

Report to District Development Control Committee

Date of meeting: 4 August 2009

Subject: O2 Mast, Honey Lane, Waltham Abbey



**Epping Forest
District Council**

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Recommendation(s):

That the Committee:

- (1) Resolve to NOT make a Discontinuance Order under S102 of the Town and Country Planning Act 1990 requiring the removal of the mobile phone mast at Honey Lane, Waltham Abbey; and**
- (2) Recommend to Cabinet that residents be compensated for the Council's failure to make a timely decision on an application for a determination as to whether prior approval for the mobile phone mast was required.**

Report Detail

Background:

1. On 20 June 2006 O2 submitted an application for a determination as to whether prior approval of the Council is required for the erection of a 12m high imitation telegraph pole antenna and equipment cabinet at ground level at the junction of Honey Lane and Stonyshots in Waltham Abbey, Ref EPF/1242/06. The Council was obliged to issue a decision on the application within 56 days.
2. Such applications are unique in that failure to ensure the applicant receives the Council's decision within the 56 day timescale results in a deemed planning permission for the development being granted.
3. In this particular case, although the Council decided prior approval was required and refused to grant such approval (on the basis the mast would cause harm to the amenities of the locality), the decision letter was received by O2 1 day outside the 56 day limit for the Council to notify the applicant of its decision. Consequently, under the provisions of Part 24 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (as amended) [the GPDO] O2 gained deemed planning permission to erect the antenna and equipment cabinet.
4. In order to remedy the harm caused by the telecommunications mast the Council has sought to challenge the existence of a deemed planning permission in the light of Counsels' advice. The advice was that it appeared O2 had not complied with all the relevant criteria in the GPDO because requirements to get the prior written consent of owners or occupiers of the land set out in the Electronic Communications Code had not been complied with. On the basis of that advice, Cabinet resolved on 4 February 2008 that urgent measures be taken by the Director

of Planning and Economic Development to commence enforcement action to secure the removal of the telecommunication mast and defend any appeal.

5. Prior to proceeding to issue an enforcement notice, the Council made further enquiries of Essex County Council and O2. New information was given and then provided to Counsel in order to seek confirmation that the advice previously given still held.

6. The information provided by Essex County Council confirmed it had advised O2 directly prior to works being carried out on the land that it had no objection to the mast or the equipment cabinets. The County Council also confirmed that was the case in respect of an additional equipment cabinet erected about a year after the mast was erected.

7. The information provided by O2 drew attention to specific parts of the Electronic Communications Code that clarify no consents from the owner or occupiers of the land are required for works undertaken on the highway.

8. Following consideration, Counsels' advice regarding the lawfulness of the mobile phone mast changed. The advice in respect of that question is now that the mast has been erected lawfully and that the Council cannot serve an enforcement notice under S172 of the Town and Country Planning Act requiring its removal.

Counsel states "O2 have now shown that they did come within the provisions of the (Electronic Communications) Code and hence, having served a developers notice on Essex County Council on the 19th of June 2006, within Part 24 of Schedule 2 to General Permitted Development order do not require express planning consent to erect and maintain the mast and equipment. This means it is not open to Epping Forest District Council to issue an enforcement notice requiring the mast and equipment to be removed"

Counsel further advises "There is no doubt the council have acted carefully in considering all options and seeking to pursue the prospect of enforcement action for as long as it was possible to do so. The Council has also dealt with matters transparently as advised by the Ombudsman's Special Report of June 2007. However the choice is now between taking discontinuance action and paying compensation to O2 or responding to complaints to the local ombudsman which local residents have indicated they will make based on the council's failure to notify O2 that they objected to the proposal to erect the mast within the required 56 day period."

Discontinuance Action:

9. Under S102 of the Town and Country Planning Act 1990 a Local Planning Authority may, if having had regard to the Development Plan and any other material considerations concluded that it is expedient in the interests of the proper planning of their area (including the interests of amenity), issue an Order requiring the removal of any building or works. This power can be used against both lawful and unlawful development. Where an Order is made, any person who has suffered damage in consequence of the Order or who carries out works in compliance with the order would be entitled to seek to recover compensation for the loss from the Local Planning Authority.

10. As Counsel indicates, making a Discontinuance Order requiring the removal of the mobile phone mast will, if successful, result in the Council having to bear O2's costs of erecting the mast in the first place, removing the mast and loss of income. A

report produced for the Council by the Consultants following receipt of Counsel's final advice indicates that such costs are likely to be in the region of £150,000.

11. A Discontinuance Order has to be confirmed by the Secretary of State before it can take effect. The Secretary of State has broad powers to modify the order, including power to grant planning permission. Before proceeding to confirm the order the Secretary of State must provide an opportunity to be heard to any person on whom the Order has been served. It can be expected that O2 will seek to be heard to challenge the making of the Order. In those circumstances a Public Inquiry will be held. Regardless of the outcome the Council would incur its own costs in the region of £20,000 to deal with the public inquiry. In addition, if the Council was found to have behaved unreasonably in making the Order it may have an award of costs made against it in favour of the other party.

12. Notwithstanding the matter of the Council's potential costs in seeking to take discontinuance action consideration has been given to the planning merits of taking such action having regard to the likely outcome in the event it is successful. Independent communications consultants were employed by the Council to examine the evidence of need for a telecommunications mast in the locality. Following an examination of service coverage by all other masts in Waltham Abbey it was found there is a clear demonstrable need for a telecommunications mast in the locality.

13. The consultants' report also examined whether that need could be met at identified alternative sites and found none that were available or had a reasonable prospect of being made available could meet the need and be less harmful to amenity. An alternative site that was not considered by the consultants is land on the west side of the junction of Honey Lane and Stonyshotts, however that site was previously rejected by the Council under application Ref EPF/0584/06. In the circumstances it is clear there is no alternative available site for the mast that could meet the need and be less harmful to the amenities of the locality.

14. Therefore, having regard to the demonstrable need for a telecommunications mast in the locality and the lack of alternative sites to meet that need, it is also clear that in the event of discontinuance action being successful the most likely outcome is the existing mast would be replaced by another similar mast close to the site, possibly on the previously rejected site. Consequently discontinuance action would not result in any benefit in planning terms because it would not result in any material improvement in the amenities of the locality. Furthermore, in order to have achieved no planning benefit the Council would have had to pay its Inquiry costs and then also have to compensate O2.

15. However, since there is a demonstrable need for a telecommunications mast in the locality and a lack of alternative sites to meet that need it is very uncertain that the Council could successfully defend the making of a Discontinuance Order at inquiry. If the Council loses its case it would incur its Inquiry costs and possibly have to pay O2's Inquiry costs with the outcome being the existing mast would remain.

16. Whatever the outcome, the owners of neighbouring properties would receive no compensation and would have to continue to live with a mast in the locality.

Compensation for local Residents:

17. The alternative course of action is to compensate the owners of neighbouring properties who objected to the mast when the original application was before the Council. A Consultant has been employed by the Council to advise on matters relating to the mast including the basis on which residents could claim compensation.

18. The Consultants advise that any claim by residents to the Ombudsman for compensation would be on the basis of:

- loss of value to property caused by the mast, and
- harm to the amenities of the occupants of the property.

19. The Consultants also advise that any loss in value is unlikely to be in excess of 5% of property value and there are good grounds for resisting such a claim for compensation on the basis of loss of property value. This is because even if the Council had issued its decision in time, it is most likely that planning permission for the mast would have been granted on appeal so the mast would have been erected anyway. In any event, the affected owners/residents may have a redress available directly against O2 under the Electronic Communications Code, however, they would need to take their own legal advice on that point.

20. Members are advised that the occupants of 10 neighbouring houses objected to the mast when consulted on the application by the Council. Land Registry searches show one of the properties was sold in March 2008, about a year after the mast was erected, and the price stated to have been paid was £247,000. Another property changed hands in September 2006, approximately 6 months prior to the erection of the mast, but the register of title does not include details of how much was paid. No other properties changed hands shortly before the mobile phone mast was erected or between the date it was erected and when property prices generally started to fall due to market conditions.

21. The results of the searches do not provide sufficient information on which to base any assessment of the likely value of any claim that any residents might make. Nevertheless, having regard to the Consultants report, the total lost value that might be claimed by all the residents who had objected to the application as part of a claim to the Ombudsman against the Council for maladministration (up to 5% of property value) could be as much as £120,000. However, as also pointed out by the Consultants, the likely success of such a claim is open to question.

22. Further research reveals the Local Government Ombudsman has considered this type of complaint by local residents across the country on a number of occasions. In those cases the Ombudsman's recommendation has been the Council concerned should pay compensation to those who objected to the application at the time it was being considered in recognition of their disappointment that the mast in question had to remain. The sum recommended by the Ombudsman has varied from £250-£300 and, as far as officers are aware, there have been no recommendations for any consideration to be given by the Council concerned to property devaluation.

23. These residents have already been paid £250 each as a goodwill gesture by the Council. However, it was emphasised to them that this offer was solely in recognition of the disappointment and frustration caused by the Council's failure to meet the 56 day deadline and would not prejudice any other claim they might wish to make for compensation for property devaluation should the mast have to remain.

24. After the mast was erected around 100 additional residents have either signed a petition or submitted individual letters complaining about the Council's failure to meet the 56 day deadline and/or calling for the removal of the mast. However, none of these people raised any objection to O2s' proposal to erect the mast during the public consultation process on the application. Those who did not raise any comments at the time the proposal to erect the mast was advertised by the Council would not be entitled to any compensation in the event of them making a claim to the Ombudsman.

Conclusion

25. In all the circumstances, the opinion of Officers is that a Discontinuance Order should not be made and that the best outcome for those 10 residents who did submit an objection to the application is for the Council to make a final reasonable offer of compensation.

26. Officers do not consider a reasonable case can be made for compensating, on the basis of a loss of 5% of property value, any of those objectors who was the owner of a neighbouring property at the time the mast was erected. That is because there is no substantive evidence demonstrating an actual loss of value of any property near the mast and, even if there was, it is very likely that planning permission would have been granted for it on appeal. Consequently, the mast would have erected in any event and any impact on property value would still have taken place.

27. Rather, the appropriate course of action is to offer them a further sum (£250 would be appropriate) for their disappointment that the mast has to remain and to advise those owners they would have to pursue any further claim privately against O2.

28. This view is reached on the basis that the mistake by the Council is one that has been made by many other local authorities in recent years. The Local Government Ombudsman has therefore already considered this type of complaint by local residents across the country on a number of occasions. The Ombudsman's recommendation has been that the Council concerned should pay compensation to those who objected to the application at the time in recognition of their disappointment that the mast in question had to remain. The sum recommended by the Ombudsman has varied from £250-£300 but, as far as officers are aware, there have been no recommendations for any consideration to be given by the Council concerned to property devaluation. Given that the Council has already paid £250 to each of the 10 affected property owners/residents, any additional payment of a further nominal sum to the remaining residents would therefore be very likely to be regarded by the Ombudsman as a more than reasonable settlement.

29. Accordingly, it is recommended that the Committee resolve to not make a Discontinuance Order and to recommend to Cabinet that residents be compensated for the Council's failure to make a timely decision on an application for a determination as to whether prior approval for the mobile phone mast was required, on the basis described in the conclusion of this report.