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Request made by :	IP ATHENS
Request made on:	Monday, 21 August, 2017 at 11:59 BST
Client ID:	Athens
Content Type	Westlaw UK
Title :	Infocus Public Networks Ltd v Secretary of State for Communities and Local Government
Delivery selection:	Current Document
Number of documents delivered:	1

Infocus Public Networks Limited v The Secretary of State for Communities and Local Government, The Mayor and Commonality of the Citizens of London

Case No: CO/4347/2010

High Court of Justice Queen's Bench Division Administrative Court

17 December 2010

[2010] EWHC 3309 (Admin)

2010 WL 5139407

Before: Mr Justice Foskett

Date: 17/12/2010

Hearing dates: 6th December 2010

Birmingham District Registry

Birmingham Civil Justice Centre

Representation

Olivia Chaffin-Laird (instructed by Smith Partnership) for the Appellant.

Naomi Candlin (instructed by Treasury Solicitor) for the First Respondent.

The Second Respondent was not represented.

Judgment

Mr Justice Foskett:

1 This is an appeal pursuant to section 289(1) Town and Country Planning Act 1990 against the decision of the First Respondent dated 3 March 2010 by his Inspector, D. Roger Dyer, BA, DipArch, RIBA, FCIArb, Barrister, to dismiss appeals against, and thus to uphold, enforcement notices issued by the Second Respondent on 29 May 2009 following the installation by the Appellant of 7 telephone kiosks in the City of London in April/May 2009.

2 The appeal is brought with the permission of Beatson J given on 23 June 2010. The permission was granted on three grounds and excluded an argument based upon an alleged contravention of EU competition laws. Any appeal must, of course, be on a point of law.

The procedural background

3 An electronic communications network provider (otherwise known as a telecommunications code system operator) listed under section 106 of the Electronic Communications Code and paragraph 17 of schedule 18 of the Telecommunications Act 2003 has permitted development rights under the Town and Country Planning (General Permitted Development) Order 1995 and is thus entitled to place and maintain electronic communications apparatus, including telephone kiosks, on the highway as permitted development subject to the local planning authority being given the opportunity to say whether its prior approval for the siting and appearance of the apparatus is required. The applicable provision is Part 24 of the Town and Country Planning (General Permitted Development) (Amendment) (England) (Order) 2001 .

4 Under Part 24 the installation of a telephone kiosk of the nature involved in this case is subject to a requirement on the part of the developer (namely, the telecommunications code system operator) to give notice to the relevant planning authority to enable determination as to whether its prior approval would be required for the siting and appearance of the kiosk. The relevant provisions are as follows:

> (3) Before beginning the development, the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to the siting and appearance of the development.
>
> (4) The application shall be accompanied—
>
> (a) by a written description of the proposed development and a plan indicating its proposed location together with any fee required to be paid;
>
> …
>
> (7) The development shall not be begun before the occurrence of one of the following—
>
> (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
>
> (b) where the local planning authority gives the applicant written notice that such prior approval is required, the giving of that approval to the applicant, in writing, within a period of 56 days beginning with the date on which they received his application;
>
> (c) where the local planning authority gives the applicant written notice that such prior approval is required, the expiry of a period of 56 days beginning with the date on which the local planning authority received his application without the local planning authority notifying the applicant, in writing, that such approval is given or refused; or
>
> (d) the expiry of a period of 56 days beginning with the date on which the local planning authority received the application without the local planning authority notifying the applicant, in writing, of their determination as to whether such prior approval is required ….

5 The relevant Planning Policy Guidance is PPG 8 , the pertinent provisions concerning the “prior approval” procedure appearing in Annex 1 as follows:

> 4. A number of forms of telecommunications development which are permitted under Part 24 of the GPDO are subject to a 56-day prior approval procedure under paragraph A.2(4) of Part 24. This procedure applies to the construction, installation, alteration or replacement (unless in an emergency) of:
>
> …
>
> (iv) a public call box;
>
> …
>
> 5. For such types of development the developer must apply to the local planning authority for its determination as to whether prior approval will be required to the siting and appearance of the proposed development. The local planning authority will have 56 days, beginning with the date on which it receives the application, in which to make and notify its determination on whether prior approval is required to siting and appearance

> and to notify the applicant of its decision to give or refuse such approval. There is no power to extend the 56 day period. If no decision is made, or the local planning authority fails to notify the developer of its decision within the 56 days, permission is deemed to have been granted.
>
> 6. The regulations require that an application to the local planning authority must be accompanied by:
>
> a. a written description of the proposed development;
>
> b. a plan indicating its proposed location;
>
> c. evidence that the owner or agricultural tenant of the land to which the application relates has been notified of the proposed development;
>
> d. where the proposed development consists of the installation of a mast within 3 kilometres of the perimeter of an aerodrome, evidence that the Civil Aviation Authority, the Secretary of State for Defence or the aerodrome operator (as appropriate) has been notified of the proposal; and
>
> e. the appropriate fee.

6 For completeness, I should record what is said in PPG 8 about the consultation process to be followed by the local planning authority under this procedure:

> 9. The public consultation requirements for the local planning authority under the 56-day prior approval procedure are the same requirements as for development requiring applications for planning permission.
>
> 10. The local planning authority should begin the consultations and notification as set out in the regulations as early as possible on receipt of the application in order to allow sufficient time in which to consider the application in the light of the representations received.
>
> 11. Local planning authorities should take into account any relevant representations received in determining whether to give or refuse approval for a proposed development. A local planning authority may wish to discuss with the developer possible modifications to the proposed development to mitigate the concerns raised by particular consultees.

7 An important primary issue from the procedural point of view in this case arises from the payment of the fee provided for under paragraph A.3.4(a) of Part 24 and paragraph 6(e) of Annex 1 of PPG 8 . It will be noted that the application must be “accompanied” by the relevant fee. At the material time this does not seem to have been interpreted literally because, whilst it was possible to make an application (certainly to the Second Respondent) under A.3(3) above online, it was not possible for the fee to be paid online. In other words, the fee had to be paid by a separate means, ordinarily by cheque sent separately. I understand the position so far as the Second Respondent is concerned has now changed and everything can be dealt with online, but that was not the case in early 2009. I do not know whether that arrangement applies now to all planning authorities.

8 At all events, guidance concerning the payment of fees relating to planning-related matters was given in Communities and Local Government Circular 04/2008 entitled ‘Planning-related Fees'. It bears the date 9 April 2008 and was effective from 6 April 2008. Its introductory paragraph (paragraph 1) indicates its main import:

> “This Circular is about the fees which local planning authorities charge for handling applications for planning permission, for approving certain details remaining after outline permission has been given, and for altering or removing conditions imposed on planning permissions. It also explains the fees for ‘deemed’ applications (generated in the course of appeals against enforcement notices), and for applications to display advertisements,

> for lawful development certificates, and for confirmation that planning conditions have been fulfilled. The Circular describes the scope of the planning fee régime, and the categories in which fees are grouped, and it offers general advice about charging them."

9 However, it is said at paragraph 12 of the Circular that the "fees described or discussed in this Circular are relevant to" a number of planning-related matters including "applications for 'prior approval' of some permitted development". Paragraph 68 of the Circular draws attention to the fact that a fee for a prior approval application is payable "only in relation to certain types of development authorised by four Parts within Schedule 2 to the 1995 Order", one of those types being "in respect of development by Electronic Communications Code Operators under Part 24 ".

10 In relation to the need for payment of the fee as a pre-consideration to an application being treated as valid, the Circular says this:

> 94. Without payment of the appropriate fee, an application is not valid. As part of the process of validating an application before it is placed on the Planning Register, the local planning authority should make certain it has received the correct fee. If an application is submitted without the correct fee, the authority should explain to the applicant as soon as possible that the process of registering, assessing and deciding the application cannot begin, and return it.
>
> 95. Under the validation procedure, payment of the correct fee must happen before an application can be registered. Registration of a valid application must occur within fourteen days of receipt of the fee.

11 A literal reading of that paragraph would suggest that it is referring to an application that a planning authority is required to "validate, register and determine" and that paragraphs 94 and 95 are dealing with applications that are to be "placed on the Planning Register". An application to determine if prior approval is required is not an application that is required to be placed on the Planning Register and it might be argued that the validation process referred to in paragraphs 94 and 95 does not apply to any such application. Indeed a fair reading of those paragraphs does suggest that they are addressing applications other than an application to determine if prior approval is required. However, the point is somewhat academic: since payment of the relevant fee is required to "accompany" such an application (along with the other matters specified), there can be no doubt that the planning authority would be entitled to treat non-payment of the fee as invalidating the application (just as a failure to supply the other material specified would also constitute such a justification) at least until it was paid. Whilst non-payment of the relevant fee was not in issue in the case of *Murrell and anor v SSCLG, etc. [2010] EWCA Civ 1367* (see further at paragraphs 12, 31-39 and 50–53 below), this general position seems to be supported by the judgment of the Court of Appeal in that case.

12 It is clear from the formulation of the provisions of Part 24 referred to in paragraph 4 above that the 56-day period begins on "the date on which the local planning authority received [the] application". The first issue in the appeal to this court is whether, and if so, when an effective or valid application was received by the local planning authority. It is from that point that the clock starts running: see Murrell and anor v SSCLG, etc. , at paragraph 28.

The factual background

13 The Appellant is listed under the Electronic Communications Code as an electronic communications network provider. It wished to erect 7 kiosks in various locations in the City of London and sought to comply with sub-paragraphs A.3(3) and (4) in the manner described in paragraph 8 of the witness statement of Mr Derek Parkin submitted in support of this appeal. That paragraph reads as follows:

> "8. The applications were made in respect of 7 telephone kiosks ("the Kiosks") electronically via the [Second Respondent's] website on the standard pro forma on Monday 23 February 2009 and a letter was sent that day by post enclosing the cheque. Each application included a written description of the proposed development and a plan

> indicating its proposed location. Payment was required to be sent by cheque through the postal service and in accordance with the [Second Respondent's] online procedure, as the [Second Respondent] did not have the facility for the Applicant to make online payments. The [Appellant's] position is that the complete planning applications were received on Wednesday 25 February 2009, and, therefore, the Respondent had until Tuesday 21 April 2009, being 56 days thereafter, to communicate their decision."

14 The reference to 25 February is, as I understand it, a reference to the proposition that a letter sent by first-class post on 23 February should undoubtedly have been received by then.

15 For completeness, I should say that the applications were in fact made by Infolines Public Networks Limited which is said now to be a dormant company, the assets of which have, it is said, been purchased by the Appellant. Issues had been raised about the relationship between these two companies by the Second Respondent prior to the hearing before me, but it was not an issue in the appeal.

16 What happened thereafter from the Appellant's perspective is set out in paragraph 9 of Mr Parkin's witness statement which is in the following terms:

> "9. On 21 April, the [Appellant] emailed the [Second Respondent's] Highway Department to advise that the [Appellant] would be installing the Kiosks within 7 days of Friday 24 April 2009, as per the Opening Notices that were sent to the [Second Respondent] on 21 February 2009. On or around Monday 27 April 2009, the [Appellant] received a letter from the [Second Respondent], dated 23 April 2009, advising the [Appellant] prior approval had been refused. The reason for the refusal was that the size, design, appearance and position of the proposed kiosk would detract from the townscape by adding visual clutter to the street. In addition, the [Second Respondent] believed that the proposed kiosk would be more prominent in the street as it was intended that advertisements would be placed on the same."

17 The same witness statement indicates that, because the Appellant took the view that the Second Respondent was out of time in giving its decision, the Appellant went ahead and erected the kiosks between 24 April and 1 May.

18 The Second Respondent saw things differently. Its case is that the cheque said to have been sent in the letter dated 23 February 2009 (the existence of which as a document is not disputed) was not received until 3 March and it was in effect that day that the planning authority regarded the online application as complete and valid and fully "received". Its internal documentation indicates that the application was "validated" on that date (although one of the applications was recorded as "validated" on the following day) and that, accordingly, the 56-day period did not start running until then.

19 The position of the planning authority is set out in a witness statement from Ms Annie Hampson, the Planning Services and Development Director in the Department of Planning and Transportation with the planning authority. The relevant paragraphs are as follows:

> "8. There is now produced and shown to me marked "AH1" copies of the print-out from the online post database of all post received and processed on 24 February 2009 and 3 March 2009. It can be seen that the letter from Infolines Public Network Limited dated 23 February 2009 enclosing the fee cheque for £3350 was received on 3 March 2009. The arrangements for collecting, sorting, date stamping and distributing post ensure that post is always collected and stamped on the day of receipt as long as it is received before 8.00am. Post received after that time will be collected, date stamped and distributed by 10.00am the following morning. The system has been put in place to ensure that post is not left uncollected and unstamped given the critical importance to the local planning authority and service users of ensuring certainty regarding dates when post is received.
>
> 9. I understand that the Applicant considers that the letter dated 23 February containing the fee cheque was received on 24 February 2009 but was only date stamped 3 March

> 2009 because of delay in its processing. The arrangements in place and the print-out from the online post database recording post received on 3 March 2009 show that the letter was received either on 3 March 2009 or after 8.00am on 2 March 2009.
>
> 10. I understand further that the Applicant draws the conclusion that there was delay in processing the letter dated 23 February 2009 enclosing the fee cheque because another letter dated 23 February 2009 from the same correspondent, Infolines Public Networks Limited, was date stamped 24 February 2009. It is understood that the Applicant's position is that both letters dated 23 February 2009 were posted on the same day. However, in the course of correspondence with Infolines Public Networks Limited regarding receipt of the cheque and in the course of the enforcement appeals determined by the Planning Inspector, Infolines Public Networks Limited did not raise concerns about delay in processing the fee cheque, nor did they assert that both letters from them dated 23 February 2009 were posted at the same time. The print-out from the data-base of post received on 3 March 2009 demonstrates that the letter enclosing the fee cheque was received on that date, in accordance with the post protocol."

20 In consequence of the planning authority's position, it perceived that it had until about 28 April to deal with the matter. The dates given by Mr Parkin in paragraph 9 of his witness statement (paragraph 16 above), about which there is no dispute, tie in with that perception.

21 The planning authority then took the view that there had been a breach of planning control and issued an enforcement notice in relation to each kiosk.

The enforcement notices

22 Each enforcement notice identified the kiosk concerned, specified its dimensions and set out the reasons for issuing the enforcement notice. Certain reasons given were common to each kiosk. Those reasons were as follows:

> • The telephone kiosk by virtue of its size, height, form and prominent location on highway is considered detrimental to visual amenity.
>
> • Advertisements on an authorised telephone kiosk not located within a conservation area would benefit from deemed advertisement consent. The telephone kiosk is being used for the display of advertisements. Such advertisements, and the telephone kiosk itself, cause visual clutter to the detriment of the street scene.
>
> • The development does not conform to policies TRANS6, ENV7, ENV30 and UTIL4 of the City of London Corporation's adopted Unitary Development Plan because:
>
> > The kiosk, by reason of its size, design and appearance and its position on the public highway, adds to visual clutter in the street scene in this location and detracts from the character and appearance of the City's streetscape;
> >
> > The use of the kiosk for display of advertisements on the public highway makes the appearance of the kiosk more prominent in the street scene and detracts from the generally dignified character of the City streets.

23 Each enforcement notice then gave a reason why each kiosk was, it was said, inappropriately placed in the light of the local conditions.

The appeals against the enforcement notices

24 The Appellant issued appeals against each enforcement notice. Each contained a general response to the notices in the following terms:

> 2. In accordance with the Regulations the Appellant sought prior approval for the development to which the Local Planning Authority failed to respond within the Fifty-Six day period as required by the Regulations and it is the belief of the Appellant that permitted development status is enjoyed already by the development.
>
> 3. If that is the case then it follows that the purported enforcement notice issued by the Local Planning Authority is void and of no effect.
>
> 4. Nevertheless, the Appellant Company is making this appeal on a without prejudice basis within the Statutory time-scale in order to ensure that in what the Appellant considers to be the unlikely event that the Enforcement Notice is held to be valid, the appeal against it will have been made on time.

25 Each notice also put forward a number of 'Grounds of Appeal' including the following:

> 2. The refusal of prior approval by the Local Planning Authority, if indeed such a decision was made on time as the Appellant denies, was unreasonable. The purported decision provided out of time by the Local Planning Authority was based on the Local Planning Authority regarding the application for prior approval as a full planning application. In the way the decision was arrived at the Local Planning Authority cited 'appearance' as the grounds for refusal. No reasons were provided as to why the appearance of the payphone was unacceptable as permitted development, nor were any grounds advanced as to why this particular payphone should not be permitted when other payphones with less facilities, placed and maintained on the highway by the appellant's competitors remain in place.
>
> 3. The payphone is of a modern design, has easy access for wheelchairs and is of considerable environmental merit in that it relies on solar energy for its power and requires no power supply from an electricity provider.

The appeal to the Inspector

26 This was advanced by way of written representations. The Inspector made a site visit to each of the kiosks.

The Inspector's decision

27 I will set out here those features of the Decision Letter that deal with the issue of when the application was "received" and/or "validated".

28 The Inspector dealt with this at paragraphs 5-7 having described the "prior approval" procedure in paragraph 4:

> 5. In this case the appellant's applications for the telephone boxes that are the subjects of these appeals were received by the Council on 23 February 2009 but, as they were made by way of the Planning Portal, the appropriate fee was not received by the Council until 3 March 2009. The Council says that the application could not be validated until the fee was received. 56 days from the date the application was received would have expired on 20 April 2009 but the Council did not issue its determination until 23 April 2009. The appellant contends that, by that time, the Council's determination had no effect as deemed planning permissions were already granted for the kiosks pursuant to Part 24 of Schedule 2, such that their erection did not therefore breach planning control. The Council's case is that, due to the late receipt of the required fee, its determination under Part 24 need not have been issued until 30 April 2009. Having been posted four days prior to this, no deemed planning permissions were granted and all the kiosks are unauthorised.
>
> 6. The appellant's letter in respect of the applications, dated 23 February 2009, stated

> "please find enclosed a cheque for £3350 being the cost of the planning applications below." There then followed a list of 10 sites including those that are the subject of these appeals. However the appellant has produced no proof that the cheques were despatched on that day. Instead the appellant believes that the legislative provisions make no mention of a validation period. He argues that a validation period is used only for full planning applications. The appellant also submits that applications made by the planning portal do not permit any way to forward the fees electronically. He adds that he "cannot be held liable for the City's inefficiency in not allowing fees to be paid at the time of the application."
>
> 7. Nevertheless Part 24 of the GPDO as modified requires at paragraph A.3 (4) that "the application shall be accompanied – (a) by a written description of the proposed development and a plan indicating its proposed location together with any fee required to be paid; …" It follows that the application cannot be complete until the appropriate fee is received. This being so, the period within which the Council was entitled to determine that prior approval was required did not expire until after that determination had been made. Deemed planning permission was not therefore granted for any of the kiosks. Accordingly I conclude on the balance of probabilities that the erection of each kiosk amounted to a breach of planning control and the appeals on ground (c) must fail.

29 I turn now to the challenge to that decision.

The validity of the application

30 I have referred to the terms of Part 24 and the pieces of guidance that appear in PPG 8 and the Circular concerning fees that impinge on this issue in paragraphs 4-10 above.

31 I have also referred to Murrell and anor v SSCLG, etc. above. It was reported on the Friday before I heard this case on the following Monday and it seemed to me that there might be matters in it that assisted resolution of the matters before me. I alerted both Counsel to the case and was grateful to them for their submissions based upon it. It has limited direct relevance to the issue of the payment of the fee, but the statements of principle contained within it may assist on the issue of the "validity" of the application. I should review Murrell briefly.

32 It concerned the "prior approval" provisions applicable to agricultural buildings and operations, namely, Part 6 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 . The development with which that case was concerned (the erection of a cattle shelter on the farm owned by the appellants) was permitted by Class A of that Part subject to the conditions set out in paragraph A2(2) of Part 6 .

33 The provisions of paragraph A2(2) are set out fully in the judgment of Richards LJ at paragraph 7. I will highlight two sub-paragraphs that show that the provisions are virtually identical to those with which this case is concerned. Paragraph A2(2) provides that, subject to paragraph (3), development consisting of the erection of a building is permitted by Class A subject to various conditions two of which are as follows:

> (i) the developer shall, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to the siting, design and external appearance of the building …;
>
> (ii) the application shall be accompanied by a written description of the proposed development and of the materials to be used and a plan indicating the site together with any fee required to be paid …

34 These provisions are very similar to those set out in paragraphs A.3(3) and 4(a) of the provisions applicable to the instant case (see paragraph 4 above). The provisions that follow are also very similar to those applicable in the present case save that the relevant period before which the development may not be commenced is before "the expiry of 28 days following the date on which the application was received by the local planning authority." Receipt of the

application constitutes the starting-point for the relevant period.

35 In Murrell's case the appellants applied on 28 November 2008 on one of the council's standard forms for a determination as to whether prior approval would be required for the erection of the cattle shelter. It was accepted that all relevant details on the form were completed and the required fee of £70 was enclosed . In other words, the application was not made in electronic form, but by the completion of a "hard" document. The application form was date-stamped as received by the council on 1 December 2008 and receipt of the fee was noted in manuscript on the top of the form. It was common ground that if a valid application was made on 1 December 2008, the period expired on 29 December.

36 The planning authority purported to reject the application as valid for a number of reasons, mostly relating to the details of the proposed development (see paragraph 11), each of which was rejected by the Court of Appeal: see paragraph 33. Richards LJ, referring to the arguments in that case, said this at paragraph 34:

> "Since the application was valid, the 28 day period … began to run on 1 December, despite the council's assertion to the contrary. [Counsel for the Secretary of State] sought to rely on the absence of any challenge at the time to the council's "decision" that the application was invalid. The GPDO, however, does not make the running of time dependent on a decision by the local planning authority to accept an application as valid. Whether there was a valid application or not is an objective question of law …."

37 Miss Olivia Chaffin-Laird submitted that this supported the proposition that the way in which a planning authority handles an application is irrelevant to the question of when time starts running. She argued that if mistakes were made in handling the applications and if, for example, a Planning Authority took ten days or so to register receipt of a cheque, then that should not prejudice an Applicant seeking a determination of whether prior approval was required. She submitted that the Inspector in the present case failed to consider whether mistakes were made by the Planning Authority. I will return to this argument shortly, but I would merely observe that the part of the judgment in Murrell upon which she relies does have to be viewed in its context. The argument there was that a failure to challenge the Planning Authority's decision as to invalidity in some way confirmed that decision as correct. The Court of Appeal was merely saying, in my judgment, that that consideration can have no bearing on whether an application was or was not valid. Whether it was or was not valid is an objective question of law to be determined, in the event of a dispute, by the court. Whether, as a matter of law, an application is valid – or, perhaps more accurately in the present context, whether and when a valid application has been received – may depend on certain underlying factual matters. Certainly the question of when a document has been "received" is pre-eminently a matter of fact. Often, of course, there will be no issue about this. However, as is apparent in this case, there was. I will turn to how an issue such as that is resolved and how it was resolved in this case.

38 In the present case, of course, unlike Murrell no complaint is made by the planning authority that insufficient details of the proposed deployment of the kiosks was given, merely that the fee did not arrive until 3 March and that, accordingly, the application was not finally "received" until then.

39 It is clear that there is little, if any, scope for what can be termed a practical approach, or one based on suggestions of prejudice, in the implementation of the scheme reflected in the GPDO. Richards LJ said this at paragraph 38:

> "…No doubt the inspector took a practical approach, as the judge said …, but practicality cannot displace the legal effect of the GPDO. So too, although it is no doubt true that the delay of a few days did not of itself cause the appellants prejudice, the start-point and end-point of the 28 day period are fixed by the terms of the GPDO and the question of prejudice is of no legal relevance …."

40 A consequence of this is that either a valid application has been received on a particular date or it has not. A valid application must comply with all the requirements of the GPDO. Whilst it appears that, certainly at the time of the application in this case, the expression "accompanied"

was treated in practice as having a wider meaning than its literal meaning, that merely had the effect (where necessary) of postponing the date upon which it could be said that an application was complete and thus valid. Whether a valid application has been received on a particular date or not is, as it seems to me, essentially a question of fact. Provided there is evidence to support an Inspector's conclusion of fact on such an issue, and provided no misdirection on what the law requires is evident from the decision, there would be no grounds for the court interfering with the decision on an appeal under section 289 .

41 Miss Naomi Candlin submitted that this issue of fact was considered by the Inspector and he accepted the evidence of the Second Respondent that the cheque was not received until 3 March. He said that the Appellant had produced no proof that the cheque was sent on 23 February. Although he did not refer to it, the normal approach is that the burden of proof in an enforcement appeal is on the Appellant: see, e.g., *Hill v Secretary of State for Transport, Local Government and the Regions [2003] EWCA Civ 1904* . As things stood before the Inspector, there was nothing more than an assertion on behalf of the Appellant that the cheque was sent on 23 February: there was no certificate of posting or other internal record of the Appellant that the letter enclosing the cheque was sent on that day. If there had been evidence of that nature, it might have been open to the Inspector to conclude that the cheque was received a day or so after 23 February (possibly relying, if appropriate, on Section 7 of the Interpretation Act 1978) and that any failure to register its receipt, or to "validate" the application, for another 10 days or so was simply the result of internal inertia within the Planning Authority. If that had been the conclusion, then it seems to me that the Inspector would have been entitled to conclude (and indeed should have concluded) that the application was "received" in complete form at a much earlier date than the date of registration or "validation" of the application. However, having considered the material before him, he concluded that the Planning Authority's evidence satisfied him that the cheque was not received until 3 March.

42 In the circumstances, it does seem to me that Miss Candlin's argument is correct, namely, that this is a finding of fact, for which there was evidence to support it, and it is unassailable in this court. That being so, the Inspector was correct to conclude that no deemed permission was granted, in effect, by default.

43 In those circumstances, the next issue is the substantive planning issue.

The substantive issue

44 It follows that the Inspector had to go on to consider the deemed application under section 177(5) of the Town and Country Planning Act .

45 Miss Chaffin-Laird has submitted that in material respects the Inspector's reasoning on the substantive issue is flawed and that his approach did not reflect the approach he should have adopted to these deemed applications. I will refer to her criticisms shortly, but it is plain from well-established authorities that matters of planning judgment and the weight to be attached to planning matters that are legitimate for consideration are matters for the local planning authority and the Inspector and not for the court: see, e.g., *ELS Wholesale (Wolverhampton) v Secretary of State for the Environment (1988) 56 P&CR 69* ; *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, HL* .

46 Miss Chaffin-Laird's submissions must be judged by reference to what the Court of Appeal said in Murrell is the correct approach in this situation. Richards LJ said that the approach to whether, if prior approval was required, it should be given "raised an important point of principle" (paragraph 44) upon which the court gave guidance.

47 Since the question of prior approval can only arise in respect of "permitted development" within Class A, it is important to recognise that the GPDO has "already taken a position on the issue of principle" of whether development is permitted (see paragraph 45). Richards LJ drew attention (in paragraph 46) to some analogies between that situation and the grant of outline permission although recognising that the analogy "is not a precise one". He did, however, say this:

> "Nevertheless, the two situations call for a broadly similar approach, and the analogy with outline planning permission has a real value in underlining the point that the

> assessment of siting, design and external appearance has to be made in a context where the principle of the development is not itself in issue."

48 In criticising the Inspector's approach in that case, Richards LJ said this (at paragraph 47):

> "What troubles me about the inspector's decision on the substantive appeal in this case is that, far from acknowledging that the principle of development was not in issue, she appears to have based herself on policies where the principle of development was very much in issue, so that on the question of impact on visual amenity her decision reads more like the determination of an ordinary planning application than the determination of an application for prior approval of a Class A permitted development …."

49 The Inspector in that case had not referred explicitly to Annex E of PPG 7 , "the most important policy guidance for the decision she had to make" and the "only policy that she actually quotes is key principle 1(iv) of PPS7, which provides for strict control of new building development in the countryside" and was "not apposite in the context of a Class A permitted development". It was, it was said, "permissible for the inspector to take [these] policies into account in so far as they bore on the question of impact on visual amenity", but "only for that limited purpose".

50 In Murrell (which, as indicated above, concerned development in an agricultural context) it was noted that paragraphs E15 and E16 of Annex E to PPG 7 set out the factors necessary to be considered by the local planning authority in administering the "prior approval" scheme:

> E15. Provided all the General Permitted Development Order requirements are met, the principle of whether the development should be permitted is not for consideration, and only in cases where the local planning authority considers that a specific proposal is likely to have a significant impact on its surroundings would the Secretary of State consider it necessary for the authority to require the formal submission of details for approval. By no means all the development proposals notified under the Order will have such an impact.
>
> E16. In operating these controls as they relate to genuine permitted development, local authorities should always have full regard to the operational needs of the agricultural and forestry industries; to the need to avoid imposing any unnecessary or excessively costly requirements; and to the normal considerations of reasonableness. However, they will also need to consider the effect of the development on the landscape in terms of visual amenity and the desirability of preserving ancient monuments and their settings, and sites of recognised nature conservation value. They should weigh these two sets of considerations. Long term conservation objectives will often be served best by ensuring that economic activity, including farming and forestry which are prominent in the rural landscape, is able to function successfully.

51 The Court of Appeal's criticism of the Inspector's decision in that case was articulated in the following terms at paragraph 49:

> "The question whether the particular form of development proposed is acceptable in terms of siting, design and appearance involves a balancing exercise. Paragraph E16 of Annex E refers to the weighing of two sets of considerations: on the one hand, the operational needs of agriculture and related matters; on the other hand, the effect of the development upon the landscape in terms of visual amenity, as well as the implications for ancient monuments, archaeological sites and sites of recognised nature conservation value. That exercise involves potentially difficult planning judgments, which are the province of the local planning authority and, on appeal, the planning inspector and with which the court will not interfere otherwise than on grounds of irrationality. That makes it all the important for the court to be satisfied that the decision-maker has approached the exercise from the right perspective when attributing weight to the competing considerations. An approach premised, for example, on the need for strict

> controls over development in the countryside could produce a different result from an approach premised on an acceptance of the principle of development in the countryside. This adds to my concern about the inspector's decision in this case."

52 The question raised by Miss Chaffin-Laird is whether Mr Dyer's reasoning betrays a similar wrongful approach to the planning considerations that arose on the appeal he had to consider.

53 The context, of course, has to be noted. In the present case, in my judgment, the Inspector rightly concluded that the Second Respondent was "in time" for deciding that "prior approval" was required. In Murrell the Inspector should have concluded that the appellants "had an accrued permission for the proposed development and the question of prior approval did not arise" (paragraph 43). However, the observations made about her approach, to which I have referred, were premised on the basis that, contrary to the primary decision of the Court of Appeal, it was necessary to consider whether prior approval should have been given.

54 Before turning to Miss Chaffin-Laird's submissions, I should record what the Inspector said, both in general terms and in relation to each kiosk.

55 As to general considerations, he said this under the sub-heading "The deemed planning applications":

> 8. The appellant has drawn attention to the Ofcom publication 'Access and Inclusion; Digital communications for all' 18 March 2009. Among other things the advice draws attention to the desirability of public payphones and the popularity of phone boxes, especially for certain groups including those on low incomes, young people and ethnic minorities. The appellant's kiosks are said to be similar to most modern bus shelters and to be less susceptible to vandalism and graffiti than earlier boxes. It says the aim has been to blend into the local environment.
>
> 9. In the appellant's view special features of these kiosks are the use of solar energy to power the telephones and the wheelchair access that they give. The appellant regards them as user friendly while meeting Ofcom's aims.
>
> 10. The Council's case addresses the presence of more advertising material on each kiosk than is permitted by the Town and Country Planning (Control of Advertisements (England)) Regulations 2007 . It says that no advertisement may be displayed on more than one face of each kiosk. Secondly, it says that the public footways in the City are at times subject to a high concentration of pedestrian traffic. Accordingly it needs to assess the adequacy of the pavement widths and the presence of other highway structures. Thirdly, in terms of Part 24, it also has to consider the visual effect of each of the kiosks in relation to its surroundings. Thus each deemed application has to be addressed separately because the Council's arguments relate to the characteristics of each particular site.

56 Since the discussion of each kiosk in the Decision Letter is relatively brief, I will set out in full the Inspector's decision in relation to each kiosk:

> **Appeal A: 99 Bishopsgate**
>
> 11. The Council accepts that the pavement is relatively uncluttered but says that the kiosk detracts from the street scene because of its size, design and appearance. It also says the kiosk is a prominent feature in the street scene so that it closes down the north to south view towards the Bank Conservation Area and the group of listed buildings closing that view.
>
> 12. Inspection demonstrates that the kiosk, like those in all these cases, is well designed with simple lines and suitable materials. It can be seen that this kiosk it is not out of scale with its surroundings, most of which are modern commercial buildings. Although there are some older buildings in the background, and at some distance, the

only structure of any merit nearby is St Ethelburger's Church opposite the site of the kiosk. Nevertheless the extensive use of advertising material on the kiosk has an intrusive effect especially as the advertisements face in both directions. The advertisements prevent views of the street and surroundings beyond the kiosk. This lack of transparency detracts from the appearance of the area. For that reason in particular the deemed application cannot succeed.

Appeal B: 17 Moorfields

13. The kiosk is located in Moorfields, near to one of the entrances to (and exits from) Moorgate underground station. It is also close to the escalators leading to and from the City Highwalk.

14. The pavement is 4.6m wide at the relevant point so that the new kiosk restricts movement, especially during rush hours. The proximity of the station and the escalators impinges on pedestrian traffic at this location and this is exacerbated by the presence, only 3m away, of another telephone box. For these reasons alone the deemed application for this kiosk must be dismissed. Like most of the other kiosks, the application also fails because of the effect of the advertising material on the surroundings in a street that is narrower than those in which other kiosks dealt with in this decision letter are located.

Appeal C: 120 London Wall

15. This kiosk is located in London Wall at the point where the road is a dual carriageway. It is a particularly prominent position since it stands alone in a wide vista. Views to the west encompass modern buildings including those that straddle the main road. There is a different character, though, when looking east towards a number of older buildings of a different scale. It is the effect of the kiosk on those views that causes concern with the amount of advertising panels restricting views of the smaller, and more delicate, buildings. The kiosk creates an unacceptable effect on the street scene and this application must, therefore, also be dismissed.

Appeal D: 33 Wormwood Street

16. In this case the new kiosk is in a restricted area of pavement, taking up virtually half of available width. It is also located close to other street furniture so that the immediate environment is busy throughout the day. In consequence it conflicts with pedestrian movement. Equally in the relatively confined area the kiosk has an intrusive effect that is aggravated by the amount of advertising material on the kiosk and the consequent lack of transparency. It follows that the deemed application must also fail in this instance.

Appeal E: 120 Cheapside

17. The new kiosk in Cheapside intrudes into a busy, but, relatively narrow, footpath. There are other telephone boxes about 100m away in each direction. Cheapside offers an interesting street scene with a mixture of exciting new architecture alongside historic buildings such as St Mary-le-Bow Church. In these surroundings the kiosk, with its advertisements, encroaches into the spaces created stifling views. The deemed application also fails for those reasons.

Appeal F: 16 Minories

18. The street scene around the new kiosk is similar to that of Bishopsgate with a wide pavement. However the kiosk is close to the pavement edge thus restricting foot traffic. While most, but not all, of the surrounding buildings are modern, again it is the advertisements on the kiosk that detract from the street scene. For the same, or similar,

reasons as those relevant to the Bishopsgate kiosk this deemed application must fail.

Appeal G: 3 White Kennett Street

19. The location of this kiosk differs from most of the others that are considered in this decision letter. This area of land has been the subject of a landscaping project carried out in 2005. The immediate area has been formed into a small town square with granite tree planters and new trees.

20. The Council is concerned about the size of the kiosk which it says is larger than other structures in the highway around it. It also refers to its strident appearance with the advertising material that is a feature of all these kiosks. One aspect of this kiosk that has been raised by the Council is the actual position of the kiosk within the open space. It is not in the exact location shown on the application for prior approval.

21. Inspection of the site demonstrates that the harm to the street scene may be less than other kiosks that are the subject of this decision. Nevertheless the extent of the advertising material creates visual clutter in this attractively designed street scene. For that reason alone, this deemed application must also be dismissed.

57 The Inspector's overall conclusion in respect of the kiosks was summed up as follows:

22. All the deemed planning applications considered above fail because of the effect of the new kiosks on the street scene relevant to each location. The development plan, the City of London Unitary Development Plan, aims at ENV7 to ensure that the design and siting of street furniture has due regard to the character of the City and to public safety and, at TRANS6, to improve the environment for pedestrians. In terms of telecommunications, policy UTIL4 permits ground-based equipment which would enhance or not harm the City townscape while policy ENV30 encourages advertisements which reach a high standard and which are in keeping with the character of their location. In every case the amount of advertising material on the kiosk intrudes into its surroundings. In many cases the kiosks interfere with pedestrian traffic in an area that is busy all day. Accordingly the kiosks generally fail to meet the relevant policies, the street scene and the local character.

58 He concluded in this way:

23. In reaching my decisions I have taken account of all matters brought to my attention in writing, including the appellant's submission that if the environment of the kiosks is special it would have been open to the Council to apply to the Secretary of State for an Article 4 Direction, but I have found nothing that outweighs the main planning considerations in each case.

59 Miss Chaffin-Laird draws attention to the fact that the Inspector, like the Inspector in Murrell , does not refer at all to PPG8 and, in particular, to Annex 1 that deals with the “prior approval” procedure. That is a legitimate comment and it has made me question whether he was approaching the issue before him on the basis of an acceptance of the principle of development. However, it does have to be said that a fair analysis of his observations indicates that he was addressing, from a planning point of view, the siting and appearance of each kiosk in relation to the surrounding area both of which are plainly the relevant factors to consider under the Part 24 approach. Indeed he comments favourably on the intrinsic design and appearance of each kiosk: see paragraph 12 of the Decision Letter.

60 Whilst it might have been desirable for him to say more explicitly that this was in principle permitted development, I consider that a fair reading of the way he addressed the issues demonstrates that (a) he appreciated that fact and (b) he was confining his observations to matters of siting and appearance which were the sole matters with which he was concerned. He was entitled to bear in mind the local policies in that regard, provided that they did not conflict

with the principle that there was permitted development.

61 The more difficult area, I perceive, lies in the strong emphasis he placed on the existence of advertising material on the surfaces of each kiosk as being a reason for rejecting the deemed applications for planning permission. He said, in varying ways, that this advertising material was "intrusive", causes a "lack of transparency" which "stifles views" and generally detracts from the street scene and causes "visual clutter". His conclusion was that "in every case the amount of advertising material on the kiosk intrudes into its surroundings". (My emphasis.)

62 Miss Chaffin-Laird submits that this was an irrelevant consideration. She says that it is not mentioned at all in PPG8 . Indeed Miss Candlin accepts that, though she says that it can be considered as a "relevant consideration" under paragraph 13 of the Annex. However, Miss Chaffin-Laird argues that the control of advertisements is covered by different regulatory provisions, namely, the Town and Country Planning (Control of Advertisements (England) Regulations 2007 .

63 The regulations appear in Circular 03/07: Town and Country Planning (Control of Advertisements) (England) Regulations 2007 . The following regulations are relevant:

> **Advertisements displayed with deemed consent**
>
> 15. The 16 Classes of advertisements for which deemed consent is granted, that is to say which may be displayed without the need for express consent from the local planning authority, are specified in Part 1 of Schedule 3 to the Regulations. With the exception of Class 12, the deemed consent for advertisements within each Class is subject to specific conditions and limitations as well as to the standard conditions. Part 2 of Schedule 3 defines some of the terms used in Part 1.
>
> 16. Even if a local planning authority determines an application for express consent for an advertisement coming within any of the deemed consent Classes, the deemed consent provisions do not cease to apply. Consequently, local planning authorities should notify anyone who unwittingly applies for consent for an advertisement which clearly falls within one of the deemed consent Classes, that express consent is not required for it. The local planning authority is also precluded, by regulation 14(6), when granting an express consent for the display of an advertisement within one of the deemed consent Classes, from imposing any condition which is more restrictive than the equivalent condition under the deemed consent provisions of that class.
>
> …
>
> **Class 16– Advertisements on telephone kiosks**
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> 73. Class 16 is a new deemed consent class which will allow advertisements to be displayed on the glazed surface of a telephone kiosk provided they meet certain conditions and limitations. There is no limitation on the operator's name, branding or logo. Commercial advertisements are limited to one face of a telephone kiosk. The advertisements should be placed so as to avoid interference with the lines of sight for closed circuit television cameras (CCTV). Deemed consent can apply to both free standing telephone kiosks and kiosks sited in groups. When kiosks are sited in group layouts, for example, a row, a square, and L-shape, in order to minimise the visual impact, only alternate faces should carry advertisements and using consecutive faces is not permitted.

64 Miss Chaffin-Laird draws attention also to the power of the local planning authority to take what is known as "discontinuance action". This is helpfully described in the publication "Outdoor Advertisements and Signs: a guide for advertisers" which is a government booklet which explains how the system of advertisement control works in England. It says as follows:

Power to take ‘discontinuance action’

The rules enable the planning authority to take discontinuance action against any advertisement, or the use of any advertisement site, which normally has the benefit of any of the categories of deemed consent.

Action to serve a ‘discontinuance notice’ may be taken only if the planning authority are satisfied it is necessary to do so to remedy a substantial injury to the amenity of the locality or a danger to members of the public.

When the planning authority decide to take discontinuance action they must ensure that a copy of their discontinuance notice reaches the advertiser and the owner and occupier of the site on which the advertisement in question is displayed. The discontinuance notice must state:

- the advertisement or advertisement site whose display or use is to stop;
- the period within which the display or use must stop;
- the reasons why the planning authority consider that the display or use should stop; and
- the effective date of the notice (not less than eight weeks after it is served).

Anyone who receives a discontinuance notice has a right of appeal against it to the Secretary of State before the specified date on which it is to take effect. The Secretary of State then considers the appeal on its own merits in the usual way. If the appeal succeeds, the discontinuance notice does not take effect; if the appeal fails, the display of advertisements, or the use of the advertisement site, must stop on the date specified in the decision on the appeal.

65 Miss Candlin submits that the Inspector was entitled to take into account the impact of advertising and said that he did take into account the Regulations because they had been mentioned in the submissions: see paragraph 10 of the Decision Letter referred to in paragraph 55 above. She also submits that Class 16 is not to be regarded as of significance bearing in mind that the kiosks did not have prior approval.

66 As I have indicated, it is this part of the Inspector's reasoning that I find difficult. If the primary issues for consideration, once the principle of this kind of development is acknowledged, are the siting and appearance of any kiosk, then “appearance” (though apt to include anything attached to the surface of the kiosk) would ordinarily be thought to be the intrinsic appearance of the kiosk itself . The fact that a telephone kiosk is something of a magnet for advertising material is obvious to anyone who walks along a street where telephone kiosks are situated. It has been recognised in a formal sense by the promulgation of the 2007 Regulations. Those Regulations give what would certainly seem to be a self-contained code for the regulation of advertising material generally and, in this particular context, of advertising materials attached to the surface of a telephone kiosk.

67 Against that background, it seems to me that a Local Planning Authority has ample powers to ensure the discontinuance of advertising that represents a “substantial injury to the amenity of the locality or a danger to members of the public”. There is a right of appeal for the owner or occupier of the site to the Secretary of State. To that extent and upon that basis, I do not consider that the existence of advertising material on a telephone kiosk that is otherwise sited appropriately in the planning context and has an intrinsically acceptable appearance is a material consideration in deciding whether prior approval should or should not have been given to the erection of that kiosk.

Conclusion

68 On that basis, it seems clear that the presence of advertising material on the kiosk's referred

to in appeals A, C, E, F and G was the predominant determinant in the rejection by the Inspector of the deemed applications for planning permission in those appeals. Whilst appeals B and D were rejected also, partly on this ground, the predominant reason in each case was the siting of the kiosks.

69 Accordingly, I allow the appeals against the Inspector's decision in relation to appeals A, C, E, F and G and dismiss the appeals in relation to appeals B and D.

70 I will invite Miss Chaffin-Laird and Miss Candlin (for whose succinct and helpful submissions I express my appreciation) to agree, if they can, an appropriate order to give effect to this decision.