

ANGUS COUNCIL

DEVELOPMENT STANDARDS COMMITTEE – 27 OCTOBER 2020

**ENFORCEMENT APPEAL DECISION: LAND SOUTH OF 65 DUNDEE STREET
CARNOUSTIE**

REPORT BY SERVICE LEADER – PLANNING & COMMUNITIES

Abstract:

This report presents the findings of the Reporter appointed by Scottish Ministers to determine an appeal by EE Ltd/Hutchison 3G UK Ltd against the decision of Angus Council to issue an enforcement notice requiring the removal of a telecommunications mast and associated apparatus from land to the south of 65 Dundee Street Carnoustie. The Reporter dismissed the appeal and upheld the terms of the enforcement notice.

1. RECOMMENDATION

It is recommended that the Committee notes the outcome of the above appeal.

2. INTRODUCTION

- 2.1 A telecommunications mast was erected on the land in question in July 2018 under the provisions of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, as amended. Amongst other things those provisions allow for the siting of telecommunications apparatus in emergency circumstances for a period not exceeding 18 months. At the end of the 18 month period the Order requires the apparatus to be removed.
- 2.2 The telecommunications operator was advised that the location was not considered to be appropriate as a permanent site for a mast and was encouraged to investigate alternative locations before the expiry of the temporary period. At the end of the temporary period in January 2020 the mast had not been removed and was on-site in breach of planning control.
- 2.3 The operator was provided a period of time to remove the mast but a planning application ([20/00103/FULL](#)) seeking its retention for a further period of time was submitted. That application attracted objection from residents in the local area and the applicant was advised that the location was not considered to be appropriate. The applicant indicated that construction of a permanent mast at another site where planning permission had been granted was imminent and would allow removal of the mast. On that basis it was agreed that determination of the application would be delayed. That alternative mast was constructed but the applicant subsequently indicated that it did not meet the coverage requirements. In the absence of any significant progress an enforcement notice was served that required removal of the mast.
- 2.4 The enforcement notice was subject of appeal and determination of the planning application was delayed pending the outcome of the appeal. The applicant has subsequently withdrawn the planning application for retention of the mast and has confirmed that it is their intention to comply with the enforcement notice and the timescale for compliance contained within it.

3. REPORTER'S DECISION

Decision

I dismiss the appeal and direct that the enforcement notice dated 27 July 2020 be upheld. Subject to any application to the Court of Session, the enforcement notice takes effect on the date of this decision, which constitutes the determination of the appeal for the purpose of Section 131(3) of the Act.

Background

1. Part 20, Class 67(1) of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, as amended by the Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2017, states that the following works are permitted development:

“Development by or on behalf of an electronic communications code operator for the purposes of the operator’s electronic communications network in, on, over or under land controlled by the operator or in accordance with the electronic communications code, consisting of –

 - (b) the use of land in an emergency for a period not exceeding 18 months to station and operate moveable apparatus required for the replacement of unserviceable apparatus, including the provision of moveable structures on land for the purposes of that use;
2. Paragraph 17 of Class 67 indicates that development which is carried out under the terms of sub-paragraph 1(b) is permitted subject to the condition that the developer must, as soon as possible after the emergency arises, give written notice to the planning authority containing certain information and the date when the development commenced or is to commence. Paragraph 21 requires that when the period of 18 months expires or, if earlier, when the need for the development ends, the apparatus must be removed from the land and the land restored to its condition before the development took place.
3. On 26 July 2018, agents acting for one of the current appellants wrote to the council, notifying the intention to erect a 17.5 metre high temporary mast on concrete blocks, with associated works, on the appeal site. The reason given for this requirement was to replace existing Airwave sites which were going to be decommissioned as part of the Home Office’s move to a new 4G service operated by EE Ltd. It was stated that the temporary site was required to provide coverage whilst planning for a permanent site solution took place, and the apparatus would be removed once this was in place. It was envisaged that the temporary installation would not be in place for the full 18 months allowed by Class 67(1)(b).
4. The enforcement notice which is the subject of this appeal was served by the council on 27 July 2020 and requires the removal of the apparatus within 16 weeks of the notice coming into effect.

Reasoning

5. The appeal against the enforcement notice was made on the following grounds as provided for by section 130(1) of the Town and Country Planning (Scotland) Act 1997, as amended:
 - (f) that the steps required by the notice exceed what is necessary to remedy any breach of planning control; and
 - (g) that the period specified in the notice for compliance falls short of what should reasonably be allowed.

6. In addition, however, the appellants' agent has also suggested that the enforcement notice may be invalid for two further reasons:
 - (i) the notice omits any reference to when the alleged breach commenced, and therefore how much of the permitted 18 month period has been "used up" (although the appeal does not formally cite ground (c) of section 130(1)); and
 - (ii) the notice was not served on the owner of the land on which the apparatus is located, as required by section 127(2) of the Act (although the appeal does not formally cite ground (e) of section 130(1)).
7. I will deal with these two matters first before returning to the formal grounds of appeal referred to in paragraph 5 above. The council has pointed out that there is no requirement in section 128 of the Act to set out the date when the breach of planning control commenced. It states that the beginning of the 18 month emergency period was clearly set out in the notification letter of 28 July 2018, referred to in paragraph 3 above. In correspondence between the appellants' agent and the council, the former stated on 27 November 2018:

"It's only been on site since 26/7/2018, so it is early days in the 18 month temp period lifecycle..."
8. I am satisfied that the balance of evidence indicates that 18 month period commenced on or about 26 July 2018, and therefore expired on or about 26 January 2020. The enforcement notice was not served until 27 July 2020, well after the emergency period had expired, and I conclude that the continued presence of the mast and associated apparatus on the appeal site does constitute a breach of planning control.
9. With regards to the second matter referred to in paragraph 6 above, the temporary mast is situated within the yard of an industrial building, and the appellants suggest that the enforcement notice was not served on the owner of that land. The council has confirmed, however, that a copy of the notice was served on the landowner. I am therefore satisfied that the notice was served correctly.
10. Turning to the first of the formal grounds of appeal, I was unable to inspect the site itself for security and safety reasons. However, the temporary mast was clearly visible from the surrounding area. In any event, there is no dispute between the parties that the mast and associated works are present on the site. The appellants have stated that the facility is required to serve the DD7 post code area and also the emergency services network. An alternative site is currently being sought and a planning application was submitted to the council on 10 February 2020 for the retention of the temporary facilities for 12 months. That application has not yet been determined and the appellants question the expediency of serving the enforcement notice in these circumstances.
11. The council has confirmed that the planning application is still under determination, but planning officers have indicated to the appellants that it is unlikely to be supported. I do not know the reason for the delay in determining the application but, in any event, it is not open to me in dealing with an enforcement appeal to consider the planning merits or otherwise of the development. The appellants have highlighted the benefits of retaining the mast, which they consider outweigh any perceived impact on the amenity of the area. However, the enforcement notice has been served because there has been a breach of planning control and the specified measures to be taken are intended to remedy that breach, in accordance with section 128(4)(a) of the Act. In these circumstances, I find that there is no appropriate remedy other than the removal of the mast and associated works, as required by the notice. The appeal under ground (f) therefore fails.

12. With regards to the appeal under ground (g), the notice allows a period of 16 weeks for compliance. Based on current timescales, this would require the removal of the mast by early in the New Year. As the planning application submitted by the appellants seeks an extension for the retention of the mast until February 2021, the period for compliance does not fall far short of that. I appreciate that, if the council refuses permission for this retention, the appellants would have the right of appeal, in which case the planning merits of its retention would be considered. However, as I have already indicated, it is not for me to consider any such merits. The appellants have now had over two years in which to find an alternative location for the permanent siting of the necessary communications equipment and, whilst I do not underestimate the difficulties associated with such a search, I am satisfied that the period for compliance allows adequate time to remove the existing mast and associated apparatus from the site. I therefore find that the appeal under ground (g) fails.
13. In the circumstances, therefore, I dismiss the appeal and uphold the enforcement notice as served.

4. FINANCIAL IMPLICATIONS

There are no financial implications arising from this Report.

NOTE: No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) were relied on to a material extent in preparing the above report.

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DATE: 09 OCTOBER 2020

Appendix 1 : Location plan