Commercial Property ~ January 2023

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**5G Mobile Phone Masts Can't Be Located Just Anywhere – High Court Ruling**

5G mobile phone masts are sprouting up all over the country and most people would agree that there is a real need for them. However, as a High Court ruling showed, they are not wholly exempt from planning rules and they cannot be located just anywhere.

A mobile phone company argued that erection of a 15-metre-high mast in an urban street was vital to secure 5G coverage in the area. The proposal would ordinarily have been automatically permitted. The local authority's prior approval was, however, required because the site was in a conservation area.

Approval was refused on the basis that the mast and its accompanying cabinets would be an incongruous addition to the street scene. The council also took the view that the development would be visually intrusive, create visual clutter and detract from the area's character and appearance.

After the company appealed against that decision, a planning inspector found that the proposal would harm the setting of the conservation area and a neighbouring cottage. Granting the approval sought, however, he concluded that the harm would be less than substantial and was outweighed by the public benefits of the proposal.

In upholding a challenge to the approval brought by the cottage's owner, the Court found that the inspector failed to consider the potential impact of the development on the root system of a nearby English yew, which was protected by a tree preservation order.

The inspector further failed to grapple with the question of whether 5G facilities could be accommodated on the site of an existing mast which was located on the same street and only about 100 metres away. The inspector's decision was quashed and the Secretary of State for Levelling Up, Housing and Communities was directed to redetermine the company's appeal.

We can advise you on any matters relating to planning law. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Murtagh v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 2991 (Admin)*

**Community Football Pitch Must Make Way for Strategic Stadium Development**

Community open spaces and leisure facilities are heavily protected by planning law. However, as a High Court ruling showed, even they must sometimes make way for strategic developments that are considered to serve the wider public interest.

The case concerned planning permission granted for the replacement of a football club's stadium. On the site of the existing stadium, 219 homes would be built, at least a third of them affordable. However, the proposal would involve the loss of a synthetic grass football pitch which had proved an asset of real value to local people who were cooped up at home during COVID-19 lockdown periods.

A planning officer's report, on which the council based its decision, noted that it was only in 2018 that the pitch was opened to the public for informal play and recreation. It was in poor condition and a modern, multi-functional kickabout pitch would be provided in part substitution. The report stated that the new facility, although much smaller, would amount to a positive improvement.

Dismissing a local resident's judicial review challenge to the permission, the Court noted that the overall development was of significant strategic importance. The pitch is classified as Metropolitan Open Land and enjoys the same high level of planning protection as the Green Belt. The local authority, however, found that there were very special circumstances justifying its loss.

The Court rejected arguments that the planning officer's report made a mistake of fact when it noted that there was no open space deficiency in the area. That assertion rested on a hyper-critical reading of one passage in the report, which merely pointed out to councillors that there were other open spaces in the area that could also be used for informal recreation.

The council took proper account of planning policies designed to protect open and recreational public spaces. It acknowledged that the development was in conflict with the development plan as a whole but went on to conclude that the significant benefits of the proposal justified a grant of planning permission.

It was further argued that, in reaching its decision, the council failed to comply with the Public Sector Equality Duty enshrined in the Equality Act 2010. There was evidence that the pitch was particularly well used by members of the Black, Asian and Minority Ethnic (BAME) community. However, the Court found on the evidence that, in substance, the council had due regard to the need to advance equality of opportunity between those sharing protected characteristics.

**Partner Note**

*R on the Application of Addison v London Borough of Southwark [2022] EWHC 3211 (Admin)*

**High Court Lifts Ban on Use of Hotels to Accommodate Channel Migrants**

Never let it be said that judges are only interested in the law and have little regard to events in the real world. In a case concerning the accommodation of asylum seekers in private hotels, the High Court took full account of the unprecedented flood of migrants risking their lives by crossing the Channel in small boats.

Two local authorities argued that the block booking by government contractors of two hotels for the accommodation of asylum seekers would, in effect, transform them into hostels. They asserted that that would amount to a material change of use and, in the absence of planning permission, a flagrant breach of planning control.

The councils obtained temporary injunctions that prevented the use of the hotels, or any other similar establishments in their areas, being used for accommodating asylum seekers without planning consent. At a further hearing, they sought an extension of those orders pending a full trial of their claims.

Ruling on the matter, the Court acknowledged that the councils had raised a triable issue as to whether the use of the hotels solely for asylum seekers would represent a material change of use. It was not disputed that awarding the councils damages would not be an adequate remedy were breaches of planning control established.

In discharging the temporary injunctions, however, the Court did not accept that the actions of the government, its contractors or the hotel operators were flagrant. They strongly contested the councils' case and had advanced a respectable argument that the intended use of the hotels to accommodate asylum seekers would involve no material change of use for which planning consent was required.

The Court recognised the unprecedented pressure on the Home Office arising from the unrelenting surge of tens of thousands of migrants making their way across the Channel. Faced with the widely publicised overcrowding of reception facilities, measures were afoot to temporarily accommodate thousands of asylum seekers at numerous hotels up and down the country. Without such arrangements, there was a real risk of some of them becoming homeless. If the injunctions were maintained, the reality was that the Home Office would have to look for accommodation elsewhere.

Neither council, the Court ruled, had succeeded in showing that the alleged change of use of the hotels would cause substantial harm in planning terms. Their use as asylum seeker accommodation was intended to be temporary and, if that turned out not to be the case, there were other weapons in the councils' planning enforcement armoury that could be brought to bear. Overall, the factors in favour of discharging the injunctions clearly outweighed those in favour of continuing them.

We can advise you on any aspect of commercial property law, including issues surrounding changes of use. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Ipswich Borough Council v Fairview Hotels (Ipswich) Ltd and Another [2022] EWHC 2868 (KB)*

*East Riding of Yorkshire Council v LGH Hotels Management Ltd and Others [2022] EWHC 2868 (KB)*

**Property Investment – Professional Supervision is Vital to Guard Against Fraud**

Fraud is a very real risk faced by investors in property developments and that is why detailed professional supervision of projects is so essential. The point was powerfully made by a case in which a family fell victim to dishonesty and lost millions on the ill-fated purchase and redevelopment of a luxury flat.

Following the flat's purchase for £7.75 million, the project was to be administered by a man who would receive 5 per cent of profits generated on the property's resale. In the event, there were no such profits and members of the family, who had substantially bankrolled the project via single-purpose corporate vehicles (SPVs), lost the entirety of their £2.5 million investment.

The offender, amongst other things, made fraudulent cash calls on investors, paying their funds into his personal accounts. Evidence emerged that he had spent their money on his personal rent, private school fees and a smart car. The project eventually fell apart when the flat's freeholder obtained an injunction, requiring discontinuation of the works that had been carried out without permission. Mortgage payments were not met, and the denouement came when the flat was sold at auction for £5.5 million.

After the SPVs launched a private prosecution, the offender was convicted by a jury of a number of offences under the Fraud Act 2006 and the Forgery and Counterfeiting Act 1981. He was sentenced to a total of seven years' imprisonment and was disqualified from acting as a company director for 10 years.

In rejecting his appeal against the sentence, the Court of Appeal found that he had been granted due credit for his mental health issues and other mitigation. Given his personal use of investors' funds, there could be no suggestion that his offending was merely an attempt to keep the development show on the road. His challenge to the convictions was also dismissed.

Sourcing expert legal advice prior to entering into large-scale property developments is vital. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*R v Taktouk [2022] EWCA Crim 1254*

**Public Benefits of Renewable Energy Projects Can Outweigh Local Harm**

Large infrastructure projects of national importance often cause environmental or other forms of harm to the areas where they are located. As a High Court ruling showed, however, there are cases where public benefit considerations outweigh local concerns, no matter how justified they may be.

The case concerned proposals to build electricity substations on an expanse of rural land measuring over 46 hectares. They were intended to connect two offshore wind farms to the National Grid. Despite a storm of local opposition, the Secretary of State for Business, Energy and Industrial Strategy issued development consent orders (DCOs) authorising the proposed works.

A local campaign group that objected to the location of the substations mounted a judicial review challenge. It asserted, amongst other things, that the Secretary of State erred in his assessment of flood risks, noise generated by switchgear and circuit breakers and the harm that the development would cause to heritage assets.

Ruling on the matter, the Court noted that the overall development is classified as a nationally important infrastructure project. The proposals were subject to public consultation and detailed consideration by an examining authority. In its report to the Secretary of State, the examining authority noted that the local harm the project would cause was substantial and should not be underestimated. Mitigation measures, it said, were only just sufficient.

However, in finding that the public benefits arising from the project would outweigh its substantial adverse impacts, the examining authority noted highly weighty global and national considerations concerning the need to increase renewable energy generating capacity to meet public demand and to mitigate the climate impact of carbon emissions.

In reaching its finely balanced conclusions, the examining authority recognised that they would be met with considerable dismay by many local residents and businesses who had contributed positively and passionately to the planning process and who had raised issues of real concern. In his ultimate decision, the Secretary of State found that there was a strong case in favour of making the DCOs.

Dismissing the challenge, the Court could detect no legal flaw in the Secretary of State 's decision. He was entitled to conclude that the substantial local harm the development would cause was outweighed by the national benefits of providing highly significant renewable energy generation capacity.

Environmental considerations are central to commercial property proposals. To ensure you are up to date and aware of the latest environmental law, contact our expert team.

**Partner Note**

*R on the Application of Substation Action Save East Suffolk Ltd v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 3177 (Admin)*

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