

TELECOMMUNICATIONS EQUIPMENT WELLS ROAD

Head of Service:	Mark Shephard, Head of Property and Regeneration
Wards affected:	Stamford Ward;
Urgent Decision?(yes/no)	
If yes, reason urgent decision required:	
Appendices (attached):	Appendix 1 – Location Plan Appendix 2 – Plan showing limited general area considered for new mast Appendix 3 – DCMS / MHCLG Note Appendix 4 - Strategy & Resources Report and Minutes 4 th April 2006 Confidential Appendix 5 - Covering letter and Draft Heads of Terms

Summary

A request for siting of telecommunication equipment has been received on Council owned land at Wells Road. Permission for its siting is sought and agreement to a ten year lease on terms to be negotiated.

Recommendation (s)

The Committee is asked to:

- (1) Note the provisions in the Electronic Communications Code (with effect from December 2017) with its significant changes favouring the presumption of approval for telecommunications masts and limiting the grounds for objection by land owners and occupiers of land.**
- (2) To agree the siting of a telecommunication mast on Council owned land at Wells Road, Epsom; and**
- (3) To permit the instruction of an independent surveyor to act on behalf of EEBC to negotiate and agree Heads of Terms with the cost to be met by the operator; and**
- (4) To enter a lease for a term of 10 years, with authority to agree terms and conditions delegated to the Chief Legal Officer.**

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1 Reason for Recommendation

- 1.1 The new Electronic Communications Code (the Code), which came into force in December 2017, constituted a significant change to the law in this area. It is widely interpreted as having been a positive change for telecommunications network operators and a negative one for owners and occupiers of land.
- 1.2 By way of context, a letter from central government (specifically Department for Digital, Culture, Media & Sport and Ministry of Housing, Communities & Local Government) to Council Chief Executives dated 7 March 2019 stated as follows:

“We need to create the market and policy conditions necessary to support the large-scale commercial investment required to extend and future-proof digital connectivity. A key part of this is making it easier for operators to deploy infrastructure. To help to achieve this, the Government recently reformed the Electronic Communications Code - the statutory framework which underpins agreements between communications network providers and those in both the private and public sector who can provide sites for the installation of network equipment. The purpose of the reforms was to make it easier and more cost effective for communications network providers to deploy and maintain digital infrastructure.

Local authorities have an essential role to play as site providers.”

and

“We would, therefore, ask you:

...

to ensure your teams are granting access to your assets and infrastructure effectively to support the rollout of full fibre and mobile networks.”

- 1.3 Any occupier of land will need to carefully consider any approach from an operator, rather than either dismissing the approach out of hand, or agreeing to everything that is asked of it without any scrutiny. It is worth considering what tests the Code imposes in the event that a dispute arises which has to be determined by the Upper Tribunal.
- 1.4 The Code is drafted so as to make it very difficult for an occupier of land to resist having an agreement imposed on it by the Upper Tribunal, in the event that it does not agree voluntarily to enter into an agreement for the siting of Electronic Communications Apparatus.
- 1.5 In a case where the land occupier is not intending to redevelop the relevant land, the “operator” (i.e. the telecoms network provider) has to satisfy paras 21(2) and (3) of the Code.

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1.6 The test at para 21(2) is as follows:

“The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.”

The test at para 21(3) is as follows:

“The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.”

1.7 In the recent case of **CTIL v UAL [2020] UKUT 0248 (LC)**, the Tribunal made clear that *“It is clear that Parliament in enacting the Code intended private landowners to participate in the provision of telecommunications sites for the public good by suffering the use of their land for that purpose...”*, before stating that:

“The level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications.”

1.8 Given that there is no doubt that the Wells Road site would be capable of housing Apparatus that would contribute to a telecoms network, there will be public benefit arising from the imposition of an agreement. The Council would need to identify specific prejudice in order to prevent an agreement being imposed.

1.9 It is established under recent case law of the Upper Tribunal that the Tribunal would not have to find that the Wells Road site is the best site for the proposed Apparatus, and indeed the existence of other sites that would be as suitable is not something that the Tribunal is obliged even to take into account. Further, the Council’s policy was drafted back in 2006, a long time prior to the New Code coming into force, and in any event the Tribunal would not be likely to give it any weight and is unlikely to consider it relevant to the test to be applied under paras 21(2) and (3) of the Code.

1.10 In the event that the Council refuses to enter into an agreement, the operator would be able to serve a formal notice and then to apply to the Tribunal for the imposition of the agreement. The litigation before the Tribunal would involve full costs powers. That is, if the Council were to lose, it would be likely to have to pay the legal costs of the operator. These would be many tens of thousands of pounds, and may well run to six figures.

1.11 It is therefore recommended that the Committee agrees the siting of the equipment, agrees to the instruction of an independent surveyor to achieve the optimal terms and for the Chief Legal Officer to agree the terms of a ten year lease for the site.

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2 Background and EE's Proposal

- 2.1 An enquiry was initially received on 27th February 2020. It explained EE's proposals and requested consent to locate a new telecoms mast on EEBC owned land close to the junction with Woodlands Road and Wells Road (Appendix 1).
- 2.2 According to EE, there is a limited general area in which the mast can be sited as shown within the green ringed area (Appendix 2). Within this general area, suitable SCC Highways land was considered but discounted by EE due to the close proximity of extensive underground gas pipework.
- 2.3 The new equipment, which would not initially be 5G, is required by Network Rail to provide better Wi-Fi connectivity for train customers as part of project SWIFT (Superfast Wi-Fi In-carriage for Future Travel). This will enable rail customers to stream entertainment, purchase goods on line and validate tickets for travel without loss of service. It also has important applications for better monitoring of train locations, trackside staff communication and public safety. EE also won the emergency services supplier agreement which will mean the proposed new equipment will host part of the network to provide full connectivity for the emergency services. As a useful direct community benefit the mast will also bring better connectivity to local homes and businesses.
- 2.4 Along with the initial enquiry, reference was made to a note from the Department for Digital, Culture, Media & Sport and the Ministry of Housing Communities & Local Government (Appendix 3) which explains that Local Authorities have an important role to play as site providers to provide better communications networks for those in the public and private sectors and that such organisations should have appropriate policies and procedures in place to promote effective engagement with the digital communications industry and minimise barriers to deployment.
- 2.5 EEBC policy on telecoms equipment was updated following a report to this Committee on the 4th April 2006 (Appendix 4). The updated policy provides a list of sites which would not be considered suitable for sites and four sites which would be considered suitable. Those sites which would not be considered included areas within 250 metres of schools and colleges and also within municipal parks.
- 2.6 The four sites considered as suitable included Horton Country Park. For the avoidance of doubt this site is not within 250 metres of any schools, nurseries or colleges. The Council resolved that any applications received for siting equipment outside the excluded areas should be considered by the Telecommunications Masts Sub-Committee. This sub-committee was disestablished in 2008, hence the reason why this matter has come before this Committee.

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- 2.7 Since 2006, matters have moved on in terms of legislation and the siting of telecommunications equipment. The siting of Telecoms Equipment falls under the Code. If the Council and EE are unable to agree on terms or siting of the equipment, then EE or its agents are able to serve notice on the Council giving 28 days to reach agreement, failing which the matter is referred to and determined by the Upper Tribunal, as indicated above.
- 2.8 The land in question forms part of Epsom Common and any development therefore requires consideration of the Commons Act 2016. However Section 38 (6) (D) of the Act states there is no prohibition of development for works for the installation of electronic communications apparatus for the purposes of an electronic communications code network. This means the operator is not required to seek Secretary of State consent to site the apparatus in this location. For the avoidance of doubt, the land is also outside of the Epsom & Ashted Commons SSSI.
- 2.9 Separately from the land ownership and lease issue there is also the planning aspect. Planning consent for the siting of the equipment at the location was given on 18th June 2020. The siting of telecoms masts is permitted development by virtue of Schedule 2, Part 16, Class A of the GPDO and as the proposed mast does not exceed 20m in height, the Local Planning Authority can only consider the siting and appearance of the proposed development rather than the principle of the development. It was stipulated as part of the consent that any equipment should be painted green to blend in with its surroundings and other existing street poles and the amount of equipment should be kept to a minimum.
- 2.10 The draft heads of terms including a copy of the covering letter dated 18th March 2020 are attached at the confidential Appendix 5.
- 2.11 Before the introduction of the 2017 Code, telecommunications companies would regularly pay £10,000 to £15,000 in rent per year depending on location and accessibility for siting equipment on properties with leases often in excess of 10 years.
- 2.12 However, since the Code, the ability for the landlord to charge market rents has been significantly diluted in many cases. This is because the Code mandates that the consideration payable under an imposed agreement should disregard any value which is attributable to the telecoms network. So, if land is otherwise of only nominal value (because for example there is no demand for it for any valuable use other than telecoms, and/or there would be no planning permission for any valuable use other than telecoms), then the consideration payable will only be nominal.

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- 2.13 In addition, the Code makes provision for compensation for losses suffered by an occupier of land. However, the mere fact of having a code agreement imposed is not something which will attract compensation. It is recommended that an independent surveyor acting for the Council consider the issue of consideration and compensation. The Council's reasonable surveying and legal fees will be met by the operator without the Council incurring liability if the project did not subsequently proceed.
- 2.14 Should the terms of any agreement not be agreed by EEBC, the operator has the ability to serve notice under the Code, and the Tribunal has the ability to decide on, and impose terms. As previously mentioned, it is a matter for this committee to decide. Such court action would incur costs by this Council, not only its own, but were the finding to be in favour of EE, then the Council would also be likely to be responsible for their costs.

3 Risk Assessment

Legal or other duties

3.1 Impact Assessment

3.1.1 There are no impact assessment implications for this report.

3.2 Crime & Disorder

3.2.1 There are no specific crime and disorder considerations associated with this report.

3.3 Safeguarding

3.3.1 There are no specific safeguarding implications associated with this report.

3.4 Dependencies

3.4.1 There are no dependencies for this report.

3.5 Other

3.5.1 N/A

4 Financial Implications

4.1 Agreement to a lease would provide the Council with a modest receipt.

4.2 Should this committee not agree the recommendations there will be additional internal and external legal costs required to pursue this matter in court, a modest estimate would be £20,000 to £30,000. Should the Council be unsuccessful at court at least the same amount again could be awarded to EE.

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4.3 **Section 151 Officer's comments:** *None arising from the content of this report.*

5 Legal Implications

5.1 These are set out within the body of the report.

5.2 **Monitoring Officer's comments:** *None arising from the content of this report.*

6 Policies, Plans & Partnerships

6.1 **Council's Key Priorities:** The following Key Priorities are engaged:

There are two Key Priorities that are relevant to this report. Firstly, it is a priority to enhance the Borough's natural assets, preserving and increasing biodiversity. The second priority is to increase digital connectivity for all. Key priorities are not ranked in any way and it can be clearly seen that there may be times when they conflict, as they do in this case. It is then a matter for Members to decide where the priority should lie.

6.2 **Service Plans:** The matter is not included within the current Service Delivery Plan.

6.3 **Climate & Environmental Impact of recommendations:** None arising from the content of this report.

6.4 **Sustainability Policy & Community Safety Implications:** None arising from the content of this report.

6.5 **Partnerships:** None arising from the content of this report.

7 Background papers

7.1 The documents referred to in compiling this report are as follows:

Previous reports:

- Strategy & Resources Report and Minutes 4th April 2006

Other papers:

- None