

AGENDA ITEM NO. 10

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

24 JULY 2006

CLEAN NEIGHBOURHOODS AND ENVIRONMENT ACT 2005, Section 2 (Report of the Director of Planning, Transport & Sustainable Development)

Ward: City-wide

Purpose of Report

1. To advise Members of the commencement of the provisions of the Clean Neighbourhoods and Environment Act 2005 (Section 2) in respect of Gating Orders and the related procedure regulations.

Background

2. The majority of measures contained in the Clean Neighbourhoods and Environment Act 2005 came into force on 7 June 2005 and 6 April 2006. These range from crime and disorder to litter, fly tipping, abandoned vehicles, pollution and problems relating to dogs.
3. The provisions relating to Gating Orders are contained in Section 2 of the Clean Neighbourhoods and Environment Act 2005, which came into force on 1 April 2006. Section 2 provides a means whereby a local authority may 'gate' a highway, where they would otherwise be under a duty both to assert and protect the rights of the public to use the highway and to prevent its obstruction. Authorities will also have the ability to decide whether the gates should be permanently closed to the public throughout the day, or closed at certain times. It should be noted however that this power does not permanently extinguish rights of way, making it possible to revoke subsequently the restrictions

and reinstate the public's right to use the highway if appropriate.

4. Section 2 of the Act inserts a new Part 8A into the Highways Act 1980, and the related Highways Act 1980 (Gating Orders) (England) Regulations 2006 published on 1 April 2006 set out the procedure to be followed by councils who wish to make, vary or revoke gating orders under the new Sections 129A to 129G of the Highways Act 1980.

Government guidance on implementing Sections 129A to 129G of the Highways Act

5. More detailed guidance is contained in the *'Full Regulatory Impact Assessment of the Clean Neighbourhoods and Environment Bill'* attached to the Memorandum to the Regulations, which indicates that before such an Order can be made it would first have to be demonstrated that:
 - a. "the premises adjoining or adjacent to the highway are affected by high levels of crime and/or serious anti-social behaviour;
 - b. "the existence of the highway is facilitating the persistent commission of criminal offences and/or serious anti-social behaviour;
 - c. "the local highway authority has consulted local residents and has their support;
 - d. "the local highway authority had consulted the local crime and disorder reduction partnership and has its support;
 - e. "the local highway authority has considered and, where appropriate, tried alternative means of dealing with problems, such as installation of security lighting and CCTV, before using these powers;
 - f. "the local highway authority has considered the availability of a reasonably convenient alternative route before using these powers."

6. The Regulations referred to above set out the procedure that must be followed by councils before a Gating Order can be made under the Act. This includes:

- the requirement to publish any proposal to make a gating order and to consider any representations as to whether or not the proposed gating order should be made;
- a discretion on how the council may deal with any objections received including whether or not to hold a public inquiry in relation to a proposed gating order. However the regulations state that the council must hold a public inquiry where the emergency services, other councils, a chief police officer or an NHS Trust object to the making of a gating order;
- regulations which prevent a council from making an order before the elapse of 28 days following notice of the proposal to make an order, or until any public inquiry has been concluded.

7. Orders can be made in respect of any highway other than:

- *“(a) a special road (i.e. a motorway);*
- *“(b) a trunk road;*
- *“(c) a classified or principal road;*
- *“(d) a strategic road, within the meanings of sections 60 and 61 of the Traffic Management Act 2004 (strategic roads in London);*
- *“(e) a highway of such other description as the appropriate person may by regulations prescribe.”*

[Section 129A]

However it should be noted that, in addition to this list, Gulliksen cases (Gulliksen v Pembrokeshire CC 2002-The Appeal Court judgement held that footpaths through council

estates constructed under statutory powers of Part V of the Housing Act 1957 or Part II of the Housing Act 1985 are legally defined highways and are maintainable at the public expense irrespective of whether or not they are shown on the list of adopted highways). Adopted highways such as footways, alleys etc are likely to fall within the definition of a highway.

8. A gating order can restrict access for certain periods or times of the day or at all times [*Section 129B*]. However, the council should consider the availability and convenience of alternative routes when gating highways – including appropriate routes available to children going to school. Where an alleyway is the only or principal means of access to any premises used for business or recreational purposes, a gating order may not be made so as to restrict the public right of way during periods when these premises are normally used for these purposes.
9. Guidance is provided on the content of a gating order [*Section 129C*] and the requirement to ensure that the order is available for public scrutiny [*Section 129E*].
10. Any person may apply to the High Court to question the validity of an order on the grounds that it is ultra vires or that the specified procedures had not been followed [*Section 129D*], it is recommended in guidance that the council must always justify their decision to make the gating order.
11. The procedure to be followed for any variation and revocation of gating orders is contained in *Section 129F*.
12. Finally, councils are required to keep a register of all gating orders made [*Regulation 17*].
13. As referred to above, government guidance is available to assist councils with interpreting and implementing the new legislation. However, whilst it is clear that the Council is the order making authority in respect of Gating Orders, in terms of internal Council procedures it appears at the present time that the responsibility for Gating Orders will be an executive function delegated to the appropriate director in consultation with the relevant Cabinet Member. Although it should be

noted, as demonstrated in Appendix A, that the issues which would be considered may encompass more than one directorate`s responsibility.

14. There is nothing in the legislation which requires an area to be designated before a Gating Order can be made, in contrast with Sections 118B and 119B of the Highways Act (special orders for crime prevention in areas designated by the Secretary of State). Gating orders may be more widely used as a result as they may be seen as an easier process to follow. Also, the legislation is silent on the degree of crime and/or anti-social behaviour required to justify the making of an Order. It is likely that government guidance will clarify the extent of the evidence required to show that a route was being abused for criminal/anti-social purposes and the amount of information that should support any application for a gating order. This may therefore include police data and/or analysis of recorded crime and incidents, evidence of community surveys, consultations, information from local insurance contacts, crime prevention panels and neighbourhood watch co-ordinators.
15. Consideration will need to be given to which is the most appropriate piece of legislation to use if premises adjoining a highway are affected by high and persistent levels of crime. Your officers view is that if crime can be proved to be persistent and high then a Designation Order (i.e. permanent closure) should be followed rather than the making of a Gating Order. The reason for this is a concern that gating orders maybe seen as an easy option. In the event of the making of a Gating Order it should be noted that additional costs will arise where such an order is revoked at a later date. Also the re-opening of highway and maintenance whilst they are closed require consideration. It is also considered that any proposals to have a time related gating order would be impossible to monitor and police.
16. However, the Council must not lose sight of its general duty to protect and assert public highways when considering these matters, as any departure from this general duty should not be taken lightly and only in very specific circumstances.

The Impact on Bristol City Council Directorates

17. Attached as Appendix A to this Report is a report prepared by the Public Rights of Way Team which evaluates the impact of the new legislation on Bristol City Council's Directorates should any proposals for gating orders be received. Clarification is required on Stages 7 to 9 as indicated in the Appendix of the implementation of any proposal for a gating order as it is not clear from government guidance whether the costs of an application, both legal costs and physical measures, will be met by the applicant. Consideration needs to be given as to how the costs of alternative measures to deal with problems e.g. CCTV, lighting etc and subsequent maintenance of the highway following gating, and works to remove the gates and reinstate the highway following any Revocation Order, will be met i.e. which directorate/department will meet these costs.
18. Meanwhile, the merits of proceeding with any proposals for gating orders should be assessed by officers according to the government guidance set out above, to ensure compliance with the legislation.

Consultations PTSD - Highway Asset Management.
CLS – Parks
NHS – Housing Management
CSS - Legal Services
CX Department - Safer Bristol Partnership

Appendices Appendix A – An evaluation of the impact of the new legislation on Bristol City Council Directorates

Policy

Implications There is a potential conflict between the new powers and the statutory duty under s130 Highways Act 1980 to assert and protect the rights of the public to the use and enjoyment of highways.

There is also a potential conflict with adopted strategies to increase levels of walking and cycling as outlined in both the Bristol Local Plan and Joint Local Transport Plan: e.g. Safer routes to school, Walking and Cycling Strategies and the Council's

duty to prepare a Public Rights of Way Improvement Plan in accordance with the Countryside and Rights of Way Act 2000 (s.60).

Consideration should also be given to Section 17 of the Crime and Disorder Act 1998, which although it is without prejudice to any other obligation imposed upon this authority, requires authorities to consider crime and disorder reduction and community safety in the exercise of all their duties and activities.

Therefore a balance will need to be struck between the above-mentioned conflicting policies, strategies and duties when considering proposals for gating orders where evidence indicates that the proposal will prevent or reduce crime and anti-social behaviour.

Resource Implications Please see Appendix A

Financial

Implications Funding will be required to comply with the guidance on seeking out other ways of addressing the crime issue such as improvements, upgrading, cleaning, and lighting which the Highway Authority will have to have considered and if appropriate carried out prior to making a gating order. The funds will have to be identified within the relevant cross directorate departmental budgets. This will ensure that all requirements of the legislation are complied with to enable to Council to make an informed decision when making a gating order.

Any orders made under these new powers will incur costs in carrying out the required preliminary consultation before a Gating Order can be made. Should a proposal be received to gate a highway under Section 129A and objections are received from specified authorities, then a Public Inquiry must be held with associated costs.

Legal

Implications As indicated in this report the Clean Neighbourhoods and Environment Act 2005 makes provision for the gating of minor highways, which can sometimes be seen to facilitate anti-social/illegal behaviour. Gating Orders will provide local authorities with a means to erect, or allow the erection of, a physical barrier to restrict public access to a highway over which the public would normally have a right of passage.

It should be noted that the gating of a highway does conflict with the Council's duty both to 'assert and protect' the rights of the public to use the highway and to prevent obstruction. Each case will inevitably be a question of proportionality and balance depending on the facts. Access may be permitted for certain periods or times of the day or at all times. Access for occupiers of premises adjoining or adjacent to the highway cannot be restricted, nor where a way forms the only or principal means of access to dwellings/businesses. It will also provide for exemptions, such as for emergency service access. Gating Orders will not extinguish rights of way nor will the status of the highway be affected. It will also be possible to revoke or vary an Order at a later date.

The Secretary of State has, as already mentioned, made procedure regulations - including the need to advertise proposals and consideration of any representations. There is also provision for public inquiries in certain cases.

At the time of writing, there has as yet been no amendment to the Local Authorities (Functions and Responsibilities) Regulations 2000 to deal with this new power thereby making it a regulatory function. Until there is, the decision on whether to promote a Gating Order will be an executive function delegated to the appropriate Director.

Legal advice given by: Peter Malarby, Senior Solicitor (Highways & Transport)

**Other Approvals
Necessary**

None.

Recommended - that the report be noted.

**LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT
1985**

Background Papers

'Full Regulatory Impact Assessment of the Clean Neighbourhoods and Environment Bill', Department for Environment, Food and Rural Affairs (DEFRA), December 2004, pp.29-32 (www.defra.gov.uk)

Statutory Instrument 2006 No. 537, Environmental Protection, England – The Highways Act 1980 (Gating Orders) (England) Regulations 2006, 1 April 2006 (www.opsi.gov.uk)

Adopted Bristol Local Plan 1997 (www.bristol-city.gov.uk)

Joint Local Transport Plan July 2005 (www.bristol-city.gov.uk)

Walking (Draft) and Cycling Policies (www.bristol-city.gov.uk)

Safer Routes to School (www.bristol-city.gov.uk)

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CONSULTATION ON PROPOSALS FOR GATING ORDERS

Under Part 8A of the Highways Act 1980 - Sections 129A to 129G

(as inserted by Section 2 of the Clean Neighbourhoods and Environment Act 2005)

STAGE OF IMPLEMENTATION	ROLE OF BRISTOL CITY COUNCIL DIRECTORATES AND OTHER AUTHORITIES								
	CSS	PTSD		NHS	CLS	POLICE	EMERGENCY SERVICES	NHS TRUST	OTHER COUNCILS
		PROW	TM / HAM						
1. Consultation on proposed Gating Order	•	[•]	[•]	[•]	[•]	•	•	•	•*
2. Investigation of alternatives		[•]	[•]	[•]	[•]				•*
3. Objections	•	[•]	[•]	[•]	[•]				
4. Public Inquiry	•	[•]	[•]	[•]	[•]	•	•	•	•*
5. Confirmation of Order	•	[•]	[•]	[•]	[•]				
6. Subsequent Appeal to High Court	•	[•]	[•]	[•]	[•]				
7. Physical works to gate highway									
8. Subsequent maintenance of highway									
9. Revocation of Order and subsequent works to reinstate highway/remove gates.	•								

KEY • = likely to be involved at this stage [•] = involvement at this stage is dependent on which department manages the highway
 •* = consulted only where highway crosses local authority boundary **[N.B. Clarification required ref. Stages 7 to 9]**