

IN THE MATTER OF THE PLANNING
APPEAL RELATING TO VARIOUS PARTS
OF BARNET

AND IN THE MATTER OF THE HIGHWAY
ACTS

THE UNITED SYNAGOGUE
ERUV COMMITTEE

ADVICE

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ADVICE

1 GENERALLY

1.1 I am instructed to advise the United Synagogue Eruv Committee ("the Committee") in relation to highway legislation matters related to its appeal (which is to be heard at a Public Inquiry commencing on November 30th 1993) against the refusal by the London Borough of Barnet ("the Council") to grant planning permission for the establishment of an Eruv in the Barnet area of London on 2nd March 1993.

1.2 Overall, the Committee is concerned to avoid a situation in which a successful planning appeal would need to be followed by a further inquiry into highway matters. The matter in question is the erection of wires across roads in Barnet, between existing or specially erected poles.

1.3 I am specifically instructed to address the following issues:

- (1) Whether there is some overriding legal power whereby the Council could prevent the erection of the poles and wires necessary for the constitution of the Eruv, even when consent under the planning and highways legislation had been obtained.
- (2) Whether the Council would have the power to refuse to allow the erection of the poles and wires utilising its land ownership or other powers.
- (3) Whether the top spit of land vested in the Council as highway authority enables the Council to exercise powers other than wholly for highway related purposes (for example, on grounds of public amenity, visual intrusion or social considerations).
- (4) In relation to the Council's powers for the erection of the signs on lamp posts including the statutory framework covering such erections.
- (5) Whether, in relation to the powers under subparagraph (4) above, the Committee would have right of appeal against the Council's decisions.
- (6) Whether, and if so how, the Eruv wire is distinguished from existing and already established wires; and whether distinction relates only to questions of visual intrusion or to other reasons.

1.4 In order to answer these questions, I shall consider the full range of powers which exist under the highway legislation and the related case law.

2 SUMMARY CONCLUSIONS

2.1 In summary, and for the reasons given below, it is my opinion that:

- (1) Where the wires cross land which the Council purchased independently of the vesting powers (below), it can potentially control the wires in its capacity as landowner as well (see below) as in its capacity as highway authority. If such land is involved in the present case (which should be checked), such landowner consent should be sought (see paragraph 8.10 below).
- (2) In relation to other highway land (i.e. land vested in the Council as highway authority), it has no powers other than the specific statutory powers considered below by which it could control the wires (see paragraph 8.1 below).
- (3) Hence, in the absence of any extant applicable byelaws made pursuant to the Public Health Amendment Act 1890 (prior to its repeal in 1925) (as to which, see paragraph 6.1 below), the Council could only, as a matter of highway law control the proposed wires:
 - (a) by exercising its powers under section 178 of the Highway Act 1980 (consent pursuant to which appears to have been given) (see paragraph 5.1 below); and
 - (b) (arguably) by using its powers under section 69 of the Road Traffic Regulation Act 1984 to control unauthorised signs placed on land next to the highway (see paragraph 7.8 below).

- (4) Accordingly, if (as I assume it to be) the section 178 consent already given by the Council is acceptable in its terms to the Committee, then nothing more is strictly necessary in relation to land for which the Council is highway authority (but not owner of the fee simple in the full sense, as above). However, it would be prudent to check with the Council that it will not exercise its section 69 powers (as above) in relation to the wires and poles.
- (5) The Council also has the power under section 115A to 115H of the 1980 Act to permit the erection of the wires. Even though there is no requirement that such permission is sought, it may be pragmatic to raise the matter with the Council (see paragraph 4.1 below). An application in relation to such powers, would, if it related to roads for which the Secretary of State for Transport is highway authority (i.e. trunk roads), necessitate his consent, in relation to the granting of which he may decide to hold a public inquiry (see paragraph 4.12 below).
- (6) There is, in principle, no reason why the consents (etc) given by the Council above would cause a problem by setting a 'precedent'. In particular, the Council's powers to regulate authorised signs (i.e. by section 64 of the 1984 Act) are separate from its section 69 powers to control unauthorised signs.
- (7) If the wires are to cross any roads for which the Secretary of State is highway authority (i.e. trunk roads), then his consent under section 178 of the 1980 Act (as above) would be needed for such wires. Similarly, it would be the Secretary of State who exercised the section 69 power under the 1984 Act to control unauthorised signs on such highways. In relation to such matters, the Secretary of State could choose to hold a public inquiry.

- (8) In the light of the above, it is clear that the Council's powers in relation to its highways powers are limited; however, there is no way to guarantee that a separate public inquiry will not be held by the Secretary of State into highway matters.

3 **THE HIGHWAY AUTHORITY**

- 3.1 The principal material statute in the present case is the Highways Act 1980 ("the 1980 Act"), section 1 of which states:

"(1) The Minister is the highway authority for —

(a) any highway which is a trunk road;

...

...

(3) The council of a London Borough ... are ... are the highway authority for all the highways in the borough ... whether or not maintainable at the public expense, which are not highways for which under sub-section (1) above the Minister is the highway authority.

..."

- 3.2 The definition of "highway" is partially given by section 328 of the 1980 Act, as follows:

"(1) In this Act, except where the context otherwise requires, 'highway' means the whole or a part of a highway other than a ferry or waterway.

..."

- 3.3 However, the Act gives no — more specific — definition and the matter is therefore left to the common law, namely: a "way over which all members of the highway have the right to pass and repass; their use must be as of right, not on sufferance or by licence" (see The Highway Law Encyclopedia at para. 2—484). (I shall consider the extent of the highway in

relation to the highway authority's powers below.)

3.4 Section 329 of the 1980 Act provides the following material definitions:

"...

'Council' means a local authority; ...

'highway maintainable at the public expense' means a highway which by virtue of Section 36 above or any other enactment (whether contained in this Act or not) is a highway which for the purposes of this Act is a highway maintainable at the public expense; ...

'local highway authority' means a highway authority other than the Minister; ...

'the Minister' ... means as respects England, the Minister of Transport ...; ..."

3.5 The functions of the Minister of Transport were transferred to the Secretary of State for Transport by SI 1981 No. 238.

3.6 It is not clear to me from my instructions whether the highways being considered in the present case are trunk roads (i.e. highways for which the Secretary of State for Transport would be the highway authority), or not (i.e. highways for which the Council itself would be the highway authority). I shall deal with both possibilities.

4 **POWER TO CONSENT TO THE PLACING OF OBJECT OVER HIGHWAYS**

4.1 The following sections of the 1980 Act empower the Council (but not, the Secretary of State for Transport) to grant consent as follows. (I note, in passing, that it is to these sections that the Department of Transport referred in their letter to the committee dated 30 April 1993 (Document 1)).

4.2 Section 115B of the 1980 Act provides that:

"(1) Subject to subsections (4), and (5) and (7) below, the council shall have power —

...

(b) to place objects or structures on, in or over ... a highway, for the purpose —

...

(iii) of providing a service for the benefit of the public or a section of the public

(2) A council shall have power to maintain —

...

(b) any objects or structures placed on, in or over a highway under paragraph (b) of [subsection (1)].

...

(4) A council may not exercise the powers conferred by this section on, in or over a walkway unless they have first obtained walkway consent"

4.3 The Eruv wires and poles could, in my opinion, fall within the definition of "objects ... place[d] ... over a highway ... providing a service for the benefit of ... a section of the public" per section 115B. Accordingly, the Council could, in principle, erect and maintain the wires and poles themselves, should they wish to do so.

4.4 I shall assume for the purposes of this advice, that none of the wires and poles are to pass over "walkways" (which, per section 35(1) of the 1980 Act, are footpaths over private land and which, with the consent of the landowner, the highway authority has dedicated for public use). If this is not the case, then further consideration of this matter will be needed.

4.5 Section 115E of the 1980 Act empowers the Council to grant permission to other persons to do what it itself could do by virtue of section 115B, as follows:

"(1) Subject to subsections (2) to (4) below, a council may grant a person permission —

- (a) do on, in or over a highway to which this part of this Act applies anything which the Council can do on, in or over such a highway under section 115B(1) to (3) ... above;**

..."

4.6 Section 115F of the 1980 Act empowers the Council to place conditions on permissions granted under Section 115E, as follows:

"(1) Subject to subsections (2) to (4) below, the council may grant a permission under section 115E above upon such conditions as they think fit including conditions requiring the payment to the Council of such reasonable charges as they may determine.

(2) Except where the Council are the owners of the sub-soil beneath the part of the highway in relation to which the permission granted, the charges may not exceed the standard amount.

(3) In subsection (2) above, "the standard amount" means -

...

(c) ... such charges as will reimburse the council their reasonable expenses in connection with granting permission.

(4) Nothing in this section shall prejudice the right of the council to require an indemnity against any claim in respect of injury, damage or loss arising out of the grant of permission; but this subsection is not to be taken as requiring any person to indemnify a council against any claim in respect of injury, damage or loss which is attributable to the negligence of the council."

4.7 Section 115G of the 1980 Act requires notification prior to the granting of permission under Section 155E, as follows:

"(1) Subject to subsection (4) below, a council shall not —

...

(b) grant any permission under section 115E above unless they have first published a notice under this section.

(2) A council shall publish a notice under a section —

(a) by affixing it in a conspicuous position at or near the place to which the proposal relates; and

(b) by serving a copy of the notice on the owner and occupier of any premises appearing to the council to be likely to be materially affected.

(3) A notice under this section —

(a) shall give details of the proposal; and

(b) shall specify a period (being not less than 28 days after publication of the notice) during which representations regarding the proposal may be made to the council.

...

(5) Where a council has published a notice under this section, they shall not exercise the power or grant the permission to which the notice relates until they have taken into consideration all representations made to them in connection with the proposal within the period specified in the notice".

4.8 Section 115H of the 1980 Act adds a further requirement for the council to consult or obtain the consent of other authorities in relation to the powers above, as follows:

"(1) Subject to subsection (3) below, a council shall not —

...

(b) grant any permission under section 115E above in relation to a highway unless they have consulted —

(i) any authority other than themselves who are the highway authority for the highway;

...

...

(3) Subsection (1) above shall have effect in relation to highway —

(a) to which this Part of this Act applies;

...

as if the requirement to consult the highway authority were a requirement to obtain their consent to the exercise of the power or the granting of the permission.

..."

4.9 Accordingly, it is clear that the council could in principal, having undertaken the necessary consultation with third parties (and obtained the consent of the Secretary of State for Transport where trunk roads were involved), grant the committee permission (subject to conditions) to erect the poles and wires or could place the poles and wires over the highway itself.

4.10 Note, however, that the sections of the 1980 Act above, do not prohibit the placing of wires, nor make it conditional upon consent; they merely empower the Council (which, as a creature of statute itself, can only do what it is specifically empowered to do).

4.11 Moreover, the 1980 Act provides no mechanism whereby a person who seeks the Council's consent as above can appeal against the Council's refusal to consent. However, the normal

judicial review principles would apply to allow an applicant to challenge the legality of the process followed by the Council in reaching its decision (but not the merits of the decision).

4.12 In those cases where the Secretary of State for Transport's consent is required (i.e. where wires are to cross a trunk road), the Secretary of State for Transport is empowered (by Section 302 of the 1980 Act) to hold an inquiry into the matter, as follows:

"(1) Subject to subsection (2) below, the Secretary of State for Transport ... may ... cause such inquiries to be held as he may consider necessary or desirable for the purposes of his function under this Act ...

..."

4.13 Section 250 of the Local Government Act 1972 lays down the outline procedural framework to be followed at such an inquiry, the detailed framework for which is given by the Highways (Inquiries Procedures) Rules 1976 (SI 1976 No. 71). There is no specific statutory right of appeal against the Secretary of State for Transport's decision following such an inquiry. However, as above, such a decision would, in principle, be amenable to judicial review.

5 REQUIREMENT TO OBTAIN PRIOR CONSENT

5.1 In contrast to the provisions of the 1980 Act stated above, which empower the Council to grant consents, section 178 of the 1980 Act places a requirement on the Committee in relation to the erection of the poles and wires, as follows:

"(1) No person shall fix or place any overhead beam, rail, pipe, cable, wire or similar apparatus, over, along or across a highway without the consent of the highway authority

for the highway, and the highway authority may attach to their consent such reasonable terms and conditions as they think fit.

- (2) Subjection to subsection (3) below, a person aggrieved by the refusal of a consent under subsection (1) above, or by any terms or conditions attached to such a consent, may appeal to a magistrate's court.
- (3) No appeal lies under subsection (2) against any term or condition attached by the Minister to a consent given by him under this section if he declares the term or condition to be necessary for the purpose of securing the safety of persons using the highway to which the consent relates or preventing interference to the traffic on it ...

....

- (5) This section does not apply to any works or apparatus belonging to any statutory undertakers, and for this purpose the Civil Aviation Authority, the Post Office and the operator of a telecommunications code system or a driver information system are to be deemed to be statutory undertakers."

5.2 From 178(5) above, it is immediately clear why it is necessary to draw the distinction between wires put up by, for example, British Telecom, and other wires, such as those contemplated in the present case: the distinction is not in the nature of the wires; rather, 'statutory undertakers' such as British Telecom are explicitly exempted from the section 178 requirement to obtain consent.

5.3 I note from the minutes of the Council's Public Works Committee (document 2) that, by resolution of that Committee, the Council granted the Eruv Committee consent under sections 178 and 181 of the Highways Act 1980 "to erect wires over the public highway at prescribed crossing points for a period of one year from the initial granting of a licence subject to: [conditions]". Note, however, that such consents only apply in relation to highways for which the Council is highways authority, and not, therefore, to trunk roads for which the Secretary of State for Transport's section 178 consent is required.

5.4 It is not clear to me, whether the conditions subject to which the consent was granted are acceptable to the Committee. I shall assume for the purposes of this advice that they were acceptable. If they were not, then, as noted above, it is in, in principle, possible to appeal the Magistrates' Court (and, per section 317 of the 1980 Act, to further appeal to the Crown Court). In general, section 316(2) of the 1980 Act imposes a 21 day limit within which the appeal must be commenced (in which case the appeal would be out of time in the present case). However, section 315 of the 1980 Act requires that, where a power to appeal to the magistrates' court exists, notification of such power should be given by the person making the order (i.e. the highway authority in the present case) to the person seeking it; there is authority to suggest that the absence of such notification may invalidate the notice of the order: Rayner —v— Stepney Corporation [1911] 2 Ch 312. This is a matter to which further consideration should be given should it prove necessary.

5.5 It is notable, that the Council has also granted the Committee section 181 consent. Section 181 of the 1980 Act was repealed by the New Roads and Street Works Act 1991 ("the 1991 Act"), schedule 9 with effect from January 1, 1993 (SI 1992 No. 2984) and permissions given pursuant to section 181 now take effect under the 1991 Act. In any event, it may be that this a matter to which further consideration must be given, since it is not clear to me that the Committee needs section 181 consent for the wires and poles described in my instructions, since such consent allows:

"[a person] to place and leave, or retain and thereafter (in either case) to maintain, repair and reinstate, apparatus in or under the highway and to break open and have access to the highway for those purposes." [my emphasis]

5.6 In any event, as noted above, the consent granted by the Council under Section 178 of the 1980 Act does not apply to those highways for which the Secretary of State for Transport is the highways authority (i.e. trunk roads) in relation to which the Secretary of State for

Transport's own consent under section 178 would be required. In the absence of any information to the contrary, I assume that such consent has not been obtained to date. Upon an application for such consent being made, the Secretary of State for Transport (as noted at paragraph 4.12 above), has the power under section 302 of the 1980 Act to hold a public inquiry into the matter. If (per section 178(3) above) the Secretary of State for Transport were to grant consent, subject to a term or condition "necessary for the purpose of securing the safety of the highway ... or preventing interference with traffic on it", then there would be no right of appeal to the magistrates' court (although judicial review would, in principle, be available to challenge the lawfulness but not the merits of the Secretary of State for Transport's decision); if other conditions were imposed (or consent was refused altogether) by the Secretary of State for Transport, then an appeal would lie on the merits to the magistrates' court and then the Crown Court.

6 **POWERS TO MAKE BYELAWS**

6.1 Section 13 of the Public Health Amendment Act 1890 ("the 1890 Act") stated that:

"(1) An urban authority may from time to time make, alter, and repeal byelaws for prevention of danger or obstruction from posts, wires, tubes, or any other apparatus stretched or placed above, over, along, or across any street (whether before or after the adoption of this Act) for the purpose of any telegraph, telephone, lighting, railway signalling, or other purpose." [my underlining]

6.2 This provision has been repealed (and the equivalent 'modern' provision — in the Public Health Act 1925 — applies only to "wireless telegraphy or telephony" and not to "other" purposes). However, the repeal was only prospective. Hence, any byelaws made under the 1890 Act could, unless otherwise repealed, still apply. Instructing solicitors are asked to give their consideration to this matter. If (which seems most unlikely) there are applicable byelaws still in force, then I will give further consideration to the provisions of the 1890

Act, since that Act includes, for example, a right of appeal to the Crown Court (at section 7) in relation to powers exercised under the Act.

7 TRAFFIC SIGNS

7.1 The statutory provisions regulating 'traffic signs' are contained in the Road Traffic Regulation Act 1984 ("the 1984 Act") and regulations made under that Act.

7.2 Section 64 of the 1984 Act provides the general provisions as to Traffic Signs as follows:

"(1) In this Act 'traffic sign' means any object or device (whether fixed or portable) for conveying, to traffic on roads or any specified class of traffic, warnings, information, requirements, restrictions or prohibitions of any descriptions —

(a) specified by regulations made by the Ministers acting jointly ...

...

(2) Traffic signs shall be of the size, colour and type described by regulations made as mentioned in subsection (1)(a) above except where the Secretary of State authorises the erection or retention of a sign of another character; ...

(3) Regulations made under this section may be made so as to apply either generally or in such circumstances only as they be specified in the regulations

..."

7.3 The definition of "road" is given by section 142(1) of the 1984 Act as follows:

"road" means any length of highway or of any other road to which the public has access, and includes bridges over which a road passes..."

7.4 It is notable, that the 1984 Act provides no definition of "traffic". However, the definition

gives

7.5 n by section 329(1) of the 1980 Act, is as follows:

'traffic' includes pedestrians and animals"

7.6 A number of regulations have been made pursuant to section 64(1)(a) of the 1984 Act, the most important of which are the Traffic Sign Regulations and General Directions 1981 (SI 1981 No. 859). The wires and poles currently contemplated would not, in my opinion, fall within the detailed provisions of those regulations; nor am I aware that the Secretary of State has given directions pursuant to his section 64(2) powers to bring such wires and poles within section 64. Accordingly, even to the extent that the wires and poles could be said to be an "object or device ... for conveying, to traffic on roads or any specified class of traffic, warnings, information, requirements, restrictions or prohibitions of any descriptions", they would not, in my opinion, fall within the definition of a 'traffic sign' for the purposes of the 1984 Act.

7.7 Thus, questions of precedent in relation to the wires and poles on the one hand, and in relation to the exercise by the highway authority of its powers (under section 65 of the 1984 Act) to permit the erection of signs by non-statutory bodies on the other, do not arise (and, furthermore, for example, the 1984 Act makes specific provision for the erection of temporary signs by bodies such as the AA and RAC (see, for example, section 65(3A)(b)(ii))).

7.8 However, section 69 of the 1984 Act then goes on to empower the traffic authority to control (i.e. remove) signs which do not fall within section 64(1) above, as follows:

"(1) The Traffic Authority may by notice in writing require the owner or occupier of any land on which there is an object or device (whether fixed or portable) for the guidance or direction of persons using the road to remove it.

..."

- 7.9 Section 121A of the 1984 Act provides (in effect) that the Secretary of State is traffic authority for roads for which he is highway authority; and the Council is traffic authority for other roads.
- 7.10 Accordingly, if it could be argued that the wires and poles comprising the area were an "object or device ... for the guidance or directions of persons using the road" (per section 69 of the 1984 Act above) then, even where the wires and poles were placed on private land, the Council or the Secretary of State for Transport (as highway authorities) could, pursuant to Section 69, require the owner of the land on which the poles and the wires were placed to remove them.
- 7.11 If a cautious approach is to be taken, it would, in my opinion, be advisable to obtain the assurances of the Council (and, for that matter, the Secretary of State for Transport) that they will not use their section 69 powers in this case (in as far as they can give such assurances). I must stress that in giving this advice, I am being particularly cautious; it would not lie in the mouth of the Council to use its section 69 powers when it had already granted highways permission (as above). Moreover, the actions taken by the Council and/or Secretary of State for Transport pursuant to section 69 of the 1984 Act would, of course, be susceptible to judicial review; and it would, in my opinion, be arguable, that the wires and poles do not fall within section 69 in any event.
- 7.12 As to the question of whether the Council could argue that a precedent was being set in relation to traffic signs: it seems to me that this argument would be largely unsustainable.

Section 69 of the 1984 Act gives the Traffic Authority a discretion ("may") to require the owner of the occupier of land to remove a "sign". The fact that the Council did not exercise this discretion in a given case (i.e. in relation to the Eruv) would not, in any sense, bind it in relation to subsequent considerations of other signs. Furthermore, a blanket policy on behalf of the Council to exercise or, alternatively, to refuse to exercise, its powers under Section 69 of the 1984 Act could amount to an unlawful fetter on the Council's discretion.

8 **THE COUNCIL'S POWERS AS LAND OWNER**

8.1 Except where the highway authority has purchased the relevant land for use as a highway (which situation I shall consider further below), section 263(1) of the 1980 Act applies, as follows:

"... Every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway. ..."

8.2 In the present context, two questions therefore potentially arise in relation to Section 263: (i) what is the physical extent of the highway vested in the Highway Authority; and (ii) what powers do they exercise in relation to such extent. In practical terms, the two must be considered together, since what is at issue is whether the highway authority can, by virtue of the section 263 vesting, control the poles and wires.

8.3 The most explicit formulation of a rule in this respect was given (in relation to the then relevant statute and by the House of Lords) in The Mayor etc. of Tunbridge Wells —v— Baird [1896] AC 434 (in the context of the local authority's proposal to construct a public toilet underneath the highway). Lord Halsbury LC observed that:

"In giving judgment in Coverdale —v— Charlton 4 QBD 116 at 118, Lord Brenwell is reported to have said that it would be a reasonable construction of the statute to suppose, not that the soil of the freehold had been given ..., but only so much that the street should be used as a street; and then his Lordship is also quoted with the observation that a local authority would have authority to do such things as are commonly done in or under a street. 'What is commonly done in a street' may include water-pipes and gas-pipes as well as sewers, and it could not be supposed that any such powers intended to be conveyed by such language. I think what his Lordship must have meant was such things as are usually done in a street for the purpose, as he elsewhere in his judgment describes it, of maintaining it as a street, and which are incidental to the maintenance and repair of the street as a street".

8.4 Lord Herschell added, at 442:

"My Lords, it seems to me that the vesting of the street vests in your urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use".

8.5 In Wandsworth Board of Works v. United Telephone Company (1884) 8 QBD 904, (which was considered in Mayor of Tunbridge (*supra*) and which also applied Coverdale (*supra*)), the Court of Appeal was concerned with whether the highway authority was entitled, in relation to land vested in them as highway authority, to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected a great height and causing no appreciable danger to the public or to the traffic in the street. Given that factual situation, the case is of particular relevance in the present circumstances. Brett MR, at 916, observed:

"Those [in Coverdale (*supra*)] who came to the conclusion that in the Public Health Act 1895 Section 149, the word 'street' includes downward from the surface only that which is within the area of ordinary user of the piece of ground over street, must if they are consistent, hold that the same rule applies to that which is above the surface, and therefore it includes only so much of the area which is above the surface as is the area of the ordinary user of the street as a street.

.....

Now comes the question, how is that rule to be applied to the case of a wire which is affixed to the top of chimneys. No one uses a street, in the ordinary cause of using a street, by walking

along the tops of the chimneys, or by going through the air at the height of an ordinary chimney. That is not the ordinary use of the street; it is not within the area of ordinary user of a street as a street. In ordinary language, that is not in the street, it is above the street. I am of the opinion that this Act of Parliament by the use of the word 'street' does not pass any property *above or over* the street, it only passes property *in* the street. It therefore passes only that which is the ordinary space occupied by men or things, which use the street as a street. Under those circumstances, it appears to me that no property passed in that part of the air through which, or in which, this telephone wire was placed. If this telephone wire as placed had been dangerous to that which did pass, that is to the 'street' as I have interpreted it, an injunction would have been properly granted against the use of it, because it would have been a danger to the street and to the public, who had a right to use the street and the board of works, who are the legal owners of the street, and the trustees for the public of the street, would have probably interfered".

8.6 Following the decision in Wandsworth (*supra*), parliament introduced the Public Healths Act Amendment Act 1890, by section 13(1) of which, the highway authority was given powers to control 'wires, tubes and other apparatus placed above, over, along or across any street'. That provision and its successor, Section 152(1) of the Highways Act 1959, (which is, in turn, the predecessor section of Section 178 of the 1980 Act, above) was considered in New Towns Commission —v— Hemel Hempstead Corporation [1962] 3 All ER 183. In that case, the cables under consideration were incorporated into the span of a building which stretched across the highway. The court was concerned with whether Corporation — as highway authority — was required to consent to the building and/or the wires under the Highways Act (section 152(1) being potentially applicable to the wires). Wandsworth (*supra*) was considered, and it was held that the building was not a bridge and that the wires in question could not exist as separate apparatus for which separate consent could sensibly be required for Section 152. The clear implication of this decision, is that the highway authority only has power to regulate objects placed above the highway to the extent that the statute explicitly gives them such power.

8.7 Instructing solicitor has drawn my attention to observations made by Denning LJ (as he then was) in Tithe Redemption Commission —v— Runcorn Urban District Council [1954] 2 WLR 518, namely that the depth below the surface that vests in the highway authority may be said to be "the two top spits". However, in that case (which related to the potential liability of the highway authority to pay tithes for highway land) no detailed consideration was given to the extent of the land in question, since the point at issue was the nature of the legal estate held by the highway authority.

8.8 Guidance on the question of the 'two top spits' can be gained, however, from Wandsworth (*supra*) (which was considered in Tithe (*supra*)) which held that the extent of the highway vested is: 'as sufficient an interest as is necessary to protect and assert the public right to pass and re-pass'. Brett MR in Wandsworth (*supra*), at 913, described the street as comprising:

"... not a surface bit of no reasonable thickness — not a mere mathematical surface — but a surface of such thickness as a local board may require for the purpose of doing to the street that which is necessary for it and the street, and also doing those things which are commonly done in or under the street — that is what he thought it comprehended — and to that extent they had a property in it."

8.9 In the light of the above case law, it is, in my opinion, fairly clear that the highway authority (be it the Secretary of State for Transport or the Council) has no common law powers to restrict or control wires or cables placed over those highways which are vested in them by virtue of section 263 of the 1980 Act.

8.10 The major *caveat* to be placed on the above is in relation to land which the highway authority specifically purchased as the site for a highway (i.e. land which they hold independently of section 263 of the 1980 Act). In such cases, the highway authority (i.e. the Council or the Secretary of State for Transport) has the full powers of an owner of the

fee simple estate in its widest sense, save only that the authority cannot interfere with the rights of the public to use the highway or otherwise cause an obstruction (except in as far as expressly authorised so to do by statute). Such powers enable the landowner to control the airspace above their land (see, for example, Truckell —v— Stock [1957] 1 WLR 161) at a height material to the present case.

- 8.11 Accordingly, to be completely secure, the Committee would be wise to ensure that it had the consent of the appropriate highway authority in its capacity as landowner (as in paragraph 8.10 above) in such cases (if any exist). Instructing solicitors are asked to give further attention to this matter. I stress that this is a cautious approach, since, clearly, if the relevant highway authority was to grant consent under the relevant sections of the 1980 Act in its capacity as highway authority, it would not lie easily in its mouth to then refuse consent as landowner.

9 THE INQUIRY PROCEDURE

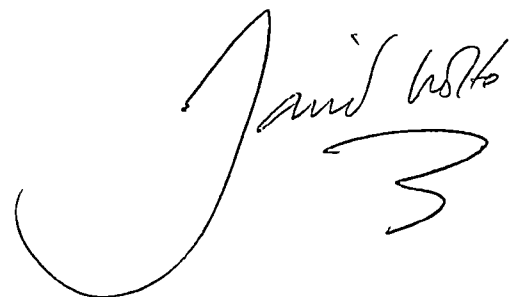
- 9.1 As will be clear from the above, there are a number of ways in which the Secretary of State for Transport's consent might be required for the erection of the wires and poles over highways under the highways legislation. As is also clear, the Secretary of State for Transport may, in such instances, convene a public inquiry into the matter. Such an inquiry would be governed by the Highways (Inquiries Procedure) Rules 1976 (SI 1976 No 721). It would be for the Secretary of State to determine whether to hold such an inquiry (since he can give his consent without doing so).

- 9.2 Moreover, (see the Committee's letter of 30 April 1993 and the Department of Transport's reply to it of 10 May 1993 at document 1), there is the possibility of an inquiry in relation

to stopping up orders (with details of which I have not been provided) under sections 247 and 253 of the Town and Country Planning Act 1990 ("the 1990 Act").

9.3 In considering whether such inquiries could be avoided, they have to be considered alongside the forthcoming planning inquiry (which, I assume, is being held by the Secretary of State for the Environment before an inspector pursuant to section 79 of the 1990 Act in relation to an appeal under section 78 of the 1990 Act against the Council's refusal of planning permission).

9.4 In general, the powers of any one Secretary of State can be exercised by another (see Halsbury's Laws, 4th Ed, Vol. 8, para 1193). In this light, there is not, in principle, any reason why the matters could not be considered at the same inquiry. However, given the timing of the November inquiry, and the clear reluctance (per document 2) on the part of the Department of Transport to take an early view on the matter, it seems most unlikely that this could happen in practice. Furthermore, there is no guaranteed way of avoiding different aspects of the matter being discussed in different inquiries. It must be the case, however, that a favourable outcome at the November inquiry would be of some weight in persuading the Secretary of State for Transport to give the necessary consents without recourse to another inquiry.

A handwritten signature in black ink, appearing to read 'David Wolfe', with a large, stylized flourish at the end.

DAVID WOLFE
27 August 1993

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