

<b>Cabinet Decision</b> 8 April 2015	 <b>TOWER HAMLETS</b>
<b>Report of:</b> David Galpin Service Head – Legal Services Jamie Blake – Service Head Public Realm Jackie Odunoye – Head of Strategy Regeneration & Sustainability	<b>Classification:</b> Unrestricted
<b>Delegation to the Transport and Environment Committee and Third Variation to the Association of the London Government Transport and Environment Committee Agreement</b>	

<b>Lead Member</b>	<b>Councillor Shahed Ali, Cabinet Member for Clean and Green</b>
<b>Originating Officer(s)</b>	David Galpin Service Head – Legal Services, x4348 Jamie Blake – Service Head Public Realm x6769 Jackie Odunoye – Head of Strategy Regeneration & Sustainability x7522
<b>Wards affected</b>	All
<b>Community Plan Theme</b>	A great place to live
<b>Key Decision?</b>	Yes

### Executive Summary

- 1.1 The Protection of Freedoms Act 2012 (“the PFA 2012”) made a number of changes to the law related to parking on private land. It banned vehicle immobilisation and removal without lawful authority. It also provided private landholders with additional powers to pursue the registered keeper of a vehicle for unpaid parking charges, provided that certain conditions are met. One of the requirements is that any ticket should specify the arrangements under which disputes or complaints may be referred to independent adjudication or arbitration.
- 1.2 Following enactment of the PFA 2012, the British Parking Association (BPA) introduced an independent appeals service in respect of parking enforcement on private land. London Councils entered into a contract with the BPA to provide this service in London and the service, known as Parking on Private Land Appeals (POPLA), started operating on 1 October 2012. POPLA is available for cases of parking enforcement on Council-owned land, such as housing estates.
- 1.3 An objection has been raised in respect of the London Councils consolidated accounts by an interested person, claiming that the Transport and

Environment Committee (TEC) of London Councils did not have the legal power to provide the appeals service. To deal with the legal doubt, London Councils have asked all necessary Councils to:

- formally delegate their powers under section 1 of the Localism Act 2011 (the general power of competence) to TEC for the purpose of providing an appeals service for parking on private land for the BPA contract;
- confirm that the services have been and continue to be provided on this basis; and
- vary the TEC governing agreement to this effect

### **Recommendations:**

The Mayor in Cabinet is recommended to:

1. Confirm that the functions delegated to TEC to enter into the arrangement with the British Parking Association were and continue to be delivered pursuant to section 1 of the Localism Act 2011 (“the 2011 Act”);
2. Agree to expressly delegate the exercise of the Council’s general power of competence under section 1 of the 2011 Act to the TEC joint committee for the sole purpose of providing an appeals service for parking on private land for the British Parking Association under contract; and
3. Agree that the TEC Governing Agreement can be varied to this end and the Memorandum of Participation to vary the TEC Governing Agreement can be entered into.

## **1. REASONS FOR THE DECISIONS**

- 3.1 London Councils was established as a joint committee between the London Borough of Tower Hamlets, the City of London and the 31 other London Boroughs. The 33 Councils have delegated certain powers to the London Councils Leaders' Committee and the TEC. The joint arrangements were established under, inter alia, section 101 of the Local Government Act 1972 and what was then section 20 of the Local Government Act 2000 (now section 9EB Local Government Act 2000).
- 3.2 The TEC has been delegated authority to discharge functions of the London Borough of Tower Hamlets under specified transport and environment legislation. The TEC are able to undertake other functions that are conferred on the 33 London Councils or Transport for London (TfL) under any other legislation that relates to transport, planning and environment matters, subject to consultation with and the written agreement of the 33 London Councils. As a joint committee London Councils (and its committees) can only exercise the powers which the London Councils delegate to it.
- 3.3 The PFA 2012 came into force in 2012 and sections 54 to 56 provided that clamping and towing away vehicles on private land would be banned. In addition to this, Schedule 4 to the PFA allowed for the liability for parking charges to be recovered from the keeper of the vehicle as opposed to the driver of the vehicle. Notices may be issued to this effect, provided that specified conditions are met, including that the notice specify the arrangements by which the notice may be referred by the driver to independent adjudication or arbitration. Prior to the introduction of Schedule 4 there was no way of challenging actions taken in relation to parking on private land other than challenging a private parking charge in the courts or asking Trading Standards to consider whether the claim was fair. This was seen as being daunting for people and people often felt obliged to pay.
- 3.4 Prior to the new legislation coming into effect the Government agreed that an independent appeals service should be established in respect of private parking. This was then provided for in the PFA 2012. The legislation does not specify who is to provide the independent appeals service. The BPA decided to introduce an independent appeals service in London and the TEC agreed that London Councils would provide this appeals service for parking on private land for the BPA under contract.
- 3.5 The POPLA service is fully funded by the BPA and is delivered by London Councils under contract to the BPA on a full cost recovery basis at no cost to the taxpayer. The POPLA service was established on 1 October 2012 to coincide with coming into effect of Schedule 4 of the Protection of Freedoms Act 2012. The Government made the creation of an independent appeals service a pre-condition for the commencement of Schedule 4 which provides for a form of keeper liability.
- 3.6 To take advantage of the keeper liability provisions an operator must be a member of an approved industry body such as the BPA and must meet

certain criteria (Code of Practice) to become a member of the Approved Operator Scheme (AOS). Operators who are not a member of an approved trade association, such as the BPA, may not access the DVLA's database, and, in effect, cannot enforce any parking charge notices they issue against the keeper of a vehicle. Motorists may only appeal to POPLA against a parking charge notice issued by an operator who is a member of the BPA's approved operator scheme.

- 3.7 Members of the BPA account for more than 85% of all parking charge notices issued throughout England and Wales. London Councils have been unable to say how many operators are active within Tower Hamlets and have advised that the number will regularly change as contracts change hands.
- 3.8 The membership of the Approved Operator Scheme ensures that all enforcement companies operate in a fair and transparent manner. A member company will be measured against all the requirements within the Code of Practice to ensure residents and all other parties are confident they are receiving a fair and effective service. Membership will be refused to operators failing to meet the standards required of the Code of Practice, or members may be withdrawn who operate outside of the Code subsequent to warnings over operating practices.
- 3.9 London Councils have advised that the appeals process works in a similar way to the appeals against penalty charge notices issued by the council for parking contraventions. The notice gives details of the appeals procedures, including POPLA, and initial appeals are made to the operator. If the operator rejects the appeal, the motorist may then appeal to POPLA (or may take their appeal directly to court). Appeals are free of charge to the motorist and, while not binding on the motorist, the outcome is binding on the operator. The current appeal rate of more than 30,000 a year, represents about a 1% appeal rate, roughly the same as for on street parking enforcement. POPLA does not maintain statistics on the address of each appellant.
- 3.10 Any person can appeal such a parking charge notice and representations should be made to the operator who issued the parking charge notice. If these are rejected, there are 28 days to appeal against the operator's decision. The independent POPLA Assessor will consider all the evidence presented by the motorist and by the operator. POPLA aim to send out the decision to all parties on the working day following the Assessor's decision.
- 3.11 The POPLA service is available for use by all approved operators enforcing parking on private land in the borough (and those who have received parking charge notices when parking on the associated land within the borough). This includes the council's housing land and the POPLA service used by Tower Hamlets Homes (THH). All ALMO managed land is using the POPLA service, with the exception of a few pockets of private land which is not using this service at present. THH have a contract with NSL to provide ticketing and enforcement services and THH have been using the services since the PFA 2012 came into force. THH and NSL are not currently using the access to the DVLA however as there is dispute as to the local authority being able to

access the DVLA records. THH are, however, using the POPLA system.

- 3.12 The benefit to THH is that those vehicles parked outside of the conditions of parking on their private estates will be issued with a Parking Charge Notice. This will enable residents who have paid for a permit to park to be free to do so in the way that the resident's scheme was intended. THH have a contractor who performs enforcement on the housing estates, with the sole aim to ensure that residents are able to park in the bay they are renting. THH have stated that if land under their management was subject to road traffic regulations, then this would be more expensive and it is a benefit to residents for the land to remain as private land.
- 3.13 The principle benefit to THH and, consequently, the Council, is to ensure that a fair and equitable enforcement service is carried out and that all parties have an opportunity to state their case in relation to a Parking Charge Notice. There is also a consistency of approach, which represents best practice, as to how ticket enforcement is carried out by contractors. Landlords and residents within Tower Hamlets will feel the benefit from an effective and fair enforcement service. This will enable all who are entitled to park within **THH** managed estates to be able to do so free of vehicles which are not entitled to do so.
- 3.14 As noted above an objection has been raised on the London Councils consolidated accounts by an interested person (residing within London) that the TEC did not have the legal power to provide the POPLA service. London Councils' auditors, PWC, have, for some time, been investigating this and numerous other objections submitted by the same person.
- 3.15 PricewaterhouseCoopers (**PwC**) has informed London Councils of legal advice it has had from the Audit Commission on the Commission's view as to the power of London Councils to provide the POPLA service. In essence, the Audit Commission advice accepts that the London local authorities have the power under section 1 of the 2011 Act to provide the service and that the exercise of these functions could be delegated to the TEC. London Councils has agreed with this conclusion.
- 3.16 The Audit Commission advice, however, questions whether the exercise of those functions has been properly delegated to the TEC. The issue turns on:
- Whether the Committee could be said to have existing delegated authority under the terms of the TEC Governing Agreement;
  - Alternatively, whether it made or confirmed such a delegation by virtue of the decisions it made to provide the service in 2012; or
  - Whether each individual authority should have expressly resolved to delegate the exercise of section 1 of the 2011 Act to the joint committee for the purposes of TEC's delivery of the POPLA service with the TEC Agreement being formally varied accordingly.
- 3.17 PwC has asked for London Councils' view on this advice in advance of making a formal determination about the objection. London Councils and its

legal advisors remain of the view that the service is currently being delivered by TEC on a lawful basis on behalf of all the participating authorities with their consent and proper authority under the existing terms of the TEC Governing Agreement, and confirmed by the Committee resolving to provide the service in 2012 with these matters having been raised with local authorities prior to those decisions being taken in the normal way in respect of the TEC business. However London Councils have accepted, that there is room for argument as to whether individual councils had to state expressly that they agreed that the arrangement with the BPA was pursuant to exercise by TEC of their powers under section 1 of the 2011 Act.

- 3.18 In the circumstances, London Councils have asked all participating London boroughs and the City of London to take the steps outlined in the recommendations above to put beyond doubt, so far as is possible, the work of the TEC in operating POPLA.

## **2. ALTERNATIVE OPTIONS**

- 2.1 If any of the authorities take a decision to make the delegation without the prior confirmation or ratification of the delegation, then the variation could be amended to substitute the words “were and continue” with “will”. There would be no need to alter the substantive provisions of the variation setting out the terms of the delegation to the joint committee, which delegation would legally take effect from the date that all the participating authorities (and TfL) returned their signed Memorandum of Participation for inclusion in the Agreement.
- 2.2 The London Borough of Tower Hamlets could decide not to delegate the requested functions to the London Councils. The implication of this would be that London Councils would be unable to provide the POPLA service and therefore there would be no independent parking on private land appeals service which the residents within our Borough could appeal to in respect of actions taken when parking on private land.

## **3. DETAILS OF REPORT**

- 3.1 The authority of TEC to deliver the POPLA service to satisfy the London Council’s auditors needs to be clarified to inform their determination in respect of the objection raised by the interested party. All authorities including the London Borough of Tower Hamlets have been requested to:
1. Confirm that the functions delegated to TEC to enter into the arrangement with the British Parking Association were and continue to be delivered pursuant to Section 1 of the Localism Act 2011
  2. Resolve to expressly delegate the exercise of section 1 of the 2011 Act to the TEC joint committee for the sole purpose of providing an appeals service for parking on private land for the British Parking Association under contract; and
  3. Resolve that the TEC Governing Agreement can be varied to this end and the Memorandum of Participation to vary the TEC Governing Agreement can be entered into.

#### **4. COMMENTS OF THE CHIEF FINANCE OFFICER**

- 4.1 TEC have asked all Councils to formally delegate their powers under section 1 of the Localism Act 2011 for the purpose of providing an appeal service for parking on private land (POPLA) as part of the British Parking Association contract. Tower Hamlets Homes, using NSL as a contractor for the delivery of the service, issue Parking Charge Notices on vehicles that breach conditions of parking on private estates. The POPLA service therefore ensures that there is a fair and equitable enforcement service being carried out by THH with parties having recourse to an approved disputes process.
- 4.2 The THH managed land is not subject to the Traffic Management Orders regulations and therefore there is no impact on the Parking Account operated by the Council. The view held by THH is that retaining their parking bays as private land will benefit the residents as the charges can be controlled independently of the TMO.
- 4.3 The interested person has also raised an objection relating to the proposition that the parking bays on private land should be liable for business rates. The Council has sought clarification on this matter from the valuation office. If it is confirmed that the bays are subject to business rates, this will impact on income generated by THH.

#### **5. LEGAL COMMENTS**

- 5.1 Section 1(1) of the Localism Act 2011 states that a local authority has power to do anything that an individual generally may do, subject to any statutory restriction to the contrary. This would enable the London Borough of Tower Hamlets to act as an independent appeals service for parking on private land. An independent private parking appeals service could have been set up by an individual and therefore a local authority would also be able to set this up under section 1(1) Localism Act 2011. By delegating this power to London Councils it will confirm that the TEC has the authority to enter into the agreement with the BPA. The legal implications of delegating this power for the future will confirm that the functions of TEC are valid for the future.
- 5.2 Section 101(5) of the Local Government Act 1972 allows two or more authorities to discharge any of their functions jointly, including through a joint committee. Pursuant to the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012, in the case of Tower Hamlets who operate a mayor and Cabinet executive, the Mayor has power to make arrangements under section 101(5) of the Local Government Act for the authority to discharge their functions jointly, and therefore it is appropriate for the Mayor in Cabinet to consider whether Tower Hamlets wishes to do so in this instance.

- 5.3 It should be noted that not only have the Council been asked to officially delegate their powers to the TEC to confirm that they have the authority to enter into the arrangements with the BFA to provide the appeals service going forward, they have also been asked to confirm that the functions were previously delegated to the TEC from when the appeals service was first established. The legal position on retrospectively ratifying the Council's delegation of powers under section 1 of the 2011 Act should be dealt with cautiously.
- 5.4 The case law on ratification focuses on officers taking action on behalf of their authority without being authorised to do so. The case law does make clear that ratification is not available where the function performed by the agent would have been ultra vires the authority, where the authority has no power to delegate the function, nor when a third party's legal rights have been adversely affected by the invalid action. The London Borough of Tower Hamlets has the authority to delegate its powers under section 1 of the 2011 Act and the function being performed by TEC was within the London Borough of Tower Hamlets powers to delegate. The TEC have not advised of any issues with adverse effects on third party rights.
- 5.5 The establishment of the POPLA appeals service is considered to have been in the public interest, and in the interests of residents of this borough. It is also noted that the Government took steps to ensure that this organisation was established prior to Schedule 4 PFA coming into effect.

## **6. ONE TOWER HAMLETS CONSIDERATIONS**

- 6.1 The Council must have regard to the public sector equality duty as contained in the Equality Act 2010. The Council must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 6.2 An Equalities checklist has been completed to assess any equality implications of the decision. Whilst no specific monitoring information in respect of the relevant protected characteristics has been provided by London Councils because the service is open to all, it is not considered that there will be any negative equalities implications or that there will be a disproportionate impact on any person or groups who share a relevant protected characteristic.

## **7. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT**

- 7.1 The proposals do not effect or contribute to sustainable action for a greener environment.

## **8. RISK MANAGEMENT IMPLICATIONS**

- 8.1 The purpose of the variation and the delegation of powers are to minimise the risk of challenge by an interested member of the public and remove doubt as to the delegation of the authority.

## **9. CRIME AND DISORDER REDUCTION IMPLICATIONS**

- 9.1 The proposals do not effect or contribute to crime and disorder reduction implications.

## **10. EFFICIENCY STATEMENT**

- 10.1 The delegation of functions under section 1 Localism Act 2011 will allow for the current POPLA parking service to continue to provide an independent appeals service for motorists parking on private land to appeal parking charges that residents in the Borough of Tower Hamlets can use if needed.

### **Linked Reports, Appendices and Background Documents**

#### **Linked Report**

- NONE

#### **Appendices**

Appendix 1 - Memorandum of participation

Appendix 2 - Draft Third further variation of ALGTEC agreement.

Appendix 3 - The ALGTEC agreement

Appendix 4 - The London Councils' TEC Executive Sub Committee Report dated 11 September 2014

Appendix 5 – Equalities checklist

#### **Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012**

- None

#### **Officer contact details for documents:**

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