



Neutral Citation Number: [2022] EWHC 2991 (Admin)

Case No: CO/1020/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2022

Before:

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between:

JOHN MURTAGH

- and -

**SECRETARY OF STATE FOR LEVELLING UP,
HOUSING AND COMMUNITIES**

-and-

**(1) HUTCHINSON 3G (UK) LIMITED
(2) ROYAL BROUGH OF KINGSTON UPON
THAMES**

Claimant

Defendant

**Interested
Parties**

Mr Leon Glenister (instructed by **Leigh Day**) for the **claimant**
Mr Riccardo Calzavara (instructed by **Government Legal Department**) for the **defendant**
The **interested parties** were not present or represented

Hearing date: 10 November 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 25 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ JARMAN KC

Introduction

1. The second interested party in these proceedings as local planning authority (the authority) by a decision dated 12 May 2021 refused to give prior approval for the siting and appearance of a 15m high street pole and 3 cabinets and ancillary works for the purposes of 5G (the proposed mast) on Kingston Hill, Coombe. The application was made by the first interested party (Hutchinson) pursuant to schedule 2 Part 16 Class A Town and Country Planning (General Permitted Development) (England) Order 2015/5962 (the GPDO). The reasons given for refusal were as follows:

“The proposed telecoms equipment by virtue of its siting and appearance and in particular its height would result in an incongruous addition to the streetscene that would be visually intrusive and create visual clutter that would not be in keeping with and detract from the character and appearance of the surrounding area, causing less than substantial harm to the significance of the Coombe Wood Conservation Area, the harm of which would not be outweighed by the public benefits of the proposal, and it would also compete with and detract from the setting of the Locally Listed Building Warren Cottage. The proposal would not accord with Section 72 of the Planning (Listed buildings and Conservation Areas) Act 1990, paragraphs 184 - 202 of the NPPF and policies CS8, DM10 and DM12 of the Council's adopted LDF Core Strategy April 2012.”

2. Hutchinson appealed that refusal under section 78 of the Town and Country Planning Act 1990 (the 1990 Act) which appeal was heard by an inspector appointed by the defendant (the Secretary of State). He made a site visit on 3 February 2022 and issued his decision in writing on 14 February 2022, after considering written representations. He found that the proposed mast would harm the setting of Warren Cottage and the Coombe Wood Conservation Area, in which it would be situated. Nevertheless he concluded that the public benefits from additional telecommunications equipment would outweigh those harms, and allowed the appeal.
3. The claimant owns and lives in Warren Cottage which abuts the pavement where it is proposed to site the proposed mast. He seeks a statutory review, under section 288 of the 1990 Act, of the inspector's decision on the basis that it is wrong in law. On 28 July 2022, Mr James Strachan KC, sitting as a deputy judge of the High Court, granted permission to proceed with the review, on two grounds.

The two grounds of review

4. The first is that the inspector failed adequately to consider alternative sites, and particularly an existing mast on the same street some 100m away from the site of the proposed mast, contrary to paragraphs 115 and 117 of the National Planning Policy Framework (the NPPF), or failed to give adequate reasons. Second, the inspector failed to address the impact of the proposed mast upon a yew tree within the claimant's

property which is subject to a Tree Preservation Order, or failed to give adequate reasons.

5. The Secretary of State refutes both of those grounds. In respect of the first, he submits that the evidence supplied by Hutchinson in support of its application showed that alternative sites were not suitable. Although the existing mast was not included in these, and was not specifically referred to, this evidence made clear that in this location, existing mast sites are not capable of supporting additional equipment to extend coverage across the target area. The inspector dealt adequately with the evidence in his decision. As for the second, it is accepted that this was not addressed by the inspector, but it was not a principal issue before him and in any event the preservation of the yew tree is adequately dealt with under the Town and Country Planning (Tree Preservation) (England) Regulations 2012/605 (the 2012 regulations).
6. The authority had refused two previous applications (one in June 2020 and the other in January 2021) for telecommunications equipment in the area, namely 20m Phase 8 monopoles with a wraparound cabinet at the base.

The prior approval application

7. The present application was made on 18 March 2021 and was accompanied by plans showing the relationship of the proposed mast with the existing street scene and the yew tree. It was also accompanied by a document entitled “5G Site Specific Supplementary Information” (the supplementary information) in which the methodology of choosing the site of the proposed was explained.
8. Section 3 deals with that site and planning policy and includes the following extracts:

“In this location, existing mast sites are not capable of supporting additional equipment ...to extend coverage across the target area ... There is an acute need for a new mast.”
9. Section 5 deals with why this site is required and says:

“The site is required to provide new 5G coverage ... in order to improve service in Kingston Hill, Coombe. The cell search areas for 5G are extremely constrained with a typical cell radius of approximately 50m meaning that it would not be feasible to site the [proposed mast] outside of this target locale... Consideration is always given to sharing any existing telecommunication structures in the immediate area.”
10. Section 6 then deals with alternative sites considered and not chosen:

“In accordance with the sequential approach outlined in the NPPF, the following search criteria have been adopted. Firstly, consideration is always given to sharing any existing telecommunication structures in the immediate area, secondly; consideration is then given to utilising any suitable existing structures or buildings and thirdly, sites for freestanding ground-based installations are investigated.”

11. Four such sites, two specific and two more general, are then set out with the reasons for not choosing them. These are shown on an aerial photograph, entitled “100m DSA (Desired Search Area) shown circled.” Only one specific and one general site is shown within the circle. The reasons given for not choosing the two specific sites include that they are not suitable because of driveway crossings, existing street furniture or traffic sightlines. One of the more general sites is not suitable because of properties facing directly onto the site.
12. The remaining site is the only one of the four to refer to an existing mast infrastructure, and is specified as D3 (as I shall call it, to distinguish it from the existing mast on Kingston Hill). D3 is shown north east of, and outside, the circle. The reason given for discounting D3 is that it is not capable of extending the signal reach across the coverage gap. The site of the proposed mast is shown north west of, and outside, the circle. The existing mast on Kingston Hill is to the north of, and beyond the limits of, the total area shown in the photograph and therefore not shown on it.
13. Section 7 sets out quotes from section 10 of the NPPF which deals with supporting high quality communications infrastructure. The latest version of NPPF uses different paragraph numbering, which I shall use as there is no material difference in the wording. Paragraph 114 is set out as follows:

“Advanced, high quality and reliable communications infrastructure is essential for economic growth and social well-being. Planning policies and decisions should support the expansion of electronic communications networks, including next generation mobile technology (such as 5G) and full fibre broadband connections. Policies should set out how high quality digital infrastructure, providing access to services from a range of providers, is expected to be delivered and upgraded over time; and should prioritise full fibre connections to existing and new developments (as these connections will, in almost all cases, provide the optimum solution).”

14. Paragraph 115 is then cited:

“The number of radio and electronic communications masts, and the sites for such installations, should be kept to a minimum consistent with the needs of consumers, the efficient operation of the network and providing reasonable capacity for future expansion. Use of existing masts, buildings and other structures for new electronic communications capability (including wireless) should be encouraged. Where new sites are required (such as for new 5G networks, or for connected transport and smart city applications), equipment should be sympathetically designed and camouflaged where appropriate.”

15. After quoting these parts of the NPPF, this is said:

“Operators always follow the sequential site selection process. Where an existing site can be shared or upgraded this will always adhered to before a new proposal is put forward for

consideration. In this instance there is no scope to upgrade existing mast or site share with the remaining practical solution to extend such coverage to Coombe being that of new infill Streetworks infrastructure located within the Public highway.”

16. No reference is made in the supplementary information to paragraph 117, which so far as is material provides:

“Applications for electronic communications development (including applications for prior approval under the General Permitted Development Order) should be supported by the necessary evidence to justify the proposed development. This should include:..

(c) for a new mast or base station, evidence that the applicant has explored the possibility of erecting antennas on an existing building, mast or other structure and a statement that self-certifies that, when operational, International Commission guidelines will be met.”

Objections

17. In written objections by or on behalf of the claimant, the existing mast was identified by a photograph, and this was said:

“The application fails to properly consider the utilisation of the pre-existing mast installation on Kingston Hill. See picture below. This is only approximately 100m from the proposed site. This is evidently a more suitable place to submit a planning application. There has been no indication in the original application that this site has even been considered. This is in breach therefore of planning guidelines. The following picture shows the current mast and cabinets that are only approximately 100m away. Planning guidance quite clearly states that extensive consideration should be given to existing sites. At no stage has the existence of the current site of nearby series of masts been considered in the application.”

18. The issue of potential damage to the yew tree was also dealt with, thus:

“The questionnaire also falsely states to question 16 that the proposed site would not be subject to a Tree Preservation order. The following picture from Kingston Council’s website clearly shows that the existing trees that are in Warren Cottage are subject to a tree preservation order. The proposed mast and the cabinets are all at the base of the existing trees which are protected by a TPO. As part of the planning permission for the extension to Warren Cottage...a Tree survey and report was produced as a Tree Preservation Order affects the site... It is apparent that the proposed application will indeed affect and encroach on the root protection area of a Category B tree within

the curtilage of Warren Cottage... an English yew... The root protection area (which extends beyond the property's fence line) would most certainly be adversely affected. The proposal would require the construction of extensive foundations. It is impossible to conceive that their proximity would not cause root severance."

The inspector's decision letter

19. The inspector's decision letter comprises 19 paragraphs. He recognised that as the site of the proposed mast lies within the Conservation Area he had to give special attention to the desirability of preserving or enhancing the character and appearance of that area pursuant to section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. He referred to paragraph 119 of the NPPF which indicates that great weight should be given to the conservation of a heritage asset and to paragraph 200 which provides that any harm to such an asset requires clear and convincing justification. He also recognised that Warren Cottage is a locally listed building and thus a non-designated heritage asset.
20. The fact that the appeal site lies within the Conservation Area also explains why prior approval is needed for the proposed mast. Planning permission for the same is given by the GPDO. However, that is subject to the condition that if the proposal is in a conservation area and consists in the installation of a mast there must be compliance with the prior approval conditions (see paragraph A2(3)(a)). The principal condition is that before beginning the installation the developer must apply to the local planning authority for a determination as to whether prior approval is required having regard to the siting and appearance of the installation (paragraph A3(4)). It follows that the only questions for the authority and the inspector was whether the siting and appearance of the proposed mast are appropriate.
21. At paragraph 8 of his decision letter, the inspector described the location of the appeal site, the road upon which it lies and various items of street furniture. At this point, he said "I did note an existing telecommunication mast some distance away to the south along Kingston Road on the western side of the highway." It is agreed that this is the existing mast identified by the claimant. Mr Calzavara, for the Secretary of State, submits that this shows the inspector was aware of the existing mast, as indeed he was. However, this is the only reference in the decision letter to it, and in my judgment, reading the decision letter fairly, no more can be read into this paragraph than that the existing mast was noted as part of the street furniture.
22. The inspector at paragraph 13 found that the harm to Warren Cottage and to the Conservation Area was less than substantial in that the main significances of these heritage assets would remain. He referred to paragraphs 202 and 203 of the NPPF which indicates that such harm should be weighed against the public benefits of the proposed mast, and after referring to paragraph 114 of the NPPF found that the siting and appearance of it would provide those public benefits and he therefore gave them substantial weight.
23. At paragraph 15, the inspector then said this:

“The appellant has submitted information to show that there is a need for additional telecommunications equipment in this area, and while local residents have expressed concern that the documentation is not clear, I am satisfied that there is a need for a mast in this near vicinity. The appellant has also demonstrated that it has looked at alternative sites to meet the specific need and again I am satisfied that it has shown that these would have greater effect.”

24. It was agreed before me that what the inspector meant by those last few words is not clear, but that the greater effect he referred to must, logically, be taken to mean greater effect on the Conservation Area. Nor is it clear why he came to that conclusion, given that the information supplied by Hutchinson in support of its application refers to reasons other than the effect on the Conservation Area. In any event, Mr Calzavara realistically and properly accepted that the existing mast does not have a greater effect on this area than would the proposed mast.

25. The inspector’s conclusion is set out in paragraph 17 as follows:

“In this case the decision comes down to a judgement between the harm to the heritage assets, the effect on the living conditions of the occupiers of Warren Cottage and the public benefits of providing additional telecommunications facilities. Even giving great weight and special attention to the harm to the heritage assets I conclude that in this location on a busy and wide highway that the public benefits from the additional telecommunications equipment outweigh those harms.”

26. That balancing exercise was a matter of planning judgment for the inspector, and not for the court. However Mr Glenister, for the claimant, submits that in coming to that conclusion, the inspector made two errors, as set out in the grounds, each of which renders the decision amenable to review by the court.

The first ground

27. He points out that the inspector did not expressly refer to the requirement in paragraph 117 of the NPPF that applications such as the present should be supported by necessary evidence to justify a new mast, including that the use of existing masts have been explored. Mr Calzavara submits that it is not necessary for the inspector to mention a particular policy in his decision letter to show that he has taken it into account. In *St Modwen Developments Ltd v SSCLG* [2017] EWCA Civ 1643, Lindblom LJ said this at paragraph 6:

“(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80 , at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).”

28. In my judgment, it is not apparent from the way the inspector dealt with the issue of whether the existing mast should be considered, that he misunderstood the need to justify the proposed mast. In paragraph 15, he refers to the information submitted by the applicant which shows a need for a mast in the area and also shows that alternative sites have been looked at. This suggests that he was aware of the requirements of 117 of the NPPF. As Mr Calzavara submits, paragraph 115 encourages the use of existing masts, but does not prohibit new masts even where there is an existing one. However, under paragraph 117, the new mast must be justified.
29. The inspector did not expressly consider the existing mast. It is possible he did not do so at all, because it was not specifically dealt with in the supplementary information. It is also possible that he did consider it but discounted it because of the general indication in that information that existing masts in the area were not suitable to support additional equipment to extend coverage. The issue would then arise as to whether that generality was, in the present case, then reduced to the area of D3 by the specific reference to it and to no other existing structure. It appears that the existing mast is about the same, maybe a little more, distance from the DSA than the site of the proposed mast. Another possibility is that he took the view that the existing mast is outside the DSA, but so too is the proposed mast.
30. Mr Calzavara submits that the supplementary information justified the need for the proposed mast and it was not incumbent on the inspector to consider the existing mast not specifically mentioned in that information. However, it was specifically raised as an issue by the claimant, and in my judgment should have been grappled with by the inspector. In any event, his reference to the alternative sites as having greater effect leaves a real doubt as to how he reached the conclusion that the proposed mast was justified at this site.
31. The requirements in respect of decisions of inspectors were summarised in *St Modwen* at paragraph 6. They should be construed in a reasonable flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph. The reasons for an appeal decision must be intelligible and adequate, and be capable of being understood as to why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues. However, the reasons need refer only to the main issues in the dispute, not to every material consideration.
32. In my judgment, in the above respects, the inspector’s decision does not permit an understanding as to why the appeal was decided as it was, and what conclusions, if any, were reached in respect of the exiting mast.

The second ground

33. As for the yew tree, Mr Calzavara criticises the claimant's reference to reports (obtained for the purposes of an extension to Warren Cottage) without disclosing the same. In my judgment, his objection was sufficient to raise this as an issue, which should have been dealt with if it were a principal issue. The information set out was sufficient to raise the issue of potential damage to the roots of the tree given the proximity of it to the proposed mast and associated cabinets.
34. Policy DM10 is the relevant local plan policy, and provides:
- “The Council will expect new development to ensure that trees that are important to the character of the area or covered by Tree Preservation Orders are not adversely affected. Where trees are to be lost through development the Council will normally require the planting of two specimens for each tree lost. The Council will refuse applications that adversely impact upon the leafy character of the Borough where commensurate appropriate replacement is not provided.”
35. Mr Glenister submits that this is a material consideration that was not dealt with by the inspector. He accepts that the regime under the 2012 regulations applies, but submits that nevertheless it was a matter which should have been dealt with. He relies on *R v Bolton MBC ex p Kirkman* 1998] Env.L.R 729, where the Court of Appeal found that the duties in Schedule 4 to the Waste Management Regulations did create a free standing duty upon local planning authorities to ensure that waste is not disposed of in a manner which might be harmful to health or the environment.
36. Mr Calzavara relies upon the distinct regime for the protection of trees, in submitting that the inspector did not have to deal with this. The TPO means that no one may wilfully damage the yew tree (regulation 13), except so far as such work is necessary to implement planning permission unless such permission was granted under the predecessor to the GPDO (regulation 14(1)(a)(vii)). In respect of this prior approval, therefore, the rule that the tree may not be damaged applies, and that was not ultimately disputed by Mr Glenister.
37. I accept that, but in my judgment policy DM10 was a material consideration and indicated that the authority did expect it to be shown that development, which the proposed mast would be, would not adversely affect the yew tree. The inspector should have dealt with this issue. It would have been open to him to do so by giving reasons why this issue could not justify dismissing the appeal, but he should have dealt with it. In my judgment, his decision would not inevitably have been the same (see *Simplex GE (Holdings) Ltd v SSCLG* [1989] 57 P. & C.R. 306).

Conclusion

38. In my judgment, each of the grounds of review are made out. The decision of the inspector must be quashed and the appeal remitted for redetermination.
39. I am grateful to each counsel for his clear and focussed submissions. They helpfully indicated that any consequential matters not agreed can be dealt with by way of written submissions. I invite them to submit a draft order, agreed as far as possible, together with any such submissions, within 14 days of hand down of this judgment.