

RE: REGULATION OF STREET WORKS IN STRATEGIC ROAD NETWORK

OPINION

Introduction

1. I am asked to advise National Highways Limited (“NH”) upon issues arising over the application of the statutory provisions regulating street works contained in Part III of the New Roads and Street Works Act 1991 (“NRSWA”) to developments involving infrastructure being placed in or under the Strategic Road Network (“SRN”) in the context of applications for a Development Consent Order (“DCO”).

NRSWA 1991

2. Part III of NRSWA reformed previous legislation contained in the Public Utilities Street Works Act 1950 which governed the exercise of the various public utilities’ powers to undertake street works. It sought to simplify and reform procedures governing matters such as the notification of street works, their supervision and reinstatement, and to appropriately balance the interests of the rights of highway users, the interests of the highway authority with responsibility to maintain the highway and the free flow of traffic over it, the rights of consumers of services supplied under or over the highway, and the interests of undertakers with apparatus in the highway. It is the regulation of the relations between those various persons and bodies which NRSWA seeks to achieve by conferring controls on the street authority in respect of all street works.
3. That fundamental purpose of NRSWA is important to recognise. It is not concerned with granting rights or interests in land to enable the placing of apparatus in the highway; such rights are conferred by other legislation or by agreement or otherwise. Instead, it is concerned with regulating the execution of physical works in the highway.

It brings all street works, other than roadworks carried out by or on behalf of the highway authority, under the same area of control. Thus, persons or bodies who may be granted licenses by the street authority to undertake such street works are required to follow the same procedures as undertakers acting under statutory powers.

Street Works

4. Section 48 of NRSWA provides the definition of a “street”, “street works” and “undertaker” for the purposes of Part III. It states as follows:

“(1) In this Part a “street” means the whole or any part of any of the following, irrespective of whether it is a thoroughfare—

(a) any highway, road, lane, footway, alley or passage,

(b) any square or court, and

(c) any land laid out as a way whether it is for the time being formed as a way or not.

Where a street passes over a bridge or through a tunnel, references in this Part to the street include that bridge or tunnel.

...

(3) In this Part “street works” means works of any of the following kinds (other than works for road purposes) executed in a street in pursuance of a statutory right or a street works licence—

(a) placing apparatus, or

(b) inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, changing the position of apparatus or removing it,

or works required for or incidental to any such works (including, in particular, breaking up or opening the street, or any sewer, drain or tunnel under it, or tunnelling or boring under the street).

...

(4) In this Part “undertaker” in relation to street works means the person by whom the relevant statutory right is exercisable (in the capacity in which it is exercisable by him) or the licensee under the relevant street works licence, as the case may be.

(5) References in this Part to the undertaker in relation to apparatus in a street are to the person entitled, by virtue of a statutory right or a street works licence, to carry out in relation to the apparatus such works as are mentioned in subsection

(3); and references to an undertaker having apparatus in the street, or to the undertaker to whom apparatus belongs, shall be construed accordingly.”

5. Thus, a “street” is very widely defined and includes “any highway”.
6. The definition of “street works” is then of particular note. It includes any works executed in any highway pursuant to a statutory right or street works licence involving placing apparatus in the highway and any incidental works. Significantly, the reference to works “*executed in a street*” must be interpreted in accordance with the definitions provision for the purposes of Part III, namely s.105(1), which provides as follows:

*““in,” in a context referring to works, apparatus or other property in a street or other place includes a reference to works, apparatus or other property **under**, over, across, along or upon it”* (Emphasis added).

That is consistent with the definition of “street works” including “*tunnelling or boring under the street*”. Hence, it matters not whether the works in question are physically in, over, on or under the highway; they are still “street works” governed by Part III of NRSWA.
7. It therefore follows, for example, that works involving trenchless technology which would not involve the actual breaking up of the surface of a highway in order to place infrastructure under the highway would still amount to “street works” within the meaning of s.48(3) and would be governed by and regulated by NRSWA.

Statutory right or street works licence

8. The next point of significance is that street works can only be undertaken by an “undertaker”, namely a person or body which has the requisite statutory right or street works licence to carry out those works. If and when that statutory right exists or licence has been granted, the street works can then be undertaken in principle, BUT they still remain subject to the regulation contained in NRSWA by the street authority.
9. Hence, statutory undertakers have such express statutory rights contained in legislation applicable to their undertaking. By way of example, there are powers for undertakers to lay their apparatus in, under or over a highway contained in s.158 of the Water Industry Act 1991, Schedule 4 to the Electricity Act 1989, Schedule 4 to the Gas Act

1986, and Schedule 3A to the Communications Act 2003. Nonetheless, although statutory undertakers have such statutory rights, **the physical works involved in exercising those powers are then regulated by the street authority pursuant to NRSWA**. That “statutory right” means that no acquisition of the land in which such apparatus is to be laid is required by those undertakers. It also means that they do not require a street works licence. However, it does not result in the regulation set out in NRSWA not applying. On the contrary, NRSWA’s very objective is to enable the street authority to properly control and regulate all such street works.

10. If no such statutory right exists, an application may be made to the street authority for the requisite street works licence. Section 50(1) of NRSWA provides:

“The street authority may grant a licence (a “street works licence”) permitting a person—

(a) to place, or to retain, apparatus in the street, and

(b) thereafter to inspect, maintain, adjust, repair, alter or renew the apparatus, change its position or remove it,

and to execute for those purposes any works required for or incidental to such works (including, in particular, breaking up or opening the street, or any sewer, drain or tunnel under it, or tunnelling or boring under the street).”

The same s.105(1) definition must be applied in respect of such a licence permitting a person to place apparatus “in” the street, namely it includes the placing of apparatus “under” the street.

11. Again, that provision merely enables the street authority to grant a licence to a person to execute the works required so that they are then an “undertaker” within the meaning of s.48 of NRSWA. Thereafter, the carrying out of such works will be subject to the control of the street authority applying the provisions contained in NRSWA.

12. Thus, if a statutory right to place infrastructure in, on, above or below a highway is conferred by a DCO, the subsequent execution of that right, namely the carrying out of the requisite physical “street works”, remains subject to the regulatory provisions of NRSWA to be applied by the street authority. It is therefore important that such is reflected in the terms of the DCO and all requisite street works are recorded as such.

Nature of regulation

13. As to such regulation, Part III of NRSWA, together with the regulations and codes of practice made thereunder, then provides detailed provisions to be complied with when any street works are being executed, whether pursuant to a statutory right or a street works licence. They also impose duties on the street authority to co-ordinate the execution of such works. Such regulation on undertakers promotes safety, and further, for example, avoids unnecessary delays or obstructions, protects other apparatus in or below the street, and ensures adequate reinstatements, with penalties imposed for non-compliance. NRSWA also designates certain streets as being subject to special controls. Hence, special roads, such as the SRN, are “protected streets” under s.61. The supervisory control over that statutory regulation is conferred on the street authority and NRSWA must be complied with by any undertaker undertaking “street works”, irrespective of that undertaker’s proprietary or statutory rights to lay apparatus in, above or under a highway.

Depth of highway

14. Finally, given that the regulation imposed by NRSWA applies to the execution of all “street works”, and as street works are defined as including the placing of apparatus “*under, over, across, along or upon*” the street (see s.105(1) definition), it is immaterial to the application of NRSWA whether the apparatus is placed within the surface of the highway or in the subsoil below. Similarly, it is immaterial whether the undertaker has a proprietary interest in the land in which the apparatus is to be installed, a statutory right to install it or the landowner’s consent to do so. Provided the apparatus is to be installed in, under, above or on a highway, the physical works required to so place the apparatus comprise “street works” to which the NRSWA controls remain applicable in any event.

15. Subject to the above, in considering the depth of a highway for which NH is the highway authority, that crucially depends upon the context in which the issue is being raised. Lord Briggs pointed out in *Southwark LBC v Transport for London*,¹ which was concerned with the construction of a property transfer order between two highway authorities:

¹ [2018] UKSC 63 at [32].

“There is in my view no single meaning of highway at common law. The word is sometimes used as a reference to its physical elements. Sometimes it is used as a label for the incorporeal rights of the public in relation to the locus in quo. Sometimes, as here, it is used as the label for a species of real property. When used within a statutory formula, as here, the word necessarily takes its meaning from the context in which it is used.”

The depth of a highway is therefore dependent upon the context in which the word “highway” is being used.

16. Further, linked to the above, it is of note that the vesting of the surface of a highway maintainable at the public expense in the highway authority arises from the statutory vesting contained in s.263(1) of the Highways Act 1980. Yet, by virtue of s.263(2), that provision does not apply to the vesting of a trunk road in circumstances where the provisions of ss.265-267 instead apply. In respect of a transfer of the highway under s.265, it was emphasised by the Supreme Court in *Southwark* that the word “highway” for the purposes of a s.263(1) vesting had a different meaning to the word “highway” for the purposes of s.265. Hence, the “highway” transferred under s.265 would include land acquired for highway purposes in the vertical plane, such as by conveyance on compulsory acquisition for highway purposes, even if it extends beyond the zone of ordinary use. Section 265 is likely to apply to many highways which comprise the SRN in which case there would be no separate subsoil owner.

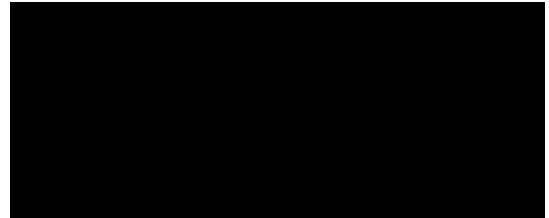
17. Even in the s.263 sense, the zone of ordinary use which is vested in the highway authority will necessarily vary on a case by case basis. Lord Briggs stated in *Southwark* at [10]:

“It is common ground that the zone of ordinary use is a flexible concept, the application of which may lead to different depths of subsoil and heights of airspace being vested in a highway authority, both as between different highways and even, over time, as affects a particular highway, according to differences or changes in the nature and intensity of its public use.”

18. It follows that the depth of a highway in any particular case is fundamentally dependent upon the context in which the word “highway” is being used and the purpose in which the issue is raised. However, in terms of the application of the NRSWA, it has no

particular relevance. Instead, irrespective of the depth at which apparatus is laid under a highway, and whether it is within the zone of ordinary use or within the subsoil below, the works involved in placing such apparatus under the highway amount to “street works” within the meaning of s.48(3) of NRSWA and are therefore subject to the control and regulation of the provisions of NRSWA by the street authority at the time those works are carried out. That is also the position irrespective of whether the works involve breaking open the surface of the highway, as that is not a pre-condition to the works being “street works” within the meaning of s.48(3).

19. I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.



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WORKS IN STRATEGIC ROAD
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OPINION

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