



## The race to “net-zero”: “Retro-First” takes a stumble

In a recent case that has captured the attention of many operating in the real estate sector, M&S challenged the decision of the Secretary of State for Levelling Up, Housing and Communities to refuse planning permission to demolish and upgrade their outdated flagship buildings on Oxford Street in the High Court, where, after a hearing in February 2024, Mrs Justice Lieven quashed (in other words, voided) the decision. The M&S buildings, which were not originally built for retail purposes, have become energy inefficient to the point of redundancy, and increasingly expensive to run over the years. Consequently, in 2021 M&S applied for planning permission to demolish the buildings and replace them with a state-of-the-art energy efficient building designed by renowned architect Fred Pilbrow. The planning application was met with support from statutory consultees and interested parties including the Greater London Authority (“GLA”), Historic England, and the local planning authority, Westminster Council (“LPA”), who all acknowledged that the new building would be a much-needed boost for Oxford Street after the pandemic.

However, it was not to be smooth sailing for M&S, and in June 2022 objections received from Save Britain’s Heritage led to the planning application being “called in” by the Secretary of State, Michael Gove (essentially, taking the decision making out of Westminster Council’s hands and into his own). This brought about a lengthy planning inquiry led by the Planning Inspector who was ultimately in agreement with the GLA and LPA, but which resulted in a decision by the Secretary of State in July 2023 to refuse planning permission.

### The showdown: what did the court have to say?

In short, the court has found in respect of the Secretary of State’s decision that:

- > His statement that “there should generally be a strong presumption in favour of repurposing and reusing buildings, as reflected in paragraph 152 of the National Planning Policy Framework” was a misinterpretation of the framework and an error of law;
- > He unlawfully failed to explain why he disagreed with his Inspector’s conclusions that there was no viable and deliverable alternative to the demolition of the existing buildings proposed by M&S;
- > He unlawfully failed “to grapple with the implications of refusal”, the resulting loss of benefits in refusing planning permission and his departure from important development plan policies supporting M&S’s proposed redevelopment;
- > He unlawfully failed to provide adequate reasons for concluding (again in disagreement with his Inspector) that the harm to the vitality and viability of Oxford Street if M&S’s proposed redevelopment (or an alternative) were not delivered would be “limited”; and
- > His decision was also diminished both by a factual error namely, an erroneous understanding that there was no dispute that the proposed redevelopment would involve much greater embodied carbon than refurbishment and by a misinterpretation of development plan policy on carbon.

### The battle for the middle ground

One of the most eagerly anticipated outcomes of the case has been the issue of carbon emissions in the context of whether energy inefficient buildings should be demolished or retrofitted/refurbished. In recent years, the pendulum has swung in the direction of “Retro-First” as the Government and local planning authorities have sought to put in place policies which support this *modus operandi*. The London Plan contains a policy that requires major developments to be “net zero-carbon,” with a focus on re-use and retrofitting of existing buildings. Whilst national policy (namely, the National Planning Policy Framework) does not have the same emphasis on this approach. In the M&S case, all parties agreed that the existing buildings were inefficient, but that the new building would be highly sustainable in terms of (importantly) “operational” carbon.



Save Britain's Heritage argued that M&S had not justified the need to demolish the existing buildings compared to retrofitting them. Whilst the Planning Inspector found that there would be harm from the demolition of the existing buildings, he ultimately recommended granting planning permission due to the lack of viable alternatives and the potential closure of the store if planning permission was refused. However, the Secretary of State disagreed with all parties on this point in reliance on the London Plan and National Planning Policy Framework and refused the application citing a lack of evidence on the viability of alternatives and the need for a more thorough exploration of options. Helpfully, the High Court judgment is unambiguous that it is "clear beyond any rational doubt . . . that the offsetting requirements in the London Plan relate to operational carbon, and not embodied carbon", in other words neither the London Plan nor the National Planning Policy Framework should be a bar for those schemes which seek enhanced "operational carbon" efficiency over the lifetime of a development at the expense of greater embodied carbon in the short term.

This judicial clarification will likely be welcomed by all those in the industry and could give developers greater confidence in bringing forward new-build schemes, even where the possibility of retrofitting existing structures is theoretically possible. Regardless, there appears to be an urgent need for clear national policy on how developers and planners alike should approach their decision making when it comes to demolition vs retrofitting to avoid needless and costly delays.

#### **The cliffhanger: what happens next?**

The planning application will now be sent back to the Secretary of State to be redetermined. Consequently, it remains to be seen whether the Secretary of State (or his successor) has a change of heart and if any policy changes will be made before the final outcome is known. Nonetheless and quite apart from this outcome, this case has raised many questions including whether there should be a higher threshold for the Secretary of State to call in decisions, especially given the disruption the delay has caused not only to M&S, but to many operating in the wider real estate sector who have been waiting with bated breath to learn the outcome of this case before making critical business decisions themselves.

### Key contact



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