

HIGHWAYS ACT 1980**AVERAGE SPEED CAMERAS**

OPINION

Introduction

1. I am instructed by Lancashire County Council in its capacity as Highway Authority to advise it in relation to the installation of average speed cameras.

Factual Background

2. The Safer Road Fund programme aims to reduce casualties on routes identified by the Department for Transport as the County Council's historically most dangerous A roads.
3. One such route is on the A588 from Lancaster to Skippool. As such, the Council proposes to install average speed cameras along the route in an effort to improve road safety.
4. The infrastructure works by reading and recognising the number plates of passing vehicles and calculating the driver's average speed over a known length of road that is subject to the same speed limit. This has the desirable effect of requiring drivers to maintain a steady average speed rather than simply slowing down when the driver becomes aware of the presence of a conventional speed camera.
5. The particular issue upon which my Opinion is sought relates to those instances where the part of the land that has been identified to install the average speed camera infrastructure is owned by a third party.

Legislative Background

6. Before turning to answer the specific questions raised in my Instructions, I propose to set out my analysis of the powers, responsibilities and functions available to the Highway Authority in this instance.

7. The power to install average speed cameras is that contained in Section 95A of the Highways Act 1980. This states:

“A highway authority may install and maintain on or near a highway structures and equipment for the detection of traffic offences ...”

“On or near”

8. There are two elements in relation to the correct interpretation of Section 95A of the 1980 Act:

(a) The correct contextualised meaning of the words “on or near” in the circumstances of the highway involved; and

(b) Whether it would be permissible to interpret the power in Section 95A of the 1980 Act as wide enough to allow the Highway Authority to install structures and equipment in land owned by a third party.

9. In respect of the first issue in relation to the meaning of “near”, there have been a number of instances where wording to a similar effect has been deployed in legislation.

10. However, it should be noted that throughout the analysis of the meaning of the word in the context of that legislation is essentially determined by a purposive interpretation of the subject matter of the statutory provisions.

11. Hence Lord Adam in the Scottish case of ***McMillan v. Barclay Curle Ltd [1899] 2 F (Ct of Sess) at 91*** stated:

“... the question whether one place is near another is entirely a question of circumstances, entirely a question of fact, and entirely a question for the tribunal which determines the claim.”

12. An example of the approach adopted by the Courts is that found in the case of ***Tyne Keelmen v. Davison* [1864] 16 CBNS 6112** where Byles J stated that the purpose of a local Act of Parliament that empowered a body of persons to levy tolls from the owners and lessees of collieries “near” the River Tyne that exported by the river. The specific question related to whether a colliery 10 miles from the River Tyne was within the local Act. Byles J at 622 stated:

“The word ‘near’ is not a restraining, but an expanding word - to be extended so far as to give effect to the intention of the legislature. Railways have brought places in one sense near to each other which were not so before the discovery of that rapid mode of transport. It is enough to say that I agree with the rest of the court in thinking that this colliery is near the River Tyne within the meaning of the Act.”

13. More recently, in the case of ***R v. East Sussex Coroners ex parte Healy* [1989] 1 All ER 30** the phrase that required consideration was the words “in or near the area” of the responsibility of a particular Coroner. Woolf LJ at 35 said:

“The word ‘near’, being an ordinary word of the English language indicating a short distance or at close proximity, is to be applied by the Coroner in a common-sense manner and as long as the Coroner approaches the matter in a way which is not wholly unreasonable it seems to me that it is not for the courts to define precisely what is meant by the word ‘near’ ... The role of the court, it seems to me, is confined to lying down what are the parameters of what is capable of being regarded as within his jurisdiction by a Coroner. The court does that on the basis of particular cases that come before the court.”

14. A further case in the Court of Appeal was to consider the meaning of the words “at or near” the place of work in the terms of Section 15 of the Union and Labour Relations Act 1974. In that particular case there was an instance of employees picketing at their place of work at the entrance to an industrial estate which was approximately half a mile from the employer’s building. The case of ***Rayware Ltd v. Transport and General Workers Union* [1989] 3 All ER 583** provided the following analysis. May LJ stated:

“In my judgment, the phrase ‘at or near’ in Section 15(1) of the 1974 Act must be considered in a geographical sense. We must bear in mind

the intent and purpose of the legislation with which one is dealing. We are dealing with a statutory provision giving a right to picket. The context is the conduct of industrial relations in a dispute situation: a situation in which perhaps common-sense has a greater part to play than in many others. The mere fact that the plaintiffs are on a private trading estate and that other concerns also lease properties on that estate is not in my view of itself sufficient to prevent the nearest point where pickets can lawfully stand from being at or near the plaintiff's premises."

15. Nourse LJ continued:

*"The words 'at or near' not being words of art, must be construed with due regard for the purpose of the provision in which they are found. No experience of unlawful picketing, however grave, can obscure the clear purpose of Section 15 which, broadly speaking, is to confer on an employee or a group of employees a liberty to exert peaceful persuasion over fellow employees. It is not consistent with that purpose to construe the section so as to make it impracticable, in the conditions in which many industrial and commercial developments are now found to exist, for many groups of employees to maintain pickets at all."*¹

16. The upshot of the above analysis is that the determination of whether the "structures and equipment" are "near a highway" is essentially firstly, a question of their proposed geographical location and secondly, the determination of whether that location is "near" being made with regard to the purpose of the power to install equipment to control speed.

17. In my view, this provision does not require a sequential approach to the determination of location. There is no requirement, for example, that the Highway Authority in the first instance dismiss the possibility or prospect of the structures and equipment being located on highway land. The essential determinating issue will be related to the possibility of locating the equipment so as to achieve the objective of achieving the objective that underlies these provisions; namely, efficient detection of traffic offences.

¹ See also *AG v. Corner* [1885] 11 App Cas 66 per Lord Selborne in respect of a charter granted by King Charles II.

18. The second issue then turns upon whether the provisions at Section 95A of the 1980 Act are sufficiently widely drafted so as to allow the installation and maintenance of such structures and equipment on third party land.
19. For the reasons I shall develop, I do not consider that the statutory provision enables the acquisition of land and/or rights over land save by the utilisation of the procedures for compulsory acquisition of such matters within the 1980 Act.
20. The wording of itself is, as set out above, merely a geographical stipulation of proximity and the installation and maintenance of such structures and equipment for that purpose. There is nothing, on that wording alone, that would expressly provide a power available for the utilisation of third party land.
21. The interpretation of Section 95A of the 1980 Act as facilitating the acquisition of land or rights over land by the Highway Authority without a process and compensation is, in my view, contrary to the Human Rights Act 1998 and in particular Article 1 of Protocol No.1 - the "*Right to Property*". This provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
22. A body of European jurisprudence has been built up in respect of the interpretation of these provisions. The interference must fulfil certain criteria: it must comply with the principles of lawfulness and pursue any legitimate aims by means reasonably proportionate to the aim sought to be realised: ***Beyeler v. Italy***. The provision has also been interpreted as requiring the persons affected being afforded a reasonable opportunity to put their case to the responsible authorities for the purpose of effectively challenging the measures including allegations of illegality, arbitrary conduct and unreasonableness: ***Yildirim v. Italy*** and ***AGOSI v. United Kingdom***.
23. In a similar vein, when an individual's property is subject to expropriation there is to be anticipated under this Protocol a procedure which ensures an overall assessment

of the consequences of the expropriation that includes the granting of compensation in relation to the value of the property acquired: *Palka v. Czech Republic*.

24. In the specific context of other provisions within Part V of the Highways Act 1980, it is readily apparent that a contrast can be drawn between a number of those provisions and Section 95A. In particular, the other provisions expressly anticipate use of third party land and provide for a mechanism of securing compensation for any losses sustained. For example, Section 100 of the 1980 Act states:

“(1) The highway authority for a highway may, for the purpose of draining it or otherwise preventing surface water from flowing onto it, do all or any of the following:

- (a) construct or lay, in a highway or in land adjoining or lying near to the highway, such drains as they consider necessary;*
- (b) erect barriers in the highway or in such land as aforesaid to divert surface water into or through any existing drain;*
- (c) scour, cleanse and keep open all drains situated in the highway or in such land as aforesaid.”*

25. In that instance, the exercise of this power also carries with it an obligation to pay compensation to the owner or occupier of any land who suffers damage by reason of the exercise by the Authority of the power under Section 100(1): see Section 100(3) of the 1980 Act.

26. In a similar vein, Section 101 of the 1980 Act deals with the power to fill roadside ditches. Section 101(1) states that a Highway Authority, where it considers the ditch unnecessary for drainage purposes again under Section 101(1) provides:

“If it appears to the highway authority of any highway that a ditch on land adjoining or lying near to the highway constitutes a danger to the user of the highway, the authority may –

...

- (b) place in the ditch, or in land adjoining or lying near to it, such pipes as they consider necessary in substitution for the ditch and thereafter fill it in.”*

27. Section 101(2) requires the Highway Authority to pay compensation to the owner or occupier of any land that suffers damage by reason of the exercise of this power.
28. The provisions that especially deal with compensation in the above statutory provisions can be contrasted with those that appear at Section 95A of the 1980 Act that is the statutory power relied upon in this particular case.
29. In my view, it follows from the analysis set out above that Section 95A of the 1980 Act does not permit the Highway Authority to enter land of a third party for the purposes of installing and maintaining structures and equipment for the detection of traffic offences without going through a process enabling an owner/occupier of such land to challenge in the particular facts of the case whether the acquisition of the land or rights over it is justified. Furthermore, provision for compensation should be available.
30. In my view, the Highways Act makes such a provision: see Section 239(3) and 240.
31. The power to acquire rights over land (in contrast to acquisition of land itself) is contained at Section 250 of the Act.
32. The provision of average speed cameras is a *"improvement"*:

"An 'improvement' means the doing of any act under powers conferred by Part V of this Act."
33. Section 95A is within Part V and appear under the sub-heading *"miscellaneous improvements"*.
34. The opportunity for the Highway Authority to enter into voluntary agreements with relevant landowners and occupiers to acquire such rights to provide the speed cameras on their land and acquire rights over the land for the purposes of future maintenance is facilitated, in my view, by Section 111 of the Local Government Act 1972.

35. Having set out my interpretation of the relevant legislation that relates to the issues engaged in this Opinion, I now turn to deal with the specific questions raised.

Counsel is asked to advise in relation to the following sites: 1, 15, 16 and 27:

(a) Is there any case law that would assist in relation to the definition of “near” a highway?

Response:

36. I have set out above the case law that is relevant. The essential point that is derived from the analysis of the cases is that the word “near” is to be given a common-sense geographical interpretation. The precise distance and determination of whether such is “near” is entirely a function of the objective or purpose of the relevant legislation. The purpose of this particular piece of legislation is for the detection (and prevention) of criminal offences and especially those in relation to speeding motor vehicles. It would follow that the word “near” must be construed in that context and the utility of the infrastructure to be deployed to serve that purpose.

37. Provided that the decision of the Highway Authority is not irrational or “Wednesbury” unreasonable in the context of forming its judgment as to whether the specific location is “near” then the High Court will not interfere.

(2) From the drawings that are included within Counsel’s brief, would the locations constitute as “near” in accordance with Section 95A Highways Act 1980?

Response:

38. There is no “hard and fast” rule as to what would constitute “near” in the context of a universal application of the meaning. What is required, on a case by case basis, is the determination of whether - for the purpose of achieving the underlying statutory intention - the utility of the infrastructure to be provided would be appropriate for the detection of traffic offences.

39. Ultimately, the test if it were to be challenged in the Court is whether the determination by the Highway Authority is determined to be "*Wednesbury*" unreasonable in the sense that the Authority could not rationally conclude that the proposal was "*near*".
40. As set out above the High Court would not interfere with a judgment made by the Highway Authority provided it could demonstrate that it was a rational conclusion having regard to the objective contained within the statutory provisions.
41. This position is subject to the point made in this Opinion that it is not open to the Highway Authority to enter land without agreement with the landowner/occupier or authority confirmed under the procedures set out in the 1980 Act.
- (3) Are there arguments that landowners could pursue to have the camera moved and positioned elsewhere/what must, if anything, the Highway Authority have in place to justify the chosen location and avoid this being successfully contested?**

Response:

42. As set out above, it is my interpretation of the legislative provisions that it is not an option that is available to the Highway Authority simply to march on land and erect the infrastructure discussed in this Opinion. The process that has to be gone through, if an agreement is not an option that is available, is the process set out in the 1980 Act for the acquisition of land and/or rights over land. That process would enable a landowner/occupier to argue that the legislative purpose would be best served by the location of the speed cameras elsewhere or alternatively the choice made by the Highway Authority is not effective.
43. In this respect, the Highway Authority will have to justify that the acquisition of land and/or rights over land meets the test for confirmation of a CPO that the acquisition meets the test that the acquisition of land or rights over land is justified on the basis that there is a "*compelling case in the public interest*" for the action proposed to be taken. That will require a balance to be made between the compulsory acquisition of land or rights over land that are currently enjoyed by the landowner/occupier on one

hand and the need for control over speeding vehicles on the relevant highway and the deployment of such equipment being likely to be effective in achieving that objective on the other hand.

44. In short, the Highway Authority must be in a position to rationally justify the need, firstly, for the exercise control over speeds on the highway; and, secondly the deployment of the equipment would be likely to achieve that objective; and, thirdly that the provision of such equipment in the locations sought by the Highway Authority is a rational decision capable of being objectively justified.

- (4) Sites 1, 16 and 27 are concerned with visibility splays. Should an owner or site be operating in accordance with a planning permission that has a condition concerning visibility splay, will the Council prejudice their position if equipment was placed within the same?**

Response:

45. This issue can only be determined by an objective and rational analysis of the precise circumstances of the individual cases.
46. Plainly, the simple placing of infrastructure within a visibility splay will be regarded as hindrance, to some degree, of the utility of that visibility splay that may well have safety implications for the use of that particular junction. It would therefore follow that if this issue arose and could be avoided without any prejudice to the efficacy to the speed cameras and their deterrent effect, the justification for the infrastructure within the visibility splay would require a particularly robust justification.
47. Conversely, if a rational choice has been made to the effect that the balance between safety and/or prejudice to the maintenance of safety concerning the visibility splay (and its likely users) compared to the benefits associated with the provision of the average speed camera **in that location**, there is no basis, in my view, for excluding the possibility of such infrastructure being placed within a visibility splay.

48. Again, in short, this requires a rational and objective justification by the Highway Authority and its choice of location.

(5) Do the proposals meet with the proper use of this power?

Response:

49. I do not consider that it would be a proper use of this power simply to enter land and maintain rights over such land once the same is installed.

50. In my view, Section 95A of the 1980 Act does not entitle the Highway Authority to execute such works without the process anticipated in the Act of the acquisition of such land/rights as are necessary.

51. There would be no impediment to the Highway Authority installing such equipment within the boundaries of highway land under permitted development rights².

52. A completely different set of considerations would apply to land owned by a third party.

53. For the reasons I have set out above, in the absence of an agreement with the relevant landowner/occupier, the initiation of the process of compulsory acquisition is required.

54.

² Town and Country Planning (General Permitted Development) Order 2015 Schedule 2 Part 9 Class A:

“The carrying out by a highway authority—

(a) on land within the boundaries of a road, of any works required for the maintenance or improvement of the road, where such works involve development by virtue of section 55(2)(b) of the Act; or

(b) on land outside but adjoining the boundary of an existing highway of works required for or incidental to the maintenance or improvement of the highway.”

Site 21

55. In respect of Site 21, the camera equipment is proposed to be located within the highway with the power connection crossing private land. There is a history of fatal road traffic collisions on the stretch of road between Stakepool and Cockerham and in the opinion of the Highway Authority requires multiple cameras at regular intervals.
56. The problem arises in respect of this site because it is in a remote location relative to a suitable power source. The route identified is the closest with minimal effect to the landowner to provide a mains power connection. There is also an option in relation to solar power for the site. In relation to these issues, I am asked to advise in relation to the following matters:
- (6) **Would the equipment for the power connection comply with Section 95A Highways Act 1980 as being near the highway notwithstanding it crosses private land?**

Response:

57. In my view, a purposive approach to the interpretation of the words "*structures and equipment*" is to be given to the statutory provision. As the supply of electricity is an inevitable requirement for the purpose of the installation and maintenance of average speed cameras this, in my view, would plainly fall within the meaning of "*equipment*" and be subject to the same interpretation as identified above.
58. In this context, the Highway Authority has applied its mind to the question of the source of providing the electricity supply (and the "*equipment*" that would carry such supply) to the relevant average speed cameras and come to the justifiable conclusion that notwithstanding the distance involved that would represent the most efficient and, as I understand the position, shortest means by which to supply electricity to the equipment.
59. In these circumstances, notwithstanding the fact that it crosses private land, the provision would meet the test of "*near*" in my view.

(7) Would an easement be required for the equipment to cross the private land?

Response:

60. For the reasons I have set out in some detail above, I do not consider that the provision of such infrastructure could be imposed on the landowner/occupier without the process being engaged as set out in the Highways Act 1980.
61. In my view, the Highway Authority has the opportunity to negotiate an easement with the landowner/occupier under the Highways Act 1980 or Section 111 of the Local Government Act 1972.
62. In the absence of agreement, compulsory acquisition of rights over land to lay and maintain the equipment and infrastructure associated with the average speed camera would be required.

(8) If the above is of issue, would the solar powered option fall into the remit of Section 95A of the Highways Act 1980, the fence being a structure and the solar panel being equipment?

Response:

63. In short, the solar powered option would fall within the remit of Section 95A of the 1980 Act. In my view, as set out above, a purposive interpretation is required to be given in order to give effect to the statutory provisions. In that context, "*structures and equipment*" would be given an appropriately wide interpretation in order to facilitate the object of providing such infrastructures as to provide for the detection of traffic offences.
64. In my view, a fence carrying the equipment would plainly be a structure within the normal and natural meaning of the word. Furthermore, the solar panel would represent "*equipment*" on the same basis.

65. There is one further issue that needs to be considered in this context. In the event that the solar panel was an effective and efficient means by which to maintain an average speed camera device, the availability of that option may be deployed by the owner/occupier as a basis for resisting any attempts to acquire rights over his land.
66. It may well be that the “*solar panel*” option is very much a secondary choice in terms of the efficacy of the system, and if that was the case the power of acquisition of rights would be capable of being objectively justified. However, the converse is true. If the solar panel option is equally efficient (and this might include risks associated with vandalism etc) as the route over private land, then the justification for the acquisition of such rights may be successfully challenged by a landowner/occupier.

Conclusion

67. In conclusion, I advise as follows:
- (a) The interpretation of the word “*near*” in Section 95A of the 1980 Act is determined by reference to the purpose of the statutory provision. It is essentially a geographical decision based upon a rational justification for the structures and equipment necessary to achieve the objective.
 - (b) I do not consider that there is an unfettered ability of a Highway Authority to enter third party land and place the equipment even if it was to be regarded, in a geographical sense, as near to the highway.
 - (c) The processes involved with the acquisition of land and/or rights over land would have to be progressed by the Highway Authority in furtherance of this issue in accordance with the 1980 Act in the absence of agreement.
68. I advise accordingly.

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