



Meeting:	Decision Session - Executive Member for Economy and Transport
Meeting date:	16/01/2024
Report of:	James Gilchrist, Director of Transport, Environment and Planning
Portfolio of:	Councillor Kilbane, Executive Member for Economy and Transport

Decision Report: Highway encroachment in Rural West

Subject of Report

1. In 2021 and 2022, the Parish Council contacted City of York Council (CYC) to ask CYC, as the highway authority, to investigate a possible highway encroachment issue.
2. CYC officers have investigated the location and have identified an encroachment issue over roadside verges.
3. Under Section 130 of the Highways Act 1980, the Highway Authority has the duty to assert and protect the rights of the public to use any highway for which they are the highway authority, including any roadside verges.
4. This report presents a summary of the evidence collated by officers, describes the legal background to any enforcement action that the Council may decide to take, and provides options for the Executive Member to consider when determining the next steps to be taken by CYC as the highway authority.
5. Due to data privacy issues, any information which could lead to persons being identified has been included in Annexes which will not be published.

Benefits and Challenges

6. If the decision is made to recover the verges to their full width under the Inclosure Act (**Option A**):
 - a) The benefits include:
 - i. Sufficient width recovered to provide passing places and plant trees/and or hedges should resources become available to do so; and
 - ii. CYC would be acting according to its duty under Section 130(6) (b) of the Highways Act 1980;
 - b) The challenges include:
 - i. Significant cost to the Council to reinstate the verges (currently estimated at approx. £250,000) and significant risk of additional costs if this is contested in court as well as a risk that these costs may not be recovered by the Council (despite the provisions of the Highways Act); and
 - ii. Significant on-going maintenance duty for the reinstated verges (with associated resource implications).

7. If the decision is made to recover the verges to a reduced width (compared to that established by the Inclosure Act – **Option B**):
 - a) The benefits include:
 - i. Sufficient width recovered to provide passing places and plant trees/and or hedges should resources become available to do so (although to a lesser extent than with Option A);
 - ii. CYC would act according to its duty under Section 130(6) (b) of the Highways Act 1980, whilst reaching a compromise solution;
 - iii. This option would reduce reinstatement costs and the long-term maintenance burden on CYC;
 - b) The challenges include:
 - i. The Parish Council has a right of veto on the Stopping Up Order which would be required for the part of the verges which would not be reinstated so the option may not be

deliverable if further discussions with the Parish Council do not result in an agreed reduced width for the verges;

- ii. The reinstatement works required would still result in a significant cost to CYC initially, and significant risk of additional costs if this is contested in court, as well as a risk that these costs may not be recovered by the Council (despite the provisions of the Highways Act 1980).

8. If the decision is to take no further action (**Option C**):

a) The benefits include:

- i. No additional costs/risks for CYC, linked to the reinstatement and the future maintenance of the verges;

b) The challenges include:

- i. No future improvements possible to the lane (for example by providing passing places) or to the planting in the verges;
- ii. CYC would be in breach of its duty under Section 130(6) (b) of the Highways Act 1980. The obligation on a Highway Authority to act in relation to a Section 130(6) representations is an absolute duty. A mandatory order could be granted to the Parish Council against the Highway Authority, resulting in costs for CYC and an obligation to reinstate the verges.

Policy Basis for Decision

9. The proposed decision will contribute to the following Council Plan Core Commitments:

- a) **Climate** – Environment and the climate emergency, as recovering the highway verges should enable the Parish Council to plant trees and/or hedges and seed the verges in line with the Council's pollinator strategy (if funding is available – this is not considered as part of this report);
- b) **Health and wellbeing** – As the recovery of the grass verges (and possible tree planting) will result in an improved experience for users of the highway, many of which use the highway for leisure and recreation purposes, using active travel modes (exercise, dog walking, cycling, etc).

10. The proposed decision will contribute to the following Council Plan's Priorities (as described above):
 - a) **Health and wellbeing**; and
 - b) **Sustainability**: Cutting carbon, enhancing the environment for our future.
11. Under Section 130 of the Highways Act 1980, the Highway Authority has the duty to:
 - a) Section 130 (1): "assert and protect the rights 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" (Note: highway grass verges are described as "roadside waste" in the Act).
 - b) Section 130 (4): "prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority".
12. Section 130 (6) (b) also states that: "If the council of a parish or community or, in the case of a parish or community which does not have a separate parish or community council, the parish meeting or a community meeting, represent to a local Highway Authority
 - a) that a highway as to which the local Highway Authority have the duty imposed by subsection (3) above has been unlawfully stopped up or obstructed, or
 - b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority,it is the duty of the local Highway Authority, unless satisfied that the representations are incorrect, to take proper proceedings accordingly and they may do so in their own name".

Financial Strategy Implications

13. Financial implications for CYC if further action is required include:
 - a) Costs related to enforcement action taken by the highway authority against the landowner. The Council's actions may for example be challenged in court.
 - b) Costs related to the reinstatement of the verges. A cost of approx. £250,000 has been identified as an initial estimate for

the reinstatement for the full width of 60 feet (18.3m) between, and exclusive of the ditches (as described in the Inclosure Act – see below). CYC would aim to recover these costs from the landowner, but this may be challenged in court and full cost recovery may not be possible. It is important to note that this is an initial cost estimate and costs may increase once more detailed surveys and designs have been undertaken.

14. There are also staff costs and resource implications associated with any enforcement action pursued by CYC (as well as an opportunity costs as officers spending time on this issue will not be able to work on other matters).
15. The recommended Option A will require the Council to fund the initial costs of the work from Highways Maintenance Programme.
16. In the long-term, CYC will need to maintain and protect the wider verges which may be reclaimed through enforcement action. This will result in long-term costs associated with repairs to the verges when damage is caused by any vehicle, cutting, cleaning and possibly protecting the verges (and any future planting) from damage, obstruction or occupation.
17. The additional cost of planting and/or creating passing places in the reinstated verge areas is not considered in this report.

Recommendation and Reasons

18. It is recommended:
 - a) To approve that CYC takes all necessary enforcement action to recover and reinstate the verges to their full width in accordance with Sections 130, 131 and 305 of the Highways Act 1980.
 - b) To delegate authority to the Director of Transport, Environment and Planning, in consultation with the Director of Governance, to determine and undertake all necessary activity to recover and reinstate the verges to their full width in accordance with Sections 130, 131 and 305 of the Highways Act 1980, including (but not limited to) the determination, drafting, commissioning, and concluding of any necessary public highways works contracts in compliance with the Highways Act 1980 and CYC's Contract Procedure Rules.
19. Reasons: The recommended option is Option A – Enforcement action under Sections 130, 131 and 305 of the Highways Act 180

aiming for full width reinstatement. This option is recommended due to the following:

- a) Option B (reduced width reinstatement) is not considered feasible as it requires the approval of the Parish Council, and this option has been rejected by the Parish Council during previous consultation;
- b) Option C (no further action taken by CYC) would result in the Council being in breach of its duty, with the risk that a mandatory order could be granted to the Parish Council against the highway authority;
- c) Option A also offers the maximum width to support future planting in the verges, contributing to the Council's climate and pollinator strategies.

Background

- 20. This is provided in Annex 1 as the information is likely to reveal the identity of an individual.

Consultation Analysis

- 21. This is provided in Annex 1 as the information is likely to reveal the identity of an individual.

Options Analysis and Evidential Basis

Option A – Enforcement action under Sections 130, 131 and 305 of the Highways Act 180 – full width reinstatement

- 22. CYC could serve notice to the landowner that works will take place to reinstate the verges to the original alignment. The Council will aim to recover the costs of doing so from the landowner (under Section 305 of the Highways Act 1980). Once the full width of the verges is recovered, this may enable tree and hedge planting and the construction of passing places by the Council (if funding becomes available to do so – this is not considered in this report).
- 23. Action is also available to the Council under Section 131 (1) of the Highways Act 1980: "If a person, without lawful authority or excuse (...) (b) removes any soil or turf from any part of a highway, except for the purpose of improving the highway and with the consent of the highway authority for the highway". Maximum fines are Level 3 of standard scale (£1,000).

Option B – Enforcement action under Sections 130, 131 and 305 of the Highways Act 180 – reduced width reinstatement

24. CYC could continue discussions with the Parish Council and the landowner to agree a modified highway alignment, subject to a successful stopping up order being processed for the remaining width of highway (as described by the Inclosure Act). The Parish Council has a right of veto for such a stopping up order, so pursuing this option would only be possible if a revised alignment can be agreed with the Parish Council.
25. The reduced width of the recovered verges would enable the construction of passing places by CYC and should enable limited planting in the verges (if funding becomes available to do so – this is not considered in this report).
26. If the stopping up process were successful, CYC would then serve notice to the landowner of works taking place to reinstate the verges to the modified alignment. CYC would aim to recover the costs of the stopping up process and the reinstatement of the verges from the landowner (under Section 305 of the Highways Act 1980).

Option C – No further action taken by CYC

27. CYC could decide that no further action will be taken due to the costs and risks associated with any enforcement action and the relatively low usage of the highway. This would result in CYC being in breach of its duty under Section 130(6) (b) of the Highways Act 1980.

Organisational Impact and Implications

28. The following implications have been identified:
 - **Financial** - This scheme will need to be incorporated into the Highways Maintenance Programme. Cost will vary significantly depending on the option chosen, the highest being Option A with cost over £250k, including potential significant legal costs. Despite the provisions of the Highways Act these costs might not be recovered. If CYC can recover all or part of those costs, the receipts will be added back into the Highways Maintenance Programme.
 - **Human Resources (HR)** - no implications identified.
 - **Legal**

- Under Section 130 of the Highways Act 1980, the Highway Authority has the duty to assert and protect the rights of the public to use any highway for which they are the Highway Authority, including any roadside verges. CYC (acting as Highways Authority) has the power to recover and reinstate the verges to their full width in accordance with Sections 130, 131 and 305 of the Highways Act 1980 (i.e., Option A in this report).

Key risks identified in relation to **Option A** are as follows:

- CYC's enforcement decision could be challenged in court – associated costs and resource implications.
- CYC takes enforcement action, but CYC not able to recover all costs, resulting in CYC having to meet some or all of the costs (court costs and/or verge reinstatement costs).
- Recovery of costs under Section 305 of the Highways Act 1980 is subject to appeal by the landowner to the Magistrates' Court (under Section 305(3) of the Highways Act 1980).
- Reinstatement costs may be higher than currently estimated as no detailed survey has been undertaken at this stage.
- As resources are limited within CYC to manage, supervise, and undertake this type of reinstatement works, notice could be served on the landowner but the works to reinstate the verges could be delayed significantly due to resourcing issues.
- As with any enforcement action, there can be psychological and physical risks for CYC officers, members of the Parish Council or any other party involved, if the landowners or other persons affected by an enforcement decision oppose the Council's actions.
- If the person seeking the removal of an obstruction, or the owner or occupier of land on which there is an obstruction thinks that the Council made an error in carrying out its duties, and that the Council should have acted differently, they may submit a complaint to the Local Government Ombudsman.

Key risks identified in relation to **Option C** are as follows:

- If the Council decided to take no further action (**Option C**), this would result in the Council being in breach of its duty under Section 130(6) (b) of the Highways Act 1980.
- The obligation on a Highway Authority to act in relation to a Section 130(6) representations is an absolute duty. Case law makes it clear that, once charged with acting under Section 130(6), the Highway Authority must act accordingly, and not seek to evade or undermine its duty.
- If CYC fails to respond, the Parish Council could apply to the High Court for a mandatory order compelling the authority to act. Such an application would involve judicial review of the Highway Authority. Judicial review action is likely to be very costly, particularly if the Court, upon undertaking an objective review of the evidence finds that the Parish Council acted correctly.
- **Procurement** - Any contractors required to undertake any reinstatement works, subject to there being sufficient budget to do so, must be appointed in accordance with a robust procurement strategy in compliance with the Council's Contract Procedure Rules.
- **Health and Wellbeing** - no implications identified.
- **Environment and Climate action** - no implications identified at this stage (any potential planting on reinstated verges does not form part of this report).
- **Affordability** - no implications identified.
- **Equalities and Human Rights** –

The Council recognises, and needs to take into account 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).

At the time of writing there are no equalities implications identified in respect of the matters discussed in this report. However, if Options A or B are implemented and funding can be made available in the future to create additional passing places, this would make the lane more suitable for people who live with a disability and for families with pushchairs.

An Equalities Impact Assessment will be carried out in due course and the process of consulting on the recommendations in this report will identify any equalities implications on a case-by-case basis, and these will be addressed in future reports.

- **Data Protection and Privacy** – Decision to be made in private due to the report containing information relating to an individual, information which is likely to reveal the identity of an individual and information relating to the financial or business affairs of any particular person.

Data protection impact assessments (DPIAs) are an essential part of our accountability obligations and is a legal requirement for new systems and processes such as introducing new technology or where the processing operation is likely to result in a high risk to the data protection and privacy rights and freedoms of individuals. Failure to carry out a DPIA when required may leave CYC open to enforcement action, including monetary penalties or fines.

The DPIA screening questions identified that whilst there is processing of personal and/or special categories of personal data for the purposes of this report, it was not considered this processing would have a high risk to the data protection and privacy rights and freedoms of individuals and a full DPIA was not carried out.

However the potential risk of information identifying an individual including information relating to the financial or business affairs of any particular person, has been mitigated and minimised by the decision being made in private.

- **Communications** - no implications identified.
- **Economy** - no implications identified.

Risks and Mitigations

29. Key risks identified in relation to **Option A** are as follows:

- a) CYC's enforcement decision could be challenged in court – associated costs and resource implications.
- b) CYC takes enforcement action, but CYC not able to recover all costs, resulting in CYC having to meet some or all of the costs (court costs and/or verge reinstatement costs).
- c) Recovery of costs under Section 305 of the Highways Act 1980 is subject to appeal by the landowner to the Magistrates' Court (under Section 305(3) of the Highways Act 1980).
- d) Reinstatement costs may be higher than currently estimated as no detailed survey has been undertaken at this stage.
- e) As resources are limited within CYC to manage, supervise, and undertake this type of reinstatement works, notice could be served on the landowner but the works to reinstate the verges could be delayed significantly due to resourcing issues.
- f) Any contractors required to undertake any reinstatement works, subject to there being sufficient budget to do so, must be appointed in accordance with a robust procurement strategy in compliance with the CPRs and (where applicable) the Procurement Regs.
- g) As with any enforcement action, there can be psychological and physical risks for CYC officers, members of the Parish Council or any other party involved, if the landowners or other persons affected by an enforcement decision oppose the Council's actions.
- h) If the person seeking the removal of an obstruction, or the owner or occupier of land on which there is an obstruction thinks that the Council made an error in carrying out its duties, and that the Council should have acted differently, they may submit a complaint to the Local Government Ombudsman.

30. Key risks identified in relation to **Option C** are as follows:

- a) If the Council decided to take no further action (**Option C**), this would result in the Council being in breach of its duty under Section 130(6) (b) of the Highways Act 1980.

- b) The obligation on a Highway Authority to act in relation to a Section 130(6) representations is an absolute duty. Case law makes it clear that, once charged with acting under Section 130(6), the Highway Authority must act accordingly, and not seek to evade or undermine its duty.
- c) If CYC fails to respond, the Parish Council could apply to the High Court for a mandatory order compelling the authority to act. Such an application would involve judicial review of the Highway Authority. Judicial review action is likely to be very costly, particularly if the Court, upon undertaking an objective review of the evidence finds that the Parish Council acted correctly.

Wards Impacted

31. Rural West York.

Contact details

For further information please contact the authors of this Report.

Author

Name:	James Gilchrist
Job Title:	Director of Transport, Environment and Planning
Service Area:	Place Directorate
Email:	james.gilchrist@york.gov.uk
Report approved:	Yes
Date:	08/01/2024

Co-author

Name:	Helene Vergereau
Job Title:	Head of Highway Access and Development
Service Area:	Transport, Place Directorate
Email:	helene.vergereau@york.gov.uk

Background papers

Not applicable

Annexes

All Annexes are exempt from publication

- Annex 1: Further information on the issue and evidence collated by officers
- Annexes A, B and C: Extracts from the Inclosure Act
- Annex D: OS map dated 1850
- Annex E: OS map surveyed in 1891 and published in 1893
- Annex F: OS map made and published in 1968
- Annex G: OS map made and published in 1968 coloured version
- Annex H: Topographical survey information –South of the area
- Annex I: 1951 Aerial Photograph
- Annex J: Close up of 1951 Aerial Photograph
- Annex K: Topographical survey information – North of the area
- Annex L: Pictures of roadside markers
- Annex M: Pictures provided by the Parish Council