

Dear Neighbours

Those of you who attended the recent Derby Road Fund Association AGM in June or have read the AGM minutes on the DRFA website will be aware that the current Committee has been undertaking a review into the lawfulness of closing and locking the pinch point. This was prompted by legal advice received by the previous committee in early 2020 that raised questions about this. This is now complete and below is a summary of the review's findings. The full report is available on the Derby Road website under Derby Road News on the home page. If anyone has any comments/questions, please email derbyroadfund@gmail.com or address letters to 29 Derby Road RG4 5HE by **18th Oct.**

To summarise the Committee position following this review:

1. Any decisions regarding the road and traffic control must firstly ensure their legality and lawfulness, and secondly have regard to ensuring the safety of all its users.
2. As DRFA is responsible for the residents' contributions as specified in Section 2 of the Constitution, any decisions must take their financial implications into account.
3. Any action or decision must be covered by insurance liability.

Further to the legal advice outlined below and in detail on the website, the Committee has concluded:

1. It is not willing to subject either itself, or any member of the DRFA, to the risk of actionable charges, with their potential legal and financial consequences.
2. It would not be responsible to proceed with locking or even closing the barrier until, or unless, there is clear and contrary legal direction in this matter, and the DRFA can be certain of insurance liability against any potential claim.
3. To inform all residents of the potential legal and financial consequences of actionable charges, which in the case of serious personal injury or damage to property resulting from a claim could potentially lead to personal unlimited legal and financial liability for all residents, unless insurance cover can be guaranteed.

SUMMARY OF THE INVESTIGATION

1. In 2018–2019 the DRF committee oversaw the installation of a pinch point in Derby Road with a lockable barrier that stops traffic passing through on days when it was in operation.
2. Committee minutes show that previous committee members were informed in 2018 that constructing a pinchpoint with the intention of locking the barrier, and potentially even with just closing it, could be considered unlawful.
3. In January 2020 the previous committee sought and received advice from Mr Thorowgood of Clifton Ingrams, solicitors, who stated that it would be unlawful to lock the barrier. He wrote:
I understand that a practice has been adopted for some time of closing a set of gates at the end of Derby Road; and ... of blocking a pinch point for a period. Neither of these expedients would be lawful. If it is a highway to obstruct it in that way is an offence, if it isn't it would still be an obstruction of the private right of way granted by the original conveyances.
On 16 March 2020 he wrote that the committee:
have no right whatever to obstruct it by shutting the gates or whatever.
4. To check the validity of these comments, several independent lawyers have been contacted, who reported as follows:

i. Judge Chris Darbyshire

I agree with the solicitor that the barrier could give rise to ‘actionable charges’* which means that someone could sue for breach of their right to pass and repass. If something is unlawful, it means that it should not be done, and that someone can sue whoever does it. An unlawful act could lead to a civil action by someone affected.

**An ‘actionable charge’ is where there has been a breach of a civil right and the offended party can bring action for compensation. In the case of the pinchpoint, this means that someone could sue for breach of their right to pass and repass.*

ii. Mark Loveday, barrister specialising in private road case law

Any substantial interference with the exercise of a right of way would generally be an actionable nuisance. Generally speaking, the traditional view is that any kind of gate (even an unlocked one) is considered an actionable interference. The case of Sisters of the Sacred Heart of Mary Ltd and others v Kingston BC [2008] All ER (D) 209 (Mar) involved a school which successfully argued that a barrier with a keypad operated lock was a substantial interference with the use of a private road by parents etc. visiting a school.

iii. Private Roads: The Legal Framework (sixth edition, 2021) by Andrew Barsby

Interfering with a right of way is a civil wrong ... namely a nuisance. A person whose land has the benefit of a right of way may take action against any person interfering with the right, whether the person is the owner of the road, or a person who also enjoys a right of way, or someone entirely unconnected with the road. (p. 58, 5-45)

Compensation can be obtained, to compensate for interference with a right of way, and the court can, if necessary, grant an injunction in order to restrain further interference. Traffic-calming measures, such as road humps, and electronically-controlled gates and other barriers, will not necessarily amount to a nuisance provided they do not interfere substantially with rights of way. In one case, however, a series of four gates was held to be an unlawful interference with a right of way.

iv. Prescriptive rights

Where there is no express grant of a right of way, i.e. no Deed creating it, and a property owner has exercised a right over the neighbour's (the ‘Association’? the Crown?) land for at least 20 years, a legitimate right of way exists, whether the neighbour agrees to it or not.

To date, therefore, all legal comment received by the current Committee states that it is unlawful to lock the barrier. It is also most probably a ‘nuisance’ to close but not lock it, especially if a person with a right of way has difficulty in opening it. As such, actionable charges could be brought against the DRFA and its members.

INSURANCES

Both the DRFA’s insurers were asked if they would indemnify the DRFA against any actionable charges or claims in relation to this issue. Both replied that the DRFA and/or its agents would not be covered and that liability would rest with the DRFA and/or individuals responsible for closing or locking the barrier.

PINCH POINT CERTIFICATE OF LAWFULNESS

The Reading Borough Council legal team have advised that the certificate of lawfulness does not override the rights of way of residents. Also, the certificate was for the installation of the two planters in the road only – ensuring the lawfulness of the operation of any barrier remains the responsibility of the DRFA.