Case Name: *Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs & Anor* [2023] EWHC 900 (Admin) (20 April 2023)

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Commentary: The claimant unsuccessfully applied under paragraph 12 of Schedule 15 of the Wildlife and Countryside Act 1981 ("the 1981 Act") to quash the Northumberland County Council Definitive Map Modification Order (No 30) 2016 Byways Open to All Traffic Nos 20 & 17 (Parishes of Bamburgh & North Sunderland) ("the Order").

Northumberland County Council ("NCC") had proposed a modification in 2016 of the definitive map and statement for the area by recording a byway open to all traffic ("BOAT") from the B1340 public road south of Bamburgh, via Greenhill and Fowberry, to the U2018 public road at Shoreston Hall.

Following opposition to the proposed modification, a public inquiry was held by an inspector pursuant to paragraphs 7 and 8 of schedule 15 of the 1981 Act, after which the inspector determined that part of the order route proposed by NCC (hereafter referred to as "X-Y") should be modified to show a footpath only, and not a BOAT.

The claimant contended that the whole of the order route, including the part modified by the inspector, should be a BOAT. The challenge was based on three grounds.

Ground 1: the inspector made a mistake in concluding that a 1951 highway authority map did not show a physical feature between X-Y

The judge set out the principles as summarised by Carnwarth LJ in E v Secretary of State for the Home Department [2014] EWCA Civ 49 at paragraph 66 to apply where, as here, a mistake of fact is alleged as a ground for legal challenge in judicial review as summarised by Carnwarth LJ in E v Secretary of State for the Home Department [2014] EWCA Civ 49 at paragraph 66.

Applying the principles referred to above, and agreeing with the Secretary of State, the judge found that, on a fair reading of the Order, the inspector does not say that the 1951 map shows no link between X-Y but rather that the link shown was on a different alignment to the order route.

If there was any mistake, which the judge was not persuaded that there was, it was not a mistake as to existing fact or one that was uncontentious or objectively verifiable.

Ground 2: the inspector did not accord proper weight to pre-1931 maps showing a physical feature between X-Y or to the description of the order route (including X-Y) as "cross-roads" in a commercial map published by Greenwood & Co in 1827-28.

Disagreeing with the claimant, the judge found that the inspector had made clear that she attached weight to the maps in question and that the weight to be attributed each of them were matters for her.

The reference in the Greenwood & Co maps to part of the order route being "cross roads" was also properly considered by the inspector, and she was entitled to come to the conclusion that on the balance of probability no public vehicular right of way existed between points X-Y.

Applying the principles of "ordinary judicial review" (per Carnwarth LJ in Whitworth v Secretary of State for Environmental Food and Rural Affairs [2020] EWCA Civ 1468), the judge pointed out the process of the inspector's review and analysis of the historic material "…is one of drawing inferences of fact from disparate material" and that, in her judgment, "such inferences may vary from case to case, depending on the evidence and the material. The inspector was not persuaded that there was any inconsistency. Nor am I."

Ground 3: the inspector misdirected herself in law as to the improbability of two vehicular cul-de sacs leading to Greenberry and Fowberry respectively if X-Y is a footpath only.

The judge agreed with Widgery J in Roberts v Webster (1968) 66 LGR 298 at 305 that "[t]he authorities clearly show that there is no rule of law which compels a conclusion that a cul-de-sac can never be a highway […], if there is some kind of attraction at the far end which might cause the public to wish to use the road, it is clear that that may be sufficient to justify the conclusion that a public highway was created"

Applying the above principles, and agreeing with the Secretary of State, the judge found that the inspector gave reasons for concluding that the order route comprised two vehicular cul-de-sac highways, namely that they each lead to several properties.

The challenge to the inspector's Order failed. For these reasons.

Case summary prepared by Charlie Austin