

Enforcement Policy

Obstructions (temporary and permanent), issues relating to farming (ploughing and cropping) and materials deposited on the highway



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Nothing in this policy should be construed as limiting or preventing the implementation of any reasonable enforcement action or legal proceedings which the Council considers appropriate where a public right of way is wilfully obstructed.

Any deviation from this policy must be requested in writing and approved by the Assistant Director - Planning and Development.

1. Introduction

- 1.1. The Definitive Map and Statement are Central Bedfordshire Council's legal record of public rights of way: footpaths, bridleways, restricted byways, and byways open to all traffic. The map informs landowners and tenants whether a public right of way crosses their garden or paddock, or runs around their field or through their farmyard. These routes are as much part of the greater public

rights of way network as our country roads and motorways and enjoy equal protection under the law. Members of the public have the right to use these routes when they wish and should expect to be able to use them freely and without interruption or obstruction.

- 1.2. The requirement that public rights of way are available for public use is a general duty of both the landowner¹ and this Council². Where rights of way are obstructed the Council has a duty to protect the public's right to use the path or way and, where necessary, to seek³ the removal of the obstruction.
- 1.3. Section 130 of the Highways Act 1980 imposes a duty on Central Bedfordshire Council, as 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...*". The High Court case of *Regina v Surrey County Council (ex parte Send Parish Council) 1979*, mandates that the Council, as highway authority, carries out its duty in a reasonable and appropriate manner to facilitate use of the route by those legally entitled to do so. Central Bedfordshire Council has discretion in how and the extent to which it discharges its duty.
- 1.4. This policy is one of a coherent suite of policies and practices which link into the themes within the Outdoor Access Improvement Plan⁴ and are founded on the core values of openness and least restrictive access to the network.

Definitions

- 1.5. For the purposes of this document the term "*land owner*" will mean the owner of the fee simple, or leasehold, if applicable. The term "*occupier*" will relate to the land owner, tenant, occupier or farmer who occupies and actively manages the land, and not to the owner of the land where the owner has leased the land. The term "*path*" will mean any of the following public rights of way: footpath, bridleway, restricted byway, or byway open to all traffic (BOAT), or a cycle track⁵.
- 1.6. For the purposes of this document the term "*permanent features*" include (but are not limited to) the following:
 - Inhabited domestic residences
 - Operational commercial and agricultural buildings
 - Any water feature, the removal of which would require consent under Section 23 of the Land Drainage Act 1991

¹ Highways Act 1980, Section 137 *and other sections*

² Highways Act 1980, Section 130.

³ Central Bedfordshire Council may decide not to seek the removal of an obstruction in circumstances where doing so could expose members of the public using the path to other clearly identified hazards.

⁴ At the time of writing the Outdoor Access Improvement Plan is being re-written.

⁵ As defined within Section 56 of the Wildlife and Countryside Act 1981 and Section 3 of the Cycle Tracks Act 1984 or Section 329 of the Highways Act 1980.

- Any significant⁶ structure constructed by a statutory undertaker for the purposes of its undertaking

1.7. For the purposes of this document a “*long-lived feature*” is something that was constructed or came into being before 1st March 1964 – the date of the first Definitive Map and Statement.

1.8. For the purposes of this document the term “*temporary features*” are things which could be removed without significant difficulty and include (but are not limited to) the following:

- Trees and hedges
- Walls and fences
- Gates and stiles⁷
- Detached garages and greenhouses
- Ponds, slurry pools, muck clamps, animal shelters and pens.
- Hay & straw stacks

1.9. For the purposes of this document a “*long-lived temporary feature*” will be considered to be temporary in nature and capable of removal.

1.10. This policy will be subject to periodic review and amendment by the Rights of Way Team Leader.

2. Obstructed paths not subject to a Public Path Order application or confirmed Definitive Map Modification Order

2.1. Where paths are obstructed by temporary structures or by structures that have been constructed since the paths were recorded on the Definitive Map, the presumption will be that the Council will seek the removal of the obstruction using its powers under the Highways Act 1980⁸ - see Sections 7 and 9 below.

2.2. Where paths are obstructed by permanent and/or long-lived features⁹ and consequently the obstruction could not be reasonably or practicably removed by means of enforcement action, the Council will consider either making a Council-generated Public Path Diversion Order or a Public Path Extinguishment Order to resolve the issue. The Council will take into consideration any Court Order¹⁰ requiring the removal of the obstruction when deciding whether an order should be made.

⁶ The case of *R. v Secretary of State for the Environment, ex parte Barry Stewart (1980)* addressed the issue of permanence of obstructions and found an electricity sub-station to be a temporary feature.

⁷ Where not authorised under Section 147 of the Highways Act.

⁸ The Highways Act 1980 empowers the Council to remove any obstructions, including fencing, gates, vegetation and crops which prevent or impede use of a public right of way.

⁹ See Sections 1.6 - 1.8.

¹⁰ *Ashbrook, R (on the application of) v East Sussex County Council [2002] EWCA Civ 1701*

- 2.3. Where the Council considers making a Public Path Diversion Order, it will require the landowner, where possible, to enter into a permissive path agreement to provide a suitable alternative route for members of the public to use until any Order is confirmed and certified. As part of the agreement, the landowner will be required to defer all Council costs associated with drafting the agreement and maintaining the permissive route.

3. Obstructed paths subject to an application for a Public Path Order or Definitive Map Modification Order which would resolve the obstruction issue

General requirements

- 3.1. Keeping paths open and available for public use is a general duty of both the landowner¹¹ and Central Bedfordshire Council¹². The execution of the Council's duty, however, must be reasonable and proportionate. Whilst there is no justification in directly linking the presence of obstructions on an existing path with the processing of an application to divert or extinguish it, the presumption shall be that all paths that are the subject of an application will be open and available for public use until such time as an extinguishment or diversion order is made and confirmed (and where necessary, certified).
- 3.2. The decision as to whether enforcement action is appropriate, and whether an application to divert or to extinguish a path is appropriate, should be made by the Rights of Way Team Leader¹³ on the merits of each individual case.
- 3.3. The Case Officer, in consultation with the Rights of Way Team Leader, may temporarily waive the requirement that a path should be open and available for public use where he or she deems it appropriate having regard to all the circumstances of the particular case.
- 3.4. Where the legal line of the path is obstructed by temporary structures that can be removed the applicant will be required to open up the path on the legal line until an order has been confirmed and, where necessary, certified.

Requirements for obstructed paths to be diverted under Section 119 of the Highways Act 1980

- 3.5. The requirements relating to a Public Path Diversion Order application affecting an obstructed path are as stated in the Council's **Applications Policy**; namely:

¹¹ Highways Act 1980, Section 137 *et. seq.*

¹² Highways Act 1980, Section 130.

¹³ The power of the Rights of Way Team Leader to authorise the taking of enforcement action is a power delegated down to him under Sections 3.1.2 of Annex H3 (*Scheme of delegation by the Council and by the Executive to Directors and other Officers*) of Central Bedfordshire Council's Constitution.

5.24 *The presumption shall be that all paths that are the subject of an application will be open and available for public use until such time as an extinguishment or diversion order is made and confirmed (and where necessary, certified)...*

5.25 *Where the legal line of a path is obstructed, the applicant will have to make a case in writing why the legal line of a path cannot be made open and available for public use. The Rights of Way Team Leader may, if satisfied by the reasons given, temporarily waive the requirement to have an open path where he deems it appropriate, having regard to all the circumstances of the particular case.*

3.6. Where an obstructed path is subject to an application under Sections 119A-D of the 1980 Act, the Case Officer and Rights of Way Team Leader may, if satisfied by the reasons for the application, temporarily waive the requirement to have an open path where they deem it appropriate, having regard to all the circumstances of the particular case.

Requirements for obstructed paths to be extinguished under Section 118 of the Highways Act 1980

3.7. The requirements relating to a Public Path Extinguishment Order application affecting an obstructed path are as stated in the Council's **Applications Policy**. Namely:

5.26 *Where an application seeks to extinguish a path the Rights of Way Team Leader may require that the path be monitored for a period of time to assess whether it is used by the public and to what extent. Where the application relates to a route that has been unavailable for public use because of obstructions that cannot be removed, the Rights of Way Team Leader may require that a suitable alternative route be provided so that a comparable level of use may be ascertained.*

5.27 *A suitable alternative route means one on an existing right of way or permissive path of equal or higher status, or on land in the same ownership as the application path along a route that does not impede the passage of the public entitled to use the application path, and which is substantially as convenient for members of the public to use. Where an alternative route is proposed on land in a different ownership the applicant would have to compensate the affected landowner.*

5.28 *The duration of the assessment period will be determined by the Case Officer on a case-by-case basis and will generally be between one month and one year. The applicant will be required to pay any reasonable costs expended by the Council in ascertaining the level of use of the route. The Case Officer has discretion to waive these requirements if a suitable alternative right of way of equal or higher status exists nearby.*

3.8. Where an obstructed path is subject to an application under Sections 118A-C of the 1980 Act, the Case Officer and Rights of Way Team Leader may, if

satisfied by the reasons for the application, temporarily waive the requirement to have an open path where they deem it appropriate, having regard to all the circumstances of the particular case.

Requirements for obstructed paths to be deleted under Section 53 of the Wildlife and Countryside Act 1981

3.9. The requirements relating to a Definitive Map Modification Order application affecting an obstructed path are as stated in the Council's **Applications Policy**. Namely:

8.8 *Where an application to delete a path relates to a route that has been unavailable for public use because of permanent or long-lived obstructions, the applicant may enter into a formal permissive path agreement with this Council to provide a suitable alternative route where possible whilst the Definitive Map Modification Order application is being determined¹⁴. The alternative route should keep as close to the definitive line of the path where possible and should conform to all the requirements of a public right of way.*

8.9 *The applicant must make every effort to remove any temporary obstructions preventing use of the legal line of the path. The Case Officer may, however, temporarily waive this requirement where he or she deems it appropriate having regard to all the circumstances of the particular case.*

3.10. The effect of deleting a path from the Definitive Map is to recognise that the path is either not a public right of way and therefore should not be shown on the Definitive Map or, if it is a public right of way, it is of a type that ought not to be recorded on the Definitive Map. In the latter case, enforcement of the right of way will still be considered.

3.11. Section 4 below details the Council's approach in relation to obstructions arising from a recently confirmed Definitive Map Modification Order.

Applications received in response to commencement of enforcement proceedings

3.12. Where an application to divert, extinguish, or delete a path is received after enforcement proceedings have begun, the Rights of Way Team Leader has discretion¹⁵ as to whether to continue with the enforcement process or to allow the application to be processed on the condition that a suitable alternative route is provided.

¹⁴ Until a Definitive Map Modification Order is confirmed the map is conclusive legal evidence of the existence of a right of way shown upon it.

¹⁵ In deciding whether to take enforcement action, the Rights of Way Team Leader should have regard to *R. v Lancashire County Council ex parte Guyer (1980)* which removed the duty under S.130 to assert the public's rights where a route was in serious dispute.

Failure of an application

- 3.13. Where an application to either divert, extinguish, or delete an obstructed right of way is refused by the Council, or is not confirmed by the Council or Secretary of State for the Environment, Food and Rural Affairs, the Council will either take enforcement action to open up the legal line of the path and seek to recover any costs associated with doing so; or will make a Council-generated order¹⁶ to resolve the issue. A Council-generated order will seek to provide a route of the Council's own choosing that it considers to be the most acceptable to the users of the right of way.

4. Obstructed paths resulting from a recent Definitive Map Modification Order

- 4.1. Where a public right of way has been modified or added to the Definitive Map by the recent confirmation of a Definitive Map Modification Order and the new line of the path is obstructed, the Council will consider the following factors before acting:
- The nature of the obstruction (permanent, long-lived or temporary);
 - The current or likely future use of the land affected by the path;
 - The surrounding public rights of way network;
 - Representations from the local Ward Members, local town or parish council, P3 and user-groups, and affected landowners;
 - The reason behind the modification order.
- 4.2. Where a Definitive Map Modification Order results in the added or modified right of way being obstructed by a temporary structure, the initial position of the Council will be that the added or modified right of way should be opened up along its definitive line and the temporary obstruction removed.
- 4.3. Where a Definitive Map Modification Order results (or would result if confirmed) in the added or modified right of way being obstructed by a structure which **could** reasonably or practicably be removed by means of enforcement action **and** the circumstances are such that a suitable alternative route could be provided within the legislative tests of the Highways Act 1980, the landowner/occupier should be invited to apply for a Public Path Diversion Order at their expense. This application would be processed in parallel with the Definitive Map Modification Order, with a Public Path Diversion Order being made once the modification order was confirmed.
- 4.4. In cases where the obstruction **could** reasonably or practicably be removed by means of enforcement action, **and** the circumstances are such that there is **no** reasonable alternative route, the landowner/occupier should be invited to apply for a concurrent Public Path Extinguishment Order at their expense. This application would be processed in parallel with the Definitive Map

¹⁶ Whilst the applicant cannot be charged for such an order under the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (as amended), they will be expected to agree not to claim compensation for any order so made.

Modification Order, with a Public Path Extinguishment Order being made once the modification order was confirmed.

- 4.5. Where an application for either a Public Path Diversion Order or Public Path Extinguishment Order has been made as per Sections 4.3 or 4.4, the Council will not unreasonably refuse to make such an order.
- 4.6. Where an application to either divert or extinguish an obstructed right of way under Sections 4.3 or 4.4 is refused by the Council, or an order is not confirmed by the Council or Secretary of State for the Environment, Food and Rural Affairs, the Council will consider whether action should be taken to either open up the legal line of the path, or to make a Council-generated order to resolve the issue as below.

Council-generated orders

- 4.7. The exception to the above points is where the modification order was made to correct an acknowledged error by this or another local authority - in which case any concurrent Order will be Council-generated.
- 4.8. Where an obstruction is considered to be either permanent or long-lived and consequently the obstruction could **not** be reasonably or practicably removed by means of enforcement action, the Council will consider either making a concurrent Council-generated Public Path Diversion Order or Public Path Extinguishment Order to resolve the issue.
- 4.9. A Council-generated order will seek to provide a route of the Council's own choosing that it considers to be the most acceptable to the users of the right of way. Any structures required to facilitate passage by the public will be of the Council's choosing and will comply with the Council's **Structures Policy: Achieving Least Restrictive Access on Central Bedfordshire's Rights of Way**. Widths of Council-generated paths will comply with the Council's **Applications Policy**. Any significant deviation from the Council's preferred route would have to be achieved by means of an application by the affected landowner or tenant at their expense. Similarly, any structures for stock control would have to be authorised by the Council¹⁷ and paid for by the affected landowner or tenant.

5. Paths obstructed by ploughing and crops

The Council's Ploughing and Cropping Policy deals with all issues relating to failures to comply with Sections 134 and 137A of the Highways Act.

- 5.1. Section 134 of the Highways Act 1980 permits a farmer, under good husbandry, to plough or disturb the surface of a cross-field highway for the purposes of agriculture but only if it is not *reasonably* convenient for him *not* to plough or otherwise disturb the path.

¹⁷ Under Section 147 of the Highways Act.

- 5.2. Headland paths and byways open to all traffic (“BOATs”) are excluded from Section 134 and therefore it is an offence to disturb the surface of any headland path or BOAT.
- 5.3. Under Section 137A of the Highways Act 1980 farmers have the duty to ensure that any crop (other than grass for grazing/silage) is removed from the line and full width of a public right of way.
- 5.4. Any notice served on a farmer for a ploughing or cropping obstruction will be copied to the Rural Payments Agency.

6. Paths obstructed by vegetation other than crops

- 6.1. Paths obstructed by encroaching or overhanging vegetation other than crops - such as trees, bushes etc. - will be dealt with under Section 154 of the Highways Act 1980 and, where applicable, under the Trees section of the Council’s **Maintenance Policy for Public Rights of Way**¹⁸.
- 6.2. Where any vegetation is found to overhang or encroach on a path the land owner and/or occupier will either be given a verbal and/or written notice to remove the obstruction within 14 days, or will be served directly with a formal notice under Section 154 requiring the obstruction to be removed within 14 days. The notice will include an estimate of the costs that the Council will be charging the landowner for taking the enforcement action. A contractor should be instructed to be on standby to take action on a date as soon after the 14th day as is practicable.
- 6.3. The notice or covering letter should also inform the land owner and/or occupier that if they clear the obstructing vegetation after the deadline but do not inform the area’s Rights of Way Officer that they have done so, they will still be liable for any Council contractor costs.

7. Paths obstructed by material, things deposited on the highway, or structures placed across the highway

Material and Deposits

- 7.1. Paths obstructed by material - including cut vegetation and rubbish, etc - will be dealt with under Section 149 of the Highways Act 1980. The Area Officer will immediately serve written notice on the person who deposited the material (where known) requiring them to remove it within a 7 day deadline. Where the identity of the owner of the deposited material cannot be ascertained the Council will take steps to remove the material themselves.
- 7.2. If the material is not removed by the end of the 7th day the Rights of Way Team Leader will make an application to the Magistrates’ Court for an order to

¹⁸ At the time of writing the Council’s **Maintenance Policy for Public Rights of Way** was still being updated.

remove the material and recover all costs associated with taking enforcement action where the owner of the deposited material is known.

- 7.3. Where the Area Officer has reasonable grounds to consider that anything deposited on the highway constitutes a danger (including a danger to users or other members of the public) and ought to be removed without the delay of giving notice, they will act to remove the thing as soon as possible and will charge the appropriate person (if known) for taking enforcement action and safely disposing of the material.

Unauthorised Structures

- 7.4. Any unauthorised structures placed on a public right of way will be dealt with as below, or under Sections 2, 3, or 4 of this policy, or the Council's **Structures Policy: Achieving Least Restrictive Access on Central Bedfordshire's Rights of Way**, depending on the circumstances.
- 7.5. Where an existing authorised structure has been replaced, the new structure **must** comply to the **Structures Policy: Achieving Least Restrictive Access on Central Bedfordshire's Rights of Way** otherwise it will be deemed to be unauthorised and will be dealt with as below.
- 7.6. Where an unauthorised structure or object has been erected and obstructs a public right of way maintainable at the public expense, the Area Officer may take steps under common law to remove the obstruction as quickly as possible. Where removal costs could be recovered, the Area Officer may, under Section 143 of the 1980 Act, serve notice upon the person or organisation responsible for the structure giving them 7 days notice to remove the structure.
- 7.7. Where the structure or object has not been removed by the deadline set within the notice, the Council will, under Section 143 of the 1980 Act, remove the obstruction. The Council must allow at least one month from the date of service of the notice before exercising its power to remove the obstruction and may recover any expenses incurred in removing the structure of object from its owner.

Wilful obstruction

- 7.8. Where a person wilfully obstructs a public right of way without lawful authority or excuse and does not remove the obstruction within any notice period served upon them by the Council, the Council will seek to prosecute that person at the Magistrates' Court under Section 137 of the 1980 Act. Section 137ZA of the Act empowers the Council to remove the obstruction and recover any expenses incurred in doing so.

