

Appeal Decision

Site visit made on 26 July 2018

by R C Shrimplin MA(Cantab) DipArch RIBA FRTPI FCI Arb MCIL

an Inspector appointed by the Secretary of State

Decision date: 19th August 2019

Appeal Reference: APP/X5990/W/17/3186882

Pavement outside 146 Marylebone Road, London NW1 5PH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under 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 Mr T Fisher of Euro Payphone Limited against the decision of the City of Westminster Council.
 - The application (reference 17/04658/TELCOM, dated 22 March 2017) was refused by notice dated 20 July 2017.
 - The development proposed is the "installation of electronic communications apparatus (telephone kiosk) on the pavement".
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Appeal Decision

1. The appeal is dismissed.

Procedural matters

2. The description of the proposed development is taken from the appeal form, to provide certainty of the proposal subject to the appeal.
3. The application and appeal predate the coming into effect of the Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019, which do not affect this case, therefore.
4. Thus, as an electronic communications code operator, the appellant benefits from deemed planning permission for a proposed payphone kiosk (which may also be described as a public telephone call box) by virtue of the provisions of Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
5. Such a deemed planning permission is subject to the prior approval of the local planning authority of the siting and appearance of the proposed kiosk and the appellant applied to the Council on that basis. In this case, the Council determined that prior approval was required for the siting and appearance of the payphone kiosk and refused to grant approval.
6. The Order provides that the proposed development (as a telephone kiosk) is to be assessed solely on the basis of its siting and appearance, taking into

account any representations received, in the context of current regulations and planning policy. Even so, there is no requirement to have regard to the Development Plan and section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply in this case. In this case, however, the site is located within the Dorset Square Conservation Area and decision makers are required to pay special attention to the desirability of preserving or enhancing the character or appearance of conservation areas affected by development proposals.

Main issues

7. Following the Court's judgment in *Westminster CC v SSHCLG & New World Payphones Ltd* [2019] EWHC 176 (Admin), and in the light of the submissions that have been made, the first main issue is whether or not the proposal is solely for the purpose of the operator's electronic communications network.
8. If it is, it becomes necessary to consider the effect of the proposed development on the appearance and character of the surroundings and its effect on highway and pedestrian safety and convenience.

Reasons

9. The appeal site is located on a section of public footway on the north side of Marylebone Road. Marylebone Road is an especially busy main road through London, carrying heavy flows of traffic with a dedicated bus lane. There is a wide footpath, with trees at intervals alongside the carriageway.
10. The proposed kiosk is of a standard modern design and large in scale, constructed with large side panels on a metal frame. The submitted drawing shows that it would be 2.45 metres high overall, with a floor plan sufficient to accommodate a wheelchair, measuring 1.11 metres by 1.32 metres beneath the roof canopy. Essentially, however, the telephone kiosk would have only two long sides (with a short return panel). A solar panel would be included on the roof of the kiosk.
11. The local planning authority argue that the dimensions of the proposed kiosk are based on a desire for advertising space. The appellants point out that advertisement consent has not been applied for in this case and they assert that the kiosk has not been "designed specifically to accommodate advertising". However, the appellants also refer to the "potential for advertising" in connection with other arguments.
12. This appeal is concerned only with the construction of the kiosk and there is no application or appeal for advertisement consent. While the "potential" for advertising is referred to in the appellant's submissions, it is argued that such advertising should not be considered when considering the application for prior approval of the kiosk itself.
13. The kiosk drawings do not specifically identify an advertising panel but the large size of the side panels and their materials and simple form of construction evidently support an advertising function, in fulfilment of the acknowledged "potential". In consequence, I have concluded that the kiosk has, indeed, been designed specifically to accommodate advertising and that the size and design

of the unit clearly demonstrate that it would be intended to have an advertising function in reality.

14. The recent judgment that is referred to above raises a point that is not addressed in the cases referred to in the appellant's "Key High Court Judgments", making it necessary in cases such as this to consider whether or not the proposal is solely for the purpose of the operator's electronic communications network. In this case, I have considered the proposed design on its own merits and, because of the scale and design of the unit and in the light of all the submissions that have been made, I have formed the opinion that the proposed kiosk would clearly have a dual purpose, for both telecommunications and advertising.
15. Accordingly, the appeal proposal is not solely for the purpose of the operator's electronic communications network and, as such, it falls outside Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015.
16. In the light of that determination, it is unnecessary to consider the effect of the proposed development on the appearance and character of the surroundings (including the Conservation Area) and its effect on highway and pedestrian safety and convenience.

Conclusion

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

Roger C Shrimplin

INSPECTOR