

## **Introduction**

Parish councils interested in safeguarding and improving the public paths in their areas have available to them a wide range of powers which give them a privileged position to protect this precious heritage. Most of this work can still be done even at a time of budget restraint and cuts in public expenditure.

This leaflet has been published by Peak and Northern Footpaths Society to assist parish councils by explaining the powers available to them with respect to Footpath Law.

## **Highways Act 1980 section 130(6)**

This provides that if the parish council makes a representation to the highway authority, which will be either the county council or the unitary/district council, that a public right of way has been unlawfully obstructed, it is the duty of the highway authority to take proceedings to have the obstruction removed. This would mean the highway authority serving a notice on the landowner to remove the obstruction under section 143 of the Highways Act 1980. If the obstruction is not removed in the time specified, usually four or six weeks, then the authority can remove the obstruction itself and recover the cost from the landowner. Thus, providing the representation is correct, i.e. the path concerned is a public right of way and is obstructed (not out of repair e.g. because the surface is overgrown or flooded), the highway authority is bound to take steps to have the obstruction removed.

A good illustration of the power of this provision is provided by the case of *R v. Surrey County Council ex parte Send Parish Council* 1979. This concerned a path which had been taken into the gardens of a number of houses in the parish. The path was consequently obstructed by fences and a summer house and a swimming pool had been constructed on the line of the path. Whilst the path was not recorded on the definitive map for the parish, there was good evidence, accepted by the county council, that the path had the legal status of a public footpath on the basis of historical evidence and use of the path as a public right of way for in excess of twenty years. The parish council duly made representations to the county council under section 130(6) asking for the obstructions to be removed. The owners of the houses then proposed a diversion of the path onto land which they had purchased for the purpose. The parish council objected to this proposal as the diverted path was not as convenient as the original path and they did not see why the house owners should be allowed to buy their way out of trouble by purchasing the land, diverting the path and so extinguishing the rights of the public to use the original footpath. The county council then proposed to extinguish the original path and to recognise the path on the land purchased by the householders as an alternative substitute path. In response the parish council brought an action in the High Court claiming that the county council was not complying with section 130(6) and asking for an order to force them to take action to have the original path reopened free from obstructions. This application was successful. The Court found that the county council was acting in the interests of the householders, the persons who had obstructed the path, and not in the interests of those who should have been enjoying the use of the of the right of way over the original footpath. This was in breach of its statutory duty under section 130(6). In effect the county council had shut its ears to the parish council's application made pursuant to the section and this was unlawful.

This case shows that representations under section 130(6) provide a powerful weapon available to parish councils to get an obstructed footpath or bridleway cleared by the highway authority which has a statutory duty to 'assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority'. Wonderful words and a worthy sentiment indeed!

## **Wildlife and Countryside Act 1981 section 87(5)**

This section of the Act states that the parish council should have for public inspection, a copy of the definitive map for the parish. This is a map and description drawn up by the surveying authority, the county council or unitary/district council, showing all public footpaths, bridleways, restricted byways (no public motorised vehicular rights) and byways open to all traffic (includes public motorised vehicular rights) in the parish.

An excellent practice is for the parish council to display the map on the parish notice board and to include all access land where there is a right to walk under the Countryside and Rights of Way Act 2000. Recent relaxation of copyright restrictions by the Ordnance Survey means that the highway authority can make available a copy of the definitive map for display purposes without payment of a fee. A good example of

such a map can be seen outside Marsden station in West Yorkshire. This was erected by Marsden Walkers are Welcome Group with the assistance of Kirklees Council with funding from a local charity.

The parish council should also hold, for public inspection, a copy of all orders made by the highway authority which modify the definitive map. This includes Definitive Map Modification Orders (DMMOs), which have added or deleted paths from the map. The parish council has to be consulted about any application for a DMMO before the order is made. Where an application is made to add a path to the map, this will be on the basis of evidence of use of the route as a public right of way for a considerable period and /or historical evidence of the path's existence such as inclosure awards or estate maps. Many parish councils have successfully made such claims. Applications to delete paths are much rarer and are on the basis that evidence has been discovered which, had it been available at the time the definitive map was produced, would have meant the path not being included on the map as a public right of way. In either case the local knowledge of parish councillors will often enable the parish council to provide useful comments on the merits of the DMMO application. If the parish council or any person objects to the making of the DMMO, the order cannot be confirmed by the highway authority, but must be sent to the Planning Inspectorate which will determine the matter by written representations or at a public inquiry or hearing.

### **Public Path Orders to divert or extinguish paths**

Any order to divert or extinguish a public right of way must be served on the parish council. Such orders may be made under highways or planning legislation. A public path diversion order may be made under section 119 of the Highways Act 1980 in the interests of the public or a landowner or both. The new path must not be substantially less convenient to the public than the original path. Also the effect on public enjoyment is a relevant matter. A public path extinguishment order may be made under section 118 on the ground that the path is not needed for public use. Such an application is normally on the basis that there is a satisfactory alternative path or the path is no longer serving a useful purpose because of developments in the area. Under planning legislation a path may be diverted or stopped up where it is necessary to do so to enable development to be carried out in accordance with the grant of planning permission by the planning authority, normally the district council. The normal practice is for the parish council to be consulted before the order is made so its comments can be considered before the final order is made. As in the case of DMMOs, this will provide an opportunity for the parish council to comment on the draft orders in the light of its detailed knowledge of the locality. If the parish council objects to the making of the order, then as with DMMOs, the matter must be referred to the independent Planning Inspectorate which is then responsible for the final determination.

A highway authority can apply to a magistrates' court for an order stopping up or diverting a highway under section 116 of the Highways Act 1980. The court must be satisfied that the highway is unnecessary or can be diverted to make it nearer or more commodious to the public. This is a profoundly undemocratic procedure, which cries out for repeal. Appearing in court to argue before magistrates is a daunting experience for objectors. Also it is doubtful whether magistrates are the appropriate people to determine such applications. Fortunately most councils make little or no use of these provisions preferring the more open and democratic procedures under sections 118 and 119. In any event the parish council can veto the use of the procedure and does not have to give a reason. We urge parish councils to use this power of veto unless there are very exceptional circumstances.

### **Maintenance of public rights of way**

A parish council may undertake the maintenance of any public right of way within the parish. In some parishes there are well established schemes in place whereby routine maintenance is delegated and funded by the highway authority. The Cumbria County Council Parish Paths Initiative provides a splendid example of what can be achieved by a highway authority and the parishes working together (full details on the county council's website). The parish council may well be in a good position to recruit volunteers to work on paths in the parish. The highway authority should have a volunteer policy dealing with the important practical issues of risk assessment, insurance cover and provision of tools and training. Public rights of way staff should assist with liaison with landowners, disposal of waste and overall supervision of work undertaken. There is also a power to sign and waymark public rights of way with the consent of the highway authority under section 27 of the Countryside Act 1968. Waymarking is very important to encourage use of rights of way and to keep users on the proper line, avoiding trespass onto private land. Also waymarking is a suitable task for a wide range of volunteers to undertake. The parish council can insist that a particular footpath or bridleway or restricted byway be signposted by the highway authority where it leaves a metalled road.

Signing is particularly important when the path or way looks private, so the public is discouraged from using it. From the 4<sup>th</sup> July 2016 it should not be possible for somebody to purchase a house or other property with no knowledge of the existence of a public right of way through or next to the land. Any public right of way on the definitive map will have been revealed in response to a question on the search form sent to the local council by the purchaser's solicitor during the conveyancing process. However in the past this question was optional and was often not asked to save money. This was a misguided and negligent practice which can cause upset to the purchaser when they discover walkers or riders using a definitive path on or next to their property.

### **Barriers on public rights of way**

Under section 147 of the Highways Act 1980, gates or stiles may only be erected across a highway for stock control purposes. Stock includes horses as well as cattle and sheep but not dogs. Gates cannot be authorised for other purposes, such as increasing security or enhancing the appearance of the entrance to the drive to a house along which there is a public right of way. Erection of a gate across a public footpath or bridleway without the authority of the highway authority amounts to an unlawful obstruction. Unfortunately this rule is not always properly enforced, despite case law making it clear that the whole width of the path must be available to the walker. In accordance with the Equality Act 2010 any barrier erected to control stock must be the 'least restrictive option'. This should mean that gaps or gates are normally used rather than a stile. This will also apply when a path is diverted or a new path created and a barrier is required. Where the path crosses a fence or a wall, it should be as accessible as possible to all walkers, including the elderly.

The highway authority may erect on a public footpath or bridleway such barriers, rails, fences or posts as it thinks necessary for safeguarding persons using the path or way (section 66(3) Highways Act 1980). This enables it to erect bollards to prevent unlawful use of a footpath by vehicles or horses. Another example would be the putting up of a handrail on a steep path to make it easier to use.

### **Seats and path improvements**

It is a common practice, hugely welcomed by walkers, for parish councils to erect seats on any land abutting any road within the parish. 'Road' is defined as any highway, including a public path. This provision is in the Parish Councils Act 1957 which also allows for the erection of shelters and lighting on any footpath or bridleway.

Under section 30 of the Highway Act 1980 the parish council has power to create new highways by agreement with the landowner over land in their area and adjoining parishes. This power could be most usefully exercised to provide a 'behind a hedge path' where the existing footpath passes along a narrow busy lane with no footway (pavement) or where a path emerges onto such a road. There may also be cases where a path from a neighbouring parish ends at the boundary of your parish but could be extended to meet an existing path to provide a through route.

### **Taking legal action**

There are powers under highway legislation for parish councils to prosecute for unlawful obstruction, or where crops inconvenience users of footpaths or bridleways or where paths have been ploughed but not restored within the time allowed by law, normally 14 days. Rather than carrying out a prosecution themselves, most parish councils would expect the highway authority to be responsive to complaints and for there to be in place a rigorous enforcement policy which will include a section on the appropriate use of prosecution.

### **Join us**

Parish councils may become affiliate members of the Society. Many have done so. Details of how to join are on our web site [www.peakandnorthern.org.uk](http://www.peakandnorthern.org.uk). We urge you to join us, so that we can work together to protect our precious heritage of public rights of way.