



Appeal Decisions

Site visit made on 8 February 2019

by R Sabu BA(Hons), BArch, MA, PgDip ARB

an Inspector appointed by the Secretary of State

Decision date: 16 August 2019

CASE DETAILS

All Appeals

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3(1) and Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
- The appeal is made by Maximus Networks Ltd against the decision of Birmingham City Council.
- The development proposed is 'prior approval for siting and appearance: Installation of a telephone kiosk.'

Appeal A Ref: APP/P4605/W/18/3193231

Public Highway, Smallbrook Queensway Jct Hill Street, Birmingham B5 4EN

- The application Ref 2017/04521/PA, dated 17 May 2017, was refused by notice dated 11 July 2017.

Appeal B Ref: APP/P4605/W/17/3192226

Public Highway, Hill Street Adj Holiday Inn Hotel, Birmingham B5 4EW

- The application Ref 2017/04444/PA, dated 16 May 2017, was refused by notice dated 10 July 2017.

Appeal C Ref: APP/P4605/W/17/3192289

Public Highway, 14 Hurst Street, Birmingham B5 4BN

- The application Ref 2017/04603/PA, dated 18 May 2017, was refused by notice dated 10 July 2017.

Appeal D Ref: APP/P4605/W/17/3192272

Public Highway, 41-43 Hurst Street, Birmingham B5 4BJ

- The application Ref 2017/04559/PA, dated 18 May 2017, was refused by notice dated 10 July 2017.

Appeal E Ref: APP/P4605/W/17/3192262

Public Highway, 77 Smallbrook Queensway, Birmingham B5 4HX

- The application Ref 2017/04520/PA, dated 17 May 2017, was refused by notice dated 11 July 2017.

Appeal F Ref: APP/P4605/W/17/3192263

Public Highway, Smallbrook Queensway in front of Debenhams, Birmingham B5 4BL

- The application Ref 2017/04522/PA, dated 17 May 2017, was refused by notice dated 11 July 2017.
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Appeal G Ref: APP/P4605/W/17/3192292

Public Highway, Edgbason Street In Front Of Debenhams, Birmingham B5 4QL

- The application Ref 2017/04605/PA, dated 18 May 2017, was refused by notice dated 11 July 2017.

Appeal H Ref: APP/P4605/W/17/3192228

Public Highway, 42 High Street, Birmingham B4 7SS

- The application Ref 2017/04445/PA, dated 16 May 2017, was refused by notice dated 7 July 2017.

Appeal I Ref: APP/P4605/W/17/3192301

Public Highway, 67-69 High Street, Birmingham B4 7TA

- The application Ref 2017/04446/PA, dated 16 May 2017, was refused by notice dated 4 July 2017.

Appeal J Ref: APP/P4605/W/17/3192294

Public Highway, 100B Bull Street, Birmingham B4 7AA

- The application Ref 2017/04667/PA, dated 16 May 2017, was refused by notice dated 12 July 2017.

Appeal K Ref: APP/P4605/W/17/3192297

Public Highway, Priory Queensway adj The Square SC B4 7LL

- The application Ref 2017/04305/PA, dated 11 May 2017, was refused by notice dated 4 July 2017.
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Decisions

1. The appeals are dismissed.

Background and Procedural Matters

2. The appeals relate to proposals by Maximus Networks Ltd for the 'Installation of a telephone kiosk' at 11 sites in Birmingham city centre. The proposed apparatus, as set out in the drawing titled 'Maximus Networks Ltd Telephone Kiosk', is identical in each case. Therefore, in the interests of conciseness, I have dealt with all the appeals in the same decision.
3. Since the submission of the appeal the revised National Planning Policy Framework (the Framework) has been published and I have therefore taken it into account in my decision. I am satisfied that no interested party has been prejudiced by this approach.
4. The description of development for the appeals is taken from the respective appeal forms to provide certainty of the proposal subject to each appeal and as they accurately capture the scope of the proposed development.
5. While the application form for Appeal E refers to '77 Smallbrook Queensway in front of Debenhams', from the evidence before me and my observations during my site visit, the appeal site is some distance away from the Debenhams store and I have therefore omitted the reference to Debenhams.
6. Whilst it would appear that the requisite notice was not given to Birmingham City Council at application stage, no prejudice has been caused and therefore I

consider it is appropriate to treat the applications as valid and allow the appeals to proceed to a decision.

7. Whilst The Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 amends the GPDO¹ by removing permission for the installation, alteration or replacement of a public call box by, or on behalf of, an electronic communications code operator, this is subject to transitional and saving provisions.
8. Therefore, for the purposes of these appeals, which were validly made, the proposals fall to be considered against the provisions of Schedule 2, Part 16, Class A of the GPDO, which refers to development ‘...by or on behalf of an electronic communications code operator for the purpose of the operator’s electronic communications network...’.
9. The recent *Westminster* judgement² concerned prior approval appeals involving telephone kiosks under Schedule 2, Part 16, Class A of the GPDO, and considered the matter of development for ‘the purpose’ of an operator’s network. The Court found “... that means that the whole development for which prior approval is sought must fall within the Class relied on, and no part of it can fall outside it. Otherwise, the general permission in the GPDO, and the restricted range of considerations would be applied to development which falls outside the scope of the permission.” (paragraph 37).
10. The proposals before me were refused by the Council on grounds relating to siting and appearance. However, *Westminster* found that “... the judgement as to whether the kiosk, as applied for, comes within the scope of Class A has to be made before siting and appearance are considered...” (paragraph 46).
11. Whilst the Council determined the applications before the *Westminster* judgment was handed down, the appellant and Council have been offered the opportunity to comment on the bearing of the judgment upon the appeals. I have taken these comments into account in making my decision.

Main Issues

12. Following the Court’s judgment in *Westminster*, the main issue is whether the proposals are solely for the purpose of the operator’s electronic communications network.

Reasons

13. The *Westminster* judgment found that a development “falls outside the scope of Class A Part 16 if it is not “for the purpose” of the operator’s network. That means, at least in the specific context of a GPDO permission, that a proposed development falls outside it, if part of it falls outside it. It cannot be said that the whole falls within the GPDO... A development which is partly “for the purpose” of the operator’s network, and partly for some other purpose, is not a development “for the purpose” of the operator’s network, precisely because it is for something else as well. The single dual purpose development must be judged as a whole.” (paragraph 39).

¹ The Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended).

² *Westminster CC v SSHCLG & New World Payphones Ltd* [2019] EWHC 176 (Admin) (5 February 2019)

14. In all cases, the proposed kiosk would be of a modern and lightweight design, open to one side, would have two fairly narrow sides with transparent panels and from the precedent photos would have a wide opaque panel to the rear. The proposed kiosk would be solar powered and linked to the mobile telephone network.
15. The proposals make no specific reference to the installation of advertisements on the proposed kiosks. Nonetheless, the plans show a hinged panel on the rear elevation of the kiosks. When viewed with the proposed rear elevation this appears to be an opening for the posting / replacement of advertisements. In the context of what is set out in the appellant's appeal statement regarding advertisements, it is apparent that the kiosks are intended to support advertising, such that they should be considered to constitute a dual purpose in the terms of the *Westminster* Judgment.
16. I note that, in commenting on the bearing of the *Westminster* judgment on the appeals, the appellant asserts that 'these appeals under consideration are not in any way whatsoever for advertising and there is no incorporation of advertising in the proposals that are the subject of these appeals'. I also note that the design of the proposed kiosks would be different to those in the *Westminster* judgment and would not be illuminated. However, based on the evidence before me, as outlined above, the proposed apparatus would contain features which are not there solely for the telecommunications function.
17. Therefore, I conclude that the apparatus would be both for the purpose of the operator's telecommunications network and for the purpose of commercial display. Accordingly, the proposals are not solely for the purpose of the operator's electronic communications network and so fall outside Schedule 2, Part 16, Class A of the GPDO.

Conclusion

18. For the reasons given above and having regard to all matters raised, including in representations, I conclude that the appeals should be dismissed.

R Sabu

INSPECTOR