From:	Stephanie Statham on behalf of Margaret Stevenson
To:	A303 Stonehenge
Subject:	Registration ID No: 20019859 - Appendices to Written Representations from the Trail Riders Fellowship
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Attachments:	Appendix_1_A303_Safety_James_Higgs_20.06.19.docx Appendix_2_Ramblers_Association_v_Kent_CC_1990.rtf TRF_summary_ISH_traffic_21.06.19.docx
Importance:	High

Dear Sirs

We now enclose the following by way of submission:-

- Written Summary of Oral Submissions from ISH held on 13th June 2019 and suggested amendments to the draft DCO (dated 21.06.19)
- Summary of Oral Submissions of James Higgs from ISH held on 13th June 2019 (20.06.19)
- Photograph of Byway 11 (dated 14.04.18)
- Ramblers Association v Kent County Council (29.01.90)

Kind regards

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A303 Amesbury to Berwick Down

Proposed development consent order

WRITTEN SUMMARY OF ORAL SUBMISSIONS FROM ISSUE SPECIFIC HEARING HELD ON 13 JUNE 2019 RELATING TO TRAFFIC AND TRANSPORTATION

AND

SUGGESTED AMENDMENTS TO THE DRAFT DCO FOR FURTHER CONSIDERATION BY THE EXAMINING AUTHORITY AND INTERESTED PARTIES

INTRODUCTION

1. This note sets out the key points raised on behalf of the Trail Riders' Fellowship ("TRF") at the issue specific hearing ("ISH") dealing with traffic. The note does not reiterate points set out in TRF's Written Representations ("WRs") and other submissions.

2. It also sets out (at paras.37-63 below) an outline of suggested amendments to the draft DCO that TRF seeks in order to overcome its objections.

SUMMARY OF ORAL SUBMISSIONS

The extinguishment of the link between byways 11 and 12

3. The underlying scheme behind the DCO is billed as an *"important link"* between Amesbury and Winterbourne Stoke. In addition, many of the individual topics discussed at the ISH related to situations where Highways England ("HE") is proposing enhancing, adding to, or at least maintaining, links affected by the scheme. A number of additional routes are also proposed to maintain or improve the network.[1] The deliberate *breaking* of the rights of way network between byways AMES 11 and 12 is therefore inconsistent with the general approach. It is also unjustified. The impacts are potentially very great and the justification tenuous if not misconceived.

<u>Impacts</u>

4. The impacts are chiefly on (i) users, (ii) the countryside access network and (iii) the management of the network. Insofar as users, HE's May 2019 response makes two new arguments. First, it argues that extinguishing the link *"will affect a handful of*

[1] e.g. as discussed in respect of agenda times 4.2 (a new restricted byway), 4.4 (a new BOAT and restricted byway), 4.5 (a new BOAT) and 4.6 (an alternative BOAT to compensate for the stopped up part of AMES1; Reuben Taylor QC for HE said that it *"seeks to maintain the continuity of existing byways"*

people in preventing a manoeuvre which on some days no motorcyclists make at all and preventing other manoeuvres from being undertaken which are illegal" (para.9.1.20). Second, it is asserted that *"there is an alternative route between these Byways (albeit using public roads via Middle Woodford and the A360, a detour of about 5 miles*)" (para.9.1.31). However, neither point is an adequate response to TRF's objection. Dealing with the claimed illegality first, that is misleading. There is a traffic regulation order ("TRO") preventing right turns from the A303 onto byway 12 but motorcycles do not need to contravene this to enjoy the link, they can turn left onto byway 12 and as Mr Higgs explained, if they wish to continue north, they can turn around on byway 12 then travel straight across the A303. In any event, the draft DCO provides for the revocation of the TRO, so the point is of limited relevance. TROs are about traffic management and do not remove highway rights.

5. On numbers, while countryside access in motorbikes may not be very substantial, the evidence is of steady use by a consistent number of individuals. It is a little unusual that HE only sought to refer to its June 2018 surveys in May 2019.[2] In any event, that evidence does not show a lack of use: it confirms a steady number of motorcycles[3]. It is said that on some days there were no motorcyclists using one or other of the byways.[4] However, that is not unusual and certainly does not mean that the byways are not both used and valued.

6. In its oral evidence HE also referred to (and sought to rely upon) unpublished survey work being carried out now. Again, it is surprising that this work is only being done now. Moreover, TRF has not seen or had an opportunity to respond to that evidence and submits that the Examining Authority should be very cautious about placing any weight on it.[5] In any event, the evidence (as summarised orally) is consistent with a regular amount of low level usage by motorcycles. It is not clear what if anything the evidence says about other types of use.

7. HE has also done a rough analysis of TRF's 72 user evidence forms ("UEFs") at its Appendix 9 (para.9.1.18). That analysis ignores the fact that the UEFs do not relate to *all* users, only those TRF members who responded to TRF within a tight timescale. In fact, many of the users indicate that they have ridden the route in groups (see answers to UEF question 6). Moreover, it ignores the quality and safety of the user experience, and its connection to the wider network. Questions 7, 8 and 9 of the UEFs provide important details on these aspects.

8. In his UEF, James Higgs (who appeared at the ISH) states about byway 11 that it:

[2] This evidence is not before the Examination, although a summary of it is provided in the witness statement of Parvis Khansari included at Appendix 8 to TRF's WRs

[3] See tables on pp.10-12 of the witness statement at Appendix 8

[4] It may be noted in this regard that the byways were closed for the summer solstice in 2018, and this was followed by a temporary TRO for emergency repair work

[5] TRF also reserves is position as to costs if it is sought to admit new evidence at a late stage

"… has a character unlike any other byway in the country … having great amenity value, both as somewhere to rest mid-ride and through the view of Stonehenge as you approach from the south".

9. The ExA is referred to the UEF responses. Common themes are the enjoyment of riding on the byways (including the link), the scenic beauty, the desirability of avoiding main roads and the safety implications of having to use main roads, in particular busy main roads, if the link was closed. James Peer, for example, describes byways 11 and 12 as *"the most pleasant and enjoyable section of my typical route …"*.

10. HE's focus on quantity alone, ignores the qualitative aspects of the current use of byways 11 and 12.

11. On alternatives, the possibility of taking a 5 mile detour via the A360 is clearly not a satisfactory – or safe – alternative. It is not the route chosen by TRF members at present and were they forced to make a detour as suggested, those who continued to ride in this area would face greater danger on busier and less enjoyable roads. It is not an alternative for recreational enjoyment of the countryside.

12. It is also a new argument, not mentioned in the application or the draft DCO. There has been no assessment of the suitability of this as an *"alternative"* for motorcyclists or other more vulnerable road users.

13. At the ISH Mr Higgs related his experience as a user and his concerns about the closure of the link. Appended to this summary is a written statement from him reflecting what he said and providing appropriate references.

Justification

14. TRF also submits that HE's approach misunderstands the nature of countryside recreation. Even little-used routes are valuable. They are part of a network and should, as a matter of policy and law (see below), be protected unless there is a good reason to close or divert them. Paras.4.8-4.11 and 5.18 of TRF's WRs provide some references to the applicable policy. In broad terms connectivity and circular routes should be promoted for all types of user. Wiltshire has a particularly extensive byway network of which byways 11 and 12 form part. The Defra guide *Making the best of byways* (December 2005)[6] sets out practical guidance for authorities to maintain and support that network.

[6] https://webarchive.nationalarchives.gov.uk/20130403151447/http:/archive.defra.gov.uk/rural/documents/countryside/crow/bestofbyways.pdf

15. The National Networks NPS includes *"other public rights of way"* in the guidance at para.5.184 and promotes countryside recreation generally. At the ISH HE stated that it promotes active travel, not vehicular travel and referred to para.3.16. While it is not disputed that Government is promoting improvements in cycling and walking infrastructure, that does not mean that countryside access by equestrians or motorcyclists is to be ignored. In any event, motorcycling is an active pursuit in itself[7] and for some less able-bodied individuals the only way that they can access the countryside.

16. HE seeks to justify the removal of the link between byways 11 and 12 in a number of ways. It states that the scheme aim is to remove the sight and sound of traffic from Stonehenge. However, it is not an objective of the scheme to remove all traffic, and nor does stopping up the link achieve that. The objectives of the scheme are recorded at p.2 of the Design and Access Statement (document 7.2) and are entirely consistent with retaining a vehicular link between the byways. Moreover – and importantly – HE has carried out no assessment of the use of the byways and the link to ascertain its value to users or its alleged visual and oral impact. Indeed, the claim that there are few motorcyclists using byways 11 and 12 is inconsistent with the claim that they cause any significant impact.

17. The views of the highway authority, traffic authority and rights of way authority for the area (that will also become the relevant authority for the A303 upon de-trunking), Wiltshire Council should be given considerable weight. Wiltshire Council confirmed at the ISH that it did not perceive trail riders as having an impact on the surface of the byways or giving rise to significant noise or visual impact.

18. HE also refers to the WHS Management Plan 2015. That is, of course, a free-standing document that does not depend on the DCO for its implementation. In any event, nothing in the Management Plan promotes the removal of recreational vehicles from the WHS entirely. Aim 6 is to reduce the negative impacts of roads and traffic and is supported among other things by policies 6a and 6b. What is clear is that the Management Plan does *not* aim to remove the sight and sound of vehicles from the WHS, but that *"[i]mpacts of motorised access on byways open to all traffic in the WHS should be monitored and the most appropriate management response identified and implemented"* (para.11.4.5 – see also policy 6b). As emphasised in TRF's WRs, that is an exercise that Wiltshire Council has been undertaking and for which it sought to impose an *experimental* traffic regulation order (now quashed by the High Court[8]). Moreover para.11.1.1 of the Management Plan emphasises the heritage significance of byways. In terms of Outstanding Universal Value the UNESCO statement is that:

[7] TRF has carried out research demonstrating that trail riding is an active pursuit comparable for example to e.g. downhill skiing: see *The Health Benefits of Trail Riding* (Dr Sean Comber, February 2016), available at http://www.trf.org.uk/wp-content/uploads/2016/05/Health-Benefits-Document-FINAL-01.pdf

[8] TRF v Wiltshire Council [2018] EWHC 3600 (Admin)

"The presence of busy main roads going through the World Heritage property adversely impacts on its integrity. The roads sever the relationship between Stonehenge and its surrounding monuments, notably the A344 … [also referring to the A4]"

19. There is a clear distinction between busy A-roads and byways used for countryside recreation and agricultural access. It is hyperbole to suggest, as the National Trust did, that motorcycles continuing to have access to the link would have an impact on the integrity of the WHS's Outstanding Universal Value.

20. Moreover, the argument about proximity to Stonehenge (or Normanton Down) is illogical. Byways 11 and 12 are no less proximate than the link. The A303 in any event will be designed for and remain open to agricultural vehicular access. Moreover, the proposal to make byway 11 into a cul-de-sac and install an engineered turning circle means that any traffic that does continue to use that byway will stop and/or turn around at *the closest point* to Stonehenge. HE's proposals therefore will not *prevent* traffic in proximity to features of historic interest, but may well make the heritage impact worse, while at the same time seriously impacting on the ability of trail riders and others to use of the byways and wider network for recreational purposes. TRF agrees with Wiltshire Council's submissions about network management. Severing the link is inherently problematic and may well lead to additional problems such as the turning area being used for camping or car parking. None of this has been sensibly assessed or even considered by HE.

21. TRF also reiterates the importance of the conclusions of planning tribunals in 2005 and 2011.[9] Of particular note is para.10.234 of the 31 January 2005 report of Michael Ellison MA (Oxon) (assisted by Clive Cochrane Dip Arch Reg Arch MSc MRTPI) ("the 2005 Inspector") that is obviously of application to the present situation as (i) it is relatively recent, (ii) it was assessing a materially similar proposal (the tunnelling of the A303 without providing a link between byways 11 and 12) and (iii) there have been no material changes in circumstance that would affect the inspector's reasoning.

22. At para.10.234, the 2005 Inspector concluded as follows:

"As regards the short distance of the proposed Byway between Byways Amesbury 11 and 12, I entirely take the point made by objectors – if the short distance between those two connection were not open to motor vehicles using Byway 11, then that Byway would be turned into a dead end. At the

[9] Appendix 5 to TRF's WRs mistakenly contains extracts from the wrong report from 2011; although the correct conclusions are quoted in the appendix to appendix 2 to the WRs; for completeness TRF has now submitted the full 2011 report to the Examination, it apologises for the oversight

moment it can be used with the A303 as part of a rights of way network, but if the present Byway Regulation Order were confirmed as requested by the Highways Agency, then that would no longer be possible. I cannot see how such an arrangement can represent a reasonably convenient alternative provision, as required for the approval of the Side Roads Order. Nor can I see how it would improve the amenities of the area to ban motorised users of Byways 11 and 12 from using the 400m length of the Stonehenge Byway. Those users would still be able to take their vehicles perfectly legally to within around 250m of Stonehenge on either Byway 11 or Byway 12; they simply would not be able to travel between the two. This seems to me completely illogical."

23. For that reason the 2005 Inspector recommended that the amendment sought by the objectors retaining vehicular access between the junctions be supported (para.10.235). By its main ground of objection, TRF seeks essentially the same outcome here.

24. The 2011 report to Wiltshire Council is also relevant and important. Alan Boyland BEng(Hons) DipTP CEng MICE MCIHT MRTPI (assisted by John Wilde CEng MICE) ("the 2011 Inspector") noted that byways 11 and 12 are *"key links in the network"* and *"[i]t seems to be undisputed that the only alternative routes would largely be on roads rather than BOATs"* (para.7.30). He concluded that diverting trail riders onto those roads would increase risk to their safety (para.7.32). At para.7.60 the Inspector concluded:

> *"I have found that the introduction of the TRO would lead to a significant loss of amenity to the motorised users of the BOATs, as well as increasing the level of risk to their safety, particularly those on motorcycles. I recognise that the numbers affected would be low in absolute terms as well as relative to the number of other visitors to the WHS, but the impact of the TRO on their enjoyment of the BOAT network would be exacerbated by the importance of these particular links. The loss of amenity in this respect has to be balanced*[10] *against the gains in other aspects of the WHS"* (underlining added).

25. He went on to conclude that the TRO was not justified and that issues such as parking (etc.) could be addressed without adversely affecting recreational users (paras.7.61-7.68).

26. It does not appear that HE has given these previous decisiosn any serious consideration. Nor has it seriously assessed the negative consequences of stopping up the link between the byways, in terms of impact on countryside access, noise impacts, visual impacts or the heritage implications.

[10] The test is different for traffic regulation than the extinguishment of highway rights

Legal implications

27. The legal implications flow from the above consideration of the substance. Not only is stopping up the link a thoroughly bad idea, it is also impossible to justify against the criteria in s.136 of the 2008 Act (see also TRF's WRs at paras.5.19-5.23). The essential right of the public in a highway is to pass and repass, as is summarised usefully in Sauvain's *Highway Law* (5th ed. 2013) at para.1-11 (after referring to Lord Mansfield's statement in Goodtitle d. Chester v Alker & Elmes (1757) 1 Burr 133):

> *"It does not matter whether the right to pass along the highway is exercised to get from one place to another, to gain access to or egress from land adjoining the highway or whether the use of the highway is purely recreational in nature."*

28. This provides the context for TRF's submissions on s.136(1), which are simple. First, does the scheme extinguish a public right of way? The answer is yes: it extinguishes the northern end of byway 11 and all highway rights along the line of the A303, only providing an alternative on that line for private and restricted byway users, and so ending the public right to pass and repass in vehicles. Second, is an alternative right of way provided? For the same reason, the answer is no. Third, is the provision of an alternative right of way not required? This appears to be the question that HE seeks to persuade the ExA to answer in the affirmative. It argued at the ISH that there is no necessity for an alternative link because there is already an alternative route between the highways. However, that is not an alternative. It is a five mile detour. Nor does it arguably mean that the link is not required. As is set out at para.4.3 of TRF's WRs *"required"* means simply *"needed for public use"*, on the evidence before the ExA, the only possible conclusion is that the link is both used and valued, and so is required. The case of Ramblers Association v Kent CC (1990) 60 P & CR 464 is noted at para.4.3; in that case, Woolf LJ stated that if a way is being used *"for recreational purposes"* that is relevant to the question of whether it is *"unnecessary"* for public use. The purpose for which trail riders (and others) use the byways is equally relevant to whether the link between the byways is *"required"*. For convenience, a copy of the Ramblers Associtation case is appended to this note.

29. A final legal point underscores the illogicality of making byway 11 into a cul-de-sac. While cul-de-sacs may be highways (particularly in towns), it has been generally held that there needs to be a *terminus ad quem* – i.e. a destination – of interest to the public for the essential characteristics of a highway (passing and repassing) to be met. In Moser v Ambleside UDC (1925) 89 JP 118 Atkin LJ considered the question of whether a cul-de-sac highway could be created in the countryside and concluded:

> "*I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway."*

30. Similar reservations were expressed by the High Court in Attorney-General v Antrobus [1905] 2 Ch 188 (a case about highways around Stonehenge).

31. This is relevant because the effect of the DCO as proposed would be to turn byway 11 into a vehicular cul-de-sac, which would only make sense if it is – as Wiltshire Council fears – to be used in itself as a place of popular resort: a car part of camping spot from which to experience Stonehenge.

Prohibition of driving order

32. TRF would not object to traffic management measures on the byways and the link as long as they acknowledged and retained continued use by recreational motorcyclists.[11] However, there are real difficulties to achieving this through the DCO, given that it would extend the scope of the proposals beyond the A303 and affect byways that were no part of any consultation. Also, it is questionable whether there is a sufficient connection between the DCO and such wider traffic management measures. Wiltshire Council claims that there is on the basis that the proposals as submitted will lead to a marked *increase* in use of the byways. TRF considers that it is more likely to be the other way round: breaking the link between the byways will *reduce* use of byway 11 and of byway 12 insofar as it used in conjunction with byway 11. For the reasons set out at paras.7.5-7.8 of TRF's WRs therefore, TRF maintains that it would be inappropriate for the DCO to be amended to include traffic regulation measures on byways 11 and 12. That said, if the change is made, TRF would not object to it provided that it allows continued access for motorcycles.

33. It is also relevant that this is not the only opportunity for Wiltshire Council to address any concerns it has about the use of byways 11 and 12. It has powers under the Traffic Management Act 2004 to promote traffic regulation measures on any roads. It is therefore reasonable for the ExA to leave this matter to be addressed separately from the Examination of the DCO.

[11] As is noted at the ISH traffic regulation orders allowing motorcycle only vehicular use of byways are commonplace; TRF's WRs refer to Hampshire (para.5.28), in Hampshire a total of 23 byways have been regulated to permit just *"two wheeled motor vehicles"* or *"motorcycles"* (these are Ashmansworth BOAT 18, Bentworth BOAT 27, 28 & 23, Binsted BOAT 60 (Hardings Lane), Bradley BOAT 7, Colemore and Priors Dean BOAT 22 (Buttons Lane), East Meon BOAT 41 (Gravel Lane), East Meon BOAT 45 (Woodbridge Lane), East Meon BOAT 46 (Greenway), East Meon BOAT 47 (Cumbers Lane), East Meon BOAT 48 (Pidham Lane), East Meon BOAT 49 (Fishponds Lane), East Meon BOAT 50 (Limekiln Lane), Fareham BOAT 125 (Glen Road), Headley BOAT 36, Hook BOAT 1, Kingsley BOAT 29, Langrish BOAT 14 (Rake Bottom Lane), Langrish BOAT 23 (Pidham lane), Langrish BOAT 24 (Greenway), Newton Valence BOAT 30 (Buttons Lane), Selborne BOAT 67, Wield BOAT 17 (Rushmoor Lane), Wield BOAT 19 & 20, Winchfield BOAT 14, Worldham BOAT 38); such traffic regulation measures are also common elsewhere in the country (esp. Somerset) and are recognised in the Defra publication *Making the best of byways* (see footnote 6 above) at p.85

34. The issue with the draft DCO is that it will prejudice sensible future management of the network against the interests of the public. Despite this, at para.9.1.38 of HE's response to TRF's WRs it is said:

> *"Wiltshire Council could decide to bring such a measure [i.e. to allow motorcycles to utilise the proposed restricted byway between byways 11 and 12] forward in the future if it decided that this was appropriate."*

35. TRF agrees that Wiltshire Council could bring forward a measure in the future, but it could *not* do this if the DCO is made as proposed. Under the DCO the link would become a restricted byway without any public vehicular use to manage. HE's response on this point is therefore misguided. At least the link needs to be retained for vehicular access *in order* for Wiltshire Council to have any relevant powers. Outside of this process, TRF is willing to work positively with Wiltshire Council to ensure that necessary and proportionate management measures are realised.

36. As below, TRF submits that a better solution would be to retain public vehicular access on the A303. Alternatively, the DCO could contain some traffic regulation measures, but they should be limited to the A303.

SUGGESTED AMENDMENTS TO DRAFT DCO TO ADDRESS TRF'S OBJECTION

Introduction

37. The ExA has requested that TRF set out what changes it considers might overcome its objections. It is important in this regard to recall that while the ISH focussed on the link between byways 11 and 12, TRF also objects to the impact of the proposals on the users of small-capacity vehicles (and those on mobility scooters) (see WRs paras.6.1-6.3).

38. The text below sets out the various changes that TRF suggests could be made to the DCO to overcome these issues in turn. As was emphasised at the ISH, it is important to recall that these are not aspirational extras, but necessary changes to avoid unacceptable impacts of the scheme. They should be capable of being made as amendments to the DCO, but if they cannot be, the ExA should recommend that the DCO as applied for is not made which will compel HE to address the issues.

39. As requested by the ExA at the ISH this section addresses (i) the amendments sought, (ii) the materiality of the changes and (iii) the appropriate procedure to be followed.

Amendment 1: to avoid extinguishment of link between byways 11 and 12

<u>Amendment</u>

40. One way of maintaining vehicular rights between byways 11 and 12 would be to amend Part 1 of Schedule 3 to the draft DCO so that:

- After the penultimate entry on p.67 there be inserted:
  "Reference #
  A length of new byway open to all traffic from its junction with byway AMES12, in a generally easterly direction to its junction with byway AMES11, a distance of approximately [400] metres
  (as shown [etc.])"
- Amend the final entry on p.67 so that instead of *"byway AMES12"* it reads *"byway AMES11"* and the distance (2.33 kilometres) is corrected accordingly

41. Elsewhere in the DCO, the extinguishment of the northern section of byway 11 would have to be omitted as well as the works to create a turning circle.

42. An alternative would be to amend the extent of stopping up of the A303 in Part 1 of Schedule 3 (on p.64) so that it does not stop up the road between the byways and specifies a width.

Materiality

43. While section 114(1) is not explicit on the point, it is generally considered that the Secretary of State can make a DCO with or without modifications; and there is nothing in section 114 that limits the Secretary of State's power to make such order as he thinks fit. This understanding is confirmed by the 28 November 2011 letter from Bob Neill MP letter to Sir Michael Pitt, namely that the Secretary of State may make a DCO in terms *"which different from that originally applied for"*. It therefore follows that the ExA can recommend that changes be made. Such changes can be material as long as the ExA (i) acts reasonably and (ii) acts fairly.

44. In this case TRF submit that the change would not be material. It is to limit the stopping up effect of the DCO for a length of 400 metres. It would not affect the de-trunking of the A303 or the arrangements as to the surfacing of the new byway given that the intention is that it remain available and suitable for agricultural vehicular traffic. It would mean existing recreational and other vehicles that use byway 11 would be able to continue using the link rather than having to turn around. It would avoid the problem of a cul-de-sac, which has its own likely adverse impacts (see above).

45. As far as environmental impact assessment, as HE's own surveys show the byway traffic is relatively light. HE did not see fit to assess the impact of vehicular traffic on the byways as part of its environmental statement, or the impact of traffic stopping or turning around at the northern end of byway 11. It was right not to do so. Removing the main trunk road will clearly have a positive significant environmental effect, but the residual level of traffic that use the byways is of no real significance in environmental terms. Nor is there any reason to think that there will be a significant change in usage.

46. Longer-term management of the network would become the responsibility of Wiltshire Council.

Procedure

47. TRF does not accept that the need for further submissions arises at all before the minor change could be made by the Secretary of State. TRF raised the issue about maintaining the link between byways 11 and 12 at the pre-application stage. It has also been raised by other parties – notably the Green Lane Association. The topic has been the subject of examination and extensive submissions. Parties concerned about the possibility of the link between byways 11 and 12 being retained have had ample opportunity to make representations (and indeed many have).

48. However and for the avoidance of doubt, if the ExA exercised its discretion to allow parties to make further representations to it on the proposed amendment, that would address any possible concern about procedural fairness. The recent indication that comments be received on the proposed amendments by deadline 4a (5 July 2019) would, as far as TRF's proposed amendments are concerned, satisfy that.

49. TRF does not accept that it is necessary to submit further assessments or supporting documents to support what is a minor change to overcome a distinct deficiency in HE's scheme. At the ISH HE posited that updated environmental impact assessment, equality impact assessment, noise assessment, heritage assessment and socio-economic (and religious) assessment would be required. That is disproportionate and unnecessary. Retaining the link between byways 11 and 12 would not make any of the submitted assessments out of date. To the extent that motorbikes and other vehicles using the link could give rise to environmental impacts, that is very low and must be seen in the context of the continued availability of byways 11 and 12. HE did not distinctly assess the environmental implications of vehicles stopping or turning around at the cul-de-sac. The environmental implications of vehicles making the 400 metre link between the byways instead are likely to be less.

50. If, which is not accepted, further environmental information is required, it strongly suggests that HE's environmental statement is inadequate as it does not assess the positive or negative impacts of stopping up the link.

Amendment 2: to ensure motorcycle-only use of link

Amendment

51. As a possible addition to the above, Part 2 of Schedule 10 to the draft DCO could be amended to add a prohibition on the use by the public of the link by motorised vehicles *"except for invalid carriages and two-wheeled motor vehicles"*. There are

different ways that this could be worded, but it would be easy to achieve within the draft DCO.

52. TRF puts forward this option as an alternative additional possibility, it is not its primary position. As above, TRF considers that traffic regulation of the byways and the link is best left to Wiltshire Council to deal with as a network issue. Amendment 2 would not ensure consistency between the use of byways 11 and 12 and the link for vehicles other than motorcycles, so the cul-de-sac problem would remain. TRF therefore favours amendment 1 without amendment 2.

Materiality

53. The suggested change is not material for reasons as set out above. There would be some additional impact from four-wheeled vehicles stopping and/or turning at the junction of byway 11 and the old A303, but less than the promoted scheme where all traffic would have to turn around.

Procedure

54. For the avoidance of doubt, the ExA could exercise its discretion to allow parties to make further representations to it on the potential additional amendment, that would address any possible concern about procedural fairness.

Amendment 3: to retain use of the A303 for small-capacity vehicles

Amendment

55. One way of achieving this within the existing draft DCO would be to amend entries in Part 1 of Schedule 3 on p.67 so that instead of creating a *"restricted byway"* they create a *"byway open to all traffic"* and to include in Part 2 of Schedule 10 a prohibition on those sections of public vehicular traffic except for motorcycles where the cylinder capacity of the engine is less than 50 cubic centimetres.

56. As for amendment 1, an alternative would be not stop up the full width of the A303, but to address the necessary controls through traffic management measures.

Materiality and procedure

57. The same points apply as discussed above.

Amendment 4: to retain use of the A303 for motorcycles only

Amendment

58. As set out at para.6 of TRF's representations of 10 June 2019 a final option is to retain motorcycle use along the length of the A303. As set out there, the proposal was "*[d]o not extinguish public highway rights along the entire width of the 'old' A303 and create by order a new restricted byway. Instead stop-up part of the width, and leave the existing public right of way on the residual width and regulate traffic along it by means of a traffic regulation order."*

59. The same could be achieved by a similar means to amendment 1, namely (i) creating a BOAT rather than a restricted byway excepting all public vehicular traffic except for motorcycles *or* (ii) not stopping up the A303 but controlling its use by traffic management measures.

Materiality and procedure

60. The same points apply as discussed above. The impact from motorcycle use of the A303 would be limited.

Conclusion

61. TRF submits that the above amendments are well with the scope of the Secretary of State's powers under section 114(1). They are also capable of overcoming a serious deficiency in HE's scheme. HE ought therefore to be welcoming and engaging with the suggested changes. Amendments, even in the alternative, would normally be proposed by applicants. TRF does not have the resources to provide substitute plans or a tracked changed version of the draft DCO. It considers nonetheless that the above suggestions are tolerably clear and helpful suggestions that are capable of being understood and commented on by any interested parties.

62. TRF also submits, having regard to the guidance in Advice note 16 and the letter of 28 November 2011 that the changes can both reasonably and fairly be considered by the ExA and form the basis of a recommendation to the Secretary of State.

63. Following other parties' comments, TRF accepts that further consideration of the precise detail and drafting would be useful and suggests that could be factored into a future ISH on the draft DCO.

21 June 2019

SUMMARY OF ORAL SUBMISSIONS OF JAMES HIGGS FROM ISSUE SPECIFIC HEARING HELD ON 13 JUNE 2019 RELATING TO THE SAFETY OF MOTORCYCLISTS

Conclusion:

The applicant's failure to adequately consider the safety of motorcyclists within the proposed development consent order exposes trail riders to an increased risk of being injured or killed.

1. Oversight:

The omission of motorcyclists from consultation paraphernalia circulated by the applicant casts doubt on whether their safety has been duly considered. This apparent oversight extends to computer-generated video of anticipated vehicular use of both the proposed tunnel and new junctions.

2. Lack of parity between vulnerable road users:

The motorised/non-motorised users dichotomy used by the applicant fails to recognise motorcyclists as vulnerable road users and consequently precludes investigation as to how their safety will be affected by the project. This is despite:

i. Motorcyclists being recognised as vulnerable road users by the Department for Transport since the term's inception.

ii. The safety of pedestrians, cyclists and equestrians being both identified and considered within the proposals.

iii. Motorcyclists statistically being the most vulnerable road user.

This failure extends to proposing improved safety measures for all other vulnerable road users at the expense of (and detriment to) slower motorcyclists.

3. False equivalence:

The applicant's failure to wholly identify or distinguish between methods of motor vehicle use has the effect of treating all such methods equally. This is despite trail riding motorcyclists:

i. Typically cruising at 50mph when using sealed roads subject to national speed limit.

ii. Typically riding in groups of four to six riders rather than individually.

iii. Being less conspicuous than other motor vehicles.

iv. Being of a narrower width than other types of motor vehicle.

These traits invite the 'mile a minute' beneficiaries of the application to overtake and bisect groups of slow-moving trail riding motorcyclists in ways which can compromise their safety. This is evidenced by the Department for Transport publishing collision data where motorcyclists have been killed or seriously injured whilst being overtaken.

4. Inaccuracy/misrepresentation and oversight of consequential diversions:

The applicant's method of using the shortest alternative route between the start and end of individual byways affected by the proposals fails to consider the sequential manner in which the byway network is used by the public to form longer routes.

Therefore, it is more appropriate to question and consider the routes the public will be compelled to use in order to reach their next destination as a consequence of any proposed changes affecting this historic 'dot-to-dot' use of the byway network.

Byways 11 and 12 are cherished routes which link Salisbury Plain, Berwick St. James and the Bourne Valley with one another (from the Northern end of byway 12, the southern end of byway 12 and the southern end of byway 11, respectfully). These three areas are rich in byways and are both popular and natural inclusions in trail riding routes.

Fragmenting this established network of byways will compel motorcyclists to use alternative routes with a history of motorists being killed or injured in order to reconnect these three destinations.

The following three examples use injury data obtained from the Department for Transport:

1. Salisbury Plain westward to the Bourne Valley

i. Motorcyclists arrive on The Packway in Larkhill via one of two byways located either west (SU117444) or east (SU144440) of the town before riding to the northern end of byway 12 via The Packway and Willoughby Road.

ii. The consequential route west from SU117444 will compel motorcyclists to use the B3086, A360 and C42 for 13.38km before reconvening with the route to the Bourne Valley at The Bridge Inn, Upper Woodford (SU124371).

iii. This consequential route is 3.09km longer than the current byway route and has a traffic injury frequency of 119 slight, 19 serious and 2 fatal (of which 9, 3 and 1 were motorcyclists, respectfully) for the previous twenty years (1999-2018).

iv. The current byway route has a traffic injury frequency of 29 slight, 2 serious and 2 fatal (of which none were motorcyclists and the only injury to occur on a byway was slight).

2. Salisbury Plain eastward to the Bourne Valley

i. The consequential route east from SU144440 will likely compel motorcyclists to use the A345, South Mill Road (a byway), Stockport Avenue, Old Marlborough Road (a byway) and the A345 to High Post at SU150364 for 10.16km as this is the most amenable route to reconvene with the popular route to the Bourne Valley.

ii. This consequential route is 3.99km shorter than the current byway route but has a traffic injury frequency of 260 slight, 35 serious and 5 fatal (of which 5, 8 and 0 were motorcyclists, respectfully) for the previous twenty years (1999-2018).

iii. The current byway route has a traffic injury frequency of 36 slight, 4 serious and 2 fatal (of which none were motorcyclists and the only injury to occur on a byway was slight).

3. Salisbury Plain to Berwick St. James

i. Motorcyclists use York Road (a byway) to arrive in Berwick St. James, having first ridden the entirety of byway 12 and a very short section of the A360 which links the southern end of byway 12 with Druid's Lodge at SU099389.

ii. The consequential route will compel motorcyclists to use The Packway, B3086 and A360 for 8.56km before reconvening with the route to Berwick St. James at Druid's Lodge.

iii. This consequential route is 2.43km longer than the current byway route and has a traffic injury frequency of 84 slight, 14 serious and 2 fatal (of which 7, 3 and 1 were motorcyclists, respectfully) for the previous twenty years (1999-2018).

iv. The current byway route has a traffic injury frequency of 12 slight, 2 serious and 1 fatal (of which none were motorcyclists and only one slight injury was reported on a byway).

Notes regarding this data:

i. Measurement was undertaken using OS 1:25k mapping via www.xpedition2.com.

ii. Collision injury data was obtained from DFT statistics published via www.crashmap.co.uk.

iii. A conservative estimation was undertaken when the location of incidents was in doubt. Junction and road layouts will be affected by the proposed DCO.

iv. Countess Roundabout was engineered into a traffic light controlled junction during the twenty year data period. This significantly reduced collision injury.

5. Lack of reference data:

The *natural* use of byways 11 and 12 by trail riding motorcyclists precludes reliable reference data for their proposed *unnatural* use of the aforementioned consequential routes. Accordingly, the applicant's dismissal of our concerns *must* be speculative.

Furthermore, it does not follow that the apparent infrequent use of the byways by motorcyclists equates to an insignificant increase in risk should such use be denied. The applicant's lack of evidence considering the effects of introducing slower-moving motorcycles to traffic travelling at the national speed limit is both unprofessional and reckless.

James Higgs

20th June 2019.

*464 Ramblers Association v Kent County Council

Positive/Neutral Judicial Consideration

Court
Divisional Court

Judgment Date
29 January 1990

Report Citation
(1990) 60 P. & C.R. 464

Queen's Bench Divisional Court

(Woolf L.J. and Pill J.):

January 29, 1990

Real property—Rights of way—Application for stopping up under section 116 of the Highways Act 1980 —Notices issued pursuant to the Act—Application granted by magistrates—Appeal by case stated—Whether notices misleading—Whether notices properly sited—Whether rights of way unnecessary

Kent County Council made an application before magistrates for the stopping up of rights of way under section 116 of the Highways Act 1980 . The ways were still in public use. The applicant authority, as required by Part I of Schedule 12 to the Act, issued notices, all of which were in the same form. The notices stated that the application was for the stopping up and *diversion* of the rights of way on the grounds that the routes were unnecessary and crossed land which was classed as military land under the Military Lands Act, 1892 . The notices further stated that an alternative route was being provided. The magistrates were referred to a proposal to use a military path as an alternative route, though there was no suggestion that it was to be dedicated to the public nor any undertaking given by the Ministry of Defence that it would be available to the public for any specific period. The magistrates granted the application. The appellants argued that the notices were invalid because (i) the suggestion that an alternative route was to be provided was misleading as was the suggestion that there was to be a *diversion* of the rights of way, and (ii) they had not been properly sited. They further argued that, on the evidence before them, the magistrates were not entitled to conclude that the rights of way were unnecessary. On appeal by case stated:

Held, setting aside the order of the justices, that (i) the notices were misleading and so did not comply with the requirements of section 116 of the Highways Act 1980 . The justices were, therefore, deprived of the right to make the orders; (ii) there had been a further failure to comply with the requirements of the Act that the notices be placed at the ends of the highway affected under section 116(6) which was a mandatory section; (iii) the question of whether a way was unnecessary under section 116 of the Act was primarily one of fact for the justices. However, where there was evidence of use of a way, it would be difficult for justices properly to conclude that it was unnecessary unless the public were to be provided with a reasonably suitable alternative with similar characteristics to the existing way.

Cases cited:

(1) *Compton v. Somerset County Council (1982) (unreported*).
(2) *R. v. Surrey Justices (1870) L.R. 5 Q.B. 466, D.C.*

Legislation construed:

Highways Act 1980 (c. 66) Sched. 12, Part I, para. 2 and section 116(1) . These provisions are set out at pages 467 and 465, *post* .

Appeal by case stated by the justices for the County of Kent, sitting at Folkestone, in respect of a decision of March 11, 1989, granting an application by the respondent, the Kent County Council, for stopping up public rights of way. The facts are stated in the judgment of Woolf L.J.

Representation

G. Lawrence for the appellants.
S. Blackford for the respondent.
E. Caws held a watching brief for the Treasury Solicitor.

Woolf L.J.

This is an appeal by case stated by the justices for the county of Kent, sitting at Folkestone, in respect of a decision which they ***465** reached on March 11, 1989. On that occasion, the justices had before them an application for stopping up public rights of way in Kent.

The rights of way in question are known as HL41, HL16 and HL18. In each case it is only part of the right of way which was the subject of the application. The ways are shown clearly on a plan which was prepared by Mr. Lawrence, who appears on behalf of the appellants, the Ramblers Association, and which is marked “B.” On that plan HL41, which is a RUPP, runs from north to south on the plan towards the sea, which can be seen at the end of the plan.

HL41, as the result of the decision of the magistrates, was to be stopped between points V and T. HL16 forms a loop to HL41 at the northern part of the plan. Part of HL16 is now submerged under water, but the part which is not submerged is also stopped as the result of the decision of the magistrates. HL18 joins HL41 at point S and then runs through point Q, where another way, HL29, links HL18 to HL41. There was before the justices an application to stop up HL29 as well, but that application was adjourned and therefore does not figure in this judgment. The part of HL18 which is to be stopped up in consequence of the justices’ decision is between point R and point Q. HL39 links HL18 to HL41 at point R. There was no application before the justices in relation to HL39.

The copy of the plan “B” has crosses marked upon it in red. The crosses indicate the positions in which notices were erected, those notices giving rise to issues which have to be resolved in the course of this judgment.

Among the points that are taken on behalf of the appellants there are two which relate to the notices which are required to be given in order to give the justices jurisdiction to hear an application to stop up a way. In a sense, they could be described as technical. However, the importance of failing to give the required notices should not, for this reason, be underestimated because the notices are intended to bring to the attention of the public the proposals to stop up the public rights of way and, if the public are not aware of the proposal, they may be deprived of an opportunity of protecting the public rights to which they are entitled.

A third point is raised by the appeal. That is one of some general importance and goes to the matters upon which the magistrates have to be satisfied before they can come to a decision to stop up a public right of way. That issue turns on the meaning of the word "unnecessary" which appears in the relevant statutory provisions, to which I must now turn.

The principal statute is the Highways Act 1980 . Section 116 of that Act, contained in Part VIII of the Act, refers to the power of magistrates to authorise the stopping up or diversion of a highway. Subsection (1) provides:

> Subject to the provisions of this section, if it appears to a magistrates' court, after a view, if the court thinks fit, by any two or more of the justices composing the court, that a highway (other than a trunk road or a special road) as respects which the appropriate authority have made an application under this section—
>
> (a) is unnecessary, or
>
> (b) can be diverted so as to make it nearer or more commodious to the public,
>
> the court may by order authorise it to be stopped up or, as the case may be, to be so diverted.

***466**

The Highways Act in Part VIII contains parallel provisions dealing with procedures for stopping up footpaths and bridleways in section 118 of the Act. There are also parallel procedures for diverting footpaths and bridleways which appear in section 119 of the Act. Subsection (1) of section 118 provides:

> Where it appears to a council as respects a footpath or bridleway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.
>
> An order under this section is referred to in this Act as a "public path extinguishment order."

Subsection (2) states:

> The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

The references to "expediency" which appear in section 118 do not appear in section 116 . Therefore it is to be noted, in my view, that on a proper application of section 116 , no question of expediency is involved.

Turning to section 116, subsection (5) provides:

> An application or order under this section may include 2 or more highways which are connected with each other.

Subsection (6) provides:

> A magistrates' court shall not make an order under this section unless it is satisfied that the applicant authority have given the notices required by Part I of Schedule 12 to this Act.

It is because of the language of subsection (6) that I earlier referred to the jurisdiction of the magistrates. Although it will be necessary to look at other provisions, to which I will come in a moment in connection with notices, it can be said straight away that the requirements of subsection (6) are, in my view, mandatory, so that a magistrates' court has no power to dispense with the requirement which is there specified.

Schedule 12, Part I of the Act, which is referred to in subsection (6) requires by paragraph 1:

> At least 28 days before the day on which an application for an order under section 116 of this Act is made in relation to a highway the applicant authority shall give notice of their intention to

> apply for the order, specifying the time and place at which the application is to be ***467** made and the terms of the order applied for (embodying a plan showing what will be the effect thereof)

I emphasise that by underlining the words "what will be the effect thereof." Then there are set out the various persons to whom notice has to be given, and then I turn to paragraph 2, which provides:

> Not later than 28 days before the day on which the application is made the applicant authority shall cause a copy of the said notice to be displayed in a prominent position at the ends of the highway.

A highway is described in section 328(1) of the Act, except where the context otherwise requires, as meaning "the whole or a part of a highway."

The question therefore arises under paragraph 2 of Schedule 12 , in a case where only part of the highway is proposed to be stopped up, as to what is the meaning of the "ends" of the highway. Does it mean the ends of the parts being stopped up, or does it mean the ends of the whole of the highway? When the provisions of Part I of Schedule 12 are looked at as a whole, in my view they clearly indicate that what is meant is the end of that part of the highway in relation to which it is intended to ask the magistrates to make an order.

The parts of the highway which we are concerned with are parts of a highway to which the Military Lands Act 1892 apply. Section 13 of that Act, as amended, gives magistrates a further jurisdiction to stop up or divert footpaths, a jurisdiction which, it appears to me, is narrower than that given under section 116 of the 1980 Act in so far as, first of all, it only applies to footpaths crossing or near to any land leased under that Act and thus would not, for example, apply to highways or, so far as this case is concerned, HL41 and, secondly, requires magistrates before they make an order under the section to be satisfied that a new footpath, convenient to the public, will be substituted therefore, or that the footpath as diverted will be as convenient to the public as the case may be.

Accordingly, although it is necessary to recognise the existence of that alternative power, one turns to the questions which arise on this appeal in relation to the notices. The magistrates in this case did not in fact exercise their powers in relation to the highways under the 1892 Act but have exercised those powers in accordance with section 116 of the 1980 Act.

The fact that the rights of way ran over land, to which the Military Lands Act 1892 applied, has a factual effect which is only relevant because it resulted in the ways being closed for some 280 days in the year so as to enable the land to be used as a shooting range by the military.

Turning to these issues and dealing with the two issues which deal with the notices, first it is necessary to refer to the terms of the notices. They were all in the same form. They referred to both section 116 and the 12th Schedule of the Highways Act 1980 and section 13 of the Military Lands Act 1892 . Paragraph 1 of the notice provided:

> 1. Notice is hereby given that the Kent County Council in pursuance of its powers under Section 116 of the Highways Act intends to apply to the Folkestone Magistrates' Court sitting at the Law Courts, Castle Hill Avenue, Folkestone on Thursday 22nd December, 1988 at 10 am for an Order for the Stopping Up and Diversion of Public Rights of Way HL41 (part), HL16 (part), HL18 and HL29 all in the Town of ***468** Lydd, and situated on the Army Ranges, as shown on the attached plan.
>
> 2. The application is made on the grounds that the routes are unnecessary and cross land which is classed as Military Land under the 1892 Act. An alternative route is also being provided.

It is not necessary to refer to the remainder of the notice.

Mr. Lawrence submits that the notice is misleading in its effect, first of all because it refers to the diversion of the rights of way and, so far as that is concerned, there was a proposal, to which the magistrates were referred, that a military path, which on plan B runs from T to V and therefore forms an additional route to HL41, should be used as an alternative route. However, there was no suggestion before the magistrates that that alternative route was to be dedicated to the public, nor was there any undertaking or indication given by the Ministry of Defence that that route would be available to the public for any specific period.

Mr. Caws, who appears on the appeal for the Ministry of Defence, mainly in a watching capacity but also to assist the court generally on the appeal, very helpfully indicated that the Ministry of Defence could give no assurance that the path between T and V would be available for the public for any specific period. In my view, they could not be regarded as a satisfactory alternative route for the public rights of way which at present run between HL41 and HL16 though, as I have already indicated, part of HL16 is flooded; so HL16 can only practically be used by using part of what I will describe as the "military path."

Mr. Lawrence submits that the suggestion that an alternative route was to be provided, contained in the notice, was misleading. He also submits that the suggestion that there was to be a diversion of the public right of way was misleading. There was no question of the rights of way being diverted. All that was involved was their being stopped up. In those circumstances, Mr. Lawrence submits that a member of the public reading the notice could well believe that he was not going to be adversely affected by the proposals because he would not realise that it could result in his not being able to use a way as equally convenient as that at present provided by the public right of way which it was proposed to stop up.

On the other hand, in his submissions on behalf of the Kent County Council, Mr. Blackford contended that as there were two statutory powers, only one which required an alternative route to be provided, the notice referred to both statutes and there was nothing wrong with the terms of the notice. I do not accept that submission of Mr. Blackford. If a notice is

putting forward two alternative proposals, both those alternatives should be set out in the notice. They were not set out here. Furthermore, although there was a map included with the notice as was required by the legislation, the map purported to show an alternative route to be provided. That was the military way, to which I have made reference and which was not properly described as an alternative route.

Accordingly, I have come to the conclusion that Mr. Lawrence is right in his submissions and these notices are notices which do not comply with the requirements of the Act. If a notice is as misleading as these notices are, then, in my view, that has the result of depriving the justices of the right to make the orders which they made here.

Turning to the second point which is taken with regard to the notices, ***469** that relates solely to the position of the notices. There are two submissions here made by Mr. Lawrence. First of all he submits that there was no notice as was required at the end of HL16 where it joins the military Way just short of point D on the plan. The second submission that he makes is that there was no notice at point Q on the plan in relation to the path of HL18 which it was proposed to be stopped up.

In relation to HL16, although it is right that there was no notice precisely at the end of HL16, the evidence was given by Michele Medhurst, an administrative assistant in the Kent County Council, as to how the notices came to be positioned where they were. She said that it was not physically possible to place notices at the end, and the places selected by her were, in her judgment, the most prominent and sensible places to put them in order to draw attention to the contents. Because of the area of water in the close vicinity, there was no reason to doubt that part of Michele Medhurst's evidence.

Although the statutory requirement contained in Schedule 12 is to place the notice at the end of the highway, in looking, at that requirement, it obviously has to be interpreted in a commonsense way. Where it is not possible to place the notice precisely at the end, if there is substantial compliance with the requirement, that, in my view, is sufficient to fulfil the requirements of the Act. The justices, in exercising their jurisdiction, should approach the requirement as to the placing of notices at each end of the highway in a commonsense way.

So far as the absence of a notice at point Q is concerned, there was a notice at point P. There was also a notice further along HL29, off the plan which is exhibited to this judgment. Mr. Blackford submitted that anyone seeking to approach the southern end of HL18 would pass either the notice at point P or the notice at the other point on HL29, so no prejudice would be caused by the absence of a notice at what is the proper position at the southern end of HL18.

I have considerable sympathy for this submission, because the purpose of the notice is that which I indicated earlier in this judgment. However, there is an authority of some seniority. That is the case of *R. v. Surrey Justices* where a very similar question was considered by the Divisional Court, consisting of three judges presided over by Cockburn C.J. and containing Blackburn J. and Mellor J., and where a firm view was taken in relation to the need to comply with a very similar statutory requirement. In that case, the three ways which were being stopped up formed a Y. There was a notice erected at the end of each limb of the Y, but there was no notice at the point where the three limbs joined. The Divisional Court, having regard to the terms of the legislation, came to the conclusion that it was not sufficient to have a notice at the three ends of the limb. A further notice was required at the point in which they joined. In the course of his judgment,

which was in relation to an application for what was the then equivalent of judicial review, Blackburn J. said [1] :

> We think if clear that the actual publication of the prescribed notices is made a condition precedent to the jurisdiction of the two justices, the obvious object of the legislature being to secure that every one interested in the preservation of the highway should be aware of what was ***470** about to be done before it was done; and we also think it clear that the legislature have prescribed that the notices shall be placed at each end of the highway, so as to secure to every one who comes upon it the opportunity of reading the notice.

Later in his judgment, Blackburn J. referred to the fact that certiorari is not a writ of course. Notwithstanding the discretion of the court which exists on an application for certiorari, that court felt obliged to quash the decision of the justices in that case.

Having regard to that authority, Mr. Caws made a helpful submission which drew attention to the fact that in the legislation as it now appears, the mandatory requirement is contained in section 116(6) of the 1980 Act, whereas the detailed requirements are contained in Part I of Schedule 12 . As I understand his submission, he was contending that because subsection (6) is mandatory, it does not necessarily follow that the detailed requirements in Schedule 12 are mandatory.

I have difficulty in following Mr. Caws's argument entirely as he was developing it, as I understood it. However, I do regard his argument as providing help as to the proper solution of this particular problem. It seems to me that all that has to be done is for there to be substantial compliance with the detailed requirements of Schedule 12 . If there has been substantial compliance with those detailed requirements, then the mandatory requirement contained in subsection (6) is fulfilled. However, even approaching the requirements in Schedule 12 in that way, I am afraid that, in relation to the absence of a notice at the southern end of HL18, it has to be accepted, in my view, that there has been no compliance here, so that that would deprive the justices of jurisdiction to make a stopping up order in relation to HL18.

I turn therefore to the third point, and perhaps the point of most importance on this appeal, and that is as to the meaning of the word "unnecessary" in section 116(1) . With regard to the ways which were the subject of the decision of the magistrates, there was little evidence before the magistrates as to the extent to which they were being used; but they were undoubtedly being used, albeit to a limited extent, by the public.

There was also reference to a tarmac road in the evidence before the justices, and that apparently was or could be a reference to the Denge Marsh Road, which is shown on the plan, and by use of that road, and use of another public path, there is a way which can give access to the shore at the south of the plan. It is clearly a reasonable distance away, and it involves travelling over a different type of highway.

Mr. Lawrence submits that having regard to the evidence that was before the magistrates, and having regard to the fact that there was no proper alternative provided by the military way, the justices were not entitled to come to the decision

which they did.

Mr. Blackford, on the other hand, submits that this is entirely a question of fact for the justices and not a matter on which this court can intervene on an appeal by case stated.

That Mr. Blackford is right in regarding the issue at least primarily a question of fact for the justices, I have no doubt. I equally have little doubt that magistrates, on the whole, are best left to determine what is unnecessary themselves. The very fact that there is an express reference, which is unusual, to the magistrates making a view, indicates how much this is a ***471** question of fact and one in relation to which one would expect the magistrates to use their local knowledge and common sense in coming to a decision.

However, it may provide some assistance to magistrates in the difficult adjudicating task they have to perform under section 116(1) if I give the following guidance. First of all I consider that magistrates, in deciding whether or not a highway is unnecessary, should bear in mind the question for whom the highway is unnecessary. It is to be unnecessary for the public. It is the public who have the right to travel up and down the way in question, and it is the public with whom the justices should be concerned because the right is vested in them. It is for this reason that I drew attention to the somewhat different language in section 118 .

Then the justices might ask themselves, in considering an application under section 116 , the question for what purpose should the way be unnecessary before they exercise their jurisdiction. So far as that is concerned, it should be unnecessary for the sort of purposes which the justices would reasonably expect the public to use that particular way. Sometimes they will be using it to get primarily to a specific destination—possibly here the shore. Another reason for using a way of this sort can be for recreational purposes.

In my view, where there is evidence of use of a way, prima facie, at any rate, it will be difficult for justices properly to come to the conclusion that a way is unnecessary unless the public are or are going to be provided with a reasonably suitable alternative way. In deciding whether an alternative way is reasonable, it must be a way which is protected, so far as duration is concerned, in the same way as the existing way is protected. It must also be suitable, or reasonably suitable, for the purpose for which the public were using the existing way.

If it is a way which has similar characteristics as the existing way, then certainly the justices can find that the existing way is unnecessary, albeit that the justices must also bear in mind that the result of the loss of way could be to render the other ways which are available more crowded than they are at present. If a way is being used primarily by the public for recreational purposes, that is a consideration which the justices are perfectly entitled to take into account and in my view, should take into account in deciding whether the way is unnecessary.

However, having sought to give that assistance, I repeat that the question of whether a way is or is not unnecessary is one of fact for the justices and a decision on which, normally, this court will not intervene.

There have been previous authorities where this same issue has been considered, though the only decision to which I need make reference is an unreported case, *Compton v. Somerset County Council* , decided by McNeill J. on March 23, 1982. I have been provided with a transcript of that judgment, and McNeill J. was at pains to stress, as I have been at pains to stress, in the course of his judgment that the question as to what is a way and whether it is unnecessary for its retention is a question of fact. At the conclusion of his judgment, McNeill J. said this:

> I do not think it is desirable to add a gloss to the statutory words. If it were proper to do so, I think the gloss would be "unnecessary in the public interest," for both the highway authority and the magistrates ***472** have to weigh up all the circumstances in dealing with the matter of public access to highways. I prefer to leave it on the basis that the question of necessity under section 116(1)(a) is a question of fact for the magistrates upon which they were properly instructing themselves and upon which they had an abundance of evidence to decide as they did.

McNeill J. therefore dismissed the appeal. In that case there was an abundance of evidence.

In this case, as far as one can tell, there was not an abundance of evidence. This case is going to have to be redetermined, and I therefore propose to say no more about the evidence. However, I would just say this with regard to the passage I have cited from McNeill J.'s judgment. I am not quite clear what McNeill J. meant by his reference to "unnecessary in the public interest." It may well be that he had in mind exactly the same considerations to which I referred earlier—the interests of the public in the right of way.

If, however, he was referring to some broader public interest—for example, here there were the interests of the Ministry of Defence—then I would respectfully dissent from that dicta of McNeill J. I do not see that the fact that it might be more convenient for the Ministry of Defence, for example, here not to have a way travelling across land which is used regularly as a range would make the existence of that way unnecessary. The question as to what is or what is not necessary has to be decided, in my view, on the lines that I have sought to indicate earlier in this judgment.

I will therefore, for those reasons, allow this appeal. In doing so, I would answer the questions which the justices have set out in the case in the following way.

The first question, whether the notice given by Kent County Council under the provisions of section 116(3) and Part I of the 12th Schedule of the Highways Act 1980 was a good and valid notice under the Act, I would answer that question no.

So far as (b) is concerned, that starts off by asking whether in the event that the notice was good but capable of being misunderstood the justices were entitled to conclude that no one had been disadvantaged. For the reasons that I have already given in this judgment, I do not think that that question arises, because the notice was not good.

So far as (c) is concerned, that is whether in view of paragraph 2 of the notice of application to the court (i) it was

necessary for the respondent to satisfy the magistrates both that the routes were unnecessary and that they crossed land which is classified as military land under the 1892 Act, I would answer that question by saying no. Question (ii), that the magistrates were obliged to ensure the provision of an alternative route as offered in the application, again I would say no, but the absence of an alternative route was of critical importance to the question as to whether or not the existing routes were unnecessary.

So far as (d) is concerned, whether in view of the evidence called on behalf of the Ramblers Association and the Kent County Council and the petition lodged with the court, it was open to the justices to make a determination that parts of footpaths HL41, HL16 and HL18 were unnecessary within the meaning of the Highways Act 1980 , I would answer that ques- ***473** tion by indicating that the material contained in the case is not sufficient for me to enable the question to be answered.

So far as (e) is concerned, whether the evidence of Michele Medhurst was sufficient evidence that the requirements of paragraph 2 of the 12th Schedule to the 1980 Act had been complied With, I would answer that question by saying that the evidence was sufficient as to HL16 but was insufficient as to HL18 since, in relation to HL18, counsel very properly, on behalf of the council, conceded that the evidence was not meant to relate to HL18.

In the result, I would make an order that the decision of the justices contained in the case must be set aside and that the applications which were before the justices must be dismissed.

Pill J.

I agree with the order proposed by my Lord and with the conclusions he has reached on each of the points in issue. I add a few sentences only upon the use of the word “unnecessary” in section 116(1)(a) of the Highways Act 1980 .

The effect of an order by the justices under the section is to extinguish a right enjoyed by members of the public, a right of passage and re-passage over the highway. That is the context in which their powers have to be construed and in which the justices should consider the evidence when deciding whether a way can properly be said to be unnecessary.

It is common ground that the existence of a reasonable alternative way for users may be taken into account in deciding whether a particular way is unnecessary. Clearly it is for the justices to consider the question of need on the basis of the material before them. The need may be particularly important to a few users. It may be of less importance to a larger number of users. It may in the circumstances be completely unnecessary.

In this case it is not clear whether the justices held that there was insufficient evidence of users or that they disbelieved such evidence as there was, or that they believed that an alternative right of way was available, which in law it was not, or simply that their finding accorded with more general notions of public interest.

The concept of expediency, which arises when an application to extinguish a public right of way is made under section 118 of the Act, does not arise upon an application under section 116 . It is not, in my view, open to justices to decide that a way is unnecessary, under section 116 because they hold the view that it is in the public interest that the highway should be closed.

Bearing in mind the legal rights of members of the public which it is sought to extinguish, including the rights of actual users, if any, the question whether a highway is unnecessary should not be decided, in my judgment, merely upon general notions of public interest in extinguishment.

In a case where the justices hold that a way is unnecessary within the meaning of section 116 , I would expect them to give reasons for their finding upon a case being stated for the opinion of this court.

WOOLF L.J. I agree with the judgment which has just been given. Because of the unsatisfactory notices, the application must be dismissed.

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Representation

Solicitors— Pearlman , Grazin and Co. , Leeds; County Solicitor's Department, Maidstone; Treasury Solicitor .

Order that the decision of the justices be set aside and that the applications before the justices be dismissed. Subject to there being jurisdiction to make an order in favour of the objectors, costs before this court and in the court below to be paid by the respondent. ***475**

Footnotes

[1] *(1870) L.R. 5* Q.B. 466 at p. 471.

