



CHIEF EXECUTIVE MAX CALLER BSc(Eng) C Eng MICE MCJWEM FRSA CDipAF

The Town Hall
The Burroughs
London NW4 4BG
Telephone: 0181-359 2000
Fax: 0181-359 2480
Doc Exch. 59318

Distribution:
All Members of Council

Max Caller

Contact:
Direct Line:

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Your reference

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THE ERUV DECISION - RISK OF SURCHARGE

A number of Members have indicated to me that they have been advised that they are at direct risk of surcharge if they vote in particular ways on the two decisions that the Council has to take in respect of the Eruv. I do not know who has given such advice. I am certainly not aware of any officer who has discussed the prospect of surcharge and indicated to Members that they are at risk. However, for the avoidance of doubt, I have set out in this letter some general principles with respect to surcharge and some specific issues with respect to Members who may be involved in determining both the Development and Protection and the Public Works decisions.

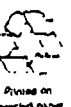
Surcharge Generally

Members can be surcharged if either of the following happens:-

- a) Following an application by the Council's external auditor, the court declares that an item of expenditure in the Council's accounts is "contrary to law", and orders that the "person responsible" for incurring or authorising it should repay it. The court may only make such an order surcharging a councillor if it is satisfied not only that they are responsible for the illegal expenditure, but also that they did not act reasonably or in the belief that the expenditure was authorised by law.

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- b) The Council's auditor certifies, subject to a right of appeal to the court, either than an item of income or expenditure has been left out of the Council's accounts, or that a loss or deficiency has occurred as a result of the "wilful misconduct" of any person. Members will not be guilty of "wilful misconduct" unless they knew that they were acting wrongfully, and persisted in the course of action or inaction, or were recklessly indifferent to the results.

If Members take formal decision in committee on a bona fides basis and in accordance with relevant legal and professional advice, they should not be surcharged. Members can, of course, take decisions which go against professional advice. Provided they are taken properly and in good faith and are within the range of decisions that a local authority could reasonably and legally take in the circumstances in exercise of its statutory powers, they will not be surcharged.

The risk of surcharge might arise if Members knowingly or recklessly took decisions which were outside the Council's statutory powers, which were wholly unreasonable, which were tainted with some improper motive, or which were reached in an improper or illegal way.

For surcharge to arise the Council must spend money or incur a loss. This can arise, though, if it takes an illegal or perverse decision which is subsequently overturned by the courts or after a planning appeal. In these cases, the expenditure would consist of any payment that the Council has to make by way of costs or damages.

A member of a committee will usually be responsible for the decisions of that committee unless he or she attends the meeting and votes against the illegal resolution. If a Member knows that the Council is due to take an illegal decision, he or she should attend the meeting and vote against it. They are also entitled to require that their votes be recorded.

I would advise Members that my duty as the Head of Paid Service, Mr Creer's duty as Monitoring Officer and the Director of Finance's duty as Chief Finance Officer might result in us formally advising Members in the appropriate forum if we believed such an activity were to take place.

In the specific case, there are two decisions for Members to take. One is about highways issues and will be taken by the Public Works Committee and the other is about planning issues which will be taken by the Development and Protection Committee.

Highways Issues

The Council is highway authority for borough roads but not for trunk roads. It has received a request for permission to install poles in some of these highways and to hang wires over them. Although it acts as agent for the Secretary of State for Transport for trunk roads, we believe that the Department will deal with Eruv consents in trunk road themselves.

The Council has the necessary statutory powers to grant consent under various elements of legislation. Obviously it must approach the exercise of this statutory discretion in a proper way. It must take into account all the relevant highways considerations, and it must not take into account irrelevant considerations.

I am advised that it would be lawful for the Council either to grant consent or to refuse it. Members will of course appreciate that the previous history is a relevant consideration. The Public Works Committee has previously decided in principle that consents can be given, subject to conditions, officers are satisfied that Council can consider the matter under the Sections of Highways legislation which it is proposing to use and this is the advice that the Public Works Committee will receive which has been confirmed by leading counsel. In the circumstance there should be no risk to councillors if they deal with these applications on their merits.

Planning

Planning permission has been granted for poles and wires on appeal by the Secretary of State for the Environment. It is still valid. The Council now has received a new planning application for the scheme which changes some of the locations. The Council has to deal with this new planning application on its planning merits. Members will appreciate that the merits and considerations were thoroughly dealt with in previous committee reports and at the Public Inquiry and these are all relevant considerations for Members sitting on the Development and Protection Committee to take into account when determining their position. They also have to take into account the existence of the permission granted on appeal. They will have to consider whether or not there has been a change in the circumstances and whether or not there are differences between this application and the previous applications which are significant in planning terms.

There is a special issue with planning applications. If the Council refuses permission, and the refusal is subject to an appeal, the applicant can ask the Inspector or the Secretary of State to award the costs of the appeal against the Council. Costs can be awarded if the Council behaves unreasonably. The relevant circular sets out a list of criteria which includes the unreasonable refusal of planning permission. It is in this area that Members need to be careful that they apply proper planning criteria to the decision that they have to take, that they do not

deliberately or recklessly allow a decision to be taken which will lead to an award of costs. They should be careful both in the debate and in their decision that they use proper planning criteria and do not deal with extraneous matters. Particularly, they need to be aware of the issues that have already been dealt with and concluded on by the Secretary of State.

Members in this authority have a tradition of acting sensibly in these matters. It would be inadvisable for Members to reject the Eruv planning applications in circumstances which were for the brief reasons I have stated above extremely likely to lead to an award of costs. In these circumstances there is a possibility that the external auditor and the court would regard the behaviour as so capricious as to amount to wilful misconduct, however, if there were valid planning reasons advanced for the decision, which took into account the Secretary of State's decision, even if these were not upheld on appeal, I think that Members would be safe from surcharge.

In dealing with the planning application Members should have regard to the legal advice that will be given to them at the meeting. However, the most important thing for Members to appreciate is that they must turn up and vote if they are to completely absolve themselves from any risk of surcharge. Absence will not absolve a Member from surcharge.

If you have any queries on the content of this letter please do not hesitate to contact either myself, or Mr Creer personally. In these circumstances I do not consider it appropriate to obtain advice from another officer of the Council.


Max Caller
CHIEF EXECUTIVE

c.c. Deputy Director of Environmental Services
 Controller of Legal Services