



DEVELOPMENT CONTROL COMMITTEE

Date – 31st May 2007

Report of Head of Planning and Building Control

Telecommunications installation, Darlington Street, Darlaston

1.0 PURPOSE OF REPORT

To update the situation as reported to your meeting of 13/3/2007, and advise the committee of possible actions.

2.0 RECOMMENDATIONS

- 2.1 a) that no enforcement action be taken.
b) That the mobile operator be advised of this Council's concern and displeasure at their actions in defiance of the Regulations.

3.0 FINANCIAL IMPLICATIONS

None arising from the report. If enforcement action is taken, there could be costs implications if there is a subsequent appeal,

4.0 POLICY IMPLICATIONS

The report sets out the relevant policy issues.

5.0 LEGAL IMPLICATIONS

None arising from the report.

6.0 EQUAL OPPORTUNITY IMPLICATIONS

None arising directly from this report.

7.0 ENVIRONMENTAL IMPACT

This is assessed in detail in the report.

8.0 WARD(S) AFFECTED

Darlaston South

9.0 CONSULTEES

None

10.0 CONTACT OFFICER

Bob Scrivens: 01922 652488

11.0 BACKGROUND PAPERS

Applications previously published. Current investigation file.

D. Elsworthy
Head of Planning and Building Control

Development Control Committee

31st May 2007

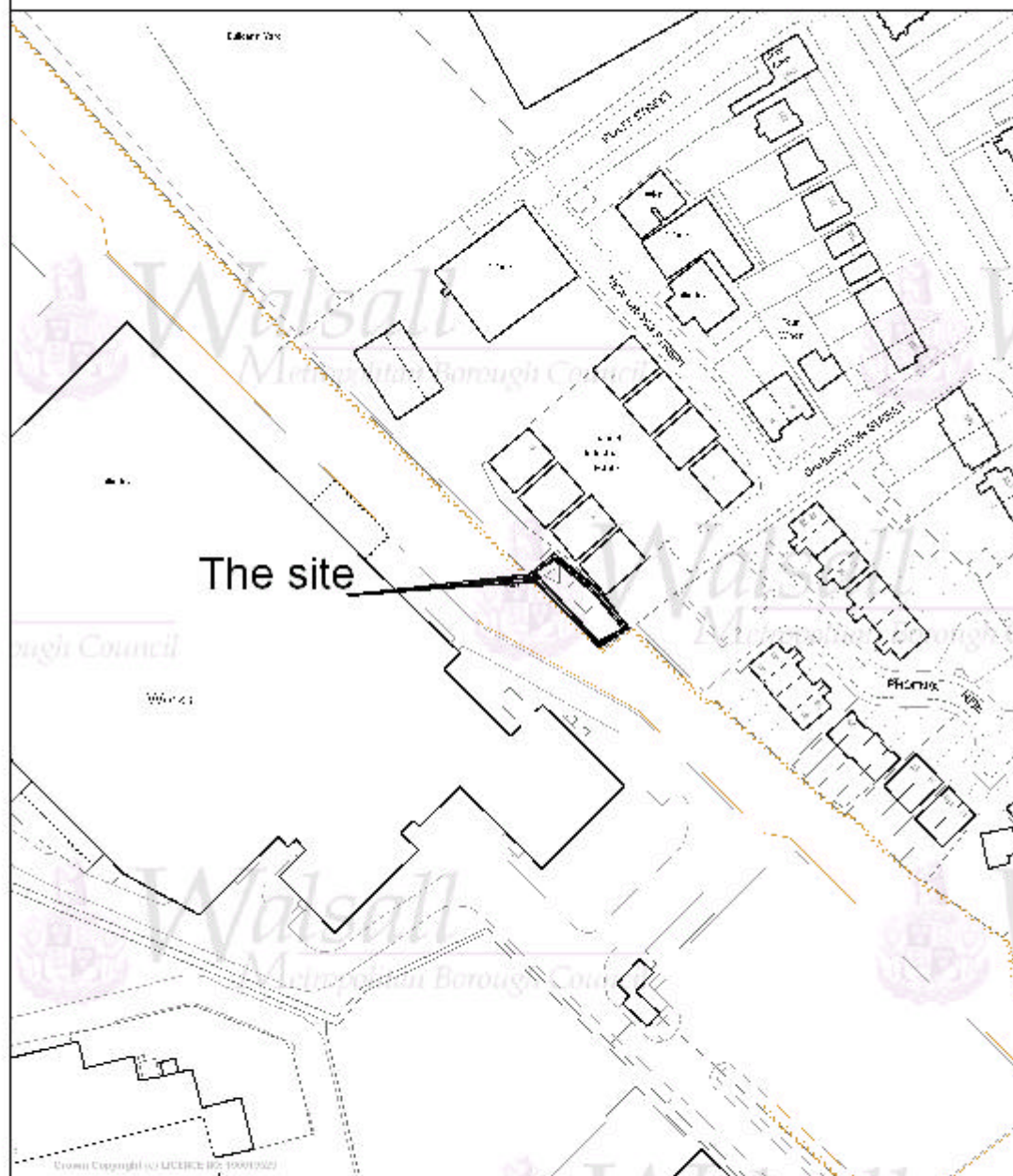
12 BACKGROUND AND REPORT DETAIL

- 12.1 At your meeting of 13/3/2007, you considered a report on this work. A copy is attached for information. You resolved to seek a full enforcement report detailing options for action to be taken. These are set out in paragraph 12.9.
- 12.2 The situation is that the equipment cabinets *as erected* needed prior approval. The prior approval procedure was not followed and therefore the works done are not lawful. This applies to aerials, wiring etc. (if one part of a scheme fails the tests in the Regulations, all of the scheme needs planning permission). The work becomes lawful after 4 years, if no enforcement action is taken, or if no planning permission is given.
- 12.3 The Council can therefore enforce what is a breach in planning control. An enforcement notice must specify what needs to be done, and also when it must be done (in this case, removal of the equipment and a reasonable time to carry out this work, say 6 months). It must also specify the equivalent of a refusal reason, demonstrating the harm that is being caused, and which needs to be undone. The "refusal reason" would have to be in something like the following terms:-
The installation is unacceptable because (*for example*) it has a significantly damaging effect on the visual amenity of the residents in the area, by reason of its size, height and general appearance.
Before resolving to use that general reason, it is necessary to look more deeply at the case in hand, to show that such a reason is appropriate.
- 12.4 When deciding whether to enforce the Council *must* decide if it is *expedient* to enforce (this is the test defined by the legislation).
- 12.5 The first step in deciding on this question is what harm does the work do? If little or no harm results, the Council does not need to enforce (and this is an entirely proper position to adopt). More significantly, if no harm results, the Council arguably should not enforce.
- As was set out in the 13/3/2007 report, the work done is in a compound containing a number of other similar pieces of equipment. The extra pieces of equipment added at ground level, on wiring structures, and on the mast have no significant effect against the backdrop of the pre-existing equipment. Consequently there is no justification to take enforcement action on grounds of appearance.
 - The works are all contained in a compound, in a corner of a cul-de-sac and will have no noticeable effects on the safety or operation of the highway.
 - The position of the planning system on health issues has been aired repeatedly in connection with applications for telecommunication works. While the arguments can be a material issue, there is a lack of evidence to support any impact on health being used as a refusal reason, and that applies equally to taking enforcement action. A certificate of compliance with the ICNIRP standard has been submitted, and that is held, by the Government, to be sufficient re-assurance on the subject.

None of these issues are sufficient, in the present case, to justify enforcement action.

- 12.6 The second step in deciding if it is expedient to enforce is that the Council must have regard to what could have been done on the site without needing to submit a planning application or a prior approval notification.
- Planning permission is needed in this case, solely because the equipment cabinets, in total, slightly exceed the allowed limits.
 - A slightly smaller installation would not need any approval from the council.
 - If an enforcement notice is served, all parties must have regard to this fall-back position.
 - The degree of damage done by the excess cabinet volume is not capable of being identified, on site and therefore it could not be held to justify enforcement action.
- 12.7 The third relevant step in deciding to enforce is what would / could happen if the notice is complied with. In this case:-
- the mobile operator would remove all the additional antennae from the mast, and the wiring installations and base cabinets from the base compound.
 - However, having done this, almost identical works could be re-installed, the day after, without any Council control at all, as permitted development. Enforcement action would achieve, effectively, nothing, because of the terms of the Regulations about what can be done without approval from the Council.
- 12.8 If an enforcement notice is served, there will, almost certainly, be an appeal. The Inspector would have to consider each of these three steps, in determining the appeal. There is no conceivable argument that can be constructed to show that so small a variation over the allowances in the Regulations justifies requiring removal.
- 12.9 Members asked for options. Option One is to serve a notice, in the terms set out at para. 12.3, or such other terms as Members may feel appropriate. However, this is likely to achieve nothing, for the reasons set out in the preceding paragraphs. Option Two is not to serve a notice and this forms the basis of my recommendation. It is considered that there is no other available option.

Darlington Street



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LICENCE NO: 100019529

Scale 1/1250 Date 3/5/2007

Centre = 397670 E 295988 N





DEVELOPMENT CONTROL COMMITTEE

Date – 13th March 2007

Report of Head of Planning and Building Control

Telecommunications installation, Darlington Street, Darlaston

Reason for lateness – concern from residents about delays, and the need to resolve the concerns of residents.

1.0 PURPOSE OF REPORT

To advise the committee of works carried out on this site.

2.0 RECOMMENDATIONS

2.1 That the Committee supports the conclusions as set out in the report

3.0 FINANCIAL IMPLICATIONS

None arising from the report.

4.0 POLICY IMPLICATIONS

The report sets out the relevant policy issues.

5.0 LEGAL IMPLICATIONS

None arising from the report.

6.0 EQUAL OPPORTUNITY IMPLICATIONS

None arising directly from this report.

7.0 ENVIRONMENTAL IMPACT

This is assessed in detail in the report.

8.0 WARD(S) AFFECTED

Darlaston South

9.0 CONSULTEES

None

10.0 CONTACT OFFICER

Bob Scrivens: 01922 652488

11.0 BACKGROUND PAPERS

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D. Elsworthy
Head of Planning and Building Control

Development Control Committee
13th March 2007

12 BACKGROUND AND REPORT DETAIL

Existing situation

- 12.1 The site has had telecommunications equipment on it since 1989, including a lattice mast (currently 18 metres tall). Complaints were received in September 2006 that additional aerials have been added to the mast, together with wiring, support structures, and equipment cabinets. The works are to enable a further operator (T-Mobile) to share this Vodafone site.
- 12.2 Residents are concerned that:-
- There was no notification of neighbours before the work was done
 - Installation works were done in ways that were intrusive, e.g. late at night, leaving litter etc.
 - They are also puzzled how the work can be done given the refusal of a prior approval application in 2005 for what appears to be the same work.
- 12.3 The surrounding area is mixed in character. The areas to the north, south and west are industrial while to the east the area is predominantly residential. The distances between the nearest two dwellings (on Phoenix Rise) and the mast are approximately 47 and 55 metres.

History

- 12.4 The relevant history of the site, in brief is
- BC27268P - radio base station and security fence. **Granted** 1989.
(A 15 metre mast was erected at this time, but under the then applicable rules did not need a planning application as it was defined as permitted development.)
- BC47576P - six metre extension to then-existing 12 metre mast and replacement of antennae. **Granted** 1997.
- 04/0930/FL/W2 - three metre increase in height of then-existing 18m mast and add 12 panel and 4 dish antennae. **Refused** 2004 on the basis that the increased height and the additional antennae would have an adverse effect on amenity and living standards.
- 05/1859/PT/W2 - Prior Approval application proposed 6 further antennae and 4 dishes on the mast (no extension was proposed for the height of the mast), and various equipment cabinets and wiring. The number of antennae was reduced by approximately half compared to the previous application. The application showed that Orange and T-mobile would share the mast and base station with Vodafone. **Refused**, 2005, contrary to recommendation, on the basis that the additional antennae would have a visually damaging effect in the area.
- 12.5 It is the similarity between this last application and the present works which has confused residents. The works are, indeed, similar. The differences are,

however, very important, and are related to the size of the equipment housings.

- 12.6 Vodafone's agents consider the most recent proposal, refused in 2005 was subject to the prior approval procedure (which was pursued) but only because of the size of the equipment housing on the ground. However, Orange are now no longer involved and the current installation is only for T-Mobile. As a result, it has been possible to reduce the size of the equipment housing. They consider prior approval is therefore not required for the work recently carried out. The issue is explored in the following section of the report.

Planning Implications

- 12.7 The legal provisions relating to permitted development and telecommunications installations are complex but can be summarised as:-
- planning permission is needed for the larger telecommunication installations
 - smaller works do not need a planning application but are subject to a process known as Prior Approval which gives the Council the chance to judge issues such as siting and appearance
 - a still smaller level of work does not need planning permission nor is it subject to the Prior Approval arrangements.
- 12.8 Officers have been considering both the additional antennae on the mast and the additional equipment housings etc. on the ground. It is clear that the additional antennae on the mast do not trigger the need for prior approval, in themselves. Matters turn on the size of the equipment housings.
- 12.9 Officers have established that the operators notified the Council of their present intentions in February 2006, but the documents did not reach planning officers. The operators took the view that, because the equipment housings were smaller than in the 2005 refusal, no formal notification was necessary (i.e. that the work did not need a planning application, and did not need to go through the Prior Approval process).
- 12.10 The industry has adopted a code of practise, and they notify councils by letter in those smallest cases. The operator implemented this informal code of practise in this case. Because there was no Prior Approval application to the Council, nor a planning application, there was no process to involve residents, and no notification was sent to them (there had been notification of the applications listed in the History section). The residents see no distinction between the formal applications and the present case, and consider they should have been consulted. That is part of their concern.
- 12.11 Matters have progressed slowly since the complaint, in part because of the need to gain access to the site, and in part by the need to interpret the complex Regulations that govern such work. In the time that has elapsed, the operator has decided to revise the work (proposing to reduce the number and size of cabinets on the site). The operator is now of the view that the work is in the smallest relevant category so it does not need planning permission and the prior approval process does not apply.
- 12.12 Legally the situation is complex, but can be summarised as follows:-

- a) The original notification on the most recent works defined work that was permitted development and not needing prior approval
- b) Had that smaller installation been carried out, the work would not have needed consent of any sort from the Council
- c) The equipment cabinets as *erected* were larger and, while it was still permitted development, it needed prior approval
- d) The prior approval procedure was not followed
- e) Therefore as erected, the work was not lawful. This applies to aerials, wiring etc, as if one part of a scheme fails the tests in the Regulations, all of the scheme needs planning permission
- f) It is your officer's view that legally, the work can not become lawful in retrospect (i.e. even by making it smaller), so a planning application is necessary because the failure to comply with the terms of the prior approval process take the case outside the terms of the Regulations
- g) The operators do not accept this conclusion, arguing that if they reduce the works, they avoid the need for both a planning application and a prior approval notification
- h) No planning application has been made
- i) The unlawful work is open to enforcement action
- j) Changes are proposed to reduce the work below the Prior Approval limits

The case for enforcement

- 12.13 The Council can enforce unauthorised works, and that is the situation here. However, the Council *must* decide if it is *expedient* to enforce (this is the test defined by the legislation). If it is not expedient, we should not take enforcement action. In judging whether it is appropriate to enforce, the Council must have regard to what could have been done, without a planning application, as well as the normal range of issues such as appearance. As I have set out above, if the currently proposed amendments had been incorporated in the original installation, no permission would have been needed from the Council. That must weigh heavily in the judgement about whether the Council should enforce.
- 12.14 While there has been no significant commentary from residents, on health issues in this case, members will be familiar with the concerns residents can hold over health, in relation to this sort of proposal. The arguments about health have been aired repeatedly in connection with applications for telecommunication works. While the arguments can be a material issue, there is a lack of evidence to support any impact on health being used as a refusal reason. The operators have submitted a certificate of compliance with the nationally recognised safe levels (ICNIRP), and that is held, by the Government, to be sufficient re-assurance on the subject.
- 12.15 Enforcement can be justified by the appearance of a scheme. In this case, the work done is in a compound containing a number of other similar pieces of equipment. The extra pieces added have had no significant effect against the backdrop of the pre-existing equipment. There is no justification to take enforcement action on grounds of appearance.
- 12.16 If enforcement were to be authorised for the works done, an appeal is likely to follow. It is highly likely that the Inspector would be invited to consider allowing

the appeal because, firstly, while the council has the power to serve such a notice, that is only because of a technicality (a minor excess in the size of the equipment cabinets ONLY), and that as a pragmatic judgement what has been done did not really need the agreement of the Council.

- 12.17 Secondly, if the intended reduction in the cabinets is carried out prior to the appeal, this will reinforce the operator's position.
- 12.18 Thirdly, the Inspector will have to consider the events if the appeal was to be dismissed. The company would be obliged to remove all the additional antennae from the mast, and the wiring installations and base cabinets from the base compound, However, having done this, the same works could be re-installed without any Council control at all as permitted development (assuming the cabinets are slightly reduced in size to avoid exceeding the Prior Approval limits).
- 12.19 Members will appreciate that this is not a strong position for the Council to adopt. The enforcement process would achieve no gain of any sort in environmental terms. It is the view of officers that this would be a misuse of the Councils resources and powers. The recommendation reflects these matters.