

COMMUNITY GOVERNANCE REVIEW

OPINION

1. I am asked to advise in respect of the Frost Estate Community Governance Review.
2. The background is set out the Committee Report of 10th September 2014 (and update) and the results of the first stage of public consultation are dealt within the Report of 10th December 2014. This Opinion should be read with those reports.
3. It is readily apparent that the primary motivation for the request for the area to be “parished” concerns the state of the roads. That is, of itself, not unusual as it may commonly be one issue which prompts such a review. And there is no dispute that the condition of the roads, or at least part of them, is poor. That does not, however, determine the outcome.
4. A parish council has very limited general highway powers. Its maintenance powers are restricted to footpaths and bridleway, see s.43 of the Highways Act 1980, but only in respect of highways maintainable at public expense. Whilst it has other limited powers under that and other Acts, including under the Parish Councils Act 1957, as I understand it none would authorise the works of repair/maintenance required/desired in this instance.

5. Absent such powers to do work to highways, it is no answer to seek to rely upon the general power of competence under the Localism Act 2011, nor the well-being power under the Local Government Act 2000. A specific power is required to authorise any council to undertake works on a highway and parish councils do not have them. An “individual” cannot just repair public highways/roads at will and there is a detailed statutory scheme which provides for works to highways.
6. However, I understand that it may be possible to purchase the roads in question from the Official Receiver. If the putative parish council were to do so, then it would have the ability to repair them - acting as an individual who owned such roads might do so and relying on the general power of competence.
7. However, such a putative parish council would at least have to consider recouping its costs from frontagers. Indeed, in my view, it would need at least to consider asking for money in advance of undertaking works.
8. I have not seen what obligations there are on frontagers in terms of the up-keep of the roads but the parish council would be under a fiduciary duty to recover or seek to recover its expenditure in so far as it could pursuant to such obligations. The general power of competence does not excuse any authority from acting as a public authority should when it has the ability to exercise private law rights to recoup expenditure. Whilst it has powers to act without charge – see s1(4)(b) of the Localism Act 2011, that does not mean it should not consider recouping costs it has the ability to recoup.
9. That it may be reasonable not to seek recovery is one possible outcome but the question will need to be considered. It cannot simply transfer the burden from frontagers to the whole of the parish without giving proper consideration to alternative steps.

10. When determining what to do on a review a local authority, pursuant to section 93 of the LGPIH Act 2007, must have regard (i) to the need to secure that community governance within the proposed area under review (a) reflects the identities and interests of the community in that area and (b) is effective and efficient, and (ii) it must take into account what alternative arrangements could be made for the purposes of community representation or community engagement in respect of the area under review. (The range of such “alternative arrangements” is wide, see the Guidance at paragraphs 136-146.)
11. Of course, it must also have regard to the consultation responses etc. but these three matters provide useful criteria against which to assess any review, see the Guidance at paragraphs 52 and 136. For example, if an authority considered that the proposal did not reflect the interests of the community then it would probably be unlikely to accede to a request to parish an area.
12. Application of these criteria raises issues of judgment, not law. These are matters for the authority and what follows is hopefully of assistance but it is no more than that.
13. In this case there are apparently divisions within the community as to where its interests lie. Whilst no proposal is likely to be universally popular and the existence of opposition is no embargo to “parishing” an area, it is a matter of judgment as to whether this proposal is in the interests of the “community in that area”.
14. Note the focus is unsurprisingly not, directly at least, on the need to secure good roads but is on the need to secure community governance which fulfils the relevant criteria. However, there is a clear link between the two. The Guidance makes this clear. See for example

paragraph 56, where it states that parish councils can contribute to the creation of successful communities in a number of ways relating to the physical environment.

15. Again, just because the primary motivation is to improve bad roads does not prevent the proposal being properly “effective and efficient”. The Guidance suggests that this is to be judged in the context of ability to deliver quality services economically and efficiently and as well giving users a voice, see paragraph 62.
16. A judgment has to be made as to whether the proposal which has one, or perhaps two – security being the other, principal aims is effective and efficient. Just because the roads are in a poor state of repair is not necessarily indicative of ineffective or inefficient community governance or that there might not be other more effective and efficient ways of achieving the same end, see 8(ii) above, but it may do so. Further, addressing poor roads at a parish level may not be considered efficient if there are other routes by which the same outcome could be realistically achieved.
17. Acquiring land will only be the first hurdle in terms of remedying the poor state of the roads. Proper consideration will have to be given to the standard of repair, insurance and identification of the contractor to undertake the work and management and supervision of any contracts.
18. Regard will also have to be given to the lack of activity in carrying out the works at present and alternative options in that regard – and what alternative arrangements could produce the same result. A residents’/frontagers association may for example provide a solution. A parish council is in no better position to enforce frontagers’ obligations than such an organisation. It may be adoption is the answer, although that may not be popular with frontagers given the cost and potential other implications.

19. Regard, in my view, should also be had to all aspects of community governance so a balanced view is taken. It is a matter of judgment whether in this instance there will be a benefit which goes beyond fixing the roads and even if not, whether fixing the roads. The NALC advice quoted in the reports makes this point as well.

20. If I can help further at this point I would be glad to be of assistance.

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OPINION

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