

Allerdale Borough Council

Overview and Scrutiny Committee – 28 August 2020

Satisfying the Legal Test for a Public Spaces Protection Order relating to Dog Fouling

The Reason for the Decision

The existing order for the regulation and power for the Council to issue fixed penalty notices for those who fail to clean up after their dog is regulated by way of a Public Space Protection Order (“PSPO”) which is due to lapse on 20 October 2020. Evidence has been gathered and a consultation exercise undertaken to establish if the legal test for making of such an order has been met; Officer are satisfied the test has been met and ask the Committee to undertake the same assessment and scrutinise the reasoning given by officers.

Summary of options considered

In line with Officers recommendation, the Committee can agree that the legal test has been met based on the evidence before the Committee today and the reasons outlined in this report; allowing for this matter to be progressed to the Executive for the making of an order.

The Committee can disagree that the legal test has been met and decide that a further consultation exercise should be undertaken; specific questions that should be put to the consultees will need to be provided and reasons given for the need to ask such questions. The Committee may also want to list additional ways in which the consultation is undertaken.

The Committee can disagree that the legal test has been met and not take any further action; it should fully detail its reasons for this as set against the evidence before it today. A further consultation exercise to seek the opinion

of the consultees on not making a PSPO may be necessary to support this decision.

Recommendations

The legal test has been met based on the evidence before the Committee today and the reasons outlined in this report. Officers also welcome any recommendations or comments the Committee has on the duration of the order, level of fine and any exemptions including those listed on the draft order which will be put before the Executive should the Committee be satisfied that the legal test has been met.

Financial / Resource Implications

There are no financial and resource implications should Members agree that the legal test has been met based on the evidence before them today. Should Members wish to open up a further consultation exercise an assessment of the cost of such will need to be undertaken based on the details of the consultation exercise proposed.

Legal / Governance Implications

Outlined at paragraphs 4.0 and 5.0 of this report.

Community Safety Implications

There are no Community Safety Implications at this stage of the decision making process.

Health and Safety and Risk Management Implications

There are no Health and Safety and Risk Management Implications at this stage of the decision making process.

Equality Duty considered / Impact

The Council's Equality Duty is

Assessment completed	considered at paragraph 4.6.
Wards Affected	All Wards
The contribution this decision would make to the Council's priorities	
Is this a Key Decision	No
Portfolio Holder	Councillor Tony Markley Portfolio Holder - Environmental Services
Lead Officer	Christopher Fleming – Legal Officer Email: christopher.fleming@alldale.gov.uk Tel: 01900 702915

Report Implications

Community Safety	Y/N	Financial	Y/N
Legal	Y/N	Partnership	Y/N
Social Inclusion	Y/N	Asset Management	Y/N
Equality Duty	Y/N	Health and Safety	Y/N
Employment (internal)	Y/N	Employment (external to the Council)	Y/N

Background Papers

Annex A: the Allerdale Borough Council the Fouling of Land by Dogs (No.2) Order 2007

Annex B: The Consultation Communications Plan and Accompanying Documents

Annex C: Reports of Dog Fouling between 2 August 2016 and 24 June 2020

Annex D: The Consultation Responses and Written Representations from the Consultation

Annex e: Draft Public Space Protection Order

1.0 Introduction

- 1.1 The existing order for the regulation and power for the Council to issue fixed penalty notices for those who fail to clean up after their dog is regulated by way of a Public Space Protection Order (hereon in referred to as a "PSPO") per Chapter 2 of Part 4 of the Anti-Social Behaviour, Crime and Policing Act 2014 (the "Act"); the Council currently relies on a saving provision under section 75 which converted the Allerdale Borough Council The Fouling of

Land by Dogs (No.2) Order 2007 to a PSPO on 20 October 2017, for a term of three years, expiring on 20 October 2020 (a copy can be found at Annex A).

- 1.2 In preparation of the existing order lapsing, on 12 August 2020 the Council commenced a consultation exercise in accordance with section 72 of the Act, the purpose of this is to understand the impact the anti-social behaviour has on the community and help the Council understand if the proposal of a new order is a proportionate response to the issue.
- 1.3 The consultation was directed at the Statutory Consultees (the Chief Officer of the Police and the Police and Crime Commissioner), the town and parish councils, the Allerdale Focus Hub, Mark Jenkinson MP, Cumbria County Council and the Borough Councillors. A copy of the consultation materials and Communications Plan and Accompanying Documents can be found at Annex B.
- 1.4 The reports of dog fouling and consultation responses have been brought before members today to consider against the legal test for making a Public Space Protection Order; officers have reviewed the evidence and feel it satisfies the legal test in accordance with the reasoning outlined in this report, is it therefore asked of members to assess the reasoning put before the Committee and consider whether they feel the legal test has been satisfied and this matter can be progressed to the Executive for the making of such an order.

2.0 Content

- 2.1 Members will find annexed the pre-consultation evidence being a record of dog fouling reports from between 2 August 2016 and 24 June 2020 (this being the earliest available date the data was available from the My Allerdale App), a total of 3,484 reports were made during this time, giving a daily rate of 2.45 reports. It is accepted by Council Officers that the reported figure does not capture the whole extent of this issue and many incidents of dog fouling go unreported. The true extent of the issue is unknown, but the current report rate indicates that this is something which is likely, at some time, to affect every resident in Allerdale and its visitors.

Also before members are the consultation responses, these are split into two categories, those that answers the questions as stated (a summary of the responses is given below) and those that provided more general representations and comments. You will note some of the comments refer to issues outside of the scope of the proposed order; these have been outlined and addressed below.

2.2 Summary of Responses

Number of responses received: 429 at 11am on 26 August 2020.

Question	Yes	No
Do you feel that dog fouling has a detrimental effect on your community and the people	394 (95.86%)	17 (4.14%)

around you?		
Do you feel that dog fouling has a direct impact on your day to day life? If yes, how?	361 (91.39%)	34 (8.61%)
Do you feel there are any instances in which dog fouling should be tolerated and should be any exemptions to such an order?	76 (18.95%)	325 (81.05%)
	It's getting worse	No, it's getting better
Have you seen a recent increase or decrease in the incidents of dog fouling in your community?	373 (93.02%)	28 (6.98%)

You will note that some of the figures do not correspond with the overall number of responses, as not all consultees answered all of the questions.

2.3 Comments outside of the scope of the Consultation

A large number of responses brought our attention to an increase in discarded poo bags, where people are picking up the faeces but not putting the bag in a bin. This issue is known to enforcement officers and is addressed as littering under (section 87 of the Environmental Protection Act 1990), as an existing offence, government guidance stipulates that the Council should rely on existing powers to address such an issue.

The consultees also raise that on a number of footpaths there are a lack of bins, this may correlate with the increase in discarded poo bags. This has been noted by the Community Services team and an exercise will be undertaken to understand where these issue is most prominent and look at increasing the bins in these areas. However, it should be noted that this is not sufficient reason for littering or failing to clean up after a dog.

There is also a perceived lack of enforcement of the existing order by the public; members should be aware that the enforcement team are made up for 4 full time officers who patrol the whole Borough daily and are constantly looking to address this issue. In accordance with government guidance the first step when someone is caught failing to clean up after their dog is to educate them, allowing them an opportunity to pick up the faeces and not simply issue a fixed penalty notice; those serial offenders or people being obstructive or refusing to clear up the waste are issued with fixed penalty notices. When a fixed penalty notice has been issued it is usually publicised on social media.

Responses included requests to increase the fine payable, it should be noted that per section 68(6) of the Act the fine is fixed to a maximum of £100 and

should members be minded to agreed that the legal test has been met, when the order is put to the Executive Committee it will be with the request that the highest available fine is considered. This request will not be solely made on public demand but the cost to the Council of cleaning the streets, the time spent by enforcement officers attempting to educate and issue notices on those who are not complying with the order and the detrimental effect it has on our communities and perception of the area by visitors.

It should also be noted that some representations were made with regards to excluding dogs or requiring them to be on a lead in certain places; such behaviour can be regulated by way of a PSPO but this order and consultation has been undertaken to address dog fouling alone. An exercise will be undertaken shortly to address areas adversely affected by other anti-social behaviour, this will require a stringent assessment of each site and a further evidence gathering exercise.

3.0 Finance/Resource Implications

- 3.1 There are no financial and resource implications should Members agree that the legal test has been met based on the evidence before them today. Should Members wish to open up a further consultation exercise an assessment of the cost of such will need to be undertaken based on the details of the consultation exercise proposed.

4.0 Legal Implications and Risks

4.1

Risk	Risk Assessment	Risk Level	Risk Management
Reputation and service delivery if members do not feel the test is met	If members still support the principle of an order but feel more evidence is needed, a further consultation exercise will need to be undertaken. Given the short deadlines currently in place, it is unlikely that such an exercise will be possible before the order expires. It should be noted that the expiry date of the existing order is known by the public and may lead to an increase in dog fouling should the order lapse and	Medium	Members are asked to detail in the decision what questions the need to be put to the consultees and the means in which to do so; this will allow for the consultation to begin promptly after the Committee meeting, and officers will strive to get this consultation complete and back to the next Overview and Scrutiny Committee meeting. The council's grounds maintenance contractor is contracted to clear the fouling irrespective of the

	potential reputational damage for residents.		amount and will continue to keep the streets clean.
Reputation and service delivery if members do not feel the test is met	If members do not support the principle of an order and decide that the behaviour is not such that warrants a PSPO the existing order will lapse and the Borough will be susceptible to an increase in fouling and public dissatisfaction with the Council.	Low	The Committee will need to detail its decision in full; such will need to be weighed up against the evidence and consultation responses. Officers are satisfied that there is strong evidence to support the order, and if members are not satisfied there is sufficient demand for an order, they should consider a further consultation exercise before making a decision not to proceed.
Reputation and service delivery if members agree that the test is met	The consultation and decision of the Committee will push the matter of dog fouling further into the focus of the public and there will potentially be a greater expectation on the matter being addressed by enforcement officers; with limited resource the team cannot address every individual report nor catch every offender.	Medium	The team will be looking at different ways in which to publicise successes and ways to effectively tackle dog fouling, including increased signage and public awareness.
Risk of Legal Challenge	As with every decision of the authority there is a risk of legal challenge	Low	If the Committee agree the test is met, Officers feel that the information before Members is enough to mitigate the risk of challenge should they feel the test is met. If the decision that the test is not met, Members are encouraged to undertake another consultation exercise to obtain and consider the information it feels it needs to consider this matter further. If a decision is made that

			the test has not been met and not to undertake another consultation, this decision will be susceptible to challenge, however this can be mitigated by Members giving detailed reasoning for their decision.
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4.2 Section 59 of the Act provides for the power of the local authority to make a PSPO if satisfied on reasonable grounds that two conditions are met. The PSPO regime is designed to 'put victims first'.

The first condition is that:

- a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or
- b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.

The second condition is that the effect or likely effect of the activities:

- a) is, or is likely to be, of a persistent or continuing nature.
- b) is, or is likely to be, unreasonable, and
- c) justifies the restriction imposed.

Section 66 of the Anti-Social Behaviour, Crime and Policing Act allows that an interested person, i.e. "an individual who lives in the restricted area or who regularly works in or visits that area" may challenge the validity of a PSPO by application to the High Court where:

- a local authority did not have power to make the order; or
- that a requirement under the legislation was not complied with.

A PSPO is an order that identifies a specific public place and:

- a) prohibits specified things being done in that place;
- b) requires specified things to be done by persons carrying on specified activities in that place, or
- c) does both of those things.

The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order:

- a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or

- b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.

A prohibition or requirement may be framed:

- a) so as to apply to all persons, or only to persons in specified categories, or to all persons except those in specified categories;
- b) so as to apply at all times, or only at specified times, or all times except those specified.

4.3 In establishing which restrictions or requirements should be included, the council should ensure that the measures are necessary to prevent the detrimental effect on those in the locality or reduce the likelihood of the detrimental effect continuing, occurring or recurring.

4.4 In July 2014, the Home office issued statutory guidance entitled “Anti-Social Behaviour, Crime and Policing Act 2014: Reform of anti-social behaviour powers – statutory guidance for frontline professionals”. The guidance states that PSPOs are intended to deal with a particular nuisance or problem in a particular area that is detrimental to the local community’s quality of life, by imposing conditions on the use of that area which apply to everyone. They are designed to ensure that the law-abiding majority can use and enjoy public spaces safe from anti-social behaviour.

4.5 The council must also have regard to the provisions of the Human Rights Act 1998 and in particular the rights of freedom of expression and assembly set out in articles 10 and 11 of the European Convention on Human Rights. Any restriction imposed must therefore be proportionate having regard to the legitimate aim of preserving the quality of life for those in the area to be covered by the order.

4.6 Equality Act 2010
The council must also have due regard to the public sector equality duty as set out in Section 149 of the Equality Act 2010, as follows:

- (1) “A public authority must, in the exercise of its functions, have due regard to the need to:
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

- (3) Having due regard to the need to advance equality of opportunity between person who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
- a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - b) take steps to meet the needs of person who share a relevant protected characteristic that are different from the needs of persons who do not share it; and
 - c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Of the protected characteristics, the only one likely to be infringed upon by an order of this nature is those with a disability per section 6 of the Equality Act 2010; where it is possible that the picking up of the faeces would be difficult or not possible for someone with a physical or mental impairment.

In order to ensure compliance with the Equality Act 2010 a number of exemptions have been established by authorities using the former dog control orders; these have been included in the draft order. These will be put before the Executive for approval and welcome any comments of the Committee today and ask that any recommendations in this respect are recorded in the decision, so they can be put to the Executive.

5.0 Satisfying the Legal Test

- 5.1 There is no prescriptive way in which to assess the evidence against the legislation, but members should feel that the evidence before it satisfies each of the requirements laid out in section 59 of the Act.

First Condition	Activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality	The questions included in the consultation were written to address this requirement; the questions of note are <i>Do you feel that dog fouling has a detrimental effect on your community and the people around you?</i> As outlined above 394 (95.86%) of the consultation responses felt that dog fouling had such a detrimental health. It is important to also consider that the responses included a number of
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		<p>additional comments which highlighted that the public seen this as being a blight on the street, impacting on how people felt about their communities and concerns about children coming in to contact with faeces and it being brought in to their houses on shoes and pram wheels.</p> <p>The second question of note is <i>Do you feel that dog fouling has a direct impact on your day to day life? If yes, how?</i> As outlined above 361 (91.39%) of the consultation responses felt that dog fouling was having a direct impact on them. Additional comments were made by consultees which again outlined concerns of the aesthetic of our towns and villages and health concerns as a result of coming in to contact with faeces.</p> <p>It is important to also recognise that the Council receives on average 2.45 daily reports of dog fouling; this is a clear sign that this is having a notable detrimental effect on the lives of residents as they continue to report this issue to the authority.</p> <p>It is the opinion of Officers that this is sufficient evidence to satisfy this requirement.</p>
First Condition	It is likely that activities will be carried on in a public place within that area and that they will have such an effect	<p>The consultation responses can again be relied upon particularly the question <i>Do you feel that dog fouling has a detrimental effect on your community and the people around you?</i> A large number of responses include details that the issue is prominent on paths, parks and public spaces.</p> <p>Again looking at the reports of dog fouling, these are reports exclusively where the fouling is in a public place, often parks, path ways and</p>

		<p>public open space.</p> <p>It is the opinion of Officers that this is sufficient evidence to satisfy this requirement.</p>
Second Condition	Is, or is likely to be, of a persistent or continuing nature	<p>The number of reports in itself of fouling shows this to be an issue which is persistent and continuing. The Council continue to receive numerous reports daily, and Enforcement Officer are regularly witnessing and enforcing against those who fail to clean up after their dog.</p> <p>The consultation responses to the question <i>Have you seen a recent increase or decrease in the incidents of dog fouling in your community?</i> Shows that 373 (93.02%) of consultation responses felt that the issue was getting worse.</p> <p>It is the opinion of Officers that this is sufficient evidence to satisfy this requirement.</p>
Second Condition	Is, or is likely to be, unreasonable	<p>The question of whether dog fouling is unreasonable is supported by all of the consultation responses and the reports. We received 429 responses to the consultation and 3,484 reports, if the behaviour was reasonable then there wouldn't have been this level of engagement which supports the making of an order.</p> <p>The consultation question <i>Do you feel there are any instances in which dog fouling should be tolerated and should be any exemptions to such an order?</i> Resulted in 325 (81.05%) of the responses show that the public feels that this behaviour could not be considered reasonable in any circumstances.</p> <p>It should also be noted that dog faeces is also a public health risk,</p>

		<p>with the potential to lead to blindness from an infection called <i>Toxocara canis</i>.</p> <p>It is the opinion of Officers that this is sufficient evidence to satisfy this requirement.</p>
Second Condition	Justifies the restriction imposed	<p>The restriction to be imposed is for the owner pick up faeces; the reports and consultation responses show that the action of not picking up the faeces is causing a detrimental effect on the communities across the Borough. The fine for non-compliance becomes a deterrent in itself and should result in this not continuing, occurring or recurring.</p> <p>The proposed order does not impede on any freedoms or rights of dog walkers, but promotes responsible behaviour which should in turn should ensure that the public are not brought in to contact with dog faeces and that the streets and public spaces are kept clean and usable by the whole community.</p> <p>It should be noted that the consultation question <i>Do you feel there are any instances in which dog fouling should be tolerated and should be any exemptions to such an order?</i> Resulted in 325 (81.05%) responses stating that there should be no exemptions, it is recognised that the public feels that this behaviour is never acceptable, however the Council's Equality Duty needs to be considered during this decision making process.</p> <p>Members will also note that a number of the responses urged for higher penalties and regulations.</p> <p>In the opinion of Officers to satisfy this requirement it must balance its</p>

		Equality Duty against the ability to issue fixed penalties to those who fail to clean up after their dog. This is achieved by including a number of exemptions to the order in line with the Equality Act.
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5.2 Members are also asked to provide comments and recommendations in relation to the duration of the PSPO in light of the above assessment and evidence before it. Per section 60 of the Act, the order cannot extend over a period of more than three years; however the evidence before it shows that this issue is ongoing and persistent and is per the results of the consultation increasing in frequency. In the opinion of Officers this is enough evidence to show that the maximum period should be utilised, however if there is a significant decrease in the anti-social behaviour then the need for the order can be assessed at a later date.

6.0 What we've Learned Procedurally

6.1 It has been raised by representatives of town and parish councils that more time could have been given to the consultation; the 14 days period provided fell within a time in which there is a reduction on the number of council meetings, (being at the height of summer where attendance has previously proven low (summer holidays, parenting responsibilities etc.)) and it proved difficult to obtain a collective response. Officers acknowledge that the consultation timing was impacted by both the order lapsing in October 2020 and the increased workload as a result of the Coronavirus pandemic. It is felt that sufficient mitigation has been provided on the basis that individual members could submit their responses online, and that the wealth of evidence held by the authority show that this anti-social behaviour is not likely to be supported by town/parish councils.

6.2 The use of technology has been very effective in this consultation exercise and allowed for it to be undertaken in a cost effective way; the online form meant that responses were fed back to the Council immediately, the introduction of a QR code and a shortened web address on the poster made access to the form much easier. We believe by making the process it easier it has encouraged people to engage with the process and submit a response.

7.0 Recommendations

7.1 The legal test has been met based on the evidence before the Committee today and the reasons outlined in this report. Officers also welcome any recommendations or comments the Committee has on the duration of the order, level of fine and any exemptions including those listed on the draft order which will be put before the Executive should the Committee be satisfied that the legal test has been met.

8.0 Conclusion

- 8.1 In line with Officers recommendation, the Committee can agree that the legal test has been met based on the evidence before it today and the reasons outlined in this report.
- 8.2 The Committee can disagree that the legal test has been met and decide that a further consultation exercise should be undertaken; specific questions that should be put to the consultees will need to be provided and reasons given for the need to ask such questions. The Committee may also want to list additional ways in which the consultation is undertaken.
- 8.3 The Committee can disagree that the legal test has been met and not take any further action; it should fully detail its reasons for this as set against the evidence before it today. A further consultation exercise to seek the opinion of the consultees on not making a PSPO may be necessary to support this decision.

Christopher Fleming
Legal Officer