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## Order Decision

Inquiry held on 24 November 2015

Site visit made on 25 November 2015

**by Alan Beckett BA MSc MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 7 January 2016**

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### **Order Ref: FPS/W2275/7/77**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Kent County Council (Byway Open to All Traffic AE429 at Chilham) Definitive Map Modification Order 2014.
- The Order is dated 9 December 2014 and proposes to modify the Definitive Map and Statement for the area by upgrading the whole of Restricted Byway AE429 and part of Restricted Byway AE18 to the status of Byway Open to All Traffic. The routes affected are shown in the Order plan and described in the Order Schedule.
- There were 32 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is not confirmed.**

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### **Procedural Matters**

1. I held a public local inquiry into the Order at the Chilham Village Hall on Tuesday 24 November 2015. Following the close of the inquiry I made an inspection of the route in question in the company of the representatives of the Trail Riders Fellowship (TRF) (the applicant for the Order), Stour Valley Farms (the principal objector), Kent County Council (the Council) and other statutory objectors.
2. In September 2004 the TRF had made an application to record the Order route in the definitive map and statement as a Byway Open to All Traffic (BOAT). The Council determined not to make the Order and were directed to do so by the Secretary of State following a successful appeal. At the inquiry, the Council adopted a neutral stance and the case for the confirmation of the Order was presented by Mr Kind on behalf of the TRF. At the inquiry, Mr Pavey represented Stour Valley Farms; the Parish Councils of Wye, Godmersham and Chilham parishes were represented by Cllr Lulham, and Mr Perrett represented the Chilham Environmental Protection Society.

### **The Main Issues**

3. As noted above, in September 2004 the local representative of the TRF made an application to the Council to record AE429 and AE18 as BOATs<sup>1</sup>. On behalf of Stour Valley Farms, Mr Pavey argued that the application had not complied with the requirements of paragraph 1 to Schedule 14 of the 1981 Act and consequently, it was not a qualifying application which would preserve a public right of way for mechanically propelled vehicles (MPVs) from extinguishment by the operation of section 67 (1) of the Natural Environment and Rural Communities Act 2006 (NERC).

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<sup>1</sup> At the time of the application AE18 and AE429 were recorded as Roads Used as Public Paths (RUPPs)

4. The two main issues before the inquiry were therefore (i) whether the 2004 application was a qualifying application which preserved any right the public had to use MPVs on the Order route; and (ii) whether the documentary evidence discovered demonstrated, on a balance of probabilities that public vehicular rights subsisted over the Order route such that it could be recorded as a BOAT.
5. I shall first consider the question of the validity of the application. Only if I conclude that the application complied with the requirements of paragraph 1 of Schedule 14 to the 1981 Act will I go on to consider the documentary evidence adduced in this case.
6. I approach the determination of the Order in this way because the Order route was statutorily reclassified as a Restricted Byway on 2 May 2006 by the coming into operation of sections 47 and 48 of the Countryside and Rights of Way Act 2000 (the CROW Act). If the application made in 2004 is not a qualifying application under section 67 (3) of NERC, then any right the public had to use the Order route with MPVs would have been extinguished on 2 May 2006. In such circumstances if the documentary evidence did show on a balance of probabilities that the Order route was a public carriageway, the extinguishment of public MPV rights would mean that the Order route could not be recorded as anything greater than its current status.

***Whether the application made by the local representative of the TRF on 25 September 2004 was compliant with the requirements of paragraph 1 of schedule 14 to the 1981 Act***

*The statutory framework*

7. The coming into operation of section 67 (1) of NERC on 2 May 2006 extinguished any right the public may have had to use the Order route with MPVs unless any of the exceptions found in section 67 (2) or 67 (3) (a) are applicable. It has not been argued by any party that the exceptions set out in section 67 (2) apply in this case.
8. The exception found in section 67 (3) (a) would preserve MPV rights if before 20 January 2005 an application had been made to record the Order route as a BOAT. Section 67 (6) of NERC provides that "*For the purposes of subsection (3) an application under section 53 (5) of the 1981 Act is made when it is made in accordance with paragraph 1 of schedule 14 to that Act*".
9. Paragraph 1 of schedule 14 to the 1981 Act requires that "*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*".
10. Paragraph 8 (1) of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 [SI 12 1993] (the 1993 regulations) stipulates that an application for a modification order shall be in the form set out in Schedule 7 or in a form substantially to the like effect. Paragraph 8 (2) provides that the map which accompanies the application is to be drawn at the scale specified in paragraph 2 of the regulations; that is, at a scale of not less than 1:25,000.

11. The question of the extent to which an application made under section 53 (5) of the 1981 Act has to comply with the provisions of paragraph 1 of schedule 14 in order for it to be a qualifying application under section 67 (6) of NERC and thereby preserve MPV rights over a route was considered by the Court of Appeal in the case of *R (oao Warden and Fellows of Winchester College and anor)* [2008] (EWCA Civ 431) (*Winchester*). The *Winchester* case was primarily concerned with whether an application that had been made to add a BOAT which was accompanied by a list of the documentary evidence being adduced (but not copies of those documents) was a qualifying application under section 67 (6) of NERC.
12. In *Winchester* Dyson LJ held that *"In my judgement, section 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).....Thus minor departures from paragraph 1 will not invalidate an application. But neither the Tilbury application nor the Fosbury application was accompanied by any copy documents at all, even though it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances I consider that neither application was made in accordance with paragraph 1."*
13. In Dyson LJ's view *"The language of the paragraph is clear and unambiguous. The application must be accompanied by copies of any documentary evidence which the applicant wishes to adduce. This must mean any documentary evidence, whether it is already available to the authority or not.....The applicant is required to identify and provide copies of all the documentary evidence on which he relies in support of his application"*.
14. The need for compliance with the requirements of paragraph 1 of schedule 14 was also considered in *Maroudas v Secretary of State for Environment, Food and Rural Affairs* [2010] (EWCA Civ 280) (*Maroudas*). In that case an application had been made which was neither signed nor dated and was not accompanied by a map showing the way to which the application related. Although the application was eventually signed and dated following correspondence between the applicant and the relevant Council, Dyson LJ held *"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 paragraph 1 of Schedule 14."*
15. With regard to the absence of a map showing the route to which the application related Dyson LJ held *"The absence of an accompanying map is an important omission just as is the absence of documentary evidence on which an applicant wishes to rely.....For these reasons, I would hold that the February application, even when it is considered with the exchange of correspondence, did not comply with the strict requirements of paragraph 1 of schedule 14 of the 1981 Act."*
16. The question of strict compliance was given further consideration by the Supreme Court in the recent case of *R (oao Trail Riders Fellowship & anor) v Dorset County Council* [2015] (*'Trail Riders Fellowship'*) UKSC 18. Although the Supreme Court was not required to give judgement on the issue of compliance as the case was determined on other matters, the views of three of the

Supreme Court judges were as one with the Court of Appeal in *Winchester* and *Maroudas*.

17. Lord Toulson's view was "*That subsection [section 67 (6)], as it appears to me, made it clear for the removal of doubt that section 67 (3) of the 2006 Act applied only to an application made in time and in compliance with the formal requirements of paragraph 1 of schedule 14. Put in negative terms, the saving provided by section 67 (3) does not include applications purportedly made before the cut off date which were substantially defective, whether or not the defects might otherwise have been cured in one way or another.*"
18. Lord Neuberger PSC considered that "*Unless section 67 (6) is mere surplusage, it seems to me that it can only sensibly be interpreted as meaning that, if a section 53 (5) application has been made, but that application does not comply with the requirements of paragraph 1 of schedule 14, then it is not to be treated as an application for the purposes of section 67 (3) (a).*" Furthermore he said "*I find the notion that 67 (6) is mere surplusage very difficult to accept. It is not as if the choice was between a strained meaning and no meaning at all, as the natural effect of the words of the subsection is as I have described. And that meaning appears to me to be entirely consistent with the purpose of section 67, which is to extinguish certain rights of way if they are not registered, subject to certain exemptions including those ways subject to section 53 (5) applications*".
19. Lord Sumption was of the view that "*It follows that on the relevant date any way for mechanically propelled vehicles was extinguished. Since that defect might in theory have been made good after the relevant date, this may be described as a technical point. But sometimes technicality is unavoidable. Where the subsistence of rights over land depends upon some state of affairs being in existence at a specified date, it is essential that that state of affairs and no other should be in existence by that date and not later.*"
20. Whilst the views expressed on the requirement for strict compliance with paragraph 1 of schedule 14 by Lords Toulson, Neuberger and Sumption in *Trail Riders Fellowship* were *obiter*, those views were expressed having heard argument on the issue. I consider that they represent a significant endorsement of the findings of the Court of Appeal in *Winchester* and *Maroudas*.

#### *The application of 25 September 2004*

21. The application submitted to the Council comprised of a number of documents behind a covering letter from the applicant to Mr Wade of the Council. The bundle of application documents submitted to the inquiry by Mr Pavey reflects accurately the bundle forwarded by the Council as part of its original submission to the Planning Inspectorate. Mr Wade had thoroughly checked the Council's files relating to AE429 and AE18; there were no other documents on file relating to the application which had not been included in the Council's original bundle.

#### *Paragraph 1 to Schedule 14 – 'application in the prescribed form'*

22. The bundle of application documents does not contain an application form in the form specified in schedule 7 to the 1993 regulations. Again, Mr Wade has examined the Council's files and has not found either an original schedule 7

- form or a copy of such a form, nor any document in a similar form. The absence of a signature and a date on the application form in *Maroudas* was fatal to the application in that case. In the current case, there is no evidence that an application in the prescribed form was submitted by the applicant, although schedule 8 forms and the certificate of notice required by schedule 9 were included.
23. Mr Kind argued that if the bundle of application documents had not contained something that it should have contained then the Council would be expected to inform the applicant in order for the application to be rectified. However, the Council had accepted the application and had had no difficulty determining it. In such circumstances, the presumption of regularity should apply; that is, it should be presumed that all the necessary documentation was available to the Council for them to have been able to accept the application as valid and to have acted upon it. It is submitted that given that the applicant had used the correct schedule 8 and schedule 9 forms, it was improbable that the applicant had not also used a schedule 7 application form. In Mr Kind's submission the use of the correct forms for parts of the application process suggested that a proper application form had been submitted but which had subsequently been lost.
24. I am not persuaded that the presumption of regularity can be applied to these circumstances. The receipt of a section 53 (5) application is not an 'official act' of a public authority which is encompassed by the presumption of regularity. Although the Council received the application, accepted it as being valid and subsequently determined it, the actions of the Council cannot regularise the application or make up for any deficiencies in it. The burden of ensuring that the application was fully compliant with the provisions of paragraph 1 of schedule 14 lay and remained with the applicant. If there were errors, omissions or deficiencies in the application at the time it was submitted, the responsibility for those errors omissions or deficiencies lay with the applicant.
25. In *Maroudas*, the absence of a signature and date from the application form for a period of around 10 weeks was considered to a substantial departure from the strict requirements of schedule 14. In the current case there was no application form submitted; in my view the absence of a schedule 7 form (or anything to the like effect) is a more substantive omission than that considered in *Maroudas*.
26. Although the applicant had submitted schedule 8 and schedule 9 forms to show that various stages of the application process had been completed, the absence of a schedule 7 application form means that the application was not compliant with the requirements of paragraph 1 of schedule 14 when it was sent to the Council. There is no evidence that the applicant sought to rectify this omission at any stage. I conclude that the application was defective in a matter of substance at the time it was sent to the Council, had not been rectified by 20 January 2005 and has remained defective ever since.
27. The absence of a schedule 7 form (or any document to the like effect) means that the application was not 'made' in accordance with paragraph 1 of schedule 14 and was therefore not 'made' as required by section 67 (6) of NERC.

*Paragraph 1 (a) to Schedule 14 – ‘accompanied by a map....’*

28. The application bundle did not include a map which showed the routes subject to the application. A copy extract from the ‘interim map’ of public rights of way was included in the bundle but this map was an A4 sheet which did not show AE429 and only showed the very northern part of AE18 where it connected with BOAT CB207. On this map a yellow highlighter had been used to mark the numbering of AE18 and BOAT CB207, with the highlighter running the short length of that part of AE18 shown on the extract.
29. Mr Kind argued that the extent of the highlighting on AE18 suggested that the map had originally been an A3 sheet which had been folded for photocopying purposes and that the A3 map is likely to have highlighted the whole of the application route. Mr Kind submitted that the clear cut-off line of the highlighter at the same point as the remainder of the map detail clearly pointed to there having been an folded A3 map in the original application which had been passed through a copier machine unopened.
30. Mr Pavey argued was that this map had been included in the application bundle to illustrate a point being made by the applicant under the document headed ‘*map evidence*’. Under the sub heading ‘*Definitive Map of Public Rights of Way – County of Kent, 1<sup>st</sup> April 1987 (copy enclosed)*’, the applicant noted “*AE18 continues as Byway CB207 at the parish boundary, without vehicular access along AE18, CB207 would become a dead end for vehicles, which would be contrary to the current Rights of Way Improvement Initiative to create circular routes*”. In Mr Pavey’s view, the highlighted map could not be considered to be a map which would satisfy the provisions of paragraph 1 of schedule 14 as it did not show the whole of the route being applied for and had been included in the bundle for another purpose entirely.
31. Although Mr Kind suggested that the A4 highlighted map had originally been an A3 map which had been folded and passed through a photocopier unopened, there is no evidence of an A3 map of that description being received by the Council as part of the application. Mr Wade has carefully examined the Council’s files and the highlighted A4 map was the part of the bundle received from the applicant.
32. From the clip of documents which Mr Neville submitted to the inquiry it is clear that the applicant had access to an A3 copy of the definitive map as an A3 copy marked up to show AE18 and AE429 had been submitted to Land Registry as part of the applicant’s attempt to ascertain ownership of the land<sup>2</sup>.
33. Given that the copies of the Stile Farm Map, Mudge’s map, and the extracts from the book of reference for the Central Kent Railway found in the Council’s bundle are A3, it seems highly unlikely to me that the highlighted map had been submitted at A3 and somehow miscopied. If this map had been prepared by the applicant at A3 and an error in copying had occurred, it is more likely that such an error was made by the applicant prior to submitting the documents as opposed to an error having occurred once those documents were in the Council’s hands.
34. Furthermore, there is considerable force in Mr Pavey’s submission that the highlighted map was included to illustrate the point being made by the

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<sup>2</sup> Letter from Mrs Kerrison to Land Registry 14 July 2004

- applicant about the cul-de-sac nature of BOAT CB207; the applicant makes reference to a copy of the definitive map being included in the application bundle for this purpose. Given that the applicant had an A3 copy of the definitive map, but only an A4 copy of part of the definitive map was submitted with the application documents, I consider it to be more likely than not that it was the applicant who produced the A4 copy and for the purpose of illustrating graphically the cul-de-sac nature of BOAT CB207.
35. It follows that I do not consider that the A4 highlighted map can serve as a map drawn to identify the routes subject to the application as required by paragraph 1 (a) of schedule 14.
36. Mr Kind submitted in the alternative that the copy of the 1837 Central Kent Railway map could serve as the application map for the purposes of paragraph 1 (a). The *Trail Riders Fellowship* case had established that application plans did not have to be Ordnance Survey maps; as the railway map was drawn to the prescribed scale it could serve as the application map.
37. I am not persuaded by this submission for the following reasons. First, the railway map does not show the whole of the route to which the application relates as required by paragraph 1 (a) of schedule 14. Whilst the whole of AE429 is shown, only that part of AE18 from point B to just beyond point D is shown. Secondly, the railway map was clearly submitted by the applicant as part of the documentary evidence being adduced in support of the application. Finally, given that the applicant had access to an A3 copy of the definitive map at the appropriate scale on which the application routes could have been shown there would have been no need to rely upon a map which only showed part of the application route. In my view, the railway map cannot be considered to serve as the application map.
38. There are parallels between this case and *Maroudas* with regard to the absence of an application map. The only conclusion to be drawn in the light of the findings of the Court in *Maroudas* is that the application of 25 September 2004 did not strictly comply with the requirements of paragraph 1 (a) of schedule 14.

*Paragraph 1 (b) of Schedule 14 - Copies of documentary evidence adduced*

39. The application bundle set out the documentary sources being adduced over nine typewritten pages. Under the heading 'Map Evidence' a number of source documents were listed under separate sub-headings along with a note "(copy enclosed)". Copies of six of the seven source maps were included in the application bundle, the exception being the 1769 Topographical Map of the County of Kent by Drury and Andrews. The applicant noted that this map was "too large to copy".
40. It was Mr Pavey's case that the absence of a copy of the relevant sections of the Drury and Andrews map was also fatal to the application as it rendered the application non-compliant in the light of *Winchester*. Mr Pavey acknowledged that the law did not compel the impossible but submitted that it would not have been impossible to obtain a copy of the map (either from the Canterbury Studies Centre or from the National Archive) although it may have been difficult or expensive.

41. I concur with Mr Kind that in 2004 it may not have been possible to digitally photograph the Drury and Andrews map due to the state of development of digital technology at that time. However, I consider it highly likely that a conventional photograph of the relevant sections of the map could have been taken and a not-to-scale enlargement made from the resulting negative. If conventional photography was not permitted by the archive holding the document, then a copy should have been sought from the archive directly or from the National Archive where other copies of the Drury and Andrews map are held.
42. I accept that obtaining a copy of the relevant section of the Drury and Andrews map may have been time consuming, it may have been difficult and it may have been expensive, but it would only be possible to say that obtaining a copy was impossible if all other avenues had been explored by the applicant. On the basis of the statement that the copy held in the Canterbury Studies Centre was "*too large to copy*", it does not appear that the applicant made any attempt to obtain a copy of the map from any other source.
43. There were numerous other source documents which the applicant listed under further sub-headings. These sources appear to be fully referenced and include the title of the work quoted, its author(s), the publishing house, the page reference and its archive catalogue number or ISBN number. It is clear that the applicant had done considerable research in preparing the application, but had chosen not to include photographic or photocopied copies of the documents relied upon.
44. Whilst I accept that a written transcript of the section of the text of a document being relied upon can be described as a 'copy' of that text, the inclusion of photocopy extracts from such sources would permit a comparison between the transcribed text and the source document to ensure the accuracy of the transcript and to set the extract in context of that part of the work from which it has been taken.
45. In *Winchester* Dyson LJ held that the applicant had to provide copies of *all* the documents adduced in support of the application. In that case, no copies had been produced which rendered the application non-compliant. In the current case, although the application bundle contained copies of most of the map evidence adduced, the absence of a copy of the Drury and Andrews map and the absence of copies of those sources from which extracts have been transcribed means that the application did not include copies of all the documentary evidence adduced and therefore did not comply with the requirements of paragraph 1 (b) of Schedule 14.

## **Conclusions**

46. The application bundle sent to the Council under cover of a letter dated 25 September 2004 was not compliant with the requirements of paragraph 1 of schedule 14 to the 1981 Act. Firstly, the bundle did not contain a schedule 7 application form or any document which could be said to have been 'to substantially the like effect'. Secondly, there was no plan attached to the application at the prescribed scale which showed the whole of the route which was the subject of the application. Finally, copies of some of the documentary evidence which the applicant wished to adduce were not submitted.

47. As the application was not strictly compliant with the requirements of paragraph 1 of Schedule 14 the application was not made for the purposes of section 67 (6) of NERC and the exception found in section 67 (3) (a) is not engaged. Consequently, any right that the public may have had to use the Order route with MPVs was extinguished on 2 May 2006.
48. The Order route is already recorded as a Restricted Byway. Even if the documentary evidence showed on a balance of probabilities that the Order route was a public carriageway, as MPV rights have been extinguished the highest status the route could attain would be that of a Restricted Byway. Consequently, it is not necessary for me to give consideration to the documentary evidence submitted to the inquiry.
49. Having regard to these and all other matters raised at the inquiry and in the written representations, I conclude that the Order should not be confirmed.

**Formal Decision**

50. I do not confirm the Order.

*Alan Beckett*

Inspector

## APPEARANCES

For Kent County Council (neutral stance)

Mr C Wade                      Principal Case Officer, Public Rights of Way, Growth  
Environment Transport, Invicta House, Maidstone, Kent,  
ME14 1XX.

In support of the Order

For the Trail Riders Fellowship (TRF)

Mr A D Kind                      Hodology Limited

Who called:

Mr S Neville                      Local representative, TRF

In objection to the Order

For Stour Valley Farms:

Mr J Pavey                      Thomas Eggar PLP, Belmont House, Station Way,  
Crawley, RU10 1JA.

For Chilham, Godmersham and Wye Parish Councils:

Mr P Lulham                      Chair of Chilham Parish Council

For the Chilham Environmental Protection Society

Mr A J Perrett                      Chairman, Chilham Environmental Protection Society

Interested Party

Mr B Gore                      Local representative, CPRE

Inquiry documents

1. Copies of documents which comprised the application bundle sent to Kent County Council on 25 September 2004.
2. Addendum to the legal submission of the TRF.
3. Copy of the Law Times of August 16 1902 containing report of A-G v Settle RDC and Lunesdale RDC.
4. Addendum to Appendix N of the TRF Statement of Case.
5. Copy extracts from an undated map showing the lands of Edward Knight required for the construction of the East Kent Railway.
6. Documents relating to the production of the definitive map and statement as regards Chilham and Chartham.
7. Extract from Ordnance Survey map showing the current road layout in the vicinity of the Ashford to Canterbury railway.
8. Details of the copies of the Drury and Andrews map held by the National Archives.
9. Clip of documents held by Mr Neville relating to the application made on 25 September 2004.
10. Closing submissions on behalf of Stour Valley Farms.