

## The Ombudsman's provisional view:

1. is that I should investigate Mrs Z's complaint because:
  - a) It would be reasonable for Mrs Z to use the process the law provides to challenge the status of the BOAT. The Ombudsman has no power to determine its status. **The LGO is able to say that the Council:**
    - Made a mistake in marking Cradle Lane as a BOAT on the definitive map.
    - That it has taken too long to repair Cradle Lane
    - That it has made too many TRO's over too long a time because the closure of Cradle Lane for three and a half years is well in excess of the six months permitted under sec.14 RTA 1984.
    - That the Council have not been fair in communicating with me as an adjacent landowner.
    - Changed the decision of the Executive Member to apply a TRO excluding all motor vehicles.
    - Did not follow its consultative procedure properly
    - Made a decision before any full consultation
    - Did not allow objections to the Order to itself.
  - b) it would have been reasonable for Mrs Z to use or to have used her rights of appeal to the High Court to challenge the temporary and recent permanent TROs since 2008. Arguments about the validity of the TRO including the way it was advertised are matters for the court to determine. Mrs Z's complaints are outside the Ombudsman's jurisdiction. **The way it was advertised broke the Council's own rules and laws and failed to meet expected standards of service.**
  - c) The Ombudsman would not usually investigate a complaint about the way a complaint has been handled where she is not investigating the main issues of complaint as the complaint process alone rarely gives rise to significant injustice. **Above it says the matter should be investigated rather than should not! Printing error, typo?**

How can you decide not to investigate a complaint if the complaint has not been addressed in the first instance by the Council?

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## The complaint

2. Mrs Z complained that Hampshire County Council:
  - a) Incorrectly registered a byway open to all traffic (BOAT) on the definitive map in the 1980's prior to which it was differently recorded.
  - b) **Made too many TRO's without application to or consent of the Secretary of State. It has therefore broken the law.**
  - c) failed to make permanent a Traffic Regulation Order restricting all traffic on a byway open to all traffic (BOAT) since 2008;
  - d) failed to consult neighbouring landowners and the correct parish council when it proposed to open the BOAT to motorcycles in March 2012.

## The Ombudsman's role and powers

3. The Ombudsman considers complaints of service failure and maladministration causing injustice. The Ombudsman must consider whether the council has acted reasonably in accordance with the law, its own policies and generally accepted standards of local administration. Where a council has acted with maladministration, the Ombudsman considers whether injustice has arisen, and any appropriate remedy for that injustice.
4. The Local Government Act 1974 as amended says that normally the Ombudsman may not investigate a complaint unless it was made to her, within 12 months from the day when the complainant first knew something had happened that affected her. This restriction appears to apply to the TRO's made between 2008 and 2011. I do not see any grounds which would lead the Ombudsman to investigate those early TRO's now. **The TRO's have been continuous the last of which finished on 22<sup>nd</sup> May 2012, last week. They are all part of a single process which has not been agreed by the Secretary of State as required by law.** Mrs Z did not suffer problems with motor cycles

using the path. **Absolutely wrong.** Mrs Z suffered for forty years from lack of maintenance of the path and the impact of vehicle use on the path which eventually culminated in it having to be closed to all traffic in 2008.

5. The Local Government Act 1974 says that the Ombudsman shall not investigate a complaint if a remedy exists or existed by way of proceedings in a court of law unless she is satisfied that it is or was not reasonable to expect a complainant to use that right and to take or have taken those proceedings. **It should not be considered reasonable to have to take proceedings against a council's refusal to meet its Statutory Duties.** A right of appeal to the high court arose for each of the temporary TRO's and the recently advertised permanent TRO. **Surely there should be a period for objection to the LA which does not involve legal proceedings?** I consider it would have been reasonable for Mrs Z to use her right to protect her interests as a neighbouring landowner. **That is just what I am doing in appealing to you to help me invoke that right. How can I do that if the Council take no notice, do not respond to my complaints and even threaten to invoke their troublesome resident policy?**

## How I considered this complaint

6. I have considered the complaint and the documents provided by Mrs Z.

## What I found

### What happened

7. Mrs Z recently sought records about the BOAT from various sources. She considers she has established evidence to show that the BOAT was not used by motor vehicles for the required period and should have been registered as a bridleway. The Council told her to apply for the map to be modified. **The points here are that the Executive Member in 2008 had agreed a permanent TRO to ban all motor vehicles. The Council prevaricated so long and then decided to re visit that consultation. It appears to me that if they wait long enough and then act quickly they can achieve their desired result rather than the wishes of local residents.**
8. In 2008 the Council proposed to close the BOAT completely and members agreed. Mrs Z received a telephone call to ask her consent for three months at the time. **Not correct. The request was for three months only.** The Council issued a number of temporary Traffic Regulation Orders (TROs) but did not make a permanent order. Mrs Z says she was not made aware of the temporary TRO's that followed. **Mrs Z emailed the CEO of East Hampshire DC saying that HCC had just applied the third TRO which she understood needed the consent of the Secretary of State and that they needed to close the road or repair it. I made this request as a sitting Cllr. The CEO asked his Highways Officer to make enquiries. This she did over a period of time but was never able to get an answer. You have been able to see with my complaints referred to you how this could be.**
- Mrs Z says that is contrary to the law as a permanent TRO should have been made after six months.
9. She also alleges that the path may be incorrectly designated as a BOAT. Mrs Z recently sought records about the BOAT from various sources. She considers she has established evidence to show that the BOAT was not used by motor vehicles for the required period and should have been registered as a bridleway. The Council told her to apply for the map to be modified. Mrs Z says the Council has a significant backlog for applications.
10. She sought an update regarding TRO's. In October 2010 significant repairs were carried out to the surface which had previously deteriorated. After repairs the path was opened to walkers and cyclists. In May 2011 the path was reopened for use as a bridleway.
11. In January 2012 a meeting of interested parties and the Council was held regarding the future of the Lane. It was acknowledged significant repairs had been carried out over the last 20 years. The Council had proposed the closure of the Lane to all motor vehicles, advertised this, and received objections. A significant number were objecting motorcyclists. The Council's countryside officer outlined the options for the Council:
- a) Do nothing, which the Council did not favour given its earlier expenditure.
  - b) Restrict all motor vehicles, which the Council considered too restrictive as there was a lack of evidence to restrict motorcycle use. **I see they have even managed to confuse you. This was not an option given.**

Dear All

*Further to my email dated 25th January (below), I would like to clarify for those of you who have asked, that Officers propose to pursue the course of action outlined in Option 3 below, but the formal decision in this matter will still be made by the Executive Member, hopefully in March. The current temporary closure is expected to remain in place until the end of May 2012, dependant upon the formal decision mentioned above.*

Many Thanks

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12.

Dear All

*I am writing to you further to your response to HCCs intention to impose a Traffic Regulation Order against motor vehicles on Cradle Lane, advertised during October last year. We received a very high level of response to this formal consultation with 184 objections to the proposal and 58 expressions of support. Owing to the very strong feelings on both sides of this debate, HCC has considered all the points raised very carefully, weighing them against the Council's TRO policy and the provisions of section 1 of the Road Traffic Regulation Act 1984.*

*There is clearly a lot of concern from non-motorised users of this route about the impact, in terms of both surface damage and noise, from motor vehicles using this lane. However, the fact remains that this route is recorded as a Byway Open to All Traffic and motorised users have a right to use such routes, unless restricted by TRO. TROs can only be imposed where other measures to manage the problems that exist have proved ineffective and there is sufficient justification to apply a restriction under both Council's TRO policy and the provisions of section 1 of the Road Traffic Regulation Act 1984.*

*It is clear that excessive and inappropriate use by four wheel drive vehicles has caused significant damage to this route in the past and, given the narrowness of the route and the fragile clay subgrade, it appears to be generally accepted that the use of four wheel drive vehicles on this route is unsustainable. However, there has been much debate about whether a responsibly ridden motorcycle actually would do any significant damage to the surface of this lane in light of the high standard of the recent repairs; no evidence has been presented to suggest that they would.*

*A meeting was held in January 2012 involving the local County Councillors, representatives of Headley and Kingsley Parish Council and representatives of the motorised users that would be affected by the proposed TRO. At the meeting three options were considered;*

**1. Reopen the lane to all motorised traffic.**

*There has been a significant amount of local objection to this option from non-motorised users of the route and local residents. Officers are of the view that the level and nature of motorised use previously seen on this lane is not sustainable and would result in a reoccurrence of the damage previously seen. It is unlikely that funds could be made available to carry out further repairs in the foreseeable future.*

**2. Impose a permanent restriction against motor vehicles with three or more wheels to protect the surface of the lane from further damage, and a seasonal restriction on two wheel motorcycles to preserve the character of the lane, as proposed.** A very significant level of objection was received to this proposal from motorised users. Whilst it appears to be generally accepted that use of this route by four-wheel-drive vehicles is inappropriate owing to the narrowness and character of the lane, Officers are of the view that the restriction of motorcycles does not adequately comply with the Council's TRO policy. In particular, there is currently no evidence to suggest that motorcycles will have any significant impact on the surface of the lane following the extensive repairs that have been made, and there is a possibility that less restrictive options to manage motorcycle usage might be trialled.

**3. Impose a permanent restriction against motor vehicles with three or more wheels to protect the surface of the lane from further damage, but impose no formal restriction on two wheel motorcycles. Set up a local team to monitor the impact of motorcycle usage of the route, and work with motorcycle user groups to promote responsible behaviour.** Officers are of the view that this option complies with the Council's TRO policy in that it represents the least-restrictive solution that will effectively resolve the issue of significant damage being caused to the surface of this route. This TRO will be combined with a robust system of monitoring the condition of the surface of this lane in consultation with the parish councils and the relevant user groups to accurately assess the impact of the various user groups.

At the meeting it was agreed that Option 3 (above) would be an acceptable solution to all those present.

In light of the above, it is now proposed to seek a permanent TRO against motor vehicles with three or more wheels to prevent further damage to the newly-repaired surface. A robust system of monitoring the condition of the lane will be put in place to accurately assess the impact of the other user groups on this lane to inform future reviews of the TRO.

Many Thanks

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It was also not the case that there was insufficient evidence to exclude motor cycles as I have shown you. This then is wrong information.

c) Impose a permanent TRO on 4x4 vehicles but reopen the BOAT to motorcycles and monitor the use, and review for damage or irresponsible use.

13. It was agreed at the meeting **which was not attended by the local residents because they had not been notified**, that the third option would be implemented, with motorcycle access from May 2012. Mrs Z is a neighbouring landowner and could be affected if the path is reopened. She also assists the British Horse Society.

14. In March 2012 the Council advertised its intention to make a permanent TRO hat restricted all motor vehicles except motorcycles with effect from 6 April 2012. It emailed this notice to Mrs Z.

15. Mrs Z says the notice is defective as it limits objections to a High Court appeal and does not invite objections in writing to the Council. She says the law requires notice to her as a neighbouring landowner and the correct Parish Council both of which have not occurred. **Why have you not addressed this issue? Is it fair or reasonable?**

16. On 21 March Mrs Z was told by the departmental director that if she continued to complain about the Lane the Council would consider implementing its persistent complainant policy. On 4 April she was told the Council would reply to her complaint shortly but she came to the Ombudsman as it had not been answered in three months.

#### **What should have happened**

17. The Road Traffic Regulation Act 1984 sections 14 and 15, as amended, set out the Council's powers for making TRO's. It can make such orders to restrict or prohibit temporarily use of a road by vehicles of any class to such extent as it may consider necessary.

For your convenience I have copied sec 15 of the RTRA 1984:

[F115 Duration of orders and notices under s.14..

(1)Subject to subsections (2), (3) and (5) below, an order under section 14 of this Act shall not continue in force— .

(a)if it is in respect of a footpath, bridleway, cycle track or byway open to all traffic, for more than six months; and .

(b)in any other case, for more than eighteen months, .

from the date on which it comes into force.

(2)The time-limit of eighteen months in subsection (1) above shall not apply to an order made for the reason mentioned in section 14(1)(a) of this Act if the authority making it are satisfied, and it is stated in the order that they are satisfied, that the execution of the works in question will take longer; but in any such case the authority shall revoke the order as soon as the works are completed. .

(3)Where an order subject to the time-limit of eighteen months in subsection (1) above (in this subsection referred to as “the temporary order”) has not ceased to be in force and the Secretary of State is satisfied that— .

(a)an order which the authority that made the temporary order proposes to make under any other provision of this Act has the sole effect of reproducing the provisions of the temporary order and continuing them in force; and .

(b)in consequence of the procedure required to be followed in connection with the making of the proposed order that authority would be unable to make it so that it would come into operation before the temporary order ceases to be in force, .

the Secretary of State may, subject to subsection (4) below, from time to time direct that the temporary order shall continue in force for a further period not exceeding six months from the date on which it would otherwise cease to be in force.

(4)Where the Secretary of State is not himself the authority that made the temporary order he shall not give a direction under subsection (3) above except at the request of that authority. .

(5)The Secretary of State may, at the request of an authority that has made an order subject to the time-limit of six months in subsection (1) above, from time to time direct that the order shall continue in force for a further period from the date on which it would otherwise cease to be in force. .

(6)Where the Secretary of State refuses a request under subsection (5) above in respect of an order no further order to which that subsection applies shall be made in respect of any length of road to which the previous order related unless the Secretary of State has consented to the making of the further order or at least three months have expired since the date on which the previous order ceased to be in force. .

(7)A notice under section 14 of this Act shall not continue in force— .

(a)if issued for the reason mentioned in paragraph (a) or the purpose mentioned in paragraph (c) of subsection (1) of that section, for more than five days from the date of the notice; .

(b)if issued for the reason mentioned in paragraph (b) of that subsection, for more than twenty-one days from that date; .

but the Secretary of State may by regulations alter the number of days for the time being specified in this subsection.

(8)Provided that no restriction or prohibition imposed under section 14 of this Act in respect of any length of road remains in force for more than the period applicable to an order in respect of the road under subsection (1) above (except by virtue of subsection (2), (3) or (5) above and subject to subsection (6) above)— .

(a)a restriction or prohibition imposed by an order under that section may be continued by a further order or further orders under that section; and .

(b)a restriction or prohibition imposed by a notice under that section may be continued— .

(i)by an order under that section; or .

(ii)if the notice was issued for the reason mentioned in subsection (1)(b) of that section, by one (but not more than one) further notice under that section..

(9)In the application of this section to England and Wales— .

(a)“footpath” does not include a highway over which the public have a right of way on foot only which is at the side of a public road; .

(b)“cycle track” has the same meaning as in the M1Highways Act 1980; and .

(c)“byway open to all traffic” means a highway over which the public have a right of way for vehicular and all other kinds of traffic but which is used by the public mainly for the purpose for which footpaths and bridleways are used.

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(10) In the application of this section to Scotland “footpath” and “cycle track” have the same meaning as in the M2Roads (Scotland) Act 1984.]

The question remains, did the Secretary of State give permission for all these TRO's if not then the Council have not followed the procedure required of them or the law.

Neither has the correct information been given.

This must be maladministration.

Regulations set out how TRO's must be advertised. These are:

## Objections

8.—(1) Any person may object to the making of an order by the date specified in the notice of proposals or, if later, the end of the period of 21 days beginning with the date on which the order making authority has complied with all the requirements of regulation 7(1) to (3).

The advertised Order has not complied with these requirements, therefore the Council has not followed the required procedure for making objections to an Order. It has not complied with the law.

18. A road used as public path (RUPP) was one of the three types of public right of way (along with footpaths and bridleways) introduced by the National Parks and Access to the Countryside Act 1949. The Countryside Act 1968 required all highway authorities to reclassify RUPPs in their area – occasionally as public footpaths but in practice generally as public bridleways unless public vehicular rights were demonstrated to exist in which case it would become a BOAT.

19. Under rights included in the Wildlife and Countryside Act 1981 a person can apply to amend the Definitive Map if a right of way is wrongly recorded. A person can also apply to the Secretary of State for an order requiring a council to deal with a request to amend the Definitive Map. The Ombudsman normally expects someone to appeal to a government minister if they have a right to do so.

20. I have not considered the content of the notice the Council has published because its validity can be challenged in the High Court. The role of the LGO is to examine my complaint and see if the Council has treated me fairly, followed the rules and law, took too long to do something, broke its promises, made mistakes, gave wrong information etc. The LGO seems to want to pass the buck in saying that I have recourse to other methods. As this will always be the case one has to question whether the LGO's role is actually in the public interest since it is clearly not doing its job.

21. I have not considered the Council's failure to reply to the complaint because Mrs Z has other methods to resolve the main issues of her complaint, as described above. How can you consider a complaint when that complaint has not been addressed by the Council? But I will ask the Council to provide the response it promised to give in April 2012, so that Mrs Z can consider the options open to her.

## Provisional view

22. My provisional view is that I should not investigate Mrs Z's complaint because:

a) It would be reasonable for Mrs Z to use the process the law provides to challenge the status of the BOAT. The Ombudsman has no power to determine its status.

The Council has made a mistake and the time to consider the mistake is when they are considering the use of the way. The Council have made it clear that despite their Statutory Duty of one year to consider DMMO's they are in fact taking six or more years. How can that be fair or just?

b) it would have been reasonable for Mrs Z to use or to have used her rights of appeal to the High Court to challenge the temporary and recent permanent TROs since 2008. Arguments about the validity of the TRO including the way it was advertised are matters for the court to determine. Mrs Z's complaints are outside the Ombudsman's jurisdiction. The procedure does not follow the rule of law or meet the expected standards of service. The Council have treated me unfairly in not responding to my questions with regard to the TRO's even tho' submitted through the CEO of EHDC when I was a Councillor. These are the issues that the LGO should be addressing.

The Ombudsman would not usually investigate a complaint about the way a complaint has been handled where she is not investigating the main issues of complaint as the complaint process alone rarely gives rise to significant injustice.

The broken promises, wrong information, unlawful procedures, standard of service, prevarication and delay, mistakes are all written down as matters for investigation so why are they not being investigated?

"The Ombudsman must consider whether the council has acted reasonably in accordance with the law, its own policies and generally accepted standards of local administration"

Why are you not doing your job?

How can the ordinary man maintain his rights in law if he is not supported by it and it is not enforced?