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18th May, 1999

F.A.O. Ted Mason, Principal Solicitor
C.C. Councillor Filer
Your ref. PT/3/EWM/JLP

Dear Mr. Mason,

Re: Headley Park Pistol and Rifle Club

Councillor Filer very kindly passed a copy of your letter to him of 7th August, 1998 to me for a response. My apologies for the delay in penning this reply. Please note that as a reciprocal courtesy I have copied this to him so that all parties are equally informed of my position.

Firstly may I thank you for complementing on my efforts to maintain the rights of horse riders in the area. I'd rather that I didn't have to! It is important though to emphasise that my efforts to keep the C102 safe for its lawful users are not mere self interest but down to a belief that a right to free passage is exactly that. That view is patently supported by statute and was plainly the view of Parliament, and its intention, when drafting section 130 of the Highways Act and its predecessors. What may appear to be a matter of "low priority" to the Council is in fact an erosion of a right which it is Hampshire County Council's statutory duty to protect.

Your letter, fairly, acknowledges that my rights as a highway user are being infringed by the banging of guns so close to the C102. You take the stance that as no other complaints have been made, the Council can avoid its duty to ensure safe passage on the basis that it forms a low priority. There are two short, emphatic, points to be made. First, on the question of fact as to

whether the gun club is interfering with the public right of passage, I refer you to the 16 or so statements of other local riders: there is plainly a problem here. Secondly, regardless of whether or not I am the only formal complainant, the rights of those lawfully using the C102 are being infringed and that triggers the duty of the Council to do something about it.

It is therefore not a question of priority, it is not a question of shall we or shall we not carry out the duty to protect the rights of the highway user, but *how* shall we protect and assert those rights? In the judicial review proceedings which I had to take in relation to this matter ~~last year~~^{in 1997}, the Council was at least forced to acknowledge that it has a duty to protect and assert the rights of the highway user. However, it must be agreed that *how* the Council protects and asserts those rights (i.e. how it carries out its duty) is a matter for its discretion. I have suggested a couple of options i.e. closing the gun club down, or creating a bridleway on the common land away from the road. What is done is entirely up to the Council, *as long as what is done works*. Only if it works will the Council have carried out its statutory duty. But the point remains that it must perform its duty.

In exercising its discretion on the matter of how to perform its duty, that discretion must be exercised reasonably. The Council must take into account that which is relevant and must not take into account that which is irrelevant. That much, as Counsel puts it, is "trite law". The case of *R v East Sussex County Council ex p Tandy* makes the point that lack of finance is not a relevant factor in making that decision, if it were it would have the effect of turning the duty into a power. So with respect I cannot agree that that case does not take the matter further.

Similarly, the other consideration seems to have been how much the Council has spent in addressing other matters raised by myself over the years. Presumably such money as has been spent as a result of my (reluctant) efforts is evidence, if evidence were needed, that they were justified, as they are in this case. In

any event, how much money the Council has spent on addressing other matters is so obviously not a relevant factor in deciding how to deal with the gun club problem, that it needs no further comment. It is therefore clear that the two reasons for not acting (the lack of money generally and money spent on other queries raised by me) are irrelevant and the decision to do nothing about the C102 is plainly unreasonable.

In equating the "low priority" with having reluctance to spend money to carry out the statutory duty, I am calling a spade a spade as that is obviously the import of the letter of 7th August, 1998. However, in anticipation of "Clintonesque" avoidance of the meaning of what has been said, I also make the point that even if the problem is considered "low priority" because the cost of dealing with it outweighs the benefit to the public, that approach is misconceived: it is settled law that where Parliament lays down a statutory requirement for the exercise of a duty it expects to be obeyed in the minutest detail (see for example *London & Clydeside Estates v Aberdeen District Council* (1980) 1WLR 182 per Lord Hailsham at 189). There is no balancing exercise of cost versus benefit mentioned anywhere in the Highways Act 1980 nor anywhere else, the duty under section 130 is absolute.

The only way that cost comes into what the Council does to assert and protect the rights of the highway user is that it is entitled to seek out and choose to pursue the least expensive option if there is a range of options available to it. The range of options available to the Hampshire County Council in this case consists of any solution that will have the effect of ensuring safe passage along the C102. As stated, I have suggested a couple that would probably work. In exercising its discretion it must do so reasonably. It is a reasonable exercise of the discretion of how to carry out the duty under s.130 Highways Act 1980 to decide to do the thing which a) ensures safe passage and b) is the cheapest option in the range of options that will have that effect. Deciding to do *nothing* falls outside the ambit of the reasonable

exercise of the discretion precisely because doing nothing does not ensure the safe passage of riders along the C102. If the Council is in doubt on this point then I would refer it to the speech of Lord Brown Wilkinson in Tandy: "If there were more than one way of providing suitable education the council would be entitled to regard its resources in choosing between different ways of providing suitable education." For suitable education read safe passage: a duty is a duty.

Failure to perform the statutory duty is easily established, the fact that it is a broad and weighty duty does not mean that it does not have to be complied with as your letter of 7th August seems to infer. The terms of the section 130 duty may be broad, but they are clear. The real question is what flows from the failure to perform that duty. The answer, from Counsel, is "mandamus" and order of the court to require the council to act, for my part I suspect publicity would be equally forceful. I have been down the judicial review route once in connection with this matter and would only do so again reluctantly, the cost implications of such actions are well known to both myself and the Council. More to the point I, an individual highway user, should not be in the position of protecting and asserting the rights of highway users generally, that is precisely the purpose of section 130 and the Council must recognise that in both the spirit and the letter of the legislation.

Yours sincerely,

Maureen Comber

BHS Hampshire County Bridleways Sub-Committee

Three Counties Bridleways Group