

APPENDIX B

**JOINT LETTERS OF 11TH NOVEMBER 1992 AND 4TH FEBRUARY 1993 FROM
34 LOCAL RESIDENTS RAISING LEGAL AND OTHER ISSUES**

Wed, Nov 11, 1992

PLANNING GROUP	
REC'D	18 NOV 1992
REF'D TO	
112	
COPY TO.....	

From the persons whose names and addresses are ~~set out~~ below.

To Councillors
and to such others as it may concern.

Dear Councillor , The Eruv Planning Application

We write further to our letter of the 2nd. October in which we set out our detailed objections, which derived from a study of the proposal and application, and, an attempted summation of the public objections that have come to light, as a result of the statutory advertisement of the planning application.

The view has been expressed by Eruv supporters and others, that the law dictates strict planning guidelines as to what are material planning considerations and that some of our objections do not fall within those guidelines.

There are in fact no strict planning guidelines which the law dictates in any case (except in the special case of Conservation Areas to which we refer below) and, because of the unprecedented nature of the Eruv application, there is no relevant guidance other than the statute and decided cases.

We quote throughout, unless otherwise indicated, from Brand & Williams Planning Law

"In reaching a decision under Section 29 of Town & C.P. Act 1971 (now TPA 1990) the planning authority has to have regard to any development Plan and to any material considerations .

The essence of the system as enacted is that the local authority has a **wide ranging discretion as to what matters are to be taken into consideration in deciding each application.**

The main area of concern is over what constitutes material considerations and the amount of litigation on this point testifies to it's complexity"

There simply are no easy general answers on this point., although, the

courts have set out principles in previous decided cases which do have a bearing on the Eruv proposal.

"The creation of a planning precedent is a material consideration" Collis Radio Ltd. v Secretary of State for Environment 1975 73 LGR."

. Every single pole, cable post sign or permanent structure whatever, on the streets now, is justified if at all, by the calculation that by purpose location, and design, it is for the benefit of the public at large. The Eruv precedent is, that public highways are to be used to install visible permanent structures, for the benefit of a separate sect, organization or community.

The whole of our letter was an examination of the nature and likely consequences of establishing this precedent .

In *Stringer v Min. of Housing* (1970) 1 WLR 1281 it was decided that **"the effect on private interests is a material consideration"**

We considered the private interests of individuals who have to face the permanent prospect of having (within one foot of the front boundary wall of their house) a pole supported by wires/cables, in aid not of a public service (light telephone etc.), but rather in aid of a sectional interest, with which they may not identify.

Further, there are also many immediately adjoining houses, one of which, is planned as being within the Eruv and one of which is without. The one within may attract a higher price, from some applicants, and this could even complicate banding for council tax.

The relative price of houses over the borough and the tendency to which the Eruv would give rise are likely to affect the private interests of all house owners. We raised these questions under headings **Demographic Changes and Creation of a Ghetto.**

"The materiality to be considered is a materiality from a planning point of view and in particular the question of amenity is to be considered. Devonshire County Council v Allen Caravans (Estates) Ltd 1962 14 P & C R 440 "

The purpose of the Eruv is to convert the entire area within the boundary into one, notional jointly owned domain' This quotation is from the proposal. If this conversion were notional only, there would be no difficulty. Unfortunately for Barnets freeholders and road users

the conversion although primarily symbolic is effected by real posts and wires upon this most public of amenities, the highway. The amenity to be considered therefor is the public highway itself.

The consideration involves questions of appearance and location and we have dealt with these points, but in addition, when you consider questions of 'appropriateness' in this case, you are driven to ask whether visual religious symbols having a particular meaning for some, are 'appropriate' to the public highway, which historically contains only installations of a strictly functional nature, designed and located to provide a public service.

This symbol means different things to different people: such is the nature of this kind of symbol.

To A the Eruv symbolizes 'Sabbath limits', to B 'a desecration of the Sabbath' (a group of orthodox Rabbis have so proclaimed), to C 'a communal dividing line' to E 'the walls and gates of the ghetto', to F 'non functional street clutter' To G 'a focus for antisemitism' and so on.

This is the human factor to which Lord Scarman referred in the classic statement in this field in the case of Westminster City Council v Great Portland Estates Plc. (1985)

He said that the test of what was a material consideration, was whether it served a planning purpose and that a planning purpose was one which related to the use of the land. But he added:

'Personal circumstances....personal hardship....value to the character of the community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course indirectly as the background to the consideration of the character of land use. It can however and sometimes should be given direct effect as an exceptional or special circumstance.....'

(Heap on Planning 1991 Edition)

We dealt with these considerations extensively in the text and under the general heading of 'Emblem of Disharmony'.

Such a symbol is primarily 'inappropriate' to the public highway across the borough. It is also 'inappropriate' in varying degrees to the land neighbouring the highway. It is the effect of the Eruv on people as users of the public highway as well as its effect on neighbouring 'residents' that is the material planning consideration.

There are no religious or ideological objections (apart from the objections of the orthodox Rabbis above referred to, which are only

material as a further example of how divisive these proposals are). There are no cultural objections. There are only 'planning objections' some of which have primary regard to 'the human factor'.

We quote these various cases merely to indicate to you the broad range of materiality according to the law, but whether you take a broad view or a narrow view there are persuasive grounds which must inevitably direct a refusal of this application.

Take one example only. The installations affect, we are informed' several conservation areas.

. Here the law does dictate strictly and clearly:

" In relation to conservation areas the law imposes a significant restraint on the discretion of local planning authorities...by sec 277(8) of the T&CPA 1971(now 1991).

This provision requires that in relation to any application for development attention must be paid to the desirability of preserving or enhancing the character and appearance of a conservation area in the exercise of powers conferred by the T&CPA

In *Steinberg v The Secretary of State For the Environment* (1989)JPL it was held that the section should be interpreted in a positive manner and that the duty was not discharged by an inspector who considers only whether a proposal would 'harm' the character or appearance of a conservation area "

It is quite clear ,whatever your views as to the harm done, that these poles and wires etc. will not enhance the character and appearance of a conservation area . If you proceed strictly as directed by the law therefore, you have no alternative but to refuse the application.

We shall be very pleased to hear from you further , should you wish to query anything in this letter or otherwise

This letter is sent by the following in alphabetical order:

Mr. Jack & Dr. Dora Black of 9 Park Ave. NW11
Gillian Cohen 55 Lincoln Rd. N2 9 DJ
Freddie & Tessa Cohn 53 Gainsborough Road London N.12
Mr. & Mrs Comberti 11 Reynolds Close NW11
Raymond & Sandra Greenberg 1 Foscote Rd. Hendon London NW4
Mrs Jackie Edelman 10 Mossborough Close Moss Hall Grove N12 8PF
Mr & Mrs Hodgson 1 Wildwood Terrace NW3
Philip & June Kossoff 16 Park Drive N.W.11 (for reply)
Mrs Helen Kraemer 8 Basing Hill NW11
Paul & Jeanette Kriwaczek 12 Wessex Gardens NW11
Alfred & Rema Lester 5 Reynolds Close NW11
Lavender MacMillan 12 Park Ave. NW11
Bill & Miriam Mazower 16 Wessex Gardens NW11
Mr & Mrs D Pevsner 5 Wildwood Grove NW3
Mr & Mrs T Pevsner 13 Wildwood Grove NW3
Paul & Gwen Shweitzer 20 Park Drive London NW11
Sandra Shavik 4 Princes Close Edgware HA8 7QB
Mr Ian Sheratte and Mrs. Offra Sheratte 2 Beech Vale Close N12
John & Tina Spencer 20a The Park London NW11
Sheila Sullivan 69 North End Road NW11

From the persons whose names and addresses are set out below

3.6A

To Councillors:

John Tiplady, Don Goodman, Jim Anani ,
Gillian Bull, Eddie Bunn, Anita Campbell, Jack Cohen , Melvin Cohen Stan Cross ,
Julian D. Czarny , Frank Davis, Jane Ellison, Eva Greenspan Victor Lyon, Mrs. Mary
Phillips Mrs Sheila Scott Agnes Slocombe Alan Turner R.J Vis Dr. Williams Malcolm
Lester Archie Smith Doreen Neal Tim Sims Leslie Foster John Hedge Monroe Palmer
Brian Stone Mike Freer Helena Hart Roy Schutz Veronica Soskin and to such others as it
may concern:.

Feb 4th. 1993

Dear Councillor, Eruv planning application: London Borough of Barnet

Since we wrote to you on the 2nd Oct 92 and of the 11th November 92. The Dept. of Transport has written to the Eruv committee on the 8th January and to the Barnet Borough Council on the 12th. Jan 1993 giving two separate reasons why the Dept. is not empowered to consider the application of the Eruv committee for consent under Section 178 of the Highways Act 1980. thereby ruling out the Eruv proposal. We refer you to these letters (copies enclosed) and to the enclosed detailed consideration of them, which also provides legal references .

1) In short, the Dept. of Transport has not given and cannot give any of the consents required. It is not empowered to do so because the scheme requires posts on the public Highway, which are unlawful obstructions of the Highway, and because in addition, the proposed structures are likely to endanger persons

2) In spite of the public importance of this matter involving the positioning of posts and wires on dedicated highways all over the borough. and in spite of an updated proposal having been delivered. persons whose private interests appear to be directly affected by this proposal have not been given information to enable them to assess how it will affect their lives and property and are unable to formulate their objections. This arises, because of a decision by the City Corporation which has unequivocally refused its consent for the original proposal, which was to use the fence between Golders Hill Park and Sandy Lane (as shown in the original proposal and the plan which accompanied it), as part of the Southern boundary . The amended application does show a new 'gate' by Hampstead Way across North End Road but how the boundary gets from that gate to the next is not shown in the new proposal as there is no plan provided of the amended boundary

We have made several requests to the Council for production of a copy of the amended plan and other documents which we are entitled to inspect under The Local Government [Access to Information] Act 1985 . This has not been supplied to us. The copy letters from the Dept. of Transport, which came from another source were similarly requested, and so was all correspondence between Barnet and the Dept. of Transport and all correspondence and papers relating to legal advice, technical advice as to safety, or otherwise. Nothing has been provided.

This means, that if permission is granted, and the principle is so established, the boundaries and posts can be set anywhere in the area. Any necessary subsequent planning consent will, in effect, rubber stamp the principle so established. In the absence of such vital detail it would not accord with natural justice, if the committee, gave its consent in these circumstances.

3) In our letter to you of the 2nd. Oct 92 we set out our initial objections to the Eruv planning application, we refer you to it in detail and we shortly summarise as follows:

"Just a few posts and wires" to the Eruv Committee seems to mean many different things to the users of the public highway, variously, visual blight; communal disruption; Sabbath limits; a desecration of the Sabbath (Orthodox Rabbis); personal distress; a convenience for burglars(shinning up the posts over adjoining walls and fences);, a territorial claim to make private freehold property "communal "; reminders of concentration camps and ghettos; communal divisions; unlawful interference with the environment of conservation areas; and threats to security in homes (vigilantes). Objects of this kind, having such multivalent significance to the public, are not appropriate to the public highway. In addition, the legal definition of a public highway which has stood from time immemorial specifically excludes dedication of any part of the Highway to a section of the public and appears directly relevant in this respect.

4) We refer you also to our letter to you of the 11th November 92, in which we set out, with supporting legal authority, the reasons why all of our objections were material considerations in relation to the planning application. We referred you also, to the limited discretion of the local planning authorities in the special case of Conservation Areas, in that, applications affecting such areas can only be approved, if they enhance the character and appearance of a Conservation Area. We referred you further to the fact, that numerous Conservation Areas are included in the Eruv and that it is not possible to contend, that the Eruv would enhance the character and appearance of these areas.

5) If this permission is granted the Council will enter the legal no mans land of criminal offences, and possible claims for breach of public duty of numerous sorts. According to the Dept. of Transport, the Eruv proposal cannot proceed even if planning consent is granted, unless the structures are firstly, made safe, and secondly, unless an order from the relevant Secretary of State is obtained, to stop up the Highway in sixty places across the borough. This would involve a local public enquiry, and, in the unlikely event of it being granted, there is the possibility of compensation for objectors claiming for injurious affection. All this will have a considerable impact on public funds.

The planning committee has a simple task. Following the Corporation of the City of London, and now with the benefit of authoritative guidance from the Ministry of Transport, it is clear that public concern, public expenditure and public harm (including harm to the proponents) arises, and will continue, from the failure by Barnet, which the Committee can now rectify, to use the single appropriate word in the English language, - No

This letter is sent by the following:

Mr. Jack & Dr. Dora Black of 9 Park Ave. NW11
Gillian Cohen 55 Lincoln Rd. N2 9 DJ
Freddie & Tessa Cohn 53 Gainsborough Road London N.12
Mr. & Mrs Comberti 11 Reynolds Close NW11
Raymond & Sandra Greenberg 1 Foscote Rd. Hendon London NW4
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Bill & Miriam Mazower 16 Wessex Gardens NW11
Mr & Mrs D Pevsner 5 Wildwood Grove NW3
Mr & Mrs T Pevsner 13 Wildwood Grove NW3
Paul & Gwen Schweitzer 20 Park Drive London NW11
Sandra Shavik 4 Princes Close Edgware HA8 7QB
District Judge Ian Sheratte and Mrs. Offra Sheratte 2 Beech Vale Close N12
John & Tina Spencer 20a The Park London NW11
Sheila Sullivan 69 North End Road NW11

Eruv proposal: London Borough of Barnet

1.1

Under Section 178 of the Highways Act 1980 it is an offence to place any cable or wire over or along or across the Highway (which always includes the footpath), without the consent of the Highway Authority which may be given conditionally. The relevant Highway Authority for the Eruv means Barnet, for twenty five of the local roads, and the Dept. of Transport for the five Trunk roads involved in the "gate" structures. Under the authority of such consent a person may enter the highway and install such overhead structures without being in breach of the criminal law. The Eruv committee with the support of Barnet has applied to the Dept. of Transport for consent under this section.

The Dept. of Transport. wrote to the Eruv committee on the 8th January, and to the Barnet Borough Council on the 12th. Jan 1993(as per copies), giving two separate reasons why the Dept is not empowered to consider the application. thereby ruling out the Eruv proposal.

There are two reasons given by the Dept:

1) The 'gate' structures proposed are likely to be dangerous to persons
The Depts' letter of the 8th Jan states 'My purpose in writing to you is to remind you that there is no nexus between the Planning Act 1990 and the Highways Act 1980. It is an offence under section 162 of the Highways Act to place any rope or wire across a highway so as to be likely to endanger persons Highways Act 1980'

Whether any planning permission is obtained or not Sec. 162 of the Highways Act creates a separate criminal offence which the Dept has no power to consent to. It provides

"that a person who for any purpose places any rope . wire or other apparatus across the Highway (the term highway includes the footpath), in such a manner as is likely to cause danger to persons is unless he proves that he has taken all necessary means to give adequate warning of the danger guilty of an offence and liable to a fine not exceeding etc" Halsburys Laws of England Vol 21 Para 471. Secondly, even more significantly the letter of the 8th Jan. continues

2) " I am advised that there is no power under Highways legislation to permit posts to be erected for the purpose of the proposed Eruv on land which retains Highway status"

The telegraph poles electricity cables gas installations and the provision for the disabled - all these structures are there because Parliament has decided by separate and specific statute that it is in the public interest for them to be there. No authority has the power to licence such obstruction except under specific powers for specific purposes specifically delegated by Act of Parliament.

This situation results from the definition of a highway at common law (the term highway includes the footpath). The definition is:

" A Highway is a way over which there exists a public right of passage, that is to say a right for all of her Majestys' subjects at all seasons of the year without let or hindrance. A highway may be dedicated subject to certain restrictions or obstructions if they are open to the public generally footpaths bridleways and driftways are highways. It is however an essential characteristic of a highway however that every member of the public should have the right to use it for an appropriate class of traffic but there can be no dedication to a limited section of the Public such as the inhabitants of a parish." Halsburys Laws of England Vol. 21 Page11 para 1.

The Dept. makes two suggestions in relation to amending the proposed Eruv scheme:

A) **If the wires presently attached to posts were attached to buildings on either side of the road and the structures were redesigned so that they they did not endanger persons,** the Dept. would then be empowered to consider the application of the Eruv committee for the consent applied for under Sec. 178 of the Highways Act

B) **If the Eruv committee is unable to accept this, and can put forward amended proposals which are not likely to endanger persons and if they can obtain planning permission for these amended proposals, they can consider applying to the Secretary of State, who has the power (subject to objections and a local public enquiry) under Section 247 of the Planning Act 1990 to publish an Order to stop up or divert the highway (the term highway always includes the footpath) if he is satisfied that it is necessary to do so to enable development in connection with a planning application which has been granted . This power was designed to be used for example, to divert a road where planning permission is granted for a new road to enter it .(The effect of such an order by the Secretary of State, if made, would be to empower the Dept. to consider the application of the Eruv committee for the licence under Sec. 178 of the Highways Act in respect of amended Eruv proposals, provided they were not then likely to endanger persons.).**It should be noted that where any restrictive use of the highway results from an order of the Secretary of State under this section, compensation for consequential injurious affection may be claimed by any person who has lawful access to the highway i.e. any Barnet road user or property owner who is suffering injurious affection from the Eruv (there seem to be quite a few of them)
No planning or other proceedings before the Barnet Borough Council can change the proposed Eruv scheme into a lawful one. In pursuing this scheme before the Planning Committee, in the face of the Dept's ruling, the Eruv committee are inviting the planning committee to give the scheme a spurious veil of legality.

Barnet is the Highway Authority for the twenty- five or so non Trunk Roads included

in the Eruv proposal. Its position in this capacity is exactly the same as that of the Dept, namely that it is not empowered to grant a licence under sec.178 of the Highways Act for the same two reasons: 1) The 'gate' structures proposed are likely to be dangerous to persons and would therefore involve a separate criminal offence under Sec 162 of the Highways Act 1980. 2) There is no power under Highways legislation to permit posts to be erected for the purpose of the proposed Eruv on land which retains Highway status.

The Barnet Borough Council was therefore acting beyond its powers, in purporting, through its Public Works Committee on the 30th. June 92 to grant conditional consent under Section 178 of the Highways Act 1980 to the Eruv Committee, to enable it to place any cables or wire over or along or across the Highway and to enable it, to enter the highway for the purpose of installing Eruv structures. (The minutes show that the committee based its decision on a document headed "Background Information /Officers Comments" which appears to be taken almost verbatim from the Proposal document in support of the Planning Application by the Eruv Committee which is misleading and inaccurate). It is difficult to imagine why the committee was not advised by the officials concerned of these fundamental legal and safety issues).

More importantly for all concerned, as a result of that decision, Barnet was, and is now, also acting in breach of its duties as a highway authority.

"The highway authority has a duty to protect and assert the rights of the public to the use and enjoyment of any highway for which it is the authority..... It is the duty of a council which is a highway authority to prevent as far as possible the stopping up or obstruction of the highway for which it is the highway authority" Halsburys Laws of England Vol. 21 Page 317 para.437

In this case Barnet (which like other Highway authorities has entrusted to it only the top two spits of the roadway and as much of the area above, as is necessary to maintain the highway), strictly for the purpose of protecting the right of the public, has failed in its duties to the public, in purporting to consent to structures which are likely to endanger persons and are an unlawful obstruction of the highway.

It is doubtful, whether in the circumstances, Barnet is empowered to deal with a planning application. As it stands, on the authority of the Dept. of Transport, the application contemplates unlawful obstructions and criminal constructions across the borough, and even more importantly structures which if actually constructed would leave Barnet and the Eruv committee at risk of action by adjoining owners (and other road users) claiming injunction and damages for breach of duty, public nuisance and private nuisance/trespass, for exceeding the proper use of the highway. In these circumstances, as entirely unanswered planning objections have already been set out in letters dated the 2nd October and 11th. November and have been widely referred to in the press and by objectors, I need refer to them, in summary only:

'Just a few posts and wires" to the Eruv Committee seems mean different things to the users of the public highway, variously, visual blight; communal disruption; Sabbath limits; a desecration of the Sabbath (Orthodox Rabbis); personal distress; a convenience for burglars (shinning up the posts over adjoining walls and fences); a territorial claim to make private freehold property "communal"; reminders of concentration camps and ghettos; communal divisions; unlawful interference with the environment of conservation areas; and threats to security in homes (vigilantes); as well as involving the detailed interstices of personal finances. **Objects of this kind, having such multivalent significance to the public, are not appropriate to the public highway.**

The Eruv Committee now know that the scheme is an unlawful one as it stands. All public service Statutory Undertakers - Gas Companies, Electricity Companies, Telegraph Companies, Post Office, required specific statutory authority before they could place obstructions on the Highway. Specific statutory provision has also been made obligating Highway authorities to make provision for the disabled and blind - Highways Act 1980 (Sec 175A). Parliament is the authority, capable of changing the Law of England to allow obstructions of the Highway in the interests of a section of the public. If an Eruv is required, the first step for the Eruv Committee is a specific enabling statutory authority from Parliament.

It seems unfortunate, that the committed local interests involved were not informed at an early stage that, the law of the highway embodies fundamental English ideas about the liberty of the subject. It speaks of **"the rights of the public" "all of Her Majestys subjects" "the public generally" "every member of the public"** and specifically that **"there can be no dedication of the highway to a limited section of the Public"** The Rabbinic legal concepts of the Eruv are out of keeping with the laws of England, which in the case of the basic law affecting the public highway, derive from time immemorial. As a matter of law, those members of the public, who have sensed that their legal and democratic rights are threatened, by the pursuit of this scheme are right.

A planning committee, having before it an application for consent to acts which if carried out would be unlawful, has a simple task. Following the Corporation of the City of London, and now with the benefit of authoritative guidance from the Ministry of Transport, it is clear that public concern, public expenditure and public harm (including harm to the proponents) arises, and will continue, from the failure by Barnet which the Committee can now rectify, to use the single appropriate word in the English language, - No

Feb 3rd. 1993