

AGENDA SUPPLEMENT

Executive

To: Councillors Aspden (Chair), Ayre, Craghill, Cuthbertson, D'Agorne, Runciman, Smalley, Waller and Widdowson

Date: Thursday, 18 November 2021

Time: 5.30 pm

Venue: The George Hudson Board Room - 1st Floor West Offices (F045)

The Agenda for the above meeting was published on **10 November 2021**. The attached additional documents are now available. They relate to **Agenda Items 5, 6 and 7** and comprise:

- Officers' responses to the recommendations and comments of the Customer & Corporate Services Scrutiny Management Committee (CCSMC);
- Legal Advice relating to compliance with the public sector equality duty.

This agenda supplement was published on **16 November 2021**

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Officer Response to Customer and Corporate Services Scrutiny Management Committee Recommendations/Comments to Executive

To aid the Executive in considering the recommendations from CCSMC Officers have drafted the below.

Recommendation 1 To proceed with the permanent extension to the Footstreets area, with the accompanying action plan.

(Members of the Committee wished it to be recorded that the vote was split 4:3 along party lines on this recommendation)

Officer Response It is noted that the committee recommended Executive should proceed with as per Officers recommendations. The reference to the Action Plan is the Action Plan contained within the City Centre Access Report before Elected Members at the same meeting. Officers would concur that improving access, as per the Action Plan in the City Centre Access Report, should be done if the vehicle free element of the footstreets is extended.

Recommendation 2 The Executive should satisfy themselves that the public sector equality duty in the Equality Act has been met, particularly in consideration of the following four points:

Does the plan or recommendations advance the equality of opportunity between persons who share the protected characteristic of disability and those who do not share it?

Does the plan or recommendations foster good relations between persons that share the protected characteristic of disability and those that do not share it?

Does the plan or recommendations comply with the requirement in the Equality Act to avoid discrimination on the basis of disability?

Do they feel that the equality impact assessment sufficiently covers the issues and provides sufficient mitigations given the existing feedback from contributors, describing their feelings of traumatisation and discrimination?

Officer Response

External legal advice has been obtained to review the report and its recommendations, this is published as an annex to the agenda supplement. The Barrister has concluded that the Council has fully and properly complied with the Public Sector Equalities Duty to date including the preparation of the report and recommendations before Executive. It is for the Executive to then proceed to balance all the competing needs, benefits and impacts in reaching its ultimate decision.

Recommendation “b” of the Consideration of changes to the City Centre Traffic Regulation Order Report asks Executive to consider the Public Sector Equality Duty, and paragraph 149 recognises the importance of making a decision which is reasonable and proportionate having fully considered the Equalities Impact Assessment. This is also set out in the Legal and Equalities Impact section of the report.

Recommendation 3

The Action plan should include a practical trial of the shuttle bus with a range of service users, as part of the feasibility study recommended by the Martin Higgitt Associates report.

Officer Response The feasibility report on the bus shuttle is part of the Council's Bus Service Improvement Plan bid. The scope of the feasibility has not yet been determined. Therefore the feasibility of trial and the costs can be included and brought back to Elected Members.

Recommendation 4 That the Executive accept the following specified recommendations from the York Disability Rights Forum and York Human Rights City Network, noting that there are some elements of crossover, and ensure that they are appropriately met:

Recommendations 3, 4 and 5 in the joint statement from the disability action groups in annex S of the report 'Consideration of changes to the City Centre Traffic regulation order', namely:

Recommendation *3. CYC should explicitly acknowledge the free labour Disabled People's Organisations (DPOs) have invested in gathering rich data around this topic, completing the relevant surveys, and attending multiple hours of consultation zoom meetings where they have already shared their data and recommendations.*

Officer Response Officers are grateful to all those disabled people and the DPO's that have engaged with the Council, particularly those that have helped design and facilitate workshops. The rich data has been invaluable in understanding the impact.

Should Executive wish, they could add a specific recommendation/decision to both the City Centre Access Report and the Consideration of changes to the City Centre Traffic Regulation Order Report to state.

Executive are asked to:

Thank everyone, especially the disabled people and the disabled peoples organisations who have engaged with the council in gathering rich data and helped develop a deep understanding of the impacts of removing blue badge exemptions for the footstreets and designing improvements to access.

Reason: to reflect the significant contribution of disabled people in the process.

Recommendation 4. CYC should set up a working group, including DPO's as equal partners, to collectively assess the Footstreet Scheme and consider how to balance the rights of York's disabled citizens with other considerations. YHRCN extends an offer to facilitate this working group to mitigate the tensions now surrounding this issue.

Officer Response The appointment of an Access Officer will enable the continued engagement with Disabled People Organisations and an Access Forum Approach is envisaged.

Recommendation 5. We recommend that CYC take a human rights approach and use PANEL principles (Participation, Accountability, Non-Discrimination and Equality) to guide decision making now and in the future. This ensures that human rights are put at the centre of policy and practice.

Officer Response We have followed our 'My' approach to engagement" which includes some key principles:

Open, honest conversations which clearly articulate why and what we are consulting over

Exploration of the impacts of proposals, using the insight to inform plans

Surfacing alternative perspectives and trying to bring people together to understand each other and explore opportunities for change.

This has included a series of accessible workshops, surveys and ongoing conversations with disabled residents and Disabled People's Organisations. This has allowed Officers to develop a deep understanding of the impacts of removing blue badge exemptions for the footstreets.

These impacts have been set out to Elected Members, often first hand, in reports to be considered and in the public open brief and are reflected in the Equalities Impact Assessments

Recommendation

Recommendations 2, 3 and 4 from the York Human Rights City Network Report to the Human Rights and Equalities Board on Blue Badge Concerns, namely:

2. *The CYC should appoint an Access Officer to advise it on access issues and ensuring inclusivity in decision-making. The Access Officer should also be a liaison person for local disabled citizens and groups. This position would be ideal for a qualified Access Auditor with lived experience of disability.*
3. *The CYC should consider establishing a Disability Access Forum, comprising disability organisations. Its role would be to provide strategic advice on access issues, and assess*

the access implications of plans for the city. Both the Access Officer and the Disability Access Forum would embed a co-production approach to accessibility for the future.

- 4. The failure to properly understand and analyse the data in the Equality Impact Assessments illustrates the need for training within the CYC on equalities and human rights. Training for the CYC, members of the Disability Access Forum and others could provide an opportunity to “foster good relations between persons who share a relevant protected characteristic and persons who do not share it”. The development of a new Human Rights and Equalities Impact Assessment tool within the CYC provides a good opportunity to provide such training, and integrate analysis of equalities and human rights.*

Officer Response

Officers have responded to the Human Rights City Network Report for Scrutiny and this is contained within Annex V of the Consideration of changes to the City Centre Traffic Regulation Order Report. To confirm an Access Officer is a recommendation of the Review of City Centre Access and it is envisaged will establish an Access Forum and will advise on training requirements.

Officers have acknowledged that in previous versions of the Equalities Impact Assessment, that whilst the impacts were not cross referenced into the human rights section of an Equality Impact Assessment form, the impacts were understood. There are multiple Human Rights impacts as detailed in the report and the latest version of the Equality Impact Assessment reflects that.

Recommendation 5 The Committee recommends that the word 'confirm' be replaced by 'note' in the first recommendation under 'Cycling, e-scooters and e-bikes' of the Strategic Reviews of City centre Access and Council Car Parking, such that it reads 'Note the existing position that cycling is not permitted in the footstreets during footstreets hours'.

The Committee welcomes the Martin Higgitt Associates Report and findings and would encourage the Executive to consider whether any of the recommendations not currently considered actionable could be taken forward in due course.

Officer Response The intention of the word to confirm is a reflection that it has been considered whether cyclists and e-scooters should be allowed free access to the footstreets and following wider engagement it is proposed that this should not be the case, a conclusion that is also set out in the Martin Higgitt Report. Changing to note would reduce this recommendation so it would cease to be a positive statement about the future nature of the footstreets – a principle on which the whole Strategic Review of City Centre Access is based..

It is important to note that the above principle would not preclude a future consideration of a dedicated cycle route through the footstreets, and this could be considered as part of LTP4 development.

Recommendation 6 The Committee acknowledged that it was difficult to carry out a proper, fully informed scrutiny on what amounted to over 1,000 pages of information published on Friday, prior to the

scrutiny meeting on the following Monday evening.

Officer Response

Publishing the draft reports was a position agreed with the Chair of Scrutiny and were published as soon as the draft reports were ready.

The recommendations for decision are contained within the draft reports are contained within 80 pages.

The remaining documents are supporting annexes to these reports. To aid the Executive in achieving a balanced and proportionate decision officers were keen to ensure that the unedited voice of the community especially disabled people was heard and understood. Given the Scrutiny Committee had, at its previous commissioned meeting, heard the voice of disabled people, Officers felt it was important to share the background annexes so that the personal testimony could be seen as it would be presented to Executive. Approximately half the pages are community responses or are independent reviews of disabled access issues.

Officers accept that the three reports and annexes presented to Scrutiny due to be considered by Executive could have been divided up to aid the committee.

RE: ACCESS TO YORK CITY CENTRE

ADVICE

1. I am asked to advise York City Council ("the Council") upon whether it has acted, and continues to act, in accordance with its public sector equality duty ("PSED") contained in s.149 of the Equality Act 2010 in relation to its ongoing proposals for access to York City Centre involving the permanent extension of footstreets in the City Centre. In particular, issues have been raised by, and on behalf of, Blue Badge Holders over the Council's alleged failure to have due regard to the impact its proposals would have upon groups with protected characteristics, and most specifically the disabled.

LEGAL FRAMEWORK

2. Turning firstly to s.149 of the Equality Act 2010 which sets out the PSED, subsection (1) provides:

"A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

Subsection (3) goes on to state:

"Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) *remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
- (b) *take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
- (c) *encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”*

The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

3. The PSED as set out in s.149 has been the subject of much caselaw. The fundamental principles derived from the various authorities were helpfully summarised by the Court of Appeal in *Bracking v Secretary of State for Work and Pensions*¹ and from which the following are of particular note in assessing whether the Council has complied, and continues to comply, with that duty in this instance:
 - a. A public authority decision maker must be aware of the duty to have “due regard” to the relevant matters.
 - b. The duty must be fulfilled before and at the time when a particular policy is being considered.
 - c. The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument.
 - d. The duty is non-delegable and is a continuing one.
 - e. It is good practice for a decision maker to keep records demonstrating consideration of the duty.
 - f. General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

¹ [2013] EWCA Civ 1345.

- g. It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision.
- h. The duty of due regard requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required.
- i. The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal.

APPLICATION TO COUNCIL'S DECISIONS

- 4. Applying the above legal principles to the Council's proposals in relation to access to the City Centre, it is my opinion that the Council has complied with the PSED to date by complying with those principles, and continues to do so, from the documentation I have seen. From such documentation, it is evident that the Council has understood the nature of the PSED, applied the statutory criteria by having due regard to it, fully engaged with those with protected characteristics, analysed those impacts, sought to mitigate them by amending the proposals, and taken into account those impacts in its decision-making process to date.
- 5. By way of example, the Executive Report dated 26 November 2020, which commissioned the strategic review of access and approved the commencement of the formal process to consider removing the exemption for Blue Badge Holders to some streets, was accompanied by a detailed Equalities Impact Assessment. Having identified the proposals and the benefits of the revised footstreets, including to pedestrians and to support anti-terrorism measures by enabling the implementation of Hostile Vehicle Measures, the Report proceeds to identify and consider the negative effects of the proposals, including specifically to Blue Badge Holders as set out in paragraph 21. In paragraphs 22 through to 33 of that Report, the impacts on Blue Badge Holders are analysed and considered, including the in depth engagement with those affected and proposed mitigation measures. As noted in paragraph 22:

“In response to the above impact on Blue Badge Holders 40 additional free disabled parking bays were created at Monk Bar Car Park, the closest car park to the majority of the displaced on street parking capacity in Goodramgate area. In recognition of the added distance to the very centre of the city a free shuttle taxi service has also been provided from the car park, initially stopping on St Andrewgate and then revised to take customers at a point of their choice on the edge of the footstreet area. In addition to this service 16 new dedicated parking spaces for Blue Badge Holders were created as close as possible to the footstreet area, with capacity for seven vehicles on Duncombe Place, two on St Saviourgate, five on Dundas Street, and two on Carmelite Street.”

In addition, the Report identifies the extent of the engagement, both online and offline, as well as the commissioning of Disabled Motoring UK to produce an independent review of York’s disabled access offer. As pointed out in paragraph 25:

“In total there were 1,900 responses, whilst detailed work with Blue Badge Holders and disabled groups engaged with 421 people, including the advocacy groups that represent thousands of members. Overall there was broad support for the extensions of the footstreets, with 67% overall in favour and 61% of respondents who identified as having a disability also in favour. The issues that sit behind these figures were drawn out in detail in an open brief that set out all the in depth discussions that have taken place and was published online and refined based on public feedback (annex 7).”

At paragraphs 44 and 45 of the Report, the concerns voiced during the detailed engagement are specifically acknowledged, analysed, and further modifications to mitigate the impacts are proposed in relation to temporary revisions, and then further actions are proposed at paragraphs 56 to 58 for permanent extended footstreets.

6. A similar approach was taken by the Council in the June 2021 Executive Member for Transport Decision Session Report that commenced the statutory consultation on the permanent footstreet proposals. Again, a detailed Equalities Impact Assessment accompanied that Report.
7. It is also of note that other Equalities Impact Assessments have been undertaken throughout the process during which engagement has continued, specifically targeting groups likely to be affected, including the disabled. From such documentation, it is my

opinion that the Council has to date complied with its PSED in reaching its decisions on the proposals.

CONTENTIONS RAISED

8. Despite the above, a number of disability groups and local residents have raised contentions that the Council is breaching its PSED by pursuing its permanent proposals.
9. The concerns raised are entirely understandable. Further, in pursuing the permanent proposals which have evident benefits to many, including many disabled persons, they will necessarily have negative impacts on others, including Blue Badge Holders. To achieve the clear and significant benefits arising from removing vehicles from parts of the City Centre, some negative impacts are inevitable.
10. However, it is of particular significance that the PSED is a **procedural** duty the Council must comply with in reaching its decisions. It requires the Council to have due regard to the impacts on persons with protected characteristics as part of its decision-making process in accordance with the legal principles set out above. Provided that procedural duty is properly complied with, the Council is not in breach of it. Importantly, the **substantive decision** remains for the Council to reach, taking into account and giving appropriate weight as it sees fit to any negative impacts. Provided the procedural duty is properly complied with, the substantive decision is one for the Council. In other words, the PSED does not require any particular outcome to be achieved in the substantive decision made.
11. That was made clear in *Hammett v Essex County Council*² in which Singh J. dismissed a challenge by a blue badge holder to the authority's decision to move blue badge parking spaces to a less convenient location. He stated in his Judgment (with my emphasis added):

“However, important as the duty is, it also needs to be recalled that it is a procedural duty and does not control the substance of a public authority's decisions. At times it appeared to me that Mr Hogan's submissions on behalf of the Claimant risked straying into the area of substantive decision-making. For

² [2014] 1 WLR 2562.

example he eloquently submitted that, although the Defendant had rightly decided to provide more designated parking spaces for disabled people, it had put them in the wrong place. He submitted that the Defendant had simply not asked itself whether the alternative provision could in practice be used by people such as the Claimant.

*The Defendant carried out two equality impact assessments, the first in September 2011 and the second in July 2012. Although strictly speaking a public authority is not required to carry one out, **the fact that it was provides some support for the view that the public sector equality duty was taken seriously and was performed. Clearly this was no cosmetic exercise, since changes were made by the Defendant in its proposals between the two assessments.***

*This was classically a polycentric decision-making context. It was one for the public authority to which Parliament has entrusted such functions, provided of course that it complied with its legal duties. Although the outcome was no doubt disappointing to the Claimant and to others who support the campaign which she chairs, **it is important to recall that the public sector equality duty does not require any particular outcome to be achieved by a public authority; rather it imposes a procedural duty (and an important one) to have due regard to various matters in the process by which an outcome is reached.***

12. In my view, the concerns being raised contending a breach by the Council of its PSED are, in reality, challenges to the merits of the Council's substantive decision. Ultimately, it is being alleged that the mitigation measures being proposed are inadequate to offset the loss of on-street parking for Blue Badge holders. That is a challenge to the substance of the Council's decision. The PSED duty is not a means by which an aggrieved person is able to challenge the merits of a decision made as it is a procedural duty and does not require the Council to reach a particular decision. It instead requires the Council to comply with that procedural duty in the manner in which it reaches its decision. In my opinion, the Council has performed that duty appropriately to date, and it is for the Council to then proceed to balance all the competing needs, benefits and impacts in reaching its ultimate decision. The decisions made to date are, in my opinion, all reasonable decisions which the Council is entitled to make in the exercise of its discretion.

CONCLUSION

13. In conclusion, for the reasons set out above, it is my opinion that the Council has fully and properly complied with the PSED to date.

RUTH A. STOCKLEY

12 November 2021

Kings Chambers

Manchester, Leeds, Birmingham

**RE: ACCESS TO YORK CITY
CENTRE**

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