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**Parish councils: dealing with highway
obstructions under s.130(6) of the
Highways Act 1980**

Parish councils: dealing with highway obstructions under s.130(6) of the Highways Act 1980

1 Introduction

- 1.1 Town and parish councils are likely to take a strong proprietorial interest in their parish rights of way, and in their local highway network generally. They will be aware that it is the highway authority which has a duty to act against any obstruction in a highway, and from time to time they or their parishioners may report such obstructions to the highway authority, expecting action to be taken to resolve them.
- 1.2 But what if the highway authority takes no action, or is insufficiently combative, so that a highway within the parish remains obstructed?
- 1.3 Under [s.63](#) of the Countryside and Rights of Way Act 2000, a new (at the time) procedure was made available to the public, to serve notice on a highway authority to deal with certain obstructions to rights of way (but not highways more generally) – the procedure is now found in [ss.130A–130D](#) of the Highways Act 1980. If a highway authority fails to act on a notice served under s.130A, the person serving notice may apply to the magistrates' court for an order to require the highway authority to discharge its duty to deal with the obstruction identified in the notice.
- 1.4 But there is a much longer-standing and simpler procedure available to a parish council which believes that a highway (of any kind) has been obstructed. The procedure is also available to a parish meeting where there is no council (for brevity, we refer only to parish councils below, and when we refer to parish councils, we include references to councils for communities in Wales, and councils for parishes or groups of parishes in England with alternative styles¹). And the courts have made clear that the highway authority must act assiduously where the procedure is initiated.

¹ See Part I of the Local Government Act 1972. An alternative style may refer to a community, neighbourhood or village council.

2 Section 130(6)

2.1 Under [s.130\(6\)](#) of the Highways Act 1980:

‘If the council of a parish or community or, in the case of a parish or community which does not have a separate parish or community council, the parish meeting or a community meeting, represent to a local highway authority—

(a) that a highway as to which the local highway authority have the duty imposed by subsection (3)² above has been unlawfully stopped up or obstructed, or

(b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority, it is the duty of the local highway authority, unless satisfied that the representations are incorrect, to take proper proceedings accordingly and they may do so in their own name.’

2.2 S.130(6) has its origins in s.26(4) of the [Local Government Act 1894](#).

2.3 The procedure applies to any highway for which the local highway authority has responsibility. That includes all public rights of way and local roads, with the exception of trunk roads and motorways. The procedure can therefore be used in relation to local roads, including unsealed (unpaved) minor roads, as well as public paths. It cannot be used in respect of obstructions or encroachments on trunk roads for which Highways England or the Welsh Government is the highway authority.

2.4 The procedure can also be used in relation to encroachment on roadside waste — for example, if a neighbouring landowner extends the fencing of the land to take in some of the roadside waste, or erects a building on the waste.

3 Using s.130(6)

3.1 In order to trigger the s.130(6) procedure, the parish council must ‘represent’ to the highway authority that the way identified in the representation has been ‘unlawfully stopped up or obstructed’, or that there is ‘an unlawful encroachment’ on roadside waste.

3.2 The council should place details of the obstruction, and the intention to make a representation under s.130(6) about it to the highway authority,

² Under subs.(3), ‘it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—(a) the highways for which they are the highway authority...’.

on the agenda of a council meeting. The council should resolve to authorise the clerk to the council, or the chairman of the council, to make the representations on its behalf.

- 3.3 Representations should be made in writing, by the clerk or the chairman, and addressed to the clerk and chief executive to the highway authority. There is some uncertainty whether representations can validly be made by email³, so it is safer to convey them in a formal letter sent by post.
- 3.4 The representations should make clear that they are made under s.130(6), and that the writer is authorised to act on behalf of the council. It may be helpful to remind the highway authority that, having made the representations, the authority is under a duty, 'unless satisfied that the representations are incorrect, to take proper proceedings accordingly'.

4 The Send case

- 4.1 This procedure gives a parish council a powerful tool to require the highway authority to fulfil its duty to act against obstructions and encroachments on the highway. Moreover, the obligation on a highway authority to act in relation to a s.130(6) representation has been resoundingly endorsed by the High Court in 1979 in *R v Surrey County Council, ex parte Send Parish Council*⁴.
- 4.2 *Send* was an application by the parish council for a mandatory order of the court requiring the highway authority to take action on representations made by the parish council under s.116(6) of the Highways Act 1959, now re-enacted in s.130(6) of the 1980 Act. It concerned a footpath which had been obstructed by adjacent householders. The highway authority spent some ten years shilly-shallying after the difficulties were first identified. The parish council made the representation under s.130(6), whereupon the highway authority determined to make what appears, from the judgment, to have been a combined extinguishment and creation order to remove the path from the householders' gardens. The path was not included on the original definitive map, but the evidence of its public status was 'very

³ It is not clear whether representations under s.130(6) are a 'notice, consent, approval, order, demand, licence, certificate or other document required or authorised by or under this Act to be given or served on any person' to which s.322(2) applies.

⁴ Not available online. Reported at (1979) 40 P & CR 390n, [1980] 1 EGLR 27, 253 Estates Gazette 579, [1979] JPL 613.

strong indeed'. It seems that steps to have the path added to the definitive map may have been in train (but this was under the National Parks and Access to the Countryside Act 1949, before the requirement for continual review of the definitive map under the Wildlife and Countryside Act 1981).

4.3 The court granted the order sought. Geoffrey Lane LJ, commenting on the nature of 'proper proceedings' mentioned in s.130(6), said:

'The local authority must at all times act with the object of protecting the highway and of preventing or removing any obstruction, and, more broadly speaking, of promoting the interests of those who enjoy the highway or should be enjoying the right of way; and the county council must likewise operate against the interests of those who seek to interrupt such enjoyment of the highway.'

4.4 Regarding the steps taken by the highway authority, he said:

'...looked at objectively, they were acting in the interest of the frontagers, in the interest of the people who had in fact obstructed this public footpath, and not in the interest of those who should have been enjoying the use of the right of way over the footpath. It seems to me no reasonable local authority could have so acted if they truly had in mind the ambit of their duty under section 116⁵.'

4.5 Ackner J added:

'I accept that there must be some discretion arising out of the words "proper proceedings" taken together with the duty of the council under subsection (3) to prevent "as far as possible" the stopping-up or obstruction of highways. So I accept that in a proper case a proper compromise of proceedings may be made. But such a compromise must be intended to promote the policy and the object of the Act. The compromise which was here suggested, on the contrary, would have resulted in the objects of the Act being frustrated. ...In a sentence, the county council has, in my judgment, in effect shut its ears to the parish council's application made pursuant to the provisions of section 116(6). It has thus refused to exercise its discretion and, in my judgment, mandamus accordingly lies.'

⁵ Now section 130 of the Highways Act 1980.

4.6 Lord Widgery CJ agreed, so the strongly constituted court was unanimous. The case makes quite clear that, once charged with taking action under s.130(6), the highway authority must act accordingly, and not seek to evade or undermine its duty.

5 What if there is uncertainty about the status of the way?

5.1 The highway authority is not obliged to act on representations under s.130(6) if it is 'satisfied that the representations are incorrect'. If the existence of the highway is recorded in the definitive map and statement, or in the highway authority's list of streets maintainable at public expense held by the highway authority⁶, the parish council has correctly identified the subject of the representations as an obstruction or encroachment in the highway (*i.e.* it is located within the boundaries of the highway, and is not legitimate, such as a gate which the landowner has historic rights to retain across the highway), then it is unlikely that the highway authority will be able to conclude that the representations are incorrect.

5.2 However, a parish council should be cautious about using the s.130(6) procedure in relation to an alleged highway which is not recorded in the definitive map and statement, nor in the list of streets, unless the status of the way as a highway is reasonably assured. In *R v Lancashire County Council ex parte Guyer*⁷, the case turned on a complaint from a member of the public about an alleged public footpath which had been stopped up. Mr Guyer relied on the duty of the highway authority under what is now s.130(1)⁸, 'to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority,...'. The highway authority declined to take further action, having held an informal local inquiry which concluded that the status of the way was substantially in doubt (there was evidence of a gate being locked annually). The Court of Appeal upheld the decision of the High Court in refusing to grant a mandatory order. Stephenson LJ said:

6 Under s.36(6) of the Highways Act 1980.

7 Not available online. Reported at [1980] 2 All ER 520, [1980] 1 WLR 1024, 78 LGR 454, 40 P & CR 376, 124 Sol Jo 375.

8 In other words, Mr Guyer applied to the court to enforce the general duty on a highway authority under s.130(1) to prevent the obstruction of a highway. The parish council was not involved.

‘There is a serious dispute about this footpath and conflicting evidence pointing to its being public and pointing to its being private,... .
...Parliament cannot have meant the addition of those words to require an authority to assert claims in which they have no faith.’

5.3 He added:

‘Subsection (6) [*i.e.* referring to s.130(6)], by contrast, clearly imposes a duty on an authority to take proper proceedings in certain circumstances; namely, when a parish council or other named body make a representation, and if the authority are not satisfied that what is alleged by the representation is incorrect. If a council are in doubt whether a highway is a highway or not, in those circumstances subsection (6) requires them to take proper proceedings.’

5.4 Although the words of Stephenson LJ suggest that, where the highway authority is ‘in doubt’ whether a way mentioned in representations under s.130(6) is or is not a highway, it must take proper proceedings, his words are *obiter* — that is, not essential to the judgment — and the distinction between the authority being satisfied that the representations are incorrect, and being in doubt, may be fine indeed. However, Stephenson LJ’s words are helpful assurance that a parish council’s representations cannot be set aside by the highway authority simply because there is some element of doubt which makes the case a little less than cast iron.

5.5 If there is significant doubt about the way’s status, it may be better to apply to the surveying authority for a definitive map modification order, so that in due course the way becomes recorded in the definitive map and statement, which is conclusive of the public’s right. However, the authority’s response to such an application may well take time — perhaps many years — during which the highway authority is unlikely to take action on any report of obstruction or encroachment.

6 What if the highway authority does nothing?

6.1 When originally enacted in s.26(4) of the Local Government Act 1894, a district council (then the highway authority for local roads) which failed to act on representations by a parish council could have its highway powers confiscated by the county council. As all highway functions are

now carried out by the county council or its unitary equivalent, that provision does not appear in s.130(6).

6.2 There can be little doubt that a highway authority must respond expeditiously and purposefully to representations under s.130(6). What if it does not? S.130(6) assumes that the highway authority will act. Unlike s.130A, it does not provide for application to the magistrates' court to enforce the duty to act. If the authority fails to respond, the only recourse, other than political activity, is for the parish council to apply to the High Court for a mandatory order requiring the authority to act (just as Send Parish Council did in 1979). Such an application would involve judicial review of the highway authority. An action could be very costly, particularly if unsuccessful (although if the parish council has acted correctly, the precedent in *Send* ought to be compelling). A parish council is advised to seek legal advice before taking any steps towards judicial review.

While the Open Spaces Society has made every effort to ensure the information obtained in this factsheet is an accurate summary of the subject as at the date of publication, it is unable to accept liability for any misinterpretation of the law or any other error or omission in the advice in this paper.

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