

# London Councils' Transport & Environment Committee

## Construction Work and Damage to Highways      Item no:      15

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**Summary:** Building works and the delivery of equipment and materials can sometimes lead to damage to highways (including both roads and footpaths). Legislation allows councils to make good any damage caused by works on land adjacent to publicly maintainable footpaths or highways and recover the expenses incurred. However, there are a number of difficulties that boroughs wishing to pursue this have experienced. London Councils officers undertook a survey of borough officers on this issue in April 2015. This report summarises a number of potential solutions that were identified to address the issues raised and seeks the views of TEC members on the possible next steps

**Recommendations:** The Committee is asked to:

- Note and discuss the report
- Advise whether Members would like London Councils officers to help with sharing good practice
- Advise whether Members would like London Councils officers to pursue legislative change when opportunities to that effect arise (e.g. wider changes to the planning system are proposed)

## **Construction work causing damage to highways**

### **Background**

1. Building works and the delivery of equipment and materials can sometimes lead to damage to highways (including both roads and footpaths).
2. A number of members of TEC have raised concerns with London Councils officers about damage to highways and the difficulties of recovering costs.

### **Existing Powers**

3. The Highways Act 1980 (section 133), as amended by the London Local Authorities and Transport for London Act 2013, allows councils to make good any damage caused by works on land adjacent to a publicly maintainable footpath or highway and recover the expenses incurred from the landowner, the person carrying out the works or the person on whose behalf the works were carried out.
4. Using this legislation in isolation can be challenging for local authorities because they need to know that work is being carried out, what state the highway was in before the work was undertaken and be able to prove that any damage was related to the construction work. They also need to be prepared to pursue legal proceedings to apply the legislation to recover the cost of repairing the damage done.
5. Also under the Highways Act 1980, local authorities have the power to control the use of temporary structures, such as scaffolding (section 169) and builders skips (section 139) on the highway. A licence for a temporary structure may contain such terms as the authority issuing it thinks fit, which the applicant has the right to contest in a magistrate's court on the grounds of unreasonableness. Some authorities are using this to secure deposits to cover potential damage to the highway when granting licences.
6. Section 106 of the Town and Country Planning Act (as amended) allows for restrictions or requirements to be placed on the use of land through a legal agreement when granting planning permission, where this is necessary to make developments acceptable in planning terms. These 'planning obligations' are most commonly used to secure the delivery of affordable housing or new infrastructure when development is permitted but can be used for other purposes. The agreement can be enforced through an injunction.
7. Planning conditions can be used to mitigate the adverse effects of development. Where a development is undertaken in a way that is inconsistent with the planning condition, local authorities are able to take planning enforcement actions, such as issuing Stop Notices and then requiring that the issue is rectified. Planning conditions cannot be used to require payments to the local authority and should relate specifically to the site covered by the permission.
8. Section 278 of the Highways Act 1980 also allows developers to enter into legal agreements to make improvements or alterations to the highway to support a proposed development. There are similarities between these agreements and Section 106 agreements. Where this legal approach is used, the agreement can allow for 'payments in respect of the maintenance of the works to which the agreement relates and may contain such incidental and consequential provisions as appear to the highway authority to be necessary or expedient for the purposes of the agreement'. There are means of enforcement set out in the legislation, which include preventing means of access to the site covered by the agreement.

## Survey of borough officers

9. London Councils officers undertook a survey of borough officers in April 2015 to gain a better understanding of the challenges to preventing damage to the highway and reclaiming the costs of repairing the damage where it does happen.
10. 17 borough officers, from 12 councils, completed the survey. These councils were geographically spread across London and included inner and outer boroughs. The majority of responding officers were at a managerial level.
11. There was a significant range (0 to 300) in the number of reported incidents of construction work causing damage to the highway in 2013/14 and very little consistency between boroughs or a spatial pattern. Generally, those with better rates of successfully recovering costs had lower numbers of reports but it doesn't appear to follow that low numbers of reports result in higher levels of cost recovery.
12. There was also a significant range (£0 to £50,000) in the reported unrecovered cost of repairing damage, although too few boroughs provided information to be able to draw firm conclusions about this.
13. A significant majority of respondents identified this issue as very or fairly significant for residents, members and officers.

## Difficulties encountered in recovery of costs

14. The vast majority of respondents consider the following to be very or fairly significant reasons why costs are not recovered more frequently:
  - A lack of information on when building work or development is beginning (100%)
  - A lack of information on the state of the highway before work began (100%)
  - A lack of information on the state of the highway immediately after work was completed (82%)
  - Proving that the damage to the highway was caused by the builder or developer (100%)
  - Insufficient financial resources to pursue builders or developers (83%)
  - Insufficient staff to pursue builders or developers (89%).
15. Of these, the issue that most respondents commonly identified as 'very significant' was "proving that the damage to the highway was caused by the builder or developer". One officer stated that it was difficult to get witnesses or photographic evidence that provide sufficient proof in order to apply powers under s133 of the Highways Act (see paragraphs 3 and 4, above). It was noted that "broken paving stones adjacent to a parked vehicle is insufficient".
16. There was less consistency on the extent to which officers considered a 'lack of knowledge of the powers that exist' to be a very or fairly significant issue. However, over 50% did consider this to be the case. The process for reclaiming costs was identified as time consuming and requiring sufficient legal support, which was said to not always be forthcoming.
17. The majority (76%) of respondents said that they knew of instances of damage being caused by work that they had no prior knowledge of because it did not require planning permission, building control approval by the council or licencing of equipment on the highway.
18. From the responses to the survey, it appears that there is a range of scenarios where damage occurs, which may suggest different solutions, including:

- a) Development of major sites permitted through a planning permission, where a legal agreement is more likely to be put in place.
- b) Development of small sites permitted through a planning permission, where a legal agreement is less likely to be put in place.
- c) Development permitted through permitted development rights but where there is a requirement for prior notification or approval of the Council's planning department.
- d) Building work that does not require planning permission but requires some other form of local authority control, e.g. building control approval or licencing of equipment on the highway.
- e) Building work that does not require planning permission or any other form of local authority control.

19. An issue that could cut across all of these scenarios is where damage is caused by illegal traders that cannot be traced and do not have insurance. It may be expected that this would be a greater issue for smaller, less visible construction works.

### **Potential solutions**

20. A number of potential solutions have been identified, which can be grouped into the following categories:

- Using existing planning legislation or highways legislation that allows authorities to control temporary structures, plant and materials on the highway.
- Making better use of the existing legislation that specifically relates to local authorities reclaiming costs for damage to the highway (section 133 of the Highways Act, as amended) (see paragraph 3, above).
- Changes to legislation.

A summary of the specific suggestions made within these categories is presented below.

#### Using existing planning legislation or highways legislation

- 21. Some local authorities in London reported that they are successfully using highways legislation that requires licences for temporary structures, plant and materials on the highway to secure deposits to cover potential damage. Whilst this is unlikely to cover all forms of construction because not all will require such a licence, it could be part of a solution for local authorities that are not currently applying this approach.
- 22. Some local authorities also reported that they are using planning obligations or conditions (see paragraphs 6 and 7, above) to require developers to leave the highway surrounding the site in an agreed state of repair and/or submit Construction Traffic Management Plans. Whilst this is also unlikely to cover all forms of construction because not all will require planning permission, it could also be part of a solution for local authorities that are not currently applying this approach.
- 23. London Councils could assist by collating and sharing best practice amongst local authorities that are applying these approaches.

#### Making better use of section 133 of the Highways Act (as amended)

- 24. Not all construction work will require planning permission or licences for temporary structures, plant and materials on the highway. In addition, there may be cases where the local authority doesn't consider it proportionate to require planning conditions or obligations relevant to this issue. In these cases, local authorities can use section 133 of the Highways Act to recover the costs of any damage done to the highway. However, there are

challenges to applying this legislation (see paragraphs 3 and 4, above), in particular proving that damage was caused by the builder/developer.

25. Through the survey, borough officers suggested that better communications between council departments could help to ensure that the department responsible for investigating highway damage is aware when building work begins. Through using planning (including CIL) and building control information, for example, authorities could identify construction work that they may wish to monitor for damage to the highway.
26. Some borough officers identified a need for more staff out within the borough looking for damage as it occurs and investigating instances of damage. This could help to ensure that boroughs have proof that damage has been caused, which is necessary to recover costs under section 133 of the Highways Act. This would not necessarily require new staff. Existing staff that are patrolling the streets or frequently travelling within the borough could be made aware of this issue and asked to report any damage that they find or witness happening. Officers also raised the need for sufficient support from council legal departments to pursue the recovery of costs.
27. Officers also suggested raising awareness amongst residents and businesses of the issue and the powers available (see paragraphs 3 to 8 above). This may help to encourage members of the public to come forward as witnesses of damage to highways and help to deter companies and individuals from causing damage.

#### Changes to legislation

28. The majority of officers supported the suggestion of a formal procedure that requires the council to be notified, and a deposit paid, where the use of equipment or vehicles may result in damage to the public highway. Whilst some authorities are applying a similar scheme for work that requires a licence for temporary structures, plant and materials on the highway and developments that require planning permission, there is no legislation that allows this process to be put in place for all construction work. This would require a change in legislation to allow this. However, a system that imposes this requirement on all building work or the delivery of building materials is likely to be seen as being highly bureaucratic.
29. Some officers suggested imposing on-the-spot fines where damage occurs rather than recovering costs or allowing authorities to recover costs and impose penalties. Imposing penalties, in particular, may ensure that the legislation acts as a stronger deterrent and may provide a greater incentive for authorities to pursue legal action, especially in cases of relatively minor damage. However, there would be no guarantee that an on-the-spot fine would relate to the cost of repairing damage.
30. There were also suggestions that more general requirements could be placed on builders/developers, such as requiring them all to be accredited with Considerate Constructors status. To require every construction firm or builder to achieve accreditation may be unrealistic and be seen as overly bureaucratic for small firms or individuals that could be undertaking work that leads to damage. It may prove difficult to get legislation changed in this way, as it would introduce further regulation on the development industry.
31. Respondents to the survey suggested that there is a need to change the burden of proof so that the onus is on the builder or developer to prove that they did not cause the identified damage. This issue appears to be being overcome by boroughs where a licence for a temporary structure (see paragraph 5, above) makes the applicant liable for damage to it the period that the structure is in place on the highway. Some boroughs report that they are also using planning agreements (see paragraph 6, above) to overcome this issue by requiring the highway surrounding the site to be maintained during the construction and left in an agreed state. To change the burden of proof that applies to section 133 of the Highways Act (see paragraph 3, above) would require a change in legislation, which may prove difficult to secure. Through the survey, other suggestions for how boroughs may

more effectively collect evidence, include increasing the number of officers looking for damage (see paragraphs 25 and 26) and encouraging witnesses to come forward (see paragraph 27).

32. One respondent raised concerns about the impact of the previous Government's relaxation of permitted development rights. There is now the scope for developers to undertake certain works (such as the change of offices to residential use) without the need for planning permission and the types of legal requirement that boroughs used to be able to impose to ensure that highways were maintained or improved. Changes to legislation would be required for local authorities to be able to address damage to highways through the planning system in these cases.

## Summary

<b><u>Scenario</u></b>	<b><u>Potential Solution</u></b>	<b><u>Implementation</u></b>
Development of major sites permitted through a planning permission	Local authorities could consider including a requirement for the developer to leave the highway in an agreed state of repair (or pay for any damage) in a Section 106 agreement (see paragraph 6).	Existing legislation; borough would need to implement
Development of small sites permitted through a planning permission	Planning conditions, for example requiring Construction Traffic Management Plans may be able to help to limit damage to highways in these cases. S106 agreements may be appropriate in some cases.	Existing legislation; borough would need to implement
	Smaller sites may also be more likely to need to place temporary structures, plant or materials on the highway so authorities could consider requiring a deposit when issuing licences.	Existing legislation; borough would need to implement
	Improved communications and information sharing between departments may help to identify construction work that should be monitored for damage.	Borough to implement improved communication mechanisms
Development permitted through permitted development rights	Improved communications and information sharing between planning and highway departments may help to identify development work that should be monitored for damage.	Borough to implement improved communication mechanisms
	Smaller sites may also be more likely to need to place temporary structures, plant or materials on the highway so authorities could consider requiring a deposit when issuing licences.	Existing legislation; borough would need to implement
	Changes to planning legislation that would allow authorities to control these issues through the planning system.	Achieving changes to planning legislation would be a long process
Building work that does not require planning	Requiring deposits to be paid to cover potential damage where authorities issue licence for temporary structure, plant and materials on the	Existing legislation; borough would need to implement

<b><u>Scenario</u></b>	<b><u>Potential Solution</u></b>	<b><u>Implementation</u></b>
permission but requires some other form of local authority control	highway.  Improved communications and information sharing between departments may help to identify construction work that should be monitored for damage.	Borough to implement improved communication mechanisms
Building work that does not require planning permission or any other form of local authority control.	Raising awareness of the issue and the powers available may help to encourage members of the public to come forward as witnesses of damage to highways and help to deter individuals and companies from causing damage.  More staff out within the borough looking for damage as it happens and investigating instances of damage could help.  Changes to legislation could be sought to ensure that existing powers are more of a deterrent. Changes to legislation could also introduce new burdens on developers/builders regarding reporting of works that may cause damage or more general burdens relating to their overall approach to construction or running their business.	Borough to raise awareness of the issue within their communities  Boroughs to train internal staff  Achieving changes to planning legislation would be a long process

### **Potential next steps for Boroughs and London Councils**

33. If considered appropriate, boroughs can decide to take forward some of the potential actions identified immediately, such as:

- a) Establishing systems that require deposits to be paid when licences for temporary structures, plant and materials on the highway are issued;
- b) Securing guarantees that damage will be repaired through the planning system;
- c) Raising awareness of the powers that councils have;
- d) Reviewing internal communications;
- e) Reviewing the resources and support available to the responsible teams.

34. There are actions that London Councils could take to help address this issue, if Members view it as a sufficiently high priority:

- a) London Councils could support boroughs in sharing knowledge and best practice in taking forward some of the above.
- b) Pursue changes to legislation when opportunities arise, e.g. if any changes to the planning system are proposed.

### **Recommendations**

The Committee is asked to:

- Note and discuss the report
- Advise whether Members would like London Councils officers to help with sharing good practice
- Advise whether Members would like London Councils officers to pursue legislative change when opportunities to that effect arise (e.g. wider changes to the planning system are proposed)

### **Financial Implications**

35. There are no financial implications for London Councils arising from this report.

### **Legal Implications**

36. There are no legal implications for London Councils at this stage.

### **Equalities Implications**

37. There are no equalities implications of the recommendation.