

## Decision by Portfolio Holder



**Report reference: HCS-017-2020/21**

**Date of report: 02 February 2021**

**Epping Forest  
District Council**

**Portfolio: Housing and Community Services – Cllr H Whitbread**

**Author: Caroline Wiggins (Ext ) 4122 Democratic Services: J Leither**

**Subject: Delegation of Environmental Act 1995 Section 108 Powers to Corporation of London officers**

### Decision:

- 1) To delegate the powers under S.108 of the Environment Act 1995 to the Corporation of London to assist in their fly tipping investigations;
- 2) For the delegation to be for Job Titles, not named officers, and for the Corporation of London to delegate as appropriate to individuals; and
- 3) To standardise the delegation for dog and littering offences to the Job Title, and not named officers, and again for the Corporation of London to delegate as appropriate to individuals.

<b>ADVISORY NOTICE:</b> <i>A Portfolio Holder may not take a decision on a matter on which he/she has declared a Pecuniary interest. A Portfolio Holder with a non-pecuniary interest must declare that interest when exercising delegated powers.</i>	
I have read and approve/ <del>do not approve</del> (delete as appropriate) the above decision:	
Comments/further action required: None	
Signed: Cllr H Whitbread	Date: 10th February 2021
<i>Non-pecuniary interest declared by Portfolio Holder/ conflict of non-pecuniary interest declared by any other consulted Cabinet Member:</i>  None	<i>Dispensation granted by Standards Committee:</i> Yes/No or n/a  N/A
<b>Office use only:</b> Call-in period begins: 10 <sup>th</sup> February 2021	Expiry of Call-in period: 17 <sup>th</sup> February 2021

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### Reason for decision:

To delegate powers to City of London Corporation to enable them to better deal with enforcement within the Epping Forest.

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### **Options considered and rejected:**

To not delegate powers and carry on the status quo has been discounted as delegating powers to Corporation of London (CoL) officers will ensure a speedier resolution of cases and improve outcomes.

### **Background Report:**

The Community Resilience Team were approached by Criminal Investigations & Waste Management Officer from the Corporation of London (CoL) in early 2020 with a request for Epping Forest District Council (EFDC) to delegate powers under Section 108 of the Environment Act 1995. Currently CoL cannot use section 108 in their own right as they are not a Waste Collection Authority outside of the "Square Mile", nor a local authority when it comes to the environs of the Epping Forest. The CoL have been delegated powers by EFDC to issue incident tickets regarding littering and Dog Control Offences (dog fouling, etc).

Whilst the CoL currently investigate and prosecute for fly tipping and waste duty of care offences (S.33 and S.34 of the Environmental Protection Act 1990) under their own powers, the inability to use the S.108 powers can hinder their investigation into these offences, meaning that such offences may not be prosecuted.

In a recent case a CoL officer/keeper came across a fly-tip in progress whilst patrolling the forest. He confronted 2 men who proceeded to leave the scene and had the presence to take a series of photographs. The Police completed a vehicle PNC enquiry and were able to conduct a Code G interview with the owner of the van. He was not the person in the photographs.

In interview, the owner advised that he lent the vehicle to an employee and that the employee had 2 suspects in the photograph to borrow his van. The suspect failed to assist CoL in contacting the employee.

If CoL had the powers under Section 108 Environmental Act 1995 powers they would have been able to; require the vehicle keeper to give full name and contact details for the employee and also require details of insurance document for the vehicle and copies of employment contract and payment slips etc.

If the owner did not comply then prosecution under section 108 offence would commence.

By delegating these powers CoL would be able to pursue investigation further.

### **Resource Implications:**

There are no resource implications

### **Legal and Governance Implications:**

Mallard Consultancy (David Armstrong) have provided legal advice regarding the ability to delegate the powers to the CoL. Mallard Consultancy is a network for Local Authorities, which provides training and legal advice, specialising in Environmental Health and Enviro-crime matters.

They see no reason why the local authority may not deem a 3<sup>rd</sup> party (in this case the CoL) suitable to use these powers. If the powers are delegated then the CoL officers would technically be doing so as agents of the local authority and, if the section 108 powers are used, then it must be done in relation to matters the local authority may wish to pursue and within the jurisdiction of that authority.

The section 108 power is a local authority power and should be used only to unearth evidence on an offence that the local authority is interested in. However, once the offence is unearthed there is no reason why the local authority should not choose to allow another agency to take the lead and prosecute any more than it would be wrong to use these powers but then determine that. e.g. the EA should prosecute. It is still being used to further the aim of the legislation and the interests of the inhabitants of the district.

Any delegation of power would only extend to the district of the delegating authority. Therefore, the CoL could not use our delegated powers in other boroughs in which they have land (eg LB Waltham Forest, Redbridge, etc) and would have to seek delegation from those accordingly. However, as a vast amount of their land is within the EF district, it was deemed good partnership work to pilot the work with us.

Whilst Officers had no major concerns in principle regarding the delegation, there were a number of questions which needed answering, which the CoL officers passed our concerns/questions to their chief legal Lawyer (Litigation, Prosecutions and Licensing), who came back with the following replies:

- 1) Authorisation of the role of “Forest Keeper” by EFDC rather than individual named officers. There was agreement that the Council could authorise the role of ‘Forest Keeper’ for any designated powers, rather than any individual officer, and for the CoL to keep records of those officers it designates as “Forest Keeper”.
- 2) CoL to bring prosecutions on behalf of EFDC as delegated officers. CoL will bring any prosecutions themselves to avoid any risks to the council. This is already standard practice in respect of illegal street trading which they do on behalf of London boroughs. Under this scenario, any costs would be against the CoL with current arrangements.
- 3) A Memorandum of understanding (MOU)/working protocol will be developed to ensure that any enforcement action is correct and proportionate and provide an indemnity to the Council. This is particularly important due to the wide-ranging requirements of the S.108 offences, and the potential pitfalls of the use of the legislation.

Within the MOU would be a process of monitoring and evaluation on how the powers are used and to what successes the CoL achieve with the delegation.

There has been a recent High Court decision against Chelmsford CC (Walker v Chelmsford CC, March 2020) where the powers under S108 (4)(j) were deemed to be limited. This means that one cannot ask questions and demand answers pursuant to section 108(4)(j) unless one has first entered onto their premises (even the judge making the judgement acknowledged that this was not particularly sensible, but it is simply a matter of statutory construction).

All other powers within Section 108, without entering premises, remain in place, unless that particular subsection makes clear that it is restricted to use on premises only.

Sections 108(4)(c), (k) and (l) were confirmed not to require entry onto premises. Accordingly, the Council/CoL can still require a person to assist in the investigation and this may necessarily require attendance at offices in order for that to be done. However, any interview at offices would have to be under PACE caution, rather than under the previous provisions which may have been used under S.108(4)(j), as the powers no longer require the person answers if the questioning does not take place on their premises.

This was issue was raised by the CoL with their legal team, but no mention of it was made when the response was made.

It would also be beneficial to incorporate this work with the CoL's current authorisation to issue incident tickets for littering and dog control offences (which are then processed by EFDC to issue FPNs) and authorise the role rather than a named officer, and for the CoL to ensure that they keep a record those they have authorised.

**Safer, Cleaner and Greener Implications:**

By delegating these powers to CoL there will be speedier resolution of environmental crime and enforcement action can be taken against perpetrators.

Successful prosecutions will deter future instances and will improve the experience of users of the Forest.

**Consultation Undertaken:**

CoL have been consulted.

**Background Papers:** N/A

**Impact Assessments:**

**Risk Management:**

**Equality Analysis:**

The Equality Act 2010 requires that the Public Sector Equality Duty is actively applied in decision-making. This means that the equality information provided to accompany this report is essential reading for all members involved in the consideration of this report. The equality information is provided as an Appendix to the report.

**Key Decision Reference (Y/N):** No

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