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Removal of obstructions from highways: enforcement of local highway authorities duty to prevent obstructions on rights of way

Notes to accompany Statutory Instrument 2004 No. 370

Introduction

1. This booklet provides advice on new provisions relating to the obstruction of rights of way. Section 63 of the Countryside and Rights of Way Act 2000, which inserts sections 130A to 130D in the Highways Act 1980, enables any person to require a highway authority to secure the removal of certain types of obstructions. The provisions are reproduced in Annex 1.
2. These provisions provide a formal means for any person to draw to the authority's attention ways which are obstructed and to take court action where the authority fails to act without good reason. The provisions are intended to encourage authorities to be more proactive in keeping rights of way free from obstructions, leading to greater use and enjoyment of rights of way.
3. These provisions apply to all local highway authorities except those in inner London. The National Assembly for Wales is responsible for implementing these provisions in Wales.
4. This booklet is for the public, local highway authorities, landowners and others with an interest.

Protecting public rights of way

5. Local highway authorities are under a duty to assert and protect the rights of the public to use and enjoy those public rights of way for which they are responsible. They also have a duty to prevent, as far as possible, the stopping up or obstruction of those highways. Local highway authorities are also able to safeguard public enjoyment of highways for which they are not responsible and to prevent the stopping up or obstruction of such highways where this is considered to be prejudicial to the interests of their area.
6. Where there are two tiers of local authority, the county council is the local highway authority. (District councils also have power but not a duty to assert and protect public rights of way.) Unitary authorities are the local highway authorities for their areas. Local highway authorities are required to take remedial action when they receive representations from a parish council or parish meeting that a way is obstructed or stopped up or that unlawful encroachment of roadside waste has encroached. The Highways Act 1980 gives local highway authorities the power to take whatever steps they deem expedient to discharge their duties, including instituting or defending legal proceedings. It is important that authorities act quickly to investigate and resolve complaints about obstructions (or other difficulties).
7. The most common problem is likely to be obstructions on public rights of way. The public are entitled to expect that rights of way will be kept open and available for use. It is an offence for a person to obstruct a highway without lawful authority.
8. The definitive map is conclusive evidence as to the rights shown in it. Where there is a dispute as to the accuracy of the definitive map, with a claim that a way shown

on it should not be shown, the way should be kept open and available for use until such time as the definitive map is modified.

9. In some cases, structures or other objects limiting public enjoyment of a way are recorded in the definitive statement. Where they are recorded as limitations or conditions, the definitive statement is also conclusive evidence of their existence. As such, the Highways Act procedures to secure the removal of obstructions will not apply.

The new provisions – sections 130A to 130D of the Highways Act 1980

Definitions

10. These provisions apply to obstructions on footpaths, bridleways, restricted byways and highways recorded as restricted byways or byways open to all traffic on a definitive map.

11. These provisions apply to an obstruction which is without lawful authority and which is :

- any structure, including a machine, pump, post or other object of such a nature as to be capable of causing an obstruction whether or not it is on wheels;

- anything deposited on a right of way which constitutes a nuisance;

- a hedge, tree or shrub or vegetation of any other description that overhangs a right of way so as to endanger or obstruct the passage of vehicles, pedestrians or horseriders.

12. Examples of the types of obstructions that are covered by these provisions are: agricultural machinery; a fence across the way; rubbish deposited on the way; branches hanging over the way so as to obstruct passage. Walls, except where they are part of a building (see para 14 below), are also covered.

13. “Lawful authority” for an obstruction means that the person responsible for the obstruction must be authorised by law – for example by legislation or a limitation or condition recorded as such in the definitive statement. Statutory undertakers (gas, water, telecommunications bodies) have certain powers to dig up a right of way when they need to do so to lay pipes or repair cables.

14. An obstruction is not covered by these provisions if it :

- is, or forms part of, a building (whether temporary or permanent) or works for the construction of a building;

- is, or forms part of, any other structure (including a tent, caravan, vehicle or other temporary or movable structure) which is designed, adapted or used for human habitation;

- is one for which an order may be made under s.56 of the Highways Act 1980 (highway out of repair);
- is constituted by the presence of a person;

15. Some matters, which may constitute obstructions, are also excluded. These are damaging a vehicular highway by digging a ditch (section 131 of the Highways Act 1980), disturbing the surface of a footpath, bridleway or any other unmade highway in such a way as to render it inconvenient for the exercise of the public right of way (section 131A of the 1980 Act), and planting crops on or temporary disturbance of a footpath, bridleway or any other unmade highway by ploughing (section 137A of the 1980 Act). You cannot serve notice (Form 1) on the local highway authority if you encounter these types of obstruction but you should tell your local highway authority about them. They have powers to deal with these types of obstruction.

What do the new provisions involve?

16. New section 130A enables any person to serve notice on a local highway authority requesting them to secure the removal of an obstruction from a public right of way. The request may lead to an order requiring steps to be taken for the removal of the obstruction being imposed by a magistrates' court. All the notices involved in these provisions are prescribed in SI 2004 No.370. You can find the forms on the Defra website or you can photocopy the forms in the back of this booklet.

If you intend to serve notice on a highway authority

17. Form 1 sets out the form of notice requesting a local highway authority to secure the removal of an obstruction from a public right of way. Indicate the status of the way if you know it. Describe the obstruction : such as agricultural machinery; a fence across the way; rubbish deposited on the way; branches hanging over the way so as to obstruct passage. You may attach a photograph.

18. Describe the location of the way and of the obstruction. This should be detailed enough for the local highway authority to be able to locate them. For example

- describe the points where the way joins a metalled road or another public right of way nearest to and on each side of the obstruction and the obstruction in relation to them; or
- give 6 figure OS grid references for these points and the obstruction; or
- attach a sketch map or a copy or trace of the relevant OS map identifying the location of the way and the obstruction. (OS copyright does not prevent you taking a copy of the relevant part of an OS map to attach to this form); or
- the parish name and path number if the way is on the definitive map.

19. You should include the name and address of the person (or persons) responsible for the obstruction if you know who this is.

20. When you have completed the form, you must serve it on the local highway authority in whose area the obstruction lies by leaving it at, or sending it by post to,

the local highway authority's office. You should keep a copy of the completed form for reference.

21. Within one month of the date on which you serve Form 1, the local highway authority should serve notice (Form 3) on you telling you on whom they have served notice about the obstruction and stating what, if any, action they propose to take. The Data Protection Act 1998 governs the treatment of personal data about individuals, including those who serve notice (Form 1) on the highway authority. The highway authority will treat your identity in confidence. It will deal with your personal details in accordance with the Data Protection Act 1998. If you have concerns on this matter you should consult the highway authority.

22. If you are not satisfied that the obstruction has been removed, you may apply to the magistrates' court for an order requiring the highway authority to take, within such reasonable period as may be fixed by the order, such steps as may be specified in the order for securing the removal of the obstruction.

23. Before you apply to the magistrates' court, you must serve notice (Form 4) on the local highway authority that you intend to do so. You can serve Form 4 from between 2 months and up to 6 months after the date on which you served Form 1 on the local highway authority. (But note that you must leave five days between the date of service of Form 4 and applying to the magistrates' court.)

24. You can apply to the magistrates' court at any time after the end of 5 days from the date of service of Form 4. The magistrates' court will help you to make an application. You must supply the names and addresses given in Form 3.

If you are a local highway authority which has received a notice (Form 1)

25. Local highway authorities should treat the identity of those serving notice using Form 1 in accordance with the Data Protection Act 1998, which governs the treatment of personal data.

26. Within one month of the date of service of notice (Form 1) the highway authority must serve notice (Form 2) informing every person whose name and address is included on Form 1 and, so far as reasonably practicable, on every other person who it appears to them may be for the time being responsible for the obstruction that Form 1 has been served. The persons for the time being responsible for the obstruction include the owner and any other person who for the time being has possession of it or may be required to remove it. The highway authority must also state what, if any, action they propose to take.

27. The highway authority must serve, on the person who served Form 1, notice (Form 3) of the name and address of each person on whom they have served Form 2 and state what, if any, action they propose to take. Forms 2 and 3 should include the name, address and telephone number of the responsible officer.

28. Local highway authorities should try to secure the removal of obstructions by approaching those responsible and seeking their cooperation. Formal measures should be used where dialogue fails. Different actions apply to different types of obstruction. The following should be particularly born in mind.

29. If the obstruction is any structure, including a machine, pump, post or other object of such a nature as to be capable of causing an obstruction whether or not it is on wheels, and is not excluded from these provisions (see para 14), then the highway authority may by notice require the person having control or possession of the structure to remove it within such time as may be specified in the notice.

30. If the structure is not removed within the time specified in the notice and one month has elapsed from the date of service of the notice, the authority may remove the structure and recover the expenses reasonably incurred by them in doing so from the person having control or possession of the structure.

31. If the obstruction is anything deposited on a right of way so as to constitute a nuisance, the highway authority may by notice require the person who deposited it there to remove it forthwith and if he fails to comply with the notice the authority may apply to the magistrates' court for a removal and disposal order.

32. If the highway authority have reasonable grounds for considering that any thing unlawfully deposited on a highway constitutes a danger (including a danger caused by obstructing the view) to users of the highway, and that the thing in question ought to be removed without the delay involved in giving notice or obtaining a removal and disposal order from a magistrates' court, the authority may remove the thing forthwith. The authority can recover from the person by whom it was deposited on the highway or from any person claiming to be entitled to it any expenses reasonably incurred by the authority in removing it; or apply to the magistrates' court for a disposal order.

33. If the obstruction is a hedge, tree or shrub or vegetation of any other description that overhangs a right of way so as to endanger or obstruct the passage of vehicles, pedestrians or horseriders, the highway authority may serve a notice on either the owner of the hedge, tree, etc or the occupier of the land on which it is growing requiring him within 14 days of the date of service of the notice to lop or cut it so as to remove the cause of the obstruction. In addition, where it appears to the highway authority that any hedge, tree or shrub is dead, diseased or insecurely rooted and that by reason of its condition, or part of it, is likely to cause danger by falling on the public right of way, the authority may by notice to the land owner or occupier require him within 14 days of service of notice to so cut or fell it as to remove the likelihood of danger.

34. If the person on whom the notice was served fails to comply with it, the authority may carry out the work and recover the expenses reasonably incurred by them in doing so from the person in default.

35. If a person has willfully obstructed a highway, he is guilty of an offence and liable to a fine.

If you are a person on whom notice (Form 2) has been served

36. You have received notice (Form 2) because it appears to the local highway authority that you may be for the time being responsible for an obstruction for which the local highway authority has received notice. Form 2 lists all those on whom it has been served and states what action the highway authority propose to take.

37. You should write to the local highway authority if you consider that you should not have been served with Form 2. This may be because you are not responsible or the

obstruction has been or is being removed (in which case tell the highway authority when it was removed). Tell them also if you think that this legislation does not apply. You may consider that you should seek advice.

38. If the matter reaches the magistrates' court, you will be given notice by the court. The court may make an order if it is satisfied that

- (a) the obstruction is one to which section 130A applies or, in a case falling within subsection (4)(a)(ii) of that section, is one to which that section would apply but for the obstruction having become used for human habitation since service of the notice relating to it under subsection (1) of that section,
- (b) the way obstructed is a highway within subsection (2) of that section, and
- (c) the obstruction significantly interferes with the exercise of public rights of way over that way.

39. As a person for the time being responsible for the obstruction to which the application to the magistrates' court relates, you will have a right to be heard on the matters set out in para 38. The magistrates' court will send you notice of the hearing, of the right to be heard and of the right to appeal against a decision on the application. Where it makes an order, the magistrates' court will send you a copy. You have the right to appeal to the Crown Court against the order.

40. The local highway authority may prevent the making of a magistrates' court order if they can satisfy the court :

- (a) that the fact that the way obstructed is a right of way as defined in section 130A(2) is seriously disputed;
- (b) on any other grounds, that they have no duty under section 130(3) to secure the removal of the obstruction; or
- (c) that, under arrangements which have already been made by them, its removal will be secured within a reasonable time, having regard to the number and seriousness of obstructions in respect of which they have such a duty.

If the magistrates' court makes an order

41. Where the magistrates' court makes an order, the highway authority must, display a notice (Form 5) stating that an order has been made. Copies of Form 5 should be displayed on each side of the obstruction and at the first point, on each side of the obstruction, where the way joins a metalled highway or another highway.

42. Any person aggrieved by the order may appeal to the Crown Court on the grounds that section 130A does not apply; or that the obstruction does not significantly interfere with the exercise of public rights of way over that way (see para 38). Notice of an appeal to the Crown Court must be given not later than 21 days after the date on which the magistrates' court order was made. (The Crown Court has power to extend this period.)

Annex 1 - The Highways Act 1980

Protection of public rights

130 - (1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.

(2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.

(3) Without prejudice to subsections (1) and (2) above, 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, and
- (b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.

(4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.

(5) Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient.

(6) 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) 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.

(7) Proceedings or steps taken by a council in relation to an alleged right of way are not to be treated as unauthorised by reason only that the alleged right is found not to exist.

Notices to enforce duty regarding public paths

130A. - (1) Any person who alleges, as respects any highway for which a local highway authority other than an inner London authority are the highway authority-

- (a) that the highway falls within subsection (2) below, and
- (b) that it is obstructed by an obstruction to which this section applies,

may serve on the highway authority notice requesting them to secure the removal of the obstruction from the highway.

(2) A highway is within this subsection if it is-

- (a) a footpath, bridleway, or restricted byway, or
- (b) a way shown in a definitive map and statement as a restricted byway or a byway open to all traffic.

(3) Subject to subsection (4) below, this section applies to an obstruction of the highway if the obstruction is without lawful authority and either-

- (a) the powers conferred by section 143, 149 or 154 below are exercisable in respect of it, or
- (b) it is of a description prescribed by regulations made by the Secretary of State and the authority have power (otherwise than under any of those sections) to secure its removal.

(4) This section does not apply to an obstruction if-

- (a) it is or forms part of-
 - (i) a building (whether temporary or permanent) or works for the construction of a building, or
 - (ii) any other structure (including a tent, caravan, vehicle or other temporary or movable structure) which is designed, adapted or used for human habitation,
- (b) an order may be made in respect of it under section 56 above, or
- (c) the presence of any person constitutes the obstruction.

(5) A person serving a notice under subsection (1) above must include in the notice the name and address, if known to him, of any person who it appears to him may be for the time being responsible for the obstruction.

(6) A highway authority on whom a notice under subsection (1) above is served shall, within one month from the date of service of the notice, serve-

- (a) on every person whose name and address is, pursuant to subsection (5) above, included in the notice and, so far as reasonably practicable,

on every other person who it appears to them may be for the time being responsible for the obstruction, a notice informing that person that a notice under subsection (1) above has been served in relation to the obstruction and stating what, if any, action the authority propose to take, and

- (b) on the person who served the notice under subsection (1) above, a notice containing the name and address of each person on whom notice is served under paragraph (a) above and stating what, if any, action the authority propose to take in relation to the obstruction.

(7) For the purposes of this section the persons for the time being responsible for an obstruction include the owner and any other person who for the time being-

- (a) has possession or control of it, or
- (b) may be required to remove it.

(8) A notice under subsection (1) or (6) above shall be in such form and contain such information as may be prescribed by regulations made by the Secretary of State.

(9) In this section "inner London authority" means Transport for London, the council of an inner London borough or the Common Council of the City of London.

(10) Subsection (2) above has effect until the commencement of section 47 of the Countryside and Rights of Way Act 2000 with the substitution for the references to a restricted byway and to a way shown in a definitive map and statement as a restricted byway of a reference to a way shown in a definitive map and statement as a road used as a public path.

Orders following notice under section 130A

130B. - (1) Where a notice under section 130A(1) above has been served on a highway authority in relation to any obstruction, the person who served it, if not satisfied that the obstruction has been removed, may apply to a magistrates' court in accordance with section 130C below for an order under this section.

(2) An order under this section is an order requiring the highway authority to take, within such reasonable period as may be fixed by the order, such steps as may be specified in the order for securing the removal of the obstruction.

(3) An order under this section shall not take effect-

- (a) until the end of the period of twenty-one days from the day on which the order is made; or
- (b) if an appeal is brought in respect of the order within that period (whether by way of appeal to the Crown Court or by way of case stated for the opinion of the High Court), until the final determination or withdrawal of the appeal.

(4) Subject to subsection (5) below, the court may make an order under this section if it is satisfied-

- (a) that the obstruction is one to which section 130A above applies or, in a case falling within subsection (4)(a)(ii) of that section, is one to which that section would apply but for the obstruction having become used for human habitation since service of the notice relating to it under subsection (1) of that section,
- (b) that the way obstructed is a highway within subsection (2) of that section, and
- (c) that the obstruction significantly interferes with the exercise of public rights of way over that way.

(5) No order shall be made under this section if the highway authority satisfy the court-

- (a) that the fact that the way obstructed is a highway within section 130A(2) above is seriously disputed,
- (b) on any other grounds, that they have no duty under section 130(3) above to secure the removal of the obstruction, or
- (c) that, under arrangements which have been made by the authority, its removal will be secured within a reasonable time, having regard to the number and seriousness of obstructions in respect of which they have such a duty.

(6) A highway authority against whom an order is made under this section shall, as soon as practicable after the making of the order, cause notice of the order and of the right to appeal against it to be displayed in such manner and at such places on the highway concerned as may be prescribed by regulations made by the Secretary of State, and the notice shall be in such form and contain such information as may be so prescribed.

(7) An order under this section may be varied on the application of the highway authority to whom it relates.

Section 130B: procedure

130C. - (1) A person proposing to make an application under section 130B above shall before making the application serve notice of his intention to do so on the highway authority concerned.

(2) A notice under subsection (1) above shall be in such form and contain such information as may be prescribed by regulations made by the Secretary of State.

(3) The notice may not be served before the end of two months beginning with the date of service on the highway authority of the notice under section 130A(1) above ("the request notice").

(4) An application in respect of which notice has been served under subsection (1) above may be made at any time-

- (a) after the end of five days beginning with the date of service of that notice, and
- (b) before the end of six months beginning with the date of service on the highway authority of the request notice.

(5) On making the application the applicant must give notice to the court of the names and addresses of which notice was given to the applicant under section 130A(6)(b) above.

(6) On the hearing of the application any person who is, within the meaning of section 130A above, a person for the time being responsible for the obstruction to which the application relates has a right to be heard as respects the matters mentioned in section 130B(4) above.

(7) Notice of the hearing, of the right to be heard under subsection (6) above and of the right to appeal against a decision on the application shall be given by the court to each person whose name and address is notified to the court under subsection (5) above.

Section 130B: costs

130D. Where an application under section 130B above is dismissed by virtue of paragraph (a), (b) or (c) of subsection (5) of that section, the court, in determining whether and if so how to exercise its power under section 64(1) of the Magistrates' Courts Act 1980 (costs), shall have particular regard to any failure by the highway authority to give the applicant appropriate notice of, and information about, the grounds relied on by the authority under that paragraph."

(2) In section 317 of the 1980 Act (appeals to the Crown Court from decisions of magistrates' courts) after subsection (2) there is inserted-

(3) Any person who, in relation to the decision of a magistrates' court on an application under section 130B above, does not fall within subsection (1) above but-

(a) is, within the meaning of section 130A above, a person for the time being responsible for the obstruction to which the application related, or

(b) when the application was heard, was such a person and was, or claimed to be, heard on the application,

may appeal to the Crown Court against the decision on any ground relating to the matters mentioned in section 130B(4) above.