



## Appeal Decision

Site visit made on 21 October 2019 by L Wilson BA (Hons) MA

**Decision by Chris Preston BA (Hons) BPI MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 30 October 2019**

---

### All Appeals

- The appeals are 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 appeals are made by Mr Paul O'Neill on behalf of Maximus Networks Ltd against the decisions of the City of Westminster Council.
  - The development proposed in each case is a public call box.
- 

### Appeal A Ref: APP/X5990/W/19/3229398

**129-131 Oxford Street, London, W1D 2HY**

**Grid Reference Easting 529425, Grid Reference Northing 181305**

- The application Ref 18/08777/TELCOM, dated 15 October 2018, was refused by notice dated 23 November 2018.
- 

### Appeal B Ref: APP/X5990/W/19/3229403

**130 Shaftesbury Avenue, London, W1D 5EU**

**Grid Reference Easting 529884, Grid Reference Northing 180983**

- The application Ref 18/08775/TELCOM, dated 15 October 2018, was refused by notice dated 28 November 2018.
- 

### Decisions – Appeals A and B

1. Both Appeals are dismissed.

### Appeal Procedure

2. The site visit was undertaken by an Appeal Planning Officer whose recommendation is set out below and to which the Inspector has had regard before deciding the appeal.

### Procedural Matters and Background – Appeals A and B

3. The Appeals relate to proposals by Maximus Networks Ltd for the installation of 'a public call box' at two sites in the City of Westminster. The proposed apparatus is identical in both cases. Therefore, in the interests of conciseness, I will evaluate both Appeals in the same decision.
4. The proposed call boxes would comprise two sides and consist of steel with a roof-mounted solar panel. They would have a footprint of approximately 1.32 metres by 0.98m, and they would be 3.12m high. The call boxes would have a phone pocket on one side and a non-illuminated display panel on the other. LED lighting strips would be located on the outside edges of the call boxes. The submitted details indicate that the overall colour of the kiosk is customisable, but would typically be

gun metal grey or black, and would have a sheen through the integral use of toughened glass and photovoltaic glass in the structure.

5. The Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 amends the GPDO<sup>1</sup> 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. For the purposes of these Appeals, the proposals fall to be considered against the provisions of Schedule 2, Part 16, Class A of the GPDO. This sets out permitted development rights for development carried out by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network.
6. The recent *Westminster* judgement<sup>2</sup> concerned prior approval Appeals involving telephone kiosks under Part 16 Class A of the GPDO. The judgement considered the matter of development for 'the purpose' of an operator's network. The Court found that the judgement as to whether the kiosk, as applied for, comes within the scope of Class A must be made before siting and appearance are considered. *Westminster* related to a kiosk which was for a dual purpose of advertisement display and telecommunications use. Consequently, it contained features that were for advertising and not there at all for the telecommunications function.
7. The Appeals before me were determined prior to the *Westminster* judgement. The appeal parties have however had the opportunity to comment on the bearing of the judgement upon the Appeals. I will take these comments into account.
8. The main parties dispute whether the proposed call boxes are solely for the purpose of the operator's electronic communications network. The Council consider that the proposed kiosks have a dual purpose, for both telecommunications and advertising. It is apparent that the form and design of the proposed telecommunications apparatus is driven by its proposed functionality as a public call box. Counsel for the appellant states that none of the proposed kiosks before me include any advertising features. The submission is that the call boxes proposed would not be for a dual purpose and can be distinguished from *Westminster*. On the available evidence, it appears that the design of the proposed kiosks do not include elements that are there for the purpose of advertising. Consequently, the proposals would be intended for the purpose of the operator's electronic communications network and not serve a dual purpose.
9. In the reasons for refusing to grant prior approval, the Council made reference to Policies S25, S28, S41 and S7 of the Westminster's City Plan (2016) (CP); Policies DES 1, DES 7, DES 9, DES 10 and TRANS3 of the City of Westminster Unitary Development Plan (2007) (UDP) as well as the Westminster Way Supplementary Planning Document (2011) (SPD). The appellant has also referred to Policies 6.9, 6.10, 7.5 and 7.6 of the London Plan (LP) along with The Transport for London Pedestrian Comfort Guidance (PCG) and Transport for London Streetscape Guidance (SG).
10. The principle of development is established by the GPDO and permitted development rights are set out in Schedule 2 Part 16 for this type of development. The provisions do not require regard be had to the development plan. I will only have regard to the policies of the development plan and any related guidance in so

---

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

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

far as they are relevant to matters of siting and appearance. Considerations such as need for the call boxes are not relevant matters.

11. The National Planning Policy Framework (the 'Framework') was revised in February 2019, after the Council determined the applications. Both main parties have had the opportunity to comment on any relevant implications for the Appeals. I shall have regard to the Framework in so far as relevant to matters of siting and appearance.
12. The appellant has submitted a highways analysis. This analysis was not submitted to the Council when they determined the applications. As the Council have had the opportunity to review and comment on this additional information, I will take it into account when determining the Appeals. I note that no indication has been provided as to the precise orientation of the call boxes in both cases. As such, I will determine the Appeals with reference to the identified footprint on the appellant's submitted photographs.

### **Main Issues**

13. In respect of both Appeals these are, the effect of the siting and appearance of the proposed development upon (1) the character and appearance of the area including the setting of nearby listed buildings and conservation areas, and (2) the effect upon the safe and efficient operation of the highway.

### **Reasons for the Recommendation**

#### ***Appeal A - 129-131 Oxford Street - Character and Appearance***

14. The appeal site is located within a commercial area and next to a light controlled pedestrian crossing. The proposed call box would be located directly adjacent to the Soho and East Marylebone Conservation Areas, both of which have designated boundaries which run along Oxford Street in close proximity to the site. From the information before me, the two Conservation Areas have a varied character with a mix of commercial and residential streets but there can be no doubt that the busy commercial thoroughfare of Oxford Road contributes significantly to the character of both designations. The quality of buildings within the street scene varies and there are a mix of modern and more traditional shop frontages. The call box would also be located within the setting of a Grade II listed building (LB); 133-135 Oxford Street. The LB is a cast-stone clad building with three eclectic Baroque-style elevations. The three-bay Oxford Street frontage has strong compositional qualities with a central decorated bay. The sixth storey is recessed behind railings in the central bay with pediments.
15. Within this section of the pavement there is limited street clutter which results in a relatively open footway. In the vicinity street furniture consists of waste bins and lampposts. Whilst the size of the call box would adhere to that set by the GPDO, the proposal would harm the character and appearance of the area due to its scale and massing. Consequently, the proposal would introduce a built form which would be significantly more noticeable than the existing street furniture and would stand out as an intrusive feature that would draw the eye and detract from the ability to appreciate the adjacent listed building and the wider range of commercial buildings which contribute to the character of the two Conservation Areas.
16. Framework paragraph 193 states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight

should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance. Framework paragraph 194 states that any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.

17. The proposal would have a negative impact upon the Conservation Areas and LB because of its appearance and siting. It would be a dominant modern addition to the street scene which would detract from the architecture of the LB and character of the Conservation Areas. Accordingly, the proposal would fail to preserve or enhance the character or appearance of the setting of the Conservation Areas. Additionally, the proposal would fail to preserve the setting of the LB.
18. The harm arising would be localised and would be less than substantial, nevertheless it is of considerable importance and weight. This harm should be weighed against the public benefits of the proposal, where appropriate, securing its optimum viable use. The appellant has stated that the proposal's economic, social and environmental benefits will be mitigating factors where there is less than substantial harm resulting to a heritage asset.
19. The appellant has also stated that the services provided by the call box would be free-to-use, inclusive and accessible pay phone, supplemented, in accordance with the operator's Code Powers, by 4G/5G, WiFi and small cell technology to improve broadband, mobile phone and data connectivity to facilitate calls made by the public. In addition, the phone would be accessible to wheelchair users. Whilst I do not dispute those general benefits of the proposed network, there is nothing before me to indicate that similar benefits could not be achieved by siting apparatus in more sensitive locations without causing harm to designated heritage assets. In any event, the benefit arising from the positioning of a single kiosk would be limited in scale and, having regard to paragraph 196 of the Framework, would not outweigh the harm to heritage assets that I have identified.

#### *Highway*

20. The call box would reduce the width of the pavement. During the time of my site visit, this area of pavement had a steady flow of pedestrians. I have seen nothing to suggest that my observations are untypical.
21. The appellant has submitted a site-specific highways analysis to demonstrate that the proposal would not have a harmful effect upon the safe and efficient operation of the highway. However, the analysis does not take into account the existing street furniture nor factor in the pedestrian crossing. The siting of the proposal next to the pedestrian crossing would hinder the flow of pedestrians using the crossing. The call box would be significantly wider than the existing street furniture and would act as an obstacle for pedestrians to navigate around. Taking the above together, the scheme would have an adverse impact on direct, safe and convenient pedestrian movement.

#### ***Appeal B - 130 Shaftesbury Avenue - Character and Appearance***

22. The proposed call box would be situated in primarily a commercial area, close to a light controlled pedestrian crossing and pedestrian island. On the opposite side of Shaftesbury Avenue is the Soho Conservation Area and the side elevation of the

Palace Theatre which is a Grade II listed building. The listed building is a substantial red brick building with four main storeys. The building has three main bays to the front elevation and octagonal corbelled corner towers with domes.

23. The proposal would be situated directly next to a waste bin. Street trees, two telephone boxes and lampposts are also evident within this section of pavement. The existing street furniture is separated by gaps which ensures the pavement is not dominated by street clutter. The proposal would appear cramped and would not respect the spacing and siting of existing street furniture as it would be uncomfortably close to the waste bin. Additionally, due to its footprint and height the call box would appear more dominant than the existing street furniture. For all of those reasons it would be visually intrusive and would harm the character and appearance of the area.
24. Whilst the proposal would cause harm to the character and appearance of the immediate vicinity it would be situated next to a more modern building and would not unduly interrupt views of the Soho Conservation Area or the Palace Theatre, nor would it have any notable impact on how those heritage assets are experienced. Consequently, the proposal would have a neutral effect on heritage assets and would preserve the character and appearance of the Conservation Area and the setting of the listed building.

#### *Highway*

25. The proposed call box would reduce the width of the pavement. During the time of my site visit this area had high levels of pedestrian flow. I have seen nothing to suggest that my observations are untypical. The appellant has submitted a site-specific highways analysis to demonstrate that the proposal would not result in any material impact on the capacity of this section of footway nor compromise safety.
26. The analysis highlights that the footway is 3.8 metres in width and does not comply with the PCG which indicates that the overall footway should have a width of 5.3m. The proposal would accord with the minimum footway clear zone recommended by the SG. The analysis does not take into account the existing street furniture. Due to the size and siting of the call box it would act as an obstacle for pedestrians to navigate around. The proposal would result in further street furniture in an area where the overall width of the pavement is substandard. The call box would create a pinch point as it would be substantially wider than the existing waste bin and street tree which it would be located between. Consequently, the scheme would interrupt the free flow of pedestrians and have an unacceptably adverse effect on pedestrian movement.

#### **Other Matters**

27. My attention has been drawn to other appeal decisions. I do not have the full details of the other cases and so cannot determine whether the circumstances are comparable to the proposals before me. Notwithstanding this, the proposed call boxes have their own settings and my conclusions are based on the site specific circumstances of each appeal. As such, the other appeal decisions referred to are not determinative points in favour of the proposals.

#### **Conclusions and Recommendations**

28. I conclude that, in both Appeals, the siting and appearance of the call boxes would harm the character and appearance of the area. The proposals would not meet with

the aims of Policies S25 and S28 of the CP, Policies DES 1 and DES 7 of the UDP along with Policies 7.5 and 7.6 of the LP. In terms of Appeal A, the proposal would not preserve or enhance the character or appearance of the setting of the LB or Conservation Areas. The public benefits do not outweigh the harm to the setting of the heritage assets. Therefore, in addition to the above conflict, Appeal A would also be at odds with Policy S25 and DES 9 and DES 10 of the UDP. In Appeal B, I have found that the proposal would not result in harm to the setting of the listed building nor Soho Conservation Area.

29. In addition, I have also found that the call boxes would be harmful to the safe and efficient operation of the highway. The proposals would also not meet with the aims of Policies S41 and S7 of the CP, TRANS3 of the UDP, the SPD, Policies 6.9, 6.10 and 7.5 of the LP along with the aims of the PCG and SG.
30. For the reasons given above, I recommend that both the Appeals should be dismissed.

*L M Wilson*

APPEALS PLANNING OFFICER

**Inspector's Decision**

31. I have considered all the submitted evidence and the Appeal Planning Officer's report, and, on that basis, I too agree that both of the Appeals should be dismissed.

*Chris Preston*

INSPECTOR