

**Decision Session – Executive Member for  
Transport**

**15 November 2022**

Report of the Director of Environment, Transport and Planning

**Buttacre Lane: Askham Richard**

**Summary**

1. Buttacre Lane, Askham Richard, York (“the Carriageway”) is an adopted road and as such annual inspections occur with repairs instructed to maintain the carriageway in accordance with its designated status.
2. The Carriageway can be split into two sections as the character of the road and nature and volume of user varies across the length of the Carriageway. As a result the maintenance standards reasonably vary between the section to the West (approx. 100m) which services those residential properties to the West of the Carriageway (“the Western Section”), as approximately shown with a yellow line on the Location Plan annexed at Annex B, and the remainder of the Carriageway which the Authority assumes is used purely for the purposes of agricultural traffic for farm access beyond the Carriageway.
3. Reactive Repairs on carriageway assets are undertaken in accordance with the Highway Safety Inspection Manual with renewal work requirements being identified as required, pursuant to the annual condition survey in accordance with HIAMP principles, prioritising the Carriageway against the needs of the entirety of the CYC carriageway network.
4. In terms of the annual condition survey the Carriageway is identified in two sections and is considered as such in the highway maintenance programme from a planned / proactive maintenance perspective. However, as per the adopted Highway Infrastructure Asset Management Plan (“HIAMP”) it is not currently identified for renewal in our funded element of the programme.

5. In May 2022 the Council received a letter complaining about the state of repair of the Carriageway and requiring a response from the Authority pursuant to s56 of the Highways Act 1980 (“**the Complaint Letter**”) from a resident of Askham Richard who owns land within the vicinity of the Carriageway (“**the Complainant**”).
6. The Complainant detailed some areas of concern with the maintenance along the entire length of the Carriageway.
7. The Complainant referred to having a right of access to their property from the Carriageway.
8. A member of our legal team, specialising in property law has reviewed the title issues relating to the Complainant’s property (**the Property**), which, we are not identifying in this report, to seek to protect the Complainant’s identity. The result of those desktop enquiries suggests that there is not a right of access which is noted on the title of either the Property, nor on the adjoining property over which access would be required by occupants of the Property to connect to the Carriageway. For easements to be binding on registered land, they need to be registered interests at HM Land Registry. It is possible that a binding agreement has been entered between the Complainant and the relevant connecting landowner, which has not yet been registered, but officers have not been supplied with evidence of that to date.
9. A physical inspection of the Carriageway by one of our legal officers has revealed that there is a locked double metal gate at the point at which the Carriageway abuts the land owned by the connecting landowner, over which access would be required. Further, from the vantage point of the Carriageway at the location of the double metal gate, our legal officer reports not being able to identify a physical access point from the Complainant’s property to the connecting landowner’s property but acknowledges that there was not full visibility. Google Earth images (looking West), annexed at Annex B of this report do not indicate the presence of a physical access point. This accumulation of facts suggests that the acquisition of a prescriptive right of way by the Complainant (or its predecessors in title) over the adjoining connecting land may be unlikely. Confirmatory evidence of any such right has not been produced by the Complainant to officers.
10. The Complainant benefitted from the grant of planning permission relating to the conversion of a garage annexed to the Complainant’s residence to be a further independent residential annex, and the access to that annex was described as lying within the Complainant’s property.

Accordingly, the highway authority can reasonably expect the Complainant to use the private road, owned by the Complainant, lying to the North of Buttacre Lane as detailed in their planning application.

## **Recommendations**

11. The Executive Member is asked to:

- 1) Approve Option 1, which is to continue as per the Highway Infrastructure Asset Management Plan meaning that annual inspections will be carried out to identify immediate issues and repairs will be authorised in accordance with the current classification of the carriageway, its use and the priority.

Reason:

This approach recognises that the Western Section has a different use and need to the remainder of the Carriageway. As a result, the condition and level of maintenance varies across the length of the Carriageway.

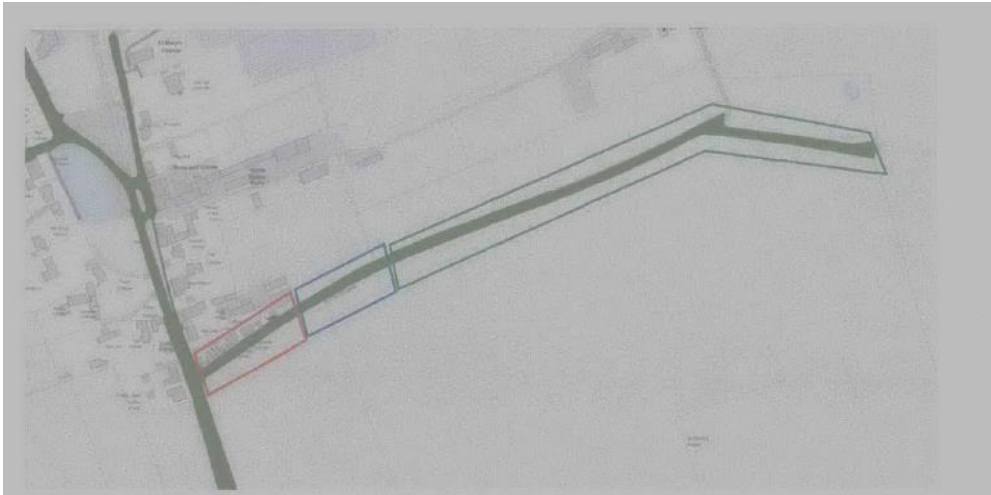
This is likely to necessitate more interventions in regard to routine maintenance but is unlikely to escalate to a capital scheme when compared to other carriageway assets within CYC and in accordance with the HIAMP principles, noting that currently the prioritisation process does not bring any works at this location into the funded element of the programme.

It also includes the annual survey which is used to prioritise capital expenditure for all carriageway assets across the CYC area, noting that currently the prioritisation process does not bring any works at this location into the funded element of the programme

## **Background**

12. Buttacre Lane, located off School Lane, Askham Richard, York is highway maintainable at public expense and as such it has previously been, and continues to be, inspected annually. See Annex A.

13. A letter written by one of the residents of Askham Richard dated 11/05/2022 was received by CYC. For the purposes of this report, we refer to that letter as “the Complaint Letter”
14. The Complaint Letter details concerns regarding the condition of the Carriageway across three distinct lengths and highlights condition and maintenance issues in each of those lengths, as shown on the plan annexed to the letter, and duplicated below. The Complainant states that the highway is out of repair and demands that CYC repair the entire carriageway length. . The Complaint Letter states that, should a satisfactory response not be provided, an application will be made for a Court order under s56 of the Highways Act 1980.
- 15.



16. In summary, the Complainant comments that the Complainant has a right of access to the Complainant’s property from the Carriageway, which the Complainant is unable to exercise due to the poor upkeep of the Carriageway.
17. We refer to information detailed within paragraph 8 above. The highway authority can reasonably expect the Complainant to use the private road to the North of Buttacre Lane

## **Consultation**

18. In terms of current CYC staff members the following meetings have occurred on site with residents and / or Ward Members

Date	Council officer	Met with
9 <sup>th</sup> June 2022	Highways Asset Manager Highways Inspector Drainage Engineer	Officer Inspection
17 <sup>th</sup> October 2022	Head of Highways & Transport	Cllr Hook, representative from the Parish Council and the Complainant, being a resident of land within the vicinity of the Carriageway, but not abutting it

## Options

19. Options in consideration are as follows:

Option	Detail
1	<p><b>Continue as per HIAMP</b></p> <p>Continue as per the Highway Infrastructure Asset Management Plan meaning that annual inspections will be carried out to identify immediate issues and repairs will be authorised in accordance with the current classification of the Carriageway, its use and the priority.</p> <p>This approach recognises that the Western Section has a different use and need to the remainder of the Carriageway. As a result, the condition and level of maintenance varies across the length of the Carriageway..</p> <p>This is likely to necessitate more interventions in regards to routine maintenance but is unlikely to escalate to a capital scheme when compared to other carriageway assets within CYC and in accordance with the HIAMP principles, noting that currently the prioritisation process does not bring any works at this location into the funded element of the programme.</p> <p>It also includes the annual survey which is used to prioritise capital expenditure for all carriageway assets across the CYC area, noting that currently the prioritisation process does not</p>

	bring any works at this location into the funded element of the programme
2	<b>Full Carriageway Rehabilitation</b> This will mean escalating the carriageway works in the prioritised programme by exception so that it can be included in current available funding. These works are likely to cost in excess of £500,000 and will be subject to final design
3a	<b>Upgrade Western section</b> Undertake design works to upgrade Western Section of Buttacre Lane from junction with School Lane to beyond the residential properties (approx. 100m) in readiness for future capital works programme subject to capital prioritisation.  This will mean escalating works on the Western Section in the prioritised programme by exception so that it can be included in current available funding. These works are likely to cost approximately £100,000 and will be subject to final design.
3b	<b>Upgrade Western section – design only</b> As above, but design works only in readiness for future capital scheme being funded

## Analysis

20. As above

## Council Plan

21. The Highway Maintenance work feeds into the following Council Plan priorities:

- Well-paid jobs and an inclusive economy
- A greener and cleaner city
- Getting around sustainably
- Safe communities and culture for all
- An open and effective council

## Implications

22. Financial

23. There is currently no capital funding identified for this location. However, should the recommended option be approved, this would result in a continuation of the current arrangements and therefore can continue to be accommodated within existing budgets.

## **24. Legal**

25. Section 41 of the Highways Act 1980 provides that the highway authority is under a duty to maintain the highway. It is the duty of the highway authority to maintain the road in such a state of repair as to enable safe passage in all seasons of the year.

26. There are a number of legal duties that have to be observed by each highway authority to ensure that roads are safe and passable. These include:

- To maintain public roads to a standard that ensures they are safe and passable
- To make adequate provisions to ensure that safety measures are in place for adverse weather conditions, such as icy pavements and roads.
- To recognise the character of each road within their care to ensure that it is maintained effectively for the volume and type of traffic use.
- To ensure appropriate warning signs are in place for any dangers on the road
- To maintain adequate records of works and repairs carried out on the road

27. Although the s41 duty applies to all highways, the question of the standard of maintenance so as to make a highway “reasonably passable for the ordinary traffic of the neighbourhood” should be assessed against the nature of user (ie whether domestic or agricultural) and volume of user.

28. When dealing with the question of whether a highway is considered to be “out of repair”, each case will turn on its own facts. In the case of *Hereford and Worcester CC v Newman [1975]*, ‘a highway out of repair’ has been defined as where ‘the surface of it [the highway] is defective or

disturbed in some way'; or 'has become unsound or impaired by neglect or use'. The Court of Appeal provided guidance on the standard of repair required in the leading case of *Burnside v Emerson and Nottinghamshire County Council* [1968]:

*“The duty of maintenance....is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition.”*

There is no modern case where the Courts have had to consider what defects would be sufficient to require a Court to find that the surface of the road is out of repair and the standard of maintenance required. Each case will be considered on its own facts.

While there is little judicial guidance on the standard of maintenance, the Department for Transport issues circulars giving guidance to highway authorities. Highway authorities, taking into account all relevant guidance, make policies as to how they will categorise their roads and the standard of maintenance to be applied to each category.

## 29. **Human Resources (HR)**

30. N/A

## 31. **Equalities**

The Council recognises its Public Sector Equality Duty under Section 149 of the Equality Act 2010 (to have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and foster good relations between persons who share a relevant protected characteristic and persons who do not share it in the exercise of a public authority's functions. These are taken into account when working on any schemes within the Highway maintenance programme and as an overarching approach to Highway asset management.



## 32. **Crime and Disorder**

33. N/A

## 34. **Information Technology (IT)**

35. N/A

## 36. **Property**

37. Officers have carried out relevant desktop and physical inspections, the results of which are summarised above. No desktop or physical evidence is currently available to indicate that the most eastern length (beyond the first 100m i.e.. the “Western Section”) of the Carriageway has been used for anything other than by agricultural vehicle(s) and pedestrians.

## **Risk Management**

CYC consider that there are two primary risks:

### 1. Section 41 Claim

38. If an individual sustains an actionable injury and they are able to show that the injury arose as a result of the Carriageway being out of repair, CYC could be exposed to a breach of statutory duty claim pursuant to s41 of the Highways Act 1980 with potential substantial financial implications. The burden of establishing a breach of the s41 duty rests with the claimant. The claimant must prove that the highway was dangerous for the ordinary traffic that passes over it (Mills v Barnsley MBC [1992]).

39. If a s41 claim is made against a highway authority, in order to utilise the s58 Highways Act 1980 statutory defence, the authority must prove that they had not breached their duty of care and that, having had regard to the individual circumstances of the case, all reasonable measures had been taken within a reasonable timeframe to prevent harm to users.

### 2. Section 56 Order

39. If a member of the public considers that a highway is out of repair, s56 of the Highways Act 1980 enables any member of the public (“a complainant”) to apply to a magistrates’ court for an order requiring the highway authority to put the highway back in repair within a specified time (“a s56 Order”). The process is initiated by the complainant serving notice on the authority requiring it to admit whether the way is a highway and whether it is liable to maintain it.
40. The authority then have one month to respond. The complainant has 6 months from receipt of the authority’s reply to apply to the magistrates’ court for a s56 Order. Where a complainant successfully obtains a s56 Order, the court may make a costs order against the authority. The Court must specify a “reasonable period” within which the highway must be put in repair. The s56 Order will not detail what repairs should be carried out. The Court’s decision can be challenged, if challenged, the Crown Court will rehear the whole case. Please see Annex C which contains the flow chart which is available to the public in relation to the s56 Order process.
41. Generally, a highway authority on receiving notice of a complaint in relation to the condition of a highway will want to consider whether the condition of the road in question complies with national codes of practice and its own policies and if not, whether there is good reason for the divergence.
42. If the authority thinks that the court may find the road to be “out of repair”, in order to avoid the s56 court proceedings, the authority may choose to undertake the repair works. The authority should inform the complainant/ residents about the repairs which the authority deems to be necessary and provide an estimated timescale for implementation.
43. Where the Court considers that the complainant is using the s56 process in order to seek an improvement to the highway or a level of maintenance beyond the level that can be reasonably required for the volume and type of traffic use, the claim is likely to fail.

In *Kind v Newcastle upon Tyne Council [2001]* the court had to consider a metalled single track road in a rural area mainly used for farm access purposes. The complainant claimed that works were required to make the road safer for pedestrians, cyclists and horse riders. The High Court held that the road was not out of repair and that the complainant was seeking an improvement to the road rather than putting it into repair.



## Contact Details

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**Report**  **Date** 7/11/2022  
**Approved**

## Specialist Implications Officer(s) List information for all

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**Wards Affected:** Rural West

All

**For further information please contact the author of the report**

## Background Papers:

None

## Annexes

Annex A: Plan of Adopted Highway  
Annex B: Location Plan

## Annex C – Section 56 Order Process

### **List of Abbreviations Used in this Report**

HIAMP - Highway Infrastructure Asset Management Plan  
CYC – City of York Council