

ENVIRONMENT POLICY DEVELOPMENT AND SCRUTINY COMMITTEE

Minutes of the meeting held at 7.30 pm on 5 March 2013

Present

Councillor William Huntington-Thresher (Chairman)
Councillor Ellie Harmer (Vice-Chairman)
Councillors Reg Adams, Peter Fookes, Julian Grainger,
Russell Jackson, David Jefferys and Nick Milner

Also Present

Councillor Colin Smith, Councillor Peter Fortune,
Councillor Douglas Auld, Councillor Simon Fawthrop and
Councillor Tony Owen

47 APOLOGIES FOR ABSENCE AND NOTIFICATION OF SUBSTITUTE MEMBERS

Apologies were received from Councillors Samaris Huntington-Thresher and Ian Payne. Councillor Russell Jackson attended as alternate for Councillor Samaris Huntington-Thresher.

48 DECLARATIONS OF INTEREST

There were no declarations.

49 QUESTIONS FROM COUNCILLORS AND MEMBERS OF THE PUBLIC ATTENDING THE MEETING

There were no questions to the Committee.

50 MINUTES OF THE ENVIRONMENT PDS COMMITTEE MEETING HELD ON 15TH JANUARY 2013

The minutes were agreed subject to replacing paragraph 14 at Minute 41 with the following paragraphs, which include additional wording proposed by Councillor David Jefferys (the additional wording underlined):

“Councillor Jefferys enquired how it might be possible to interact more closely with the inspectors. Indicating that engagement should be developed as a clear proposal and standard operating procedure, and submitted to the Committee for consideration, Councillor Jefferys offered Shortlands Ward as a possible area for a pilot study.”

It was indicated that the new role of Street Environment Inspector was intended to incorporate engagement with the locality e.g. resident associations and shop owners. The engagement had not happened as much as officers would have liked in view of the new contract bedding in.”

It was confirmed that Officers were proposing to use Shortlands ward on a pilot basis to take forward resident engagement on street cleaning matters.

51 QUESTIONS TO THE PORTFOLIO HOLDER FROM MEMBERS OF THE PUBLIC AND COUNCILLORS ATTENDING THE MEETING

Three questions were received from Mr Colin Willetts for written reply. Details of the questions and replies are at **Appendix A**.

52 PRE-DECISION SCRUTINY OF REPORTS TO THE ENVIRONMENT PORTFOLIO HOLDER

A) ENFORCEMENT POLICY CONCERNING SHOP FORECOURTS UNDER THE HIGHWAYS ACT 1980

Report RES13057

Several complaints had been received by the Council related to alleged obstructions to the public right to pass and re-pass along open shop forecourts. Although specific complaints related to the outside of shop premises at Station Square, Petts Wood, the issues raised in the complaints were of general application throughout the Borough.

The Council's recent practice on private forecourts, over which highway rights might be enjoyed, had been to normally take action only in cases of actual danger to the public. However, it was felt appropriate to consider whether the practice should be extended to enable action to be considered in response to a complaint alleging obstruction of the highway rather than actual danger.

Report RES13057 outlined the legal understanding of a highway and the role of street trading legislation on forecourts. The statutory framework in relation to non-Executive functions and Executive functions was also outlined along with enforcement considerations. This included a proposed policy for Portfolio Holder agreement which would enable the Council to take action where harm to the public resulted not just from the actual condition of the forecourt, but also from obstructions resulting from the placing of objects on the highway.

The Chairman highlighted the petition from Petts Wood residents concerning two particular forecourts at Station Square, Petts Wood. At the Chairman's invitation, the Petts Wood and Knoll Ward Members, Councillors Douglas Auld, Simon Fawthrop and Tony Owen, joined the table for consideration of this item.

Councillor Fawthrop broadly welcomed the report. He preferred not to have fees associated with any new policy. He referred to permanent obstructions outside the two premises at Station Square, Petts Wood and to residents' rights of way. He explained that some were users of the area rather than residents. There would be a resident's Annual General Meeting shortly and more signatures to the petition would result. Councillor Fawthrop referred to difficulties caused by the obstructions for members of the public e.g. those with double buggies. If observing from Woodland Way, Councillor Fawthrop indicated that there was an obstruction on both sides of

the road. He felt that the situation was hazardous and wanted the hazards covered by the policy. He was content for people to carry out their business but did not want the businesses to permanently obstruct the highway. Highlighting paragraph 3.19 of Report RES13057, he suggested that considerations for deciding whether to intervene in the public interest needed to be loose enough in definition to enable enforcement. He wanted the businesses concerned to carry on trading but to behave reasonably.

Referring to an approach by the Royal Borough of Kensington and Chelsea, Councillor Owen felt that a policy could be considered borough wide. He indicated that the premises known as "*Desperados*" were using forecourt which was not within their property and he felt that the obstructing decking needed to be removed. He also referred to wheeled planters. Councillor Owen wanted the fastest action to be taken. Referring to further obstruction from premises known as "*The Rib Shack*", across the road from "*Desperados*", Councillor Owen indicated that the "*The Rib Shack*" did not preclude a right of way for the public even though it owned the forecourt.

Councillor Auld supported comments made by his fellow Ward Councillors. He considered the positioning of the obstructions to be a danger and suggested that if two or three people were standing outside the decking at "*Desperados*" there would be no room for pedestrians to wait to use the pedestrian crossing. There was a further concern in that drivers would not know whether people were waiting to cross. Additionally, if payment was being made at the parking meter outside of "*The Rib Shack*" there would be no room for others to pass.

Councillor Grainger suggested that ownership of a forecourt was the first reference point in considering an approach. If it was publically owned, he indicated that enforcement action would be appropriate. But if a forecourt was owned by the shop, he felt there was a risk of contravening the owner's property rights. Councillor Grainger also felt that it was necessary to be clear on the width required for pedestrians. Moreover, he also enquired whether planning enforcement could be an appropriate route for action and was not convinced that "*The Rib Shack*" posed a risk.

Members were advised that with reference to planning enforcement, if there was no development works, there might not be a change of use. The application of Part III of the London Local Authority's Act 1990 for Street Trading was also briefly outlined. Concerning a suitable width for pedestrians, this would be for Members to recommend and the Portfolio Holder to decide as appropriate.

Regarding any contravention of property rights, it was indicated that highway rights can arise irrespective of ownership rights. Highway rights could arise by virtue of 20 years' usage. If the public had been using a way as of right for 20 years, the way would be deemed to have been dedicated highway by virtue of Section 31 of the Highways Act 1980 (adding to the Common Law). If the 20-year rule applied, the land owner would need to provide evidence that it was not the intention to dedicate the land as highway - a landowner could take various measures to rebut such a presumption. It was when fences (if they ever existed) were removed many years previously from properties such as those at Station Square, Petts Wood or at Windsor Drive near Chelsfield Station that the land became open and by virtue of long usage became highway.

Councillor Reg Adams felt that pedestrian safety considerations should be paramount over property rights and was concerned there could be an accident at Station Square, Petts Wood. Referring to the approach to shops at Clock House, Councillor Adams also explained that a business had been positioning potted plants at the curtilage of the pavement and he would welcome a policy that could be applied across all areas of the borough.

In the context of policy development and considering either licensing or removing activity, Councillor Jackson enquired of the legal threshold for taking action. He felt that much hinged on this and the volume of concerns across the borough. Councillor Jefferys suggested that the presence of wheels on decking did not necessarily imply that it was moveable. He also felt that use of "*actual danger*" and "*real risk*" in Report RES13057 suggested previous instances to warrant use of the terms. He asked whether this was the case and whether taking action only in cases of actual danger to the public was, in fact, present policy. He also felt that "*The Rib Shack*" could be categorised as a potential hazard. Councillor Owen indicated that "*Desperados*" had been operating at Petts Wood for two years unlike "*The Rib Shack*" which had started to operate in the last month. As such, Councillor Owen felt there had been no "*real risk*" with "*The Rib Shack*" during the last month as interpreted by Councillor Jefferys. Councillor Auld indicated that "*The Rib Shack*" itself was not a danger but rather the removal of the footway.

Referring to the duty of a Highway Authority to assert and protect the rights of the public to use and enjoy any highway for which they are the Highway Authority and to use and enjoy any highway in their area for which they are not Highway Authority, Councillor Nicholas Milner suggested that it was necessary to enforce if there was any possibility the Council could be sued for not adequately protecting rights of way. He suggested this as the starting point for consideration.

Members were advised that there is a duty to assert the highway and the Council also had powers to licence obstructions as appropriate. It was suggested that having a policy would help to avoid action being taken against the Council. Also, the wording "*potential hazard to the public*" could possibly be taken forward. Concerning a legal threshold, there will have been no previous enforcement against "*Desperados*" and the defence would highlight this should the Council prosecute. The Chairman sought clarity on whether the Council could be sued if the land was highway and the Council did not act to prevent an obstruction of the highway. It was explained that this would be qualified by the ability of the Council to licence the obstruction; if the Council did not undertake its street duties, it was possible for someone to obtain an injunction. Councillor Adams highlighted a similar scenario with an obstruction caused by tree roots and the potential for the Council to be sued. Councillor Jefferys suggested that "*Desperados*" could be seen as being singled out in the absence of a policy.

Responding to a question from Councillor Ellie Harmer, two Petts Wood and Knoll Members indicated that the restaurant owners had not been co-operative. Having installed permanent decking, "*Desperados*" subsequently

added wheels to overcome the outcome of the planning appeals procedure - the decking/fixtures often being moved slightly. The Head of Street Environment highlighted the potential use of street trading legislation to licence "*Desperados*" to come out to certain limits. It was possible to authorise and regularise through licensing and it would be necessary for the premises to take out insurance.

Councillor Fookes enquired whether there was a role for the Petts Wood Business Association. He also enquired about planning enforcement in relation to the brick wall at "*The Rib Shack*". Councillor Fawthrop indicated that such structures would go through planning processes and the appeals process as appropriate (this was the case with the "*The Rib Shack*" brick wall). If tables and chairs were put out and put away he felt that this was acceptable; it was about the Council being reasonable. It was possibly necessary for officers to visit the premises to outline what is acceptable and not acceptable based on Council policy. The Head of Street Environment indicated that visiting "*Desperados*" could be the next step for officers.

The Chairman said a fee system with a privately owned forecourt incurring one fee and a publically owned forecourt incurring a higher fee was in operation in Orpington High Street. If the approach at paragraph 3.19 of Report RES13057 was to be a general policy, it might be necessary to take account of certain exceptions. The Chairman was aware of a vehicle with two wheels parked on a privately owned verge and a parking ticket waived, the Council's initial response being that the property was not fenced from the highway. The Chairman enquired whether it was necessary for the recommended approach to highlight whether land comprised shopping parades or land adjacent to the highway. In the context of any fee based approach, the Chairman understood that licence fees in Orpington High Street differed from those in Bromley High Street and a lower fee applied for clearing the pavement at night. He enquired whether a formal policy should take account of such considerations.

Members were advised that the recommendation was currently a reactive policy and that it was possible to have a more proactive policy with fees.

Councillor Grainger supported the need for a policy but felt that it needed to be clearer than outlined at Paragraph 3.19 of Report RES13057. If a forecourt was established as being in private ownership, he suggested "*identifiable risk*" in place of "*real risk*" in the first consideration at paragraph 3.19. Councillor Jefferys suggested that a hazard was unquantifiable. He felt that it was a matter of having (i) a reactive policy or (ii) a pro-active policy in the form of licensing plus a reactive policy. He expressed a wish to see these set out.

Referring to a 20 year rule whereby a way used of right for 20 years would be deemed highway (section 31 of the Highways Act 1980), Councillor Grainger suggested that gardens and fences in the front of shops might have existed and been removed within a 20 year period. Councillor Jackson further enquired of the Council's legal base for action i.e. the legal threshold to ensure a satisfactory outcome and was advised that such a threshold would

be the securing of a successful prosecution in the Magistrates Court. For Station Square, Petts Wood there was confidence that the forecourts were highway land warranting the use of the Highways Act.

For the proposed policy, the Chairman enquired whether it would be necessary to list all private forecourts or shopping areas subject to highway rights i.e. listing all forecourts in the borough subject to highway rights, considering the policy at paragraph 3.19 and applying intervention accordingly. It seemed there was a reliance on Part III of the London Local Authority's Act 1990 (street trading legislation) for high streets.

Members were advised that most shop owners were not challenging use as a highway and it was proposed to only take action where there was a case to investigate. To look at all forecourts would mean that shop owners could be inclined to defend their position and seek to restrict access when they would not have otherwise done so. The policy was also proposed in view of the current financial constraints for the Council and officers would not seek to provide a definitive position for all shopping forecourts in the borough. The recommendation proposed that forecourts would be determined for highway rights as a problem arose. There were resource implications in assessing whether all forecourts are subject to highway rights.

Councillor Grainger supported all available action on the position with "*Desperados*" and suggested that the Rights of Way Sub Committee consider "*The Rib Shack*" (unless another Committee had taken action). The Chairman enquired whether determination of 20 year usage was a non Executive function and whether it was for the Rights of Way Sub Committee to consider. It was explained that the Rights of Way Sub Committee considered the status of footpaths under the Wildlife and Countryside Act. With private forecourts the highway was reasonably easy to define. The General Purposes and Licensing Committee had a general power to assert highway rights but ultimately it was for the courts to resolve any dispute as to the status of the land.

Councillor Grainger saw the considerations at paragraph 3.19 as a starting point and he felt it was necessary to work on a general policy. Councillor Owen considered that the Rights of Way Sub Committee should be renamed the "*Footpath Committee*". The Chairman saw the Portfolio Holder's role as enforcing the highway (e.g. providing authority for an obstruction to be removed).

Councillor Michael Tickner as a Member of the Renewal and Recreation PDS Committee felt it important the Council had a policy and that it should be borough wide. Council Tickner highlighted guidance notes that had been produced by officers for traders in Beckenham. He recommended the guidance as a starting point for policy. The guidance included reference to obstructions on forecourts and advice on the use of A Boards.

To protect the Council, Councillor Grainger suggested taking intermediate action on the two Petts Wood premises by checking the status of land with the

General Purposes and Licensing Committee or Rights of Way Sub Committee. A general policy could also be further developed (at the same time) taking account of the guidance to Beckenham Traders. He considered the second consideration at paragraph 3.19 to be too subjective.

Councillor Jackson indicated a preference for the recommended approach including taking any decisions required to the Portfolio Holder. He felt it important to act as quickly as possible.

The Committee agreed to support the approach outlined at Paragraph 3.19 subject to “*real risk*” in the first consideration being replaced by “*significant potential hazard*”. Members were advised that all of the high streets were different. There would also be consultation with Ward Members case by case. Councillor Jefferys suggested that the second consideration at Paragraph 3.19 include reference to the guidance notes produced by officers. However, Councillor Owen understood that reference was made in the guidance to a clear pavement width of 1m which he was concerned about for Petts Wood. (*Democratic Services Note: it was subsequently confirmed that the minimum width specified in the guidance was 2m*).

In agreeing a new approach as set out at paragraphs 3.19 to 3.21 of Report RES13057, it was proposed that the concerns at Petts Wood be taken forward in accordance with paragraph 3.20 and Part III of the London Local Authority’s Act 1990.

Councillor Fookes suggested finding out how other Local Authorities approached such matters. He also asked whether there were other issues coming to the surface. Members were advised that it was necessary to look at each case individually. Councillor Adams indicated that it was necessary to deal with the problem in order to provide a deterrent against future obstructions. Councillor Harmer enquired whether there would be a right of appeal to a shop owner who might feel aggrieved on the degree of any future action. It was explained that each case would be looked at individually. There was a desire to help businesses in the borough and it was suggested that any appeal by a shop owner against Council action would best be taken forward through a local ward Councillor. In Clock House ward, Councillor Milner indicated that there were not many businesses and he asked for flexibility on the Council’s part to help the businesses continue. In this context the Chairman referred to support with guidance on matters such as A boards as provided to Beckenham and Orpington traders.

RESOLVED that the Portfolio Holder be recommended to agree the following policy as outlined below.

1) A new approach to enforcement to enable the Council to take action where harm to the public results not just from the actual condition of the forecourt, but also from obstructions resulting from the placing of objects on the highway. Such an approach would enable the Council to assess and respond to complaints concerning objects that might be placed on private forecourts, which are subject to highway rights. The

considerations recommended to be taken into account in deciding whether any intervention is justified in the public interest are:

(a) the extent to which the object causes any significant potential hazard to the public;

(b) the clear pavement width available to the public to pass and re-pass, taking account of the intensity of the use of the highway in question; and

(c) whether, if an application was made for a licence under the provisions of Part III of the London Local Authorities Act 1990, the Council would be likely to approve such an application.

(2) The considerations would guide Council Officers as to whether action is appropriate under Section 137 of the Highways Act 1980, which deals with the general offence of obstruction or under Part III of the London Local Authorities Act 1990. If action is deemed necessary on the above criteria the owner of the business would be approached with a view to securing an acceptable solution by agreement. If such a solution was not possible the matter would be considered for formal action by the Council either under section 137 of the Highways Act 1980 or under Part III of the London Local Authorities Act 1990, depending on the particular facts of the case.

(3) If the Portfolio Holder were to agree the proposed new policy above, the Council would thereafter assess any complaints concerning objects placed on private forecourts over which highway rights exist in accordance with the new policy.

53 CAPITAL PROGRAMME MONITORING Q3 2012/13 AND ANNUAL CAPITAL REVIEW 2013 TO 2017

Report RES13046

At its meeting on 6th February 2013, the Executive agreed a revised Capital Programme for 2012/13 to 2016/17 and changes in respect of the Capital Programme for the Environment Portfolio were outlined as were comments on individual schemes in the 2012/13 programme.

Noting a net overspend of £0.3m on Environment Portfolio schemes in 2011/12, the Chairman highlighted that the overspend was mainly on the Chislehurst Road Bridge scheme and it was agreed to provide further details concerning the overspend for this scheme.

RESOLVED that the changes agreed by the Executive on 6th February 2013 be noted.

The Meeting ended at 9.01 pm

Chairman