

LOW EMISSION ZONES - LEGAL ISSUES

Powers under the Road Traffic Regulation Act 1984

1. Permanent TROs are made under sections 1 to 4 of the Road Traffic Regulation Act 1984 ('RTRA') for roads outside Greater London and sections 6 and 7 of the RTRA for roads in Greater London. In determining whether a low emission zone scheme would be lawful under these sections, it is necessary to consider both the *purpose* and the *form* of the scheme.

2. Dealing first with the purpose of the schemes, a TRO which is intended to reduce air pollution within a specific area could be introduced under sections 1(1)(f) or (g) for roads outside Greater London, or section 6(1)(b) for roads in Greater London.

The powers to make a TRO where it appears to the local authority that it is expedient "for preserving or improving the amenities of the area through which the road runs" (section 1(1)(f)) or "for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995" (section 1(1)(g)) appear to be sufficiently wide to cover the setting up of a low emission zone. Section 6(1)(b) replicates the provisions in sections 1(1)(a) to (g) for the purposes of roads in Greater London and consequently the position is the same for these roads.

3. As far as the form of the schemes is concerned, there should not be any difficulty in either applying the scheme to certain classes of vehicle, or in setting up a permitting system to exempt certain vehicles from the controls.

4. Section 2(1) of the RTRA provides as follows for roads outside London:-

"A traffic regulation order may make any provision prohibiting, restricting or regulating the use of a road, or any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the order-

- (a) either generally or subject to such exceptions as may be specified in the order or determined in a manner provided for by it, and
- (b) subject to such exceptions as may be so specified or determined, either at all times or at times, on days or during periods so specified".

Whilst for roads in Greater London section 6(3) provides as follows:-

"Any order under this section may be made so as to apply-

- (a) to the whole area of a local authority, or to particular parts of that area, or to particular places or streets or parts of streets in that area;
- (b) throughout the day, or during particular periods;
- (c) on special occasions only, or at special times only;
- (d) to traffic of any class;
- (e) subject to such exceptions as may be specified in the order or determined in a manner provided for by it."

Both sections would be sufficiently wide to allow for the identification of the class or type of vehicle to which an air pollution TRO was intended to apply.

5. Further, section 4(2) provides as follows with respect to roads outside Greater London:-

“A traffic regulation order which imposes any restriction on the use by vehicles of a road, or the waiting of vehicles in a road, may include provision with respect to the issue and display of certificates or other means of identification of vehicles which are excepted from the restriction, whether generally or in particular circumstances or at particular times.”

A similar, though not identical, provision is contained in section 6(2) with respect to roads in Greater London. Again, both sections would be sufficiently wide to allow the setting up of a permitting system.

6. Finally, an air pollution TRO could be made as an experimental TRO. Experimental TROs can be introduced under section 9 of the RTRA “for the purposes of carrying out an experimental scheme of traffic control”. This power should be broad enough to allow the introduction of a novel or experimental air pollution TRO.

7. However, it would appear that an air pollution TRO could not be made as a temporary TRO. Temporary TROs are made under section 14 of the RTRA and the purposes mentioned in section 14(1) - the execution of works on or near the road, the likelihood of danger to the public or serious damage to the road, and enabling the duty of litter clearing and cleaning to be discharged - are not sufficiently wide to authorise the making of an air pollution TRO.

8. The arguments in this section can be summarised as follows:-

(i) The purposes in sections 1(1)(f) and (g) of the RTRA (for roads outside Greater London) and in section 6(1)(b) of the RTRA (for roads in Greater London) are sufficiently wide to allow traffic authorities to create TROs for the purpose of reducing air pollution within a specific area.

(ii) The powers in sections 2(1) and 4(2) of the RTRA (for roads outside Greater London) and the powers in sections 6(2) and (3) of the RTRA (for roads in Greater London) are sufficiently wide to enable an air pollution TRO to apply to specific classes of vehicle, or to exempt vehicles displaying a certificate or some other permit issued by the traffic authority.

(iii) Air pollution TROs could be introduced by means of experimental TROs under section 9 of the RTRA, but not by means of temporary TROs under section 14.

Procedures for making a traffic regulation order

9. Due to the breadth of the purposes set out in sections 1(1)(f), (g) and 6(1)(b) of the RTRA, the designation of an air quality management area under section 83 of the Environment Act 1995 is not a pre-requisite to the making of an air pollution TRO. Consequently, the procedural requirements for making an air pollution TRO are the same as those for any other permanent or experimental TRO.

10. The procedure to be adopted by local authorities in making TROs is set out in the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 (S.I.

1996/2489) ('the 1996 Regulations'), whilst the procedure to be adopted by the Secretary of State is set out in the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990 (S.I. 1990/1656) ('the 1990 Regulations').

11. With respect to *the 1996 Regulations*, these apply, *inter alia*, to orders made or proposed to be made by a local authority under sections 1 and 6 of the RTRA (see regulation 4(1)). Consultation is dealt with in regulation 6 and possible consultees include; other traffic authorities, Crown authorities, the concessionaire, the operator of a tramcar or trolley vehicle service, the operator of a local service, London Regional Transport, the chief officer of the appropriate NHS trust, the chief officer of the fire brigade authority, the Freight Transport Association, the Road Haulage Association and such other organisations representing persons likely to be affected by the TRO as the authority thinks it appropriate to consult.

12. Details of when consultation must occur are contained in the Table to regulation 6(1), but very generally consultation must occur where the potential consultee, or any roads over which the consultee has control, are likely to be affected by the air pollution TRO. The major exception is with respect to the Freight Transport Association, the Road Haulage Association and such other organisations representing persons likely to be affected by the TRO as the authority thinks it appropriate to consult. In these cases, consultation is mandatory.

13. Public inquiries are dealt with in regulation 9. Regulation 9(1) provides that the authority making the TRO shall cause a public inquiry to be held before making an order to which paragraph (3) applies and may cause such an inquiry to be held before making any other order. Thus, inquiries are mandatory in situations which fall within regulation 9(3) and permissible in any other case. Very broadly, regulation 9(3) relates to cases where a TRO will prohibit the loading or unloading of vehicles during certain times, or to cases where the TRO will prohibit or restrict the passage of public service vehicles along a road and an objection has been made under regulation 8.

14. With respect to *the 1990 Regulations*, these apply, *inter alia*, to orders made or proposed to be made by the Secretary of State under sections 1 and 6 of the RTRA (see regulation 3(b)). Regulation 5 deals with consultation and, in addition to any consultation required by the RTRA, the Secretary of State is required to consult the chief officer of any police area in which any road or other place to which the order is to relate is situated.

15. There is no regulation which sets out when inquiries must or may take place. Regulations 8(1) and (2) imply that public inquiries are not mandatory in any case, but that the Secretary of State is free to decide to hold a public inquiry if he wishes.

16. This section can be summarised as follows:-

(i) The procedure for making an air pollution TRO is the same as the procedure for making any other permanent or experimental TRO.

(ii) The procedure to be adopted by local authorities is set out in the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 (S.I. 1996/2489) ('the 1996 Regulations'), whilst the procedure to be adopted by the Secretary of State is set out in the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990 (S.I. 1990/1656) ('the 1990 Regulations').

(iii) Consultation and public inquiry requirements are contained in regulations 6 and 9 of the 1996 Regulations and regulations 5 and 8 of the 1990 Regulations.

Exemptions for disabled person's vehicles

17. The Local Authorities' Traffic Orders (Exemptions for Disabled Persons)(England and Wales) Regulations 1986 (S.I. 1986/178) essentially provide that TROs which prohibit or restrict the waiting of vehicles in roads and street parking places must include a provision exempting any disabled person's vehicle displaying a disabled person's badge

Legal challenges to TROs

18. There are two possible challenges to an air pollution TRO. Firstly, an application under paragraph 35 of Part VI of Schedule 9 to the RTRA (referred to as a 'Schedule 9 application') to question the validity of the order on the grounds that it is not within the relevant powers, or that any of the relevant requirements has not been complied with. It should be stressed that the existence of this procedure will probably exclude applications for judicial review. Secondly, a claim based on some private law right such as negligence or public nuisance.

19. Dealing first with Schedule 9 applications, provided:-

- (a) the purpose for which the local authority has made the air pollution TRO is within sections 1(1)(f), (g), or 6(1)(b) of the RTRA;
- (b) the content of the TRO is compatible with the provisions of sections 2, 3, 4 or 7 of the RTRA;
- (c) the requirements of either the 1990 or the 1996 Regulations are complied with; and
- (d) the content of the TRO is not such that no reasonable traffic authority could have made the TRO;

the application should fail.

20. With respect to a private law claim, the case of the **Great House at Sonning Ltd. and Others v Berkshire County Council** (1996)¹ is relevant. That case concerned a temporary TRO made under section 14 of the RTRA. The county council temporarily closed a road and thereby caused loss to the plaintiff. The plaintiff began proceedings by ordinary writ for an injunction and damages for nuisance caused by the wrongful obstruction of the public highway. The council successfully had the claim struck out as an abuse of process on the basis that the claim was in public law and the proper remedy was an application for judicial review. Nourse L.J. decided that the making of the TRO prevented the obstruction of the highway from being a nuisance unless or until the TRO was set aside.

21. Whilst the case concerns section 14 of the RTRA, the grounds on which the decision was made appear to be equally applicable to TROs made under sections 1, 6 or 9 of the RTRA. The major difference is that, due to the availability of Schedule 9 applications, applications for judicial review will not be available with respect to TROs made under sections 1, 6 or 9 of the RTRA. However, the result should be the same; there will be no private law right of action until the TRO is set aside by way of a Schedule 9 application. And Schedule 9 applications will only succeed if the requirements in paragraphs 30(a) to (d) are not met.

¹ The Times, 25.3.96.

22. Assuming a TRO has been successfully challenged, a private law claim can be made. Most likely are claims based on public nuisance for obstruction of the highway and claims based on negligence.

23. To succeed in a claim based on public nuisance, the claimant would have to show that he had suffered loss over and above that suffered by the public at large.

24. To succeed in an action based on negligence, the claimant would have to show that the relevant traffic authority owed him a duty of care, that the duty was breached and that the breach caused him loss. There are three reasons why a claim in negligence is unlikely to be successful.

25. Firstly, it is arguable that the local authority owes no duty of care to a person who suffers loss as a result of the use of the powers in sections 1 and 6 of the RTRA. Those sections are intended to provide the local authority with wide powers to deal with traffic regulation and it is arguable that the traffic authority should be concerned with this goal exclusively without being concerned about possible liability in negligence.

26. Secondly, any claimant would have to show that his loss was reasonably foreseeable. TROs can affect a wide range of individuals and the courts will not allow all losses to be recovered.

27. Thirdly, any loss claimed will be economic in nature. It is very difficult to mount a successful negligence action if all that is claimed is loss of this type, as opposed to damage to property or personal injury, and consequently even if a traffic authority were to owe a duty of care to a claimant and even if that claimant's loss was reasonably foreseeable, an action based on negligence would be unlikely to succeed.

28. The arguments in this section can be summarised as follows:-

- (i) A Schedule 9 application should fail if the conditions in paragraph 30 are met.
- (ii) It is likely that a private law claim can only be made if a TRO is set aside as a result of a successful Schedule 9 application.
- (iii) If a TRO has been set aside, claims could be made in public nuisance for obstruction of the highway or in negligence. However, these claims would be difficult to prove for the reasons set out above.

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