

## LIABILITY FOR TREES ON COMMONS LAND

Cleaner & Greener Advisory Committee - 13 June 2023

Cabinet - 15 June 2023

**Report of:** Deputy Chief Executive & Chief Officer - Finance & Trading

**Status:** For Decision

**Key Decision:** No

**Executive Summary:** This report updates members on the current management of a number of commons pursuant to a scheme made under the Commons Act 1899 and the extent of the Council's liability.

**This report supports the Key Aim of:** a green environment and safer communities

**Portfolio Holder:** Councillor McArthur

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**Recommendation to Cleaner & Greener Advisory Committee:** That the recommendations as detailed in this report be considered by the Committee, and its views be submitted for consideration by Cabinet.

**Recommendation to Cabinet:** That the recommendations in this report along with any proposals submitted by the Cleaner & Greener Advisory Committee be considered and approved.

**Reason for recommendation:** Sevenoaks District Council made a scheme for the regulation and management of any Common within the district, under section 1 of the Commons Act 1899. The legal advice on the Council's liability for trees on commons land has significantly changed. the Council's primary obligation is to protect the trees from harm, rather than to pursue active arboriculture management.

## Introduction

- 1 Sevenoaks District Council made a scheme for the regulation and management of any Common within the district, under section 1 of the Commons Act 1899.
- 2 The scheme made by Sevenoaks Rural District Council, approved by the Secretary of State in 1925 amended in 1963 and 1966.
- 3 The scheme identifies approximately 280 hectares of commons land, in the following locations:- (Appendix A)

### Knole Estate

- Seal Chart
- Fawke Common
- Bitchet Common
- Bitchet Green
- Godden Green
- Land at Blake's Green and Stone Street
- Wickett Common
- Land adjoining Oak Lane/ Glebe Lane
- Land adjoining Bayley's Hill and Pitfield Wood

### Squerrys Estate

- Crockham Hill Common
  - Farley Common
  - Hosey Common
- 4 Previous to 2008, it the Council's responsibility for management of commons land extended to a stewardship role, where maintenance to trees was required, for safety reasons only. The Council notified the owner of the land, who had responsibility for undertaking any work as necessary. Surveys regularly undertaken by the Councils Countryside Ranger Team, or where necessary, commissioned by a tree surgeon.
  - 5 However in 2008 this position was challenged by an agent acting on behalf of one of the commons landowners. In view of this, we obtained Counsel's opinion, to clarify the Council's responsibilities under the Commons Act 1899.
  - 6 In an opinion dated 22 July 2008, Counsel concluded that in his view, the Council is obliged, under the scheme, to seek to ensure that trees on the commons remain in good health, and to remedy injury, disease or decay when it appears. In his opinion, this extends to surveying the trees, and to carry out any work required to them, including pruning, topping and lopping etc.
  - 7 Clearly, this legal opinion, had wide implications for the Council, not only in requiring a survey of all the trees within the defined areas, but also to

undertake any works required, identified from the surveys, and on-going maintenance responsibilities.

- 8 By its very nature, common land is open to public access and many trees line identified walks and abut highways. A particular issue is the A25 running through the Seal Chart Common where traffic management schemes will be necessary to safeguard traffic whilst works are being undertaken. As the public have open access to these areas, public safety is of paramount importance.
- 9 In 2008, due to these identified liabilities, and because of public safety implications, it was imperative that surveys were undertaken and priority works identified from the surveys, was undertaken immediately.

### **Previous Decisions**

- 10 On the 21 October 2008 the Council's Environment Select Committee recommended to Cabinet that the additional expenditure required in 2008/09 of £50,000 be funded from the General Fund Reserve, and additional expenditure in 2009/10 onwards to be considered as part of the 2009/10 budget process. Cabinet approved this request, however no budget provisions agreed for future years and only an initial £50,000 budget was agreed, which was spent in 2008/2009.

### **Current Situation**

- 11 On the 7 September 2022 Kent County Council served an enforcement notice under section 154 of the Highways Act 1980 to the landowner of the Seal Chart Common requesting that all trees and vegetation are cut back that overhang the footpath and carriageways on land to the south and north side of Maidstone Road, Seal within 28 days.
- 12 A site meeting was arranged involving the issuing Highways Inspector and the Council's Countryside Manager to discuss which works need this urgent attention. It would appear to be the same area that was cut back in 2008, which obviously over the last 14 years have grown back stronger and higher.
- 13 The 2023/2024 Parks-Rural budget contains a small budget provision for works on commons land, which is not for tree maintenance, (on average around £3,000 per Common, £23,000 in total), and is insufficient to undertake the survey work, and identified works, now required. It was agreed between the Council and Highways Authority that junction works would be completed for highway safety reasons (line of sight) at a cost of £1,000. These works were completed in November 2022, however if the entire stretch of the A25 needed arboriculture works that runs on the Seal commons land it would cost in the region of £60,000.

## Further Legal Advice

- 14 Given the massive quantities of trees on these privately owned commons land within the Sevenoaks scheme, recent case law and the disproportionate responsibility and cost liability on the Council, further legal counsel's advice was sought on the 5<sup>th</sup> May 2023.
- 15 Having reviewed the previous legal advice obtained in 2008 and in light of the decision of the High Court in 2014, (Norbrook Laboratories) the legal advice on the Council's liability for trees on commons land has significantly changed.
- 16 A benchmarking exercise was carried out through our membership of the Association of Public Sector Excellence (APSE) on how other Councils handled their responsibility under the Commons Act 1896. All Councils surveyed reported that they did not undertake any arboricultural works on commons land that was privately owned. Their role was as a guardian of the commons to ensure trees and commons rights were preserved.

## Recommendations

- 17 It is now Counsel's opinion that as to the Council's duty to preserve trees on the Commons, the Council's primary obligation is to protect the trees from harm, rather than to pursue active arboriculture management.

The Council should:

- 18 Ensure as there are identified owners of the Commons the duty of care under the Occupiers Liability Act imposes a statutory duty on an occupier of that land on the visitor's safety to that land.
- 19 Under article 3 of the Commons Act 1899 the Council's primary responsibility is to protect and preserve the trees on the commons, in that to keep safe from any harm, such as stopping unauthorised felling or fencing off areas of trees from access to allow rest and revival of the trees. This is supported by Article 9 of the Commons Act 1899 which allows the Council to make bye-laws for prohibiting any person without lawful authority from cutting, felling or damaging any timber or other tree on Commons land.
- 20 Change its working practice, to reflect Counsels advice and recent case law as it is not reasonable to expect the Council to bear all costs for any arboriculture works across the commons land scheme.

## **Key Implications**

### Financial

Given the further legal advice the current budget for commons land is adequate to ensure we are managing our responsibilities under the scheme created in 1925 under the Commons Act 1899.

### Legal Implications and Risk Assessment Statement.

In 2008 the Counsel's opinion was that the Council, were obliged, where a scheme exists for Commons land, under the Commons Act 1899, to carry out any works identified, as necessary on trees.

However, following further legal advice and the High Court ruling for Norbrook Laboratories the Council's responsibility only extends to preserving the commons trees from hard and not arboriculture management.

### Equality Assessment

The decisions recommended through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on end users.

### Net Zero Implications

Members are reminded of the Council's stated ambition to be Net Zero with regards to carbon emissions by 2030. The decisions recommended in this paper directly impact on this ambition. The impact has been reviewed and there will be a very slight increase on carbon emissions produced in the district as a result of this decision, given the machinery required to maintain the trees. In these circumstances the maintenance of commons land trees have little or no effect on carbon emissions.

#### **Appendices**

Appendix A - Commons Map.

#### **Background Papers**

None.

**Adrian Rowbotham**

**Deputy Chief Executive and Chief Officer - Finance & Trading**