

# CHESHIRE EAST COUNCIL

## Cabinet Member for Environmental Services

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**Date of Meeting:** 5<sup>th</sup> December 2011  
**Report of:** Head of Highways and Transportation  
**Subject/Title:** Repairs to Private Streets Policy  
**Portfolio Holder:** Councillor Rod Menlove

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### **1.0 Report Summary**

- 1.1 That the Cabinet Member approves the reaffirmation of the inherited policy for the Repair to Private Streets (Appendix A).
- 1.2 Each year the Council receives requests to repair un-adopted roads. However the Council's responsibility in respect of these un-adopted roads differs to those for highways that are "maintainable at the public expense". The purpose of this report is to set out the issues surrounding repairs to un-adopted roads, to propose a policy for the Council and provide guidance on how to deal with requests to repair.

### **2.0 Recommendation**

- 2.1 That the Cabinet Member for Environmental Services approve the Repair to Private Streets Policy.

### **3.0 Reasons for Recommendations**

- 3.1 The Policy will set out the Council's consistent approach in dealing with requests from owners or frontagers to carry out repairs to private streets to obviate danger to traffic and or pedestrians.
- 3.2 It is practical for the Council to have a policy for urgent repairs to private streets with accompanying guidance. Whilst the guidance is in part subjective it does give the Council some degree of flexibility and discretion. This will enable the Council to consider unusual situations with a degree of pragmatism particularly where use by the more vulnerable sections of the community are concerned as well as affordability issues.

### **4.0 Wards Affected**

- 4.1 This report affects all wards equally.

### **5.0 Local Ward Members**

- 5.1 This report affects all ward members equally.

## **6.0 Policy Implications including - Climate change - Health**

- 6.1 There are no human resources implications of the recommended option.
- 6.2 The policy is intended to ensure that highway officers act in a fair and consistent way.

## **7.0 Financial Implications (Authorised by the Borough Treasurer)**

- 7.1 The Strategic Director confirms that the costs of implementing this policy will be met from existing budgets.
- 7.2 The Council proposes to cap the expenditure for urgent repairs to £500 in any one street in any one year. This would equate to a maintenance crew for a full day to carryout repairs, e.g. pothole filling.

## **8.0 Legal Implications (Authorised by the Borough Solicitor)**

- 8.1 Section 41 of the Highway Act 1980 imposes a duty on the Highway Authority to maintain highways which are maintainable at the public expense. The duty requires the highway authority to maintain the highway in a fit state to accommodate the ordinary traffic which passes or maybe expected to pass along it.
- 8.2 The duty is owed to all users, whether using vehicles or on foot, of the highway whether pedestrians or vehicle users. Section 130 of the Highways Act 1980 imposes a further duty on the highway authority to assert and protect the rights of the public to the use and enjoyment of the highway.
- 8.3 Under Section 230 of the 1980 Act, “where repairs are needed to obviate danger to traffic in a private street” the Highway Authority can step in and may, by notice, require the owners of the premises fronting the street to execute, within a time limit, such repairs as may be specified. In the event of failure to execute such works, the Authority can carry out the repairs and recover the costs from the frontagers. A person who is aggrieved by a notice to carry out repairs can appeal to a Magistrates Court.

## **9.0 Risk Management**

- 9.1 Although the Authority would not be liable for any compensation claims as a result of the poor state of repair of the private street, it does have a duty of care for those using the highway. The Highway Authority will use the powers within Section 230 of the Act to mitigate any risks associated with poorly maintained private streets.
- 9.2 It is practical for the Council to have a policy for urgent repairs to private streets with accompanying guidance. Whilst the guidance is in part subjective it does give the Council some degree of flexibility and discretion.

This will enable the Council to consider unusual situations with a degree of pragmatism particularly where use by the more vulnerable sections of the community are concerned as well as affordability issues.

## **10.0 Background**

- 10.1 Un-adopted roads are more generally known as private streets and a definition is set out in the Highways Act 1980 section 203(2)...."means a street that is not a highway maintainable at the public expense...."

The liability to repair highways exists at three levels:

- Repairable by no one.
  - Repairable by a person or body under statute, prescription, tenure or inclosure.
  - Repairable at the public expense.
- 10.2 A private street may be owned by a person or an organisation but in practice ownership is found not to be recorded and difficult if not impossible to trace. Without any information to the contrary there is a legal presumption in law that the owners of land fronting a highway are presumed to own the sub-soil of the highway, street in this case, up to the centre line of the road. This is known as the "*usque ad medium filum viae principal*". This presumption may be rebutted by evidence of ownership of the sub-soil.
- 10.3 The owners or frontagers to a private street are not under any obligation to maintain the street unless an obligation has been conferred by virtue of that set out in the second bullet point above. However the owners or frontagers may, under certain circumstances, have some liability for damage or injury caused to users of the street.
- 10.4 The Highways Act 1980 Part XI sets out that whenever a Highway Authority carries out works in a private street the frontagers shall normally be responsible for meeting the costs of repair or improvement.
- 10.5 There are some streets that are in private ownership and are generally known as private roads. For a road to remain private the owner(s) must have prevented general access for at least one day every year and made a declaration by advertisement, sign or by lodging a document with the highway authority stating that the road will be closed to the public at a particular time each year.
- 10.6 Where this has occurred no highway rights will have been established over the road/street in question. The owners of the private road are responsible for its repair and upkeep and the Council would have no responsibility or powers to carry out repairs.

## Legal Framework

- 10.7 Cheshire East Council is the Highway Authority for all highways in Cheshire East, whether or not maintainable at the public expense, except for those highways for which the minister is the Highway Authority (these are trunk roads and motorways). It is also the Street Works Authority for all the private streets in the Borough.

### Highways Act 1980

- 10.8 Section 130(1) of the Highways Act 1980 sets out 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....”*

Furthermore, Section 1(2) of the Highways Act 1980 states that:

*“Outside Greater London the council of a county are the highway authority for all highways in the county, whether or not maintainable at the public expense...”*

- 10.9 Where highway rights have been established over a private street, unrestricted use by the public, exceeding 20 years, and the street is in such a condition that it could present a danger to users then their “rights” and “enjoyment” to use it could be considered to be impaired. At this point the Highway Authority would usually discharge its duty to “assert and protect the rights of the public” by using its powers to remove obstructions.

- 10.10 However the Highways Act Section 230(1) provides a way of dealing with urgent repairs to a private street. This section states that:

*“Where repairs are needed to obviate danger to traffic in a private street the street works authority may by notice require the owners of the premises fronting the street to execute.....such repairs as may be so specified.”*

- 10.11 If the frontagers fail to carry out the specified repairs within the timescale set out in the notice, then Section 230(4) enables the authority to execute the repairs and recover its expenses from the frontagers. Given these powers, it is therefore clearly in the interests of the owners of properties that front a private street to keep it in a reasonable condition.

- 10.12 Section 230(7) of the Highways Act states that:

*“....the street works authority....may in any street that is not a highway maintainable at the public expense, execute such repairs as are in their opinion urgently required to prevent or remove danger to persons or vehicles in the street.”*

- 10.13 This is a power the Council may use to carry out repairs to remove a hazard or danger without charging the frontagers. It should be noted that this is a power and not a duty. There is no obligation on the street works authority, the Council, to undertake any repairs in a private street. The power should only be used as an exception. This is because the risk of carrying out repairs in a private street by the Council may be misunderstood and used as evidence that the street is a highway maintainable at the public expense.
- 10.14 In summary section 230 of the Act gives the Council the option to either fund any repairs they may wish to carry out in a private street or, alternatively, require the frontagers to undertake and/or pay for the repairs.

### **Previous Highway Authority Policy**

- 10.17 The policy for repairs to private streets was reaffirmed by the former County Council's Environment Executive Member on 4 June 2003. The reaffirmation contained guidance for highway's managers in dealing with requests for repairs to private streets. The reaffirmed policy was that any repair in a private street should be limited to a *maximum* of £1,000 in any one year, irrespective of the length of the street. At an operational level, £1000 had been sufficient to deal with instances where repairs had been required to rectify urgent dangerous defects on private streets.
- 10.18 The scope of repairs carried out under the policy were limited to those which were genuinely required to "*prevent or remove danger*", e.g. filling in deep potholes. There was no intention to carry out repairs that would solve any underlying structural weaknesses in the road construction.

### **11.0 Access to Information**

The background papers relating to this report can be inspected by contacting the report writer:

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## **Appendix A**

### **Repair to Private Streets Policy**

It is proposed that Cheshire East Council should have a policy for dealing with urgent repairs to private streets where expenditure is limited to £500 in any one street in any one year and that the budget for repairs to private streets be limited to £5,000 per annum where overall budgets allow this. The budget shall be managed by the Highway Manager.

Proposed guidance for the Highway Manager for dealing with repairs to private streets is set out in Appendix B to this report.

### Procedure Guidelines

The procedure guidelines laid out below detail the practice required to effectively implement the policy for undertaking repairs to private streets. It may be necessary to revise this procedure over time to ensure the most effective and efficient delivery of the policy.

### Requests for Repairs to Private Streets – Procedure

This procedure should be read in conjunction with the policy for Repairs to Private Streets.

- 1 Any request to undertake repairs in a private street will only be considered if it is received in writing from:
  - (i) One or more residents.
  - (ii) A Parish or District Council.
  - (iii) A Borough Councillor
  - (iv) A Member of Parliament.

Alternatively, Officers may make their own recommendations.

- 2 On receipt of such a request, the site should be inspected and a decision taken as to whether the condition of the road is such that it presents an immediate danger to users. In doing so, the normal 'Category 1' intervention levels should not be used as a guide as to whether the road does present a hazard to drivers or pedestrians. Rather, Officers will be expected to use their judgement and experience to:
  - (i) Identify the defects that could, in their opinion, present a danger to users.
  - (ii) Decide whether the defects are of such a nature that they require urgent attention.
  - (iii) Determine what works would be practical and sensible to do given the scale of the problem and the available budget.

Clearly, this is rather a subjective approach and the application of such a procedure may lead to some inconsistencies arising. However, the purpose of this advice note is not to provide a set of prescriptive standards, but rather to present a set of guidelines and procedures for Officers to work within. Indeed, in some respects, it would be advantageous to retain some degree of flexibility and discretion as this will enable Officers to react to an unusual situation with a degree of pragmatism. For instance, it would be sensible to take a more reasonable and understanding stance if a public

footpath runs coincidentally along the length of the private street or if the route were regularly used by the elderly or infirm.

- 3 If it is clear that some repairs are needed, the next stage should be to decide whether, in the opinion of the Officer, the frontagers should be asked to undertake them rather than the Borough Council.

If necessary, further advice and guidance should be sought from the Highways Manager.

- 4 Once this decision has been taken, the Officer involved will be required to submit a short written report detailing:

- (i) The circumstances behind the request.
- (ii) A description of the site.
- (iii) The defects that have been identified.
- (iv) The works that will be required to obviate the danger and their approximate cost.
- (v) A recommendation as to whether:
  - (a) The defects are such that they require immediate action.
  - (b) The frontagers or the Borough Council should fund the works.

Any relevant photographs should also be included. The report should be forwarded to the Highways Manager.

- 5 The Highways Manager shall then decide whether there is sufficient justification for the Borough Council to undertake and pay for the works. This is subject to funding being available from the Private Street Works budget. Their decision will be confirmed in writing to the Officer. Alternatively, if he/she believes that the frontagers should fund the works, then the relevant Legal Department will be asked to prepare the necessary notices under S230(1).

Note: If a Street Works Authority do issue a notice under Section 230(1), the residents can issue a counter-notice requiring the Authority to invoke their powers under the Private Street Works Act and bring the road up to an adoptable standard. Given the legal problems that such a counter-notice may cause, advice should always be sought from Legal Services before any such notice is issued. If it is clear that the Borough Council has no intention of adopting the street in question, then Officers will carry out the repairs under Section 230(7) and inform the frontagers of the actions the authority is undertaking.



- 6 If the decision is taken to undertake the works at the Borough Council's expense, then before any works are undertaken, a letter must be sent to each and every affected frontager on the street to remind them that:

- (i) The Borough Council has no duty to repair the road.
- (ii) By carrying out the works, the Authority is not, in any way, admitting any maintenance liability.
- (iii) The works will be limited to those which are urgently required to prevent or remove danger to persons or vehicles in the street.

To assist in this matter, attached is a pro-forma letter for Officers to use when responding to a request from the frontagers of a private street to undertake repairs in that street. The letter is attached at the rear of this appendix.

### **Private Street Works Budget and Allocation Code**

All costs incurred in carrying out works in private streets must be booked to the relevant private street works budget. However, any order must first be approved by the Highways Manager.

The private street works budget is limited and once this fund has been exhausted, no further works will be sanctioned. In these cases, all requests will have to be held over until the following financial year.

### **Register of Repairs**

If not already in existence, each Highway Maintenance Team will be expected to create and maintain a register/file which will detail all works that have been carried out on the network of private streets in the Borough. The register should include the following items:

- (a) Street name and location.
- (b) Nature of works undertaken and exact location in the street.
- (c) Cost of the works.
- (d) Date that works were carried out.

Records of all correspondence and any other relevant material (ie photographs, reports etc) should also be held on this file.

## Repairs To Private Streets

### Pro-Forma Letter To Frontagers

Dear Sir/Madam,

#### **HIGHWAYS ACT 1980 – SECTION 230(7) REPAIRS TO PRIVATE STREET KNOWN AS *(INSERT STREET NAME)***

You may be aware that the Borough Council has recently received a request to undertake repairs on *(Insert street name)*.

According to our records *(insert street name)* is an unadopted road and therefore the Borough Council, as the Street Works Authority, is not responsible for either maintaining it or undertaking any repairs that might be needed.

However, Section 230(1) of the Highways Act 1980 states that;

*“Where repairs are needed to obviate danger to traffic in a private street the Street Works Authority may by notice require the owners of the premises fronting the street to execute, within such time that may be specified in the notice, such repairs as may so be specified.”*

Furthermore, under Section 230 (4) of the Highways Act 1980, should the frontagers fail to carry out the works in the specified period, the Borough Council has the power to carry out works and recover the costs of doing so from the frontagers. Therefore, it is clearly in the interests of you and your fellow residents, as the frontagers of the private street known as *(insert street name)*, to keep it in a reasonable state of repair.

However, Section 230(7) of the Highways Act 1980 and the Borough Council's own policy in respect of repairs to private streets, does give the Authority a discretionary power to carry out works on Private Streets at the Borough Council's own expense. The costs of any works undertaken on a private street are limited to a value of £500 per street per annum.

I must emphasise that this resolution gives us the *power* to carry out repairs on private streets rather than a *duty*. We are therefore under no obligation to carry out any works if we believe they are not warranted. In addition, the type and nature of works we can undertake will be limited to those required to obviate danger to users.

In this instance, we have decided to use our discretionary powers and undertake repairs to *(insert street name)* at our own costs. However, these repairs will be done on the understanding that:

- i) Any works we do carry out will only be minor in nature (eg filling of potholes) and shall be restricted to those that are required to remedy significant defects which could present immediate danger to users. They will not solve any underlying structural weaknesses in the road construction and, as such, it is likely that such works would only provide a short-term solution to this problem.
- ii) By undertaking the works, the Borough Council is not admitting any past, present or future liability for maintaining (*insert street name*).

In addition, it might also be worth noting that, should the Borough Council receive a subsequent request from either yourself or any other frontagers of (*insert street name*) to carry out further repairs, Officers may well recommend that we use our powers under Section 230(1) and require you, the frontagers, to undertake the works yourselves.

I trust that this letter clearly sets out our position with regard to this matter. However, should you wish to discuss any aspect in further detail, please do not hesitate to contact (*insert contact name and telephone number*).

You should keep a copy of this letter so that you can produce it to any subsequent purchaser of your property.

Yours faithfully

(Insert name)