

**Decision Session – Executive Member for
Transport**

13 December 2022

Report of the Director of Environment, Transport and Planning

Buttacre Lane: Askham Richard

Summary

1. Buttacre Lane, Askham Richard, York (“the Carriageway”), as shown on the plan of the adopted highway at Annex A, 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 several sections as the construction and 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. 80m to 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 (Revenue) Repairs on carriageway assets are undertaken in accordance with the requirements of the Highway Safety Inspection Manual (“HSIM”) and visual inspections are undertaken annually at this location by the Highways Inspector.
4. The latest annual asset inspection at this location occurred on 28th November 2022 (“the Inspection”) and was undertaken by the Inspector and the recently appointed Highways Maintenance Manager as a fresh and independent assessment of the full length of the Carriageway. A report of the Inspection results can be found in Annex D.
5. In summary the Inspection confirmed 11 actionable defects totalling approx. 28m² within 84m of the Western Section. It is intended that all of these defects will be undertaken in accordance with the HSIM within 28

days of the date of the Inspection. No other actionable defects were found across the remainder of the Carriageway.

6. Proactive (Capital) renewal work is identified pursuant to the city-wide annual condition survey in accordance with Highway Infrastructure Asset Management Plan (“HIAMP”) principles, prioritising each carriageway against the needs of the entire CYC carriageway network.
7. Whilst the latest survey identifies the need for potential capital intervention on sections of Buttacre Lane, when prioritised against other carriageway issues within the City it is not currently identified for renewal in our funded element of the programme in accordance with the HIAMP principles.
8. 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**”).
9. The Complainant detailed some areas of concern with the maintenance along the entire length of the Carriageway.
10. The Complainant referred to having a right of access to their property from the Carriageway.
11. 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.
12. 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.
13. 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. The Complainant has a key to the

second padlock to that gate, but has not informed officers that the Complainant has a key to both padlocks necessary to open the gate. However, officers acknowledge that is a possibility. 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. Our legal officer has also reviewed all available previous aerial photographs of the relevant area, in particular for 2002, 2007, 2017 and 2020. Up until 2007 there is evidence of a belt of trees situate along the northern boundary of the Property, and it is not certain from the relevant photographs that access to the adjoining property would have been physically possible at that point in time. The photographic evidence is inconclusive, but does show some changes in layout at the eastern boundary of the Property at some stage between 2007 and 2017 whereby the tree belt referred to was removed and then, by 2020 there is evidence of the installation of hard paving in the relevant area. Officers have also been supplied with photographs taken from within the Property showing a double timber gate exiting to the adjoining, separately owned private land, over which the Complainant may or may not have a right of way to connect to Buttacre Lane.

14. It is not for officers to consider the complicated legalities of the acquisition of a prescriptive right of way, which requires more than the statement of the most recent (and current) property owner, but our legal officer advises that this accumulation of facts suggests that for various reasons it may be challenging for the Complainant to evidence the acquisition of a prescriptive right of way by the Complainant over the adjoining connecting land to the Carriageway. To date, confirmatory evidence of any such right has not been produced by the Complainant to officers. However, officers can confirm that in any event, assessment of actual user of Buttacre Lane, based on evidence available, is a relevant factor in the context of the HSIM and the HIAMP.
15. A review of the planning history relating to the Property reveals various references to access to the Property being gained via a "private drive"/ "unmade track" partly owned by the Complainant and located to the north of the Carriageway ("the Private Drive") Accordingly, the highway authority can reasonably expect that access to the Complainant's Property is gained via the Private Drive. Officers have not carried out a complete review of the ownership of the Private Drive and/or any

additional rights over land forming part of it, which may or may not benefit the Complainant.

16. In addition to the specific complaint received from the Complainant, the Council has also previously received various other written and verbal representations from local residents and Ward Councillors. We highlight that while comments and concerns are welcomed from concerned parties, and are considered, such concerns are and have been considered within the precepts of the HSIP and the HIAMP mentioned above.
17. One of the representations refer to past assurances given by the Council's previous Head of Highways Asset Management during a site visit which took place on November 2021. Internal investigations regarding this matter have revealed no written record of the previous Head of Highways Asset Management committing to works on the Carriageway or giving any assurances in this regard. As stated within paragraphs 3, 6 and 13, any works on the Carriageway would have to be identified and implemented in accordance with the HSIP and HIAMP principles, in any event.
18. The Complainant has raised a speculative suggestion proposing that the Complainant would create a new access across both the (Complainant's) Property and adjoining land which abuts Buttacre Lane.
19. Desktop enquiries reveal that the adjoining land is not currently within the Complainant's ownership. The Complainant suggests that such access would potentially redirect some of the agricultural traffic using part of Buttacre Lane. Our legal officers advise that any such arrangement would require a commercial negotiation between the Complainant and the adjoining landowner. However, in due course, there is nothing to prevent the Complainant and/or the adjoining landowner approaching the Council separately in relation to future arrangements relating to entering into a related Section 278 Agreement. Council officers would consider any such application made upon its merits and in accordance with ordinary procedure, at that time.

Recommendations

20. The Executive Member is asked to:

- 1) Approve Option 1, which is to continue as per the HSIM and HIAMP meaning that annual safety 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. In addition annual surveys from a proactive perspective will occur with specific asset needs prioritised against the entire network

Reason:

This approach recognises that the Western Section has a different use and need to the remainder of the Carriageway. In particular, there is evidence that the Western Section is used by both non-agricultural and agricultural vehicles, whereas the remainder of the Carriageway appears to be used principally by agricultural vehicles. 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.

The HIAMP 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.

Finally, the implementation of this option would ensure compliance with the statutory duties of the Highways Authority.

Background

21. 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.
22. 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”
23. 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. 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.

24. 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.
25. The planning history relating to the Property supports the position that access to the Property is gained via the Private Drive. The Complainant obtained and implemented planning permission for the conversion of a garage to form a separate residential annex at the Property. The planning application documents show that access to the annex is gained via the Private Drive.
26. In 2021, the Complainant obtained planning permission specifically in relation to the Private Drive for the "creation of new private driveway to replace existing". It is unknown whether the permission has been implemented. Of relevance is the following comment contained in the Officer Report relating to the highways assessment when considering the planning application:
 - a. "Impact on Highway: The proposals would not alter the existing access point into the site and as such would not be considered to have any impacts on the existing highway."
27. The Complainant has also submitted a further planning application referring specifically to access via the Private Drive. The application seeks permission for the following development on the Property "erection of replacement agricultural barn and associated access from existing private drive". The Design and Access Statement submitted by the Complainant in relation to this application states the following:
 - a. "ACCESS The site is accessed from the existing private drive..."
28. Based on the various information regarding access to the Property revealed by the planning history, it is reasonable for the Highways

Authority to expect access to the Complainant's Property to be gained via the Private Drive.

29. A s56 Notice has also been served by the Parish Council in a letter dated 21st November 2022. The letter sets out concerns regarding the condition of the Carriageway and states that the Council is required to fulfil its statutory duties.
30. The Council received emails from a resident raising concerns regarding the condition of the Carriageway and setting out their intention to serve a s56 Notice.

Consultation

31. 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 th June 2022	Highways Asset Manager Highways Inspector Drainage Engineer	Officer Inspection
17 th 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

32. Options in consideration are as follows:

Option	Detail
1	Continue as per HIAMP 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>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 bring any works at this location into the funded element of the programme</p>
2	<p>Full Carriageway Rehabilitation This would mean expediting the Carriageway works in the prioritised HIAMP 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 would be subject to final design</p>
3a	<p>Upgrade Western section Undertake design works to upgrade Western Section of Buttacre Lane from junction with School Lane to beyond the residential properties (approx. 80m to 100m). This would mean expediting this section of the Carriageway. This would not be in accordance with the Executive approved HIAMP programme.</p> <p>These works are likely to cost approximately £100,000 and would be subject to final design.</p>
3b	<p>Upgrade Western section – design only As above, but design works only in readiness for future capital scheme being funded. This would not be in accordance with the Executive approved HIAMP programme.</p> <p>These design works are likely to cost approximately £30,000.</p>

Analysis

33. As above

Council Plan

34. 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

Financial

35. In accordance with the application of the HIAMP principles, there is currently no capital funding identified for this location. However, should the recommended option (1) be approved and implemented, this would result in a continuation of the current arrangements and therefore can continue to be accommodated within existing budgets.

36. Any future maintenance requirements at this location as with any other highway asset will be funded from revenue and capital budgets that are set aside for highway maintenance.

Legal

37. 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.

38. 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

39. 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. The nature and volume of user are also relevant considerations when looking at the design and construction of a Highway. Not all highways will need to be constructed with tarmacked surface or as a metalled road.

40. 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.”

41. 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.

42. 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.
43. Highway authorities have to show that they carry out inspections of their highways network in accordance with their policies and national guidance. Highway inspection reports are part of the evidence used to show that the highway authority has acted reasonably as required under s58 of the Highways Act.
44. Pursuant to s58 of the Highways Act 1980, the highway authority is required to prove that they took such care as in all the circumstances can be considered reasonably required to secure that the highway was not dangerous for the nature of traffic reasonably expected to use the type of highway in question. When assessing this defence, the courts have regard to various matters including the standard of maintenance appropriate for a highway of that character and used by such traffic (s58(2)(b) of the Highways Act 1980).
45. Highway authorities should also consider customer reports of highway defects, however not all defects which the authority becomes aware of either by inspection or customer report need to be repaired. All works to highways must be identified and implemented in accordance with the relevant policies.
46. In relation to Option 2 a subsidy control assessment would need to be carried out in respect of the full carriageway rehabilitation to ensure that a specific economic advantage was not being conferred on one or more enterprises. The new Subsidy Control Act comes into force on 4 January 2023 and will govern how subsidies (formerly state aid) are awarded.

Human Resources (HR) - none

Equalities

47. 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. An Equalities Impact Assessment has been carried out and is annexed to this report at Annex [X]. In summary, the result of the assessment is [set out findings from EIA]"

Crime and Disorder - none

Information Technology (IT) - none

Property

48. 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 Western Section) of the Carriageway is used regularly for any purpose other than by agricultural vehicle(s) and pedestrians.

Risk Management

49. CYC consider that there are two primary risks:

1. Section 41 Claim

50. 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]*).

51. If a s41 claim is made against a highway authority, in order to utilise the s58 Highways Act 1980 "Special 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 (see paragraph 34 above).

2. Section 56 Order

52. 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.
53. 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.
54. 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.
55. 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.
56. 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.
57. 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.

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Report **Date** 5/12/22
Approved

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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

Annex D – Report of Maintenance Managers findings from Site Inspection on 28th November 2022

List of Abbreviations Used in this Report

HIAMP - Highway Infrastructure Asset Management Plan

HSIM - Highway Safety Inspection Manual

CYC – City of York Council