COTSWOLDS CONSERVATION BOARD COMMENTS REGARDING PLANNING APPLICATION S.17/2073/TEL AND THE 'PRIOR APPROVAL' PROCESS FOR ELECTRONIC COMMUNICATIONS

BACKGROUND

This report relates to the proposed installation of a 15m telecommunications mast and associated infrastructure at land off Pincot Lane, Painswick, Gloucestershire (Planning Reference: S.17/20973/TEL).

From the information that has been provided to the Board and / or researched by the Board, the background to this proposal is as follows.

The application was submitted to Stroud District Council (Stroud DC) in September 2017. Stroud DC refused planning permission in November 2017, on the basis they were '*not satisfied that the mast and its associated equipment would not be visually harmful to the established landscape character of this part of the* AONB'. I have attached the site location map, proposed site elevation and decision notice for information.

However, the applicant apparently didn't receive notification of this decision within the required period of 56 days (see below). As a result, the way that the relevant legislation is framed means that permission is deemed to have been granted. The developer is now wanting to proceed with the development, against the landowner's wishes, and may refer the case to a tribunal case to force the development through.

Stroud DC has provided additional information regarding this planning application (see attached email).

PERMITTED DEVELOPMENT RIGHTS / PRIOR APPROVAL

Proposals for communications masts such as this one come under what are known as permitted development rights. Communications masts are covered under Part 16, Class A, of the Town and Country Planning (General Permitted Development) (England) Order 2015 (link).

For a 15m high mast, 'prior approval' is required from the local planning authority (LPA) as part of the permitted development process. Paragraph 029 of the Government's Planning Practice Guidance for 'When is Permission Required' (link) states that '*statutory requirements relating to prior approval are much less prescriptive than those relating to planning applications. This is deliberate, as prior approval is a light-touch process which applies where the principle of the development as already been established*.'

In considering prior approval applications of this type, LPAs must restrict themselves to considering the acceptability of the proposal only in relation to appearance and siting. Consideration of appearance covers aspects such as materials used, colour and design. Consideration of siting covers

aspects such as impacts on the ecological value of the site and on the wider landscape, as well as the proximity to buildings and housing.

In summary, the prior approval process is akin to outline planning permission having already been granted, with the only reserved matters that the LPA should consider being the detailed siting and appearance of the apparatus.

56 DAY TIMESCALE

The conditions relating to Part 16, Class A, permitted development specify that the LPA must determine the planning application and inform the applicant, in writing, of their decision within *'a period of 56 days beginning with the date on which the local planning authorities received the application*.' If the LPA does not make their decision *and* inform the applicant of this decision within this 56 day period, **permission is deemed to have been granted**. This fact is reiterated in the Government's Planning Practice Guidance referred to above.

Court decisions have shown that it is not sufficient for a local planning authority to have made a decision within 56 days for the requirements of the legislation to have been met. It is the receipt of that decision (in the form of a valid legal notice) by the applicant that constitutes compliance.

According to the Stroud DC planning portal, this prior approval application was received by Stroud DC on Wednesday 13 September 2017. So, '*a period of 56 days beginning with the date on which the local planning authority received the application*' would run through until Wednesday 8 November 2017. According to the planning portal, Stroud DC made the planning decision (and the decision was 'printed') on Wednesday 8 November 2017.

So, the decision was made within the required time period. However, Stroud DC has clarified that the decision notice was then sent by letter, in the post, and was received by the applicant after the 56 day period had expired. Stroud DC has explained that measures have subsequently put in place to ensure that this delayed notification does not happen again (for example, by emailing decision notices to the applicant rather than sending a letter in the post).

OTHER CONDITIONS RELATING TO PART 16, CLASS A, DEVELOPMENT

The 2015 Order set out a range of conditions relating to Part 16 Class A development.

For example, the development must begin within 5 years of the date that the LPA received the application (i.e. by 13 September 2022, in this instance).

If the applicant hasn't complied with all of the relevant conditions then it could potentially be argued that the permitted development rights do not apply.

CODES OF PRACTICE

Another factor that should be taken into account is Ofcom's 'Electronic Communications Code of Practice' (link). The information on page 5 of this code indicates that the developer should seek the written agreement of the landowner. Paragraph 1.25 states: '*Although the Code provides a mechanism for the court to impose terms of occupation on the Landowner and the Operator, the parties should make every effort to reach voluntary agreement first*.' Paragraph 1.27 emphasises that that '*one of the principal purposes of this Code of Practice is to establish a voluntary process,*

which avoids recourse to the courts.' Paragraph 1.52 adds that '*where disputes arise, the parties should seek to resolve them informally (i.e. without recourse to litigation) in the first instance*.'

So, a key question to consider would be whether the developer has made every effort to reach voluntary agreement with the landowner and whether they have sought to resolve any dispute informally, prior to recourse to the courts. If they haven't then they could be said to be in breach of the Code of Practice.

The 'Code of Best Practice on Mobile Network Development in England' (link), published jointly by the mobile network operators, would also be relevant. For example, page 39 has further details on siting and appearance considerations and page 29 outlines additional considerations relating to proposals in AONBs – see 'Duty of Regard', below, for further comments on this.

NATIONAL PLANNING POLICY FRAMEWORK (NPPF)

Section 10 (paragraphs 112 to 116) of the NPPF (link) sets out national planning policy with regards to 'supporting high quality communications'. However, would primarily apply to applications for masts that exceed the permitted development rights and would, therefore, require a full planning application. As indicated above, for prior approval applications for masts, LPAs must restrict themselves to considering the acceptability of the proposal in relation to appearance and siting.

DUTY OF REGARD

Under Section 85 of the Countryside and Rights of Way Act 2000 (link), 'relevant authorities' have a statutory duty to have regard to the purpose of conserving and enhancing the natural beauty of AONBs '*in exercising or performing any functions in relation to, or so as to affect, land in an AONB*'. This duty is commonly referred to as the 'duty of regard'. 'Relevant authorities' includes local planning authorities (LPAs) and statutory undertakers. Mobile network operators, such as Vodafone, would be classed as statutory undertakers in this regard. So, in this instance, Vodafone must have regard to the purpose of AONB designation when proposing to install a mast in the Cotswolds AONB.

Formal guidance on the duty of regard has been published by Defra (link) and by Natural England (link). This guidance is referred to in the Government's Planning Practice Guidance on the Natural Environment (paragraph 039) (link). The Board has also summarised this guidance in Appendix 4 of the Cotswolds AONB Management Plan 2018-2023 (link).

It is worth noting that the duty applies to *any* activities that a relevant authority, including statutory undertakers such as Vodafone, may undertake that affects land in an AONB. So, in theory, it relates to permitted development as well as to development that requires planning permission. However, given the narrow focus of the 'reserved matters' for such 'prior approval' developments, the main consideration in this regard would have to be the siting and appearance of the proposed development.

The 'Code of Best Practice on Mobile Network Development in England' (page 29) highlights the fact that there are certain locations, including AONBs, where sensitive siting and design are of increased importance. It states: '*In these areas, particular attention will need to be paid to the nature of the proposals, the significance of the location, the impact that the proposals could have and the need to reduce any adverse impact. Operators may sometimes be able to avoid a specific site (e.g. a Listed Building) but not an entire protected area (e.g. a National Park) in which case they should seek to*

minimise the impact through sensitive design and appropriate siting of the proposals' (N.B. Underlining added for emphasis).

The applicant might argue that siting the mast next to trees and having a green coloured mast fulfils this requirement. However, it could potentially be counter-argued that:

(i) this doesn't necessarily mean that impacts have been minimised *(for example, is the selected site the best option for minimising visual impacts or are there more suitable, alternative sites for achieving this within the area where the mast needs to be located?)*; and

(ii) if impacts haven't been minimised, the applicant has not complied with the Code of Practice.

Further weight is added to this counter-argument by the fact that Stroud DC refused planning permission on the basis that they were '*not satisfied that the mast and its associated equipment would not be visually harmful to the established landscape character of this part of the* AONB'. The fact that the applicant seeks to proceed with implementing the scheme, in spite of this refusal and the reasons for it, adds even greater weight to this counter-argument.

One way in which a statutory undertaker can demonstrate that they are seeking to fulfil their duty of regard is to consult the body whose statutory purpose is to conserve and enhance the natural beauty of the AONB (i.e. the Cotswolds Conservation Board). However, in this instance, Section 7 of the application form shows that **the Board was not included in the list of stakeholders that the applicant consulted. As such, the applicant has not fulfilled this aspect of the duty of regard.**

Based on the points outlined above, it could potentially be argued that the applicant has not fulfilled their statutory duty of regard (and, by extension, has broken the law).

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13 August 2020