

30 July 2015

Executive

Joint Report of Director of Customer and Business Support Services
and Interim Director of City and Environmental Services

Coppergate Report

Executive Summary

1. The purpose of the report is to update Members about the Review Decision of the Chief Adjudicator to the Traffic Penalty Tribunal (TPT) regarding civil enforcement of the Coppergate Traffic Regulation Order by way of camera, and to make recommendations on the way forward.

Recommendations

- (i) Require Officers to implement a Coppergate Repayment Process to facilitate the settlement of claims on the basis of repaying the Penalty Charge Notice (PCN) fine only (from earmarked reserves), in full and final settlement. The deadline for submitting a claim to be 31st March 2016.
- (ii) The deadline for submitting a claim in respect of the existing Lendal Bridge Repayment Scheme to be extended from the 31st December 2015 to the 31st March 2016.
- (iii) Authorise Officers to identify, consult upon and analyse options which may include (a) solutions to conveying the meaning of the present Coppergate Order that will satisfy Regulation 18 of the 1996 Regulations, (to potentially include revised signage, road markings and surface treatment) and/or (b) alternative Orders and interventions that may provide more effective traffic solutions.
- (iv) Require Officers to prepare a further report to the Executive presenting the findings from (iii) above, and seeking approval to take forward an agreed solution.

- (v) Until such time as the solution at (iv) above is implemented, the Council will not proactively pursue enforcement of the Coppergate Order by camera.

Background

2. The statutory regime and law relating to civil traffic enforcement is particularly complicated.
3. The power to make a Traffic Regulation Order (“TRO”) is within *Section 1 of the Road Traffic Regulation Act 1984*. The procedures for making a Traffic Regulation Order are set out in the *Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 (as amended)*. Under Regulation 18 of the 1996 Regulations, the Authority has a statutory duty to convey the meaning of the TRO through adequate signage.
4. The Police have power to enforce a breach of a TRO, as it is a criminal offence under *S5 of the Road Traffic Regulation Act 1984*. Prior to the 2013 Coppergate Order, a Traffic Regulation Order had been in place for decades restricting moving traffic, however, this could only be enforced by the police.
5. The statutory power available to the Council to carry out civil enforcement concerning moving traffic can only be used in a “bus lane”. It is governed by *s144 of the Transport Act 2000*, and the *Bus Lane Contraventions (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2005*. The *York (Coppergate) Local Bus Priority Traffic Order 2013* (“2013 Coppergate Order”) was made on 9th July 2013 and came into force on 1st August 2013, to create a “bus lane”. The new Order was required because civil enforcement powers concerning moving traffic offences are only available to CYC in respect of “bus lanes”.
6. Coppergate is a bus lane for the purposes of S144. CYC is an “approved authority” to carry out such civil enforcement under the *Bus Lanes (Approved Local Authorities) (England) Order 2005*, and the cameras used are authorised under the *Bus Lanes (Approved Devices) (England) Order 2005*.
7. Although a bus lane is perhaps traditionally seen as a separate lane within a road where other lanes are used by other vehicles, it can lawfully include a road that is only to be used by buses and certain other classes of vehicle. This is the situation in Coppergate.

8. Under the civil enforcement procedure, when a person is issued with a penalty charge notice, a right of appeal is given. First, an appeal is made to CYC. If unsuccessful, there is a further right of appeal to the TPT.
9. In March 2014, an Adjudicator at the TPT considered a number of appeals together concerning penalty charge notices issued for contraventions at Lendal Bridge and Coppergate. He produced a combined decision, in which he held that the Coppergate Order was invalid as, amongst various other reasons, in his view it was not a “bus lane” within the definition in S144 of the 2000 Act, and so the Council could not enforce the Order through the civil regime.
10. The Council challenged the decision by requesting a formal review by the TPT. (The Lendal Bridge review request was subsequently withdrawn as the trial ended, the experimental order was revoked and a repayment process established).
11. On 24 April 2015, the Chief Adjudicator at the TPT issued the Review Decision in respect of the Coppergate Decision. Whilst she concluded that the TRO was not enforceable, it was for different reasons to those given by the first adjudicator, and focussed solely on her opinion that the signage failed to comply with Regulation 18 of the 1996 Regulations.
12. The Chief Adjudicator held that :
 1. *The Coppergate Traffic Regulation Order is valid, albeit that it is drafted carelessly and obtusely;*
 2. *Coppergate is a bus lane within the meaning of Section 144;*
 3. *As such City of York are in principle entitled to enforce the Coppergate Traffic Regulation Order under the civil enforcement provisions;*
 4. *However the signs at the entrances to Coppergate do not convey the terms of the restriction imposed by the Traffic Regulation Order because*
 - a. *The order of the words on the plate does not indicate the 7am – 7pm restriction*
 - b. *The exemption for private hire vehicles is not included*
 5. *The errors in the signs means that contraventions of the Coppergate TRO are unenforceable (unless they have been changed);*
 6. *There is no Secretary of State’s Authorisation for the signs;*

13. On receipt of the Decision, your Officers sought advice from Leading Counsel to consider the appropriateness of seeking judicial review of the TPT Decision.
14. As the Chief Adjudicator has found in the Council's favour in respect of the principle issue, namely that Coppergate is a bus lane that can be enforced through the Civil regime, and the signage is capable of being reviewed prior to enforcement taking place, Leading Counsel advised strongly against challenging further in the High Court.

Proposed way forward

15. The Traffic Penalty Tribunal held that the Order is valid to enable enforcement as a bus lane by camera. However, the Chief Adjudicator considered that the signage was inadequate to convey the meaning of the Order as required by *Regulation 18 of the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996*. Further challenge of the TPT decision to the High Court by way of judicial review is not advised, having regard to advice from Leading Counsel. This is because the TPT conceded the principle issue, namely that the Order is valid, and that Coppergate can be enforced as a bus lane by camera. The outstanding difference of opinion between the Council and the TPT in relation to adequacy of signage for the purposes of Regulation 18 is a more subjective judgment, rather than a fundamental issue of law. Members are therefore advised that the issue of conveying the meaning of the Order through signage is better dealt with by reviewing and consulting with the Department for Transport, the TPT, key stakeholders such as private hire firms and the public generally about signage options. This would be instead of pursuing the difference of opinion with the TPT through protracted and costly High Court litigation which would have no guaranteed outcome in any event.
16. A consequence of not challenging the TPT decision further in the High Court, is the potential for those issued with a Penalty Charge Notice who have paid (and the Council still retains their payment) to make an appeal out of time to the TPT, or pursue the matter in the small claims court against the Council. This could therefore have the potential to lead to 12269 individual claims being the number of payments with a value of £387,350 which the Council still retains in its ear marked provisions and reserves.

17. It would be lawful for the Council to retain the monies, (other than those that were subject of appeal to the TPT) as they were lawfully obtained through the PCN process. However, as there are potentially 12269 individuals who could actively pursue a claim out of time, Members are advised that the cost of dealing with such claims on an individual basis, (which are likely to require settlement in any event in light of the TPT decision on signage), is likely to far exceed the cost of setting up a repayment settlement process.
18. Advice has been sought from Leading Counsel that such a course of action is reasonable, lawful and pragmatic in the circumstances in which the Council finds itself following the TPT Decision in relation to signage. Officers' recommendation is to set up a repayment settlement process, as described at paragraph 33 to this Report.
19. In relation to reviewing the signage, Officers seek authority to investigate and consult upon options to adequately communicate the meaning of the Order. Solutions could include altering the wording on the signs, road markings or surface treatment, or more radical proposals such as creating a further Order to extend the length of the bus lane to include for example Pavement.
20. A further report would be brought to the Executive in the autumn to consider the outcome of consultation on proposed solutions to communicate the meaning of the Order.
21. Until such time as the issue of compliance with Regulation 18 is resolved the Council will not proactively pursue enforcement of the Coppergate TRO by camera.

Consultation

22. *Informal consultation with key stakeholders will take place in the preparation of the next report to Members as outlined in this report. There would also then need to a period of formal consultation following Members decisions on the options presented in the Autumn report prior to implementation.*

Options

Options for dealing with PCN revenue

23. PCN Revenues – Whether to retain monies pending out of time appeals or to implement a Coppergate Repayment Scheme to facilitate settlement of claims.
24. Members attention is drawn to the fact that the 2013-14 annual accounts for the Authority have been subject to challenge by the National Motorists Action Group (NMAG) in respect of the retention of PCN revenues and therefore the accounts have been subject to review by the Council's External Auditors Mazars. During the course of this review the Auditors have rigorously tested the Council's rationale not only for retention but also return of Lendal Bridge PCN funds through a settlement process. The outcome of the Auditors review is expected after the publication of this report but prior to the Executive meeting and therefore a verbal update will be given at the meeting.

Option 1 – Retaining Monies Pending Appeal

25. Advice has been sought by CYC from Leading Counsel, as to whether it is lawful for the monies to be retained pending appeals being made and whether it is lawful to set up a pay back scheme.

He has advised that:

The decision as to whether to instigate a pay back scheme in the same way as Lendal is therefore one of policy – there would be nothing legally preventing the Council from retaining the monies pending out of time appeals being made by motorists, equally, there would be nothing legally preventing the Council from settling potential appeals and providing an administrative method (as done with Lendal), for claims to be made.

26. As previously advised, if monies were retained pending appeals being made out of time, there is potential for 12269 individual claims being successfully made to the Tribunal. An approach whereby individual appeals are administered and settled as and when they arise is not considered to be conducive to the good administration of public funds. It would be more costly than providing a Repayment Scheme. In any event, the retained funds could not be released for general expenditure, but would necessarily be held in a reserve pending settlement of any appeals out of time. It is also likely to give rise to reputational damage in light of the already heightened public interest in this issue should

the motorists be required to formally appeal to the TPT. Option 1 is therefore not recommended as an appropriate way forward.

27. The recommended option to Members is that whilst it is lawful to retain the monies pending ad hoc appeals being made, it would be preferable in terms of more effective administration, cost, and certainty for the public for a Repayment Scheme to be implemented, as set out below in Option 2.

Option 2

28. This options would replicate the refund request process that has been approved by Leading Counsel for Lendal Bridge and hence avoid the significant financial and reputational risks of Option 1. It would be proposed to maximise publicity of the Scheme as follows:-
 - 1) Automatically writing directly to all the estimated 12,269 outstanding people who have received a PCN but not to date had a repayment. This would be to inform them directly of the refund request process.
 - 2) As the issuing of the PCN was undertaken by ICES (a specialist private sector company) all addresses are currently held on their secure databases. Therefore, the quickest and most cost effective for issuing the letters would be to engage ICES to undertake a single main distribution. We are advised by ICES that it would take up to 2 weeks to extract the data and mailing would begin shortly thereafter.
 - 3) Currently the Lendal Bridge process closes on the 31st December 2015, it is proposed that this is extended to the 31st of March 2016 and this Coppergate process also closes on the same date to avoid confusion between the different schemes. This should give motorists as a minimum 7 months to make a claim.
 - 4) Publicising the online refund process and deadline through media.

Legal Implications of Option 2

29. The online refund process would require a claim to be made by the individual, and the Council would then settle that claim in full and final settlement only to the amount of the PCN. The settlement is

on the terms set out in the 'Coppergate Online Refund' form attached at Annex A and replicates the Lendal Bridge form.

30. This process effectively prevents any other claims from the individual once the settlement has been reached through this process. It closes down the matter. Leading Counsel's advice is that this process, in paying back penalties to those who did not appeal is appropriate as a pragmatic response to the situation.
31. Leading Counsel advises that this process is lawful and significantly better than simply paying cheques to every individual. It is the best means of achieving reimbursement to those who received a PCN.
32. This option is therefore recommended.

Future TRO enforcement – Whether to revoke the Order or Review the Signage

Option 1 – Revoking the Coppergate Order

33. Whilst Members could revoke the current TRO for Coppergate, this option is not recommended by Officers. Restrictions have been in place on Coppergate for many years and revocation of the TRO would, in the opinion of your Transport Officers, have significant detrimental impacts on traffic flow through the City. If Members wish to pursue this option a more detailed report would need to be prepared to evidence the impact of revocation before any final decision is made.

Option 2

34. Due to the material difference of opinion between the Council and the Chief Adjudicator of the TPT regarding the current signage, Officers recommend that the signage is reviewed, and consulted upon, to adequately communicate the meaning of the Order, and thus comply with Regulation 18. Solutions could include altering the wording on the signs, road markings or surface treatment, or more radical proposals such as creating a further Order to extend the length of the bus lane to include for example Pavement. Extensive consultation should be carried out with key stakeholders, including the Department for Transport, local private hire firms, and the general public.
35. This option is recommended, and a further report will be brought to the Executive in the autumn to present the findings to Members.

Analysis

36. Whether to Challenge the Traffic Penalty Tribunal Review Decision in the High Court.
37. Having regard to Leading Counsel's advice outlined above, Members are strongly advised against challenging the Review Decision. The Council's application for Review has been dismissed solely on the basis of inadequate signage. This does not give rise to a clear argument in law. Whether the signage is adequate is a matter of fact and degree. The Courts are reluctant to interfere in the subjective judgment of a Tribunal. For this reason it is considered unlikely that the Council would benefit from incurring significant legal costs in issuing formal legal proceedings in the High Court, where there is a real risk that the Court would place great weight on the judgment of the Chief Adjudicator in relation to signage. This is therefore not considered to be an appropriate way forward.

Council Plan

38. The recommendation supports the Council's core capabilities in relation to delivering against our customer needs.

Implications

39. Financial

- (a) The full value of fines relating to Coppergate (£387k) were included in provisions/earmarked reserves in the Council's accounts in 2014/15. If members approve the refund process the refunds will be funded from the reserve/provision.

In respect of administration of the Coppergate refund process it is anticipated that this will reflect the costs associated with the Lendal Bridge Scheme and be in the order of £40k. This can be funded from the £150k new homes bonus already allocated for the Lendal Bridge refund process in the report to Cabinet (20th January 2015).

- (b) **Human Resources (HR)** – Existing staff resource will continue to support the scheme.
- (c) **Equalities** – No implications.

- (d) **Legal** – This matter is dealt with in the main body of the report.
- (e) **Crime and Disorder** – No implications.
- (f) **Information Technology (IT)** – No implications.
- (g) **Property** – No implications
- (h) **Other – No implications.**

Risk Management

40. This matter is dealt with in the main body of the report.

Contact Details

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**Report
Approved**



Date *1st July
2015*

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Wards Affected:

All

For further information please contact the author of the report

Background Papers:

Annexes

Annex A – Coppergate Online Refund form