

Byways and Bridleways Trust

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The Rt Hon. David Milliband, MP
Secretary of State for Environment, Food and Rural Affairs
Countryside (Recreation and Landscape) Division 5
Department for Environment, Food and Rural Affairs
Zone 1/01, 2 The Square
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Fao: Mr D Waterman

19 December 2006

Dear Secretary of State,

Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways: A guide for local authorities, enforcement agencies, rights of way users and practitioners. Version 4 – issued 27 November 2006

Your new guidance states:

96. Section 34 of the Road Traffic Act 1988 provides that a way shown on a definitive map and statement as a footpath, bridleway or restricted byway is to be taken to be a way of the kind shown, unless the contrary is proved. In other words, the onus is on anyone seeking to drive a mechanically propelled vehicle over such a way to prove that a public right of way for mechanically propelled vehicles exists. Section 67 of the Natural Environment and Rural Communities Act, creates a presumption that any unrecorded rights for mechanically propelled vehicles have been extinguished, unless the way falls into one of the exceptions in subsections 67(2) or (3) of the Act.

We would not disagree with that.

97. Therefore anyone using a mechanically propelled vehicle on a way other than a byway open to all traffic would have to be able to show both that:
(a) a public right of way for mechanically propelled vehicles existed at commencement of section 67 (on 2 May 2006); and
(b) that those rights had not been extinguished, because one of the exceptions in subsections 67(2) or (3) applied.

We would not disagree with that either.

Unless these are proved, it is an offence to drive a mechanically propelled vehicle anywhere other than on a byway open to all traffic recorded on the definitive map and statement, or on an established road.

We would not disagree with that, but would prefer to see that clarification that 'proving' a right in this situation is not a condition precedent to exercising such a right: if it were, then you would be asking everyone in the country to 'prove' their right to drive on 'ordinary roads' before so doing.

102. All surveying authorities have been under a statutory duty since 31st December 2005 to maintain a register of applications for definitive map modification orders that had not been the subject of a determination by that date and the stage in the process that the application has reached. Where an outstanding application for the recording of a public right of way for mechanically propelled vehicles under section 53(5) of the Wildlife and Countryside Act 1981 falls within the terms of subsection 67(3) of the NERC Act, until the application is determined the only rights that should be exercised are those shown on the definitive map and statement. [our emphasis].

Who says? Has there been a change in the law here? Surely the fundamental nature of rights in English law is that they are exercisable by the very virtue of their being rights? Mr Blair and his colleagues have not quietly slipped the *Code Napoleon* in to replace the English common law – have they?

114. It is the responsibility of drivers and riders of mechanically propelled vehicles to ensure that they only use routes that are shown on the definitive map as byways open to all traffic or which are established roads. [our emphasis]

Can you please say what is an 'established road'? Where is such defined? By what process? Can you please tell me how I can find out if any given road is a public road for motor vehicles before I risk driving on it? Can you please tell me from where derives this 'responsibility' you place on the public here? Is it from statute? Is it from case law?

115. It is an offence to drive on routes not shown on the definitive map and which are not established roads, or on routes shown on the definitive map as footpaths, bridleways or restricted byways.

But, with the greatest respect, how can this paragraph 115 be correct? Surely the well-established legal position is this:

The Road Traffic Act 1988, s.34 states:

Prohibition of driving motor vehicles elsewhere than on roads.

34.—(1) Subject to the provisions of this section, if without lawful authority a person drives a motor vehicle—

(a) on to or upon any common land, moorland or land of any other description, not being land forming part of a road, or

(b) on any road being a footpath or bridleway [or restricted byway], he is guilty of an offence.

The Highways Act 1980, s.328(1) defines (for example) a footpath as meaning, "... a highway over which the public have a right of way on foot only, not being a footway."

The Wildlife and Countryside Act 1981 states (for example) in s.56(1)(a), "where the map shows a footpath, the map shall be conclusive evidence [of footpath status] so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right."

That being so, your paragraphs 114 & 115 would appear to be seriously incorrect. Where a footpath, bridleway or restricted byway is subject to a NERC-valid definitive map modification order (or application) then there is no absolute offence under s.34 in using such, as of right, with a mechanically propelled vehicle, albeit that a person so using bears the burden of proving, to the civil standard, such a surviving right. Surely your 'guidance' is an open invitation for certain members of the public wrongly to be stopped, delayed, detained, questioned and – quite possibly – prosecuted.

Can you please tell me what you will do to correct this serious misinformation?

Many thanks.

Yours sincerely,

Alan Kind

Editor

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Mr Alan Kind
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CCU Ref: DWO 4545

31 January 2007

Dear Mr Kind

GUIDANCE ON PART 6 OF NERC ACT 2006

Thank you for your letter of 19 December to David Miliband about Defra's guidance on Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways. I have been asked to reply.

In paragraph 102, the guidance says that the only rights that "should" be exercised are those shown on the definitive map and statement. The word "should" (unlike "can" or "may") implies an obligation or indicates that something is the right thing for a person to do. Defra therefore does not believe that this statement is inappropriate.

As to paragraphs 114 and 115 of the guidance, there is no definition of an 'established road'; this term is used in the guidance with the aim of explaining the legal situation in everyday English. To say that anyone using a way should first establish that they have a right to do so is not creating a new principle. In most cases, it will be clear whether a given road is a public road for motor vehicles and it is not unreasonable to advise that where there is doubt, a person should not use it until they have checked.

It is an offence under section 34 of the Road Traffic Act 1988 to drive a mechanically propelled vehicle on land not forming part of a road, or on a footpath or bridleway or restricted byway. However, if a person could prove that a right of way for mechanically propelled vehicles existed on the route over which they were driving then this would be a defence against a charge under this section. In the case of a footpath, bridleway or restricted byway, section 34(2) puts the onus squarely on those asserting a public right of way for mechanically propelled vehicles to prove that the right exists.

Defra believe that the guidance is correct in what it says on these matters, but in light of your comments, can see that the content of paragraphs 114 and 115 could be made clearer. This will be done when Defra next revise the guidance.

Yours sincerely

Julie Tucker
Defra - Customer Contact Unit

