

Report to the Cabinet

Report reference: C/107/2007-08.
Date of meeting: 4 February 2008.



**Epping Forest
District Council**

Portfolio: Planning & Economic Development.

Subject: Telecommunication Mast - Honey Lane, Waltham Abbey.

Officer contact for further information: John Preston (01992-564111).

Democratic Services Officer: Gary Woodhall (01992-564470).

Recommendations/Decisions Required:

- (1) That the Council notes the procedures that were in use to deal with applications for prior approval were deficient, but that they have been replaced by revised procedures;**
- (2) That the Council repeats the apology to residents;**
- (3) That the Director of Planning and Economic Development takes urgent steps to commence enforcement action against the particular mast, and defends any appeal that arises as the first action;**
- (4) That the Director of Planning and Economic Development presses Essex County Council to consider how they licence such masts and equipment that are erected in the public highway, and whether or not the highway land is over land in other ownership(s); and**
- (5) That if Planning Enforcement action is not successful in removing this mast, that a further report is brought to Cabinet, which deals with any Planning Discontinuance Notice and compensation, or to pay compensation to the local residents most closely impacted.**

Background:

1. This report concerns the erection of a telecommunications mast on land at the junction of Honey Lane and Stonyshotts. It explains issues concerning how certain procedures were not well handled by Planning Services, and what has been done to correct the procedures, and to apologise for those points. It also explains investigations as to whether all other procedures were complied with at the date of the erection of the mast, and in considering what options are available to the Council, it explains various specific advice that has been sought, including advice on possible alternative locations, advice of Queen's Counsel, and valuation advice.

2. Complaints were made to the Council about the erection of the mast, and this report will explain what has been done in response to those complaints so far. It is also clear that the Ombudsman has been concerned about such matters, because his office issued a special report in 2007. (This report was issued to all Local Authorities.) During the investigations that have been undertaken, certain points have arisen which concern how the County Council deals with such matters, and these have been raised with the County Council.

3. The erection of telecommunications masts raise a number of planning considerations; although many individuals now have mobile telephones, and enjoy and accept the services which such telephones offer, the mast and equipment necessary to deliver those services are

less well received. The planning system defines the mast and equipment as development, but the Government gave extensive permitted development rights (i.e. abilities to erect such equipment if they meet national criteria.)

4. As the use of this technology has grown, and new generations of types of telephone have been developed, there was public disquiet about masts being erected, particularly where the public considered that they had not been consulted before hand. Some of that disquiet concerned the visual impact of such masts (perhaps particularly when close to houses, schools or other sensitive premises) and some concerned issues about actual or perceived health impacts of the technology.

5. The Government made several changes to the legislation, (specifically the Town and Country Planning General Permitted Development Order (GPDO) as amended) and the expectation as to how such proposals would be handled; including the introduction of a code of practice from the Mobile Phone Operators Association (MOA). The handling of proposals by Councils was changed in 2001, and in 2003 and 2004 Council's should receive an annual roll out plan from the MOA, and then receive specific details in the form of an application for prior approval. The Council has to consult the public and give a decision about whether it considers prior approval is required, or not. If it considers prior approval is necessary a decision then has to be made on whether prior approval is granted. It has to transmit these decisions such that this entire process is completed within 56 days, and such that the Council's decisions are received back by the applicant or agent within that 56-day period. The Ombudsman's special report to all Councils, and selective reports show that there were issues at the start of the 56 days, when an agent used recorded delivery, but the documents were not booked into the planning system that day, and at the end of the process if the Council did not use similar methods to have evidence to show that receipt back had been achieved within the deadline.

6. Our procedures had not been specific enough, and nor had the importance of the points been fully appreciated and understood by staff. This was an amended proposal, where an earlier scheme on the other junction of Honey Lane and Stonyshotts, had not met the deadlines, but where Essex County objections prevented the first scheme. Those procedures have been amended, and residents who had commented about the prior approval application have been given an apology, and given £250 to reflect those errors, irrespective of what else will have to happen.

7. The operator in this case is O2, and on the basis that they did not receive back the Council's decision within 56 days, they have taken the stance that they have prior approval by default, and have then proceeded to erect a telecommunications mast, as per the parameters they indicated.

8. The erected mast was checked to see if it exceeded those parameters, but that was not found to be the case. However, the prior approval regime included other criteria in the GPDO that also have to be met, and it was not clear that all relevant criteria had been met.

Report:

9. In considering those matters, and what options should be put to Cabinet, officers have taken advice from Queen's Counsel; his advice is set out in full in an appendix to this report. (This is exempt confidential information.) Officers have also issued a Planning Contravention Notice, both on O2, and on others understood to have an ownership interest in the land on which the mast has been erected; the replies to that notice are set out in a second appendix. (This is considered to be exempt and confidential at this stage.)

10. Having regard to the QC's advice, officers have also sought an expert opinion on what other alternative locations might be possible for the mast to be relocated to, and have made their own assessment of the acceptability or otherwise of those alternatives; that advice and associated assessment is set out in a third appendix. Lastly expert valuation advice has been sought, and that is set out in a fourth appendix. (This is considered to be

exempt and confidential.)

11. Residents have been regularly advised about these actions, and letters have been copied to the ward member. The Portfolio Holder has similarly advised Council. Unfortunately pulling all this information together has taken some time.

Possible Options:

12. The response to the Planning Contravention notice suggest that O2 did not own all the land, or have a lease of the land on which the mast has been erected (in particular given that the mast goes some 3.375 meters down into the land.) On that basis, all the terms of the relevant part of the GPDO have not been met, and there is a basis for taking enforcement action, if that is also considered to be an expedient course of action in this particular case. If that is considered as the first possible option, then it needs to be recognised that such a notice issued by the Council might well be the subject of appeal, and that an appeal might succeed on legal grounds, or if an Inspector did not consider the mast objectionable. In such an appeal the normal rule is that each party bear their own costs, unless any party is considered to have acted unreasonably. In this case the chances of the Council having costs awarded against them are perhaps higher than normal since the Council will be portrayed as seeking to use enforcement action to reverse its own mistake. However Leading Counsel considers that since, on the current evidence, the mast does not enjoy planning permission because all the preconditions of the GPDO have not been met there would be proper grounds for resisting any costs application even if any appeal against the enforcement notice were to succeed. In any event the Council would carry out a final review of all the available evidence before issuing the enforcement notice.

13. Officers have not thus far met with O2, because they need to know what options are actually available, but another option would be to seek the voluntary removal of the mast by O2.

14. The next option is to consider the issuing of a Planning Discontinuance Notice, on the basis that contrary to the position about enforcement, or if that enforcement action is taken and fails, then it is possible to seek to discontinue what would otherwise have been a lawful development. Such a notice has several important requirements, quite apart from being agreeable to this Council, it would require the approval of the Secretary of State, it would be subject to the holding of a public inquiry, and, not least, it would involve the payment of compensation to the developer.

15. If, any one of the aforementioned three options were to succeed in achieving the removal of this mast, then residents may have only been temporarily disadvantaged by the presence of the mast. However, if the mast stays, then residents are likely to achieve an Ombudsman decision against the Council, and some redress. That redress could be payments to residents close by to reflect some diminution of the value of their properties That 'option' also has a cost to it; there is really no do nothing option in this case.

16. In researching the above options, some queries arise as to the approach that has been used by the Essex County Council. They have plainly been making practical highway safety objections or comments as part of the prior approval process, however, they also have objections to masts incorporated into street lights (but which may be a less visually objectionable solution) and it is not clear how they are addressing street works legislation. The District Valuer has recently asked for a copy of the annual roll out plan, which may suggest that some valuations for non-domestic rates for telecommunications masts are being considered or checked. The County Council may have more of a role in considering the basis on which such masts are accepted and controlled than has necessarily been apparent.

17. Another issue that arises is whether an alternative location for such a mast exists to serve this locality; advice has been taken on this point and some alternative positions do exist; however, the Officer assessments of the other positions is that none is without any objection; for example because they are all near or within view of some residents, and none

can be hidden from view. Whatever successful action the Council takes about this mast, it is likely that this locality will end up with a different mast somewhere nearby.

Statement in Support of Recommended Action:

18. The special report of the Ombudsman suggests that if errors are made that they should be swiftly reported to Members, and acted upon. However, that does not appear to recognise that Members need to see what options, costs and issues arise with a variety of options. In this case it is suggested that there is a proper basis to take planning enforcement action, and that the adverse visual impacts of the particular design of mast in the particular location and surroundings make it expedient to take such action. This is also likely to be relatively the cheapest option.

Other Options for Action:

19. The report sets out other options for action, although doing nothing is not a real option in this case, but concludes that the recommended course of action should be taken first, and only if that fails should Members consider more costly options of discontinuance or the payment of compensation.

Consultation Undertaken:

20. Expert advice has been taken as indicated in the report. That advice is all copied as appendices, but most needs to be kept confidential at this stage, and thereafter.

Resource Implications:

Budget Provision: The recommended actions can be met from within existing budgets..

Personnel: From existing resources.

Land: N/A.

Council Plan 2006-10/BVPP Reference: N/A.

Relevant Statutory Powers: N/A.

Background Papers: Special report of Local Government Ombudsman June 2007; Latest version of EFDC Procedures for Telecommunication Installations June 2007; Advice of QC, comprising preliminary advice and that following site visit 27/8/07*; Response by O2 to Planning Contravention Notice 1/6/07*; Advice of Telecommunications expert about this mast and alternative locations; Officer assessments relating to those locations; Advice of Valuation experts.*; Letter to ECC of 3/12/07. (Those marked * are to stay confidential. Any public interest is not considered to outweigh the exempt status of the documents.)

Environmental/Human Rights Act/Crime and Disorder Act Implications: N/A.

Key Decision Reference (if required): Key Decision – Telecoms Mast – Honey Lane, Waltham Abbey.