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NOT NPPF2: A CASE ABOUT PRIOR APPROVAL APPLICATIONS AND APPEALS

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As Parliament rises for the summer recess it leaves us with a revised Framework and a call for evidence on the appeals system. As a diversion from the commentary on the former, and of some relevance to the later, this note looks at a case on prior approval for PD.

The Chief Executive of the Planning Inspectorate wrote to *Planning Magazine* (18 April 2018) on the topic of delays in the appeals system. One factor which she highlighted was this:

> *"The demand on our resources has been compounded by the unexpected receipt of more than 1,000 prior approval appeals for phone kiosks, and that number is likely to increase. Currently these have been absorbed into our normal planning appeal work, with consequent delays. We are now adopting a different model to process these appeals which will use our non-salaried inspectors, and this should release capacity back to mainstream work. This will have a positive impact on the overall time taken to determine appeals over the coming months."*

In *Maximus Networks Ltd*[1] the Claimant challenged the decision by the Planning Inspectorate that some 400 appeals were invalid. Those were appeals from prior determination applications in respect of PD rights to install telephone kiosks. The claim was dismissed.

The case deals with issues which are variously of interest to planning consultants, planning authorities and lawyers.

Invalid application; valid appeal?

The GPDO[2] grants permission, inter alia, for the installation of communications apparatus – here, telephone kiosks. Like many prior determination procedures, an application is to be

[1] *Maximus Networks Ltd v Secretary of State for Homes Communities and Local Government* [2018] EWHC 1933 (Admin). Rupert Warren QC and Richard Moules appeared for the Claimant. Richard Kimblin QC and Mark Westmorland Smith appeared for the Secretary of State.
[2] Part 16 Class A of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015

made to the local planning authority for it to determine whether prior approval will be required.

The application must be accompanied by evidence that notice has been given to owners of the relevant land. This requirement gave rise to the issue in the case: if the application is not accompanied by such evidence, how are decisions on the validity of the application and appeal to be decided?

The issue is fairly simple at application stage: Section 327A Town and Country Planning Act 1990 provides that a local planning authority must not entertain an application which does not comply with a requirement as to the manner or content of the application.

In contrast, Section 79(1) of the 1990 Act gives a discretion to the Secretary of State, on appeal, to deal with the application as if it had been made to him in the first instance. So, can an applicant fail to comply with a requirement for an application, i.e. make an invalid application, and ask the Planning Inspectorate to, nevertheless, determine the appeal?

Dove J concluded the Planning Inspectorate has[3]

> *"…a discretion to conclude at the outset of an appeal whether or not the application upon which it is founded is valid and also to decline to determine the appeal if it emerges that, for instance, provisions of the GPDO in respect of requirements for a valid application have not been complied with. By the same token, since this is a discretion, it is open to the defendant to conclude that it is appropriate to continue to process the appeal and accept it as valid notwithstanding breaches of the requirement if it is appropriate to do so."*

So, the position is different at application and appeal stages. However, the fact that a planning authority is obliged to find an application is invalid is relevant and may provide a strong justification for the Planning Inspectorate to stand by those same procedural requirements.

In practical terms, those making applications can expect a failure to follow procedural requirements to result in a finding of invalidity, departure from will require strong justification to persuade the Planning Inspectorate to a different view.

[3] §31

Fees

If the application is not valid, either at application or appeal stage, what happens to the application fee? The 2012 Regulations provide for refund[4] and that is what the court ordered.

For Lawyers: discretion

It is worthwhile to say something about the use of the term 'valid' in the different contexts which arise here.

The Claimant relied on a line of authority commencing with the Court of Appeal's decision in *Main*[5]. In that case, and the subsequent cases which were fully and carefully reviewed by Dove J[6], a permission or consent had been granted and an error or omission subsequently identified in the application materials. The issues in each of those cases were impact, relief and discretion. Each was concerned with the Court's discretion. Each was an exercise in considering the nature of the error, its impact and the prejudice which would or might flow from granting relief by quashing the permission or consent.

Rather than looking forward from the point at which an application is made, asking whether the application should be determined, these cases look backwards and ask whether the decision should be undone. The term 'validity', as used in those cases, concerns the question of whether or not the permission which had been granted had legal effect.

In contrast, in the context of a prior approval application, validity is to be understood as compliance with the relevant requirements under or made under the 1990 Act. Validity is therefore concerned with the conformity of the application with the statutory requirements; not the legal effectiveness of a grant, right or permission which results from the determination of the application. Validity in the context of an application is a term which is very widely understood by the planning profession and which ought not be confused with the validity of a document conferring rights (e.g. a planning permission or enforcement notice).

In all of the cases on which the Claimant relied, the decision in question was whether or not to quash a planning permission on the basis of a procedural error in the application that had not

[4] The Town and Country Planning (fees for applications, deemed applications requests and site visits) (England) Regulations 2012: "14(3) Any fee paid pursuant to this regulation shall be refunded if the application is rejected as invalid."

[5] *Main v Swansea City Council* [1984] 49 P&CR 26

[6] See §§20-31 of the judgment

been picked up at the anterior validation stage. They do not relate to the question of whether or not an application is valid in the context of whether or not to determine that application or to found a jurisdiction on appeal.

The judgment makes clear that the principles and approaches which the court will apply to application to quash a substantive administrative decision are not the same as those which apply to the discretion which is in play when considering whether an appeal is valid and should proceed, or not.