

Town and Country Planning Act 1990 (as amended)

Section 78 Appeal by Cellnex UK Limited against the decision of the London Borough of Hillingdon Council to refuse prior approval for the installation of electronic communications apparatus to upgrade the Cherry Lane Cemetery Communications Installation, Shepiston Lane, West Drayton, London UB7 9DL

The Appellant's Application for an Award of Costs

Planning Inspectorate Reference APP/R5510/W/22/3292326

London Borough of Hillingdon Council Reference: 35298/APP/2021/3325

Cellnex UK Limited Reference: UK-LO-004678

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1. The reasons for the application for an award of costs

1.1 The advice provided in the Government's Planning Practice Guidance (PPG) includes examples of the circumstances when a Local Planning Authority will be at risk of a substantive award of costs through the planning appeals process. The guidance provided is not exhaustive, but it carries over many of the long-established principles previously set out in the now superseded DCLG Circular 03/09 Costs Awards in Planning Appeals and Other Planning Proceedings.

1.2 The appellant considers that the London Borough of Hillingdon Council (the LPA) has acted unreasonably in respect of the following matters:

- The decision to refuse prior approval has prevented development proceeding that should clearly have been permitted having regard to its accordance with the Development Plan, the National Planning Policy Framework, and other material considerations.
- It has misled itself on a point of law by determining that the proposed works constitute inappropriate development within the Green Belt. Consequently, it has incorrectly applied national, regional, and local Green Belt policies in making its decision to refuse prior approval for the development
- It has acted contrary to planning appeal decisions that have confirmed that the issue of inappropriate development and the related test of Very Special Circumstances do not apply to prior approval applications for electronic communications development in Green Belt areas
- The failure to produce evidence to substantiate why it assessed the proposal as inappropriate development, which underpins the reason for refusal, in its appeal statement.

2. Green Belt policy and the scope of the prior approval determination

2.1 The central justification for making this application for an award of appeal costs is rooted in the LPA's failure to properly apply Green Belt policies to its assessment of the prior approval determination application to upgrade Cellnex's shared base station at Cherry Lane Cemetery. This is a LPA with extensive areas of Green Belt within its boundaries and it handles numerous prior approval applications each year for electronic communications and other types of development. It should, therefore, be familiar with the scope of the planning permission granted by Article 3 for the permitted development rights contained in Part 16 Communications of Schedule 2 to the Town and Country (General Permitted Development) (England) Order 2015, as amended (the GPDO).

- 2.2 It should also be aware of the weight that can be given to the Green Belt policies set out in the National Planning Policy Framework (the NPPF), the London Plan, and its own Hillingdon Local Plan when determining prior approval applications for electronic communications development. In short, the Green Belt policies in the Framework and the Development Plan are relevant planning considerations but only to the extent that they relate to the siting and appearance matters that are the sole scope of the determination the LPA was required to make.
- 2.3 Instead of dealing with these matters correctly and reasonably, the LPA has adopted an erroneous application of a point of law in determining that the works involved constitute inappropriate development within the Green Belt. This led it to make the incorrect assessment that Very Special Circumstances needed to be demonstrated by the applicant under national, regional, and local Green Belt planning policies before prior approval could be granted. The application submitted was found to be deficient in this regard due to the applicant's failure to demonstrate Very Special Circumstances, as is clearly stated in Section 1 Summary and the penultimate paragraph of section 7.2 of its report. Neither of these considerations applied to the determination of the application, as they fall outside the scope of matters the LPA can consider under the prior approval regime, and yet they underpin its justification for the refusal. This constitutes unreasonable behaviour.
- 2.4 The LPA has also ignored appeal decisions that have confirmed this position. The appellant's Statement of Case refers to three examples, one of which related to an appeal in this LPA's administrative area at Swakeley's Drive. The LPA's assessment and decision ignores the outcome of that appeal and the now well-established legal position on issues of inappropriate development and Very Special Circumstances when determining prior approval applications in Green Belt areas. This is a further example of unreasonable behaviour.
- 2.5 We also wish to highlight that the LPA did not respond to requests from Cellnex to provide an update on the progress of its assessment before the decision to refuse prior approval was made. Furthermore, at no point during the determination period did the LPA contact Cellnex to discuss its concerns about the perceived conflict with Green Belt policies. Had it done so, Cellnex would have been able to engage with the LPA on the issue of how the tests of inappropriate development and Very Special Circumstances applied, or rather do not apply, to prior approval applications. Had the LPA taken this step, this appeal could potentially have been avoided.

3. Flaws in the LPA's assessment of the planning balance

- 3.1 As is demonstrated in the appellant's Statement of Case, there is no evidence that the LPA gave any weight to the extent to which the development accorded with NPPF and Development Plan policies for electronic communications mast sharing in reaching its decision.

- 3.2 The LPA's report lists the NPPF (albeit by an incorrect reference to the 2018 iteration), London Plan, and Hillingdon Local Plan policies for electronic communications development as being relevant to the determination. However, the relevant assessment of these policies is nowhere to be found in Section 7 Main Planning Issues where the LPA's balancing exercise was undertaken. In the appellant's view, it is not enough to simply list relevant policies as being applicable and one must be able to find a written assessment that demonstrates the weight that has been given to them.
- 3.3 Instead of examining how policies for electronic communications development related to the LPA's determination, the Main Planning Issues section of the report contains only erroneous assessments of inappropriate development and the related issue of Very Special Circumstances within the Green Belt, along with other matters such as the impact on the street scene, the relationship to residential amenity, and access considerations.
- 3.4 The LPA's report, therefore, provides the written evidence that some policies relating to siting and appearance matters were considered, e.g. in relation to visibility, access, etc., but not electronic communications policy. In the appellant's opinion, the omission in the LPA's balancing exercise of any reference to the public benefits of 5G and other connectivity, and the extent to which the siting of the development accords with policies for mast sharing, fatally undermines its decision. This constitutes unreasonable behaviour.
- 3.5 There is also nothing contained in the LPA's statement that specifically addresses the appellant's evidence on these most material points, especially in relation to the issues of inappropriate development and Very Special Circumstances. Instead, the LPA's statement at paragraph 2.2 contains the following reference only, which completely side-steps the appellant's challenge to the weight it gave to the assessment of the inappropriate development and Very Special Circumstances tests:
- "2.2 The appellant has referenced the LPA's green belt reference in their statement of case. Whilst this forms part of the reason for refusal, a key part of the reason for refusal is the impact on the open character of the wider area, due to the siting, scale, bulk and height of the proposal. The open character of the green belt is material to the decision, as it is relevant in terms of the character assessment when considering the development; the siting and appearance rightly noted in the statement."*
- 3.6 Drawing all these strands together, it is clear that the LPA has unreasonably prevented the implementation of permitted development rights for the upgrade of the base station that should have been approved having regard to all the material planning considerations that apply in this case.

3.7 As a consequence, the appellant has been put to unnecessary expense by submitting an appeal that could and should have been avoided if the LPA had acted reasonably by determining the prior approval application within the scope of the powers granted to it by Parliament. This expense has involved:

- Cellnex's costs in submitting the appeal, e.g. in preparing our Statement of Case and in preparing this application for an award of appeal costs
- Engagement with EE Limited, Hutchison 3G UK Limited, and MBNL in relation to the preparation and submission of this appeal
- Costs associated with an accompanied appeal site visit should the Inspector consider this is required.

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