Neutral Citation Number: [2019] EWCA Civ 1016

Case No: C1/2018/0558

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE LANG DBE
[2018] EWHC 263 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 June 2019

Before:

Lady Justice King
Lord Justice Lindblom
and
Lord Justice Holroyde

- -

Between:

(1) R. (on the application of Nigel Mawbey)
(2) London Borough of Lewisham Council
(3) Secretary of State for Communities and Local Government **Respondents**

- and -

Cornerstone Telecommunications Infrastructure Ltd. **Appellant**

Mr Christopher Lockhart-Mummery Q.C. and Ms Heather Sargent (instructed by **DAC Beachcroft LLP**) for the **Appellant**
Mr Andrew Parkinson (instructed by **Richard Buxton Environmental & Public Law**) for the **First Respondent**
The Second and Third Respondents did not appear and were not represented.

Hearing date: 28 March 2019

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Under Class A of Part 16, "Communications", of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO") what is a "mast" within paragraph A.1(2) – which excludes from the scope of permitted development certain forms of "building based apparatus other than small antenna and small cell systems"? That is the main question in this appeal.

2. The appellant, Cornerstone Telecommunications Infrastructure Ltd., appeals against the order of Lang J. dated 16 February 2018, in a claim for judicial review brought by the first respondent, Mr Nigel Mawbey, by which she quashed the determination of the second respondent, the London Borough of Lewisham Council, recorded in a letter of 9 June 2017 to Mr Mawbey's solicitor, that the electronic communications apparatus installed by Cornerstone Telecommunications on the roof of Forsythia House in Pendrell Road, Brockley was permitted development under Class A of Part 16. The council defended its decision in the court below, but has not appeared in this court. The third respondent, the Secretary of State for Communities and Local Government, was joined as an interested party in the court below, and written comments on the matters in issue in the claim were made on his behalf by the Government Legal Department on 31 August 2017.

3. Mr Mawbey's home is in Pendrell Road, within the Telegraph Hill Conservation Area. Forsythia House is a block of flats outside the conservation area, owned by Lewisham Homes, which manages social housing on behalf of the council. Lewisham Homes granted Cornerstone Telecommunications a licence to erect the apparatus on a plant room on the roof of the building. The apparatus comprises nine antennae, mounted in groups on the four corners of the plant room roof. Each antenna is supported by an antenna pole, attached by a yoke arm to one of four central support poles. Each central support pole holds one, two or three antennae. It 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. Forsythia House is 8.2 metres in height, and the plant room rises a further 2.3 metres, to 10.5 metres above ground level. At their top the antennae are 13.5 metres above ground level, the central support poles slightly lower.

4. Lang J. concluded that, in its determination, the council adopted a wrong understanding of paragraph A.1(2)(c) of Part 16, and that its decision was "irrational". I granted permission to appeal on 3 October 2018.

The issues in the appeal

5. The appeal is on three grounds: first, that the judge's interpretation of the word "mast" as defined in paragraph A.4 of Part 16 was "too broad and is wrong in law"; second, that she was wrong to conclude that the council's decision was "irrational"; and third, that she was wrong to find that each "central support pole" was a "mast". The critical issue, however, is one of statutory construction: the correct interpretation of paragraph A.1(2)(c), which provides that the installation of a mast on a building less than 15 metres in height, when the mast would be within 20 metres of the highway, is not permitted development. Forsythia House is less than 15 metres in height and the apparatus is within 20 metres of the highway.

The dispute, therefore, is whether the council misunderstood the relevant definition of a "mast". It is common ground that if the central support poles fall within that definition, an express grant of planning permission for their erection was necessary.

The legislative framework in place at the time of the council's decision

6. Under section 57(1) of the Town and Country Planning Act 1990 planning permission is required for the carrying out of development. Section 58(1)(a) provides that planning permission may be granted by a development order made by the Secretary of State, which, under section 60(1), may be either unconditional or subject to conditions or limitations specified in the order. Article 3(1) of the GPDO grants planning permission for the classes of development described as permitted development in Schedule 2. Article 3(2) provides that "[any] permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2".

7. The permitted development rights in Class A of Part 16 of Schedule 2 are for development by an "electronic communications code operator":

> "Permitted development
>
> 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 …
>
> …".

8. Under paragraph A.1 certain apparatus is not permitted development:

> "Development not permitted
>
> A.1. – Development not permitted: ground-based apparatus
>
> (1) Development consisting of the installation, alteration or replacement of electronic communications apparatus (other than on a building) is not permitted by Class A(a) if –
>
> (a) in the case of the installation of electronic communications apparatus (other than a mast), the apparatus, excluding any antenna, would exceed a height of 15 metres above ground level;
> (b) in the case of the alteration or replacement of electronic communications apparatus (other than a mast) that is already installed, the apparatus, excluding any antenna, would when altered or replaced exceed the height of the existing apparatus or a height of 15 metres above ground level, whichever is the greater;
> (c) in the case of the installation of a mast, the mast, excluding any antenna, would exceed a height of –
>
> (i) 25 metres above ground level on unprotected land …
>
> …

(d) in the case of the alteration or replacement of a mast, the mast, excluding any antenna, would when altered or replaced –

…

(ii) together with any antenna support structures on the mast, exceed the width of the existing mast and any antenna support structures on it by more than one third, at any given height.

…

Development not permitted: building-based apparatus other than small antenna and small cell systems

(2) 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 –

(a) the height of the electronic communications apparatus (taken by itself) would exceed –
  (i) 15 metres, where it is installed on a building which is 30 metres or more in height; or
  (ii) 10 metres in any other case;
(b) the highest part of the electronic communications apparatus when installed, altered or replaced would exceed the height of the highest part of the building by more than –
  (i) 10 metres, in the case of a building which is 30 metres or more in height;
  (ii) 8 metres, in the case of a building which is more than 15 metres but less than 30 metres in height; or
  (iii) 6 metres in any other case;
(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);

… .

Development not permitted: antennas and supporting structures installed, replaced or altered on article 2(3) land or land which is a site of special scientific interest

(4) Development consisting of the installation, alteration or replacement of an antenna, a mast or any other apparatus which includes or is intended for the support of an antenna, or the replacement of an antenna or such apparatus by an antenna or apparatus which differs from that which is being replaced, is not permitted by Class A(a) [(a) on any article 2(3) land or (b) on a site of special scientific interest, unless certain criteria are met]".

9. Paragraph A.2 sets out the relevant "Conditions". Its provisions include:

"A.2 – (1) Class A(a) and A(c) development is permitted subject to the condition that –

(a) the siting and appearance of any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment

housing constructed, installed, altered or replaced on a building (excluding a mast) are such that the effect of the development on the external appearance of that building is minimised, so far as practicable;

…

(3) … Class A development –

…

(c) on unprotected land where that development consists of –

(i) the installation of a mast …

…

is permitted subject … to the conditions set out in paragraph A.3 (prior approval).

… ".

10. The provisions for "Prior approval" in paragraph A.3, where they apply, include a requirement for notice to be given by or on behalf of the developer, stating "a description of the proposed development (including its siting and appearance which includes the height of any mast)" (sub-paragraph A.3(2)(iii)).

11. Paragraphs A.4 and A.5 are interpretation provisions. Paragraph A.4 sets out a number of definitions, including these:

"Interpretation of Class A

A.4. For the purposes of Class A –

…

"electronic communications apparatus" and "electronic communications code" have the same meaning as in the Communications Act 2003;

"electronic communications code operator" means a person in whose case the electronic communications code is applied by a direction under section 106(3)(a) of [the 2003 Act];

"mast" means a radio mast or radio tower;

…

"small antenna" means "… an antenna which –

(a) is for use in connection with a telephone system operating on a point to fixed multi-point basis;

(b) does not exceed 0.5 metres in any linear measurement; and

(c) does not, in two-dimensional profile, have an area exceeding 1,591 square centimetres …

…

"small cell system" means an antenna which may be variously referred to as a femtocell, picocell, metrocell or microcell antenna, together with any ancillary apparatus, which –

(a) operates on a point to multi-point or area basis in connection with an electronic communications service … ;
(b) does not, in any two-dimensional measurement, have a surface area exceeding 5,000 square centimetres; and
(c) does not have a volume exceeding 50,000 cubic centimetres,

and any calculation for the purposes of paragraph (b) or (c) includes any power supply unit or casing, but excludes any mounting, fixing, bracket or other support structure; and

"unprotected land" means any land which is not –

(a) article 2(3) land; or
(b) land which is a site of special scientific interest."

12. Paragraph A.5 states:

"A.5. 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;
…

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

13. The combined effect of sections 151(1) and 106(1) of the 2003 Act is that "electronic communications apparatus" has the meaning provided in the "Telecommunications Code" in Schedule 2 to the Telecommunications Act 1984, as amended. Paragraph 1(1) of Schedule 2 to the 1984 Act defines "electronic communications apparatus" as meaning:

"1(1) …

i. 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;
ii. 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;
iii. any line;
iv. 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."

Section 405, "General interpretation", of the 2003 Act defines "apparatus" as including "any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable".

The council's determination

14. In its letter of 9 June 2017 the council said:

> "…
>
> You state that the electronic communications apparatus recently installed breaches paragraph A1(2)(c) of Part 16. …
>
> …
>
> The reason is explained in Clues & Co's [letter dated 23 May 2017 to Planning Services]. Mr Clues considers that the "tripod mounted 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 and 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.
>
> It is also asserted that the tripod mounted poles supporting the antenna are "fixed to the wall of the plant room". However, drawings 200A and 300A show that the tripod mounted support poles are situated on the roof of the plant room.
>
> The plant room has a flat roof. Therefore the antennas are not situated on a roof slope so as to constitute a breach of paragraph A1(2)(d) of Part 16.
>
> …
>
> … The Council has reconsidered its decision and considers that the development is permitted development[.]"

Lang J.'s judgment

15. Before Lang J. it was submitted on behalf of Mr Mawbey that, since the central support poles were poles supporting antennae that were transmitting and receiving radio waves, they were "radio masts" (paragraph 30 of the judgment). The judge referred to the Secretary of State's observation that in Class A of Part 16 the concept of a "mast" was not limited to "masts of a particular scale or design", but was intended to include a "structure that supports antennas at a height where they can transmit and receive radio waves" (paragraph 45). This, she said, was a "broad" concept, which would include the "support poles" in this case (paragraph 46). The Secretary of State had pointed out that "[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" (paragraph 48). In the judge's view the purpose of the exclusions in paragraph A.1 was "to strike a balance between … meeting the need to expand telecommunications infrastructure … and … protecting surrounding neighbourhoods from an unacceptable adverse visual impact". The Secretary of State had "also identified public safety as a purpose in restricting development close to the highway …" (paragraph 50). The council and Cornerstone Telecommunications had "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"; and both "are potentially dangerous near to the highway". This was "an illogical outcome, and inconsistent with the purpose of the legislation" (paragraph 51).

16. The judge concluded that the interpretation of paragraph A.1(2)(c) put forward on behalf of Mr Mawbey, and supported by the Secretary of State, was correct. In her view the central support poles came within the definition of "electronic communications apparatus" in paragraph 1(1)(d) of Schedule 2 to the 1984 Act – as a "… pole … on, by or from which any electronic communications apparatus is installed, supported, carried or suspended" (paragraph 52). The definition of a "mast" in paragraph A.4 should be "broadly interpreted", and "each central support pole is a radio mast within the meaning of the definition of "mast" in paragraph A.4 … as it supports antennae which transmit and receive radio waves" (paragraph 53). The council had "wrongly interpreted paragraph A.1(2)(c) … in the letter of 9 June 2017, by finding that the support poles installed [on Forsythia House] were not masts". In concluding they were not masts because they were "not ground-based" and because their "scale and design" was "not characteristic of a roof mast", it had reached an "irrational decision" (paragraph 54).

The proper interpretation of the term "mast" in paragraph A.1(2)(c)

17. As I have said, the decisive issue here is one of statutory construction. What is the correct interpretation of paragraph A.1(2)(c), and in particular what is the meaning of the term "mast" in that provision?

18. For Cornerstone Telecommunications, Mr Christopher Lockhart-Mummery Q.C. adhered to the argument rejected by the judge. Her understanding of the relevant provisions was, he submitted, mistaken. She had failed to see the need for a consistent interpretation of the term "mast" throughout Class A of Part 16, reflecting the clear differentiation between a "mast" and other "support structures"; and her analysis did not distinguish these two concepts. The word "mast" appears not only in paragraph A.1(2)(c) but in several other provisions – for example, in paragraphs A.1(1), A.1(4), A.2(1), A.4 and A.5, and also elsewhere, such as paragraphs A.1(2)(d) and (e), A.1(7), A.2(3), A.3(2) and A.3(3). Mr Lockhart-Mummery emphasized the references to antenna "support" or "supporting" structures other than a "mast" in paragraphs A.1(1)(d)(ii), A.1(4), A.2(1)(a) and A.5. The court should not adopt an interpretation more refined than the language of Class A justifies (see, for example, the judgment of Blackburne J. in *R. v Sheffield Housing Benefit Review Board, ex p. Smith* (1996) 28 H.L.R. 36, at p.55; and the judgment of H.H.J. Belcher in *R. (on the application of Tate) v Northumberland County Council* [2017] EWHC 664 (Admin), at paragraph 6). There was no need to resort to dictionary definitions. The word "mast" had to be understood sensibly in its particular context, and an appropriate "evaluative judgment" applied. That is what the council did in this case, without lapsing into irrationality.

19. I cannot accept this argument. I do not think it demonstrates any error on the part of the judge. The meaning of the term "mast" in paragraph A.1(2)(c) is a matter of law. Before a local planning authority can determine whether a particular structure is a "mast", it must adopt the legally correct meaning. In this case, as Lang J. held, the council did not do that, and thus it erred in law. Its understanding of the provision was wrong. And the judge's, in my view, is right.

20. The correct approach to construing provisions of the GPDO was aptly described by Mr Neil Cameron Q.C., sitting as a deputy judge of the High Court in *Evans v Secretary of State for Communities and Local Government* [2014] EWHC 4111 (Admin) (at paragraph 17): "[the] ordinary meaning of the language used is to be ascertained when construing the development order in a broad or common sense manner". To put it as did Mr Vincent Fraser Q.C., sitting as a deputy judge of the High Court, in *Waltham Forest London Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 2816 (Admin) (at paragraph 17), "one would expect common words to be given their common meaning unless there was something which clearly indicated to the contrary". So, as Mr Andrew Parkinson submitted on behalf of Mr Mawbey, to ascertain the true meaning of the word "mast" in paragraph A.1(2)(c) one must begin with a straightforward interpretation of it in that provision, giving it its natural and ordinary meaning; and then consider whether there is anything in the legislative context to displace that meaning. This should not be an unduly complicated exercise.

21. The place to start is the definition of a "mast" in paragraph A.4. Three things may be said about that definition. First, it is plainly intended to apply generally to Class A – to each and all of the provisions in which the word "mast" occurs. Secondly, it is in deliberately broad terms: a "mast" in this legislative context simply means a "radio mast" or a "radio tower" – which implies some distinction between the two. And thirdly, in using the term "radio mast" within the definition, the draughtsman clearly thought the word "mast" had a well understood meaning, which required no explanation.

22. If there were any real doubt as to the ordinary relevant meaning of the word, I can see no reason why one should not turn to dictionaries to dispel it. This is a well established technique of statutory construction, recognized in Bennion on Statutory Interpretation (at section 24.23): "Dictionaries may be consulted to ascertain the meaning of terms …".

23. Among the definitions of a "mast" in the Oxford English Dictionary is "[a] pole resembling the mast of a ship; e.g. the tall upright pole of a derrick or similar machine". The corresponding definition in the Shorter Oxford English Dictionary is "2. A pole; a tall pole or other slender structure set upright for any purpose; *esp* … (b) a post or latticework upright supporting a radio or television aerial"; in the online Oxford English Dictionary, "[an] upright pole or similar vertical structure resembling a ship's mast, *esp.* one supporting a flag, lightning conductor, broadcasting aerial, etc.; such a pole or structure forming part of a building, crane, etc. Also: a construction, often taking the form of a latticework tower or tripod, erected on a ship for various purposes, such as radio transmission, etc."; and in the online Oxford Living Dictionaries, "[a] tall upright post on land, especially a flagpole or a television or radio transmitter". Other dictionaries define the word in a similar way. For example, in the online Chambers Dictionary the relevant definition is "any upright wooden or metal supporting pole, especially one carrying the sails of a ship, or a radio or television aerial", and in Chambers English Dictionary, "any sturdy upright pole used as support". And

Collins Dictionary states that "a radio mast is a tall upright structure that is used to transmit radio or television signals". Mr Parkinson emphasized the evolution of the word's meaning to reflect changes in technology. He drew attention, for example, to uses given in the Oxford English Dictionary: "any structure used to raise and support the aerial wires" (1924), and "[a] spar for the support of an antenna" (1956).

24. In the relevant sense of the word, the dictionary definitions converge. A "mast" is an upright pole or lattice-work structure, whose function is to support an antenna or aerial. Some of the definitions refer to height, or tallness, as a characteristic of a "mast"; others do not. But this is not an attribute common to all definitions, whereas uprightness, or verticality, clearly is. Tallness may be in the nature of a mast erected on the ground, but is not necessarily so for a mast mounted on a building. So, for example, the online Oxford Living Dictionaries refers to "a tall upright post on land", while the online Oxford English Dictionary refers to "an upright pole or similar vertical structure …, *esp.* such a pole or structure forming part of a building" (my emphasis).

25. Does this understanding of the word "mast" fit with the evident meaning and purpose of the provisions for "building-based apparatus" in paragraph A.1(2) in Class A of Part 16? In my opinion it does. It is consistent with the general definition of "electronic communications apparatus" in paragraph 1(1)(d) of Schedule 2 to the 1984 Act, as including "… any … 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 also therefore with the definition of "electronic communications apparatus" in paragraph A.4. It also accords with the definition of a "mast" as "a radio mast or radio tower" in paragraph A.4. As the Secretary of State said in his written comments, the reason why the term is "not defined more specifically" is "to ensure that it covers structures that fulfil the function of supporting antennae to transmit and receive radio waves".

26. It has been held that a structure that contributes to the function of transmission or reception is properly to be considered part of the antenna, and is not a "mast" (see the judgment of H.H.J. Gilbart Q.C., as he then was, sitting as a deputy judge of the High Court in *Airwave MMO2 Ltd. v First Secretary of State* [2005] EWHC 1701 (Admin), at paragraph 20). But I see no difficulty with the idea that paragraph A.1(2)(c) places outside the scope of "permitted development" the installation of an upright pole or structure whose function is to support an antenna or aerial, when it is on a building less than 15 metres high, and when it would be within 20 metres of the highway. In my view this makes perfectly good sense.

27. No specific dimensions of the apparatus itself are prescribed to bring it within the definition of a "mast" in paragraph A.4 or the exclusion in paragraph A.1(2)(c). Paragraph A.1(2)(c) refers to the height of the building, but not to the height of the mast itself. Had it been thought necessary to specify the minimum height or any other dimension of the mast in that provision, this could and surely would have been done. It was done elsewhere in the definitions in paragraph A.4: for example, in the definitions of a "small antenna" and "small cell system". And it was done, elaborately, throughout the provisions for "Development not permitted" in paragraph A.1: for example, in paragraph A.1(1) and in paragraphs A.1(2)(a) and (b). But it seems implicit in the provisions of paragraph A.1 that for something to be a "mast" as defined in paragraph A.4 it does not have to be of any minimum height in itself. As those provisions show, the height of a "mast" can vary widely, according to its location and function. Whether "ground-based" or "building-based", if it is an upright pole or a lattice-work structure whose function is to support an antenna or aerial it will be a "mast", and

potentially within the ambit of paragraph A.1. To perform that function satisfactorily, for its particular purpose, it need only be as tall as it has to be in the place where it is erected. An upright pole supporting an antenna may therefore be a "mast" even if it is relatively short – which is generally more likely to be so if it is erected on the roof a building than if it is "ground-based". Whether it falls within any of the exclusions from the scope of permitted development in paragraph A.1 will depend on where it is, and may also depend on its height under a particular provision where that is specified.

28. In the case of a mast installed on a building less than 15 metres high, and where it would be within 20 metres of the highway, its own height is not a consideration referred to in paragraph A.1(2)(c). Under that provision, read together with the definition of a "mast" in paragraph A.4, the height of the apparatus itself is not a relevant factor. This avoids the potential inconsistency that would arise if, under paragraph A.1(2)(c), local planning authorities were expected to decide whether particular apparatus was or was not a mast on the basis of its height, but without any objective criterion to apply.

29. The next question is whether there is anything in the legislative context to displace the ordinary meaning of the term "mast" in paragraph A.1(2)(c). In my view there is not.

30. I do not accept the submission that an upright pole whose function is to provide support for an antenna might not be a "mast" within the definition in paragraph A.4 if it comes within a separate and undefined category – namely, an "antenna support structure" or something of that kind. As Mr Parkinson pointed out, the term "antenna support structures" is used only in paragraph A.1(1)(d)(ii), which concerns "ground-based apparatus", in the expression "any antenna support structures on the mast". Paragraph A.1(4) refers to "a mast or any other apparatus which includes or is intended for the support of an antenna". Paragraph A.2(1)(a) refers to "any antenna or supporting apparatus". And paragraph A.5 refers to "(b) [a] mounting, fixing, bracket or other support structure".

31. The expression "any support structures on the mast" in paragraph A.1(1)(d)(ii) seems to connote structures attached to an existing mast. I do not think it casts doubt on the concept of a "mast" as an upright pole whose function is to provide support for an antenna. It is consistent with that concept.

32. Nothing to suggest the contrary is to be found in other provisions of paragraph A.1. I agree with the judge's observation (in paragraph 34 of her judgment) that paragraph A.1(1)(a) "does not provide any assistance in determining whether support poles are masts or not". The references in that paragraph and in paragraph A.1(1)(b) to the installation, alteration or replacement of ground-based "electronic communications apparatus (other than a mast)" in excess of the relevant specified height do not imply that a narrower or different meaning should be given to the concept of a "mast" than the broad definition in paragraph A.4 allows. The definition of "electronic communications apparatus" in paragraph 1(1) of Schedule 2 to the 1984 Act, and thus in paragraph A.4, is, I think, wide enough to include various forms of ground-based apparatus other than a "mast", some of which will be more than 15 metres in height.

33. Nor do I accept that a narrower interpretation of the term "mast" is implied by the words "an antenna, a mast or any other apparatus which includes or is intended for the support of an antenna" in paragraph A.1(4). Again, I agree with the judge. As she said (in paragraph 35), this provision "refers to support apparatus which does not fall within the definition of [a]

"mast"". It does not narrow or modify the concept of a "mast". It brings within this exclusion from the scope of "permitted development", where it applies, not only an "antenna" and a "mast" but also the wider concept of "other apparatus which includes or is intended for the support of an antenna". This could extend, for example, to apparatus attaching the antenna to the mast itself. I think the judge was right to endorse the Secretary of State's contention that this provision contains "tight limitations" applying on article 2(3) land and sites of special scientific interest; that it was "intended to have the same effect as [paragraph] A.1(5)(a)(i) of the GPDO … before amendment …"; that "[most] structures which support [antennae] are masts, which are specifically listed in amended paragraph A.1(4)"; but that "other apparatus such as brackets would also have fallen within the restriction and it was intended that the amendment provide the same level of protection".

34. A similar conclusion goes for paragraph A.2(1)(a). The effect of this provision is not to alter the definition of a "mast" in paragraph A.4, but to apply the condition in question to various other apparatus, including "supporting structures" that are not themselves a "mast" within the definition.

35. The argument for a different understanding of the term "mast" gains no force from paragraph A.5. The reference there to an "other support structure" does not indicate that the judge's understanding is wrong. Paragraph A.5 assists the interpretation of the scope of "permitted development" under Class A of Part 16. It is engaged only in those cases where the "electronic communications apparatus" in question is "permitted development". Its effect in those cases is to enlarge the permission by extending it to various specified forms of ancillary apparatus "reasonably required for the purposes of the electronic communications apparatus". This cannot mean that anything included within the paragraph A.4 definition of "electronic communications apparatus" is removed from that definition. Thus, for example, a "pole … on … which any electronic communications apparatus is … supported …" is not to be regarded as an "other support structure" within paragraph A.5. An "other support structure" under that paragraph only includes apparatus that is not already within the statutory definition of "electronic communications apparatus" – in paragraph 1(1)(d) of Schedule 2 to the 1984 Act. There was no need to extend the scope of that definition to bring in what was already included. To read paragraph A.5 in a different way, as if some or all of the apparatus to which it refers – such as a "casing or covering", as well as a "mounting, fixing, bracket or other support structure" – fell within the scope of the statutory definition of "electronic communications apparatus", would not be right. It would make paragraph A.5 at least partly, if not wholly, redundant. I therefore agree with the judge's conclusion (in paragraph 33 of her judgment) that the "items" referred to in paragraph A.5 do "not include primary support structures such as the central support poles in issue in this case", but rather "mountings, fixings, brackets and other support structures of the same or similar type as mountings, fixings and brackets".

36. I should add that paragraph A.5(b) appears to confirm what I have said about the concept of "support" or "supporting" structures in paragraphs A.1(1)(d)(ii), A.1(4) and A.2(1)(a). It seems clear that the draughtsman regarded a "mounting, fixing [or] bracket" as, generically, a "support structure": hence the use of the term "<u>other</u> support structure" to describe things of the same kind (my emphasis). This is also apparent in the definition of "small cell system" in paragraph A.4, which excludes "any mounting, fixing, bracket or other support structure" from the calculation of "surface area" and "volume".

37. A further point, not in the end developed by Mr Lockhart-Mummery in oral argument, was that one can infer from paragraph A.2(4)(b) in Class A of Part 16 of the Town and Country Planning (General Permitted Development) Order 1995 – which required prior approval to be given for "an antenna on a building or structure (other than a mast) where the antenna (including any supporting structure) would exceed the height of the building or structure at the point where it is installed … by 4 metres or more" – that the concept of a "support structure" in paragraph A.5 in Class A of Part 16 of the GPDO is wider than ancillary apparatus such as mountings, fixings and brackets. I disagree. That provision is of no help in construing paragraph A.5, which is in different terms and has a different role. It does not bear on the meaning of the term "other support structure" in that provision.

38. Finally, I can see no justification for reading into the statutory definition of a "mast" in paragraph A.4 of Class A the definitions of various apparatus – including "Mast", "Pole Mounts" and "Stub Mast" – in the "Glossary of Terms" at Appendix F to the "Code of Best Practice on Mobile Network Development in England", published in 2016. As the Secretary of State said, the code also contains a general definition of a "mast" (in a footnote on p.10) as "… a freestanding structure that supports antennas at a height where they can transmit and receive radio waves"; the glossary includes descriptions of "structures typically used to support antennas, such as (Ground-based) Masts, Stub Masts and Pole Mounts"; and "[the] broad definition of 'mast' in the GPDO is intended to capture all such support structures [as are within the ambit of the general definition of a "mast" in the code], whether building-based or ground-based".

39. It was submitted to the judge, in the light of evidence given on behalf of Cornerstone Telecommunications, that the definition of a "mast" in paragraph A.4 means "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" – which would exclude a "pole mount" as defined in the code, but evidently not a "stub mast" (paragraphs 37 and 38 of the judgment). The judge was right to reject that submission. I agree with her that to impose so restricted a meaning on the statutory definition of a "mast" would, as she said, "amount to an impermissible re-writing of the GPDO by the court" (paragraph 39). The code is industry guidance. The definitions it contains have no statutory provenance. As the judge saw, there is no reason to think that Class A of Part 16 was drafted on the basis that a "mast" would be defined in accordance with definitions in its "Glossary of Terms". Nor does the code set out to amplify the definition in paragraph A.4 (paragraph 42).

40. In short, there is no good argument for any different understanding of the term "mast" in Class A of Part 16 from that adopted by the judge. A "mast" in this legislative context is an upright pole or a lattice-work structure, whose function is to support an antenna or aerial. The definition in paragraph A.4 is not qualified either by the requirement that the mast be "ground based" or that it be of any particular "scale" or any particular "design". The judge's interpretation was not too broad. It was, in my view, correct.

41. Thus the task of a local planning authority in determining whether a particular structure is a "mast" within the reach of paragraph A.1(2)(c) is simply to ascertain whether, as a matter of fact and degree, it is an upright pole – or another structure to which the definition in paragraph A.4 applies – whose function is to support an antenna or aerial; whether the building is less than 15 metres in height; and whether the structure would be within 20 metres of the highway.

42. This was not the approach adopted by the council when it determined that the apparatus installed on the plant room on the roof of Forsythia House did not comprise a "mast" within the paragraph A.4 definition. The council's interpretation was, in my view, too narrow, and incorrect. This was an error of law, fatal to the council's decision. It was revealed in the letter of 9 June 2017 – where the council referred to the "support poles" as "not ground based", and their "scale and design" as "not characteristic of a roof mast".

43. On this ground, therefore, I think the appeal must fail.

Irrationality

44. In my view the contention that the judge was wrong to find the council's decision "irrational" adds nothing significant to the argument that its understanding of the term "mast" in paragraph A.1(2)(c) – as defined in paragraph A.4 – was incorrect. The misinterpretation of those provisions was an error of law, which was enough to invalidate the decision. It led the council to misdirect itself by taking into account considerations irrelevant to the question of whether the apparatus comprised a "mast" within the relevant definition. One might say then that the council's decision was not only infected by illegality but also, in traditional public law terms, contrary to "Wednesbury" principles. But nothing turns on that.

Are the central support poles masts?

45. In her judgment the judge did not confine herself to the conclusion that the council erred in law by misinterpreting and misapplying the relevant definition of a "mast". She went further. She found that "each central support pole is a radio mast" within that definition, "as it supports antennae which transmit and receive radio waves" (paragraph 53 of the judgment). In her order, however, she simply quashed the council's decision that the apparatus was permitted development (paragraph 2 of the order). That relief was appropriate. If the appeal is dismissed, the council will have to reconsider its decision, directing itself properly on the provisions of Class A of Part 16. Whether, on a true understanding of the paragraph A.4 definition, the apparatus comprises a "mast", and therefore comes within paragraph A.2(1)(c), remains a question for the council, not the court, to determine.

Conclusion

46. For the reasons I have given, I would dismiss the appeal.

Lord Justice Holroyde

47. I agree.

Lady Justice King

48. I also agree.