

Case Name: *Network Rail Infrastructure Ltd, R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs* [2018] EWCA Civ 2069 (21 September 2018)

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Commentary: The Court of Appeal dismissed an appeal against the quashing by Holgate J. of the decision by an Inspector not to confirm a stopping up order under section 259 of the Town and Country Planning Act 1990 (Lewison LJ dissenting).

Under section 259, a stopping up order may not be confirmed unless the authority is satisfied that it is necessary to authorise the stopping up in order to enable the development to be carried out in accordance with a planning permission that has been granted. The Court held that a planning condition did not prevent a stopping up order being confirmed by the Secretary of State under section 259 because the condition contemplated the development going ahead even if the order was not confirmed.

The relevant condition was in Grampian form and prevented development of more than 64 of the plots unless either of two "exceptions" had occurred (i) a stopping up order had been made and confirmed, or (ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point i) does not confirm the order. The Inspector had decided as a preliminary point that the exception in (ii) meant that the stopping up order was not necessary and therefore could not be confirmed and did not go on to consider the merits of the stopping up.

Lindblom LJ held that when construing a condition, a construction that defeats the obvious purpose of the condition should be avoided and a construction sought to give it the effect it was plainly meant to have otherwise, not only will the condition be deprived of its intended effect as a restriction or control on the grant, but the authority's decision to approve the development may itself be cast into doubt (following *Fawcett Properties, Trump International and R v Ashford BC*).

The judgement states "There is no basis for taking the concept of "consideration" in condition 13 to mean anything less than a complete assessment of the need for the Order to be confirmed, in accordance with the statutory scheme. In that assessment, as the judge recognized, the "necessity test" and the "merits test" are applied in conjunction with each other." (para 48)

"the correct analysis was therefore that it is for the decision-maker in the stopping-up order process to decide whether both tests are met or not. This part of the statutory process is left exclusively where it belongs, with the decision-maker in that statutory process. It is not predetermined by condition 13. If, having fully applied both the "merits test" and the "necessity test" in the course of his consideration of the stopping-up order, the decision-maker concludes that the confirmation of the Order is justified, the condition does not debar him from making that decision. In that event the confirmation of the Order will have become "necessary" through the operation of condition 13, in accordance with the terms of the

condition and the reason for its imposition, and thus in accordance with the planning permission itself. The potential necessity for the Order to be confirmed, authorizing the stopping-up or diversion, and the need for that question to be addressed and resolved by the decision-maker under section 259, is thus intrinsic to the condition. The condition does not make confirmation unnecessary simply by spelling out the possible outcomes of the statutory process in which necessity has to be considered." (para 51)

Lewison LJ. dissenting did not agree that the test of necessity was met but stated that this conclusion would not invalidate the condition or the planning permission because the condition does not tie itself to the exercise of any particular statutory power to stop up highways. Section 119A of the Highways Act 1980 contains a specific power to divert a footpath crossing a railway. That section does not contain the necessity test that is inherent in section 259 so the Council could still leave the decision to the Secretary of State but needed to have chosen the Highways Act procedure rather than the s259 procedure.

Case summary prepared by Town Legal LLP