Neutral Citation Number: [2019] EWHC 176 (Admin)

Case No: CO/3111/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2019

Before :

MR JUSTICE OUSELEY

- -

Between :

WESTMINSTER CITY COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and –	
NEW WORLD PAYPHONES LTD	**Interested Party**

- -
- -

MS SAIRA KABIR SHEIKH QC
(instructed by **BI-BOROUGH SHARE LEGAL SERVICES**) for the **Claimant**
MR MARK WESTMORELAND SMITH
(instructed by **THE GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**
MR PAUL STINCHCOMBE QC
(instructed by **SQUIRE PATTON BOGGS**) for the **Interested Party**
Hearing dates: 15 January 2019

- -

Approved Judgment

MR JUSTICE OUSELEY :

1. New World Payphones Ltd, the Interested Party, is the operator of an electronic communications network for the purposes of the Communications Act 2003, and the Town and Country Planning (General Permitted Development) (England) (Order) 2015 SI No. 596, the GPDO. It wanted to replace two existing telephone boxes with a single new kiosk outside 25-27 Marylebone Road, London, in the area of Westminster City Council. The intended exercise of the permitted development rights within the GPDO required New World Payphones to apply to the City Council for a determination as to whether its prior approval was required for the siting and appearance of the new kiosk. New World Payphones' application was refused, but its appeal to the Secretary of State for Housing, Communities and Local Government was successful. The appeal was decided by an Inspector upon written representations and a site visit. The decision letter, DL, is dated 27 June 2018. Westminster City Council challenges the lawfulness of that decision under s288 of the Town and Country Planning Act 1990.

2. New World Payphones also applied to the City Council for express consent under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007, for the "display of illuminated digital advertisement panel…as part of new telephone kiosk". This panel was on the rear of the proposed kiosk. Consent was refused. New World Payphones lost its appeal against that refusal. Its appeal was dealt with by written representations together with the prior approval appeal. The same DL dealt with both issues. There is no challenge to the decision to refuse advertising consent.

3. Westminster City Council contends first that the grant of prior approval was outside the powers conferred by the GPDO because the new kiosk was not "for the purpose" of the operator's electronic communication network, but instead was primarily for the purpose of advertising via the illuminated panel. Second, but related, the City Council contended that the Inspector had ignored an issue which it raised, namely that there was no need for the proposed kiosk. There had to be a need for the proposal before it could come within the scope of permitted development in Class A of Part 16 of the GPDO, and before consideration of its siting and appearance could be relevant. Third, as a form of belt and braces, it contended that the Inspector's approach to the need for and purpose behind the proposed kiosk was irrational or inadequately reasoned.

4. These grounds reflect a growing concern, at least within the City Council's area, about a proliferation of prior approval applications in relation to telephone kiosks along with advertising consents; it contends that little use is made of the kiosks for electronic communications, and that the electronic communications network operator, many of which are owned by advertising companies, see the kiosk as a means of displaying advertisements. Indeed, the City Council obtained permission to introduce quite detailed evidence into the appeal, to support these concerns, and to explain the City Council's programme of monitoring kiosks, which were little used or not used at all. This was all in support of its contention that the need for such kiosks was a material planning consideration. There was a reply from New World Payphones. Most of this evidence was not before the Inspector, I am prepared to consider that evidence only for the purpose of explaining the City Council's concern behind its appeal. Beyond that, I regard that evidence, insofar as it was not before the Inspector, as inadmissible to support a challenge on the grounds that the decision was outside the powers of the Inspector or one for which he provided legally inadequate reasons. It has played no part in my conclusions.

The legislative and policy framework

5. "Planning permission may be granted by a development order"; s58(1) of the 1990 Act. "A development order may either (a) itself grant planning permission for development specified in the order for development of any class specified;…"; s59(2). The relevant Order for that purpose is the GPDO. Article 3 (1) provides: "Subject to the provisions of this Order…, planning permission is hereby granted for the classes of development described as permitted development in Schedule 2." Such a planning permission is subject to any exception, limitation or condition specified in the schedule.

6. Schedule 2 Part 16 is the relevant part; it relates to "Communications". Class A deals with "electronic communications code operators". It defines Class A thus:

> "A. 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 or in accordance with the electronic communications code consisting of –
>
> (a) the installation, alteration or replacement of any electronic communications apparatus…."

Conditions are imposed by paragraph A2, materially in A.2 (2):

> "(2) Class A development is permitted subject to the condition that –
>
> (a) any electronic communications apparatus provided in accordance with that permission is removed from the land or building on which it is situated –
>
> (ii) in any other case, as soon as reasonably practicable after it is no longer required for electronic communications purposes; and….;"

7. By paragraph A.2 (3) certain forms of Class A development are permitted subject to the condition that prior approval be obtained under paragraph A.3. These include, by A.2 (3) (c)(iii) "the construction, installation, alteration or replacement of - (aa), a public call box."

8. Paragraph A.3 sets out the procedure for applying for prior approval from the local authority, and at A.3 (4) provides that:

> "Before beginning the development described in paragraph A. 2(3), the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting and appearance of the development."

9. By subparagraph (8), development cannot begin until the determination of whether prior approval is required and, if so, its grant.

10. The various definitions relevant to electronic communication code operators cross refer to the Communications Act 2003. Mr Stinchcombe QC for New World Payphones

pointed to the definition of an "electronic communications system" in s32, because one aspect of Ms Sheikh's submissions created some doubt as to whether she was saying that a kiosk fell outside its scope. An "electronic communications system" is a transmission system for the conveyance of signals of any description, and a signal included anything which comprised speech, sounds, visual images or communications or data of any description. I am satisfied that telephone kiosks in principle and this kiosk in particular would be part of that system, about which a comment by the City Council had introduced some uncertainty.

The Decision Letter

11. The written submissions accepted that the New World Payphones was an electronic communications code operator, entitled to benefit from Part 16 Class A of the GPDO. The Inspector took into account various policies of the City Council's Unitary Development Plan and a Supplementary Planning Document in so far as they were relevant to siting and appearance. This approach was not controversial. He also referred to the National Planning Policy Framework, NPPF, for its support for high-quality communications infrastructure, and because it requires local planning authorities to determine applications for prior approval on planning grounds. Paragraph 45 of the NPPF explained that applications related to telecommunications, including applications for prior approval under the GPDO, "should be supported by the necessary evidence to justify the proposed development." Paragraph 46 stated that applications should be determined on planning grounds and authorities should not question the need for the telecommunications system or seek to prevent competition between operators.

12. The Inspector commented, at DL6: "The Council has expressed concern relating to the need for a proposed kiosk. However, the principle of development is established by the GPDO and the Framework confirms that considerations such as need for the payphone kiosk, a telecommunications system, should not be questioned." Ms Sheikh QC for the City Council submitted that that involved the wrong approach to "need", and was an inadequately reasoned response to the City Council's representations.

13. The Inspector then focused on the issues relating to siting and appearance. I do not need to set out his appraisal of the siting and appearance of the proposed kiosk. No complaint is made about his planning judgment of those issues, save for those which Ms Sheikh made about the role of the purpose of the operator and need.

14. The Inspector said this at DL14 and 15 about the City Council's expressed concern that the purpose of the proposed kiosk was primarily to facilitate the display of a large advertisement:

> "However, the construction of a kiosk and the display of advertisements are distinct and separate matters requiring different applications where necessary. A proposed illuminated advertisement which was refused by the Council is considered separately under Appeal B. Whilst I have considered the prospect that a non-illuminated advertisement may be capable of being displayed on the kiosk, it is not what has been applied for and I have no reason to resist the kiosk on that basis, given that

> static, non-illuminated advertisements are a feature of other kiosks within the surrounding area.
>
> 15. The overall number of applications and appeals for similar kiosks within the Council's area is not a matter that has a direct bearing on my consideration of the appeal, particularly as those other proposals have little effect on the siting and appearance of the proposed kiosk before me."

15. 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.

The City Council's case to the Inspector

16. The application for prior approval had been refused by the City Council in September 2017 on the grounds that the proposed kiosk would be harmful to visual amenity and would add to street clutter, contrary to various local planning policies. But it widened its case in its written representations on the appeal. In January 2018, having taken legal advice, the City Council had resolved, in the light of the recent receipt of a large number of applications for prior approval for the installation of telephone kiosks, that applications should be refused and existing appeals resisted on the further ground that the application for prior approval did not fall within Part 16 Class A of the GPDO, as it was not considered "to be for the purpose of the electronic operator's communication network and it is not required for those purposes." I need to set out a little of the City Council's written representations because it was at issue in the appeal before me as to how far the grounds it pursued had truly been raised before the Inspector.

17. Its written representations pointed to the growing pressure for advertisement screens on telephone kiosks, and to the fact that many telephone companies are owned by outdoor advertising companies. New World Payphones was one; Infolines was owned by JCDecaux, and BT had joined forces with Primesight. It had recently dealt with 40 appeals in relation to prior approval for new telephone kiosks with integral advertisement panels submitted by New World Payphones / Clear Channel. In recent years it had received many such applications. There was clearly no need for new, additional telephone kiosks on the streets, which were only proposed because of the advertising revenues which could be derived from display on the kiosks. People now used mobile phones.

18. Existing kiosks had been installed under the GPDO "for the purpose of telecommunications only." The proposed kiosk was much larger than required to accommodate the proposed telephone; its size was dictated by the desire to provide advertising space.

19. New World Payphones had to demonstrate a need for the proposed kiosk, because the GPDO rights were granted for development by an electronic communications code operator "for the purpose" of its electronic communications network. It was "inherent"

in the scope and conditions of Part 16 of the GPDO, that the kiosks had to be "required" in order to benefit from permitted development rights. A condition was imposed by statute on the permission that the development had to be removed when it was "no longer required for such purposes." The permission and condition had to be read together otherwise a kiosk could be installed "for the purpose" of an operator's network, and its removal could immediately be enforced, because it was not "required for such purposes." It would therefore not be sensible if "need" could not be taken into account when considering whether proposed development came within the scope of Part 16 in the first place.

20. The factual material presented to the Inspector by the City Council on the need or absence of need for the kiosk was quite short. There was a significant number of existing kiosks in the vicinity, and the kiosk's purpose was primarily to facilitate the display of a large revenue generating advertisement, to which the inclusion of a public telephone was secondary. The existing kiosks were not required by the public, because they were rarely used, and in any event, there was no need for a large LED advertising screen to be installed on them. Information for tourists from the electronic communications facilities at the kiosk were readily available through the use of mobile phones and well-designed street signs. As I read the representations, "purpose" and "need" were rather run together, and more under the heading of "need", than Ms Sheikh's submissions to me, which endeavoured to keep the two points distinct.

New World Payphones' evidence to the Inspector

21. I am concerned with what it said factually about the purpose of and need for the kiosks. It stated 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. It operated an electronic communications network of over 2000 kiosks in the UK, with over 200 in the City of Westminster. It was upgrading and consolidating its kiosk estate, which dated back to the 1990s, was outdated in its telephony equipment, and used "tired looking structures." The new kiosk would be open, enabling unfettered access for those with impaired accessibility, and helping to reduce anti-social behaviour. It would have a slightly smaller footprint than one of the existing kiosks, would be just under 7 cm higher, just under 15cm wider, and 173 cm less deep. Its multifunctional capability would have new telephone equipment with a variety of means of payment, a 24-inch LCD interactive wayfinding capability, public Wi-Fi access points, location-based information accessible for example by Bluetooth. It would also have an LCD display for digital advertising, 1.6m high by just under 1 m wide, behind toughened glass.

The City Council's submissions

22. Ms Sheikh divided her grounds into two parts, one focusing on the operator's "purpose" in proposing to install the replacement kiosk and the other focusing on whether the operator had to show that the replacement was "required or needed" for the electronic communications network. They overlap considerably, and share much the same focus.

23. Ground 1 contended that, although consideration of the grant of prior approval was confined to siting and appearance, only an application for a development which fell within the scope of Part 16 could be considered. Its scope had to be properly interpreted, and the nature of the development properly understood. The provision of

communications facility had to be the dominant or primary purpose in order for the development to come within the scope of Part 16. This "purpose" issue, raised by the City Council had not been addressed by the Inspector, who ought to have reached a conclusion as a matter of fact as to the purpose of the development. The operator's purpose was to be identified by the reason for which he proposed the development.

24. A differently designed and smaller communications facility could be provided were it not for the advertising panel component of the design. This also showed what its dominant purpose was, as did New World Payphones' statement in its written representations that a kiosk would only be replaced if both prior approval and advertisement consent were granted. The dominant purpose could not be the provision of the electronic communications facility if, in the absence of the advertising panel, the electronic communications facility would not be provided.

25. The Inspector wrongly regarded himself as bound to appraise the appearance of the kiosk proposed even though it was not solely or predominantly for the purpose of an electronic communications facility in the form of a public call box. As Holgate J had said was arguable, when granting permission, a contention that the real purpose of the proposal fell outside the scope of Part 16, was not answered by stating that a separate consent was needed for the advertisement.

26. I have already set out the essential features of Ms Sheikh's submissions on ground 2, need, when referring to the written representations. It was for New World Payphones to show why a replacement kiosk, designed to take an illuminated LED advertising facility, was required in view of the array of kiosks in Marylebone Road which the public could use, if they needed to do so. Paragraph 45 NPPF had been misunderstood by the Inspector which, by its reference to the evidence necessary to justify the development, implied that there was a need to explain why development was necessary. Instead, he had concluded that it meant that need should not be considered. The need case had been expressly raised in the additional reason for refusal; Ms Sheikh said that she was not questioning the need for the overall electronic communication system, which was what paragraph 46 NPPF was directed to, but the need for this replacement kiosk. New World Payphones were not proposing to replace one of the existing kiosks, which showed that one was redundant and should be removed anyway.

27. I also note that Holgate J when granting permission considered it arguable that the justification for a development was relevant to the assessment of siting, which might not involve questioning the principle of a specific development proposal.

The Secretary of State's submissions

28. Mr Westmoreland Smith, for the SSHCLG, submitted that New World Payphones was an electronic communications operator, and its kiosks, with landline and internet access, were the reason it was an operator at all. The proposed kiosk was obviously "for the purpose of [its] network" within Class A GPDO. "Purpose" as the City Council submitted had the ordinary meaning of "the reason for which something is done." No elaborate reasoning was necessary, and certainly not in view of the short and general representations made to him by the City Council on this point. It was sufficient for the Inspector to deal with its contention that the primary purpose of the proposed kiosk was to facilitate the display of a large illuminated advertisement, by saying that the

installation of kiosk and the display of advertisements on it were different and separate, and the subject of a different consent regimes.

29. On need, Mr Westmoreland Smith, submitted that the definition of Class A, merely required that the kiosk be "for the purpose of" the network; it contained no "dominant" or "primary" purpose test. The proliferation of kiosks was controllable by the approval of "siting". The effect of advertising panels on the "appearance", including the size, of the kiosk was also controllable. The definition of class A did not include any requirement that the kiosk be "needed" or "required", and it should not be altered to "required for the network" or "required for the purpose of the network" by reference to the condition that the development permitted be removed when no longer required. He cited *Keenan v Woking BC and SSCLG* [2017] EWCA Civ 438, for the proposition that the condition could not so enlarge the definition of the Class to make it cover development which fell outside it. He submitted that a case that there was no "need" had not really been placed before the Inspector; the case had been that the primary purpose of the proposed kiosk was for advertising.

30. The introduction of a "need" test would require the local authority to determine "the principle" of the development which is an issue which the GPDO procedure had already resolved with its limitation on the issues for decision, under Class A of Part 16, to the acceptability of the development's siting and appearance. There was no reference, in relation to this type of permitted development, to the NPPF, in contrast to some of the classes of permitted development. Accordingly, there was no basis for a reference to the NPPF on issues other than siting and appearance; likewise development plan policies could only be material to the extent that they dealt with siting and appearance, and then not with reference to s38(6) of the Planning and Compulsory Purchase Act 2004, (the primacy of the development plan).

New World Payphones' submissions

31. Mr Stinchcombe for New World Payphones adopted the submissions of Mr Westmoreland Smith. He emphasised that the need for and benefits of public telecommunications facilities was established by the inclusion of Class A as defined in Part 16 in the GPDO, and were irrelevant to the determination of prior approval, nor should the definition of the scope of the Class be interpreted so as to bring them in.

32. He however submitted that it was the "purpose" issue which was not really raised in the City Council's representations to the Inspector. There was but a short reference to the asserted purpose of the kiosk under the heading of "Need for a Kiosk", and a repetition of the same point when commenting on the Appellant's representations. As developed by this challenge, the "purpose" issue was a new point, and the Inspector had properly addressed such point on it as the City Council had put to him. If raised as it was now, it could require evidence and argument for an Inspector to resolve; *Humphris v SSCLG* [2012] EWHC 1237 (Admin) at [23].

33. Mr Stinchcombe also made the point that if the kiosk were installed without advertising, its Class A purpose would be undeniable, and if it were not installed at all, the challenge was academic, in the sense not necessarily appreciated by academics. But prior approval could only be sought for a telecommunications facility "for the purpose of" the network. If so, then "siting and appearance" were for approval. If an advertising consent were approved as well, there would be approval for both aspects of what would

be seen in the street. Consents for each aspect should not cause the installation to fall outside the scope of Class A of Part 16 of the GPDO; as he put it, rather nicely, "two rights should not make a wrong".

Written submissions

34. After the conclusion of the hearing, I asked for and received written submissions from the parties as to what the position would be if the kiosk were obviously designed to have an advertising light panel added later, and the operator later sought to add the light panel, with any application for advertising consent to follow, and whether that had any significance for how the issue before me should be approached. Mr Stinchcombe, with whom Mr Westmoreland Smith agreed, submitted that the kiosk for which prior approval had been sought would fall within the definition of Class A, as one "for the purpose" of the operator's telecommunications network. But the alteration to the kiosk by the addition of the illuminated advertising panel would not be for that purpose, and the prior approval procedure could not be used. Mr Stinchcombe and Mr Westmoreland Smith agreed that that was of no significance here because the potential for a successful application for advertising consent could not justify a refusal of prior approval for a kiosk found to be acceptable in siting and appearance; a future potential, even probable, application for consent was immaterial in law. Ms Sheikh submitted otherwise: if the panel could not be applied for later under the prior approval process, the fact that it might be included as part of the kiosk when prior approval was sought was relevant to the purpose for which prior approval was sought, or to the judgment as to what it was for which prior approval was sought. Class A and the GPDO did not permit such a substantive distinction. The question or purpose had to be resolved independently of how any application for advertising consent was decided.

Conclusions on "purpose"

35. This issue requires somewhat more analysis than the Inspector was favoured with in the City Council's written representations which were little more than an assertion that the dominant purpose was what mattered and that it was obvious what the dominant purpose was: advertising. It was not usefully distinguished from the "need" in the way Ms Sheikh sought to adhere to before me. I understand well why Mr Westmoreland Smith and Mr Stinchcombe made submissions on the basis that the Inspector was entitled to approach the issue as he did.

36. I start with the nature and purpose of the GPDO. If there were no GPDO, a specific planning application would have to be made for all the developments which benefit from the general permission it gives. A whole array of different types of development, are regarded as fit for permission, subject to specific conditions. For some, and Part 16 Class A is one of them, the relevant material considerations are taken into account in the grant of the general permission, provided that certain specific material considerations are resolved through a specific decision-making process. Those specific considerations vary from one type of development to another. That restricted range of considerations is established because the others have already been resolved in favour of the type of development proposed. The restricted range is clearly tailored to the specific type of development at issue. However, the general range of considerations have not been resolved in relation to a development which does not come within the Class relied on, and the issues for specific consideration have not been tailored to such a development. The definition of the Class has to be interpreted in that light.

37. In my view, 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. This is in line with the language of *Keenan*, at [33] and [35], in which Lindblom LJ referred to the need for a development to fall "fully" or "squarely" within the applicable class of the GPDO in order for permission to be granted by it.

38. It is also reflected in the notion that the prior approval process is dealing with development which has already been approved "in principle". This concept in the GPDO was drawn from *Murrell v SSCLG* [2010] EWCA Civ 1367 at [48-49], and applied to the same type of development as at issue in this case by Hickinbottom J in *Infocus Public Networks Ltd v SSCLG* [2013] EWHC 4622 (Admin) at [18-19]. In *Patel v SSCLG* [2016] EWHC 3354 (Admin), at [48], I expressed reservations about the aptness of the notion of "the principle" of the development being established where its "acceptability" remained to be determined on the basis of the specific issues identified. What the grant of permission for a Class of development subject to prior approval does is to limit the scope of the relevant issues remaining for decision. But the concept of the principle of a development being established, on that basis, means that the development which is being considered for permission under the GPDO must all fall within the Class in question otherwise its "principle" cannot be taken to have been established.

39. A development therefore 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. The benefits of the GPDO, a quicker process, the limited range of material considerations, and the restricted range of conditions would be used for a development, part of which they were not intended for, and which had not been judged to merit permission on that basis. 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.

40. Ms Sheikh pointed to a potential contradiction between the definition of Class A of what is permitted and the condition requiring the removal of the permitted development. She raised it to pursue her "need " argument, which I deal with later. However, there is a straightforward relationship between the permission and the condition in my view. On my approach to "purpose", the possible contradiction does not arise; indeed this argument about the interaction between condition and permission supports my conclusion about the scope of "purpose". A kiosk for which prior approval is sought, "for the purpose of" the operator's network, is one assumed by the GPDO to be one required by it; it is envisaged that it would be erected and used for that purpose. A kiosk may become redundant, the equipment removed or unusable or simply unused. Then, although acceptable in siting and in appearance at the outset, redundant street clutter is to be removed. It is clear that the assumption is that prior approval is not sought for redundant kiosks, and that is not an assumption to be investigated before the grant of prior approval, but tested only by experience of it in use. If I am wrong about "purpose", then there is a contradiction between the test for the grant of permission,

and the test for the coming into operation of the removal of the kiosk; the former would permit a kiosk to be erected for a dual purpose, and the condition would require its removal judged only by the electronic communications purpose.

41. I do not consider that the question is whether the dominant purpose is for the operator's network, although for certain purposes that is how a statutory purpose is judged. In the context of planning law, the concept of dual or mixed uses does not turn on dominant or secondary purposes: thus a farm, when a farm shop was added, would be used for mixed purpose of agriculture and retail; similarly a house with an office use in a part of it, would not be "residential" but a mixed use. The other use would create a mixed or dual use unless it was incidental or ancillary to the identified use, which would mean that it was part of that use and not a separate use at all, or was legally so small as to be of no significance, de minimis. I consider that the GPDO should be analysed by reference to concepts with which planning law is familiar, rather than by dominant or primary /secondary considerations.

42. 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.

43. As Mr Westmoreland Smith pointed out, the language of the GPDO is not that of dominant or primary purpose. Indeed, a dominant/primary versus secondary purpose test as put forward by Ms Sheikh would lead to a secondary purpose, which may be quite significant in the eyes of planning law itself and different from the permitted class, piggybacking in to a GPDO permission. There would also be the difficulty of applying such a purpose test, in circumstances where the GPDO cannot have intended that its simpler procedures should encompass the sort of investigation which her test would entail. How is the dominant purpose to be measured: physical scale and function of the various parts, how much is telecommunications and how much advertising? Their relative financial importance to the operator? Would one be put up without the other? Some blend of everything, but which provides no sensibly applicable yardstick for judgment as to the purpose? How subjective is it?

44. I have considerable sympathy with the Inspector's answer that there are two consent regimes to be considered separately. He considered the siting and appearance of kiosk structure and pronounced it acceptable with the advertising panel. He did not find it too large, whether or not its size could have been reduced without the panel. That judgment on siting and appearance was for him. Size may be relevant to siting and appearance but did not make the kiosk unacceptable here. I also interpret his Decision Letter as meaning that he knew when he granted prior approval that he was going to refuse advertising consent for its use for illuminated advertising. I see the force in Mr Stinchcombe's submission that if the kiosk is erected with the panel, having been found acceptable in siting and appearance, but the panel is not used for illuminated

advertising, it would come within the scope of Class A, because it would be solely for the purpose of the operator's network. If not erected at all, no advantage would be taken of any error in approach. If erected with both consents, each aspect of the dual purpose would have received the appropriate consent.

45. However, I do not regard the Inspector's approach nor Mr Stinchcombe's submission in support of it as right. The question of whether a development proposed comes within the scope of Class A and can therefore proceed for consideration of prior approval, is not to be determined by the outcome of the prior approval process. It is to be determined upon the application. 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.

46. Turning more to Mr Stinchcombe's submission, the kiosk cannot be brought within the scope of prior approval under Class A merely because it is acceptable in the street scene. The kiosk would fall outside the scope of Class A if advertising consent were granted, since its dual purpose would be apparent daily. It would be illogical for the kiosk to be brought within it because of a refusal of advertising consent under a different regime; 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.

47. This is where the position of an alteration to the kiosk, after installation, to insert the display panel is instructive. If Mr Stinchcombe is right, and the panel is included in the application for electronic communications prior approval, and the kiosk is thus installed, advertising consent is all that is required, whether applied for at the same time or not. If prior approval were obtained for a kiosk, without the panel, but designed so that a panel could be inserted later and electrified, and the kiosk were then installed, the addition of the electrified advertising panel could not come within Class A. There could then be no realistic application for consent for the display of an illuminated advertisement. I can think of no good reason why the application of the GPDO should depend on that difference in the way in which what would be the identical kiosk came to be proposed, yet it is a distinction which the Inspector's approach and Mr Stinchcombe's submissions create. I accept that that is how the proper interpretation of statutory language may sometimes turn out, but it is an outcome to which the language must impel the court, and here it does not do so.

48. On that basis, the prior approval should have been refused because the application fell outside the scope of Class A, and the Inspector was bound so to conclude. The decision is therefore quashed. However, I shall consider need briefly.

The need for a kiosk

49. I accept, my cavils about the phrase "in principle" notwithstanding, that the grant of permission in the GPDO, with its limited range of material considerations, precludes an argument about whether electronic communications networks, and the facilities required for their use, which would include kiosks in the street for public use, are "needed" in the public interest. It is not necessary to explore here how far an argument in relation to the need for a particular kiosk in a particular location is relevant to the justification for siting or appearance which would not be acceptable unless it met some need. Hence the City Council's arguments, that people do not use such facilities, could be relevant to a "purpose" argument -the operator wants them for an advertising hoarding- if that is how purpose is to be judged. But it is not relevant as a separate argument in its own right.

50. I also reject Ms Sheikh's submission that the condition imposed upon the grant of prior approval, that the kiosk be removed when no longer required, imports words into the test for prior approval that the kiosk must be "required for the purpose of" the operator's network, and that that thereby imports a "need" test. The text of Class A was intended to be quite simple, and would not have been intended to import some objective "need" test, or to involve the local authority questioning precisely why the operator "required" the kiosk, and judging how good a reason that was. This would contradict the essential feature of the GPDO which is to narrow the range of considerations which a decision-maker has to consider, in order to streamline certain aspects of the planning system. It would be straightforward to judge whether a kiosk was required by an operator: it might have no telephonic equipment in it, it might be left unmaintained, unusable or unused. One of a pair might be replaced and another beside it left redundant.

51. I observe here that part of the City Council's case to the Inspector ignored the wording of Class A. Under Class A, the "required" or "need" question can only be tested by whether it was "required or needed" for the network of the applicant operator. That cannot be affected by the profusion of kiosks of other operators, relevant though a profusion of them in the street scene might be to the siting of another one.

52. I also reject the City Council's reliance on the NPPF in support of its need argument. The NPPF in [45] may refer to "necessary evidence to justify" development including prior approval applications, but it cannot alter the law. Class A, unlike some classes, makes no reference to the relevance of the NPPF. Unless the NPPF is relevant to the considerations for decision, siting and appearance, it is legally immaterial, whatever it says itself, as Mr Westmoreland Smith readily agreed. I do not know quite what the NPPF means in this context, but I cannot see its relevance. "Need" is resolved by the general permission.

53. I therefore reject the claim on the need ground.

Overall conclusion

54. This claim is allowed and the prior approval decision is quashed.