

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Executive Member for Environment and Transport
Date:	19 January 2017
Title:	Recovering from Statutory Undertakers costs incurred as a consequence of inaccurate information or poor performance
Reference:	7998
Report From:	Director of Economy, Transport and Environment

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1. Executive Summary

- 1.1. The purpose of this paper is to seek approval from the Executive Member for Environment and Transport on the approach proposed by the County Council, to recovering the cost of avoidable works incurred as a consequence of Statutory Undertakers providing inaccurate location information relating to their apparatus, or failing to complete associated diversionary work in accordance with agreed timescales.

2. Contextual information

- 2.1. Statutory Undertakers, including gas, water and electricity utility companies, install apparatus in the highway, and construction activity may require this buried apparatus to be protected or diverted. Accurately identifying the location of Statutory Undertakers' buried apparatus is essential in assessing the financial and programme implications of managing associated diversionary works, and avoiding costs that might arise through unforeseen work.
- 2.2. Identifying apparatus buried in the highway that may need to be diverted relies on the Statutory Undertakers providing accurate information on the location of their services. Unforeseen costs may occur where location information provided by Statutory Undertakers is inaccurate.
- 2.3. Once Statutory Undertakers' apparatus buried in the highway is identified, the relevant company is contracted to complete the necessary diversionary work. Additional costs may occur where this diversionary work is not undertaken in accordance with an agreed programme.

- 2.4. The key statutory provision is the New Roads and Street Works Act 1991 (“NRSWA”). Section 79 of NRSWA requires that Statutory Undertakers record the location of every item of apparatus belonging to them as soon as is reasonably practicable after:

- a) placing it in the street and altering its position;
- b) locating it in the street in the course of executing and other works, or;
- c) being informed of its location.

stating the nature of the apparatus and (if known) whether it is for the time being used.

- 2.5. While the Statutory Undertaker is required to record the location of their apparatus, their liability under section 79 of NRSWA is not strict as they can argue that they took all reasonable care to ensure its accuracy. Any dispute would need to be determined by arbitration. The burden of proof rests with the Statutory Undertaker to show they were not aware of the apparatus or its inaccurate location. The County Council would therefore not have to prove that the Statutory Undertaker was at fault as it is for the Statutory Undertaker to prove that they were not.
- 2.6. The Highways Authorities and Utilities Committee (HAUC) Code of Practice: Measures Necessary Where Apparatus is Affected by Major Works (Diversionary works) (1992), is a statutory code of practice by virtue of section 84(2) of NRWSA (“the Code”). The Code provides guidance on the responsibilities of both Statutory Undertakers and highway authorities to ‘avoid delays in programming of works and claims from the contractor’. The Code states that Statutory Undertakers should carry out steps necessary to determine the general position or nature of their apparatus at their own expense if they are not confident of the physical position in terms of line and depth.
- 2.7. In respect of recovering avoidable costs incurred as a result of a Statutory Undertaker's delay in completing diversionary work, the County Council as Highway Authority would need to show it had followed the Code. The County Council could seek compensation via arbitration where the Statutory Undertaker failed to comply with the agreement reached through the mechanism set out in the Code.
- 2.8. In order to both minimise the unforeseen construction costs arising through identifying and diverting Statutory Undertakers apparatus, and to maximise the likelihood of recovering avoidable costs incurred as a consequence of inaccurate information or poor performance, the County Council as Highway Authority and Statutory Undertakers should be following the process set out in the Code in full to demonstrate that they have fulfilled their legal obligations under NRSWA. Any dispute would need to be determined by arbitration.

- 2.9. To date, the processes followed in managing schemes have deviated from the specific provisions of the Code as they relate to contracting with individual Statutory Undertakers for diversionary work. This reduces the likely success in recovering from them costs incurred where this diversionary work has not been undertaken in accordance with the agreed programme.
- 2.10. The opportunity to recover the costs incurred as a consequence of inaccurate location information would rely on the duty (arising from NRSWA) of Statutory Undertakers to record the location of apparatus. While the Statutory Undertaker is required to record the location of their apparatus, their liability is not strict as they can argue that they took all reasonable care to ensure its accuracy.

3. Finance

- 3.1. There have been a number of major schemes on which uncharted services have had a severe impact on cost and programme. These include the A340 Aldermaston Road and the A33/A339 Ringway Roundabout, both in Basingstoke. Other schemes have also encountered difficulties arising from uncharted services, but these two schemes provide an indication of the potential financial implications of this risk.
- 3.2. The A340 Aldermaston Road dualling was a £4million scheme to widen a section of the A340 in Basingstoke from single carriageway to two lane dual carriageway, and widen and signalise two at-grade junctions. Despite appropriate investigations and liaison with statutory undertakers, an uncharted BT fibre optic cable was encountered. This cable required diversion to allow completion of the works, but the associated consultation with affected customers, along with subsequent delays by BT led to additional contract costs totalling £410,000.
- 3.3. The A33/A339 Ringway Roundabout is by comparison a relatively minor scheme to widen the north circulatory carriageway of the roundabout. In this case a 33kV high voltage cable was not located where it was mapped (in the centre of the island), but was instead underneath the area of road widening. Works are yet to be completed, but it is estimated the final cost to ensure adequate protection to the cable will be around £400,000.
- 3.4. While in both cases, additional costs like these cannot be entirely avoided, with an element of risk always existing prior to excavation, more accurate location information and tighter coordination of subsequent utility diversion works in the way set out in this report will reduce the likelihood and limit the financial implications.

4. Performance

- 4.1. Location plans for apparatus are provided by utility companies with an indication of whether their apparatus is likely to be affected by the proposal. The level of accuracy of plans used by utility companies varies greatly, but

the reliability of information becomes increasingly critical as a scheme progresses towards implementation. Statutory Undertakers will physically mark out their apparatus on the ground to assist, but the methods used to determine the location of their own plant are often rudimentary and subject to significant levels of conjecture based on the evidence found on site (chamber covers, trench scars etc.). As a result, engaging with the statutory undertakers in this way does not significantly reduce the risk of not accurately locating apparatus.

- 4.2. To improve accuracy, more invasive investigative techniques can be used e.g. slot trenching or ground penetrating radar. Neither of these techniques is guaranteed to locate equipment, and it is more often the case that they can help inform where apparatus is not. The cost of these techniques is high, but often insignificant compared to the construction prolongation costs incurred by delays to the main highway improvement works caused by the discovery of an uncharted service.
- 4.3. A revised design management procedure for highway improvement schemes has been developed to reduce the risk presented by Statutory Undertakers' apparatus buried in the highway, enabling avoidable costs of uncharted services to be minimised.
- 4.4. The revised procedure adopts the processes set out in the Code as they relate to contracting with individual statutory undertakers for diversionary work. This increases the potential to recover costs incurred where diversionary work has not been undertaken by statutory undertakers in accordance with the agreed programme

5. Recommendations

- 5.1. That the Executive Member for Environment and Transport endorses the approach set out in this report to tighten up the management of highway improvement schemes to ensure full conformity with the Highways Authorities and Utilities Committee (HAUC) Code of Practice: Measures Necessary Where Apparatus is Affected by Major Works (Diversionary works) (1992), and to keep the management process under review to adjust to changes in National guidance and best practice.
- 5.2. That the Executive Member for Environment and Transport delegates authority to the Director of Economy, Transport and Environment, in consultation with the Head of Legal Services, to pursue arbitration where avoidable costs are incurred in the future as a consequence of inaccurate information provided by a statutory undertaker or due to diversionary work not being undertaken in accordance with an agreed programme, and to approve the terms of any negotiation.

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	yes
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes
Corporate Improvement plan link number (if appropriate):	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Location

IMPACT ASSESSMENTS:

1. Equality Duty

1.1. The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- a) The need to remove or minimise disadvantages suffered by persons sharing a relevant characteristic connected to that characteristic;
- b) Take steps to meet the needs of persons sharing a relevant protected characteristic different from the needs of persons who do not share it;
- c) Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity which participation by such persons is disproportionately low.

1.2. Equalities Impact Assessment:

It is considered that the proposal will have no impact on groups with protected characteristics in so far as the scope of the proposal is limited to recovering from Statutory Undertakers costs incurred as a consequence of inaccurate information or poor performance. The works undertaken by Statutory Undertakers on individual projects may have an impact on specific groups and will be reported in the associated project appraisal.

2. Impact on Crime and Disorder:

2.1. It is not anticipated that the proposals will have any impact on Crime and Disorder.

3. Climate Change:

3.1. How does what is being proposed impact on our carbon footprint / energy consumption?

The proposal has no impact on climate change.

3.2. How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

The need to adapt to climate change and be resilient to its longer term impacts have no implications for the proposals in so far as the scope of the project is limited to recovering from Statutory Undertakers costs incurred as a consequence of inaccurate information or poor performance. There may be implications arising from individual projects requiring the diversion of Statutory Undertakers' apparatus, and these will be reported in the associated project appraisal.