



Neutral Citation Number: [2018] EWHC 263 (Admin)

Case No: CO/3411/2017

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16 February 2018

**Before :**

**MRS JUSTICE LANG DBE**

**Between :**

**THE QUEEN**  
**on the application of**

**Claimant**

**NIGEL MAWBAY**  
**- and -**  
**LEWISHAM COUNCIL**

**Defendant**

**(1) CORNERSTONE TELECOMMUNICATIONS**  
**INFRASTRUCTURE LIMITED**  
**(2) SECRETARY OF STATE FOR**  
**COMMUNITIES AND LOCAL GOVERNMENT**

**Interested Parties**

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**Andrew Parkinson** (instructed by **Richard Buxton**) for the **Claimant**  
**Mark Westmoreland Smith** (instructed by **London Borough of Lewisham**  
**Legal Services**) for the **Defendant**  
**Heather Sargent** (instructed by **DAC Beachcroft LLP**) for the **First Interested Party**  
The **Second Interested Party** did not appear and was not represented

Hearing date: 6 February 2018  
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**Approved Judgment**

**Mrs Justice Lang :**

1. The Claimant seeks judicial review of the Defendant’s decision, made on 9 June 2017, that the installation of mobile telephone apparatus by the First Interested Party on the roof of Forsythia House, Pendrell Road, Brockley, London, SE4 2PA (“the Building”) was permitted development under Part 16 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (“the GPDO”), and therefore it would not take enforcement action against it, as requested by the Claimant.
2. The Building is owned by Lewisham Homes, which manages social housing on behalf of the Defendant. It has granted the First Interested Party (“IP1”) a licence to install the apparatus, for a fee.
3. The Claimant and his family live in the same street as the Building, in the Telegraph Hill Conservation Area<sup>1</sup>. They, along with many other local residents in Forsythia House and the nearby streets, object to the installation, and the fact that they were not consulted about it. They consider it is unsightly and out of place in an attractive conservation area. They are also fearful of the health implications of the radiation emitted by the installation (there are visible radiation warning signs on the installation).
4. There is a plant room on the roof of the Building, and the apparatus has been installed on the plant room roof. IP1’s proposal comprised “6 No. ANTENNAS, 6 No. RRU’s<sup>2</sup>, 1 No. 0.3m DISH and TEF 3 No. ANTENNAS ON TRIPOD MOUNTED SUPPORT POLES”. The proposal also provided for the installation of handrails, cable trays, ladders, cabinets, and steel support grillage. The nine antennae have been installed in groups on the four corners of the roof. The antennae are not free-standing. Each antenna is supported by an antenna pole and attached by a yoke arm to a central support pole. The central support pole is held in place by steel legs, forming a tripod, bolted to a concrete cast plinth, and moulded and set into the concrete slab of the roof. At this Building, there are four central support poles, each holding one, two or three antennae.
5. According to the plan, the plant room roof is 10.5 metres above ground level and the top of the antennae is 13.5 metres above ground level. The central support poles are slightly lower than the top of the antennae. It is estimated that they are about 3 metres in height, perhaps slightly less.
6. The Defendant’s decision was in a letter dated 9 June 2017, which was a response to a letter from the Claimant’s solicitor. It read, so far as is material:

“....

You state that the electronic communications apparatus recently installed breaches paragraph A1(2)(c) of Part 16. Paragraph A1(2) of Part 16 states:

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<sup>1</sup> Pendrell Road is within the conservation area, but Forsythia House is outside it.

<sup>2</sup> RRU is an abbreviation for ‘remote radio unit’.

“In the case of the installation, alteration or replacement of a mast on a building which is less than 15 metres in height, the mast would be within 20 metres of the highway (unless the siting remains the same and the dimensions of the altered or replaced mast are no greater)”.

The reason is explained in Clue & Co’s above letter. Mr Clues considers that the “tripod mounting support poles” as shown on the drawings constitute masts. The letter states that the antenna are mounted on a “structure consisting of horizontal and vertical tubing with further tubing at 45 degrees to provide strength and stability”.

It is considered that the poles are not a mast given the following factors. The support poles are not ground based. The scale and design of the support poles is not characteristic of a roof mast.

Given this there is not a breach of paragraph A1(2)(c) of Part 16.

....”

7. By order of the Court, the Secretary of State for Communities and Local Government (“the Secretary of State”) was joined as the Second Interested Party. He made written representations, through the Government Legal Department, but did not attend the hearing.

### **Statutory Framework**

8. By section 57(1) of the Town and Country Planning Act 1990 (“TCPA 1990”), planning permission is required for the carrying out of development. By section 58(1)(a), planning permission may be granted by a development order made by the Secretary of State. By section 60, planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order, including conditions as to prior approval.
9. Article 3(1) of the GPDO provides that planning permission is granted for the classes of development described as permitted development in schedule 2. By article 3(2), any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in schedule 2.
10. Part 16 of schedule 2, entitled “Communications (Class A – electronic communications code operators)” describes the permitted development as follows:
  - “A. Development by or on behalf of an electronic communications code operator for the purpose of the operator’s electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—

(a) the installation, alteration or replacement of any electronic communications apparatus...”

11. The scope of the permitted development by Class A is subject to a number of exclusions which are set out in paragraph A.1. The exclusion relied upon the Claimant is in paragraph A.1(2)(c) which provides:

“Development consisting of the installation, alteration or replacement of electronic communications apparatus (other than small antenna and small cell systems) on a building is not permitted by Class A(a) if:

.....

(c) in the case of the installation, alteration or replacement of a mast on a building which is less than 15 metres in height, the mast would be within 20 metres of the highway (unless the siting remains the same and the dimensions of the altered or replaced mast are no greater);...”

12. Paragraphs A.4 and A.5 are interpretation provisions, set out under the heading “Interpretation of Class A”.
13. Paragraph A.4 provides that “for the purposes of Class A”, the term “mast” means a “radio mast or radio tower”.
14. The term “antenna” is not defined, but “antenna system” is defined as “a set of antennas installed on a building and operated in accordance with the electronic communications code”.
15. Paragraph A.4 also provides that, for the purposes of Class A, the term “electronic communications apparatus” has the same meaning as in the Communications Act 2003. Sections 151 and 106(1) of the Communications Act 2003, read together, provide that the term has the meaning set out in the “Telecommunications Code” in schedule 2 to the Telecommunications Act 1984, as amended.
16. Paragraph 1 of schedule 2 to the Telecommunications Act 1984 provides:

“(1) In this code, except in so far as the context otherwise requires –

...

“electronic communications apparatus” means -

(a) any apparatus (within the meaning of the Communications Act 2003) which is designed or adapted for use in connection with the provision of an electronic communications network;

(b) any apparatus (within the meaning of that Act) that is designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that

are transmitted by means of an electronic communications network;

(c) any line;

(d) any conduit, structure, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended.

and references to the installation of electronic communications apparatus are to be construed accordingly.”

17. Paragraph 1 of schedule 2 explains the meaning of some of the terms included within this definition:

“*line*” means any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service;

“*conduit*” includes a tunnel, subway, tube or pipe;

“*structure*” does not include a building.”

18. Paragraph A.5 provides:

“Where Class A permits the installation, alteration or replacement of any electronic communications apparatus, the permission extends to any –

- (a) casing or covering
- (b) mounting, fixing, bracket or other support structure;
- (c) perimeter walls or fences;
- (d) handrails, steps or ramps; or
- (e) security equipment

reasonably required for the purposes of the electronic communications apparatus.”

19. Because the Building was not within the conservation area, it was “unprotected land”, defined in paragraph A.4 as any land which is not article 2(3) land or a site of special scientific interest.
20. Section 5 of the National Planning Policy Framework provides policy and guidance on telecommunications installations, but its provisions were not relied upon by the parties in this case.

## Submissions

21. It is common ground that the installation at the Building is less than 15 metres in height and within 20 metres of the highway. The disputed issue is whether or not the antennae are supported by a mast within the meaning of paragraph A.1(2)(c). The Claimant contends that, having regard to the broad definition of the term “mast”, it includes a central support pole which supports an antenna or antennae. The Secretary of State agrees with the Claimant’s interpretation.
22. The Defendant submits that the central support poles used for this installation are pole mounts which are different in character to a “mast” and therefore the installation falls outside the scope of the exclusion in paragraph A.1(2)(c). The IP1 supports the Defendant’s case.

## Conclusions

23. The approach to the interpretation of the GPDO was recently addressed in the case of *Evans v Secretary of State for Communities and Local Government* [2014] EWHC 4111 (Admin), where Neil Cameron QC (sitting as a Deputy High Court Judge) said:

“17 Both parties are agreed as to the approach to be taken in construing the GPDO. The ordinary meaning of the language used is to be ascertained when construing the development order in a broad or common sense manner. The authority for that proposition is the judgment of Goulding J in *English Clays Lovering Pochin & Co. Ltd. v. Plymouth Corporation* [1973] 2 All ER 730 at page 735...”

24. In this case, the parties sought to rely upon external aids to construction, to assist in identifying the ordinary meaning of the language used; to shed light on the purpose of the legislation; and to ascertain the mischief which the legislation was intended to address, and the legislative remedy. Because of the ambiguity of the language used, and the conflicting interpretations of the legislation, I considered that the external aids ought to be admitted in evidence.
25. In determining the scope of the exclusion in paragraph A.1(2)(c), the starting point is the definition of “electronic communications apparatus” in paragraph 1 of schedule 2 to the Telecommunications Act 1984. In my judgment, the antennae on the Building come within paragraph (a) of the definition, as they are “apparatus” which is “designed or adapted for use in connection with the provision of an electronic communications network”. The cables running from the antennae are “lines” within the meaning of paragraph (c). The central support poles and the other parts of the apparatus are designed solely to support the antennae in place – they do not have any telecommunications function. As such, I consider that they fall within paragraph (d) of the definition, which is broad in scope. Each central support pole is clearly a “pole” within the meaning of paragraph (d).
26. The distinction between the antennae, which transmit or receive, and the structures which merely support the antennae, was applied in the interpretation of the GPDO in

*Airwave MM02 Limited v First Secretary of State & Ors* [2005] EWHC 1701 (Admin).

27. The term “mast” is defined in the GPDO as “radio mast” or “radio tower”. The word “radio” denotes that the mast or tower is used for the purposes of radio wave communication.
28. The Claimant referred me to dictionary definitions of the word “mast”. The Shorter Oxford English Dictionary gives the following meanings:
  - “1. A long pole or spar, often one of a number, set up more or less vertically on the keel of a sailing vessel to support its sails...
  2. A pole; a tall pole or other slender structure set upright for any purpose; especially (a) a flagpole; (b) a post or lattice-work upright supporting a radio or television aerial...” (emphasis added).
29. Although I had previously thought that the natural meaning of the word “mast” is a post or pole used for support, like a ship’s mast, I note that the Oxford English Dictionary expands the meaning in the telecommunications context to include a “lattice-work upright supporting a radio or television aerial”. From the evidence which I saw, a lattice-work upright of this type looks more like a tower than a post or pole. However, it seems that the generally understood meaning of the word “mast” in this context is a pole or a tower. That accords with the definition in the GPDO. The IP1 also confirmed that, in the industry, the term “mast” is used to refer to both masts and towers.
30. The Claimant therefore submitted that, since the central support poles were poles supporting antennae which were transmitting and receiving radio waves, they were “radio masts”.
31. The Defendant and the IP1 submitted that a pole that supported antennae was not necessarily a mast. The GPDO also envisaged the installation of other structures to support antennae which were not masts. In particular, they referred to paragraph A.5(b) of the GPDO which provides that the permitted development extends to “mounting, fixing, bracket or other support structure”, and submitted that the central support poles were “other support structure” not “masts”.
32. The Defendant referred me to the consultation paper headed ‘Mobile connectivity in England’, issued in May 2013 by the Department for Culture Media and Sport (hereinafter “the DCMS consultation paper”) which identified (at paragraph 55) unnecessary delays and costs caused by decisions of local planning authorities that permitted development rights did not extend to mountings, fixings, brackets etc. and required a separate planning application for them. At paragraphs 68 to 70, a similar problem was identified in respect of ancillary equipment such as handrails, perimeter walls or fences, steps, ramps and security equipment.
33. In the consultation response, the DCMS stated that an interpretative provision would be included to avoid any ambiguity and to clarify that these items were included

within the permitted development. In my view, it is clear that this was the purpose behind the drafting and inclusion of paragraph A.5 in the GPDO. Paragraph A.5 is an interpretative provision which clarifies the extent of Class A, in respect of the same items which were identified in the consultation paper as the cause of problems with local planning authorities. These did not include primary support structures such as the central support poles in issue in this case. They were already expressly included as “poles” within paragraph (d) of the definition of “electronic communications apparatus” in paragraph 1 of schedule 2 to the Telecommunications Act 1984. On my interpretation, paragraph A.5(b) refers to mounting, fixings, brackets and other support structures of the same or similar type as mounting, fixings and brackets. These were the items which some local planning authorities were not treating as falling within the meaning of “electronic communications apparatus” in Class A.

34. The Defendant and the IP1 also relied upon the exclusion in paragraph A.1(1)(a) of electronic communications apparatus, other than a mast, which exceeds 15 metres excluding any antenna. As this relates to a ground-based, not a roof-based, structure which is considerably higher than central support poles, it does not provide any assistance in determining whether support poles are masts or not.
35. The Defendant and the IP1 relied upon paragraph A.1(4) which refers to “a mast or any other apparatus which includes or is intended for the support of an antenna”. I agree with the interpretation of the Claimant and the Secretary of State that this refers to support apparatus which does not fall within the definition of “mast”. The Secretary of State said in his representations:

“This provision contains tight limitations which apply in Article 2(3) land (as defined in the GPDO). This paragraph is intended to have the same effect as Paragraph A1(5)(a)(i) of the GPDO 2015 before amendment, which referred to “any apparatus which includes or is intended for the support of such an antenna”. Most structures which support antenna are masts, which are specifically listed in amended paragraph A.1(4). However, other apparatus such as brackets would have also have fallen within the restriction and it was intended that the amendment provide the same level of protection.”

36. The Defendant and the IP1 relied upon the alternative terms in the industry guidance, the ‘Code of Best Practice 2016’. In the glossary, it provides inter alia the following definitions:

**“Antenna**

A device that transmits and receives radio waves. There are different designs in operation including Omni-directional antennas, sectorised antennas and dual/triband antennas.”

**“Mast**

A ground-based structure that supports antennas at a height where they can satisfactorily send and receive radio waves. Typical masts are of steel lattice or tubular steel construction. New slimmer versions of masts are now available which can be

painted to blend in with their surroundings, disguised as trees or telegraph poles or used in conjunction with steel lighting and CCTV cameras. Masts themselves play no part in the transmission of the radio waves for mobile telecommunication.”

**“Pole Mounts**

Roof mounted supports normally between 4-6 metres in height from the base of the roof, used to affix a combination of sector and dish antennas and unlike a stub mast (see below), used in series to provide 360 degree coverage in sectors.”

**“Sectored Antenna**

Antenna which transmits or receives higher signal levels in a horizontal direction. The antenna is split into several sectors (typically 3 or 6) to provide 360 degree coverage.”

**“Stub Mast**

A roof-mounted structure that supports multiple antennas at a height where it can satisfactorily send and receive radio waves. A stub mast is typically 4m - 6m high and of steel lattice construction. Stub masts themselves play no part in the transmission of radio waves.”

37. Mr Savage, Head of Engineering for IP1, gave his opinion that the structures on the Building were “pole mounts” which were different to masts or towers in a number of respects: (1) they were smaller in scale, with fewer components, and simpler to construct; (2) they were not freestanding (though it was accepted that a cylindrical mast has to be set into the ground); (3) they support up to 3 antennae whereas towers and masts are larger and so can support up to 9 antennae; (4) as a result each pole mount can only provide a 180 degree directional array, and so several have to be installed at a site to obtain 360 degree directional array, whereas a single mast or tower is capable of providing a 360 degree directional array.
38. In the light of this evidence, the IP1 submitted that the meaning of “radio mast” or “radio tower” in the GPDO was “a tall, self-supporting structure that supports antennas at a height where they can satisfactorily send and receive radio waves and is capable of providing 360 degrees coverage from a single position”.
39. In my judgment, ascribing such a specific meaning to the definition of “mast” would amount to an impermissible re-writing of the GPDO by the court. The definition in the GPDO makes no mention of these criteria. Indeed, Ms Sargent’s primary submission was that the court should not attempt to define the term, as it had already been defined in the GPDO.
40. The IP1’s alternative submission, supported by the Defendant, was that it was a matter for the local planning authority to assess whether a structure was a mast, in any particular case, by adopting a factor-based approach. By way of analogy Ms Sargent referred to the factors which have been adopted in deciding what is a building (see *Barvis Ltd v Secretary of State for the Environment* (1971) 22 P & CR 710, at 716) and in determining the curtilage of a building (see *Secretary of State for the*

*Environment, Transport and the Regions v Skerritts of Nottingham* [2001] QB 59, in which the court concluded that it was a matter of fact and degree in the particular case).

41. The factors Ms Sargent identified as applicable – height, scale, design and directional array - were those listed by Mr Savage in his witness statement, and encapsulated in her definition. She assumed that the height, scale and directional array of traditional ground-based masts and towers were the defining characteristics of radio masts and towers in paragraph A.4, against which any other structure, such as a central pole support had to be judged. However the definition of ‘mast’ in paragraph A.4 conspicuously lacks any specific defining characteristics, such as height, scale, design and directional array. I do not consider that they can be implied into the definition. Obviously ground-based masts and towers are typically taller and larger in scale than building-based masts. Their larger size enables them to support more antennae and so provide a 360 degree directional array. However, the GPDO also chose to use the term “mast” in respect of building-based structures, which will not typically be the same size, scale and design as ground-based structures. In doing so, it must have intended that the definition was sufficiently broad to cover the smaller structures which are mounted on roofs.
42. In my view, there is no basis for assuming that the GPDO was drafted and made on the basis that the term ‘mast’ would be defined in accordance with the definitions in the Glossary to the Code of Best Practice. The Code of Best Practice is not a statutory code and it is not cross-referenced in the GPDO. The Code of Best Practice does not even purport to give guidance on the legal definition of “mast” in the GPDO. By way of illustration, it defines a “mast” as a ground-based structure, whereas the term is used in paragraph A.2 to refer to both ground-based and building-based structures. The DCMS consultation paper acknowledged the value of the Code as a source of advice on communication and consultation between operators, local authorities and local communities, not on the correct interpretation of the GPDO.
43. Turning now to the Secretary of State’s representations, in my judgment, it is permissible to take into account the Secretary of State’s views on the correct interpretation of the GPDO, but they are by no means conclusive. It is for the court to decide upon the meaning of the legislation. Whatever may be the intention of the promoting minister or department, it is not always given effect in the wording of the instrument that is enacted (see *R (Risk Management Partners Ltd) v London Borough of Brent* [2010] PTSR 349, at [227]).
44. The Secretary of State did not support the Defendant and IP1’s narrow interpretation of the term “mast”. The Secretary of State submitted that the definition of “mast” in the GPDO was “not defined more specifically to ensure that it covers structures that fulfil the function of supporting antennae to transmit and receive radio waves”.
45. The Secretary of State went on to say:

“The industry led Code of Best Practice on Mobile Network Development in England (the Code) contains a general definition of a ‘mast’ (see footnote at page 10 of the Code) as “...a freestanding structure that supports antennas at a height where they can transmit and receive radio waves”. The

Glossary of Terms at Appendix F of the Code includes descriptions of structures typically used to support antennas, such as (Ground-based) Masts, Stub Masts and Pole Mounts. ... The broad definition of ‘mast’ in the GPDO is intended to capture all such support structures, whether building-based or ground-based.

The Claimant asks for a declaration that the definition of ‘masts’ should be read as “a ground or building based, self-supporting structure to which antennae are attached, but which does not contribute to the function of the antennae”. As explained above, we would not wish to limit the intended application of the GPDO to masts of a particular scale or design but the term mast, as used in the GPDO, is intended to encompass “a structure that supports antennas at a height where they can transmit and receive radio waves”.”

46. In my judgment, it is clear that the Secretary of State’s interpretation of the term ‘mast’ in the GPDO is a broad one, which would include the support poles in this case. I cannot accept the Defendant’s submission that, by including the reference to height in the final sentence quoted above, he intended to exclude stub masts or pole mounts installed on the top of buildings, because the height is largely provided by the building. That would contradict the broad and inclusive interpretation of “mast” which the Secretary of State gives earlier in his representations.
47. In view of the ambiguity of the term “mast”, and the conflicting interpretations of it, I consider that it is appropriate to have regard to the statutory purpose.
48. It was agreed before me that the purpose of the grant of permitted development under Class A of Part 16 was to facilitate the installation of telecommunications infrastructure without the delay and uncertainty of an application for planning permission. As the Secretary of State said in his representations dated 31 August 2017:

“The intention of the GPDO is to introduce greater flexibility to facilitate mobile infrastructure roll-out, by removing the need for a planning application for certain types of development through the introduction of permitted development rights.”
49. Demand for mobile and data usage has steadily increased, and it requires sufficient infrastructure. Part 16 of the GPDO included amendments which extended permitted development rights for mobile communications.
50. However, the GPDO continues to place restrictions upon the height and location of “electronic communications apparatus” permitted under Class A of Part 16, in recognition of the adverse visual impact of telecommunications infrastructure. On my interpretation, the purpose of the exclusions in paragraph A.1 is to strike a balance between, on the one hand, meeting the need to expand telecommunications infrastructure, and on the other, protecting surrounding neighbourhoods from an unacceptable adverse visual impact. Hence the more stringent restrictions for protected areas, such as article 2(3) land or sites of special scientific interest. The

Secretary of State also identified public safety as a purpose in restricting development close to the highway, as in this case. Where permitted development rights are excluded, applications for planning permission have to be made, thus providing closer scrutiny, and if necessary, control by the imposition of conditions.

51. The Defendant and the IP1 have not been able to identify any reason why that balance of competing interests should not be given effect in building-based developments using pole mounts rather than, say, stub masts, which they do concede are “masts”. They are of similar height (4 to 6 metres). The antennae supported by pole mounts are as unsightly as stub masts. Both are potentially dangerous near to the highway, indeed, the evidence before me was that pole mounts are placed closer to the edge of the building than stub masts. In my view, this is an illogical outcome, and inconsistent with the purpose of the legislation.
52. I have come to the conclusion that the Claimant’s interpretation, as supported by the Secretary of State, is correct. In summary, each central support pole comes within the definition of “*electronic communications apparatus*” in paragraph 1 of schedule 2 to the Telecommunications Act 1984, as it is a “...pole...on, by or from which any electronic communications apparatus is installed, supported, carried or suspended” (paragraph (d)).
53. In the GPDO, the term “mast” is defined as “a radio mast or tower”. This definition should be broadly interpreted. On this Building, each central support pole is a radio mast within the meaning of the definition of “mast” in paragraph A.4 of Part 16 of the GPDO as it supports antennae which transmit and receive radio waves.
54. For these reasons, I conclude that the Defendant wrongly interpreted paragraph A.1(2)(c) of Part 16 of the GPDO, in the letter of 9 June 2017, by finding that the support poles installed at the Building were not masts. By concluding that the support poles were not masts because (a) they were not ground-based, and (b) the scale and design of the support poles was not characteristic of a roof mast, the Defendant reached an irrational decision. The claim for judicial review is therefore granted.