

Report to the Cabinet

Report reference: C-014-2010/11

Date of meeting: 19 July 2010



**Epping Forest
District Council**

Portfolio: Finance & Economic Development

Subject: O2 Mast - Honey Lane, Waltham Abbey

Responsible Officer: John Preston (01992 564111).

Democratic Services Officer: Gary Woodhall (01992 564470).

Recommendations/Decisions Required:

That, provided they have not moved home, those residents who originally objected to the application for a determination as to whether prior approval was required for the erection of a mobile phone mast be paid a further sum of £250 as compensation in respect of the Council's failure to make a timely decision on the application.

Executive Summary:

In 2006 the Council failed to decide an application for a determination as to whether prior approval is required for the erection of a mobile phone mast. The consequence of the decision is that the mast gained deemed planning permission and was subsequently erected despite the Council raising objection to its siting and design. The lawfulness of the mast and options for using planning enforcement powers to seek its removal have been explored and following consideration of a report on 4 August 2009 the District Development Control Committee agreed there was no reasonable prospect of securing a better solution on the ground.

Residents who originally objected to the mast were paid £250 each as a goodwill gesture by the Council prior to the District Development Control Committees decision. Members are now requested to consider whether any compensation should be paid to residents for the Councils' failure to issue a timely decision on the original prior approval application and the consequences arising from that failure. In the event that Members decide to compensate, Members are requested to decide on what basis to compensate. Options for compensation are discussed and Officers preferred option recommended.

Reasons for Proposed Decision:

Although it is highly likely a mobile phone mast would have been erected within the vicinity of the existing mast, the visual amenities of residents are nevertheless harmed by the existing mast. That mast was lawfully erected as a consequence of the Council's failure to make a timely decision on the application for a determination as to whether prior approval was required for the erection of the mast and it is not expedient to take action to secure its removal.

Options for Action:

- (i) Give no compensation.

- (ii) Compensate the residents who originally objected to the application for a prior approval determination by a fixed sum.
- (iii) Compensate the residents who originally objected to the application for a prior approval determination on the basis of a possible loss of property value.
- (iv) Compensate all those who 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 by a fixed sum.
- (v) Compensate the owner/occupier of all properties that are seen within the context of the mast as identified on the map that forms an appendix to this report by a fixed sum.
- (vi) Compensate on an alternative basis decided by Members.

Report:

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 Stonyshotts 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. Following consideration of that information, 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.

7. 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”

8. 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. This course of action was considered by the District Development Control Committee on 4 August 2009 when it resolved that the Council should not proceed with the discontinuation action based upon the low likelihood of a beneficial outcome even if such action were successful. It also resolved that the Cabinet should be asked to consider the levels of further compensation to be paid to residents.

Compensation for local Residents:

11. In accordance with the resolution of the District Development Control Committee, Cabinet is now requested to give consideration to compensating local residents for the harm caused as a consequence of the Councils failure and the basis on which any such compensation is paid. To inform this report the Councils’ Complaints Officer and surveyors, Strutt & Parker have given advice.

12. As a general proposition, there is justification for compensating the owners of neighbouring properties who objected to the mast when the original application was before the Council. It is not clear whether such justification could properly be extended to any other persons.

13. Strutt & Parker were employed by the Council to advise on matters relating to the mast including the basis on which residents could claim compensation. Strutt & Parker advise that any claim by residents to the Ombudsman for compensation would be on the basis of:

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

14. Strutt & Parker 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.

15. 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.

16. 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 Strutt & Parker 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 Strutt & Parker, the likely success of such a claim is open to question.

17. 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.

18. 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. A further payment of £250 to £300 amounts to a cost to the Council of £2500 to £3000.

19. 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. Nevertheless, it is open to Cabinet to consider compensation for a wider group of residents. If the Council were to pay £250 to £300 compensation to the additional residents as well as those who originally objected to the original application, it would incur a cost of approximately £27,500 to £33,000.

20. A further basis on which residents could be compensated is to make a payment of

either £250 to £300 to the owner of all the properties that are seen within the context of the mast. The location of the mast and the properties identified as falling within that category are identified by a blue cross and a blue dot respectively on the map that forms an appendix to this report. The total number of properties identified is 71. The cost of identifying the owners by way of carrying out a Land Registry search would be up to £1,136 and the cost of compensation would be either £17,750 or £21,300 depending on the level of compensation paid. This would result in a total cost of either £18,886 or £22,436.

21. This report was presented to Members at Cabinet on 1 February this year. Before Members discussed that report they were advised that O2 were apparently interested in considering a location for a replacement mast. Attached at appendix AA are the notes of the meeting which subsequently took place, and at appendix BB are copies of the letters sent to O2 following that meeting.

22. Unfortunately, and despite chasing, there has been no response to those letters. Accordingly, as this matter has been outstanding for some time, the report and recommendation is resubmitted for Cabinet to come to a decision.

Conclusion

23. The opinion of Officers is that the Council should make a final reasonable offer of compensation on the basis that the Ombudsman would be likely to if the matter came before him. That would exclude those persons who did not raise any objection when consulted on the application for prior approval for the erection of the mast.

24. 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.

25. Rather, the appropriate course of action is to offer those residents previously paid £250 as a goodwill gesture who have not moved house a further sum (£250 would be appropriate) and to advise those residents they would have to pursue any further claim privately against O2. Members may, however, wish to offer the same payment to any of the residents who have moved house in the meantime.

26. 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.

27. Accordingly, Officers opinion is the Council should compensate residents 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. That is, a payment of £250 be made to each of the 10 residents who raised objection to the erection of the mast when consulted on the application for a determination as to whether prior approval was required to erect it, Ref EPF/1242/06, subject to them still either being an owner or an occupier of the same affected property.

28. Notwithstanding Officers views, it is open to Members to decide not to give any compensation on the grounds that it is very likely that a mast of the same height and scale would have been erected in the vicinity of the site even if the Council had issued its decision on time. Similarly it is open to Members to decide to compensate on an alternative basis to that suggested by Officers in the conclusion of this report. In suggesting amounts of compensation regard has been given to what the Ombudsman has suggested in other cases, but regard must also be given to the general duties concerning expenditure. If the Council was to suggest a higher level of compensation to appease some residents, or a greater number of other local residents, then local taxpayers elsewhere in the District may ask the External Auditor to query the legality of that higher expenditure. Alternatives discussed in the report include compensating as follows:

- (i) on the basis of a possible loss in property value;
- (ii) on the basis of a the payment of a fixed sum to all those who 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; or
- (iii) on the basis of a the payment of a fixed sum to the owners of properties that are seen within the context of the mast as identified on the map that forms an appendix to this report.

Resource Implications:

A DDF item for £93,000 was originally included in the budget as a contingency for appeals. The sum currently available is £85,200.

Options, dependent upon the Cabinet's decision, are:

- (i) 5% of property value - compensation maximum £120,000;
- (ii) (Recommended by officers) Further £250 to £300 compensation to original 10 objectors £2,500 - £3,000;
- (iii) 100 petitioners - compensation £27,500 - £33,000; or
- (iv) 71 identified properties - compensation £18,886 - £22,436.

Legal and Governance Implications:

Members' decision would be given consideration in the event of a possible claim of maladministration heard by the Ombudsman.

Safer, Cleaner and Greener Implications:

None.

Consultation Undertaken:

Council Complaints Officer
Director of Corporate Support Services.

Background Papers:

Report to District Development Control Committee on 4 August 2009 and minutes

Report to cabinet on 4 February 2008 and minutes

Report of Strutt & Parker dated August 2008

Planning Enforcement Investigation ENF/0088/07

Prior approval application EPF/1242/06

Impact Assessments:

Risk Management

Careful consideration to the matter of compensation will be given weight in the event of a claim of maladministration to the Ombudsman. The new Government has heralded that it will bring Mobile Phone Masts back into full planning control, but this has not been enacted yet.

Equality and Diversity:

Did the initial assessment of the proposals contained in this report for relevance to the Council's general equality duties, reveal any potentially adverse equality implications? No

Where equality implications were identified through the initial assessment process, has a formal Equality Impact Assessment been undertaken? N/A

What equality implications were identified through the Equality Impact Assessment process?
N/A.

How have the equality implications identified through the Equality Impact Assessment been addressed in this report in order to avoid discrimination against any particular group?
N/A.