

Decision Maker: Plans Sub-Committee 2

Date: 08 December 2011

Decision Type: Non-Urgent Non-Executive Non-Key

Title: **UNAUTHORISED TELECOMMUNICATIONS INSTALLATION
AT SPUR ROAD, ORPINGTON**

Contact Officer: Tim Bloomfield, Development Control Manager
Tel: 020 8313 4687 E-mail: tim.bloomfield@bromley.gov.uk

Chief Officer: Chief Planner

Ward: Orpington

1. Reason for report

- 1.1 Under ref. 11/00385/TELCOM an application was submitted to the Council in accordance with the requirements of Part 24 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) (GPDO), in seeking a determination as to whether the prior approval of the siting and appearance of a 12.5m high shared telecommunications mast with 2 ancillary equipment cabinets was required, and if so whether the Council approved or disapproved of its siting and appearance.
- 1.2 This application was disapproved in accordance with the Council's normal procedure and the decision notice issued within the 56 day period specified within the GPDO, however the applicants (Telefonica O2 UK Ltd. and Vodafone UK Ltd.) contend that this decision is of no effect because the Council failed to first confirm that prior approval of the siting and appearance was required. As a consequence, the applicants consider that they have met with the requirements of Part 24 of the GPDO and benefit from the permission that this development order has the effect of granting. The mast and ancillary equipment have now been erected at the site following receipt of a Street Works Permit, granted by the Highway Authority.
- 1.3 From a site inspection it is apparent that the mast is grey in colour, and would not therefore accord with the details submitted in the application, which stated that the mast would be 'mineral green' to match adjacent street furniture. In addition, the two cabinets located at ground level appear to be sited 0.3m further apart from one another and as a result the development has a greater width overall. The smaller of the two cabinets also appears to be positioned slightly further back from the edge of the footway than the drawings indicate, being out of alignment with the larger cabinet as a consequence. In addition the smaller cabinet has been sited on a newly constructed concrete plinth, which was not shown on the submitted plans. Under the provisions of Part 24, the developer is required to carry out the development in accordance with the details submitted with the application, and has failed to do so in this case.

- 1.4 Members will need to consider the expediency of authorising enforcement action, bearing in mind the Council's decision to disapprove the siting and appearance of this installation, together with the applicant's position that they benefit from consent to carry out the works by virtue of Part 24 of the GPDO, and the discrepancies between the development that was detailed in the disapproved application, and the development that has been carried out at the site.
-

2. RECOMMENDATION

- 2.1 Enforcement action be authorised.

Corporate Policy

1. Policy Status: Existing policy.
 2. BBB Priority: Quality Environment.
-

Financial

1. Cost of proposal: No cost
 2. Ongoing costs: Non-recurring cost.
 3. Budget head/performance centre:
 4. Total current budget for this head: £
 5. Source of funding:
-

Staff

1. Number of staff (current and additional): Three Planning Investigation Officers
 2. If from existing staff resources, number of staff hours: 4
-

Legal

1. Legal Requirement: Statutory requirement. Town & Country Planning Act
 2. Call-in: Call-in is not applicable. Non Executive
-

Customer Impact

1. Estimated number of users/beneficiaries (current and projected): One (1)
-

Ward Councillor Views

1. Have Ward Councillors been asked for comments? No.
2. Summary of Ward Councillors comments:

3. COMMENTARY

3.1 Under ref. 10/02236/TELCOM, the Council disapproved the siting and appearance of a 15m high shared telecommunications mast with 2 ancillary equipment cabinets at the site for the following reason:

‘Due to their height, siting and design, the proposed mast and ancillary equipment would be obtrusive and highly prominent features in the street scene, out of character with and detrimental to the visual and residential amenities of the surrounding area, and would be likely to prejudice the future wellbeing of street trees in Court Road, contrary to Policies BE22 and NE7 of the Unitary Development Plan.’

3.2 Following this decision, the applicant’s agent approached the Council for informal advice on a mast of a reduced height of 12.5m at this site. The Council advised that while the reduction in height was an improvement, the siting and design would be consistent with the previous proposal and may continue to be of concern for the reasons specified, and furthermore that in the absence of evidence to the contrary the possible impact to street trees may continue to be an issue. In response the applicant’s agent asked the Council to advise of alternative appropriate street locations for the installation. The Council advised that while it was unable to offer such specific advice, it would be glad to offer an informal view on any other proposals that may be submitted. No further proposals were put forward informally.

3.3 A further application was submitted under ref.11/00385/TELCOM seeking the Council’s determination as to whether the prior approval of the siting and appearance of a 12.5m high shared telecommunications mast with 2 ancillary equipment cabinets would be required, and if so whether the siting and appearance was acceptable. The application was accompanied by a tree survey report which demonstrated that the development would not give rise to any undue impact to the well being of Street Trees in the vicinity. While the height of the mast was reduced by 2.5m, the siting and appearance was proposed to be very similar to the previous proposal, and it was considered that the Council’s previous concerns had not been addressed. A number of local objections were received by the Council in connection with the application, which can be summarised as follows:

- as a result of height would still be visually prominent
- in direct sight of houses in area and pedestrians
- concern regarding size of cabinets
- concern that installation will return to original 15m height
- sets a precedent for further development and concerns regarding 4th generation mobile services
- suggestion that existing fire station site continues to be viable
- existence of alternative sites in the area
- site is on lower ground and therefore curious choice
- land is controlled by Bromley Council and it should reject the proposal
- consideration should be given to a temporary permission while fire station is under construction
- proposal does not comply with Policy BE22 of the UDP
- visual impact of mast from nearby houses
- proposal higher than current tree line and lamp posts
- alternative and more suitable locations in vicinity
- health risks
- loss of value to residential properties

The Council's reason for disapproval was as follows:

'Due to their height, siting and design, the proposed mast and ancillary equipment would be obtrusive and highly prominent features in the street scene, out of character with and detrimental to the visual and residential amenities of the surrounding area, contrary to Policy BE22 of the Unitary Development Plan.'

- 3.4 Subsequently, the Planning Department became aware following complaints from local residents that works appeared to have been carried out at the site to implement the proposed telecommunications development. The Council wrote to the applicant's agent by e-mail on 6th June, requesting clarification of the situation. No response was received. Subsequent discussions between the Council and the applicant's solicitors revealed the applicant's opinion that they were in benefit of a deemed consent as a consequence of the Council's failure to explicitly confirm in writing within 56 days from the date of the application that the prior approval of the siting and appearance of the proposal was required.
- 3.5 As far as the applicant is concerned therefore, they are in possession of the appropriate consent (by default) and were able to commence work on the site on this basis. It appears that the development was completed on 20th November.
- 3.6 The Council contends that the manner in which the decision was taken is sound and robust, consistent with its normal and long established procedure (and indeed the earlier disapproval at this site under ref. 10/02236/TELCOM) and in accordance with the requirements of Part 24 of the GPDO. Part 24 effectively grants permission for certain telecommunications developments. However before beginning the development the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to the siting and appearance of the development. The development shall not be begun before the occurrence of one of the following:
- (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
 - (b) where the local planning authority gives the applicant written notice that such prior approval is required, the giving of that approval to the applicant, in writing, within a period of 56 days beginning with the date on which they received his application;
 - (c) where the local planning authority gives the applicant written notice that such prior approval is required, the expiry of a period of 56 days beginning with the date on which the local planning authority received his application without the local planning authority notifying the applicant, in writing, that such approval is given or refused; or
 - (d) the expiry of a period of 56 days beginning with the date on which the local planning authority received the application without the local planning authority notifying the applicant, in writing, of their determination as to whether such prior approval is required.

Under Part 24, the developer is required to carry out the works in accordance with the details submitted in their application, or if approval is given by the local planning authority in accordance with the details submitted unless otherwise specified.

- 3.7 The Council's decision in relation to application ref. 11/00385/TELCOM disapproved the siting and appearance of the proposed telecommunications development, within 56 days from receipt of the application, following the initial determination that prior approval of the siting and appearance was required. It is on this point that the applicant disputes the validity of the decision, contending that a 2-stage procedure is required by the GPDO and should have been followed by the Council, i.e. that written notification of the need for prior approval of siting and

appearance must first be given before a decision is issued on the approval of the details (or otherwise). The applicant contends that following the expiry of the 56 day period without receipt of written confirmation that prior approval was required, they would be able to commence work on the site in accordance with the provisions of Part 24.

- 3.8 In support of its procedure and case, the Council refers to appeal decision ref. APP/G5180/X/07/2041881 dated 29th September 2007 which relates to Land outside 89 Goddington Lane, Orpington, Kent, and turned on the very issue of whether a 2-stage procedure must be followed by the Local Planning Authority under the provisions of Part 24 of the GPDO. In that case, the Council had disapproved the siting and appearance of a 12 metre high ultra slim line monopole incorporating three 1.7m antennas, radio equipment and ancillary development, without first issuing a written decision as to whether prior approval was required. The applicant (Hutchinson 3G) contended that as a consequence they had the benefit of a deemed consent, and submitted a Certificate of Lawfulness to the Council to seek to confirm this, which was refused on the basis of the earlier decision to disapprove siting and appearance. The Inspector dismissed the appeal, finding that it is not a statutory requirement under the provisions of Part 24 of the GPDO that two separate pieces of correspondence (i.e. decision notices) be issued, and that the fact that a decision is issued either refusing/disapproving or approving the siting and appearance of a proposal must follow logically from a determination that such approval was required. Since this decision related to a site within the Borough, the Council considers its procedure in relation to this type of application to be sound and robust.
- 3.9 In this case, the applicant is reliant upon an alternative decision; appeal ref. APP/B6855/C/08/2088145 dated 19th March 2009 which relates to an appeal in Wales by Vodafone Ltd. against an enforcement notice issued by the City and County of Swansea Council in relation to a 15m high monopole telecommunications mast. Again the appeal turned on the issue of whether a 2-stage procedure should have been followed by the Planning Authority. The Inspector concluded that written notification as to whether prior approval for the development permitted by Part 24 of the GPDO is required, and subsequently the appeal was allowed, the enforcement notice quashed and costs awarded against the City and County of Swansea Council.
- 3.10 Members are advised to note the conclusions of both appeal decisions in considering the expediency of authorising enforcement action in this case. Of particular note is the fact that Swansea Council routinely sent 2 part decisions and in the appeal case failed to do so. The appeals differ therefore in that Bromley followed their normal procedure and was supported, however Swansea failed to follow their established procedure and was not supported. Neither decision has been challenged and neither supersedes the other. Arguably an appeal decision in the Borough concerned is more relevant. Members may agree therefore that the Council's reliance upon a decision within this Borough, as opposed to a decision made in Wales and under separate legislation, would appear to be sound. Members are also advised to consider that any decision to authorise action is likely to result in an enforcement appeal, and an application for costs against the Council.
- 3.11 Notwithstanding the technicality of whether a 2-stage procedure is required by the provisions of Part 24 of the GPDO, the Council was not satisfied that the telecommunications installation proposed in this case would be acceptable in this location, in that it would fail to comply with the requirements of Policy BE22 of the Unitary Development Plan. The mast is, at 12.5m in height, an obtrusive and highly prominent feature in the street scene, and together with the 2 associated cabinets, appears out of character with and detrimental to the visual and residential amenities of the surrounding area. The site, which had previously been an open area of 'amenity' land, now appears cluttered as a result of the mast itself and the associated cabinets at ground level. Photographs are available on the file for Members to view.

- 3.12 Furthermore, the development that has been carried out on site would not appear to accord with the written details set out in the application, both in terms of the siting of the equipment and its appearance. The application details indicated that the mast would be coloured ‘mineral green’ to accord with adjacent street furniture, however the mast on site is coloured a light grey and as a consequence appears more prominent and discordant with adjacent street lighting columns. In addition, the two cabinets at ground level were shown on the submitted plans to be positioned 1.5m apart from one another; however appear to have been sited approx. 1.8m apart, and as a result the installation occupies a greater footprint (in terms of width) and appears less compact within the street scene. The smaller of the two cabinets (located to the west of the mast) has been positioned on a newly constructed concrete plinth which was not indicated on the submitted drawings and as a result has a greater height than the drawings specified, and appears to have been located further back from the edge of the footpath and out of alignment with the larger of the two cabinets (the drawings indicated that the fronts to both cabinets would be in aligned with the footpath edge). These changes exacerbate the harm to the visual amenities of the street scene and the character of the area that the Council initially considered would arise from the development submitted and disapproved under ref. 11/00385/TELCOM, as a result of the more prominent appearance of the mast by virtue of its colour and the less compact form that the development now has as a result of the greater separation between the two cabinets.
- 3.13 PPG 8 ‘Telecommunications’ advises that authorities and telecommunications operators should use sympathetic design and camouflage to minimise the impact of development on the environment, and that the telecommunications industry is encouraged to continue to develop innovative design solutions, in terms not only of the structure of masts and antennas but also the materials and colouring.
- 3.14 Notwithstanding the dispute over the requirement to follow a 2-stage procedure, it is an explicit requirement under Part 24 that the development is carried out in accordance with the details set out in the application. Members will need to consider in addition to the applicant’s claim that the decision should not stand, whether as a matter of fact and degree the changes made to the development as carried out on site are materially different from the details submitted to the Council under application ref. 11/00385/TELCOM, bearing in mind the greater visual impact that the mast has in the street scene as a result of its light grey colour and the less compact footprint of development. Should Members find the changes to be material, the implication would be that the development would not have the benefit of deemed consent under Part 24 of the GPDO, since the Council was not been asked to consider the need for prior approval to the siting and appearance of the development as carried out prior to its commencement.
- 3.15 The Council’s approach in issuing its decision to disapprove the siting and appearance of the proposal was in accordance with its normal and long established practice, and in line with the findings of the Inspector in the Goddington Lane appeal. In addition, the development has not been carried out in accordance with the details specified in the application. The Council does not consider that the applicant was in possession of a ‘deemed consent’ at the time of the work being carried out and it is recommended that enforcement action be authorised.

4. POLICY IMPLICATIONS

- 4.1 UDP Policy BE22 is relevant.

Non-Applicable Sections:	Financial, Legal and Personnel Implications
Background Documents: (Access via Contact Officer)	Enforcement files contain exempt information, as defined in Schedule 12A of the Local Government (Access to Information) Act 1985, and are therefore not available for public inspection.

Ref: DC/11/00385/TELCOM and DC/10/02236/TELCOM.