



Appeal Decision

Inquiry held on 13 May, 15 & 16 July
2009 and site visit made 16 July 2009

by **Tim Belcher** FCII, LLB (Hons), Solicitor
(Non-Practising)

an Inspector appointed by the Secretary of State
for Communities and Local Government

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Decision date:
12 August 2009

Appeal Ref: APP/V3310/C/08/2077856

Land at Burnham Garden Centre, Pier Street, Burnham on Sea, Somerset.

- The appeal is made under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act).
- The appeal is made by Telefonica 02 UK Limited against an Enforcement Notice issued by Sedgemoor District Council.
- The Council's reference is E11/688.
- The Enforcement Notice was issued on 16 April 2008.
- The breach of planning control alleged in the Enforcement Notice is: Class A(b) of Part 24 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (As Amended) grants planning permission for the use of land in an emergency for a period not exceeding six months to station and operate moveable electronic communications apparatus required for the replacement of unserviceable electronic communications apparatus, including the provision of moveable structures on the land for the purposes of the use subject to conditions.
- The condition in question is No A2(3) which states that: Class A(b) development is permitted subject to the condition that any apparatus or structure provided in accordance with that permission shall at the expiry of the relevant period be removed from the land and the land restored to its condition before the development took place.
- The Enforcement Notice alleges that the Condition has not been complied with because the relevant period has expired and the apparatus or structures remain on the land.
- The requirement of the Enforcement Notice is to cease the use of the land for the stationing of electronic communications apparatus or structures.
- The period for compliance with the requirement is one month.
- The appeal is proceeding on the grounds set out in Section 174(2)(a) & (g) of the 1990 Act.

Application for costs

1. At the Inquiry an application for costs was made by the appellants against the Council. This application is the subject of a separate Decision.

Decision

2. I allow the appeal, and direct that the Enforcement Notice be quashed. In accordance with Section 177(1)(b) and Section 177(4) of the 1990 Act, I hereby discharge condition No. A2(3) attached to the planning permission granted by virtue of Class A A(b) of Part 24 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (as amended), and substitute the following new condition:

A.2(3) - The use hereby permitted shall be discontinued and the mobile rig and Heras fencing removed from the site on or before the 12 February 2011 or 9 months after planning permission has been granted for a rooftop

telecommunications installation comprising a 5m shrouded flagpole mast with three shrouded antennas and ancillary development on the roof of the Ritz Cinema and Social Club, with three equipment cabinets fitted inside the building, in accordance with O2's planning application, LPA ref 11/08/00102, whichever is the earlier date.

3. I also grant planning permission on the application deemed to have been made under Section 177(5) of the 1990 Act for the use of land in an emergency for a period not exceeding six months to station and operate moveable electronic communications apparatus required for the replacement of unserviceable electronic communications apparatus, including the provision of moveable structures on the land for the purposes of the use but subject to the other conditions attached to that permission and to an identical new condition A.2(3) as set out in paragraph 2 above.

Ground (a) and the deemed planning application – that planning permission should be granted for what is alleged in the Enforcement Notice.

4. The development plan for the area includes saved Policy PCS4¹ of the Sedgemoor District Local Plan (the Local Plan), saved Policy 62² of the Somerset & Exmoor National Park Joint Structure Plan Review 1991 to 2011 (the Structure Plan) and paragraph 10.7³ of the Regional Planning Guidance for the South West (RPG 10). The Council have confirmed that the unauthorised mast is in accordance with the Structure Plan Policy⁴ and they confirmed at the Inquiry that there is no conflict with RPG 10.
5. Local Plan Policy PCS4 explains that proposals for telecommunications development will be permitted taking account of the limitation imposed by the nature of the telecommunications network and technology, provided that specified criteria are met. The only criterion that is relevant to this appeal is whether there is a serious adverse effect on character and appearance of the area as a result of the stationing of the unauthorised mast. In my view this Policy is primarily directed at assessing proposals for permanent telecommunication development rather than the temporary/emergency stationing of such development on land.
6. I have also been referred to Government advice in Planning Policy Guidance Note 8 "*Telecommunications*" (PPG 8), Planning Policy Guidance Note 13: "*Transport*", Planning Policy Guidance 18: "*Enforcing Planning Control*" and The Planning System: "*General Principles*".

Background Information

7. Prior to June 2005 Telefonica O2 UK Limited's (O2) coverage to Burnham-on-Sea (Burnham) was provided by a 40m mast at Highbridge. That mast was decommissioned in June 2005 when the Highbridge site was sold by British Telecom for residential uses. Shortly after this decommissioning O2 began to

¹ Document 3

² Document 2

³ Document 1

⁴ Paragraph 4.1 of Document 4.

- receive complaints from its customers in Burnham relating to loss of signal in the seafront area and poor quality signal elsewhere⁵.
8. Burnham Area Rescue Boat (BARB) are a charity that provide rescue services for emergencies on the mud flats and in the low waters off and near the coast of Burnham and other nearby areas. It was not disputed that problems arise off the coast due to the treacherous currents and the substantial rise and fall in water levels due to the tides along this part of the coast. BARB operates from the Burnham Marine Rescue Centre on the Esplanade at Burnham and work closely with the Royal National Lifeboat Institute (RNLI) and the Maritime and Coastguard Agency (the Coastguard).
 9. BARB uses the O2's text messaging service to muster shore-helpers and crews. The problems resulting from the loss of the Highbridge mast meant that BARB had problems getting some text messages through to their recipients and other messages were delayed. BARB lodged their concerns with O2 about the implications arising from the problems explained above⁶. The Chairman of BARB explained in a letter that delays in mustering a crew and other helpers could result in lives being put at risk⁷. Further still, members of the public who use the O2 service were unable to contact the Coastguard to report emergencies due to lack of coverage in the seafront area of Burnham. Similar problems affected the members of the RNLI service which operates out of Burnham.
 10. Attempts were made by O2 to overcome the problems identified above by erecting masts or proposing the erection of masts at Isleport Farm, Marine Drive and the Marine Rescue Centre. For various reasons those proposed solutions failed to solve the problems.
 11. The problem was remedied by the erection of a mast at Burnham Garden Centre in May 2007 using the permitted development rights under Part 24 of the Town and Country Planning (General Permitted Development) Order 1995 (GPDO). The relevant notice was given to the Council⁸. A permanent solution to the problems explained above was not found within the six month period permitted by the GPDO. In March 2008 O2 applied for a 12-month temporary planning permission for the mast and apparatus at Burnham Garden Centre. This application was refused in May 2008⁹.
 12. O2 have also tried to resolve the problem by an extension in height of a mast at Burnham Athletic & Sports Club and a rooftop installation at the Ritz Cinema. The second application relating to the Ritz Cinema is subject to an appeal that is likely to be determined later this year.

⁵ Document 10

⁶ Document 11

⁷ Document 25

⁸ Document 13

⁹ Document 19

Whether the development causes material harm to the character and appearance of the area and, if so, whether the harm is outweighed by the temporary need, having regard to the situation regarding alternative sites, for the development on this site

13. The unauthorised mast is sited adjacent to public car parking (including parking by coaches that bring visitors to Burnham), the RNLI lifeboat station and shop (a tourist destination) and a café (Alfie Blu's). It is also near one of the main roads leading to the seafront and is close to the High Street. It was clear from my visits to the site and surroundings that the High Street is the main shopping street in this part of Burnham and it caters, amongst other things, for the needs of holiday makers and tourists visiting Burnham. The unauthorised mast is clearly seen from these vantage points. Further, the mast can be seen from the Esplanade, Pier Street and Marine Drive. All of these roads are likely to be used by visitors and holiday makers coming to Burnham. The unauthorised mast is significantly taller, wider and of a different shape to nearby lampposts, other lighting columns, flagpoles and telegraph poles. The unauthorised mast is also close to bungalows in Steart Gardens and can be seen towering above those properties. I am of the view that the unauthorised mast materially harms the character and appearance of the area. It is agreed by O2 that the unauthorised mast should only be allowed to remain on site for a temporary period whilst a permanent solution to the problems explained above is found. Accordingly, the material harm will only remain for a temporary period.
14. It is clear from the O2's evidence that there is an indisputable need for the unauthorised mast. Further, the Council do not dispute that there is a need for the temporary mast.
15. O2 explained that, having applied the sequential test set out in PPG 8, there were no alternative sites available to meet the need other than the permanent solution offered by the rooftop installation at the Ritz Cinema. The alternative sites examined by O2 included those suggested by the Council¹⁰. The only other possible locations for the siting of a temporary mast were discussed at the Inquiry and O2 explained the technical constraints that applied and the Council accepted O2's evidence as to unsuitability of these. I therefore conclude that on the evidence available to me, there are no alternative sites available for the temporary mast.
16. I have explained above that the unauthorised mast is vitally important if the O2 network is going to continue to be used by BARB and/or the RNLI to respond to emergencies at sea or on the mud flats. Further, the unauthorised mast is required if members of the public using the O2 system are reporting emergencies to the Coastguard. Without the O2 service there is a serious risk for those that need the help of the emergency rescue services.
17. I therefore conclude that the material harm caused by the unauthorised mast to the character and appearance of the area is clearly outweighed by the temporary need for the mast on this site.

¹⁰ Document 21

Other Matters

18. PPG 8 advises that if a proposed mobile phone base station meets the International Commission on Non-Ionizing Radiation Protection (ICNIRP) guidelines for public exposure to radio waves it should not be necessary to consider further the health aspects of the proposal. The Council do not seek to suggest otherwise. A local resident handed a document¹¹ in to the Inquiry which implied that there may be an objection to such masts on health grounds. I accept that any fear of risk to health from the unauthorised mast is relevant to my decision. However, the unauthorised mast complies with the ICNIRP guidelines¹². Bearing in mind that there is no objective evidence before me to support local fears and that the emissions from the unauthorised mast would be well within the ICNIRP guidelines, I do not consider the health concerns are sufficient to justify refusing temporary permission for the mast.

Conditions

19. O2 suggested a condition that the unauthorised mast be removed within 9 months if planning permission was granted for the rooftop telecommunications installation at the Ritz Cinema or 18 months from the date of this permission, whichever is the earlier. The nine month period would accord with the approach adopted by Inspector Turner when dealing with an Enforcement Notice appeal relating to a temporary mast being replaced by a permanent one at Isleport Farm¹³. In my view this is an acceptable mechanism to ensure a continuity of service is provided in Burnham, especially for the emergency services seeking to protect those in trouble off this part of the coast. If permission for the Ritz Cinema proposal is refused O2 confirmed that they would require 18 months (from the date of this permission) to make alternative arrangements to provide coverage in the relevant parts of Burnham.

Overall Conclusion

20. For the reasons given above I conclude that the appeal should succeed on Ground (a) and that the Enforcement Notice should be quashed. I propose to discharge the condition the subject of the Enforcement Notice, and to grant planning permission, on the application deemed to have been made, for the operations previously permitted without complying with the condition enforced against, but to substitute condition as indicated above. The appeal on Grounds (g) does not therefore fall to be considered.

Tim Belcher

Inspector

¹¹ Document 7

¹² Document 23

¹³ Paragraph 26 of Document 12

DOCUMENTS

- Document 1 – Regional Planning Guidance for the South West – Paragraph 10.7.
- Document 2 – Structure Plan Policy 62.
- Document 3 – Local Plan Policy PCS4.
- Document 4 – Statement of Common Ground.
- Document 5 – Copy of the Council’s letters of notification of the appeal and Inquiry, list of persons notified and Site Notice.
- Document 6 – Letter dated 1 May 2009 from Peter Rossiter & Company to Sedgemoor District Council.
- Document 7 – Extract from *“Take a Break”* handed in the Inquiry by John Barnikel.
- Document 8 – List of persons etc. on whom copies of the Enforcement Notice were served.
- Document 9 – *“Scheme of Delegation to the Group Manager”*.
- Document 10 – *“O2 mobile phone users left with drop in reception quality in Burnham”* - 5 June 2005 – Burnham-on-Sea.com.
- Document 11 – *“Poor mobile phone reception could cost lives, warns hovercraft group”* - 10 June 2005 – Burnham-on-Sea.com.
- Document 12 – Decision Letter dated 14 March 2007 Isleport Farm, Highbridge – Ref APP/V3310/C/06/2014093 & others.
- Document 13 – Letter dated 11 May 2007 from Needham Haddrell to Sedgemoor District Council.
- Document 14 – Planning Contravention Notice dated 13 February 2008.
- Document 15 – Letter dated 6 March 2008 from Lawrence Graham to Sedgemoor District Council – reply to Planning Contravention Notice.
- Document 16 – *“Request for Planning Assessment for Breach of Planning Control”* dated 10 March 2008.
- Document 17 – Enforcement Notice dated 16 April 2008.
- Document 18 – Letter dated 24 April 2008 from Sedgemoor District Council to Needham Haddrell.
- Document 19 – Delegated Report dated 27 May 2008 & the Refusal of Planning Permission dated 28 May 2008 – 15m telecommunication mast at appeal site – Council Ref 11/08/00058.
- Document 20 – Council’s Pre-Inquiry Statement (incorrectly labelled *“Written Proof of the Local Planning Authority”*) sent to the Planning Inspectorate on 28 July 2008.
- Document 21 – Letter dated 1 September 2008 from Sedgemoor District Council to Lawrence Graham.
- Document 22 – Costs Decision dated 10 September 2008 – Planning Inspectorate Ref. APP/Y1110/A/08/2062116 – Junction of Haven Road/Alphington Street, Exeter.
- Document 23 – *“Declaration of Conformity with ICNIRP Public Exposure Guidelines”* dated 23 March 2009.

- Document 24 – Costs Decision dated 20 April 2009 – Planning Inspectorate Ref. APP/Y1110/A/08/2062069 – Land at the junction of Belmont Road and Western Way, Exeter.
- Document 25 – Letter dated 8 May 2009 from the Chairman of Burnham Area Rescue Boat to Glenn Holt.
- Document 26 – "Application for Costs on Behalf of Telefonica 02 UK Limited Against Sedgemoor District Council dated July 2009.

PLANS

Plan A – Ritz Cinema – Site Elevation – Plan 103

Plans B & C – Key Plan – Parts 1 & 2 submitted by Colin Arnold

PHOTOGRAPHS

Photographs A to M & Appendix A submitted by Colin Arnold and agreed location plan from where photographs were taken.