NEW FOREST NOTES NOVEMBER 2004

Rewriting the Forest's laws

This year is seeing great changes in the countryside under what the Open Spaces Society has described as the most significant piece of legislation affecting landed property since the National Parks and Access to the Countryside Act of 1949. At the same time as the activities of one set of countryside users – supporters of hunting – are coming under increasing pressure, the rambling public is being granted sweeping new rights of access to commons, moorland and downland. Already these rights have come into force in the south east and north of England and next year the rest of the country will be opened up to the right to roam. It is something of a cliché that with rights go obligations and in granting the new access, Parliament also imposed obligations on its users to protect wildlife (especially ground-nesting birds) and farmers' livestock. These protections will apply to almost all the new access land, including new access areas within the national parks.

It seemed at first that in the New Forest the public would benefit from the new right to roam, just as on any other area of common land. The access maps for the Forest were prepared by the Countryside Agency, and a very poor and erratic job they made of them, while there was talk of the Forestry Commission dedicating its woodland for rambling under the new Act, because the right to roam does not automatically include woodland. Then events took a rather strange turn as it became clear to the Commission exactly what the right to roam would entail in the Forest.

Throughout my lifetime and no doubt for generations before, it has been a firmly established and occasionally stated policy of the Crown that the public uses the New Forest by privilege and not by right. Practically that made no difference to anyone walking quietly across the heaths or picnicking beside a stream. It did, however, have some important implications in times of stress. It was always open to the Commission to withdraw the privilege if need be. It might instruct anyone abusing the privilege to remove themselves, whether offending against the byelaws or not. More importantly, I can remember several occasions on which the Commission announced that the New Forest was closed, notably in the case of disease outbreaks or, as in 1976 when the peat burned underground for weeks on end, in case of extreme fire danger. It was a valuable if sparingly-used tool.

Earlier this year (or perhaps before that) it became clear to the Commission that if the right to roam under the Crow Act applied to the New Forest, so would the protections from which ground-nesting birds and livestock will benefit on new access land elsewhere. Most of those protections relate to the control of dogs. Under the Act it would be open to the Commission to set aside those controls and subject the Forest to a lower level of protection than will prevail on other commons, but how could they square that with their conservation duties ? If they did not set aside the controls they would be in conflict with a public accustomed to free-running dogs in the nesting season and through livestock. It was a tricky political dilemma, but fortunately one which was not beyond the abilities of a sharp but

anonymous lawyer somewhere in the depths of DEFRA. If it could be proved that the public *already* possessed a right to roam in the New Forest, the Crow Act would not apply and the Forest could be given poorer protection than other national parks and commons. There would be no positive action by the Commission in setting aside controls, so no-one could blame them for giving the Forest inferior status. How was this to be done ?

The Law of Property Act of 1925 contained a provision designed to protect urban commons and, for all its traffic and over-use, the New Forest is still (at worst) a suburban area with some relatively rural fragments still holding on. That Act said that the public would have a right of access to commons wholly or partly within a borough. It was no doubt designed to apply to areas such as Southampton Common. The amazing discovery has now been made that the New Forest is (or is claimed by the Commission to be) just such an urban common. A tiny portion of the Forest at Wootton was, at the relevant date more than a quarter of a century ago, within the Borough of Lymington. According to the Commission, therefore, the entire New Forest is thus branded “urban” and land at Woodgreen, twenty miles from Lymington, is still an urban common and subject to a public right of access. Because it is subject to such rights, the Crow Act will not apply and a lower standard of wildlife and livestock protection is acceptable. While Exmoor and other national parks will protect their ground-nesting birds to a high standard, the New Forest will not. The Commission and English Nature have escaped making unpopular decisions and the doctrine of access by privilege which has hitherto been maintained is consigned to the refuse bin.

Of course the Commission expresses things rather differently. It has, it claims, byelaws which give more than adequate protection to wildlife and livestock, so what need is there for the same rules which will govern common land generally ? It also has a clear code of conduct for users which will ensure that protection is of the highest standard. There is really nothing whatever to worry about. The fact that the byelaws are so weak and unenforced (let alone unenforceable) as to be a local joke is neither here nor there. The simple fact remains that in the New Forest during the nesting season you will be permitted to run dogs loose across the heath (within the constraints of the byelaws), while you will have no right to do the same on Exmoor or other “open country”. Codes of conduct may exhort you not to do so, but they have no legal effect. At any time of year you will be permitted to run loose dogs through herds of the Commoners’ livestock (within the constraints of the byelaws), but you will have no right to do so on other commons where the protection of the Crow Act will apply. Thus are the highest British and European Conservation designations and the requirements of national park status to be honoured in the New Forest if the Forestry Commission is to be believed.

Details of the Commission’s new interpretation of the law have been seeping out piecemeal over the last few months and a definitive statement of the basis for its conclusions is still awaited (although long promised) at the time of writing. A lot of questions still remain. Is the proposed interpretation of the Law of Property Act correct ? Is the Commission in breach of its statutory obligations to protect the New Forest at least as well as other

commons ? Can the Crow Act be made to apply notwithstanding the possibility that the New Forest might truly be an “urban common” ? Finally and perhaps not least, is the Commission in breach of its obligation to give priority to conservation in making decisions affecting a national park ? It will be interesting to see how these questions are answered.

One side effect of the Commission’s new interpretation, on which I doubt if they have reckoned, relates to horses. I am told that, by case law, the riding of horses on urban commons is also a right, so that will put paid to the Commission’s long cherished desire to charge riders and could put the New Forest Equestrian Association out of business !

Respecting park purposes

Agriculture minister Alun Michael has just released draft instructions to public authorities as to how they are to interpret their duties under the National Parks and Environment Acts to “have regard to national park purposes” in making their decisions. One of those public bodies specifically named is the Court of Verderers.

I have never had any quarrel with the statutory purposes of national parks or with the priorities to be adopted in securing those purposes. My deep fears relate to how park authorities have evaded the instructions of the statutes and in the New Forest are likely to do the same. The minister’s guidance is thus timely, just as our park is established.

Park duties are firstly to conserve and enhance natural beauty, wildlife and cultural heritage and secondly to promote opportunities for public understanding and enjoyment of the park. A crucial qualification (embodied in the Acts) is that where there appears to be a conflict between the two purposes, greater weight shall be given to the first. In the New Forest this is something that the Forestry Commission is likely to find very troublesome until suitable evasion techniques can be devised. It has generally in the past given greater weight to recreation and there is little reason to hope that the park requirements will bring about a conversion.

The Verderers on the other hand should encounter few problems. Their powers to protect the Forest have received a severe battering from the establishment of the park, so that if the latter chooses to override the Court and promote damaging recreational development, there is not much to be done about it. In one sense, however, the minister’s directions have actually strengthened the hand of the Court when it comes to dealing with developers other than the park authority itself. Until now the Verderers had little statutory guidance as to how they should exercise their powers – as opposed to what those powers are. The Court must have regard to various obscure scientific qualities of the Forest and must observe European conservation directives. Beyond this, the way it should make decisions is implied rather than stated. This can lead to difficulties. The Verderers have always recognised a duty to protect the commoners and common rights and to guard the natural beauty of the Forest, but you will not find this stated in any Act of Parliament. Now, for the first time, there is a clear statutory duty to do both – natural beauty in specific terms and commoners as “cultural heritage”.

Suppose that the Forestry Commission decided, prior to the imposition of the park, to erect an ice cream shop of ultra-modern design in the A&O woods. If the shop did not damage the scientific qualities of the wood, perhaps because it was to be built on a wartime concrete base, the Verderers might have been on difficult grounds in rejecting it. Now they have a clear responsibility to do so through having regard to national park purposes: the shop is an eyesore damaging to the natural beauty of the Forest.

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