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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

The Rt. Hon. Patrick Jenkin, MP,
Secretary of State for the Environment,
2, Marsham Street,
LONDON, SW1.

15th March 1985

Dear Patrick,

ABOLITION: COUNTER OBSTRUCTION

I have seen Kenneth Baker's letter to you of 26th February in which he proposes amendments to the Local Government Bill.

I agree that if the authorities are determined to attempt to bind their successors in the manner suggested we cannot safely rely upon existing powers to prevent them; and although particular transactions could be invalidated by means of emergency retrospective legislation we could be criticised for failing to recognise a risk which was clearly foreseeable.

I therefore support Kenneth's proposals.

I should, however, draw attention to certain legal difficulties associated with surcharge and the removal of protection from innocent parties. So far as I am aware, surcharge in local government law has hitherto always been related, directly or indirectly, to financial loss; but under the proposed scheme, provided property is sold or contracts are let for the best price obtainable, there is no financial loss, nor, if property disposed of is later recovered from a third party without payment of compensation, is there any loss of assets which should have passed to the successor authorities. It may therefore be said that the surcharge is in reality a criminal sanction, and that offenders should be given the benefit of a criminal trial. Furthermore, in some cases (for example, the unauthorised sale of County Hall) the amount for which persons responsible are potentially liable could greatly exceed their ability to pay, and may be considered disproportionate to the nature of the offence.

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If disqualification is thought to be an inadequate sanction then I appreciate the need to introduce a surcharge on the lines proposed. However, you may care to consider whether it would be appropriate to include statutory defences, for example, for officers or councillors who could show that they authorised an agreement in the genuine belief that your consent had been obtained. This might make the measure more palatable without seriously weakening its effect.

So far as third parties are concerned, I appreciate that you will do all you can to publicise the measures as widely as possible. Nevertheless, as Kenneth recognises in his letter, there will inevitably be a few cases of hardship where property changes hands rapidly and a successor authority later makes a claim against a party who is genuinely ignorant of the illegality of the original transaction. In such cases there is a danger that legislation which did not afford the innocent "owner" a chance to argue his innocence and, if appropriate, obtain the property or receive compensation, could be held to be contrary to the second paragraph of Article 1 of the First Protocol to the European Convention on Human Rights. This is a difficult and uncertain area of law but I have no doubt that the point will be made in the course of the debate on the amendments. Again, you may wish to consider whether innocent parties, particularly individuals, could not be given some limited form of protection without destroying the deterrent effect of the proposed measures.

I am copying this to all members of MISC 95, those colleagues on the attached circulation list, Sir Robert Armstrong and First Parliamentary Counsel.

Yours Grg. Michael