

ANNEX 2

For information

Peak District Local Access Forum - 19 June 2008

Derbyshire County Council

Briefing note about applications under schedule 14 to the Wildlife and Countryside Act 1981, and the “Winchester” Judgment

1. The Judgment which was delivered on 29 April 2008 by the Court of Appeal in the case of R (Warden and Fellows of Winchester College and another) v Hampshire County Council [2008] EWCA Civ 431 has clarified the basic formal requirements for a valid application for an order to modify the definitive map under schedule 14 of the Wildlife and Countryside Act 1981.
2. The Natural Environment and Rural Communities Act 2006 (‘the NERC Act’) generally extinguished public rights to use mechanically propelled vehicles over highways (referred to below as “motorised vehicular rights”), subject to certain specified exceptions.
3. The Court of Appeal Winchester Judgment has in effect removed the protection of one of those exceptions in certain situations (see points 10 and 11 below). This is an exception which applies to routes for which an application under schedule 14 of the Wildlife and Countryside Act 1981 for the addition of a BOAT to the definitive map was made before 20th January 2005 (the ‘relevant date’).
4. The application of the other exceptions to the extinguishment of public motorised rights under the NERC Act specified within the Act is not generally affected by the Winchester Judgment. One of these exceptions potentially could apply to many of the BOAT claims received for Derbyshire. This is an exception for routes shown on the official record of highways maintainable at public expense (the list of streets) provided that they are not shown also on a definitive map as footpath, bridleway or restricted byway.
5. Schedule 14 of the 1981 Act stipulates that a DMMO application made under it must be in the prescribed form, accompanied by (1) a map showing the route (drawn to a prescribed scale) and (2) “copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application”.
6. The Winchester case concerned two routes (one shown as a bridleway and one shown now as a restricted byway) for which Hampshire County Council (HCC) had made Orders following the coming into force of the NERC Act, to add BOATs to the definitive map. The orders were made on the basis that the exception to extinguishment of public motorised vehicular rights under the NERC Act, for routes subject to BOAT applications made before the relevant date (see point 3 above), was applicable.
7. Neither of the two applications which had been made to HCC had been accompanied by actual copies of documentary evidence, but the applicants had listed the documents they wished to rely on.

8. HCC had considered that the absence of actual copies of documents was not fatal to the validity of the applications for the purpose of Schedule 14, and that in all the circumstances the applications should be treated as valid. This was also the view taken by the Judge who considered the case in the High Court.

9. However the Court of Appeal has taken a different view and its Judgment overrules the High Court on this point. It has found that in order for a route to qualify under the exception for BOAT applications before the relevant date to the NERC Act extinguishment provisions, the application must satisfy in full the requirements of schedule 14, i.e. must be accompanied by the appropriate map and by actual copies of the documents being relied on.

10. This Court of Appeal Judgment may have a profound impact on routes for which a corresponding claim for modification to BOAT has been received, in so far as:

- The claim was submitted before the relevant date, but was not by then accompanied by copies of all of the relevant documents (the Judgment makes it clear that no such claims should be regarded as qualifying applications)
- The route does not fall within any of the other exceptions to extinguishment of motorised vehicular rights which are set out in the NERC Act (see point 4 above).

11. In summary, any route which is subject to a BOAT application which is defective due to the absence of an accompanying copy of a document which the applicant wished to adduce, and which cannot otherwise be regarded as exempt from the extinguishment under the NERC Act of public motorised vehicle rights, must now be considered to be a route over which any public motorised vehicle rights have been extinguished..

12. The County Council, in common with other surveying authorities, will need to check through those BOAT claims submitted before 20 January 2005 which are listed in its Register of definitive map order applications, to ascertain for each one whether or not it is a valid application under Schedule 14, in the light of the Court of Appeal 'Winchester' Judgment.

13. Evidence which has come to light in connection with a BOAT claim which is no longer to be regarded as a valid BOAT application may well still be of relevance to the definitive map. This is because the Council, as surveying authority, may still need to determine whether any order should be made under the 1981 Act to modify the definitive map to show the route which was subject to the claim as a footpath, a bridleway or a restricted byway.

14. DEFRA has produced a guide to Part 6 of the NERC Act 2006. The latest revision of the guide (Version 5 – 2008) refers to the Winchester Court of Appeal Judgment (at paragraph 40). This note is intended to reflect this latest version of the guide.