

CENTRAL SERVICES CABINET MEMBER MEETING

Agenda Item 53

Brighton & Hove City Council

Subject:	Cellular phone Mast near 3 Brangwyn Way, Patcham		
Date of Meeting:	23 February 2009		
Report of:	Director of Finance & Resources		
Contact Officer:	Name:	Richard Butler	Tel: 291440
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Key Decision:	No	Forward Plan No.	
Wards Affected:	Patcham		

FOR GENERAL RELEASE

1. SUMMARY AND POLICY CONTEXT:

- 1.1 To advise the Cabinet Member Meeting about the history and issues surrounding the cellular mast near 3 Brangwyn Way that has been the subject of questions and complaints from local residents and ward councillors since 2004. There has been renewed local interest in the mast over the past three months due to its upgrading and this report addresses the questions raised in Council (4th December 2008) and the other concerns and complaints received from local residents and ward councillors.

2. RECOMMENDATIONS:

- 2.1 That the Cabinet Member Meeting notes the position as set out in the report and supports the recommendation that the council seeks to re-open dialogue with T – Mobile and that local residents be advised of the limitations faced by the council under the Telecommunications legislation.

3. RELEVANT BACKGROUND INFORMATION/CHRONOLOGY OF KEY EVENTS:

- 3.1 The mast was erected by T – Mobile in 2001 on an understanding that the grassed area between London Road and Brangwyn Way formed part of the adopted highway. This is significant because where a proposal involves the highway the council cannot object as landowner and the case falls to be considered in Planning terms and any possible impact on the highway.
- 3.2 Under Part 24 of the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2001, telecommunications operators have “permitted rights” to install telecommunications equipment. Nevertheless they do have to submit a “prior approval” application to give the council, and the public, an opportunity to object to the installation. In this case, following the “prior approval” application, the Planning file indicates that a site notice was displayed although no responses were received from the public at the time. The current council practice is to directly consult

neighbouring properties when a “prior approval” application is received. The mast has been upgraded in recent months but once a mast is in situ the operators are under no obligation to consult the council or the local public with regard to the addition of further equipment, provided that the alterations are in accordance with the regulations.

- 3.3 The recent upgrading and mast sharing arrangement initiated by T – Mobile served to re-activate previous public concerns about this mast and engendered many questions from local residents. The Planning team have re-examined the case and concluded that the mast and associated installations remain within those parameters provided by the General Permitted Development Order and there is no planning or enforcement action that the council could take. The original mast was 11.7m high with a single equipment cabinet and the replacement mast is less than the 15m high limit set by the General Permitted Development Order and there are two cabinets, one for T– Mobile and one for Network 3 who are understood to share the mast.
- 3.4 In March 2004 queries first arose about the mast’s location and the possible impact of restrictive covenants believed, by others, to cover the land. For the next two and a half years, sustained efforts were made by the council (as property owners) with T – Mobile to get the mast removed. Initially it appeared the company might comply with the arguments that the site was not authorised by the council as landowner and undertake removal, but they resisted. Subsequently the council was obliged to commence the process dictated by the Telecommunications Act and served notice for the mast to be removed. T- Mobile served a counter notice making clear that the council could not require the removal of the mast without an order of the Court in accordance the Electronic Communications Code.

Expert Advice

- 3.5 A Judge, faced with such an application from the council, would defer the application whilst the operator served a notice under the Code seeking an Order to retain the mast. The Court would support retention of the mast, if satisfied that any prejudice (to the site owner) caused by retention is capable of being adequately compensated by money or, the prejudice is outweighed by the benefit to the public of keeping the network intact. In determining the extent of the prejudice and the weight of the benefit the Court shall have regard to all of the circumstances and the principle that no person should unreasonably be denied access to an electronic communications network – a concept enshrined within the Telecommunications legislation.
- 3.6 Taylor Wessing, a legal firm commissioned by the council for expert advice on this matter, made it clear that the legislation heavily favours the operator and whilst opponents might seek to mount a case on health or visual amenity grounds the potential to prove either case is virtually non existent and that the council are unlikely to succeed in a legal action. The costs will be high particularly in regard to a health challenge where the cost of preparing, presenting and defending a case could be in the region of £150,000 and double that if the council lost and had to pay both sides

costs. To succeed on health grounds there must be some existing real prospect of harm i.e. the risk needs to be more than a vague potential or theoretical possibility. Despite many authoritative studies the health risk remains unsubstantiated. Taylor Wessing speculated about the possibility of a challenge on visual amenity grounds but explained that the council must be able to demonstrate a problem to succeed. As the land is not in a conservation area there are already three lamp-posts and a telephone pole nearby further consideration suggests that a visual amenity challenge is not supportable. Recent advice indicates that those cost estimates from 2006 now look rather conservative. For confirmation of the planning advice on visual amenity please see paragraph 3.3.

Restrictive Covenants

- 3.7 Local residents have presented an argument that the grass verge is affected by restrictive covenants. This was not supported by any of the council's documents in 2004. The council's lawyers have looked a copy of the 1937 document referred to by others but do not consider that it adds anything to the council's view that the land is not subject to restrictive covenants which would prevent the erection of the mast. Another document has also been made available but the advice is that other restrictive covenants, referred to in that document, do not affect the council's land.

4. CONSULTATION

- 4.1 Consultation has taken place with the council's planning enforcement team and the legal team on; highway, restrictive covenant, ownership and telecommunications issues. In addition the council commissioned a legal telecommunications expert, from the legal firm, Taylor Wessing, to advise on all aspects with but with particular reference to the Telecommunications law. Taylor Wessing provided written advice and met council officers to address specific questions. A meeting took place between one resident and a member of the Estates team in December 2008 and there was a further meeting in January 2009 involving two local residents, the ward Councillor, the Cabinet Member for Central Services, and officers from the council's legal and property teams.

5. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

- 5.1 The current legal advice is that it would cost the council in the region of £150,000 to undertake a challenge based on health grounds which would include gathering health data, assembling a case and presenting and defending that case. In the event that the council loses the case it would also be faced with paying the costs of the other side, taking the costs in excess of £300,000. This does not represent value for money given the chances of success. No funds have been identified to support a challenge and any costs as a result of this case would have to be met from existing revenue budgets. The council currently does not receive any rental income from T-Mobile for this site.

Finance Officer Consulted: Rob Allen, Strategic Finance *Date:* 19/01/2009

Legal Implications:

- 5.2 The legal position is set out as above. Expert advice has been sought and reviewed by legal services. The conclusion reached is that there are not currently any substantive grounds which would lead to any realistic prospect of having the mast removed.

Visual amenity does not apply and the matter of health risk from masts has been subject to parliamentary investigation (still ongoing) and they were not able to conclude that there is a health risk.

Further, in any event the mast could simply be relocated close to its current site on Highways land and the above criteria would apply. It is unlikely that this could be prevented and so no further benefit would accrue to local residents.

Telecommunications providers also have compulsory purchase powers or can seek a Court Order to install or retain a mast.

The conclusion is that the probable cost implications and doubtful prospect of success rule out even a speculative application to the Court as detailed above.

Lawyer Consulted: Simon Court

Date: 15/01/2009

Equalities Implications:

- 5.3 Whilst local residents might argue that there are equalities implications from their point of view the Telecommunications Legislation governs the situation and seeks to protect the rights of telecommunications subscribers to be connected to a mobile phone network. Such is the importance that the Government gives to the Telecommunications legislation that it takes precedence over other areas of property law.

Sustainability Implications:

- 5.4 There are no sustainability implications to this report.

Crime & Disorder Implications:

- 5.5 There are no crime & disorder implications to this report.

Risk and Opportunity Management Implications:

- 5.6 The main risk and opportunity management aspect of this report relates to any decision to pursue litigation against T – Mobile and the potential costs inherent in such a course of action that would not represent value for money.

Corporate / Citywide Implications:

- 5.7 Although this is a local issue the council could be faced with similarly intractable problems should it seek the removal of other telecommunications equipment from land or premises if the telecommunications operator resists.

6. EVALUATION OF ANY ALTERNATIVE OPTION(S):

- 6.1 The options are as follows:

- Do nothing.
- Accept the status quo and seek to grant a lease to T- Mobile to retain the mast.

- Open a dialogue with T- Mobile with a view to getting the mast removed or relocated.
 - Re-open litigation with a view to seeking a Court Order for the removal of the mast and seek to pursue a case for removal on health or visual amenity grounds. This route does not represent value for money to the council as according to expert advice the prospect of success is doubtful.
- 6.2 Whilst it is acknowledged local opinion is strong it is clear from legal advice that there is little scope to force the removal of the mast (see paragraphs 3.5 and 3.6). It is vital to inform residents of the situation the council faces.
- 6.3 If it is accepted that nothing can be done to remove the mast, the council could seek to complete an agreement with T – Mobile for the retention of the mast in exchange for a rental. However, given T – Mobile’s continuing stance regarding the land’s status as “highway” the company will resist any attempt to weaken its position and to be obliged to pay rent for a site which is has occupied freely for 7 years. In addition, any proposal to grant a lease for the site would first need to be directed to the Leadership of the four Groups in accordance with the council’s Landlord’s Policy on Telecommunication Masts and protocol established in September 2004. On the basis of previous experience, the matter will be considered contentious and in accordance with the protocol a report to Cabinet will be needed which (as with all previous cases reported to Policy & Resources Committee) is highly likely to be rejected given the strength of public opinion.
- 6.4 Attempts are continuing to re – open dialogue with T - Mobile although there has been no response to the latest emails, nor to a letter from Councillors dating from 3rd December 2008. A further letter has been sent to T-Mobile on the 21st January 2009 from 4 Councillors and the 2 relevant officers requesting a meeting. To date no response has been received. Whilst such efforts can continue, in the final analysis any solution will be down to the degree that T – Mobile are prepared to co-operate. Now that they are sharing the mast with other operators there will be a desire to retain a mast in this vicinity to preserve the existing network links. The operators will seek an alternative site nearby and apart from the grass verge upon which the mast is located and which extends for about 500 m along the eastern frontage of the Brangwyn Estate no other obvious council sites are available. The rest of this verge would give rise to the same objections as the current mast. Other locations are likely to be just as close to houses on either side of the London Road. Alternatively the operator could seek to move the installation just a few metres onto the pavement which is part of the adopted highway. There is little scope for the council to object on Planning or Highway grounds respectively, providing the apparatus remains within the Permitted Development Guidelines and does not create a safety hazard by markedly narrowing the pavement or obstructing sight lines.
- 6.5 Extensive advice has already been taken in regard to a legal challenge to the mast and for the reasons set out in the report (in paragraphs 3.5 and 3.6), not least the very high possibility of failure and the level of cost which would be incurred, this is not considered to be feasible or value for money. On the remote chance that the council won the case the operator would still have scope to seek to relocate the mast on the adopted highway within close proximity of the present mast.

7. REASONS FOR REPORT RECOMMENDATIONS

- 7.1 The options are very limited with the choice reduced to continuing efforts to re-open dialogue with T – Mobile to assess the scope to adjust the position of the mast to try to meet local concerns. At the same time officers and Councillors can make clear to local residents the reasons why the council is unable to force the relocation of the mast and the ability of the operator to seek another location within the immediate vicinity.
- 7.2 If efforts are not made to impress upon local residents the reality of the situation they are likely to continue to approach Councillors and officers in a situation where the council has little, if any, control and likelihood of success.

SUPPORTING DOCUMENTATION

Appendices:

1. Plan of site showing location of mast.

Documents In Members' Rooms

1. None

Background Documents

1. None