

Maximus Networks Limited

Prior Approval Appeals for Telecommunications Apparatus

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OPINION

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1. I am instructed on behalf of Maximum Networks Limited (“Maximus”) to provide my opinion on a specific point that has arisen in relation to a number of planning appeals that are currently under consideration by the Planning Inspectorate.
2. In each appeal, the Planning Inspectorate has written to the parties asking whether they have any comments as to whether a recent High Court judgment has any bearing on the appeals. The High Court judgment in question is the decision of Ouseley J in *Westminster CC v. SSHCLG & New World Payphones Ltd* [2019] EWHC 176 (Admin) (the “New World case”). I am instructed to advise as to the relevance, if any, of the New World case to the Maximus appeals.
3. The Maximus appeals that are the subject of this opinion are those appeals concerning the Maximus call boxes known as “Max 2”.
4. For the reasons I set out more fully below, in my opinion the New World case is of very little, if any, relevance to the issues in the Maximus appeals. In a nutshell, the decision in the New World judgment rests on the fact that the New World kiosk was for the dual purpose of advertisement display and telecommunications use (and contained features which were for advertising and ‘not there at all for the telecommunications function’). That factual situation simply does not arise in the Maximus appeals.

Background

5. The appeals each concern refusals by the relevant local planning authority to grant prior approval, in respect of siting and appearance, under Class A, Part 16 of Schedule 2 of

the Town and Country Planning (General Permitted Development Order 2015 (the “GPDO”).

6. Under Article 3 and Class A of Part 16 of Schedule 2 of the GPDO, deemed planning permission is granted for development by or on behalf of an electronic communications code operator for the purpose of the operator’s electronic communications network in, on, over or under land controlled by that operator in accordance with the electronic communications code consisting of *inter alia* the installation of any telecommunications apparatus.
7. The proposed development in each case under consideration in the appeals is telecommunications apparatus comprising a ‘public call box’.
8. The appeals concern only applications for prior approval of the authority as to the siting and appearance of the development under A.3 of Part 16 of Schedule 2 of the GPDO.

#### The New World Case

9. New World Payphones Ltd applied to Westminster City Council (“Westminster CC”) for determination as to whether prior approval was required for the siting and appearance of a telephone kiosk and, at the same time, applied for express consent for “display of illuminated digital advertisement panel...as part of new telephone kiosk” under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (the “2007 Regs”). The illuminated panel proposed by New World was to be on the rear of the proposed kiosk.
10. Prior approval was granted for the telephone kiosk by an Inspector on appeal, but the Inspector dismissed a simultaneous appeal against refusal of the advertising consent. Westminster CC brought a legal challenge against the Inspector’s decision to grant prior approval for the kiosk. The New World judgment is the High Court’s determination of that legal challenge.
11. In the New World judgment, the High Court held that the application for prior approval in that case should have been refused because the application fell outside the scope of

Class A of the GDPO (see para 48 of the judgment). This was on the basis that the development proposed was not ‘for the purpose of the electronic communicator’s telecommunications network’ (within Class A) but was instead was for a dual purpose because part of the proposed development was an electrified advertising panel:

“I do not consider that the evidence here could permit of any conclusion other than that the kiosk served a dual purpose. Part of its purpose was for the operator’s network, as a telephone kiosk. Part of it was to be the electrified advertising panel. The panel was for the purpose of displaying advertisements. It was not ancillary or incidental to the kiosk, nor legally insignificant. It does not matter whether it would have been lit if no advertisements were displayed. No relative significance has to be attributed to either part of the dual purpose; it is sufficient if the two purposes exist without the advertising use being ancillary or incidental or of no legal significance. There was no suggestion from the DL or the parties that the Inspector had or could have considered the advertising panel, for which separate consent had to be obtained, to be legally insignificant or merely incidental to the telecommunications use.” (paragraph 42 of the judgment)

12. Further, there was factual evidence that was before the Inspector which included New World Payphones stating that “the replacement kiosk and the advertisement display panel were two aspects of the proposal and were inextricably linked: a kiosk or set of kiosks would only be replaced if both prior approval and advertisement consent were granted” (recorded at para 21 of the judgment).

13. It was also clear that the application for the advertising panel (as distinct from the use of the panel for display) formed part of the development proposed under the prior approval application (and was not sought only as part of the advertising consent application). At paragraph 15 of the judgment, the Judge stated:

“Although I did not have the actual applications for consent and approval, it is clear from the DL that the panel which would be used for the display of the advertisements was part of the kiosk for which prior approval was sought under the GPDO, and that the consent sought for the display of advertisements related to the use of that panel for display, and not to its installation as part of the kiosk.”

14. The Court made clear its reasoning at paragraph 45:

“The application was for the purpose of the operator’s telecommunications network and for the purpose of advertising, because part of what was needed for the advertising role was performed by the structure and features of the telephone kiosk, to be dealt with under the electronic communications prior approval. A further consent was necessary in order for the facility, as installed, to be used for that purpose, but the advertising consent would be pointless without the inbuilt facility in the kiosk to switch on the lights and display the advertisement. On a cruder description, part of the purpose of the kiosk was as a hoarding for the display of illuminated advertising, part was for the purpose of an electronic communications network.” The fact that consent was required for a particular form of advertisement display does not mean that it was the less in part an advertising facility. The Inspector’s approach does not deal with the fact that the kiosk contains features which are not there at all for the telecommunications function, whether acceptable in the street scene or not. New World Payphones are trying to obtain permission for the structure for an advertisement display on the back of a telephone kiosk prior approval. Advertising consent or refusal cannot alter that position. They are two separate regimes.”

15. In other parts of the judgment, the Court rejected Westminster’s argument that ‘need’ (as distinct from ‘purpose’) was required to be considered on a determination of a prior approval application (paragraph 49). The Court also rejected the argument that development within Class A had to be ‘required for the purpose of the operator’s network.’ (paragraph 50).

### **Opinion**

16. As already stated, it is my opinion that the New World case has little, if any, relevance to the Maximus appeals. The only potential relevance is to establish that ‘need’ and the consideration of what is ‘required for the purpose of the operator’s network’ are not relevant factors in a prior approval determination. This may be relevant to the Maximus appeals if there are cases where local planning authorities have been seeking to argue that these factors are material to the Inspector’s determination.
17. The New World case has no other relevance to the Maximus cases because the factual matters in the New World case that led the Court to decide that the New World development fell outside Class A of the GDPO simply do not arise in the Maximus appeals.
18. The New World decision rests on what was proposed in New World’s prior approval application. The proposed development included an advertising panel and an inbuilt

facility to illuminate and to display advertisements. These features were ‘not there at all for the telecommunications function’.

19. By clear contrast, none of the Maximus appeal cases include any advertising features. All the design elements of the public call boxes proposed by Maximus form part of the telecommunications function.
20. This is clear to me from the description of the design of the ‘Max 2’ call box that has been provided to me and that is attached as an annex to this Opinion.
21. From the description provided, it is apparent that the form and design of the proposed telecommunications apparatus is driven by its proposed functionality as a public call box with modern functionality (Wifi modems, 4G & 5G Small Cells) and a renewable source of power (solar PV cells). The proposed development includes no elements that are there for the purpose of advertising and I am instructed that use for advertising does not form part of the what is proposed in the applications. Accordingly, the conclusion of a dual purpose in the New World case can have no application to the facts in the Maximus cases.
22. For completeness, I note that, as with any new public call box with a glazed surface (which probably includes *all* public call boxes), deemed permission is granted under Regulation 6 and Class 16 of Schedule 3 to the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (the “Advertisements Regs”) to display advertisements on one glazed surface of the kiosk, providing that it is not within a conservation area and is not illuminated. This fact is acknowledged in the sample Appeal Statement of Case that I have seen.
23. Self-evidently this means that the possibility of advertisements being displayed on one glazed surface of the proposed call box in one or more of the Maximus appeals at some time in the future cannot be ruled out (even though it is not proposed as part of any of the applications).
24. However, in my opinion, this possibility clearly cannot, and would not, justify any conclusion that the Maximus proposals have a ‘dual purpose’ so as to take them outside the scope of Class A of the GPDO. Unlike the illumination panel proposed in the New

World case, the glazed surfaces of the call boxes in the Maximus appeals are integral to the telecommunications functions of the apparatus (or, at the very least, are ancillary to those functions). Therefore, in the absence of advertising forming part of the application, those glazed parts of the call boxes cannot lead to any conclusion of there being a dual purpose for advertising.

25. Furthermore, if the possible use of glazed surfaces for future advertising (under the 2007 Regs) did mean that call boxes fell outside Class A due to a supposed ‘dual use’ conclusion, the permitted development rights for call boxes would be rendered of no effect by preceding legislation, an outcome that cannot have been the intention of Parliament.

26. In conclusion, it is my strong opinion that the High Court decision in the New World case is based on materially different facts from the Maximus cases, such that it is of no application to the appeals currently under consideration by the Planning Inspectorate.

11 March 2019

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## ANNEX

### Description of the Design of the ‘Max 2’ Call boxes

This is the latest version of the Maximus public call box (referred to as Max 2). The design has been developed over the course of the last two years, in part, as a response to comments on the previous Max 1 design and also as a reflection of Maximus' commitment to the highest standards of design.

In a fast moving sector of the economy, this latest design incorporates the 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.

This public call box is an updated design, using the same principles of the original Maximus public call box (referred to as Max 1) in terms of a simple design approach, sympathetic in scale and form to existing street furniture. The design has however been updated reducing its profile within the street scene so that the public call box will only be readily visible in direct views along the pavement, where it will form part of the recognisable street furniture in terms of design and scale.

The footprint of this public call box has been substantially reduced when compared to more traditional designs, to minimise the impact on useable pavement area and to be extremely discrete when viewed in profile or oblique views, as a response to perceived concern over appearance within the streetscape. The height and width is a specific response to the space and function requirements of the extensive telecommunications equipment housed within. The height of the structure has been determined to optimise the functioning and efficiency of the 4G/5G, small cell and Wifi technology within.

The canopy serves a shelter, and is made of the solar panels that will power the phone. In addition, the widest faces of the call box incorporate photovoltaic glass to maximise the energy generating potential. The phone is easily accessible by wheelchair users, and the width provides an element of 'defensible space' in the absence of more 'traditional' cabin designs. LED lighting strips on the outside edges of the call box are included for safety purposes, solely to identify the edge of the structure on the pavement during hours of darkness and will be in a customisable contrasting colour. Similarly, the overall colour of the call box is customisable, but would typically be 'gun metal' grey or black, and will have a 'sheen' through the integral use of toughened glass and photovoltaic glass in the structure. A central panel on the opposite face of the call box from the phone will allow access to equipment inside for maintenance purposes and the replacement and updating of hardware within the call box as required.

Every element of this design has been carefully considered to ensure that form follows function. The proposal submitted is an enhancement of the traditional public call box design in every regard, and will make a positive contribution to the townscape in terms of operation, function and design.

The orientation of the public call box is designed to optimise customer comfort, convenience and accessibility and at the same time to maintain satisfactory safe and unimpeded pedestrian flows on the adjacent footway. The shallow profile of the Appellant's public call box will improve visibility and discourage any anti-social behaviour or criminal activity.

The public call box will be sited a minimum of 450mm from the pavement edge.

The design is purely and primarily to facilitate the public call box functions within the legal parameters set out in the GPDO. The ground or base area of the structure does not exceed 1.5 metres square in accordance with the requirements of the GPDO.

Solar panels on the roof of each public call box will power the payphone. The payphone will connect to the network via mobile telephone technology. As a result, the public call box does not require support from any utility services and is completely independent. This provides flexibility in terms of siting. The selection of sites has therefore been determined partly by the requirements of network coverage and also by the site specific selection criteria outlined in the following section.