

	<p>Environment Committee</p> <p>24 September 2015</p>
<p>Title</p>	<p>Damage to the Public Highway Caused by Development Activities</p>
<p>Report of</p>	<p>Commissioning Director, Environment</p>
<p>Wards</p>	<p>All</p>
<p>Status</p>	<p>Public</p>
<p>Urgent</p>	<p>No</p>
<p>Key</p>	<p>No</p>
<p>Enclosures</p>	<p>Appendix 1 – Example of licence conditions</p>
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<p>Summary</p>
<p>This report seeks to address concerns about damage caused to the highway as a result of development activities and works on land adjacent to the highway.</p> <p>The report informs Members of the current process of managing development work affecting the public highway and proposes a new condition to the existing hoarding and crane licences conditions requiring a sum of money to be deposited with the Council prior to the commencement of works which could be used to fund any subsequent repairs necessary to the highway.</p>

Recommendations

- 1. That the Environment Committee note the contents of this report**
- 2. That the Environment Committee give authority to require a new condition requiring the deposit of a sum of money to cover the cost of repairs of any potential damage to the highway, such sum to be determined based on the reconstruction costs of the affected area of highway, be added to Hoarding and Crane Licence conditions issued under the Highway Act 1980 is delegated to the Commissioning Director for Environment.**
- 3. That the Environment Committee note that a pilot scheme is trialled for a period of three months in Finchley and Golders Green where a large number of development activities is currently underway, whereby an Officer will inspect development sites in this area and where visible damage to the highway fronting the development is observed, serve notice under Section 133 of the Highways Act 1980 on the property owner informing them of the Council's intention to recover the cost of the damage from them.**

1. WHY THIS REPORT IS NEEDED

- 1.1 Damage to the highway as a result of development and construction activities on land adjacent to the highway has become an increasing cause of concern to the Council. To address these concerns Legal Advice from HB Public Law has been obtained to understand:
 - Whether there is any legislation or way that the Highway Authority can request a deposit from anyone working on a property or site which will require access on or over the public highway, the action of which could cause damage to the public highway.
 - How the Highway Authority would have the power to enforce such a requirement.
 - Clarification as to what evidence would be required to ensure a successful claim against an individual or company should damage be caused as part of their works.
 - Whether any other Local/Highway Authority has implemented a scheme where deposits are requested from anyone undertaking any works which are likely to have a detrimental effect on the public highway and how successful they have been in recovering costs for repair.
- 1.2 There a number of existing provisions under the Highways Act 1980 where works can be carried out on the public highway under an agreement or licence, such as:-
 - Section 278 Agreement (Offsite Highway Improvements to facilitate new development) – a local Highway Authority can enter in to a legal agreement with a developer (in order to facilitate new development) for

the developer to either pay for, or make alterations or improvements to the public highway. This could be in the form of new junctions, roundabouts, traffic signals, pedestrian crossing facilities, existing highway improvements, etc. As part of these agreements, the Highway Authority ensures that the public highways are improved in the vicinity of new development and where necessary photographic joint condition surveys are undertaken prior to the start of the development to establish existing defects and assess damage caused by development activities.

- Section 38 Agreement – the Local Authority can enter in to a legal agreement with a developer to adopt a new highway provided that the highway has been constructed to a specified standard and to the satisfaction of the local authority.
- Section 184 Works (Domestic & New Development Vehicle Crossover Applications including new private accesses) - a developer or resident will seek Highway Authority approval for the construction of vehicle crossovers, or alterations to, any site access or accesses where these are the only highway works required to be executed to enable the development or if they need to be constructed in advance of the main works under a Section 38 or 278 Agreement. In some instances the scope of a Section 184 Works may be a crossover or be extended to cover additional minor works such as relaying a short length of kerbing either side of a new access, re-positioning a road gulley, or for the provision of a street light to illuminate an access. On new developments where the application is processed by the Local Authority Development Control Team, we try to ensure that the public highway fronting the development is reinstated at the end of the development and a photographic condition survey is undertaken to assess existing defects on the public highway and to establish any new damage caused by the development activities.
- In addition Section 171 of the Highways Act 1980 allows the Highway Authority to permit an individual to temporarily deposit building materials, rubbish or other things on the public highway or to make a temporary excavation under licence.
- Works are also carried out by Statutory Undertakers and their contractors generally under Section 50 of the New Roads and Street Works Act 1991 where a licence is granted permitting an individual to place or retain apparatus in the street and to maintain that apparatus by breaking open the public highway.
- In circumstances like these for both Section 171 and Section 50 licences we have created a formula to calculate the size of deposit based on the extent of excavation or works. In general where licences are requested for placing materials on the highway or licences for large plant such as cranes, the highway is inspected and photographed both prior and post works. The applicant is then invoiced for any damage resulting from the works. However, there is no duty placed on developers, builders, residents, etc. to notify the authority when works are taking place on

private property which is exempt of planning permission or building regulation approval.

- In all the above cases the developer is usually required to deposit a secured bond or cash with the Highway Authority usually for a percentage of the value of the highway works. Appropriate fees are then payable to the Local Highway Authority for the administration of any of these agreements, legal services, technical approval, site inspections, and issue of certificates. It is possible that the developer may also be required to pay a commuted sum to the Highway Authority for the maintenance of the works for a period from 10 to 25 years.
- Damage to the public highway is less of an issue when any of these agreements are in place. However, there are occasions where developers, builders, business owners and residents carry out works to properties within the borough and which may not require any of the above agreements, planning permission or building regulation approval.
- Damage to the highway occurs on a daily basis such as parking on verges, footways etc. and experience shows how difficult it is to recover costs when the third party is uncooperative. Although it is evident that damage has occurred as part of the work being undertaken, it is often difficult to prove who is actually responsible for causing the damage and is dependent upon the developer, builder, and business owner or resident in accepting responsibility and agreeing to recompense the Highway Authority for the damage to the public highway.
- The hire of a skip deposited in the front garden of a property for removal of garden waste, for example, or the unloading of materials for landscape gardening, neither of which would require a licence or notification to the Highway Authority, could equally cause damage to the footway or highway asset. The refurbishment of property may still require the unloading of materials and deposits of skips, but not be subject to planning permission or building regulation approval, and the Local Authority would be unaware of such works until being notified of damage to the public highway.

1.3 HB Public Law was not aware of any scheme implemented by other local authorities where deposits are requested from anyone undertaking works likely to have a detrimental effect on the public highway and how successful the authority had been in recovering costs of repairs.

2. REASONS FOR RECOMMENDATIONS

2.1 Damage to the highway resulting from development work can add a considerable burden to the already stretched highway maintenance revenue budget. In addition, the Council is often seen as ignoring such damage, to the benefit of the developer, leading to reputational damage and loss of confidence in the Council's ability to deal with this issue.

3. ALTERNATIVE OPTIONS CONSIDERED AND NOT RECOMMENDED

- 3.1 Paragraph 1.2 above details a number of well-established legal agreements and licences currently in use to manage highway works resulting from medium to large scale developments. There are however no such agreements to manage work affecting the highway as a result of small development which do not require planning permission and are carried out under the Permitted Development criteria.

4. POST DECISION IMPLEMENTATION

- 4.1 The requirement for a deposit to repair any highway damage resulting from development activities will ensure that funding is available for repairs and help improve resident's satisfaction with the Council. In addition, if the pilot trial is successful the scheme could become self-funding and rolled out across the borough to improve the condition of the footway and residents' satisfaction.

5. IMPLICATIONS OF DECISION

5.1 Corporate Priorities and Performance

- 5.1.1 The Council's Corporate Plan has a commitment that *'Barnet's local environment will be clean and attractive, with well-maintained roads and pavements'*, The Council is also committed to ensure that services are delivered efficiently to get value for money for the taxpayer.

5.2 Resources (Finance & Value for Money, Procurement, Staffing, IT, Property, Sustainability)

- 5.2.1 Re will be commissioned to develop an administrative process required to collect and refund deposits as well as the associated inspection and evidence gathering functions of the condition of the highway before and after the development. It is expected that this function will be self-funding with the cost passed to the applicant.
- 5.2.2 A holding account will need to be created to hold/refund deposits over several financial years. Where deposits are refunded in full, no interests will be paid.
- 5.2.3 In addition to the deposit applicants will be charged a non-refundable administration fee of £167.00 which is similar to that agreed and listed in the Council's fees and charges for administering payments associated with licences for depositing building materials on the highway.

5.3 Legal and Constitutional References

- 5.3.1 It is proposed to use existing powers under the Highways Act 1980 to require a deposit to be paid as part of the scaffold, hoarding and crane licence agreements. The approach taken at present is one of enforcement using powers under the Highways Act 1980. Under Section 133 of the HA 1980, the Highway Authority may make good any damage caused to footways of publicly maintainable streets where that damage has arisen in

consequence of any excavation or other work on land adjoining the street. The cost of such repairs can then be recovered from the Owner of the land or the person causing or responsible for the damage. Where a person carrying out works requires a licence e.g. for the erection of scaffolding or hoarding around the premises; skip hire etc. the licence maybe granted on such conditions as the Council sees fit (subject to withstanding legal challenge on ground of reasonableness should the Licensee appeal the imposition of a condition to the Magistrates Court) and include a requirement for the licensee to place a sum of money on deposit prior to commencing any work, for use by the Council in the event of damage to the highway.

5.3.2 The requirement could be enforced as a breach of condition of a licence either by way of a civil claim in the County/High Court or as a prosecution in the Magistrates Court. Examples of Licence Conditions are contained in the Advice.

5.3.3 For a successful prosecution for breach of conditions, the Council would need to have to have evidence of the state of the highway or footpath before the alleged damage and after. Good photographic evidence coupled with written evidence from suitably qualified officers should be sufficient. The Council would also need to prove that the actions of the Licensee caused the damage.

5.3.4 The Council's Constitution (Responsibly for Functions, Annex A) gives the Environment Committee certain responsibilities related to the street scene including pavements and all classes of roads, parking provision and enforcement, and transport and traffic management.

5.4 Risk Management

5.4.1 There are no risks identified as a result of this report. It is considered that the proposed recommendations will lead to an improvement in the condition of the highway near and around development sites and reduce the risk of any third party claims as a result of trips and falls.

5.5 Equalities and Diversity

5.5.1 The proposals will provide a safe walking environment for those who are disabled or less abled and visually impaired.

5.6 Consultation and Engagement

5.6.1 A comprehensive communication campaign will be developed to inform and advise of the Council's intention to recover the cost of repairing any damage to the highway as a result of development work.

6. BACKGROUND PAPERS

6.1 None

APPENDIX 1

Examples of the types of conditions that could be included for this purpose are as follows:

1. *The Licensee shall comply with all relevant legislation and licence conditions*
2. *The Licensee shall indemnify the Council against all costs arising from the erection, use and removal of the structure including works required to the structure deemed necessary by the Council and carried out by them and any claim in respect of injury, damage or loss arising from the presence of the structure*
3. *Prior to the erection/deposit of the structure permitted by the licence, the Licensee shall deposit the sum specified in the site-specific conditions with the Council*
4. *Prior to leaving the site at the conclusion of the works, the Licensee shall repair all damage caused to the Highway to the satisfaction of the Council*
5. *Upon the completion of the repairs to the satisfaction of the Council and cases where no repairs are required, the sum referred to in Condition 3 above shall be returned to the Licensee*
6. *In the event of the Licensee leaving the site prior to completion of any or all of the repairs, the sum in Condition 4 above shall be retained by the Council to fund the necessary repairs. In the event that the cost of the repairs is less than the sum deposited, the excess shall be returned to the Licensee, and in the event of the sum deposited being less than the cost of the repairs, the Licensee shall be liable to pay the balance within 28 days of demand from the Council*
7. *For the purpose of Condition 4, the term “damage” includes any cracking, chipping, breaking, staining and/or marking which has arisen as a direct result or in consequence of*
 - (i) *the erection, deposit, use or dismantling of the structure upon the Highway*
 - (ii) *the enclosure of any part of the Highway by the structure and/or*
 - (iii) *any of the works associated with, or requiring the erection, deposit or use of the structure*
8. *The Licensee shall identify and notify the Council of the extent of all existing damage to the Highway prior to commencement of the works*
9. *The Licensee shall notify the Council of the completion of the works by the end of the next working day and shall agree a date and time for a joint inspection of the site*

[Site Specific Conditions]

Right of Appeal

A Licensee may appeal to a magistrate’s court against the conditions imposed by a licence within 21 days of the grant of a licence. Failure to comply with the terms of a licence could lead to termination of the licence and/or prosecution and a fine of up to £5,000.