Neutral Citation Number: [2018] EWHC 3600 (Admin) Case No: CO/3039/2018
IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT PLANNING COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 21/12/2018

Before :

MR. JUSTICE SWIFT

- -

Between :

TRAIL RIDERS FELLOWSHIP	**Claimant**
- and –	
WILTSHIRE COUNTY COUNCIL	**Defendant**

- -

Adrian Pay (instructed by **Messrs Brian Chase Coles**) for the **Claimant**
Trevor Ward (instructed by **Wiltshire County Council, Legal Services**) for the **Defendant**

Hearing dates: 21-22 November, 2018

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Judgment Approved

Mr. Justice Swift:

A. Introduction

1. This is an application under paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984 (“the 1984 Act”) to quash the decision of Wiltshire County Council, of 28 June 2018 to make the County of Wiltshire (Various Byways and Footpath, Amesbury, Berwick St James, Durrington, Wilsford cum Lake and Woodford) (Prohibition of Driving) Experimental Order 2018 (“the 2018 Order”).

The 2018 Order was made in exercise of the power at section 9 of the 1984 Act, which is a power to make orders *"for the purposes of carrying out an experimental scheme of traffic control"*. Experimental orders may not continue in force for more than 18 months. The Claimant ("the TRF") is a company limited by guarantee, and a national organisation which exists *"to preserve the full status of vehicular green lanes and the rights of motorcyclists and others to use them as a legitimate part of the access network of the countryside and the doing of all such things as are incidental or conducive to the attainment of that object"*.

2. The 2018 Order affects seven byways and one footpath in the area close to the Stonehenge World Heritage site. The footpath is Footpath 3 Wilsford cum Lake. The byways are Byway 11 Amesbury, Byway 12 Amesbury, Byway11 Berwick St James, Byway 10 Durrington, Byway 1 Wilsford cum Lake, Byway 2 Wilsford cum Lake, and Byway 16 Woodford (together referred to as "the byways"). The byways are parts of two distinct ways. Woodford 16, Berwick St James 11, Wilsford cum Lake 1, Amesbury 12 and Durrington 10 are different sections of the same way, which runs south west to north east, from the A360 cutting across the A303 and the C506 (which until 2013 was the A344). Amesbury 11 and Wilsford cum Lake 2 are parts of a single way which runs (roughly) north from Wilsford cum Lake and meets the A303. Paragraph 1 of the 2018 Order prohibits the use of *"any motor vehicle"* on any of the byways. Exceptions to this prohibition are then set out in paragraphs 2 – 5 of the 2018 Order. By paragraph 2(iv) the paragraph 1 prohibition is disapplied to any vehicle that is being used

> "… by landowners or tenants to access their own or occupy or for the purposes of agriculture in connection with land adjacent to the lengths of byways or footpath."

With effect from 19 November 2018, the Council modified the 2018 Order to include additional prohibitions against leaving any vehicle on any of the byways *"for sleeping, camping or cooking"*, and preventing any vehicle travelling on the A303 from turning from that road into either Amesbury 11 or Amesbury 12. No challenge is made on the basis of either of these modifications, and neither is material to any of the issues raised by the TRF in this case.

3. The 2018 Order was made by Parvis Khansari, the Council's Director for Highways and Transport, in exercise of delegated powers. Mr. Khansari has made a witness statement for these proceedings, but that statement does not contain a narrative explaining the decision-making process.

4. The TRF contends that the decision to make the 2018 Order was unlawful on three grounds. The first ground relates to consultation. The TRF contends that there was a failure to comply with requirements relating to consultation under regulation 6 of the Local Authorities' Traffic Orders (Procedure)(England and Wales) Regulations 1996 ("the 1996 Regulations") and/or that there was a failure to consult in breach of a legitimate expectation that consultation would occur. The second and third grounds of challenge are linked: the former is to the effect that the 2018 Order was made without regard to relevant considerations; the latter is that the 2018 Order was not made for any experimental purpose and for that reason was not a proper exercise of the power at section 9 of the 1984 Act.

B. The legislative provisions

5. Under Part I of the 1984 Act traffic authorities such as the Council have power to make traffic regulation orders (see sections 1, 2 and 3), experimental traffic orders (see sections 9 – 10), orders which temporarily restrict or prohibit use of a road (see sections 14 – 15), and orders which impose restrictions or prohibitions on the use of a road in connection with sporting events, social events or entertainments (see sections 16A – 16B).

6. By section 9(1) of the 1984 Act experimental traffic orders such as the 2018 Order must be made *"for the purposes of carrying out an experimental scheme of traffic control"*. Section 9(1)(a) provides that an experimental traffic order may contain *"any such provision ... as may be made by a traffic regulation order"*. The consequence of this is that an experimental traffic order must be made for the purpose of one or more of the objectives specified in section 1(1) of the 1984 Act, and must provide for one or more of the prohibitions, restrictions or regulations referred to in section 2 of the 1984 Act.

7. Section 122 of the 1984 Act is a generic provision applicable to any exercise of functions under the 1984 Act which, so far as material, provides as follows:

> (1) It shall be the duty of every strategic highways company and local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway ….
>
> (2) The matters referred to in subsection (1) above as being specified in this subsection are—
>
> (a) the desirability of securing and maintaining reasonable access to premises;
>
> (b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run;
>
> (bb) the strategy prepared under section 80 of the Environment Act 1995. (national air quality strategy);
>
> (c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and
>
> (d) any other matters appearing to … the local authority to be relevant.
>
> (3) …"

8. In his judgment in *UK Waste Management v West Lancashire District Council* [1997] RTR 201, Carnwath J described section 122 as *"not ... an altogether easy section to construe"* (see at page 209C – F). His conclusion was to the effect that although traffic authorities are under an obligation to exercise powers under the 1984 Act to *"secure"* the two general purposes stated in subsection (1), that obligation is qualified by reference to the matters listed in subsection (2). As I see it, the subsection (1) obligation is a form of target duty. The objectives specified in it need to be met, but only up to a point – only insofar as it is practicable to do so having regard to the wideranging considerations listed in subsection (2). Subsection (2)(d) is also notable. It is clear from this that in all instances, a traffic authority is able to assess the circumstances of the case in hand. A matter falling within subsection (2)(d) is capable of trumping either the general objectives specified in subsection (1), or any of the other matters listed in subsection (2), or both. The section 122 obligation is therefore less prescriptive than at first blush it might appear. For all practical purposes, the section 122 obligation provides background and context for the use of powers under the 1984 Act, its precise impact beyond that (if any) will depend on the circumstances of the case. In any event, it does not seem to me that section 122 directly impinges upon the issues in this litigation.

9. Provisions relating to the procedure for making an order under section 9 of the 1984 Act are contained in Schedule 9 to the 1984 Act and in the 1996 Regulations (which were made pursuant to the power in Schedule 9 paragraph 21). These provisions can be summarised as follows – so far as they are material to the 2018 Order.

10. There are provisions relating to consultation. The local authority must consult with the relevant chief officer of police (i.e. the chief officer for the area in which any road that is the subject of the order is located) – see Schedule 9, paragraph 20. Further consultation obligations are specified in a table at regulation 6 of the 1996 Regulations. In part, the provisions of the table are specific; in part they are general. Lines 1 – 6 of the table require consultation with specified individuals or organisations, if the order that is proposed relates to certain specified matters. By contrast, line 7 of the table requires that in "all cases" the local authority consult with

> "(a) The Freight Association, (b) The Road Haulage Association, (c) Such other organisations (if any) representing persons likely to be affected by any provisions in the order bas the order making authority thinks it appropriate to consult."

11. There are provisions relating to notification and objection. Where the order proposed is a traffic regulation order under section 1 of the 1984 Act regulation 7 requires the local authority to publish a notice of proposals, send a copy of the notice to any person or organisation it is required to consult under regulation 6(1), and make various documents – specified in Schedule 2 to the 1996 Regulations – available for public inspection. The documents specified in Schedule 2 include a copy of the proposed order and *"a statement setting out the reasons why the authority proposed to make the order ..."*.

12. Regulation 8 then permits objections to be made to the proposal. In some cases, if any objection is received the local authority must hold a public inquiry (see regulation 9(1) and (3)); in all other cases the local authority may decide whether or not a public inquiry takes place (see regulation 9(1)). Before making the section 1 order, a local authority must consider any objection made under regulation 8, and, if there has been

an inquiry, must also consider the inspector's report and recommendations (see regulation 13).

13. The notification and objection processes are modified where the order made is an experimental traffic order. Regulation 22(1) disapplies regulations 7 and 8. The remainder of regulation 22 is as follow

> "(2) No provision of an experimental order shall come into force before the expiration of the period of seven days beginning with the day on which a notice of making in relation to the order is published.
>
> (3) The order making authority shall comply with the requirements of Schedule 2 as to the making of deposited documents relating to an experimental order available for public inspection.
>
> (4) Deposited documents shall be so made available, at the times and in the places specified in the notice of making in relation to the experimental order, for the period beginning on the date on which that advertisement is first published and ending when the order ceases to have effect."

14. In the case of an experimental order, the statement of reasons must include *"... the reasons for proceeding by way of experiment and a statement as to whether the authority intends to consider making an order having the same effect which is not an experimental order"* – see Schedule 2, paragraph 2(d).

15. Once an experimental order has been implemented, it is a matter for the local authority whether or not to make a permanent section 1 order to the same effect. If a local authority wishes to make a permanent order, it may either follow the usual processes sets out in regulations 6 – 8, or it may take advantage of the modified procedure provided for in regulation 23 of the 1996 Regulations. If in making the experimental order the local authority has complied with the requirements listed in regulation 23(3), it may make the permanent order without the need to comply with any of regulations 6 – 8. One of the requirements in regulation 23(3) is that the notice of making required by regulation 22(2) contained the statements specified in Schedule 5 to the Regulations. Those statements are (a) that the local authority will in due course consider whether the experimental order should continue in force indefinitely; and (b) that any person may, in writing, and within 6 months of the day on which the experimental order came into force *"... object to the making of an order for the purpose of such indefinite continuation"*.

C. Decision

(1) Ground 1. Consultation

16. This ground is advanced on two bases. The first is that the Council failed to comply with regulation 6 of the 1996 Regulations because it did not consult the TRF before making the 2018 Order. What is in issue is whether the Council complied with the requirement in line 7(c) of the table at regulation 6 – i.e. did it comply with its obligation to consult with *"such other organisations (if any) representing persons likely to be affected by any provision in the order as the order making authority thinks it appropriate to consult"*? Compliance with this obligation requires the local authority to have turned its mind first to whether any such organisations exist, and then to whether it should consult with them (or any of them). As to the latter, although

the local authority has a discretion, the decision must be able to withstand scrutiny by reference to the ordinary *Wednesbury* principles (i.e. of rationality, relevance and proper purpose).

17. In his submissions for the TRF, Mr. Pay contended that it would normally be appropriate for a local authority to consult any organisation that represents any persons likely to be affected by the proposed order. I consider this puts the matter too highly. There is no presumption in the Regulations that all such organisations will be consulted. Rather, regulation 6, line 7(c), as made, assumes that a local authority may exercise choice – subject always to the usual *Wednesbury* controls.

18. Mr. Pay also contended that because for an experimental order regulation 8 is disapplied, and because the right to object will only arise after the event, under regulation 23 and Schedule 5 to the Regulations if the local authority's intention is that the experimental order may become permanent, this means that the ambit of the discretion not to consult should be more strictly confined. I do not agree. There is nothing in the way in which regulation 6 line 7(c) is drafted to suggest that the discretion not to consult is more constrained or ought to be subject to a different level of scrutiny where it applies for the purposes of a section 9 experimental order than for a section 1 order. More importantly, this submission confuses the purposes of the consultation and the purposes of the objection procedure. Regulation 6 is about consultation with specific interested parties or organisations rather than consultation at large. Where regulation 6 applies in the context of a proposal to make a section 9 experimental order, the subject matter of the consultation will be whether or not the experimental order should be made. By contrast any objections made in accordance with the provisions of Schedule 5 may be made by any person, and will be objections to a possible subsequent order which would make the experiment permanent. Thus, the consultation and the objections provisions are directed to different issues, and for that matter also, to different audiences. The fact that the time for observations comes only after the experiment has commenced says nothing as to any enhanced need for consultation under regulation 6 before the experimental order is made.

19. The same point addresses a submission made by Mr. Ward who appeared for the Council. He contended that when deciding whether it was appropriate to consult with any organisation prior to making an experimental order one consideration a local authority could take account of, and which might weigh against consultation, was that after the experimental order had been made there were six months in which anyone could raise an objection (assuming that the regulation 22(2) notice of making contained the statements set out in Schedule 5 to the Regulations). For the reasons already stated,

I consider that this submission is wrong. The consultation is directed to the question whether an experimental order should be made, while the objections (if they are made) will be against a future decision to make the experiment final. Thus, opportunity for objections can have no logical bearing on whether, for the purposes of line 7(c) of the regulation 6 table, it is appropriate for the local authority to consult.

20. Mr. Khansari's evidence in this case addresses the question of consultation as follows (at paragraph 4 of his witness statement)

> "In this case it was not considered appropriate to undertake a consultation under paragraph 6 because of the high volume of traffic using byways 11 and 12 in particular it was considered operationally it made sense to undertake urgent repairs after the

> Solstice whilst the byways were cleared and then simply to continue with the closure for [the experimental order]. The Council will always consider all the objections received on the expiry of the 6 month consultation period (January 2019) and may decide to amend the [experimental order] or withdraw [it] or make [it] permanent."

21. I accept that it can be inferred from this evidence that Mr. Khansari, as the decisionmaker, did turn his mind to whether or not there should be consultation with representative groups. Nevertheless, this evidence discloses serious problems. The second sentence suggests that when deciding not to consult the Council did rely on the opportunity to raise objections after the experimental order was in force. Mr. Khansari refers to this as a "consultation period". Whether or not that is a correct description is not critical. What is important is that the Council failed to recognise that regulation 6 consultation addresses a different question from the one that is addressed by the chance to make objections. The Council's decision on its discretion under regulation 6

rested on reliance on an irrelevant consideration.

22. The first sentence quoted above is also problematic. In his submissions. Mr Ward explained that this meant that it was convenient for the 2018 Order to come into effect shortly after the summer solstice because the byways were cleared of vehicles each year before the solstice (and so would not need to be cleared again in anticipation of the experimental order), and because repairs were carried out each year after the solstice (which would mean that there was an identifiable benchmark against which to measure the effect of the experiment). These considerations would be entirely logical ones if the question being addressed was "when should the experimental order commence?". But the relevant question for the Council was "is it appropriate for us to consult with any organisation representing persons likely to be affected by the experimental order?", and the considerations mentioned by Mr Khansari do not address that question at all. Even if Mr Khansari's evidence is taken to be to the effect that by June 2018 there was insufficient time to consult with anyone, that simply begs why that was so. It appears the byways were cleared of vehicles every year before the summer solstice, and that repairs were undertaken each year after the solstice. That being so, I see no reason why the Council did not consider whether or not to consult in good time for consultation to take place (if necessary) and be concluded prior to June 2018.

23. Drawing these matters together, the decision taken by the Council not to consult was not a rational decision. It took account of an irrelevant consideration; the reasons

    relied on in Mr Khansari's evidence are not logically connected to the question posed by the requirement at line 7(c) of the table in regulation 6 of the 1996 Regulations; and to the extent that the Council is contending that the decision to make the 2018 Order had to be taken so quickly that there was no time to consult, those circumstances were entirely self-induced.

24. In the course of the hearing, in response to questions raised by me further difficulties became apparent. The first was that the Council had failed to comply with the requirements under lines 7(a) and (b) to consult the Freight Transport Association and the Road Haulage Association. The second was that it had failed to comply with the requirement in paragraph 20 of Schedule 9 to the 1984 Act to consult with the relevant chief officer of police. I did not hear detailed evidence on this latter point but it seems that the intention to make the 2018 Order was only raised in passing with a

senior officer of Wiltshire Police in the context of dealing with an entirely separate matter. The requirement to consult the police is not onerous. It need not entail anything more than informing the police of the details of the proposal and the reasons for it and then inviting comments. Yet what was described to me did not satisfy even these rudimentary requirements.

25. The second way in which the TRF puts its case on consultation is that it had a legitimate expectation that it would be consulted before the 2018 Order was made. The basis for this submission is this. First, in accordance with section 94 of the Countryside and Rights of Way Act 2000 the Council has established a local access forum. Under the provisions of the 2000 Act the local access forum exists to advise the Council on a range of matters including (by reason of regulation 22 of the Local Access Forums (England) Regulations 2007) public access to byways open to all traffic, such as the byways that are the subject of the 2018 Order. Second, the TRF is represented on the Council's local access forum. Third, at a meeting of the local access forum on 14 March 2018 there was discussion of the Council's response to a consultation exercise being undertaken by Highways England in anticipation of a

planning application to turn part of the A303 near Stonehenge into a dual carriageway in a tunnel under the present route of the A303 for part of the way between Countess Junction and Longbarrow Crossroads. The significance of this for present purposes is that if the tunnel proposal goes ahead the part of the A303 that presently connects the Amesbury 11 byway and the Amesbury 12 byway would be underground. For that reason, the Highways England consultation had contained a number of options about the form that the link between Amesbury 11 and Amesbury 12 should take. These proposals were discussed at the meeting of the local access forum, and in the course of that discussion, one of the Council's officers (Mr. Broadhead) was recorded as saying that any change to the rights of way over the part of the present A303 linking Amesbury 11 and Amesbury 12 would take place as part of the Highways England planning application.

26. Based on these three matters, the TRF contends that there was a representation, made by the Council to the members of the local access forum including the TRF, that if the Council wished to use its powers under Part I of the 1984 Act in respect of the byways, that would first be canvassed with the local access forum. I do not accept this submission. The Council made no representation that it would consult either with the local access forum or the TRF prior to using its powers under the 1984 Act to make an order such as the 2018 Order. The statement made by Mr. Broadhead at the 14

March 2018 meeting was made specifically in relation to the form that the link between Amesbury 11 and Amesbury 12 might take in the event that the A303 tunnelling proposal went ahead. Further, what was said related only to the use by the Council of its powers in respect of that link. The comments did not relate to any of the byways that are the subject of the 2018 Order. Any claim to a legitimate expectation of prior consultation must rest on a clear and unambiguous representation. On the evidence in this case, no such clear and unambiguous representation was made.

27. Nor can the TRF's case on this point draw any strength from the nature or functions of the local access forum. Under the provisions of the 2000 Act, a local access forum is an advisory body. This function does not give rise to any corresponding obligation on the local authority to consult the local access forum or any expectation of consultation. True it is that a local access forum can only discharge its advisory function if it is suitably informed of relevant matters. But the source of such information need not (and often will not) be the local authority; and in any event in

this instance the local access forum would have sufficient information for the purpose of fulfilling its advisory function in respect of the 2018 Order through publication by the Council of the notice of making in accordance with regulation 22(2) of the 1996 Regulations. For all these reasons, the legitimate expectation claim fails.

(2) Grounds 2 and 3. The evidential basis for the 2018 Order, and the Statement of Reasons. The existence of an experiment.

28. Each of the second and third grounds requires consideration of the statement of reasons given by the Council for its decision to make the 2018 Order.

29. Ground 2 is to the effect that it is apparent from the statement of reasons that the Council failed to take account of an Inspector's Report dated 16 November 2011. That report was the result of a public inquiry (under regulation 9 of the 1996 Regulations) into an earlier section 1 traffic restriction order proposed by the Council in 2010 – The County of Wiltshire (Stonehenge World Heritage Site, Parishes of Amesbury, Berwick St James, Durrington, Wilsford cum Lake, Winterbourne Stoke and Woodford)(Prohibition of Driving) Order 2010. The 2010 Order had concerned the same byways as the 2018 Order, and in like manner to the 2018 Order and subject to similar exceptions, would have prohibited the use of motor vehicles on those byways. TRF's case is that the Inspector's conclusions against the 2010 Order were material to the decision to make the 2018 Order, but were entirely ignored in the statement of reasons.

30. It is correct that the Statement of Reasons for the 2018 Order does not address the Inspector's conclusions. But I do not consider that this amounted to any failure on the part of the Council to take account of material considerations when deciding to make the 2018 Order. The first point to note is that the material provisions of the 1984 Act do not set out any highly prescriptive framework for traffic authorities in terms of considerations that are either relevant or irrelevant. Any exercise of the section 9 power must serve one or more of the purposes stated at section 1(1) of the 1984 Act, and must entail one or more of the measures listed in section 2 of the Act. Yet this still leaves significant latitude for any traffic authority to decide for itself which matters are relevant considerations.

31. The second point to note is that the 2018 Order was not some sort of re-run of the proposed 2010 Order. The proposed 2010 Order was put forward on the basis that prohibiting use of the byways by motor vehicles was expedient to preserve or improve the amenities of the area around the byways (i.e., only for the purpose specified at section 1(1)(f) of the 1984 Act). The Inspector's conclusions were directed to that issue. He assessed that the proposed prohibition would result in a substantial loss of amenity to trail riders, and that that loss of amenity would not be outweighed by benefits arising from prevention of damage to archaeological sites, enhanced wildlife conservation, and improvement to the visual amenity of the area. Based on those assessments he concluded that it would not – for section 1(1) purposes – be expedient to make the proposed order. The Council took account of the Inspector's report, as required by regulation 13 of the 1996 Regulations, and decided not to go ahead with the proposed order.

32. The 2018 Order was made by reference to various of the matters referred to in section 1(1) of the 1984 Act – each of sub-paragraphs (a), (b), (d) and (f) is referred to. The reference to sub-paragraph (f) provides the premise for TRF's contention that the Inspector's conclusions in 2011 might be of some relevance to whether or not the 2018 Order should be made. The issue concerns the materiality of that reference to

sub-paragraph (f), and the extent to which the reasons that underlay the proposed 2010 Order were material to the decision to make the 2018 Order.

33. A Statement of Reasons does not need to be an elaborate document; in most instances it will be better if it is not. A Statement of Reasons ought to contain a direct and clear explanation of the order and why it is being made. The Statement of Reasons in this case is a far from perfect document. After the first handful of paragraphs, the contents suffer from a distinct lack of logical flow; and such explanations as are contained in the document are in places difficult to follow. Overall, the document reads more like a collection of facts and thoughts than a logical explanation. It would have been much better had the Statement of Reasons set out the explanation in a narrative that was clear, simple, and to the point.

34. Be that as it may, it seems to me the Statement of Reasons falls into three parts: paragraphs 1 – 5 provide a basic background; paragraphs 6 – 11 explain reasons for restricting use of the byways and would not be out of place had the order been a permanent order under section 1 of the 1984 Act; paragraphs 12 – 13 set out the specific reasons for an experimental order. So far as concerns the reasons for restricting use of the byways (i.e., the second part of the Statement), the focus is on the Council's concern that there may have been an increase in use of the byways by motorised traffic; its belief that this has caused damage to the byways and causes difficulties to pedestrians, cyclists and horse riders ("other users" for sake of convenience); its belief that an increased number of parked vehicles might cause danger to other users; its belief that restrictions might reduce incidents of anti-social behaviour and promote use of the byways by other users, and a safer and a more pleasant environment for those other users. See specifically, paragraph 9 of the Statement.

35. Although paragraph 2 of the Statement of Reasons does assert reliance on the reason at section 1(1)(f) as a reason for making the order, it is clear to me that any issue concerning *"preserving or improving the amenities of the area through which the road runs"* was very much a subsidiary consideration. The predominant reasons

related to preventing damage to the byways and promoting safety for other users. In these circumstances, the Council did not act unlawfully by failing to address the reasoning in the Inspector's 2011 report. The focus of the 2018 Order was very different to the focus of the proposed 2010 Order. In the context of the 2018 Order, the Inspector's assessments and conclusion on the earlier proposal were marginal matters.

36. Ground 3 of the challenge is that the 2018 Order was not made for the purposes of a genuine experiment. In his judgment in *Trail Riders Fellowship v Peak District National Park Authority* [2012] EWHC 3359 (Admin), Ouseley J stated that an experiment should underlie any order made under section 9 of the 1984 Act and should be identified in the Statement of Reasons. The traffic authority must also have a rational basis for the experiment; for example, that the section 9 order is capable of producing information that would assist the authority in any decision to make a permanent order (whether in the form of the section 9 order or some variation of it).

37. In the present case the focus is paragraph 12 of the Statement of Reasons, which is as follows:

> " The changes are initially being proposed on an experimental basis to determine the impact of the changes on the byways and

> the non-motorised traffic using the byways should they be introduced on a permanent basis. As such the implementation on an experimental basis will afford the council flexibility if considered appropriate to modify or suspend the Order as a result of any objections received during consultation, and provide an opportunity to monitor the effects of the scheme before consideration is given after the trial period as to whether or not the provisions of this Experimental Order should be made permanent."

The premises for the experiment were the statement at paragraph 7 of the Statement of Reasons of an "apparent increase" in motorised traffic using the byways since 2013 (when the A344 was closed to motor vehicles between Stonehenge Bottom and Airman's Corner), and the Council's acceptance that any order restricting use of the byways would need to contain exceptions for agricultural vehicles, and local authority and emergency services vehicles (see paragraph 2 of the 2018 Order, and paragraph 11 of the Statement of Reasons).

38. The TRF contends (a) that there is no sufficient explanation of the experiment; and (b) that to the extent that the experiment is described in the Statement of Reasons, it is an experiment that makes little sense. This latter submission is made by reference to paragraph 11 of the Statement of Reasons which contains the following:

> "It is accepted that use by agricultural use has caused some damage to sections of the byways south of the A303. Agricultural vehicles will be subject to an exception to the order but landowners and occupiers have indicated that they would find alternative routes to access their land."

39. I accept without hesitation that the experiment could have been explained much more clearly. As it is, the reader is left to piece matters together for himself. But there is no requirement for elaborate explanation, and what there is in the Council's Statement of Reasons is enough. It is apparent from paragraph 12 of the Statement of Reasons, read together with paragraphs 7 – 9 that the Council was concerned to establish both the cause of damage to the byways, and whether if there were less motorised traffic on the byways, other users would use them more.

40. Mr. Khansari's statement for these proceedings contains a lot of additional information concerning traffic counts, and some information about safety. I have not relied on this to reach my conclusion. The information about traffic counts now contained in Mr Khansari's witness statement is, poorly explained, not readily intelligible, and was not, apparently, available to the Council until after the 2018 Order was made.

41. The one part of Mr. Khansari's statement that has assisted for this purpose is the explanation that following the 2018 summer solstice repair work was carried out on the byways. This gave the Council a yardstick against which to assess such damage as may arise during the lifetime of the 2018 Order. The TRF objected to any reliance on Mr. Khansari's statement, other than for the purposes of the consultation challenge, on the basis that it would be contrary to the principle in *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302. I disagree, at least to the extent that Mr. Khansari's evidence explains matters of context, such as the repair work (which is the only matter pertinent for present purposes). I accept that a comprehensive explanation of the experiment in the Statement of Reasons would have mentioned the repair work

as that would help the reader understand one starting point for the experiment, and how on that matter the Council would go about assessing the experiment's results. Yet it is not contrary to the principle in *ex parte Ermakov* for these matters to be addressed in a witness statement. The evidence makes the position clearer, but does not seek to re-write the Council's actions.

42. Despite TRF's submission to the contrary I see nothing impermissible in the Council's starting point (at paragraph 7 of the Statement of Reasons) that there had been an "apparent" increase in the number of motorised vehicles using the byways. Whether the increase in this was apparent or real would have little bearing either on the fact that to date the byways had suffered damage, or on whether the restrictions in the 2018 Order might reduce future damage to the byways.

43. TRF's further submission was by reference to paragraph 11 of the Statement of Reasons. It was to the effect that if land owners and occupiers south of the A303 intended to access their land other than via the byways, that would affect the greater part of the byways subject to the provisions of the 2018 Order, and in large part could render the experiment redundant so far as it was designed to assess the extent to which the restrictions in the 2018 Order would limit damage to the byways. There is force in this submission. However, assessing deterioration of the byways was not the sole purpose of the experiment. The experiment also sought to assess the extent to which use of the byways by other users would increase if the number of motorised vehicles using the byways was reduced. To this extent, even assuming that paragraph 11 of the Statement of Reasons indicates that quite apart from the experimental restriction, there might be a material reduction in the number of agricultural vehicles

using some of the byways, the substance of the experiment would not be hollowed out.

44. For all these reasons, my conclusion is that a rational basis for the experiment was described in the Statement of Reasons. The challenge on ground 3 therefore fails.

D. Disposal

45. The TRF's application under paragraph 35 of Schedule 9 to the 1984 Act succeeds on ground 1, for the reasons above at paragraphs 17 – 24. The consequence is that the 2018 Order must be quashed.

46. Subject to compliance with the requirements of the 1984 Act and the 1996 Regulations, it will be open to the Council to remake an order to the effect of the 2018 Order. Should the Council take that course it would be prudent to have particular care over the content and formulation of the Statement of Reasons, and the description within that Statement of the experiment that is the reason for the section 9 order.