

# Interim Rights under the Electronic Communications Code

Report of the Finance and Resources Portfolio Holder

## Recommended:

- 1. That an access agreement be entered into with EE Limited and Hutchinson 3G Limited to allow access to the site within this report, if a formal Notice is submitted.**
- 2. That the Head of Property and Asset Management and Head of Legal and Democratic Services be given authority to settle the final form of the Agreement.**

## SUMMARY:

- To consider request for access by Waldon Telecom Limited on behalf of EE Limited and Hutchinson 3G Limited seeking agreement to carry out survey works at East Portway, Andover under the Electronic Communications Code.

## 1 Introduction

- 1.1 The Council has received a request, prior to an official notice, on behalf of EE Limited and Hutchinson 3G (“the Operator”) seeking agreement to carry out survey work at East Portway in order to establish whether the site would be suitable for the installation of a telecommunications mast.
- 1.2 The location of the proposed survey site, as a temporary site, at East Portway close to the junction with Weyhill Road. The proposed survey site is shown solid red on the plan in the Annex to this report. Contact has been made with Waldon, the agent for EE and Hutchinson 3G, asking if the mast could be located further from the housing and possibly within the industrial area edged blue. Due to the site topography and trees in the line of site for the area that needs a signal this has not proven possible. Clarification has also been sought in relation to the detail of the design and access arrangements. It has also been suggested from the Council’s perspective, as landowner, that this could be a permanent site and that the Council would favour an electrical mains option rather than a diesel generator to power the mast, even on a temporary basis due to the noise and pollution impact on nearby properties.
- 1.3 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 carves out 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.

- 1.4 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 actually 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 is being decommissioned.
- 2.5 The purpose of these proposed surveys is to carry out Multi Skilled Visits (MSV) to assess whether there are impediments on the site such as radio wave interference, access issues, existing infrastructure etc. It is important to note that this 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 installations 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 arrived.
- 2.6 Outline information on the need for sites in Andover generally has been provided and these discussions are ongoing but in the meanwhile it is recommended that requests be considered prior to the formal notice.
- 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. Any decision, as landowner, to give permission for the survey works to be carried out is entirely separate and remote from the Council's capacity as LPA. If, after the surveys, 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 also required in the usual way.
- 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. In the case of temporary masts different provisions can apply. Cabinet will be provided with an update on any differences in the Code with regards this being a temporary site.

2.9 As set out above, today's decision is not in any way related to the Council's role as LPA.

### **3 Consultations/Communications**

3.1 No consultations have been undertaken in relation to this request. In the previous instance the Operator has written to some neighbouring properties regarding their proposals, normally when a Notice is served.

### **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 request.

### **5 Option Appraisal**

5.1 If either Option two or three was adopted, if a Notice follows this request, the Operator would apply to court for an order conferring the rights sought. From the experience of the previous request the Notice can follow quickly. 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. If the Council ultimately made an order requiring access it is likely that the Council would be ordered to pay the Operators costs of obtaining that order.

### **6 Risk Management**

6.1 An evaluation of the risks indicates 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 resource implications to the recommended course of action in respect of the survey works. If granted, the Operator will carry out the surveys 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 for each site. Officers are also looking to obtain fees for any external professional advice.

## 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 site at East Portway without the need for a Court Order.
- 8.2 The recommendation does not commit or imply commitment to permission being given for erection of telecommunications mast itself and in no way prejudices the Council's ability to consider any request regarding the mast itself. If 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, at the next stage following a Notice, an agreement is not entered into, the Operator may apply to the Court for an order compelling the Council to provide access. In this instance 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

- 11.1 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> 2017 Electronic Communications Code			
<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.			
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