

Interim Rights under the Electronic Communications Code

Report of the Finance and Resources Portfolio Holder

Recommended:

- 1. That a works agreement be entered into with EE Limited and Hutchinson 3G Limited in terms substantially as set out in the draft Agreement Annexed to this report.**
- 2. That the Head of Planning and Building and Head of Legal and Democratic Services be given authority to settle the final form of the Agreement.**

SUMMARY:

- To consider statutory Notice served by EE Limited and Hutchinson 3G Limited seeking agreement to carry out survey works at Beech Hurst Car Park under the Electronic Communications Code.

1 Introduction

- 1.1 The Council has been served with notice via solicitors for EE Limited and Hutchinson 3G (“the Operator”) seeking agreement to carry out survey work on part of the car park at Beech Hurst in order to establish whether the site would be suitable for the installation of a telecommunications mast.
- 1.2 A copy of the most recent Notice (which includes the proposed Agreement and plan) is annexed to this report.
- 1.3 The location of the proposed survey site is at the westerly edge of the Beech Hurst car park nearest Weyhill Road. The proposed survey site shown by yellow edging on the plan on the final page of the Annex to this report.
- 1.4 The Head of Property and Asset Management holds delegated powers to enter into various agreements regarding the Council’s estate, however the Council’s constitution reserves ‘any transaction involving the possible installation of one or more telecommunications masts and/or ancillary equipment on Council-owned land or buildings’ and requires such matters to be referred to the Cabinet for consideration and approval.
- 1.5 At this stage, the request is simply to carry out survey work to establish if the site is suitable for mast installation, *not* to erect a mast itself. Any request to erect a mast would need to be submitted and considered separately.

2 Background

- 2.1 The Electronic Communications Code ('the Code') which is inserted into the Communications Act 2003 and Digital Economy Act 2017 gives Telecommunications Operators wide-ranging statutory rights to facilitate the creation and operation of their networks.
- 2.2 It is important to note that these are *rights* and rights which can only be challenged in very limited circumstances.
- 2.3 Operators can obtain the rights in one of two ways, firstly, by agreement and secondly in the absence of agreement they can be imposed by the Court.
- 2.4 The Operator is looking for suitable sites in the local area to replace a mast which his being decommissioned.
- 2.5 The purpose of the survey is to dig a slit trench, borehole and trial dig which are intrusive works to the Council's car park. It is important to note that this Notice and request relates to the carrying out of survey work only. Granting rights to carry out the survey work does not commit the Council in any way to granting rights for any mast installation itself and in consenting to survey work, the Council does not in any way prejudice its ability to make a decision on granting rights for any mast installation itself if and when such a request ultimately arrives.
- 2.6 Senior officers are making simultaneous enquiries of the Operator as to its reasoning in identifying this site, the suitability of the site and seeking to understand the Operator's wider mast placement strategy and decision making on telecommunication mast provision in the Beech Hurst area and the wider Borough.
- 2.7 It is important to note that this decision is sought of the Council in its capacity as landowner of the site in question. The Council is obviously also the Local Planning Authority. In taking any decision, as landowner, to give permission for the survey works to be carried out is entirely separate and remote from its capacity as LPA. If, after the survey, the Operator wishes to proceed and seek to obtain rights either from the Council or ultimately from the Court to erect a mast and apparatus on the land then planning permission will be required.
- 2.8 The General Permitted Development Order 2015 gives deemed permission (subject to some exceptions) for installation of electronic communications apparatus conditional on the Developer/Operator making a prior approval application to the LPA for its siting and appearance. On receiving a prior approval application the LPA can either approve or refuse the proposed siting and appearance of the development.
- 2.9 As set out above, this decision is not in any way related to the Council's role as LPA but the general regime for obtaining substantive permission is set out in the above paragraphs for information.

3 Consultations/Communications

- 3.1 No consultations have been undertaken in relation to the Notice served. This is a Statutory Notice which has been served on the Council. It is understood that the Operator has written to some neighbouring properties regarding their proposal.

4 Options

- 4.1 **Option 1** Agree to give the requested rights to the Operator.
- 4.2 **Option 2** To refuse to give the requested rights.
- 4.3 **Option 3** To not respond at all to the notice.

5 Option Appraisal

- 5.1 If either Option two or three was adopted the Operator would apply to court for an order conferring the rights sought. The Heads of Property and Management and Legal and Democratic Services have obtained specialist telecommunications legal and technical advice. There currently exist no grounds to properly object to the survey work and it is recommended that rights are given by agreement. For these reasons Option 1 is the recommended Option.

6 Risk Management

- 6.1 An evaluation of the risks indicate that the existing controls in place mean that no significant risks have been identified at this time.

7 Resource Implications

- 7.1 There are no adverse resource implications to the recommended course of action in respect of the survey works. If granted, the Operator will carry out the survey and reinstate the site to its former condition.
- 7.2 Agreeing to confer the expressly limited survey rights at this stage will avoid the Council being ordered to pay the Operator's court fees in the event that consent is not given and the Operator applies to the court for an order conferring the rights.
- 7.3 The Operator will repay reasonable costs properly incurred by the Council in providing access to carry out the surveys along with any supervision required of up to £500 plus vat for the first day of access and £350 for each subsequent day.

8 Legal Implications

- 8.1 The legal implications of the recommended option are that the Operator EE Limited and Hutchinson 3G Limited will be able to carry out survey works at the Beech Hurst car park.

8.2 The recommendation does not commit or imply commitment to permission being given for erection of the telecommunications mast itself and in no way prejudices the Council's ability to consider any request regarding the mast itself. If and when the operators wish to proceed with that work, a further decision will be required and presented to Cabinet with all relevant supporting documentation.

8.3 As set out above, if an agreement is not entered into, the Operator will apply to the Court for an order compelling the Council to provide access. It is likely that the Council would be ordered to pay the costs of such an application. There are currently no grounds to resist that particular application.

9 Equality Issues

9.1 No equality issues arise as a result of the subject matter of this report.

10 Other Issues

10.1 None identified.

11 Conclusion and reasons for recommendation

In the absence of grounds to object to the request for rights to carry out specified surveys, and in the light of the likely court costs which would fall to the Council if the Council does not consent, it is recommended that agreement to survey is entered into. To reiterate, any agreement pursuant to the recommendation allows the operator to survey in accordance with the Agreement and nothing further.

<u>Background Papers (Local Government Act 1972 Section 100D)</u> Digital Economy Act 2017 (legislation.gov.uk)			
<u>Confidentiality</u> It is considered that this report does not contain exempt information within the meaning of Schedule 12A of the Local Government Act 1972, as amended, and can be made public.			
No of Annexes:	1	File Ref:	N/A
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