

M&S secures redetermination in the hope to secure planning permission for their flagship store



The High Court has quashed the decision of the Secretary of State (SoS), to refuse planning permission for the demolition of M&S's existing flagship Oxford Street store and the reconstruction of a nine storey mixed use development in its' place. M&S brought the challenge against the SoS's Decision Letter on a total of six grounds.

Grounds of challenge

M&S has succeeded on five of the six grounds of challenge. Of particular interest to us, are Grounds 1 and 5.

Ground 1

That the SoS had erred in respect of paragraph 152 (now 157) of the National Planning Policy Framework (NPPF) when he said (DL24) that there is a "strong presumption in favour of repurposing and reusing buildings":

M&S challenged the SoS's finding that M&S should have fully explored the options for retaining the existing buildings and have proved that there is *compelling justification* for the demolition of existing buildings. M&S submitted that the need to show a compelling justification for demolition and rebuilding went beyond the realms of existing policy as set out in the NPPF or Development Plan. The High Court agreed. The SoS had relied on a meaning of the NPPF that was not open to him. Mrs Justice Lieven stated that the SoS had not applied the policy, he had rewritten it. This finding is a helpful reminder that a presumption cannot be implied into policy, it must be expressly stated.

Ground 5

“The Secretary of State made an error of fact in respect of the embodied carbon, and misapplied policy in respect of the embodied carbon”:

The Decision Letter of the SoS found that the proposed development would fail to support the transition to a low carbon future and would fail to encourage the reuse of existing resources. The SoS had assumed that policy SI 2 (minimising greenhouse gas emissions) applied not only to operational carbon (typically the carbon used in the heating and cooling of a building) but also to embodied carbon (the carbon produced from the construction phase including demolition) and this would be substantial and contrary to the aims of the NPPF and the London Plan 2021 (in particular policy SI 2).

Mrs Justice Lieven identified that the issue of carbon impacts was one of the most important issues in the case and the SoS had erred in their interpretation and understanding of the extent of the application of policy SI 2. The Court confirmed that the offsetting requirements of the London Plan (policy SI 2) are in relation to operational carbon only – not embodied carbon *“It is clear beyond any rational doubt, and accepted by all parties before me, that the offsetting requirements in SI 2C are in relation to operational carbon, and not embodied carbon”*. It was not for the SoS to apply a zero requirement, or at least an aspiration for zero carbon impact for embodied carbon.

Mrs Justice Lieven said that *“The scale of the Secretary of State’s error, and the importance of the issue in the overall balance, means this is a case where it is more than possible that if the SoS had properly understood the policy he might have come to a different conclusion”*.

The SoS will now be required to reconsider the application. The case raises the interesting conundrum of refurbish and repurposing buildings as against demolition and reconstruction and illustrating that it is not always sustainable in the long term (or economically viable) to re-fit and refurbish. It will be interesting to see if this decision has any impact on how future developments come forward, refurbish or reconstruct? That is the question!

How we can help

If you would like advice on any of the issues covered in this article, please do not hesitate to [contact us](#).



[Nicole Cameron](#)

Managing Associate