

Case Name: *Calor Gas Ltd v Norfolk County Council* 2019 EWHC 308 (Admin) (18 February 2019)

Full case: [Click Here](#)

Commentary: Calor Gas brought a judicial review of the Council's policy concerning licences under section 50 of the New Roads and Street Works Act 1991 on the basis that the policy was unlawful because the policy imposed a presumption against private or non-statutory undertakers' longitudinal apparatus being laid under the highway and this was inconsistent with the scheme of the statute. The claim was dismissed.

The Claimant supplies liquefied petroleum gas (LPG) and part of their activities includes installation of gas supply on new housing estates including laying pipework. The Council refused to adopt the highway within a new development because the Claimant's pipework had been laid longitudinally under the road. The Council had a policy in place seeking to avoid private longitudinal apparatus in the highway with three criteria to be satisfied before a licence would be granted under section 50. The Claimant contended that it would be effectively impossible to satisfy the three criteria, in particular the final criterion that "it is not possible to locate the apparatus on neighbouring land".

The Court found that the policy was very restrictive but it had to be approached bearing in mind the second principle set out by Laws LJ in *R (West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 that a policy maker is entitled to express a policy in unqualified terms and is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. In addition, the policy applied in situations such as retrofitting in existing urban areas where the third criterion would be more likely to be satisfied. The Council had a broad discretion under section 50 in relation to the grant of licences and the Court saw nothing wrong in principle with the Council having a restrictive policy of this kind subject to the second question, namely whether it is consistent with the policy of the legislation in terms of the safety justification provided by the Council, along with the implications for the convenience of highway users.

In terms of the second question, the Court held that it was clear that public safety is part of the purpose and policy of the 1991 Act as articulated in section 59. The Claimant argued that the Council's approach was not justified because safety would be better safeguarded by allowing installation of the apparatus within the highway in a common service trench in line with industry guidance. However, the Court held that the Council's evidence provided a sound basis, rooted in safety concerns, for the policy. Placing private apparatus in a street longitudinally brings with it the risk that it will not be readily discoverable combined with the risk of danger from disturbance of non-passive apparatus. The position in relation to records and notifications in respect of non-statutory undertakers is less robust than for statutory undertakers and the Council's policy was a reasonable response to the issues and the judge could not conclude that the policy had no rational connection with the policy of the legislation to protect public safety. In addition, there was justification in the arrangements for treating non-statutory undertakers differently from statutory undertakers. A statutory

undertaker is subject to a strict regulatory regime including in respect of financial stability. It was not realistic that conditions imposed on section 50 licences could provide a mechanism for addressing the Council's concerns in relation to the differences. The Court was therefore not satisfied that the policy was unlawful and the claim was dismissed.

Case summary prepared by Susannah Herbert