245/7/36, two separate applications were made to Dorset County Council to upgrade various bridleways (in a 'connected cluster') to BOAT status. DCC officers quite reasonably treated these two applications as one for the purpose of handling the evidence, but the decision-making committee rejected officers' advice and declined to make the order.

- 2.7. On appeal under Schedule 14 the Inspector appointed directed DCC to make orders, embracing all of the two applications, except for the northern end of one leg, that on the basis of 'insufficient evidence.' DCC chose to make one composite order. Objections were lodged to this order, and the TRF presented a case largely in two heads:
- Evidence and submission to show that all of A-E and C-E-B-D are historical public carriage roads, and,
 - The order should be modified to include leg B-D, which was refused in the Schedule 14 appeal decision.
- 2.8. In her interim decision letter of 2 December 2014 (FPS/CI245/7/36) Inspector Mrs Slade notes:
- 2.9. [16] "I was also requested to include in the modification the length of the route to the north of the Order route to Drakes Lane, which had formed part of one of the original applications. This part of the route lies outside the scope of the Order plan. It was Mr Kind's view that failure to include the onward section would prevent any future modification of the DMS which to accurately reflect what the TRF believes to be the correct status of that part of the original application route.
- 2.10. [17] "I agreed to hear the evidence at the inquiry in relation to the whole of the application route on the basis that I would then be able to consider whether or not it was appropriate to make such a modification; bearing in mind that such modifications would require advertising, thus allowing a further statutory notice period for objections. I also made it clear to the other participants at the inquiry that they were at liberty to argue against such modifications.
- 2.11. [19] "To include the onward route as originally claimed by FoDRoW would require the addition to the Order of a map and a revised schedule, a draft of which was supplied by Mr Oickle at the inquiry. I have considered the situation carefully, and taken account of the arguments for and against such a modification. Whilst I understand the implications as expressed by Mr Kind, I consider that to make such a fundamental alteration to the Order would be an abuse of the process. It may be acceptable to add a map to an Order for clarification purposes (for example to clarify the location or some other aspect of a route) but to add a map for an additional length route which would extend significantly beyond the scope of the map attached to the Order as made would be a very substantial alteration.
- 2.12. [20] "My powers of modification are quite wide, but I must exercise those powers fairly and with discretion. In this case I have concluded that to modify the Order in the way requested would be too significant a change, and make the Order substantially different from the one I am considering. I have therefore declined to make any modification in respect of the additional claimed section of the route."

- 2.13. Mrs Slade maintained her view in her final decision letter. The TRF made an application to the Administrative Court, primarily on a ground concerning 'Winchester compliance', and adding a second ground that the Inspector was wrong to have held that the modification to the order sought was outwith her powers of modification, because in so doing the order applicants lost (because of s.67 of NERCA) all possibility of having this leg properly recorded as a BOAT.
- 2.14. The Judge held that this second limb was correctly a matter of the Inspector's exercise of discretion and rejected that ground of claim. [2016] EWHC 2083 (Admin).
- 2.15. In this current case, if the Secretary of State holds that there is no right of Schedule 14 appeal as regards A-B-C, then the applicant can do nothing more than object to the order for D-I when that is made by DCC, on the ground that it should include A-B-C as well. But it is then entirely within the discretion of the Inspector as to whether he or she will even entertain so-modifying the order, and hearing evidence accordingly.
- 2.16. For the Secretary of State to bar a Schedule 14 appeal now as regards the application in respect of A-B-C wrongly (in our view) deprives the applicant of the right of appeal, and leaves only a lottery as to whether a later Inspector will modify the order as made.
- 2.17. That cannot be right. This would be an unfair and biased approach as between applicants, where some have a statutory right to have their evidence heard, and some rely on the exercise of an Inspector's absolute discretion. There should be equal treatment at each stage of the appeal and determinative process.

3. Structure of these grounds of appeal

- 3.1. The basis of this appeal is that Dorset County Council officers have properly set out in the report to committee (at least some of) the various pieces of historical documentary evidence supplied by Mr Stuart, both in matters of fact (interpretation) and law, and have given proper weight to those pieces of evidence, and to the evidence as a whole. The minutes of the Regulatory Committee give no clear reason as to the grounds on which members went against officers' advice. When all the evidence is properly considered and weighed, then on the balance of probabilities a public vehicular right of way subsists along the application route.
- 3.2. These grounds accept the Report to the Regulatory Committee on 21 March 2019, and add below some additional evidence and legal submissions.

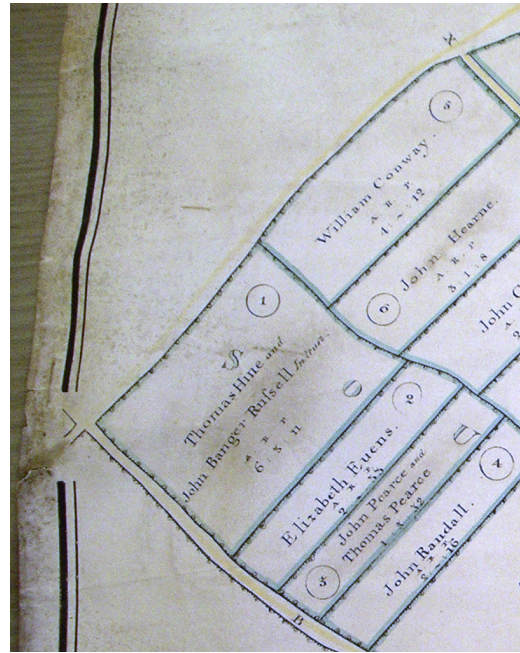
4. The evidence reconsidered

- 4.1. **Greenwood's map of 1826.** As DCC says, Greenwood shows the application route as a 'cross road'. The most-recent judicial consideration of the meaning of 'cross road' in old

maps is in Fortune v. Wiltshire Council [2012] EWCA Civ 334, Lewison LJ at [54] (our emphasis).

- 4.2. “The judge moved on to consider Greenwood’s map of Wiltshire, produced in 1829. Greenwood was a well-known commercial map-maker who produced maps of many English counties. The judge considered that this map also showed a thoroughfare which included Rowden Lane. Prof Williamson agreed. It was not coloured in the same way as the Bath road; but nor were a multitude of other roads linking disparate settlements. The legend of the map showed that the colouring of the Bath Road meant that it was a turnpike or toll road, whereas that of Rowden Lane meant that it was a “cross road”. As the judge pointed out, in 1829 the expression “cross road” did not have its modern meaning of a point at which two roads cross. Rather in “old maps and documents, a “cross road” included a highway running between, and joining other, regional centres”. Indeed that is the first meaning given to the expression in the Oxford English Dictionary (“A road crossing another, or running across between two main roads; a by-road”). Prof Williamson agreed in cross-examination that a “cross road” was a reference to a road forming part of a thoroughfare. The judge gave a further explanation of the significance of the expression later in his judgment (§ 733) by reference to guidance given to the Planning Inspectorate:
- 4.3. “In modern usage, the term “cross road” and “crossroads” are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term “cross road”. These include a highway running between, and joining, other regional centres. Inspectors will, therefore, need to take account that the meaning of the term may vary depending on a road pattern/markings in each map.”
- 4.4. “The guidance went on to urge caution as the judge recognised:
- 4.5. “In considering evidence it should be borne in mind that the recording of a way as a cross road on a map or other document may not be proof that the way was a public highway, or enjoyed a particular status at the time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere – as sometimes happened – that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality of the evidence in reaching a decision.”
- 4.6. “[56] The judge concluded that Greenwood’s map supported “the emerging picture” of an established thoroughfare. In our judgment the label “cross road”

the linear continuation of the road 'to Hook', as awarded. The inclosure commissioners had no remit to award this continuation, and it runs only a relatively short distance to make a junction with the largely east-west road, now the C102, making a 'to xxxxxx' label too remote.



- 4.12. There is additional evidence in the form of John Cary's 'Map of Dorsetshire 1787'. No scale is given, but the original plate is little bigger than A4. An extract of this map is reproduced, with commentary, on the following page, and a copy of the whole plate is appended.



(Current) Bridleway 17 Beaminster. Schedule 14 Appeal to the SoS. Grounds of Appeal.

- 4.13. Maps of this scale, in 1787, are inevitably schematic to some degree, and the evolution of the roads in the 230 years since can make the maps seem incorrect at first glance. Cary shows the road from Beaminster mostly northwards via Mosterton (do not confuse with Misterton, just to the north) as a turnpike, and he has a 'Y' junction of turnpikes (A356, A3066), just beyond the county boundary. This can be matched against the modern OS map, which is not schematic.
- 4.14. On Cary, follow the road running due east out of Beaminster. That is a schematic rendering of the B3163. Follow on the OS to just east of OS spot height 181 and then fork right on the 'yellow' road. Shortly an unclassified road (shown with red ORPA dots) turn left (north) and this is Cary's branch cross road, running towards the northwest.
- 4.15. There is immediately a road on Cary off to the right (east) near Dirty Gate, towards '16', and this corresponds to once more to the B3163.
- 4.16. Follow Cary's road northwestwards on the modern OS, and after the access to Higher Langdon this becomes the southern end of the whole of the applied-for route.
- 4.17. At the junction with the 'yellow' road near Hillbrow Farm, that yellow road going towards the northeast is clearly Cary's branch road towards Corscombe, passing through the 'e' of 'W. Chelborough'.
- 4.18. Cary's continuing line is then the subject of this appeal (currently Bridleway 17) turning westwards (schematically again) to make a junction with Cary's turnpike to Mosterton, now the junction on the A3066 at Horn Hill.
- 4.19. This reconciliation of the Cary map against modern OS also sits very well with the 1800 'Plan of roads in the neighbourhood of Beaminster', as put in with the application. That plan shows 'Dirty Gate', and the pattern of roads east from Beaminster, then cutting back towards the northwest, the application route, and beyond towards Bristol.
- 4.20. Cary's map shows little other than roads and settlements. If it was not intended for travellers, then for whom would it hold interest sufficient to buy?
- 4.21. A road that, in the 'middle of nowhere' and for just a short distance, changes status from a general-purpose road to only a bridle road, would be curious advice and reassurance to sell to travellers.

5. Conclusions from the evidence

- 5.1. Taking all of this evidence together, it is sufficiently clear that the application route was historically part of a much longer thoroughfare. Look at the whole plate of Cary's 1787 map and it is immediately visible that the cross road encompassing the order route continued southeastwards as a linear entity at least as far as Upway. That is about 18 miles, and although Cary's representation is schematic comparison with the modern OS suggests that this route was (near Upway) along one of the 'Dorset Ridgeways', and, further towards Beaminster, coincided with part of a Roman road. Overall, this has the character of a very ancient, long through route, of which the application route was one very short part. This longer route submission is contextual, and the more-local evidence goes to show the status of the application route.

6. The 'through route presumption'

[This is not argued to be a legal presumption; it is more one of common sense and experience.]

- 6.1. Part 2 of PINS's Consistency Guidelines states:

"Rural Culs-de-Sac

"2.48, 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.

"2.49, 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."

- 6.2. Expanding this guidance a little further is of assistance:
- 6.3. In *Eyre v. New Forest Highway Board* (1892) JP 517, the Court of Appeal under Lord Esher, MR, considered an appeal against a decision of Wills J, who had rejected an application by Mr Eyre that Tinker's Lane in the New Forest was not a publicly repairable highway and should not be made up by the Board. Lord Esher commended

Wills J's summing-up as "... *copious and clear and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised.*"

- 6.4. Wills J: "It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what Mr Bucknill says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a great deal more than half of them have no better origin and rest upon no more definite foundation than that. It is perfectly true that it is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place, and that you cannot have a public right to indefinitely stray over a common for instance... There is no such right as that known to the law. Therefore, there must be a definite terminus, and a more or less definite direction...
- 6.5. "But supposing you think Tinker's Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a cul-de-sac, and ends at a gate onto a common? Such things exist in large towns... but who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? ... It is a just observation that if you think Tinkers Lane was a public highway, an old and ancient public highway, why should it be so unless it leads across that common to some of those places beyond? I cannot conceive myself how that could be a public highway, or to what purpose it could be dedicated or in what way it could be used so as to become a public highway, unless it was to pass over from that side of the country to this side of the country. Therefore it seems to me, after all said and done, that the evidence with regard to this little piece across the green cannot be severed from the other... it would take a great deal to persuade me that it was possible that that state of things should co-exist with no public way across the little piece of green... I am not laying this down as law; but I cannot understand how there could be a public way up to the gate – practically, I mean; I do not mean theoretically, - but how in a locality like this there

could be a public highway up to the gate without there being a highway beyond it. If there were a public highway up Tinker's Lane before 1835, it does not seem to me at all a wrong step to take, or an unreasonable step to take, to say there must have been one across that green."

- 6.6. There are three often-cited cases on culs-de-sac and whether such can be (public) highways: Roberts v. Webster (1967) 66 LGR 298; A.G. v. Antrobus [1905] 2Ch 188; Bourke v. Davis, [1890] 44 ChD 110. In each of these the way in dispute was (apparently) a genuine dead-end with no 'lost' continuation. Fundamental argument in each was whether or not a cul-de-sac (especially in the countryside) could be a (public) highway. In each case the court took the point that the law presumes a highway is a through-route unless there are exceptional local circumstances: e.g. a place of public resort, or that the way was expressly laid out under the authority of statute, such as an inclosure award. In A.G. (At Relation of A H Hastie) v. Godstone RDC (1912) JP 188, Parker J was called upon to give a declaration that a cluster of minor roads were public and publicly repairable highways.
- 6.7. "The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the case with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively [note the similarity of logic here with Wills] in Eyre]. 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 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."
- 6.8. The matter was also touched upon in Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532 (this is the case reference given in the 'Blue Book': there may be a typographical mistake here, as the hearing was on 18 July 1989?) Judge Paul Baker QC (sitting as a Judge of the High Court).

- 6.9. “Before I come to the evidence I should deal with certain submissions of law supported by a number of authorities which have been placed before me by Mr Marten for Mr and Mrs Brand. The first one is that a public vehicular highway is and normally must be used to go from one public highway to another. In support of that, there was cited the well-known case of Attorney General v. Antrobus [1905] 2 Ch 188. That case concerned a path or track leading to Stonehenge. It was held to be not a public highway. I cannot accept the proposition precisely as stated. The position as I see it is this, that generally a public right of way is a right of passing from one public place or highway to another. Here the claimed right is from one highway (at Bellingdon) to another (at Chesham Vale). Hence I do not have to consider the position as to cul-de-sacs and tracks, as in the Antrobus case. The part of the formulation that I do not accept is the wording that it normally must be used to go from one public highway to another. In my judgment, it does not have to be shown that it is normally used to go from one end to the other. It may normally be used by people going from either end to and from premises fronting on to it and less frequently used by persons traversing its whole length. The user necessary to establish a right of way is to be considered separately from the way itself.”
- 6.10. Although it is not in any way a ‘precedent’, it is useful to note the view of Inspector Dr T O Pritchard, when tasked to consider the true status of a through-route that currently ‘changes status’ part-way. He said it is “... *Improbable for part of a continuous route to be part footpath and part carriageway*”, expressly taking the Godstone case as authority, [FPS/A4710/7/22 723, of 31 March 1999].

7. Summary

- 7.1. If it is accepted that the application route was part of a thoroughfare, and thus a ‘cross road’ (as it is described on Greenwood’s map), then it was historically either a public bridleway or a public general-purpose road. Its modern-era recording as a public bridleway on the definitive map and statement may have been on an historical basis, or, more probably, on the basis of user recent to the date of survey.
- 7.2. If it is accepted that the application route was part of such a thoroughfare, and thus a ‘cross road’, then it is improbable that the highway status changed part-way along. If one end was historically a public general purpose road (i.e. in this circumstance a cart road) then it is more probable that the whole thoroughfare was a highway of the same traffic status.
- 7.3. There is no evidence or comment in the pre-determination consultation responses that is incompatible with the application route being a ‘lost way’ as regards its historical traffic status. Weighing together the historical evidence, the opinion of experts, and how the

courts view 'cross roads', 'thoroughfares', and a presumption of continuing through-route traffic status, this application should lead to the making of the order sought.

Ends.

Attachments

- A. Letter of 4 October 2010 from Jonathan Stuart, who made the application on behalf of the Friends of Dorset Rights of Way on 21 December 2004, appointing the TRF to be his agent in this case.
- B. Order of the Supreme Court dated 13 April 2015.
- C. DCC report plan 18/13.
- D. Notice of refusal of application, letter dated 26 March 2019.
- E. John Cary's Map of Dorsetshire 1787 (dated by others in the same series).
- F. The application made to the surveying authority. This application lists the evidence submitted with the application, and this is appended here (indexed) using item references, a.a., b.b., et seq to and including o.o. The application includes the notices associated with the application.
- G. A map showing the alleged right(s) of way.
- H. Paper, "*Byway Claim for Bridleways 17 & 35 Beaminster*" as submitted with the application.
- I. Report to the Regulatory Committee, 21 March 2019. Officers' analysis of documentary evidence.
- J. Regulatory Committee minutes of 21 March 2019. Reasons for refusal of application.