COUNCILLOR: **MR. JOHN THOMSON**

CABINET MEMBER FOR HIGHWAYS, STREETSCENE & BROADBAND

SERVICE AREA: NEIGHBOURHOOD SERVICES

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REFERENCE: HSB-014-13

LAND AT CALCUTT PARK, CALCUTT

Purpose of Report

1. To ask the Cabinet Member for Highways, Streetscene and Broadband to consider whether to consent to a proposal by officers that the Council should take enforcement action under section 143 of the Act in accordance with the notice shown at **Appendix 1**.

Relevance to the Council's Business Plan

2. The Solicitor to the Council considers that the proposed enforcement action is relevant to Outcome 3 of the Business Plan, in that removal of the structures would be consistent with the aim for everyone to have access to open space for work and leisure.

Background

3. Wiltshire Council has given Mr. Maurice Jones planning permission for permanent use of a site for gypsies and travellers at Calcutt. However, at the front of the site, he has erected structures, namely a fence and wall on the highway. The photographs at **Appendix 2** show the structures, including the wall, which has been built right up to the boundary of the metalled surface of the road, thus occupying stretches of the highway verge. On 28 July 2011, the Council served a notice ("the notice") under section 143 of the Act (**Appendix 1**) requiring Mr Jones to remove the fence and wall within one month. Officers consider that this step was consistent with its duty under section 130 of the Act to assert and protect the right 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. This includes the highway verge and the duty also requires the Council to prevent, as far as

possible, the stopping up or obstruction of the highways for which they are the highway authority.

4. Section 143 of the Act defines 'structure' as including ".. ***any machine, pump, post or other object of such a nature as to be capable of causing obstruction***". Together, the fence and wall occupy a section of highway which is 50 metres long (approximately 164') and three metres (about 10') wide and officers consider that it is capable of causing an obstruction.

5. Mr. Jones has not complied with the notice and is represented in this matter by Mr Tony Phillips of Thurdleigh Planning Consultancy. As a former Wiltshire Council planning officer, Mr Phillips was already familiar with the planning issues in this case. It took considerable time to verify that the Council's highway record was correct but it has been confirmed that the section of highway concerned was created by a Department of Transport Side Roads Order in 2002. It is no longer in contention that the wall and fence have been built on land which forms part of the highway but Mr Phillips contends that it would be discriminatory, inconsistent and unreasonable for the Council to take enforcement action against his client.

6. On 4 August 2010, whilst employed by Wiltshire Council, Mr Phillips sent an email to Councillor Peter Colmer which referred to the fence and wall. He said *" this would appear to be a straightforward encroachment onto the highway and it is therefore a matter for my highway colleagues to pursue. This is a position I have always maintained* ". Although Mr Phillips no longer maintains it, highway officers still consider this view to be correct.

7. From August 2011, Mr Jones has been represented in this matter by Mr Phillips. As can be seen from the email of 20 October 2011 at **Appendix 3**, the latter asserts that enforcement action should not be carried out for the following reasons:

   (a) The wall has not been built upon land owned by the Council;

   (b) The adjacent road only serves a very small number of properties;

   (c) The road is totally adequate for there not to be pedestrian/vehicle conflict as it is 6 metres wide and does have a verge on one side;

   (d) The road is used by very few vehicles which always travel slowly (as a result of cattle grids)

Main Considerations for the Council

8. Under section 130 of the Act, the Council has a 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". This includes, under section 130(3), the duty to prevent, as far as possible, the obstruction of highway.

9. The Council has previously taken the view that enforcement action need not be taken. The Solicitor to the Council advises that it is not prevented from reviewing this decision and that the following cases are of relevance. In *Seekings v Clarke* (1961), the court held that anything which substantially prevented the public from having free access over the whole of the highway, which was not purely temporary in nature, was an unlawful obstruction. There could be exceptions for structures which were only occupying a minimal part of the highway.

10. The decision of the High Court in *Herrick v Kidner and Somerset County Council* is of limited relevance. In that case, Mr Kidner sought a court order to require Somerset County Council to remove a gate and its posts from the highway. The court had the power to require the removal of an obstruction if it was satisfied that the obstruction significantly interfered with the exercise of public rights of way over that way.

11. In the *Herrick* judgment, the court held any structure erected within the legal extent of the footpath, and which prevents public passage or the enjoyment of amenity rights over the area of its footprint, significantly interferes with the exercise of public rights of way. A highway authority which refuses to take action to secure the removal of such structures may be subject to a court order requiring their removal under section 130B. Under section 130B, the interference has to be significant. Highway authorities should take into account the size and nature of the obstruction as well as the location and character of the neighbourhood. However, the judgment also expressly stated that " . .***no such limiting condition is necessary in relation to section 143*** [author's emphasis]*, since a highway authority may be expected to exercise its own powers in reasonable proportion to the circumstances of the case"*.

12. The judgment therefore makes a clear distinction between the requirements of sections 130B and 143. However, in the present case officers have gone beyond the requirements relating to section 143 and considered not only the size of the structure but also its location and the character of the neighbourhood.

13. It is not in dispute that the council does not own the land occupied by the fence and wall but that it is part of the highway. The adjacent no-through road does not have a heavy level of fast-moving vehicular traffic and officers do not consider that the structure is necessarily dangerous to highway users. However, in their view, the structure abuts the edge of the carriageway and anyone using the highway verge at this point would be forced into the road because of it. This was referred to by Mr Phillips' in his email of 23 June 2010, shown at **Appendix 3**.

14. In addition, it is considered that the presence of the fence and the wall on the highway may well have a psychological (as well as physical) deterrent in that, because of the fence and wall, any highway users are forced to walk in the road or use the verge opposite. The existence of such an effect was acknowledged in the *Herrick* case.

15. In the present case, the Cabinet Member may wish to visit the site if he has not already done so.

Safeguarding Considerations

16. None.

Public Health Considerations

17. None.

Environmental Impact of the Proposal

18. None.

Equalities Impact of the Proposal

19. Mr Phillips has suggested that the Council's actions in this matter have been driven by an unlawful and discriminatory attitude by Cllr Peter Colmer against Mr Jones. Having been informed that Cllr Colmer will not make the decision on whether to take enforcement action, Mr Phillips has suggested that any such action would amount to unlawful discrimination against his client.

20. Officers are mindful of the fact that Mr Jones is a member of the gypsy and traveller community and were aware of this when he was served with the section 143 notice. It is acknowledged that the Council has a public sector equality duty under section 149 of the Equality Act 2010 and the Cabinet Member is asked to take this into account as an integral part of the decision-making process. A copy of the section is attached at **Appendix 4**. Essentially, the section requires the Council, when exercising its functions, to have due regard to the need to:

    • **eliminate unlawful discrimination**, harassment, victimisation and any other conduct prohibited by the Act;

    • **advance equality of opportunity** between people who share a protected characteristic and people who do not share it; and

    • **foster good relations** between people who share a protected characteristic and people who do not share it.

21. Further, it is acknowledged that Mr Jones has a "protected characteristic" under section 149(7) as race includes ethnic or national origins. Section 149 seeks to advance equality of opportunity. Amongst other factors, it should be determined whether Mr Jones's ethnic origins led to him having needs which would not be shared by another person without the protected characteristic. The Solicitor to the Council has considered the section 149 duty but does not conclude that there is a causal link between Mr Jones building on the highway

(as opposed to building solely on the part of the land owned by him which is not subject to highway rights) and the protected characteristic.

22. Officers were not and are not motivated by a desire to unlawfully discriminate against or victimise Mr Jones, as alleged. The decision to recommend enforcement action is made on the basis of the relevant Highways Act 1980 considerations, with due regard being given to the Council's public sector equality duties. Further, no evidence has been provided that Mr Jones's ethnic origin created a need for him to build on the highway or that anyone without the protected characteristic who built a structure of similar size and character on the highway could reasonably expect that enforcement action would not result.

23. Mr Phillips has been informed of the Council's complaints procedure, should Mr Jones to pursue such action in this matter. It is also open to Mr Jones to refer the matter to the Local Government Ombudsman or to seek independent legal advice.

Risk Assessment

24. Mr Phillips has indicated that he may make a complaint to the Local Government Ombudsman or, if the Council decides to enforce the notice, apply to the High Court for a judicial review of the decision to do so and seek to interest the media in his client's situation. Officers consider that the Council has acted reasonably and that the enforcement action proposed would also be reasonable.

Financial Implications

25. The cost of carrying out the enforcement action would be in the region of £10,000 but could be higher if, for example, anyone tried to frustrate the work of the enforcement team. The Council would be entitled to recover the costs from Mr Jones, although Mr Phillips has indicated that his client would resist any attempt to do so.

Conclusion

26. Officers assess each possible case of obstruction according to its circumstances. In the present case, the fence and wall occupy a section of highway which is 50 metres long and three metres wide.

27. The fact that the wall is built on land not owned by the Council is not particularly relevant. Fundamentally, it is land over which highway rights run and enforcement of the notice would be consistent with the council's statutory duty under section 130 to assert and protect the highway, referred to at paragraph (8). A verge is available on one side but it is submitted that this is

not a justification – nor should be a precedent - for permitting obstruction on the other side of the road.

28. For the reasons stated above, officers consider that it is not merely a minimal obstruction of the highway. In addition, given the degree of obstruction, officers consider that if the Council did not remove the wall and fence this could undermine our efforts to carry out enforcement action elsewhere. The public sector equality duty includes the need to foster good relations between people who share a protected characteristic and people who do not share it. The Solicitor to the Council considers that good relations would not be fostered by allowing this obstruction to remain whilst pursuing those without protected characteristics who have erected lesser obstructions.

Options Considered

29. The Cabinet Member for Highways, Transport & Broadband may resolve to:

(i) Enforce the notice served under Section 143 of the Highways Act 1980 on 28 July 2011.

(ii) Take no action in respect of the fence and the wall.

Proposal

30. It is proposed that the Cabinet Member adopt the option at 29 (i) above.

Reasons for Proposal

31. Officers consider that the structures are not merely minimal but obstructions of the highway and should be removed.

The following unpublished documents have been relied on in the preparation of this Report:

None