Agenda Item No

Derbyshire County Council

Meeting of Cabinet

21 August 2007

Joint Report of the Strategic Director – Environmental Services and the County Secretary

Public Rights of Way: Consultation on Implementation of the Right to Apply for Orders to Extinguish and Divert Public Rights of Way and Associated Rights of Appeal (Environmental Services)

(1) **Purpose of Report** The Department for Environment, Food and Rural Affairs (DEFRA) has published a consultation paper seeking views on a proposal to implement new statutory rights of appeal in connection with applications to divert or extinguish public rights of way. The new rights were introduced by the Countryside and Rights of Way Act (CROW) 2000 and were in recognition of the difficulties that land managers can encounter in persuading authorities to use their discretionary order-making powers. A response is required by 31 August 2007.

(2) Information and Analysis

Background

The right to apply would enable owners, lessees and occupiers of land used for agriculture, forestry or for the breeding or keeping of horses, and school proprietors, to apply to a local authority (or National Park Authority) for a public path or special order to permanently extinguish or divert a public right of way.

The Proposal

The rights to appeal would enable applicants to appeal to the Secretary of State at two stages in the decision-making process: firstly, if a local authority refuses to make the order applied for, and secondly where (after having made an order) the authority refuses to confirm it or to submit it to the Secretary of State. Making an appeal will ensure that the applicant's reasons, and any objections, are considered at a public inquiry, hearing or through an exchange of written representations.

The new provisions contain two other significant features - the level of charges would be prescribed by the Secretary of State in the regulations, and if

authorities are slow to deal with an application or an order, the Secretary of State could be asked to direct the authority to deal with it within a specified time.

The new rights provide no guarantee that applicants would be able to obtain an order. However, an order should usually be forthcoming provided all the relevant statutory criteria and requirements are met (including those relating, as appropriate, to the convenience and enjoyment of the public, payment of charges and agreement to defray or contribute towards certain costs and expenses).

The consultation paper seeks views on the proposed approach to implementing the new rights through the making of regulations, including the level of prescribed charges to be paid by applicants.

Scope of the New Rights

The new rights would enable applicants to:-

- **apply to an authority**, for an order under the Highways Act 1980 to extinguish or divert certain rights of way which cross their land;
- **ask the Secretary of State** to direct the authority to (i) determine an application and (ii) to decide what action to take on an order within a specified period; and
- **appeal to the Secretary of State** if a local authority refuses (i) to make an order, (ii) to confirm an unopposed order, or (iii) to submit an opposed order to the Secretary of State for determination.

The primary legislation limits the new rights to:-

- **owners, lessees and occupiers** of land used for agriculture, forestry or for the breeding or keeping of horses, in respect of public path extinguishment orders and public path diversion orders made under Sections 118 and 119 of the Highways Act 1980; and
- **proprietors of schools**, in respect of special extinguishment orders and special diversion orders made under sections 118B and 119B of the Highways Act 1980;
- **orders under the Highways Act 1980** (i.e. not orders under the Town and Country Planning Act 1990).

This new approach to making public path orders will give authorities less discretion over whether to accept applications. Hitherto, authorities have been able to refuse an application on the grounds that it is contrary to policy or the proposal is unacceptable. Local authority discretion may still be applied once an application has been received but the only criteria which may be applied are those laid down in the Act. Where an authority refuses to make an order, the applicant could appeal to the Secretary of State (SoS). The SoS would then draft the order without considering (at this stage) whether an order would

be expedient. The draft order will then be publicised and any objections will be considered through an exchange of written representations, a hearing or a public inquiry.

An authority cannot confirm an unopposed order, and the Secretary of State cannot make/confirm an order, unless all the criteria in sections 118, 118B, 119 and 119B are met, such as (where appropriate): whether it would be expedient for the order to be made/confirmed having regard to public convenience and enjoyment, to any material provisions of the Rights of Way Improvement Plan; and subject to any required agreement to defray or contribute towards certain costs and expenses. The statutory criteria that apply to the making or confirmation of orders would not be changed by the rights to apply and appeal.

The new rights provide no guarantee that applicants would be able to obtain an order, but will ensure that their reasons for wanting an order (and any objections made) are properly considered. An order should usually be forthcoming provided all the relevant statutory criteria and requirements are met.

Section 118(5) and paragraph 3(2) of Schedule 6 allow for extinguishment orders to be considered concurrently with creation and diversion orders. Although there will be no right to apply for creation orders, they could continue to be considered concurrently where an authority agrees to make such an order, or the Secretary of State agrees to draft such an order (after receiving an appeal in relation to an extinguishment order).

A summary of the main changes and details about the manner in which applications should be made are attached as Appendix A.

The consultation document contains a set of 35 questions to which DEFRA is seeking the views of stakeholders. A response to the questions is attached as Appendix B to this report.

Derbyshire County Council's View on the Proposed Regulations

The new regulations will add an additional tier of bureaucracy to a process that, with a strategic approach, can still be managed by a local authority.

The current legislation allows freedom for negotiation and whilst some authorities may refuse to make orders this should be a considered approach rather than a simple dismissal. A simple solution would be to remind local authorities of their responsibility to operate in a fair and open way in which case this legislation would be unnecessary. The production of policy which works with the landowning community and stakeholders within the current legislative framework would serve to resolve what is essentially a local issue.

Furthermore, the strengthening of the role of the Rights of Way Improvement Plan in the development and management of the network should reduce the chances of applications being refused. These issues could quite easily be monitored by central Government, the local government ombudsman etc.

If an applicant felt as though he/she has been unfairly treated then there should be an opportunity to address their concern through a local complaints procedure.

There are a number of significant problems that may arise -

- There is a risk of local authorities being put under pressure in a disproportionate way by being obliged to deal with public path orders that fall under this new regulation and therefore equally deserving cases may have to be delayed.
- The timeframe for determining an application is very short. This could lead to orders failing to be determined within the timeframe owing to a lack of personnel available to process an application.
- Because the way in which the legislation relating to public path orders is drafted the consequence of a delay at local authority level results in an order being made automatically thereby initiating a process that may involve the local authority having to meet tight deadlines to represent the authority at public inquiry.
- There would be little opportunity for discussion with applicants given that there is no indication within the legislation that there is opportunity for negotiation. In other words, an application received would have to be considered on its merits leading to the risk of referral to DEFRA in the event of a disagreement.
- Local authorities could find themselves in a position where their role at an enquiry is ambiguous.
- Public path orders could be made at public expense only for them to fail because the regulations require an order to be made.
- Local authorities will be obliged to process applications without the power to negotiate alternative/additional routes that sometimes arise out of negotiation.

The consultation document contains a partial Regulatory Impact Assessment (RIA). It estimates that the current annual cost of the application and appeals system is between £2.2 million and £8.6 million, depending on the volume of applications and other variables. DEFRA is seeking views on whether the partial RIA is a realistic assessment upon which decisions can be taken, and one way in which it can be improved.

The document admits that the introduction of the right to apply will be more expensive than current arrangements and that there may only be marginal benefit to applicants. There may even be overall dis-benefits. DEFRA accepts that the right to apply was never likely to generate large financial

gains or cost savings since it is as much about improving equity and ensuring that applicants receive a fair hearing. DEFRA begs the question as to whether it is desirable or sensible to commence the new provisions in the way Parliament originally intended.

Having considered the impact of the new legislation it will have a disproportionate impact on stakeholders and therefore Government should consider a repeal of the legislation.

(3) **Legal and Human Rights Considerations** The statutory right to apply for orders to permanently extinguish or divert certain public rights of way, and the associated rights of appeal to the Secretary of State are introduced by section 57 and Schedule 6 of the Countryside and Rights of Way Act 2000 (the "CROW Act"). This inserts new Sections 118ZA, 118C, 119ZA, 119C, 121A, 121C, 121D and 121E (and consequential amendments) into the Highways Act 1980. The legislation also enables the Secretary of State to prescribe, by regulation, procedural matters to provide clarity in administration of the new rights, as well as to prescribe the charges to be paid by applicants.

(4) **Property Considerations** There are no property considerations associated with this report.

In preparing this report the relevance of the following factors has been considered: prevention of crime and disorder, equality of opportunity; and environmental, financial, health, and personnel considerations.

(5) **Background Papers** "Public Rights of Way: Consultation on implementation of the right to apply for orders to extinguish and divert public rights of way, and associated rights of appeal" published by DEFRA.

(6) **Key Decision** Yes.

(7) **Officer Recommendations** That:

7.1 DEFRA be advised that the County Council supports the desire of Government to ensure equity and fairness within an application to divert or extinguish a right of way.

7.2 The County Council cannot support a new process that introduces a new tier of bureaucracy.

7.3 DEFRA should seek to repeal the legislation in its current form and work with local authorities to enhance awareness and service provision in the public path order process.

David Harvey
Strategic Director – Environmental Services

David Tysoe
County Secretary

Appendix A

Summary of the Main Changes

Although many authorities already make extinguishment and diversion orders on behalf of landowners, the new rights would bring about some significant changes. In particular:-

(a) a new statutory application procedure;
(b) prescribed charges payable by the applicant in advance, which need only be refunded in prescribed circumstances;
(c) where an authority fails to determine an application within four months (from receipt of a valid application) or fails to decide on what action to take on an order within two months (from the end of the period for making representations), the applicant would be entitled to ask the Secretary of State to direct the authority to reach a decision within a specified time;
(d) where an authority refuses to make an order, the applicant would (subject to certain limitations) be able to appeal to the Secretary of State who would then draft an order, consult, consider the merits of the application and any objections, and (following written representations, a hearing or public inquiry if required) decide whether to make the order applied for; and
(e) where an authority makes an order, but subsequently refuses to confirm an unopposed order, or to submit an opposed order to Secretary of State, the applicant would (subject to certain limitations) be able to appeal to the Secretary of State who would then treat the order as if it had been submitted to him for confirmation.

In summary, this means that applicants would be able to ensure that their reasons for seeking an extinguishment or diversion order are given full and due consideration.

The new rights are intended to benefit certain owners, lessees and occupiers of land and school proprietors, who would be able to follow clear and straight forward application and appeal procedures. This should ensure that due consideration is given to their reasons for seeking an order, and help to reduce the delays and inconsistencies which exist under the current arrangements.

There may be additional benefits for users of rights of way (e.g. because diversions may lead to improvements in the rights of way network, regularise informal diversions and reduce the number of illegal obstructions). Some authorities may benefit from standardised procedures and guidance, and from prescribed charges.

The prescribed charges may benefit some authorities because:-

- charges might reflect the actual costs of considering and processing applications and orders;
- authorities would no longer need to provide applicants with detailed invoices;
- charges would be levied before, rather than after, the work is carried out;
- charges should be relatively straightforward and predictable, both for applicants and authority staff;
- in areas where charges are currently high, authorities would have an added incentive to seek efficiencies and reduce processing costs; and
- the charges would enable authorities to recover the costs of some activities which are not currently rechargeable (e.g. costs incurred in considering an application where is it subsequently decided not to make an order, order-making costs where it is subsequently decided not confirm an unopposed order).

Local Access Forums

Local access forums would be free to offer generic or specific advice in the case of applications, orders and appeals, and authorities will be encouraged to seek advice of their forum, on specific cases or on the generic issues, where appropriate.

Views are invited on whether the regulations should require authorities to notify the local access forum of each application received and/or whether the Secretary of State should be required to notify the relevant forum of each appeal. Such requirements could impose a burden on authorities and forums, and many forums are unlikely to have the capacity or time to respond to individual notifications. On the other hand, some forums may wish to comment on specific cases, and receipt of notifications may help forums to appreciate the bigger picture, identify patterns and to formulate generic advice. A decision will be taken on whether the regulations should include notification of local access forums, in the light of responses to this consultation.

Restricted Byways

It is proposed to amend (in accordance with Section 52(1) of the CROW Act) Sections 118ZA and 119ZA of the Highways Act, so that applications (and appeals) can be made for public path orders to extinguish or divert restricted byways in the same way as for footpaths and bridleways.

Manner in which Applications should be made

4.1 When exercising the right to apply it is proposed that applicants should be required to use an application form obtained from the local authority, but that the precise content of the application form (and certificates) should not be prescribed in the regulations. Instead it is proposed that authorities should be under a duty to make available a form (and certificates) for applicants to use. This would allow authorities discretion over the contents of the form, and allow forms to be amended from time to time without the need for new regulations. It would also encourage potential applicants to contact the authority before making their application, providing an opportunity for authorities to give informal pre-application advice. Defra would provide a model template for authorities to use or adapt.

The CROW Act provides for a right of application to any "Council for the area in which the land is situated". This means any Council with order-making powers - not only the local highway authority, but also any District or Borough Council for the area as well as any relevant National Park Authority. All of these bodies would need to make available application forms (and certificates) for applicants to use, and be prepared to accept applications. However, in practice, it is expected that in areas where there is more than one order-making authority, applicants would be encouraged to submit applications to the most appropriate authority.

Although it is not intended to prescribe the form of application (or certificates), it is considered that the regulations should require authorities to request, as a minimum, the following information in the application form:-

(a) confirmation that the application is made under Section 118ZA, 118C, 119ZA or 119C of the Highways Act 1980;
(b) name and address of applicants(s);
(c) the nature of the applicant's interest in the land (i.e. whether owner, freeholder, or leaseholder etc);
(d) a detailed description of the path or way to be extinguished/diverted, and of any proposed new path or way (by reference to the accompanying map);
(e) the applicant's assessment of the use currently made (by the public) of the existing path or way;
(f) the applicant's reasons for wanting the path or way to be extinguished or diverted;
(g) certification that the land over which the path or way crosses is used for agriculture, forestry and/or for the breeding or keeping of horses, or as a school;
(h) certification that the application is made with the consent of every person with an interest in the land over which the path or way currently passes whose consent is required;

(i) details of any other landowners, lessees or occupiers whose land the applicant considers will be affected by the order, if made, and certification that the applicant has given notice to those persons; and

(j) certification that the application is made with the consent (where required) of the relevant highway authority(ies) and/or statutory undertaker(s).

Authorities could require additional information as part of the application form.

Appendix B

Responses to Questions

Question	Response
Question 1 Do you agree that the regulations should (a) require authorities to make available application forms for use by applicants; and (b) that the content of the application form should be for the authorities to determine?	Application forms should be made available however guidance on content for uniformity should be developed.
Question 2 Do you agree that the regulations should require authorities to seek basic information in the application form, as listed in the consultation paper?	Yes.
Question 3 Do you agree that the right to apply should allow for the making of applications to extinguish or divert restricted byways?	Yes.
Question 4 Do you agree that the scale of the map accompanying an application should be at the scale of 1:2,500 or, where a map of such a scale is not available, at the largest scale readily available?	Yes.
Question 5 Do you agree that the maps accompanying an application should only be amended with the agreement of the authority?	Yes.
Question 6 Do you agree that the applicant should only be required to notify: other landowners, lessees or occupiers whose land they consider will be affected by the order?	Yes.

Question	Response
Question 7 Do you agree that authorities should be required to consult other Councils within whose area the right of way lies, and such other persons as the authority considers appropriate, before deciding an application?	Yes.
Question 8 Do you agree that authorities should be required to notify any persons who made representations on an application, of the outcome?	Yes.
Question 9 Do you agree that 56 days is a fair period of time within which appeals should be brought?	Yes.
Question 10 Do you agree that appeals should be brought by using a form obtained from the Secretary of State, but that the form of appeal need not be prescribed by regulations?	Yes.
Question 11 Do you agree that the authority should be required to provide the Secretary of State with the required information within four weeks of receiving notice from the Secretary of State (or such other date as agreed with the Secretary of State)?	Yes.
Question 12 Do you agree that the applicant (appellant) should not be required to give notice of the making of an appeal to any other parties?	Yes.
Question 13 In the case of appeals under section 121D(1)(a) do you agree that the Secretary of State should be required to give notice of an appeal to any person who made representations or objections on the application?	Yes.

Question	Response
Question 14 In the case of appeals under Section 121D(1)(b) or Section 121D(1)(c), do you agree that the Secretary of State should be required to give notice of an appeal to any person who made representations or objections on the order (and which have not subsequently been withdrawn)?	Yes.
Question 15 Do you (a) agree that the regulations should prescribe an Application Charge set at £1000 per application, and (b) what impact do you consider this would have on the numbers of applications made ?	The application charge should be set as described **but** there should be a mechanism available to take into account inflation. The resultant charge is likely to moderate applications and focus on real need.
Question 16 Do you agree that the regulations should provide for a standard order-making charge, plus four Further Charges, at the levels proposed?	Yes.
Question 17 Do you agree that authorities should be required to refund the difference, where the actual cost of placing the newspaper notice is less than Further Charge C?	See Q18.
Question 18 Do you agree that Further Charge C should be set at a higher level in those areas where costs are unavoidably higher?	This could be avoided by allowing authorities to charge true cost of advertising + an agreed administration charge thus avoiding costly paperwork in processing refunds. Q23 suggests that the SoS will be able to charge the true costs.

Question	Response
Question 19 For Order-making authorities only: Do you consider that Further Charge C should be set higher than £500 in your area? If so, provide evidence to show that costs unavoidably exceed £500, and state what level you consider it should be set at in your area.	See Q18.
Question 20 Do you consider that the prescribed charges for public path diversion and extinguishment orders should apply to special orders (for school security)?	Yes, authority PRoW budgets may not be able to meet the costs as they occur.
Question 21 Do special orders raise any additional issues which the Secretary of State should take into account in making regulations which meet the needs of schools?	Schools should be offered advice on how to manage PRoWs and observe a checklist of requirements before making applications.
Question 22 Do you consider that (a) there is a risk of authorities erring on the side of refusing applications (which will minimise their own costs) thereby forcing applicants to appeal, and if so, (b) what measures would most effectively mitigate the risk?	This is likely to occur where an authority's costs are greater than the £150 stipulated in the consultation or where resources are such that they may not be able to handle the application in which case it would be a useful mechanism to deflect and application.
Question 23 Do you agree that applicants who appeal against an authority's refusal to make an order, should be required to meet the expenses incurred by the Secretary of State in drafting and publicising an order, through payment of a charge of approximately £150 plus the actual cost of erecting site notices and publishing newspaper notices?	Yes.

Question	Response
Question 24 Do you agree with the proposed circumstances in which authorities should be required to remit or refund charges?	The 500 metre radius does not make sense. There could be a completely different set of circumstances relating to the application and they both require the same amount of resources.
Question 25 Should a partial or full refund of the Application Charge be made when the authority refuses an application for an order?	We do not support the partial refund. The fee should stand as an "application fee". By comparison planning authorities do not refund fees following an unsuccessful planning application.
Question 26 Do you agree that applicants should be entitled to claim refunds as proposed, and that authorities should be required to make a refund on receiving such a claim?	Under the circumstances where an authority has failed to observe a statutory timescale then it would seem reasonable to offer the applicant a partial refund.
Question 27 Do you agree with the proposed levels of remittance/refund to be prescribed in the regulations?	Yes, provided the regulations take account of inflation.
Question 28 Do you consider authorities should be given the power and/or should be required to remit or refund the application Charge and/or the Further Charges, in any other circumstances?	No comment.
Question 29 Does the partial RIA adequately assess the likely level of uptake, costs, potential impacts, risks, and benefits?	Yes.

Question	Response
Question 30 Do you consider that the proposals would (a) meet the needs of landowners/lessees/occupiers; and (b) take full account of the needs of other stakeholder groups?	It may meet the requirements of the landowners/lessees/occupiers who make an application under these regulations however other parties will almost certainly be affected because this 'type' of order will almost certainly take priority leading to the likelihood of complaints being received.
Question 31 Do you consider that the legislation relating to the right to apply and appeal should be (i) commenced in its current form; or (ii) repealed; or (iii) amended? If you consider it should be amended please say in what ways and give your reasons.	Repealed. There is no indication that the SoS will adopt similar standards to the highway authority. It will lead to preferential treatment. The ROWIP is the best place to stipulate priorities and drive the improvement of the network. There is no apparent option for discussion prior to application which may result in a refused application.
Question 32 Do you agree that the regulations should allow applications, notifications and appeals to be made online?	Yes.
Question 33 Do you agree that a lead in-time of at least 6 months would be sufficient to prepare for the new rights?	No issue with this however, it is unlikely that authorities will be able to provide resources against an unknown.
Question 34 Are there any other considerations which you think it is important for the Secretary of State to take into account in deciding how or when to introduce the new rights ?	The SoS should consider exempting those authorities which are currently classed as "Excellent".

Question	Response
Question 35 Do you consider that (a) authorities should be required to notify their local access forum of each application received; and/or (b) that the Secretary of State should be required to notify the relevant forum of each appeal made?	Authorities should not be required to consult the Local Access Forum, this will be less efficient and there is no logical need to do so in the light of the fact that other applications are not referred. More significantly, authorities should ensure that all applications are available on the internet as well as being available for download.