

## EXMOOR LOCAL ACCESS FORUM 16 NOVEMBER 2005

### Changes to the Path Network and the Local Access Forum

#### Report by National Park Authority Solicitor and Monitoring Officer

#### Introduction:

1. At the Forum's meeting on 7 September 2005 a paper by Stephen Crossman was considered. (copy attached for ease of reference). The Forum asked me to consider Stephen's proposals and report to this meeting.
2. I have discussed the matter with the rights of way officers of both Somerset and Devon County Councils. Their comments appear later in this paper.

#### Recommendation

3. (1) The working practice should be that the three authorities concerned with rights of way matters – Devon and Somerset County Councils and the National Park Authority – would consult the Forum for advice in appropriate cases. Advice would not be sought in routine cases or for modification orders under the 1981 Act.  
(2) The Forum would continue to be informed of current rights of way issues in the National Park including proposals for rights of way orders.  
(3) It would be for future discussion as to how the Forum might tender advice and whether the Forum as a whole would be involved or a representative few.
4. The main order making powers are as follows:-
  - a. s.118 Highway Act, 1980 enables a highway authority or the Park Authority by order to extinguish the public right of way over a path where "it is expedient that the path or way should be stopped up on the ground that it is not needed for public use". Unopposed orders can be confirmed as such. Opposed orders must be referred to the Secretary of State and can lead to a public inquiry. Alternatively they may be settled by written representations.  
*(Note: A similar power which enables a Magistrates Court to authorise the stopping up of a highway which has become unnecessary or can be diverted to be made nearer or more commodious to the public is available under s.116 of the 1980 Act but is little used).*
  - b. s.119 Highways Act, 1980 enables orders to be made by the Highway Authority or the Park Authority to divert a path where the interests of the owner, lessee or occupier of the land crossed by the path can show that in their interest "it is expedient that the line of the path or way.....should be diverted". Diversion orders may also be made under this provision where the interests of the public are the main consideration. Again unopposed orders may be confirmed as such. Opposed orders must be referred to the Secretary of State and can lead to a public inquiry.
  - c. Modification orders under s.53 of the Wildlife and Countryside Act, 1981. These orders are made by the County Councils. Indeed they have a duty to make such orders in consequence of certain "events" which occurred before the Act's commencement date. Some of these orders are procedural in that they simply give effect to an earlier factual happening. Others could lead to a public inquiry, for example an order the effect of which is to add a new right of way which has come into existence by long usage or an order, say, to upgrade a footpath to a bridleway following the receipt of evidence that the higher right now exists. As for earlier

orders unopposed ones can be confirmed as such but opposed ones must be referred to the Secretary of State and usually lead to a public inquiry.

.../Of particular note

Of particular note is the right given to any person to apply to the appropriate County Council for an order to be made under s.53 (2) in consequence of “events” occurring and the right of that person, if the council is not prepared to promote the order sought, to petition the Secretary of State who may then direct the Council to make the order sought.

5. There are other lesser used provisions enabling the extinguishment or diversion of highways to occur e.g. ss.118A and 119A of the 1980 Act – the stopping up of footpaths and bridleways crossing railways and the diversion of the same; s.257 Town and Country Planning Act, 1980 dealing with orders by local planning authorities to stop up or divert any footpath or bridleway where it is necessary to do so to enable development to take place. S.25 of the 1980 Act enables new paths to be created by way of agreement with the landowner or compulsorily by way of an order under s.26. This power is seldom used. Finally, the Authority sometimes makes agreements with landowners to create “permissive paths”.

### **Procedural requirements for orders**

6. For Highways Act orders schedule 6 to the 1980 Act contains detailed procedures for the making, confirmation validity and date of operation of the relevant order. Other Regulations prescribe procedures for the form of the order and its making.

### **Preliminary consultations**

7. The procedural and other requirements outlined in para.6 above only come into play when a decision has been made to proceed with the order. Prior to such a decision informal consultations are carried out with those affected by the intended order. This would include the landowner and/or occupier of the land over which the path runs, the local parish and district council, local elected members and any association concerned with rights of way matters e.g. the Ramblers. Where the proposed order raises objections a site meeting is held with appropriate persons. Some objections might be accommodated for example by altering the line of the intended diversion. Other objections may be insurmountable and a decision has to be made either to press on in the face of the objections or to abandon the proposal. If the order proceeded, the likely outcome would be a public inquiry held by an Inspector appointed by the Secretary of State. Where, however, initial consultations have revealed no opposition to the proposed order, an order would be promoted under the delegated authority of an appropriate officer.

### **The functions of the Local Access Forum**

8. (a) As members know the authorising power for the Forum is s.94 of the Countryside and Rights of Way Act, 2000. For a National Park area the appointing Authority is the National Park Authority. The Forum is to be “an advisory body”. The advisory functions are set out in s.94(4). The Forum is to advise:
  - (i) The appointing authority (i.e. the National Park Authority).
  - (ii) Any body exercising functions under Part 1 (rights of access).
  - (iii) If the appointing authority is a National Park Authority, the local highway authority for any part of that area (i.e. both Somerset and Devon County Council).
  - (iv) Such other bodies as may be prescribed:-

“as to the improvement of public access to land in that area for the purposes of open air recreation and the enjoyment of the area, and as to such other matters as may be prescribed”.

.../(b) The National Park Authority

(b) The National Park Authority and the two County Councils are required to have regard “to any relevant advice given to them by a local access forum” in the carrying out of their functions. (s.94 (5)).

(c) The Forum is also required to be consulted by both County Councils in the preparation or review of a rights of way improvement plan (ss.60 and 61 of CROW).

(d) The Forum has no specific function in relation to individual rights of way orders apart from its general functions under s.94 (4).

### **The views of Somerset and Devon County Councils**

9. I have consulted the Rights of Way officers of both County Councils and provided them with a copy of agenda item 8 (the paper prepared by Stephen Crossman for the Forums last meeting on 7 September).

I extract below the comments received:

#### (a) Somerset County Council

“It would be straightforward to add the ELAF to our informal consultation list on the basis that they would be expressing a view on a particular proposal that may or may not be accepted by the Exmoor National Park Authority or the County Council when deciding whether or not to take a proposal forward. I agree with you that a sub-group would need to be formed to consider these proposals in a timely fashion and where necessary to attend site visits. It would not be possible to delay the process until the next meeting of the ELAF, as that would add a further unacceptable delay to an already lengthy process.

I do not consider that it would be practical or appropriate for the ELAF to become involved at a later stage in the process, as suggested by Mr Crossman. The CROW Act is quite specific as to the function of a local access forum in that it is to offer advice to the appointing authority as to the improvement of public access to land of open-air recreation and enjoyment. When considering applications for diversion orders the local authority must be satisfied that the diversion is in the interest of the owner or occupier of the land and whether it is expedient to confirm the order having taken into account the interests of the public and the impact that the proposal will have on the land. The “improvement of public access” will not necessarily feature in this process and the local access forum could find itself in conflict with its primary function, for example when considering applications for the extinguishment of public rights. I do not have a problem with the forum being involved at the inaugural consultation stage. However, any further involvement at a later stage should be at the discretion of the Exmoor National Park Authority or the County Council”.

#### (b) Devon County Council

“Changes fall broadly into two categories: the Definitive Map review which involves the making of Modification Orders; and diversion or extinguishment of existing routes and creation of new routes through the use of Public Path Orders. The criteria for the making of these orders are fundamentally different and it is probably best if I address the two issues separately.

## Modification Orders

Devon County Council has been engaged in a comprehensive review of the Definitive Map on a parish by parish basis since 1989. To date, the review has been completed in 246 parishes (58%) and a further 52 parishes are currently in hand. The work involves extensive consultations with parish councils, user organisations and landowners etc., and in depth research. All proposals are considered by the County Council's Public Rights of Way Committee who determines if it is appropriate to publish a Modification Order to amend the Definitive Map.

Modification Orders can be made to add a route not previously recorded on the Definitive Map; upgrade a route already shown on the Map (e.g. from a footpath to a bridleway); downgrade a route already shown on the Map; or delete a route from the Map. Such Orders are based solely on the objective assessment of documentary evidence or evidence of use. Issues such as desirability, suitability or need for a route are not factors which can be taken into account when deciding on the merits of a particular claim. It is difficult, therefore, to see any scope for the suggested arbitration role of the LAF in such matters.

## Public Path Orders

Public Path Orders are used to make changes to existing rights of way, i.e. diversion or extinguishment, or to create new routes. The criteria for each type of order are different, but the large majority of Public Path Orders relate to the diversion of existing routes. During the course of a year the County Council will typically deal with about 50 such proposals, many resulting from formal applications by landowners.

These proposals are dealt with under delegated powers by officers providing there are no objections during an informal consultation stage. If objections are made then the Chairman of the Public Rights of Way Committee will visit the site with the local member to decide if a proposal should proceed to the order making stage or be abandoned. These site meetings usually involve the landowner and objectors, and often a compromise can be reached which will allow a proposal to go forward. It will be evident, therefore, that procedures are already in place within Devon to deal with contested proposals and I am concerned that the role suggested by the LAF would only duplicate these procedures.

I am sorry if this appears to be a rather negative response but it is important to keep in mind that the primary role of the LAF is to provide strategic advice to the County Council, rather than to involve itself in what are routine path management matters. A good example of this is the recent consultation which the County Council has undertaken with the Devon Local Access Forum regarding the establishment of a new strategic bridleway in the western part of the county. The views of the LAF will be particularly helpful to the County Council when the matter is considered in detail.”

## **Discussion**

10. (a) The comments of both County Councils speak for themselves and I share the joint view that it is not appropriate for the Forum to become involved in the detailed consideration of objections to statutory orders. It would be more appropriate if the Forum left it to the Authority and the two County Councils to consult it in appropriate cases.

(b) Somerset County Council has no objection to the Forum being involved at the informal consultation stage and indeed most order proposals have been brought before the Forum by Alison

Kent to inform members. It is for officers to decide which orders could usefully be brought before the Forum. It should not be necessary for example to report on routine and uncontentious matters.

(c) The Forum should also know that the outcome of all opposed orders rests on a detailed analysis of the particular order under review – the particular local circumstances, the evidence and any legal considerations. It does not rest, for example, on the preponderance of opinion that a particular order is desirable or otherwise.

.../(d) It will be seen

(d) It will be seen that neither County Council is comfortable with the Forum assuming an “arbitration” type role and arranging meetings with objectors. Thus if the Forum is to have a role in the later stages of the process it must be by invitation of the appropriate County Council to tender advice.

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# APPENDIX

## Exmoor Local Access Forum 7 September 2005

### Changes to the Path Network and the Local Access Forum

1. It is vital that changes can be made to the Rights of Way network, as part of a continuing improvement plan.
2. The existing system works, but the LAF can have a role in making it work better. This role is to become involved in the consultation process.
3. My proposal is that the LAF invite discussion, both for and against a proposed change, and after appropriate consideration declare an opinion either for or against the proposed change.

#### CHANGES TO THE RIGHTS OF WAY NETWORK.

There is a legal principle “Once a highway always a highway”. All public rights of way, including all footpaths and bridleways, are highways, so that once it exists it remains in existence unless and until it is lawfully closed or diverted.

The process for deciding whether and how any Right of Way should be diverted is a public one.

The procedures that have to be followed are designed to ensure that the public are made aware of the change that is proposed, and that anyone who wishes to do so has the opportunity to state their view and to have them taken into account before a final decision is made.

Orders can also be made to create a new footpath or bridleway. This will be a “definitive” path.

A “permitted” path is where a landowner has agreed to a change, for a set period of time, e.g. Pitt Bridge. These are not considered here.

The ability to make changes to the ROW network are going to become increasingly important as pressure from users grows. It is important that we put in place a system that allows change.

#### THE EXISTING SYSTEM

Proposals to change the path network can come from individuals, or from the authority itself.

Other people’s reaction to a proposed change will often depend on how they see their own interests being affected.

ENPA staff, who will informally consult with the various interested parties, deal with initial proposals. If in their opinion the changes have merit, then the formal 6 to 8

week consultation period is triggered. This includes informing a list of statutory consultees.

After this, if there are no objections, then the SCC (or Devon Highways) take forwards the legal process to make the relevant order.

If there are objections the SCC will talk to the objector to try to seek compromise. If no compromise can be achieved then the order may be dropped, or may be referred to the Planning Inspectorate. The Inspector may decide to deal with the issues by written representation, or by holding a public inquiry.

The Inspector will usually take 3 to 6 months to make a decision.

## PROPOSALS FOR LAF INVOLVEMENT

- The LAF should ask the ENPA to inform it if, after the informal consultation but before the formal consultation, there are parties who are likely to make formal objections.
- The LAF should invite these parties to an LAF meeting to discuss the grounds for objection.
- The LAF should consider the issues and either resolve to uphold the objection (and recommend that the ENPA stop work on the diversion), or reject the objection (and recommend that the ENPA go ahead to the formal consultation stage).

These proposals will help the change process because:

If the objector is not satisfied then they can carry on and object “normally”. The LAF is representative of widespread interested groups and as such its opinion carries weight. This continuing objection is likely to be fragile in the eyes of an Inspector.

Support from the LAF will help make the ENPA confident that the changes can be pursued, and will be seen to be in the best public interest.