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Protecting Religious Freedom and Places of Worship - The example of the Eruv

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Protecting Religious Freedom and Places of Worship - The example of the Eruv

Abstract

Under Jewish religious law, on the sabbath one does no work. The prohibition on work extends to moving or carrying objects across a public space. To meet the needs of the observant, the rabbis developed the idea of the Eruv; a “fence” inside which Jews can carry on certain activities during Shabbat. That “fence” often can be a simple, continuous wire which marks out an area. But the wire often traverses (and is held up by) poles on public property, and consequently, the Eruv triggers important policy questions, such as (i) should public property be used to enable a minority faith community to observe their beliefs? and (ii) how are religious and secular citizens to live side-by-side in a way enabling each to pursue and enjoy their respective rights?

This article reviews the way in which these issues are addressed for Eruvs in the common-law world, giving examples from England, the United States, Canada and Australia. Too often, regulatory barriers are imposed selectively to hinder Jewish religious practice, even when visual amenity arguments fail. In jurisdictions other than the NSW Land and Environment Court, Eruv proponents have succeeded.

The recent long-running battle to establish an Eruv for the St Ives Jewish community exemplified how a local government can utilise legal mechanisms to prefer freedom from religion over freedom for religion. Eventually, Kuringai Council backed down, but only after state members of parliament and local Catholic and Anglican religious leaders spoke up for their Jewish brethren, and, regrettably, only after much public money had been spent to delay and hinder religious freedom for the small, local Jewish community.

Cover Page Footnote

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Protecting Religious Freedom and Places of Worship - The example of the Eruv

David D. Knoll AM

I. Introduction

For the Jewish people, the Sabbath is the most holy day in the Jewish calendar, surpassing even Yom Kippur (known as the Day of Atonement). Under Jewish religious law, people are prohibited from any form of “melakhah” on the Sabbath. Often translated as “work”, melakhah more closely means deliberate activity or expended efforts¹. From that definition there are derived 39 prohibited activities including things like baking, tanning and dyeing wool.² God rested from creating the world on the seventh day, and so Jewish people rest from creative endeavours also. As Judaism developed, a list of prohibited activities came to be derived from the Torah’s teachings. Unsurprisingly, with the expansion of prohibited activities came exceptions to make the rules of Sabbath observance practicable. And this is where the Eruv comes in. And, as is so often the case, the idea of the Eruv is sourced from the central story of the Jews, namely, the Exodus from Egypt.

It is said that Moses asked the newly freed Hebrews to help build the Mishkan (Tabernacle). It was to be a portable sanctuary, a spiritual centre in the midst of the desert. The people were so generous that Moses had to ask them to stop:

“And the call was broadcast in the camp, saying, no man or woman should do any more workmanship for the sanctified donations; then the people stopped bringing.”³

We learn from our rabbis that this announcement was made the Sabbath, and part of its purpose was to warn people not to carry the objects for the Mishkan from their private domains to the central encampment via the public thoroughfare. And it is from this verse comes the idea that carrying from one domain to another on Shabbat is a forbidden melakhah.⁴

In more modern times, people became concerned that they were not permitted to carry house keys between their home and the synagogue, but they did not wish to leave their homes unlocked. Young families would wish to take their infants and toddlers to synagogue but were concerned about whether it was permissible to push a pram between their home and the synagogue. Pushing a grandparent to synagogue in a wheelchair also was a concern. These are but examples of activities which were permitted within the private space of one's home or within synagogue grounds, but not in the public space in between them. A solution had to be found. To meet the needs of the observant, the rabbis developed the idea of the Eruv. The Eruv "creates a legal fiction, which converts the public domain to a private domain," thereby enabling observant Jews to engage in a number of activities on the Sabbath that would otherwise be barred.⁵

¹ Exodus 20:8-11; 31:13;

² Mishnah Shabbal; 7:2; See also: <http://www.myjewishlearning.com/article/shabbats-work-prohibition/#>

³ Shemot 36:6.

⁴ Shabbat 96b.

⁵ Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 155 F. Supp. 2d 142, 146; For more detailed descriptions, history and explanations see: Yosef Gavriel Bechhofer, *The Contemporary Eruv: Eruvim In Modern*

An Eruv is a “fence” inside which Jews can carry on certain activities during Shabbat. That “fence” can be a simple, continuous wire which marks out an area. The Eruv enclosure also may be created by telephone poles, for example, which act as the vertical part of a door post in a fictional wall, with the existing cables strung between the poles imagined as the lintel of the doorframe. Added to that there may be existing natural boundaries and fences. Without an Eruv, many observant Jews – especially the elderly, the disabled, and those with young children – would be unable to leave their homes in good conscience to participate in Sabbath services and activities at their Synagogue.

In modern cities, the physical distance between congregants’ and their Synagogue has grown and so the scale of Eruvs also has grown.⁶ Classical rabbinic law relating to establishing an Eruv had assumed that walls either of courtyards shared by a number of residents, or of alleyways could form part of the Eruv, a relatively straightforward proposition in walled European cities of the middle ages, but not today.⁷ Those who are not Jewish might find all this a rather interesting curiosity, but the Eruv brings to the fore important issues of law and public policy. For example, should our laws accommodate a minority religious practice? If yes, how and to what extent?

The issue emerges differently in different common law countries, and a brief comparative analysis is undertaken in this paper to highlight just a few of the jurisprudential issues that the Eruv brings to the surface. At the heart of the debate is a reconciling of rights in the context of neighbourhoods: how are religious and secular citizens to live side-by-side in a way enabling each to pursue and enjoy their respective rights? Before coming to the issue under New South Wales law, it is instructive to consider some precedents from England, the United States and Canada.

II. Eruvs in the UK: the case of Barnet Borough

In Barnet, a borough in northwest London, Jewish authorities had concluded that their Eruv could be formed mainly by already existing railway lines, fences, and walls; but a few open spaces needed to be filled in, so proponents of the project applied to the Barnet Planning Committee for permission to erect “a series of poles joined by thin, high wire” in these spaces. This application generated widespread and passionate opposition.

Whether Judaism should be recognised as a religion at all was an issue that re-emerged in the course of the controversy. After all, there has never been a universal legal definition of religion in English law.⁸ Purporting to ignore the religious dimension of the controversy, in 1992, the Planning Committee denied the application with the explanation that the poles would

Metropolitan Areas (Feldheim Publishers: 1998) 6-9; Robert Charles Ash, *Mountains suspended by a hair: Eruv, a symbolical act by which the legal fiction of community is established*, (University of Leicester, Ph.D thesis, 2000) at <https://ira.le.ac.uk/handle/2381/8548>.

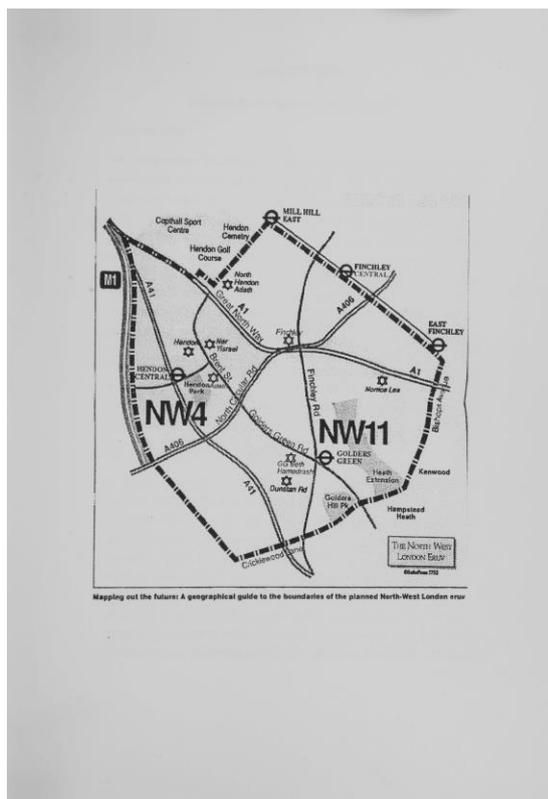
⁶ Charlotte Elisheva Fonrobert, *Sabbathdraehte, Sabbathschnuere, and Judentore: The German Century in the History of the Eruv, in It's a Thin Line: Eruv from Talmudic to Modern Culture* (Adam Mintz ed., KTAV Publishing House 2014) 75-91.

⁷ Charlotte Elisheva Fonrobert, ‘From Separatism to Urbanism: The Dead Sea Scrolls and the Origins of the Rabbinic Eruv,’ *Dead Sea Discoveries* 11 (2004): 43-71.

⁸ R. (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages [2013] UKSC 77; [2014] A.C. 610 (SC)

be "visually intrusive and detrimental to the character and appearance of the street scene."⁹ After considerable investigation and delay, this decision was eventually reversed by the Secretary of State in 1994, who found the visual impact of the poles to be negligible but, like the Planning Committee, declined to take any official notice of the dispute's religious dimension. The approval of final plans was remitted to the Council, and so it was only in 1998 that final approval was given.¹⁰ The project took many more years to come to fruition.

Here follows a map of the Northwest London Eruv route.



There are, of course, other Eruvs in the United Kingdom. They include: Edgware, Elstree and Borehamwood, Mill Hill and Stanmore.¹¹ Each has attracted its own share of controversy.

As the New York Times reported on 16 August 2002:

For almost 13 years, opponents -- mainly non-Jews and secular Jews -- have waged a passionate campaign to prevent the local authority from approving the creation of an Eruv boundary using 84 posts up to 30 feet high and linked with about 1,000 yards of fishing line to complete an 11-mile perimeter defined largely by major highways, streets and railroad tracks.

Orthodox campaigners have been fighting just as tenaciously and now sense victory is at hand. With a final decision by the Barnet Borough authorities this week to paint the

⁹ Davina Cooper, 'And Was Jerusalem Built Here?' Talmudic Territory and the Modernist Defensive,' Rex J. Adhar (ed.) *Law and Religion* (Burlington, Va.: Ashgate 2000) 199, 201-03.

¹⁰ Morris, Testing the boundaries of faith, *The Guardian*, 10 August 2002, at <https://www.theguardian.com/uk/2002/aug/10/religion.world>.

¹¹ North West London Eruv Committee, "North-West London Eruv," at <http://nwlondonEruv.org/about-the-Eruv/other-Eruvim/>

poles grey, the final planning requirements have been met, said Ray MacKay, a spokesman for the borough.

So did that mean the war of the Eruv was over?

"Most certainly not," said Elizabeth Segall, a prominent anti-Eruv campaigner who argued that the colour grey could not be formally approved until the borough's sight-impaired and blind representatives had been consulted. Further, she said, there were still matters to be resolved including the precise siting of the poles and the strength of the fishing line between them. There are even whispers of an appeal to the European Court of Human Rights in Strasbourg, a city that has its own Eruv.

In some ways, this long campaign has inspired some introspection at a time when immigration and other social changes confront many Britons with a greater and more assertive blend of cultures and faiths than ever before. In Golders Green, Orthodox Jews share sidewalk space with Britons from Asia and the Caribbean, and the discussion of the Eruv seems to rattle the uneasy balance between public tolerance and hidden prejudice.¹²

III. Eruvs in the United States of America:

No less than President George H. W. Bush in 1990 spoke at the inauguration of the Washington D.C. Eruv. He said:

"Now, you have built this Eruv in Washington, and the territory it covers includes the Capitol, the White House, the Supreme Court and many other Federal buildings. By permitting Jewish families to spend more time together on the Sabbath, it will enable them to enjoy the Sabbath more and promote traditional family values, and it will lead to a fuller and better life for the entire Jewish community in Washington. I look upon this work as a favourable endeavour."¹³

Not long before the establishment of the Washington DC Eruv, a precedent was set in Memphis, Tennessee. The Jewish community in Memphis is not large. However, it was large enough that by the mid-1980s they began to seek authorisation from the city and utility companies to construct an Eruv. The utilities were cooperative. The City was not. The City initially was worried that opponents of the Eruv would sue the City. The Jewish community provided the City with an indemnity, and by 1988 the Eruv was established. No lawsuit eventuated, and the Memphis experience, rather than the experience of the community in Tenafly, as to which more below, is the norm in the United States.¹⁴

¹² Alan Cowell, 'London Journal; A Fence for the Orthodox Faces a Wall of Critics,' *New York Times*, 16 August 2002 at <http://www.nytimes.com/2002/08/16/world/london-journal-a-fence-for-the-orthodox-faces-a-wall-of-critics.html>.

¹³ Alexandra Lang Susman, 'Strings Attached: An Analysis Of The Eruv Under The Religion Clauses Of The First Amendment And The Religious Land Use And Institutionalized Persons Act,' *Law Journal of Race, Religion, Gender & Class* 9.1 (2009): 93-134.

¹⁴ Professor Levin documents the various legislative accommodations in some detail; a topic which is for another day: Hillel Y. Levin, 'Rethinking Religious Minorities' Political Power', *UC Davis Law Review* 48 (2013): 1617, 1640-1641.

And as Professor Hillel Levin points out, groups like Orthodox Jews, the Amish and Native Americans usually obtain better results in terms of accommodation from government when they work closely with legislatures and local government authorities, rather than fight them through the courts. The Tenafly case is the United States' most notorious exception.¹⁵

Yet not every Eruv in the United States has been welcomed. The most famous dispute was one which went all the way to the Third Circuit Court of Appeals. It concerned an Eruv in the city of Tenafly, New Jersey.¹⁶

An ordinance in the Borough of Tenafly, which encompasses 4.4 square miles across the Hudson River from the Bronx and has a population of 13,806, provides in pertinent part:

"No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough."¹⁷

Despite this ordinance, the Borough permitted local churches to post permanent directional signs bearing crosses on municipal property, lost animal signs and other private postings often remained undisturbed by Borough officials. The Borough however decided to enforce the ordinance for the purpose of removing an Eruv. In doing so, the Borough reacted to concerns that the Eruv would encourage orthodox Jews to move to Tenafly, just as had occurred in neighbouring Teaneck, New Jersey, when an Eruv was established in Teaneck.

The Eruv comprised thin black strips (known as "*lechis*") made of the same hard plastic material as, and nearly identical to, the coverings on ordinary ground wires already in existence along utility poles. To the untrained eye the Eruv-strips and the utility company's wire covers were indistinguishable.

The utility concerned was Verizon, the local telephone company. Its in-house counsel researched whether municipal approval was required and advised the plaintiffs that it was not. In June 2000, Cablevision, holder of the local cable television franchise, volunteered to help the plaintiffs affix the thin black strips to Verizon's utility poles as a community service. The work was finished in September 2000. The Borough, equivalent to a local council in Australia, then instructed Cablevision to take down the Eruv. The Jewish citizens sued to save their Eruv. Despite securing interlocutory injunctions, but the Eruv proponents were unsuccessful at final hearing. So, they appealed.

Putting aside for the present the constitutional arguments, the ordinance was found to be facially neutral. It preferred no religion over any other and it did not discriminate between

¹⁵ Ibid.

¹⁶ And, lawyers have argued, and will continue to argue, about the implications of the decision of the Federal District Court for the district of New Jersey in *American Civil Liberties Union v City of Longbranch*, 670 F.Supp. 1293 (1987). In that case, the ACLU argued that the use of existing utility poles, telephone poles and fences by connecting them with a wire constituted a breach of the United States Constitution's prohibition on the establishment of religion by government. Back on 15 June 1985, the Council of the City of Longbranch had actually authorised the creation of an Eruv. Neighbouring counties cooperated. In rejecting the ACLU challenge, the Court noted that the purpose of "the Eruv was to enable observant Jews to engage in secular activities on the Sabbath". The Eruv proponents succeeded.

¹⁷ Tenafly, N.J., Ordinance 691 Article VIII (7) (1954).

secularly motivated conduct and comparable religiously motivated conduct. However, the Appellate Court found that the Borough did not enforce its ordinance neutrally. The Borough, for example, let secular attachments to poles remain in place, but not the pieces of plastic pieces required for the Eruv. The Appellate Court held that the plaintiffs were not asking for preferential treatment, but rather that the Borough not invoke an ordinance from which others are effectively exempt to deny them access to its utility poles simply because they want to use the poles for a religious purpose.¹⁸ The appeal was successful.¹⁹

The Appellate Court could have held that the Borough was entitled to enforce its ordinance as the Borough saw fit. The ordinance was not on its face discriminatory. It did not on its face prevent the free exercise of any religion either. However, the way in which the ordinance was applied in practice was discriminatory, and the Court had no difficulty in overruling the Borough's decision on that ground. In other words, the Third Circuit Appellate Court focussed on the *effect* of the regulatory decision, considered that the visual amenity and planning arguments against the Eruv were weak, and then decided to uphold the Eruv.

More recently, the establishment of an Eruv in the Hamptons became controversial.²⁰ Again Verizon helpfully offered its poles, but litigation ensued. It was a replica of the Tenafly litigation.²¹ The opposition sadly came from secularised American Jews who did not wish to accommodate their more ritually observant co-religionists. The hypocrisy of the opposition of the Eruv in the Hamptons was exposed on 23 March 2011 by the satirical "Daily Show" on national television.²² The result of the litigation? Success for the Eruv proponents.²³

IV. Eruvs in Canada

There are many Eruvs in Canada, but one in particular became famous when its continuance had to be agitated under Canada's Charter of Rights and Freedoms, which, among other things, protects freedom of religion (clause 2(a)) and prohibits discrimination based on religion (clause 15(i)).²⁴

In 2001, the City of Outremont, Quebec, listened to complaints from some residents and adopted a practice of dismantling any *Eruv* wires that were brought to its attention. When the City refused to abandon this practice, some Jewish residents took the matter to Court, alleging interference with the exercise of their freedom of religion.

¹⁸ Ibid, 169.

¹⁹ See also: *Smith v. Cmty. Bd.* No. 14,491 N.Y.S.2d 584 (Sup. Ct. 1985); *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987).

²⁰ Charlotte Elisheva Fonrobert, 'Installations of Jewish Law in Public Urban Space: An American Eruv Controversy,' *Chicago-Kent Law Review* 90.1 (2015): 63-77.

²¹ Fonrobert, *supra*, 70.

²² Comedy Central, 'The Thin Jew Line,' *The Daily Show* 23 March 2011; and see http://blog.rabbijason.com/2011_03_01_archive.html.

²³ *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 2015 U.S. App. LEXIS 2117 (2d Cir. N.Y., 2015)

²⁴ Canada Justice Laws Website, 'Canadian Charter of Rights and Freedoms' at <http://laws-lois.justice.gc.ca/eng/const/page-15.html>.

The City's defence? Just doing our job, they said, regulating public air space and keeping the public domain accessible to all residents of Outremont on the same basis and without distinction. The Court heard that the Eruv forced non-Jews and non-observant Jews into "a religious enclave with which they do not wish to be associated."²⁵

The Court rejected various arguments from residents and from the City and held that: "the City has a constitutional duty to provide accommodation for religious practices that do not impose hardship on its residents."²⁶ And there simply was no hardship to the public caused by the accommodation of the Eruv. The Court held that the City was being asked "to tolerate the barely visible wires or lines traversing City streets."

The Court ultimately rejected the City's claim that permitting the Orthodox Jewish community to erect *Eruv* wires would amount to promoting Orthodox Judaism. It decided that Canada's Charter of Rights and Freedoms required the City to accommodate this religious practice of the Orthodox community. While the City may regulate the practice, it may only do so in a manner to facilitate (and not restrict) this religious exercise.

The Canadian Appellate Court, likewise, addressed head-on the xenophobia, and frankly, Antisemitic, arguments of the residents which were supported by the local government. The issue wasn't discrimination, but rather whether local government had a duty to accommodate a religious practice that did not as a practical matter impose any hardship on residents who did not wish to observe the religious practice. The Canadian court had no difficulty in finding that the Eruv should be upheld because it, in fact, imposed no hardship on the other residents.

V. Issues of Planning Policy in NSW

Under NSW law, it is planning legislation that has the most direct impact on the establishment of any Eruv. Unlike consideration of a new mosque, churches or synagogue, the establishment of an Eruv does not raise issues such as the impact upon noise and traffic; nor does it require specific zoning. It does not raise issues of noise pollution.²⁷ As is also apparent from the North American examples above, it does however attract the Antisemitic prejudice, racism and xenophobia that inevitably accompany applications to establish places of worship by small religious minority populations.

²⁵ Cardus, 'LexView 47.0 - Religious Intolerance at City Hall' <https://www.cardus.ca/lexview/article/2309/> 6 September 2001.

²⁶ Ibid. In an endeavour to be practical, the Court admitted some curious evidence. One resident complained that the wires would prevent her from flying a kite in front of her apartment building. On cross-examination, she declined to answer the question of whether she has ever tried to fly a kite in front of her residence, or whether she otherwise ever flies kites.

²⁷ As noted by Watkin and Thomas, 'Oh, noisy bells, be dumb: church bells, statutory nuisance and ecclesiastical duties' *Journal of Planning and Environmental Law* (December 1995): 1097-1105: "On October 19, 1994, The Times reported on its front page that a complaint had been made under the Environmental Protection Act concerning a noise nuisance caused by bell-ringing at the church of St John the Baptist, Tunstall, Kent, which complaint was being investigated by the local authority. The following week, The Church Times of October 28, reported that following investigation the local environmental health officer had found that the level of noise caused by the bells was entirely reasonable.

However, it is instructive to review how little accommodation NSW planning law and policy makes for minority faiths and cultures. On 16 August 1991, the Department of Planning issued circular no. F7 headed “Planning for Places of Worship”. Its goal was to identify strategies to ease the problems that have been encountered historically by local councils and religious groups when working together to address applications for the development of places of worship. Its explicit goal was to ensure that there were: “No unnecessary impediments to fair treatment for groups lodging development applications for religious developments.”

The circular identified, as issues associated with the development of places of worship, ordinary planning matters, such as the impact of increased traffic, parking problems, crowds and noise levels. It acknowledged that concerns were often also expressed about visual impact issues.

The circular openly acknowledged that:

“Groups within the community may express fears about the presence in their neighbourhood of other groups of people whose appearance, language and customs may be different. Such fears are often linked to concerns about maintenance of property values in the area.”

Advice was given to local councils that: “Decisions to approve or reject development applications must be based on planning considerations.”²⁸

The circular stresses the need for pro-active consultation to overcome any initial hostile reaction to any development a new religious community in an area. Curiously, no comment is made in relation to developments for existing religious communities.

At the very end of the circular, the Department acknowledges that Councillors should know their responsibilities under legislation that relates to racial discrimination and vilification. There is no mention that in 1991 there was no law that required respect for religious beliefs and practices. The Anti-Discrimination Act only went so far as to define the term as to define the term “Race” to include “ethno religious or national origin”. Discrimination on the basis of faith alone fell outside the Act’s protections. It still does.

In any event, in 2012, the then Community Relations Commission for a multicultural NSW (now, Multicultural NSW) implored the Department of Planning to update the 1991 circular, but the update was deferred because of the then expected announcement of “a new planning system”. A white paper proposed a focus on community participation being placed at the forefront of a new planning system. By the end of a three-month exhibition period, some 1,500 submissions had been made in respect of it. Some 22 workshops across 10 regions in NSW were held. The Community Relations Commission made a submission in which it articulated how the principles of multiculturalism could be applied. Those principles stress not a generalised commitment to fair treatment but rather explicitly required that:

“all individuals in NSW should have the greatest possible opportunity to contribute to, and participate in, all aspects of public life in which they may legally participate, and all individual institutions should respect and make provision for the culture, language

²⁸ NSW Department of Planning, ‘Planning for Places of Worship’ Circular F7, 16 August 1991.

and religion of others within an Australian legal and institutional framework where English is the common language.”²⁹

It referred to Premier’s Memorandum M2012-19 which requires every government agency to have a multicultural plan that is current and which identifies how it will conduct its business within a culturally, linguistically and religiously diverse society. Indeed, every public authority in NSW is required by law to observe the multicultural principles in conducting its affairs.³⁰

Acutely, the Community Relations Commission submission identified that nothing in the white paper identified any planning issues which impacted on culturally diverse communities. No step had been taken, and still has not been taken, to address the problem that many Councils reject applications for religious developments and defer the decision to the Land & Environment Court so that the councillors cannot be held responsible by their constituents for allowing cultural and religious diversity within council boundaries. Regrettably, too few Councils recognise the benefits of diversity for their areas.

Indeed, in a formal consultation with the Department of Planning & Infrastructure, the Commission expressed concerns that the commitment to broad-based public consultation, which did appear in the earlier green paper, had disappeared from the white paper. Along with it went any prospect of respect for diversity issues to be embedded into the consultation processes. Facially neutral planning laws intended to apply equally to all, in fact often disadvantage minority religions. Freedom of religion as an issue was not even on the Department’s radar.

The white paper also provided for multiple layers of bureaucracy with no apparent mechanism for monitoring compliance with the principles of multiculturalism. And, neither the Department of Planning nor local councils were being encouraged to apply the principles of multiculturalism.

When the submission was forwarded in July 2013, the Commission drew the then Minister for Planning & Infrastructure, the Honourable Brad Hazard’s attention to the problem of Councils disregarding requirements specific to particular cultures or religions. The particular example then given was that of the Ku-ring-gai Council and Land & Environment Court’s rejection of the application to erect a “Jewish Eruv” in St Ives. This was seen by the Commission as a particularly compelling example of public policy failing at both the development and the implementation stages. No substantive reply was received.

However, in 2015, the NSW Office of Local Government issued a guideline entitled: “Planning for a multicultural community”. It was issued to councils across NSW. It encouraged pro-active multicultural practices. It gives examples of good practice from various councils across NSW. Although it did not focus on religious issues in particular, it laudably sought to establish a more positive culture in local government policy making.

²⁹ Community Relations Commission Submission to Review of the white paper, 5 July 2013. With some modest variation, these principles still appear in section 3 of the Multicultural NSW Act 2000.

³⁰ Multicultural NSW Act 2000 subsection 3(4). Regrettably, section 22 provides that: “Nothing in section 3 gives rise to, or can be taken into account, in a civil cause of action”.

And, the NSW Department of Planning & Environment adopted a multicultural plan for 2015-2018. It undertook to report progress to Multicultural NSW, the successor to the Community Relations Commission. It committed to making the multicultural principles part of the Department's core business. It committed to including the multicultural plan in corporate planning criteria and requiring from senior executives evidence of integration and key planning in reporting processes. It committed to identifying an executive who would be the champion of and accountable for the multicultural plan of the Department. Accountabilities were to be developed. It is an excellent step forward.

Yet, as would be apparent from the foregoing history, for so long as a light-handed approach is taken to encouraging government bodies to embrace cultural and religious diversity as significant social assets, there will always be recalcitrants. It is upon the recalcitrants that legal intervention can best be tested and regrettably is needed. And, the best example of a recalcitrant government body in NSW in connection with respect for Jewish religious practices in recent years was Ku-ring-gai Council. And, given that Jews have been in New South Wales since the First Fleet, the negative attitude to Jewish religious practices is somewhat surprising.

Among the 751 First Fleet convicts were at least 16 Jews. According to Rabbi Dr Raymond Apple AO RFD it was only some three decades later that Joseph Marcus, a German-born convict with a good Hebrew education, succeeded in gathering 30 or so Jews together for regular worship.³¹ In the late 1820s, the small Jewish community petitioned Governor Sir Ralph Darling for a Jewish house of worship, at first unsuccessfully. But, the two dozen free settlers who happened to be Jewish included one Joseph Barrow Montefiore, and his petitions were successful. Thus, on 26 September, 1832, the Sydney Monitor reported:

The New Year's Eve and Day of the Sons of Abraham
The Jews of the colony assembled at the Jews' Synagogue held over Mr Rowell's shop in George Street which is elegantly fitted out as such on Monday evening, being the last night of the year, according to the ancient chronology of the tribe of Judah, when prayers were said. On Tuesday morning and again in the evening, other meetings took place and worship was again performed.³²

... The order of service and religious principles of the congregation were to be those laid down by the Chief Rabbi of London.”

That building is no more, and the Hobart Synagogue, built in 1845 in Argyle Street, Hobart, is the oldest surviving synagogue building in Australia.

VI. Eruvs in Australia

The Sydney Eruv became operational on 8 June 2002. It is formed from a combination of natural walls (the South Head Peninsula cliff faces), existing telegraph poles and cables, golf course and park perimeter fencing, and fencing around Bondi and Tamarama Beaches.³³ It

³¹ The Great Synagogue Sydney, 'Our History' <http://www.greatsynagogue.org.au/OurCongregation/SynagogueHistory.aspx>

³² When the Sydney Jewish Museum reopens its ground floor exhibit in November 2016, visitors will be able to "walk" down the George Street of old, right past Mr Powell's stop.

³³ Sydney Eruv, <http://www.sydneyeruv.org.au/>

covers a large part of Waverley, stretching from Vaucluse through Bondi and Tamarama going south, across to Queens Park and then with a rather jagged border encompasses some of Bellevue Hill.

The Melbourne Eruv has now become an integral part of Jewish life in that city.³⁴ It covers various parts of Caulfield, St Kilda, Elwood and Brighton to include Moorabbin, Carnegie and Bentleigh. There also is an Eruv in Perth which covers parts of Menora, Coolbinia, North Perth, Yokine and Dianella.

The Northern Eruv controversies

The one controversial Eruv is the Northern Eruv in the Sydney suburb of St Ives.

In Sydney, Australia, the Jewish community includes a sizable population in the eastern suburbs and a smaller population centre on the north shore. In St Ives there are two congregations, and a large and successful Jewish day school. The orthodox Jewish community in St Ives wished to have an Eruv that encompassed both synagogues and the school, and the homes of as many families as possible.

The proposed Eruv met with a degree of Antisemitic sentiment, and consequential opposition. Much like the opposition to Eruvs in Quebec and New Jersey, the complaints about the Northern Eruv included concerns about visual impact, the need for excessive tree pruning, use of public land for private purposes, use of public infrastructure for religious purposes, and downward pressure on property values. There was express concern about a “propensity to develop into a religious enclave. One petition to Council apparently claimed that the construction of an *Eruv* would make property in the area less marketable to the general society. This latter theme implies that observant Jews moving in to a neighbourhood lowers the value of that neighbourhood. It is similar to the complaint raised in Outremont, Quebec, namely, an alleged “propensity to develop into a religious enclave.”

Visual amenity, of course, is rather elusive concept. It is about psychological well-being and is not capable of measurement.³⁵ Reliance on visual amenity issues by opponents of the Eruv sought to turn planning law into a tool for restricting religious freedoms of minorities, and to limit religious and cultural diversity.

In Northern Eruv v Ku-ring-gai Council [2012] NSWLEC 1058, Commissioner Morris heard appeals against Ku-ring-gai Council’s rejection of the first Northern Eruv proposal. This was not a case of a Council rejecting applications for a religious development and deferring the decision to the Land & Environment Court so that the councillors would be held responsible by their constituents for allowing cultural and religious diversity within council boundaries. This was a case in which the Council very actively opposed accommodating the religious needs its Jewish residents.

³⁴ Council of Orthodox Synagogues Victoria, ‘The Melbourne Eruv’ at <http://www.cosv.org.au/gsqp.php?gsqp=Eruv> .

³⁵ Leslie Stein, *Principles of Planning Law*, (Melbourne: Oxford University Press, 2008) 194-195,

The proposal included the erection of many 6 metre high poles and wiring, on a number of private properties, and consequently each private property had to lodge its own development application. There were also accompanying Roads Act applications for the poles and wires which were on a road reserve. Before the matter came on for hearing, at a conciliation conference the Eruv proponents amended their proposal to reduce the number of poles proposed within the road reserve to one³⁶ and the reduction in the number of poles proposed within private property. By reason of a road reserve being involved, the fate of the Eruv fell to be determined under the Roads Act 1993 as well as under the Environmental Planning and Assessment Act 1979 (“EPA”).

As the Commissioner acknowledged in respect of the original application:

The poles are similar to those used to provide power to dwellings in the area. The applicant advised during the hearing that the poles could all be 80mm in diameter to reduce any perceived impact and any colour that the council considered appropriate.³⁷

...

The applications are accompanied by conditional approvals from Telstra, the owners of the wires (fibre coaxial [PayTV](HfC) aerial network cabling) and EnergyAustralia, the owners of the street poles.³⁸

The tree pruning issues were quickly resolved by agreement between the competing parties’ experts.³⁹ The visual amenity experts, when brought together, ultimately agreed that: “the proposed developments would not have an unreasonable cumulative impact.”⁴⁰ Consequently, the Commissioner approved the applications under the EPA subject to appropriate variations and development consent conditions.⁴¹

However, as part of the application was to be determined under section 138 of the Roads Act 1993, the Commissioner had to consider the argument raised by Council that the court did not have power to determine the Eruv proponents’ appeal. The counter argument rested upon subsections 39(2) and (4) of the Land and Environment Court Act 1979 in relation to the powers of the court in respect of appeals: i.e.,

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

...

³⁶ Commissioner Morris acknowledged that: “[t]he new pole would be designed to meet the council’s traffic safety considerations and would provide for a crossing and re-crossing of the circuit at this point.” *Northern Eruv v Ku-ring-gai Council* [2012] NSWLEC 1058, 27.

³⁷ *Northern Eruv v Ku-ring-gai Council* [2012] NSWLEC 1058, 13.

³⁸ *Ibid.*, 15.

³⁹ *Northern Eruv v Ku-ring-gai Council* [2012] NSWLEC 1058, 42.

⁴⁰ *Ibid.*, 45.

⁴¹ *Ibid.*, 54.

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

The issue was whether there was a sufficient nexus between the works the subject of the development application and the works to be carried out within the road reserves.⁴²

The Court found as follows:

[71] I am not satisfied that the nexus exists. There is no relationship between the individual development applications and that work in roads that are not proximate to the site. Whilst I agree with Biscoe J in *Goldberg* that the power to determine applications under the Roads Act is broad, it is not so broad as to extend to the carrying out of works along a 20 kilometre route around the suburb of St Ives. The works the subject of the appeal have no nexus to the replacement of a pole in Lynbara Avenue or to the attachment of conduit to 574 poles along the 20k route. Nor do those development applications have a nexus to the intermittent placement of additional wiring along that route.

Somewhat circuitously, the Commissioner ruled that without all of the applications, under both pieces of legislation, being approved, no Eruv could be created, and because there was no pre-existing Eruv, the separate Roads Act applications were not in respect of an Eruv.⁴³

The Commissioner understood that this ruling might be contested and so, in the alternative, made clear that but for this ruling she would have found on the planning merits in favour of the Eruv.⁴⁴ Prescient the Commissioner was, and an appeal was filed, but it did not succeed.⁴⁵

The appeal necessarily was confined to the decision of the Commissioner “on a question of law”. Craig J correctly identified the critical question as to whether the application under the Roads Act was a function that was exercised by the Council “in respect of” the applications brought under the EPA Act. If it was in respect “of the matter” then the Court could exercise the function of the Council and determine the Roads Act application.⁴⁶

The Eruv proponents, in summary, argued that the phrase “in respect of” was to be given a wide meaning and relied on a number of authorities, including the oft repeated statement by Mann CJ in *Trustees, Executives & Agency Co Ltd v Reilly*⁴⁷ describing the words:

“in respect of” as having: “the widest possible meaning of any expression intended to convey some connection for relation between the two subject-matters to which the words refer.”⁴⁸

⁴² Ibid., 70.

⁴³ Ibid., 71-2.

⁴⁴ Ibid., 74-5.

⁴⁵ *Northern Eruv Inc v Ku-ring-gai Council* (2012) 192 LGERA 291; [2012] NSWLEC 249.

⁴⁶ Ibid., 30.

⁴⁷ *Victorian Law Reports* (1941): 110, 111

⁴⁸ Ibid., 32. Nothing in the case raised any issues under section 116 of the Commonwealth Constitution, which provides as follows: “The Commonwealth shall not make any law for establishing any religion, or for

Craig J also considered that there must be “some discernable and rational link” relying upon an observation of Basten JA in HIA Insurance Services Pty Ltd v Kostas [2009] NSWCA 292. That decision of the Court of Appeal was reversed by the High Court in Kostas v HIA Insurance Services Pty Ltd (1020) 241 CLR 390.

In Kostas, an issue was whether a primary judge could make factual findings having found an error of law in a Tribunal decision. There needed to be sufficient relation between the two. Did the factual findings have the necessary relation to the error of law? The power which there had to be exercised to “make such order in relation to the proceedings in which the question arose as, in the [primary judges] opinion should have been made by the Tribunal.” The High Court decided that there was a sufficient relation, reversing the NSW Court of Appeal decision that there was not a sufficient relation between the two aspects of the decision.

In the High Court, Hayne, Hayden, Crennan and Kiefel JJ with whom French CJ concurred, were critical of Basten JA’s narrow approach to the statutory interpretation question.⁴⁹

Despite the High Court’s criticism of the reasoning of Justice Basten, Craig CJ relevantly said:

While the decision of the Court of appeal in Kostas was reversed by the High Court ... I do not understand the judgments in that court to have disagreed with the observations of Basten JA as to the manner in which the phrase: ‘in respect of’ should be considered in a particular statutory context.⁵⁰

Craig J then referred to a number of earlier Land and Environment Court decisions and appeals therefrom to the NSW Court of Appeal, in framing the question to be decided as to whether the giving of the consent under the Roads Act was “a necessary incident to the power of the council to grant development approval.”⁵¹ His Honour thus substituted a narrow “necessity” test for the wide “in respect of” test, and took the view that the “relevant nexus” (utilising the reasons for judgment of Basten JA in Kostas) had to be understood as: “involving something more than a function or discretion ‘affecting’ the subject matter of the appeal”.⁵²

Here Craig J plainly departed from Justice Mann’s admonition, extracted above, that the words: “in respect of” be given:

the widest possible meaning of any expression intended to convey some connection for relation between the two subject-matters to which the words refer.”

imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.” Section 116 imposes no prohibitions on State laws, such as planning laws: Grace Bible Church v Reedman (1984) 36 SASR 376 at 379 per Zelling J, at 385 per White J and at 389 per Millhouse J and R v Gorton [2001] QCA 43; see also Kruger at 124–125 per Gaudron J. Nor can it be said that our planning laws have as its end or object the prohibition of the free exercise of a religion: Hoxton Park Residents' Action Group Inc v Liverpool City Council (2010) 178 LGERA 275; 246 FLR 207, 42 citing Kruger v Commonwealth (1997) 190 CLR 1. And finally, allowing an Eruv to be established cannot be said to constitute “establishing any religion”: Attorney-General (Vic); ex rel. Black v Commonwealth (1980) 146 CLR 559.

⁴⁹ *Ibid.*, 89.

⁵⁰ *Ibid.*, 39.

⁵¹ *Ibid.*, 50, citing Shellharbour Municipal Council v Rovili Pty Ltd (1989) 15 NSWLR 104 at 112.

⁵² *Ibid.*, 52, citing North Sydney Municipal Council v PD Mayoh Pty Ltd (1988) 14 NSWLR 740, 746 per McHugh JA.

His Honour narrowly construed the Court's jurisdiction as limited to the exercise of a power that was legally – rather than factually – indispensable to the exercise of the power to determine the subject matter of an appeal.⁵³

The requirement to obtain consent under the Roads Act arose under a different statute and was thus legally independent of the requirement to obtain consent under the EPA Act. Craig J further found that the lack of continuity among the nine properties that were the subject of the development applications and their distance from each other reinforced the lack of nexus. Regrettably, no consideration was given to the nexus being created by the wires that helped form the Eruv. It was considered to be different to the example of constructing a road to provide access to land proposed to be subdivided under a development application met the test.⁵⁴

By looking at the parts and not the whole, the Court was able to avoid addressing the religious need that had resulted in multiple development applications being lodged for a single Eruv.

Some lip service was given to: “the comprehensive nature of work required to create the Eruv, including the length of public roads over which those works were to be undertaken ...”⁵⁵ However, Craig J did not find that to be a persuasive criterion.

One can easily disagree with the approach to statutory construction adopted by Craig J, in terms of its appreciation of the High Court's Decision in Kostas, and in terms of the lack of compelling reasoning in the application of earlier appellate decisions concerning subsection 39(2) of the Land and Environment Court Act 1979. Appealing the matter further was plainly an option. However, the Eruv committee, facing an adverse costs order, for financial reasons could not continue the litigation.

Subsequently, a different Eruv committee designed a different Eruv route and approached Ausgrid for permission to create an Eruv which required no new poles nor non-live wires nor developments on private land, but rather required attaching to existing Ausgrid poles similar grey strips (“*lechis*”) to those utilised in Tenafly, New Jersey. All of these plastic conduits were to be placed on existing Ausgrid power poles.

Photographs of these plastic conduits identify the limited degree of visual impact. It should be apparent that unless one knows that the Eruv is present in a particular place, a non-informed yet reasonable and objective observer will not notice it.

⁵³ Ibid., 53.

⁵⁴ Ibid., 54.

⁵⁵ Ibid., 64.



Ausgrid were most cooperative and on 14 March 2014 allowed the Eruv to be created. The permission and, indeed, cooperation extended by Ausgrid was analogous to that enjoyed by the Tenafly, New Jersey, Jewish community from Verizon. Both utilities let their poles be used for an Eruv.

In St Ives, both Ausgrid and the new committee, appropriately called “Helping Families Unite Incorporated” took the view that no road authority, that is, Council, consent was required.

The installation of the Eruv was complete by 28 November 2014.

On 24 February 2015, at a meeting of the Ku-ring-gai Council, Councillor Duncan McDonald asked a specific question about whether any formal approach had been made to Council for the approval of the Eruv. A very vocal minority of affected residents kept pressing for Council to intervene. The minutes record that it was the Council’s position that “... *the plastic conduits being placed on the power poles – they are not Council assets and therefore, Council has no jurisdiction about whether they can go on there or they cannot go on there.*” The Council’s Director of Operations confirmed it was an Ausgrid matter.

Rather like the city of Outremont, Quebec, Council nevertheless stepped in and purported to take action to require Ausgrid to remove the conduits. On 4 July 2016, Council asserted an entitlement to remove the conduits under sections 138 and 246 of the Roads Act. By that letter the Council purported to give notice for the purposes of section 246 of the Roads Act that it would continue to remove conduits 14 days from the date of that letter. Two days later Helping Families Unite Incorporated replied, objecting on legal grounds to Council’s threatened action. Council did not “back off”, and the new Eruv proponents approached the Supreme Court of NSW to restrain the Council.

Thus came the matter before the Supreme Court of NSW. Helping Families Unite Incorporated made a number of arguments in support of its application to restrain Council’s threatened actions. One of them was as follows:

Section 65 of the Electricity Supply Act 1995 (NSW) provides that a person must not interfere with a network operator’s electricity works unless authorised to do so by the

network operator. Further, section 65A prohibits any person from entering, climbing or being on the electricity works without Ausgrid's consent. There is no evidence of any such consent having been obtained from Ausgrid and unless such consent is given, the Council's actions will constitute an offence.

An interim injunction was granted on terms. In the end, a final injunction was not necessary.

There developed a groundswell of vigorous political opposition to the Council's approach from state members of parliament and local Catholic and Anglican religious leaders. No doubt as a result of such widespread support for the Eruv a further vote was taken by Ku-Ring-Gai Council, and on 8 November 2016, the Council voted unanimously to approve the Eruv. VII. Conclusions

A few things become apparent from a comparison of the various decisions related above. Firstly, although visual amenity arguments are regularly made by opponents of an Eruv, they generally do not succeed when tested properly. In the most recent case cornering the northern Eruv in St Ives, even the Council's expert ultimately conceded the point.

Secondly, resolving the acceptability of an Eruv by using jurisdictional arguments seeks to side-step the key issues. The issues remain, to what extent should our laws accommodate a minority religious practice? To what extent?

The fundamental problem with facially neutral planning laws is that do not even allow for the exercise of religious freedom to be considered. The exercise of religious freedom is a valuable contribution to our multi-faith and multicultural society. In NSW, and indeed other common law jurisdictions, the benefit of religious and cultural diversity are recognised but have not been incorporated into planning laws. Much cost and indeed communal confrontation could be saved were such an incorporation to be made.

Far too often, the Jewish community proponents of an Eruv incur enormous cost to overcome regulatory barriers. As outlined above, sometimes litigation costs are added to the burden.

In the United States and Canada, issues of discrimination against a minority religion and the proper accommodation of those religious practices which do not impede the exercise of anybody else's rights and freedoms have been addressed directly by the courts. In each case where it has been so addressed, Eruv proponents have won their applications. In contrast, the UK authorities and the Land and Environment Court in NSW adopted circuitous reasoning to avoid treating applications in respect of a single Eruv as an integral whole. Because an Eruv involves different properties, a series of development applications were made in the first northern Eruv case. The Eruv could only be established if all of the applications were approved. Yet the Court determined that the applications were not part of an integral whole. They could rise and fall separately. All but one of them was successful, but because one was unsuccessful, the Eruv was not established.

In the most recent proceedings in the Supreme Court of NSW it became abundantly apparent that despite the support of Ausgrid and the establishment of an Eruv that did not involve new structures and therefore did not necessitate development applications, Ku-ring-gai Council decided, until enjoined, to spend ratepayers' money to oppose the Eruv. It was for many years unwilling to accommodate its observant Jewish community. In the end, democracy

worked and through the political process, religious freedom in Ku-Ring-Gai came to be respected.

The history of Eruv litigation demonstrates that far too often, the Jewish community proponents of an Eruv incur enormous cost to overcome regulatory barriers. Were the protection of religious freedom to be enshrined effectively in planning laws, much of that cost and confrontation could be avoided. As a matter of sound public policy, our laws need to do a much better job of accommodating minority religious practices.

I. Postscript

In 2017, a new southern Sydney Eruv was established without rancour or difficulty to serve the communities surrounding the Coogee and Maroubra synagogues.