

**Strategic Planning,
Sustainability and
Transportation Committee**

10 July 2018

**Use of Highways Act 1980 Section 42 Powers in the
Borough**

Final Decision-Maker	Strategic Planning, Sustainability and Transportation Committee
Lead Head of Service/Lead Director	Rob Jarman, Head of Planning and Development
Lead Officer and Report Author	Mark Egerton, Strategic Planning Manager Russell Fitzpatrick, Senior Lawyer - Planning
Classification	Public
Wards affected	All

Executive Summary

At the meeting of the Council held on 11 April 2018 a motion was moved regarding the condition of roads in the Borough. The motion sought an instruction to Officers to investigate use of the Highways Act 1980, Section 42 to change the poor state of the roads. The motion was considered at the 12 June 2018 meeting of this committee and it was resolved that a report should be presented to the Committee. This report addresses the matters and provides options to the committee.

This report makes the following recommendations to this Committee:

1. That the Committee do not pursue taking on Highway Authority responsibility for maintaining specific roads in the Borough under the powers conferred by Section 42 of the Highways Act 1980 (as amended). This would mean responsibilities would remain with Kent County Council, ensuring that it was able to direct funding and resources across its highway network.

Timetable

Meeting	Date
Strategic Planning, Sustainability and Transportation Committee	10 th July 2018

Maintenance of Roads in the Borough

1. INTRODUCTION AND BACKGROUND

1.1 At the meeting of the Council held on 11 April 2018, a motion was moved by former Councillor B Mortimer, seconded by Councillor D Mortimer.

1.2 The motion stated: "In view of the recent press coverage of pot holes within the Borough of Maidstone, I am getting very upset, if not angry, that as a Borough Councillor, and I am sure that I speak on behalf of many other Borough Councillors and Officers, at many times we the Borough Council are blamed for the bad state of our roads, which as we are all aware is the responsibility of Kent County Council.

My motion is that we instruct Officers to investigate possible options which will include the Highway Act of 1980 Section 42, which could give us the ability to change the existing dire situation. Once that report is complete, it should be presented at the earliest opportunity to the Strategic Planning, Sustainability and Transportation Committee and their recommendation should go to Full Council.

In accordance with Council Procedure Rule 17.5, the motion, having been moved and seconded, was referred to the Strategic Planning, Sustainability and Transportation Committee and was initially considered by the Committee on 12th June 2018."

1.3 The Committee requested Officers to bring a report to the Committee that sets out the implications and repercussions of the Council taking on the responsibility.

The Legal Position

1.4 In the case of highways which are not publicly maintainable, district authorities have the powers of a parish or community council under s.50 (dealing with the maintenance of privately maintainable footpaths and bridleways). They also have the powers of a street works authority under s.230(7) (dealing with urgent repairs to private streets).

1.5 Maintenance of highways is governed by Part IV of the Highways Act 1980 (as amended) ("**the Act**"). Section 41 of the Act relates to 'duty to maintain highways maintainable at the public expense' and states as follows:

41.– Duty to maintain highways maintainable at public expense.

(1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway.

1.6 The Highway Authority for the borough of Maidstone is Kent County Council ("**KCC**"). The statutory responsibility for maintenance of all adopted and publicly maintainable highways lies with KCC.

- 1.7 The Act, however, in Section 42, makes provision for district authorities to take on highway maintenance responsibilities if they elect to do so.

42.— Power of district councils to maintain certain highways.

(1) Subject to [Part I of Schedule 7](#) to this Act, the council of a district may undertake the maintenance of any eligible highway in the [non-metropolitan]¹ district which is a highway maintainable at the public expense.

(2) For the purposes of subsection (1) above the following are eligible highways:—

(a) footpaths,

(b) bridleways,

(ba) restricted byways, and

(c) roads (referred to in [Schedule 7](#) to this Act as "urban roads") which are neither trunk roads nor classified roads and which—

(i) are restricted roads for the purposes of [[section 81](#) of the [Road Traffic Regulation Act 1984](#)]³ (30 m.p.h. speed limit), or

(ii) are subject to an order [made by virtue of [section 84\(1\)\(a\)](#) of that Act imposing a speed limit]⁴ not exceeding 40 m.p.h., or

(iii) are otherwise streets in an urban area.

(3) The county council who are the highway authority for a highway which is for the time being maintained by a [non-metropolitan]¹ district council by virtue of this section shall reimburse to the district council any expenses incurred by them in carrying out on the highway works of maintenance necessary to secure that the duty to maintain the highway is performed, and [Part II of Schedule 7](#) to this Act shall have effect for this purpose.

- 1.8 Furthermore, a county council which deals with trunk roads under agency agreements with the Minister for Transport (in effect Highways England) may, with his consent, arrange for those functions to be undertaken by a district council under s.6(6). The Minister for Transport may by regulation supplement the powers of maintenance of district councils and confer additional powers upon them under s.61 of the Highways Act. It would seem from the wording of the section that the further powers will relate solely to maintenance. We are not aware of any such regulations having been passed which affect the borough of Maidstone.
- 1.9 Pursuant to Section 42 of the Act Maidstone Borough Council ("**MBC**"), as a district authority, may (through their own decision) undertake the maintenance of any footpath, bridleway, restricted byway and/or urban road.
- 1.10 "Urban Roads" are defined as those which are neither trunk roads nor classified roads and which—
- 1.10.1 are restricted roads for the purposes of section 81 of the Road Traffic Regulation Act 1984 (30 m.p.h. speed limit), or
- 1.10.2 are subject to an order made by virtue of section 84(1)(a) of that Act imposing a speed limit not exceeding 40 m.p.h., or
- 1.10.3 are otherwise streets in an urban area.
- 1.11 Section 42 (3) makes provision for the reimbursement of expenses incurred by the district authority. Equally, however, there are a number of

procedural matters that must also be complied with by the district authority.

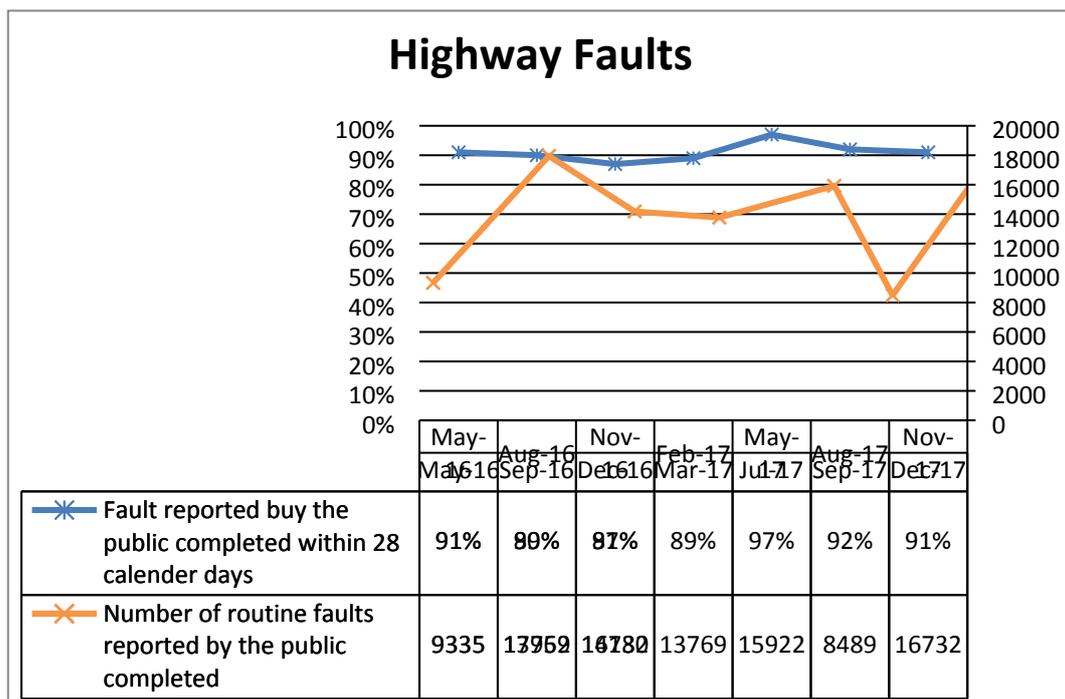
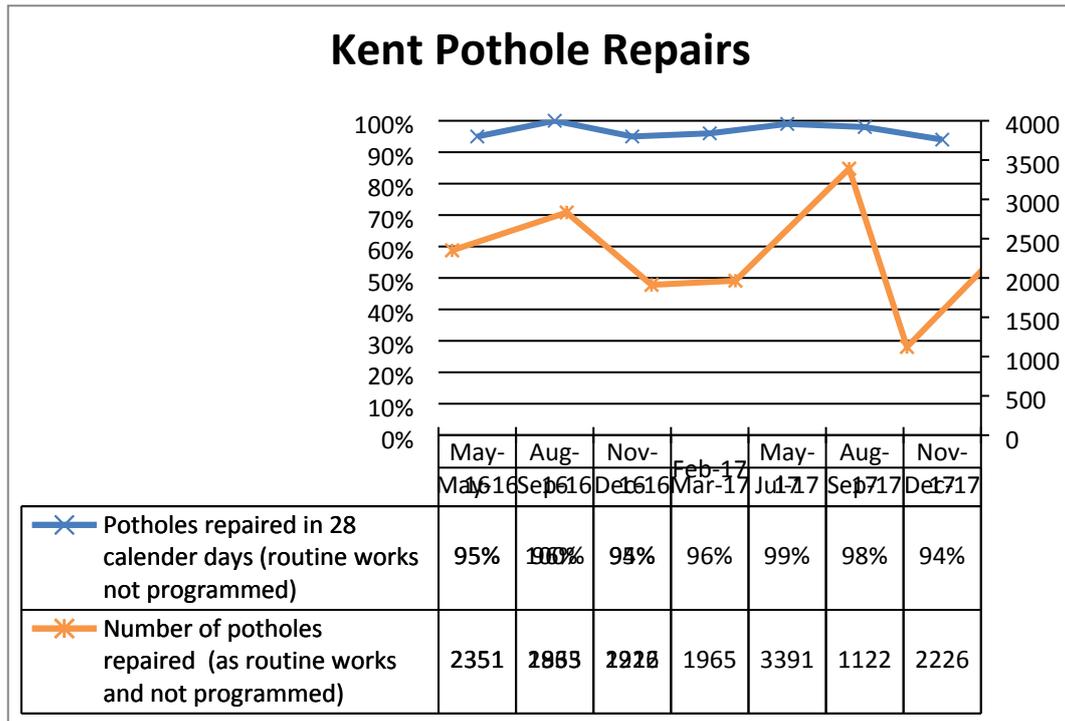
- 1.12 Before exercising this power the district authority must give notice of their intention to do so to the highway authority, specifying the highway(s) concerned. The highway authority may challenge whether or not the highway is, for present purposes, an "urban Road". Naturally, Section 42 powers can be lost if the road changes its status or the district authority voluntarily relinquish its Section 42 powers, but should it do so those powers shall not, except with the consent of the highway authority, again become exercisable with respect to that highway at any time within the period of 10 years beginning with the day on which the powers cease to be so exercisable.
- 1.13 If the district authority were to exercise this discretionary power, it would be required to prepare and keep up to date a list of the highways in respect of which the Section 42 powers relate. This list is to be made available for public inspection free of charge at all reasonable hours at the offices of the council and is to be provided to the highway authority. An entry in the list is conclusive evidence that the highway specified in the list is one in respect of which the powers conferred by Section 42 are exercisable by the district authority.

Highway Maintenance Responsibilities

- 1.14 The condition of roads is a matter of significant public interest.
- 1.15 If the Section 42 power is exercised, the district council takes on the responsibility for the maintenance (and associated liabilities) of the whole urban road and not just those parts that it wishes to maintain. In other words, the Council cannot simply carry out repairs to potholes.
- 1.16 The courts have held that the "duty to maintain the highway" is not an absolute duty, but rather a duty to maintain the highway to an objective standard. Although the Act does not state what that standard is, the courts have held that the highway (the structure and fabric of the highway) has to be maintained in such a state of repair that it is reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition.
- 1.17 Maintenance is only partially defined in the Highways Act 1980 to include "repair" but there are standards of repair that should be followed and there is extensive guidance on how this should be done. For local highway authorities these are set out in '[Well-maintained Highways: Code of Practice for Highway Maintenance Management](#)', published by the UK Roads Liaison Group (UKRLG) and regularly updated. It is not a statutory document but is supported, endorsed and recommended by central and local government.
- 1.18 Maintenance only includes actual works and not management of the network – as such maintenance does not include traffic management, network management, transport and safety schemes, development control on behalf of the highway authority, street lighting design, private street works schemes, etc. The courts have also held that the duty maintain does

not extend to erecting road signs or placing of road markings on the highway.

1.19 As noted, KCC are the highways authority with a duty to maintain highways. The following information has been reported by KCC. This relates to Kent and is not provided by District and refers to planned pothole repairs only. As is evident this is a significant work stream and this is illustrated by the below graphs, that consider both pothole repairs and highway faults.



- 1.20 It is apparent that KCC undertake several thousand repairs each year, involving significant resources and expenditure. The vast majority of potholes and highway faults are repaired within 28 days.
- 1.21 MBC could use the provisions set out above to ask KCC to transfer responsibility for maintenance of urban (unclassified) roads to the Council; however, it should be noted that it is rare for these powers to be successfully invoked by district/borough councils.
- 1.22 In the first instance MBC would need to identify the roads that it intends to take on and ensure they are urban roads. The Council would then need to assess the condition of these identified roads (not only in terms of 'pothole' damage but the general condition of the structure and fabric of the road to assess its risk profile which would need to be quantified. This would be informed by specialist assessment to ascertain the condition of the roads and nature and extent of the remediation and maintenance required, including costs. This specialist resource is not held within the Council and the level of costs would vary significantly depending on the number of roads that would need to be assessed. Once this process has taken place, MBC will need to notify KCC that it is exercising the powers conferred by Section 42 in respect of these roads. KCC can only challenge whether or not the highway taken on by the Council is, for present purposes, an "urban road".
- 1.23 As pointed out elsewhere, in exercising this power, the Council steps into the shoes of KCC and assumes the liabilities and risks associated with maintaining that highway. We are unable to quantify that risk and we have no experience in this regard. However, on 6 July 2018, it was reported to KCC Scrutiny Committee ([click here](#)) that in 2018, of the 1,286 highway related claims received, 1,161 related to damage to vehicles caused by defective carriageway surface. Whilst we accept this relates to Kent as a whole, officer and legal resources would need to be made available to investigate and deal with claims for vehicle damage and other liabilities caused as a result of defective carriage way surfaces to the urban roads. ,.
- 1.24 Should MBC decide to take on the maintenance responsibility of these urban roads, KCC is required to reimburse MBC any expenses incurred by MBC in carrying out on the highway works of maintenance "*necessary to secure that the duty to maintain the highway is performed*". As such only maintenance costs will be reimbursed. Anything above that will be met by MBC from its own resources. As the Council does not have the requisite expertise to carry out highway repairs, specialist contractors (probably those used by KCC) would need to carry out those works. This will no doubt have costs over and above those which are to be reimbursed by KCC
- 1.25 In order to claim its anticipated maintenance costs, MBC is required, on or before 15 December to submit to KCC for their approval a "*detailed estimate of the cost for the ensuing financial year of the maintenance of every urban road in respect of which their maintenance power is*

exercisable". This estimate must be approved by the County Council, either with or without modifications. KCC cannot unreasonably withhold approval of an estimate submitted to them and any dispute in this regard will be determined by the Minister for Transport.

1.26 KCC is only liable to pay (a) the approved estimate, (b) that estimate as amended by any supplementary estimate submitted to and approved by the County Council, or (c) such less sum as may have been actually expended by the Borough Council on the urban road in question during that financial year. KCC are not liable to make a payment towards the cost of the maintenance of any urban road until they are satisfied, by a report from one of their officers or such other person as they may appoint for the purpose, that the works of maintenance are being or have been properly executed. Any dispute as to whether any works of maintenance are being or have been properly executed, or as to the liability of the County Council to make a payment is to be resolved by the Minister for Transport.

1.27 The Highways Authority function regarding these urban roads could be lost if the road changes its status (i.e. it is no longer considered to be an "urban road") or the Borough Council voluntarily relinquish its Section 42 powers back to KCC, but should it do so those powers cannot, except with the consent of the County Council, again become exercisable with respect to that highway at any time within the period of 10 years beginning with the day on which the powers cease to be so exercisable.

1.28 As MBC would in effect be taking on the powers of KCC and becoming the highway authority for the "urban road", the Borough Council is required by law to indemnify KCC in respect of any claim made against the County Council for (a) a failure to maintain a highway at a time when the relevant powers were exercisable by MBC with respect to the "urban road", or (b) arising out of any works of maintenance on the "urban road" by MBC in exercising its powers. In exercising the powers of maintenance MBC stands in the shoes of KCC as highway authority and can sue and be sued accordingly.

1.29 In doing so, MBC would need to be mindful of liability for any personal injury or other claims (e.g. damage to vehicles) resulting from its maintenance responsibilities in respect of the "urban road(s)" to which it is exercising its Section 42 powers.

1.30 It should of course not be overlooked that in exercising these powers, the motorist may well not be clear as to who the highway authority for a particular highway is, MBC or KCC. This may require road signage.

2. AVAILABLE OPTIONS

2.1 There are two options available to the Committee.

- 2.2 The first is that the Committee decides to pursue taking on Highway Authority responsibility for maintaining specific urban roads in the Borough through Section 42 of the Highways Act 1980. This would involve committing resources to identifying roads that the Council would consider taking on. An assessment of cost-benefits and risks of taking on the roads would then need to be undertaken by external specialists before the Council issues a notice to KCC of its exercise of its powers pursuant to section 42 of the 1980 Act. The Council would need to submit its detailed estimate of the cost for the ensuing financial year of the maintenance of every urban road in respect of which their maintenance power is exercisable to KCC by 15 December for their approval. Taking on such a role is unusual and, as a result of the reasons set out above, is considered to present a number of difficulties for MBC, not least of all the Council will step into the shoes of the County Council and take on all the risk and associated liability of maintaining those urban road(s). If the Committee was minded to pursue this option, the constitutional procedures associated with taking decisions of this nature would also need to be investigated and the budgetary source of the funding to progress this exercise identified.
- 2.3 The second option available to the Committee would be not to pursue taking on Highway Authority responsibility for maintaining specific roads in the Borough through Section 42 of the Highways Act 1980. This would mean responsibilities would remain with KCC, ensuring that it was able to direct funding and resources across its highway network. In this scenario, it would still be possible for MBC to lobby KCC to improve the condition of particular roads.

3. PREFERRED OPTION AND REASONS FOR RECOMMENDATIONS

- 3.1 The second option is recommended for the reasons set out above.

4. RISK

- 4.1 Risks associated with this matter have been identified and explored in the preceding sections of this report. In the event that the first option above is taken, a further detailed risk assessment and analysis will need to be undertaken.

5. NEXT STEPS: COMMUNICATION AND IMPLEMENTATION OF THE DECISION

- 5.1 Should the Committee agree with the proposed recommendation, the matter will not be taken further.

6. CROSS-CUTTING ISSUES AND IMPLICATIONS

Issue	Implications	Sign-off
Impact on Corporate Priorities	We do not expect the recommendation will by itself will materially affect achievement of corporate priorities.	Rob Jarman, Head of Planning and Development
Risk Management	Please see 'risks' section	Rob Jarman, Head of Planning and Development
Financial	<ul style="list-style-type: none"> • The proposals set out in the recommendation are all within already approved budgetary headings and so need no new funding for implementation. • Accepting the recommendations will demand new spending of £x. We plan to fund that spending as set out in section 3 [preferred alternative]. • We expect accepting the recommendations will result in net extra income of £x. This income is above/within amounts already accounted within the Council's financial planning. 	[Section 151 Officer & Finance Team]
Staffing	We will deliver the recommendation with our current staffing.	Rob Jarman, Head of Planning and Development
Legal	Mid Kent legal services have co-authored the report and are content with its content in regards to legal implications	Cheryl Parks, Mid Kent Legal Services
Privacy and Data Protection	There are no implications arising from this report	Cheryl Parks, Mid Kent

		Legal Services
Equalities	•	[Policy & Information Manager]
Crime and Disorder	N/A	Rob Jarman, Head of Planning and Development
Procurement	N/A	Rob Jarman, Head of Planning and Development, and Section 151 Officer]
