

**Decision Maker:** Environment Portfolio Holder

**For Pre-Decision Scrutiny by the Environment PDS Committee on**

**Date:** 5th March 2013

**Decision Type:** Non-Urgent Executive Non-Key

**Title:** ENFORCEMENT POLICY CONCERNING SHOP FORECOURTS UNDER THE HIGHWAYS ACT 1980

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**Chief Officer:** Mark Bowen, Director of Resources

Nigel Davies, Director of Environmental Services

**Ward:** All Wards

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1. Reason for report

The Council has received complaints that established public rights of way over shop forecourts are being obstructed. The purpose of the report is to consider the existing practice of the Council regarding forecourts in private ownership over which highway rights are claimed. The report recommends a change to the current enforcement practice.

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2. **RECOMMENDATION(S)**

The Environment Portfolio Holder is recommended to: -

- 2.1 **Agree a new approach to enforcement (as set out in paragraphs 3.19–3.21); 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.**

## Corporate Policy

1. Policy Status: New Policy
  2. BBB Priority: Quality Environment, Thriving Town Centres,
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## Financial

1. Cost of proposal: No additional cost
  2. Ongoing costs: N/A
  3. Budget head/performance centre: Street Regulation
  4. Total current budget for this head: £577k
  5. Source of funding: Existing controllable revenue budget for 2012/13
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## Staff

1. Number of staff (current and additional): 3
  2. If from existing staff resources, number of staff hours: Less than 1 fte
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## Legal

1. Legal Requirement: Statutory requirement
  2. Call-in: Applicable
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## Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Borough-wide
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## Ward Councillor Views

1. Have Ward Councillors been asked for comments? All Members have been advised of the report and any comments will be reported verbally.
2. Summary of Ward Councillors comments:

### **3. COMMENTARY**

- 3.1 Several complaints have been received by the Council relating to alleged obstructions to the public right to pass and re-pass along open shop forecourts. Although the specific complaints relate to the outside of shop premises in Station Square, Petts Wood, the issues raised in the complaints are of general application throughout the Borough.
- 3.2 The Council's recent practice in respect of private forecourts, over which highway rights may be enjoyed, has been to normally take action only in cases of actual danger to the public. However, it is 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.

#### **What is a Highway?**

- 3.3 A highway is a public right of way over a defined route where:
1. The way must be open to the public at large.
  2. The public use must be as of right.
  3. The public right must be primarily for passage.
  4. The public right of passage must follow a defined route.
- 3.4 The fact that a forecourt is privately owned is irrelevant, as highway rights can be acquired over land in private ownership. Highway rights can arise if the owner has dedicated a right of way across their privately maintained land and the public have accepted that right. Dedication can either be made expressly or implied. Implied dedication may be inferred from evidence of use of the land without permission by the public at large and acquiescence in that use by the land owner. Section 31 of the Highways Act 1980 adds to the Common Law by introducing a rebuttable presumption that, if the public at large have been using a way as of right for 20 years, the way will be deemed to have been dedicated as highway. If the 20-year rule applies, it is for the land owner to provide evidence that they did not intend to dedicate the land as highway – this will usually take the form of overt acts making it clear to users of the highway that there was no intention to dedicate.
- 3.5 Highway rights can arise by virtue of 20 years' usage. However, there are forecourts that have been enclosed and for which highways rights may not have arisen. The question of whether land is highway will depend on the facts in each particular case.
- 3.6 Once land has become highway, it stays highway until its highway status is extinguished by due process of law.

#### **Street Trading Legislation**

- 3.7 It should be noted that throughout the Borough it is common for items associated with shops, restaurants and other businesses to be placed on forecourts and similar over which the public have rights of way.
- 3.8 The Council has not currently sought to licence street trading over a forecourt that is not maintained as part of the public highway, unless the street trading relates to a different business than that being carried out in the premises to which the forecourt is attached.

- 3.9 Street trading in Bromley is governed by Part III of the London Local Authority's Act 1990. This Act enables the Council to pass a designating resolution designating any street within the Borough as a licensed street. A street, for these purposes, is defined to include any road or footway, any other area not being within permanently enclosed premises within seven metres of any road or footway to which the public have access without payment, any part of such road, footway or area and any housing development provided or maintained by a local authority. Street trading is defined as meaning the selling or exposing or offering for sale of any article, including a living thing, or supplying or offering to supply any service in a street for gain or reward. It is unlawful to engage in street trading, unless authorised so to do by a street trading licence or a temporary licence. Where street trading occurs in the Borough, it therefore can be subject to the requirement for a street trading licence irrespective of the whether or not it is from the public highway.

## **Statutory Framework**

### **(i) Non-executive functions**

- 3.10 Section 115E of the Highways Act 1980 includes a power to formally license tables, chairs etc., on highways. The Council does not tend to use this power as the powers granted by the London Local Authorities Act 1990 are felt more appropriate to Bromley.
- 3.11 Section 130 of the Highways Act 1980 provides that it is the duty of the Highway Authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the Highway Authority. It also provides that the Council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the Highway Authority.
- 3.12 Section 149 of the Highways Act 1980 allows action to be taken to remove things deposited on the highway as to cause a nuisance.
- 3.13 Sections 115E, 130 and 149 of the Highways Act 1980 are listed as being non-executive functions in Schedule 1 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 as amended.
- 3.14 Part III of the London Local Authorities Act 1990 (street trading) is listed as a non-executive function.

### **(ii) Executive functions**

- 3.15 There are other powers, which are not listed as non-executive functions and fall to the Portfolio Holder. These powers include Section 137, which deals with the general offence of obstruction as well as Section 166 of the Highways Act enabling the Council to take action in relation to a stall or other erection on the forecourt of premises abutting on a street.

## **Enforcement Considerations**

- 3.16 The Council's recent practice in respect of private forecourts over which highways rights may be enjoyed has been to normally take action only in cases of actual danger to the public.
- 3.17 There is a balance to be struck between the competing interests of the land owners and that of the public to pass over the land. The resources available to the Council also have to be taken into account particularly as some land owners may dispute that highway status has arisen. The Council has not sought to assert highway status for every shopping parade. It is not felt that this would be warranted particularly where the rights of the public are not being challenged.

- 3.18 The complaints that have been received in respect of Station Square relate to particular properties rather than the Square as a whole. Whilst it is not alleged that the actual condition of the forecourt is such as to cause actual danger to users of the highway, nevertheless, planters, tables and chairs have been placed on forecourts with the result that there is a concern that insufficient pavement width is maintained for pedestrians. There is also a concern that items are being left overnight on the highway even when not in actual use.
- 3.19 It is considered that the a policy could be introduced to enable the Council to assess and respond to complaints concerning objects that may be placed on private forecourts, which are subject to highway rights. The considerations that are recommended to be taken into account in deciding whether any intervention is justified in the public interest are:
1. The extent to which the object causes any real risk to the public.
  - 2 .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.
  3. 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.
- 3.20 The proposed considerations would guide officers as to whether action is appropriate under Section 137, 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 section137 of the Highways Act 1980 or under Part III of the London Local Authorities Act 1990, depending on the particular facts of the case.
- 3.21 If the Portfolio Holder agrees to this new policy as set out above, the Council will thereafter assess any complaints concerning objects placed on private forecourts over which highway rights exist in accordance with that policy.

#### **4. POLICY IMPLICATIONS**

- 4.1 The report recommends a revision to current practice on enforcement action where there is obstruction of shop forecourts subject to highway rights.

#### **5. FINANCIAL IMPLICATIONS**

- 5.1 This new policy could be implemented within existing resources.

#### **6. LEGAL IMPLICATIONS**

- 6.1 These are addressed in the report.

<b>Non-Applicable Sections:</b>	Personnel implications
Background Documents: (Access via Contact Officer)	