The Planning Inspectorate

Appeal Decision

Site visit made on 10 December 2019 by L Wilson BA (Hons) MA

Decision by Chris Preston BA (Hons) BPl MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd February 2020

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/19/3231070
100 Marylebone Road, London NW1 5DX
Grid Reference Easting 528227, Grid Reference Northing 182073

- The application Ref 18/09298/TELCOM, dated 31 October 2018, was refused by notice dated 17 December 2018.

Appeal B Ref: APP/X5990/W/19/3231064
269 Old Marylebone Road, London NW1 5RA
Grid Reference Easting 527272, Grid Reference Northing 181517

- The application Ref 18/09336/TELCOM, dated 1 November 2018, was refused by notice dated 17 December 2018.

Appeal C Ref: APP/X5990/W/19/3231063
Adj. 191 Old Marylebone Road, London NW1 5DZ
Grid Reference Easting 527380, Grid Reference Northing 181758

- The application Ref 18/09367/TELCOM, dated 2 November 2018, was refused by notice dated 17 December 2018.

Decisions – Appeals A to C

1. All the 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 to C

3. The Appeals relate to proposals by Maximus Networks Ltd for the installation of 'a public call box' at three sites in the City of Westminster. The proposed apparatus is identical in each case. Therefore, in the interests of conciseness, I will evaluate all these 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 box. 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[1] 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[2] 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 applications 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 primary purpose of these structures is for 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 the design of the proposed kiosks would 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 S7, S25, S28, S41 of the Westminster City Plan (2016); Policies DES1, DES7, DES9, DES10, TRANS3 of the City of Westminster Unitary Development Plan (2007) as well as the Westminster Way Supplementary Planning Document (2011). The appellant has also referred to Policy 6.9, 6.10, 7.5 and 7.6 of The London Plan along with The Transport for London Streetscape Guidance (SG) and The Transport for London Pedestrian Comfort Guidance.

[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).

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 have regard to the policies of the development plan and any related guidance in so 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 each case. As such, I will determine the Appeals with reference to the identified footprint on the appellant's submitted photographs.

Main Issues

13. These are, the effect of the siting and appearance of the proposed development upon:

i. the character and appearance of the area (all Appeals), and linked to that, the setting of nearby listed buildings and conservation area (Appeal A); and

ii. the safe and efficient operation of the highway (all Appeals);

Reasons for the Recommendation

Appeal A - 100 Marylebone Road

Character and Appearance

14. The appeal site is located within a commercial area close to a traffic controlled junction and pedestrian crossing. York Gate, to the north of the site, serves as a main thoroughfare to Regent's Park. The site is adjacent to the Regent's Park Conservation Area and is within the setting of a Grade I listed building (LB); No.8-12 York Gate. The LB is distinctive within the street scene and is a unified terrace block; it has a symmetrical front elevation which is identical to that of No.1-5 York Gate, on the opposite side of the highway. The call box would be adjacent to the side elevation of the LB; I observed on my site visit that the entrance on this elevation was well-used. The side elevation of the stuccoed LB has a rusticated podium ground floor with semi-circular windows and an enclosed porch with Greek Doric columns in antis. There is cornice detailing above the ground and second floor. The LB is enclosed by palmette-finialed area railings.

15. In the vicinity of the appeal site is a line of street trees and a wayfinding sign. The trees and railings to the side of the pavement result in a sense of enclosure. The kiosk would be significantly more prominent than the wayfinding sign and street trees because of its design, scale and massing. The scheme would not reflect the traditional character of the nearby buildings nor reflect the spacing of the existing trees. Its modern and bulky design would negatively contrast with the existing street furniture

and character of this section of Marylebone Road. For all of those reasons, the siting and appearance of the scheme would be visually intrusive and would harm the character and appearance of the area.

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 goes on to state 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 LB and Conservation Area due to its modern bulky appearance and siting. The call box would be a dominant modern addition to the street scene which would detract from the architecture of the LB and character of the Conservation Area. Accordingly, the scheme would fail to preserve the setting of the LB. Additionally, the proposal would fail to preserve or enhance the character or appearance of the setting of the Conservation Area.

18. The harm arising would be less than substantial, as the harm would be localised, nonetheless it is of considerable importance and weight. This harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use. The appellant states 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 outlined general benefits of the scheme including it being free-to-use, improving broadband and accessible to wheelchair users. However, there is nothing before me to indicate that similar benefits could not be achieved by siting the kiosk in a more sensitive location without causing harm to designated heritage assets. In any event, the benefit arising from a single call box would be limited in scale and, having regard to paragraph 196 of the Framework, would not outweigh the harm which would be caused to the 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 moderate levels of pedestrian flow. A large number of pedestrians were using the nearby pedestrian crossing. 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. The Council has not submitted any substantive evidence to conclude otherwise.

21. Both main parties agree that the call box would be setback 0.45m from the edge of the kerb. However, there is a slight disparity between them with regards to the unobstructed width of the footway. The appellant considers 5.8m would be unobstructed and the Council consider 5.425m. Nonetheless, the proposal would accord with the SG which requires a minimum unobstructed footway of 2m in width and a clearance of 0.45m from the carriageway.

22. The proposal would broadly align with the existing street trees; thus, it would not have an adverse effect on pedestrian flow due to the pavement being wide. Accordingly, the siting and appearance of the call box would not be detrimental to the safe and efficient operation of the highway.

Appeal B - 269 Old Marylebone Road

Character and Appearance

23. The area is characterised by residential and commercial uses. There are currently Sheffield cycle stands situated where the call box is proposed. In the vicinity of the appeal site is a pedestrian crossing, a street tree, two telephone boxes and a street cabinet.

24. The kiosk would be a prominent addition to the street scene due to its design, scale and massing. Whilst the call box would broadly align with the existing street furniture, there would be a lack of spacing between the scheme and existing telephone box. The two existing telephone boxes are prominent within this section of the pavement, however the separation between them helps to reduce their impact upon the street scene. The proposal would result in this section of pavement being further dominated by large telephone boxes. For all of those reasons, the siting and appearance of the scheme would increase visual clutter and would harm the character and appearance of the area.

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 have a harmful effect upon the safe and efficient operation of the highway. The Council has not submitted any substantive evidence to conclude otherwise.

26. This section of pavement is relatively wide, and the existing telephone boxes and street tree have already impacted the flow of pedestrians. The main parties disagree on the extent of pavement which would be unobstructed. The Council consider that 5.975m of the footway would be left clear whereas the appellant considers 6.2m. The SG requires a minimum unobstructed footway of 2m in width and a clearance of 0.45m from the carriageway. Although the two main parties disagree on the degree of pavement that would be left clear they both agree that the call box would be set back 2.3m from the kerb edge.

27. The proposal would not create a pinch point nor impact the flow of pedestrians as it would broadly align with the existing telephone boxes and the unobstructed footway width would be adequate. Consequently, the siting of the call box would not be detrimental to the safe and efficient operation of the highway.

Appeal C - Adj. 191 Old Marylebone Road *- Character and Appearance*

28. The appeal site is located within primarily a commercial area. In the vicinity of the appeal site is an existing telephone box, street trees and bollards. The trees and bollards have equal gaps between them. The call box would not reflect the rhythm and spacing of the existing street furniture because it would be situated adjacent to an existing telephone box. The proposal would result in this section of pavement appearing dominated by two large call boxes due to the lack of separation. The kiosk would be a prominent addition to this part of Old Marylebone Road because of its design, scale and massing. For all of those reasons, the siting and appearance of the proposal would be visually intrusive and would harm the character and appearance of the area.

Highway

29. The proposed call box would reduce the width of the pavement. During the time of my visit, this area had moderate levels of pedestrian flow. 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. The Council has not submitted any substantive evidence to conclude otherwise.

30. This section of pavement is relatively wide but as the trees are sited towards the centre of the pavement this results in the footway appearing narrower. The existing telephone box and street trees have already impacted pedestrian flow. Both main parties agree that the call box would be set back from the edge of the kerb by 0.45m and 5.6m of the kerb would be left clear. The scheme therefore accords with the SG which requires a minimum unobstructed footway of 2m in width and a clearance of 0.45m from the carriageway.

31. The call box would not create a pinch point nor impact the flow of pedestrians as it would align with the existing telephone box. The unobstructed footway width would be adequate. Accordingly, the siting of the kiosk would not be detrimental to the safe and efficient operation of the highway.

Other Matters

32. 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

33. For the reasons given above, I recommend that all of the Appeals should be dismissed.

L M Wilson

APPEALS PLANNING OFFICER

Inspector's Decision

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

Chris Preston

INSPECTOR