

- Finance
- Other Chief Officers
- District Councils
- Health Authority
- Police
- Other Bodies/Individuals

FINAL DECISION **YES/NO** *(If 'No' complete Suggested Next Steps)*

SUGGESTED NEXT STEPS :

Details to be specified

- Further consideration by this Committee
- To Council
- To Cabinet
- To an O & S Committee
- To an Area Committee
- Further Consultation

Stratford on Avon Area Committee - 26th July 2006

Vehicles in the Countryside and Part 6 of the Natural Environment and Rural Communities Act 2006

Report of the Strategic Director for Environment and Economy

Recommendation

That the report be noted.

1. Background

- 1.1 As requested at the last Stratford Area Committee, this report outlines the effects of the Natural Environment and Rural Communities Act 2006 on Warwickshire's Public Rights of Way network and in particular, its effect on the use of Mechanically Propelled Vehicles in the countryside.
- 1.2 The use of motor vehicles (or Mechanically Propelled Vehicles (MPVs)) in the countryside, whether they be on public footpaths, public bridleways or non - tarmaced roads, is an emotive subject that produces strong and often conflicting views among user groups and the public. These views range between - 'I've got a right' - to - 'they should be banned'. Those who opposed vehicular use often cite the damage caused, noise and the danger presented to non-motorised users, whilst motor vehicle users argue that walkers and horse riders have access to many miles of recreational highway whilst they are restricted to less than 1% of the available network. Independent research indicates that much of the damage being attributed to 'off-roaders' is actually caused by agricultural vehicles and which would continue even if MPV's were banned.
- 1.3 The Wildlife and Countryside Act 1981 enables any person or body to make an application to the County Council for a Definitive Map Modification Order (DMMO) to record public MPV rights on the Definitive Map and Statement of public rights of way as a Byway Open to All Traffic (BOAT or Byway). Such applications may be based solely on historic documentary evidence or on user evidence; or a combination of both. The legal maxim 'once a highway always a highway' means that if it can be shown that a way was once a public highway that was used by horse and carriage, then those rights still exist today. However, until recently, the law drew no distinction between a horse and carriage and its modern equivalent, the MPV. Consequently, routes may be recognised as byways even if they are unsuitable for MPVs and have not been used for decades. Contrary to popular myth, a public highway is not stopped-up

or 'lost' by non-use or neglect, irrespective of how much time has passed. Additionally, under the Highways Act 1980 section 31, long-term use of a footpath or bridleway 'as of right' by MPVs could give rise to a presumption that the way has been created for such vehicles.

- 1.4 Government has sought to introduce a new distinction between historic routes used by horse drawn vehicles and modern roads for MPVs, through the publication of Part 6 of the Natural Environment and Rural Communities Act 2006 and to severely limit the recognition of further Byways.

2. Natural Environment and Rural Communities Act 2006

- 2.1 On the 30th March 2006, the Natural Environment and Rural Communities Act (NERC) received Royal Assent and is primarily intended to implement key aspects of the Government's Rural Strategy published in July 2004.
- 2.2 The Act comprises ten parts, with parts 1 – 5 dealing with nature conservation (biodiversity, wildlife and Sites of Special Scientific Interest); and the formation of a new independent body known as 'Natural England', which will see the amalgamation of English Nature with certain functions of the Countryside Agency and the Rural Development Service of the Department for Environment, Food and Rural Affairs (Defra). Parts 7–10 address Inland Waterways and various miscellaneous administration matters, whilst Part 6 and the subject of this report, deals with Rights of Way and Mechanically Propelled Vehicles (MPVs).

3. NERC Act 2006, Part 6 Rights of Way and Mechanically Propelled Vehicles

- 3.1 NERC does not affect existing Byways Open to All Traffic (byways) already recorded on the Definitive Map, nor does it affect any Unclassified County Roads (UCRs – D and E Roads) that are already recorded on the List of Streets, where these highways carry vehicular rights. In Warwickshire there is a working presumption that all UCRs, including unsurfaced routes, are vehicular highways unless proven otherwise. Consequently the public may still use MPVs on all existing byways, shown on the Definitive Map and on UCRs recorded on the List of Streets.
- 3.2 Part 6 of NERC took effect on the 2nd May 2006 (the 'commencement' date) and primarily deals with preventing the creation (by long use) and the registration of historic MPV highways that are not currently recorded on either the Definitive Map and Statement (the legal record of public rights of way) or on the List of Streets (the list of public highways maintainable at public expense).
- 3.3 NERC introduces a (retrospective) cut-off date of 20th January 2005. This means any formal byway applications (to amend the Definitive Map and Statement) made before that date are unaffected by NERC i.e. – where a case is substantiated (by evidence) – the route must still be recognised and added to the Definitive Map as a byway. There are currently 33 applications across the County which fall into this category. However, the files on a further 164 potential

byway cases identified by the Trail Riders Fellowship (TRF) have now been closed as no formal applications have been received before the cut-off.

- 3.4 Section 66 of NERC also prevents the future creation of any new MPV rights of way on the basis of long use by such vehicles, where that use is after 2nd May 2006. This means that if MPVs use a public footpath or bridleway, or an entirely un-recorded 'track' after the 2nd May 2006, this use will not create a new MPV route either under Common Law or under Section 31 of the Highways Act 1980.
- 3.5 However, Section 67, sets out a number of exceptions where MPV rights are NOT extinguished. These are:-
- (i) During the five years prior to commencement, the main use of the way by the public is with MPVs.
 - (ii) A route which was created by or constructed expressly for public MPVs.
 - (iii) A route is not shown on the Definitive Map and Statement, but is shown on the List of Streets.
 - (iv) It was created by virtue of use by such vehicles during a period ending before 1st December 1930.
- 3.6 In a small number of cases it is possible that the first or last exceptions might apply. Consequently, each application seeking to record a byway, will need to be investigated in full to establish whether NERC has extinguished any existing MPV rights – or whether those rights survive because of one of the exceptions.
- 3.7 Even where NERC extinguishes unrecorded MPV rights, it does not extinguish any historic right to drive horse-drawn vehicles. Therefore even where applications are made after the cut-off, they must still be processed to see if these historic carriage rights exist and must be recorded as Restricted Byways - this new class of public right of way was established by the Countryside and Rights of Way Act 2000 and may be used by the public on foot, with a horse, in a non-MPV (i.e pedal cycle) and by horse and carriage. This is important because it is not physically possible to construct an effective barrier which can exclude 4 x 4 vehicles and motorbikes, whilst still allowing a horse and carriage to pass.
- 3.8 Applications for Definitive Map Modification Orders are processed by the Definitive Map Team within Countryside Recreation and they investigate and determine applications in accordance with the Council's policy. The recently adopted Countryside Access and Rights of Way Improvement Plan 2006 states that applications will generally be progressed in a geographical sequence, from north to south, currently focussed in the Rugby area. Nothing within NERC creates a need to amend this policy.
- 3.9 NERC also considers the coexistence of public and private vehicular rights if existing public MPV rights are extinguished by NERC, but those rights were reasonably necessary to access land, then a private vehicular right of access is retained. However, the Act does not set out any mechanism to do this, nor how

a landowner might obtain documentation to prove they have an access (perhaps to facilitate a property sale), nor any indication of who is empowered to determine such matters. This may result in landowners looking to the County Council to resolve their private access problems in which the County has no jurisdiction. Defra has indicated that they will be issuing guidance notes on Part 6 of NERC shortly and it is hoped that this significant issue will be clarified. The lead Defra officer on NERC has agreed to visit Countryside Access Project Officers and a meeting is envisaged in the near future.

4. Summary

- 4.1 NERC Part 6 adds to already complex rights of way legislation relating to the acquisition of MPV rights and the mechanisms for recording those rights on the Definitive Map and Statement. As the mechanisms are not adequately defined within the Act, clarity will inevitably be achieved by a series of High Court challenges at considerable expense to any authority which becomes embroiled.
- 4.2 NERC does not reduce the requirement to investigate even those byway applications made after the cut-off, as they may result in Restricted Byways. Indeed, if anything, the investigative burden on the authority appears to be increased.
- 4.3 Over time, NERC will introduce more certainty for those purchasing land, who will not be 'overtaken' by new applications to recognise MPV routes. However, where unrecorded MPV routes are required for land/property access, there appears to be a major question as to how and even - if - the provisions of the Act actually do provide landowners with a documented private vehicular access. If this element of the Act is flawed, there may be repercussions for property access and in turn on values.
- 4.4 It must be stressed that NERC does not give the Council any additional powers to exclude vehicles from the countryside. Where a route is designated a Restricted Byway, the legal requirement to keep it open and available for a horse and carriage, means that there is no effective means of excluding 4 x 4 MPVs. Similarly, in the case of bridleways it is physically impossible to exclude all MPVs, particularly motorbikes. Enforcement will therefore remain a Police matter.

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