

EAST AYRSHIRE COUNCIL

NORTHERN AREA LOCAL PLANNING COMMITTEE: 06 AUGUST 2004

**03/0556/FL: PROPOSED DELETION OF CONDITION 2b WITH REGARD TO
APPEAL DECISION P/PPA/190/83 WITH RESPECT TO REFERENCE
02/0415/FL
AT WEST MOSSIDE FARM, KIRKLANDSIDE, KILMARNOCK
FOR HUTCHISON 3G UK LTD**

EXECUTIVE SUMMARY SHEET

1. DEVELOPMENT DESCRIPTION

1.1 Full planning consent was granted to the applicants on appeal to the Scottish Ministers following this Council's refusal of an application to erect a 22.5 metre high monopole mast to accommodate 3 antennae and 1 transmission dish and a ground based equipment cabinet of 0.316 square metres in floor area and 1.3 metres in height. The site is to be enclosed by a 1.4 metre high timber fence.

1.2 The appeal decision included a condition which required:-

"a scheme of tree planting on that part of the field immediately south east of the appeal site adjacent to the north east boundary of the field and covering a rectangular area 30 metres in length from north west to south east and 20 metres in width south westwards from the field boundary; the scheme shall include details of the species, size and position of each tree that is to be planted and details of perimeter fencing".

1.3 The Reporter imposed this condition because he considered that the acceptability of the siting of the development was dependent upon the screening and backdrop provided by existing trees to the north east of the site, trees which may not continue to stand throughout the period that the proposed mast is in use. The planting required by this condition is intended to ensure continuity of such screening and back drop effect.

1.4 The applicant now asks that this condition be removed. The applicant's agent submits that this condition is seeking to adopt a large scale landscaping scheme surrounding the base station. They submit that they cannot achieve the requirements of the condition because the applicant only has control of the specific site compound area. The applicant considers that the condition is not enforceable under Section 41 of the Town and Country Planning (Scotland) Act 1997.

1.5 The applicant submits that conditions on planning consents should be imposed only if the applicant has control of the land and in this case, the applicant only controls the site where the mast is to be located. The applicant believes that the condition set by the Scottish Executive does not meet with the six tests where a condition is valid in its imposition on a planning consent. The applicant is of the opinion that if the land required for the landscaping scheme is outside an application site as it is in this instance, the condition cannot be imposed unless the Authority is satisfied that the applicant has sufficient control over the land. In this case the condition is unreasonable because it requires the consent of a third party who in this instance is the owner of West Mosside Farm. The owner is not willing for such a condition to be imposed on his land. The applicant also considers that the landscaping scheme proposed is unduly onerous due to the sheer extent of the scheme proposed.

1.6 The applicant has also commented on the letter of objection detailed in Section 4 of this report. The applicant notes the concern expressed by the NHS Trust relative to the health and safety aspects of the proposal and in response have stressed that the site complies with Government standards set in terms of radio emissions. They also advise that an ICNIRP certificate was submitted to the Planning Authority as part of the original application.

1.7 In respect of the objectors concerns regarding visual amenity, the applicants advise that the development consists of a timber monopole and ground-based equipment which already benefits from excellent screening between the site and the hospital at Kirklandside. They do not consider that there will be any adverse visual impact as a result of the development or that the presence of landscaping would be of any greater benefit, particularly from the aspect of the hospital. Furthermore, in order to achieve the required coverage, landscaping would have to be kept to low levels meaning that the monopole would not be screened to an improved extent by the landscaping imposed by the condition. The applicant further reiterates that they have attempted to enter into discussions with the landowner although he is not prepared to release any land additional to the original application site.

2. RECOMMENDATION

2.1 The application should be refused for the reasons indicated on the enclosed sheet.

3. CONCLUSIONS

3.1 As indicated in Section 5 of this report, the application should be determined in accordance with the Development Plan unless material

considerations indicate otherwise. The Approved Ayrshire Joint Structure Plan contains no relevant policies, whilst the Adopted East Ayrshire Local Plan has relevant policy considerations. It is considered that for those reasons stated in Section 5 of this report, the proposal does not comply with the provisions of the EALP. The material considerations indicated in Section 6 are also supportive of such a position and do not warrant approval of the application. At the previous planning appeal the appellant's agent offered to provide planting as a visual screen. Whilst this Division would have been content with a smaller planted area than the Reporter, which could be concentrated around the ground based compound, it does not consider that the scheme can be supported without any additional landscaping provision.

CONTRARY DECISION NOTE

Should the Committee agree that the application be approved contrary to the recommendation of the Head of Planning, Development and Building Standards, the application will not require to be referred to the Development Services Committee as it would not be a significant breach of policy.

Alan Neish
Head of Planning and Building Control

Note: This document combines key sections of the associated report for quick reference and should not in itself be considered as having been the basis for recommendation preparation or decision making by the Planning Authority.

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Report by Head of Planning, development and Building Standards

1. PURPOSE OF REPORT

1.1 The purpose of the report is to present for determination a full planning application which is to be considered by the Local Planning Committee under the scheme of delegation because it is subject to an objection and recommended for refusal.

2. APPLICATION DETAILS

2.1 **Site Description:** The application site measures 8 metres by 8 metres and is located to the north of the 10 acre agricultural field immediately to the south of Kirklandside Hospital, Hurlford. The site is partially screened to the north by a bank of trees.

2.2 **Proposed Development:** Full planning consent was granted to the applicants on appeal to the Scottish Ministers following this Council's refusal of an application to erect a 22.5 metre high monopole mast to accommodate 3 antennae and 1 transmission dish and a ground based equipment cabinet of 0.316 square metres in floor area and 1.3 metres in height. The site is to be enclosed by a 1.4 metre high timber fence.

2.3 The appeal decision included a condition which required:-

"a scheme of tree planting on that part of the field immediately south east of the appeal site adjacent to the north east boundary of the field and covering a rectangular area 30 metres in length from north west to south east and 20 metres in width south westwards from the field boundary; the scheme shall include details of the species, size and position of each tree that is to be planted and details of perimeter fencing".

2.4 The Reporter imposed this condition because he considered that the acceptability of the siting of the development was dependent upon the screening

and backdrop provided by existing trees to the north east of the site, trees which may not continue to stand throughout the period that the proposed mast is in use. The planting required by this condition is intended to ensure continuity of such screening and back drop effect.

2.5 The applicant now asks that this condition be removed. The applicant's agent submits that this condition is seeking to adopt a large scale landscaping scheme surrounding the base station. They submit that they cannot achieve the requirements of the condition because the applicant only has control of the specific site compound area. The applicant considers that the condition is not enforceable under Section 41 of the Town and Country Planning (Scotland) Act 1997.

2.6 The applicant submits that conditions on planning consents should be imposed only if the applicant has control of the land and in this case, the applicant only controls the site where the mast is to be located. The applicant believes that the condition set by the Scottish Executive does not meet with the six tests where a condition is valid in its imposition on a planning consent. The applicant is of the opinion that if the land required for the landscaping scheme is outside an application site as it is in this instance, the condition cannot be imposed unless the Authority is satisfied that the applicant has sufficient control over the land. In this case the condition is unreasonable because it requires the consent of a third party who in this instance is the owner of West Mosside Farm. The owner is not willing for such a condition to be imposed on his land. The applicant also considers that the landscaping scheme proposed is unduly onerous due to the sheer extent of the scheme proposed.

2.7 The applicant has also commented on the letter of objection detailed in Section 4 of this report. The applicant notes the concern expressed by the NHS Trust relative to the health and safety aspects of the proposal and in response have stressed that the site complies with Government standards set in terms of radio emissions. They also advise that an ICNIRP certificate was submitted to the Planning Authority as part of the original application.

2.8 In respect of the objectors concerns regarding visual amenity, the applicants advise that the development consists of a timber monopole and ground-based equipment which already benefits from excellent screening between the site and the hospital at Kirklandside. They do not consider that there will be any adverse visual impact as a result of the development or that the presence of landscaping would be of any greater benefit, particularly from the aspect of the hospital. Furthermore, in order to achieve the required coverage, landscaping would have to be kept to low levels meaning that the monopole would not be screened to an improved extent by the landscaping imposed by the condition. The applicant further reiterates that they have attempted to enter into discussions with the landowner although he is not prepared to release any land additional to the original application site.

3. CONSULTATIONS AND ISSUES RAISED

3.1 East Ayrshire Council Outdoor Services have no objections to the application although request that any maintenance or Community Service Account held land which may be damaged by this application, should be reinstated to the satisfaction of the Outdoor Amenities Manager or his nominee.

Noted. If Members choose to grant consent the above can be incorporated as an advisory note to the applicant.

3.2 The Hurlford and Crookedholm Community Council have not responded to their consultation at the time of writing this report.

Noted.

4. REPRESENTATIONS

One letter has been received from Ayrshire and Arran NHS Trust. The points raised are as follows:-

4.1 One of the major concerns of the NHS Trust is public perception especially where there is still widespread concern about the possible impact of radio emissions on vulnerable patients. The condition in respect of landscaping is often a means of improving public perception and minimising public concern whilst allowing the applicant to move forward with their business. It would not seem unreasonable for the applicant to take this into account with any negotiations they may have with the landowner.

Noted. Health and safety issues are not relevant material considerations in respect of this application. The telecommunication site has planning permission subject to the condition requiring the provision of a landscaping scheme, otherwise the comments of the NHS Trust are noted. Members are advised that concerns regarding radio frequency emissions are as stated in Government policy (NPPG19) more properly addressed under other legislation. The original application was accompanied by certification of compliance in the form of the ICNIRP standards.

4.2 The Trust believes that the significance of this planting both as a visual screen and backdrop cannot be highlighted enough. Whilst the proposed development is only a short distance from the nearest hospital ward, it is immediately the other side of the hospital boundary with only a thin veil of mature trees within their land acting as a screen.

Noted. This Division would agree with the advantages of providing a visual screen. The area of planting sought by the Reporter in the appeal decision letter was significant and it was considered by this Division that a lesser area would be appropriate. This was explored with the applicant. The applicant advises that this is not achievable although taking into account the Reporter's view, it is considered that additional visual screening would be beneficial in amenity terms in assisting to conceal, particularly initially at low level, the equipment for the telecommunications tower.

5. ASSESSMENT AGAINST DEVELOPMENT PLAN

5.1 Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning applications be determined in accordance with the development plan unless material considerations indicate otherwise. For the purposes of this application, the development plan comprises the Approved Ayrshire Joint Structure Plan and the Adopted East Ayrshire Local Plan.

5.2 Noting that the telecommunications apparatus already benefits from planning permission, the most relevant policy is CS2 part (i) which states that in all cases, care will be taken to ensure that all telecommunications developments are sensitively sited and that the Council will consider the visual impact of the proposal on the townscape and the environment in considering any proposals for telecommunications development.

The provision of 'landscaping' as part of the proposed development and the offer to undertake same by the appellant's agent was obviously seen as critical in the opinion of the Scottish Executive Reporter during his consideration of the appeal against this Council's refusal of planning permission.

The Reporter clearly placed significant weight on the need for screening, a view consistent with Policy CS2 of the Local Plan. Removal of that screening would render the proposal contrary to the policy and conflict with the Reporter's assessment of the site's requirements. Whilst any planting would at first be of low level until it is established, it would assist in concealing the ground based equipment. Ultimately the aim however would be to ensure a pleasant visual screen of all elements of the apparatus. Whilst the tower is to comprise a timber monopole which should blend in well with the backdrop of trees within Kirklandside Hospital, the compound and associated ground based equipment will benefit significantly from the planting.

It is the opinion of the Division that the provision of screening would ensure a development compliant with Policy CS2. The lack of any landscaping renders the application contrary to the provisions of the same policy.

6. ASSESSMENT AGAINST MATERIAL CONSIDERATIONS

6.1 The principal material considerations relevant to the determination of this application are the planning history of the site and the decision on the planning appeal by the Scottish Executive, Government advice on the imposition of conditions contained in Circular 4/98, Planning Advice Note 62 "Radio Telecommunications" and the consultation replies and letter of objection.

Planning History

6.2 A planning application 02/0415/FL was refused by the Northern Area Local Planning Committee on 30 August 2002 for the reasons of visual amenity and the perceived risk to public health. This decision was appealed to the Scottish Executive who granted planning permission and awarded expenses against the Council. Permission was granted on a conditional basis that the landscaping as detailed in paragraph 2.2 be formed because the acceptability of the siting of the development is dependent on the screening and back drop provided to the north east of the site and these trees may not continue to stand throughout the period that the proposed mast is in use. The planting required by this condition is to ensure continuity of such screening and back drop effect. The decision of the Scottish Executive Reporter noted the applicants willingness to provide landscaping and considered that this could be secured by a suspensive condition embodying specific requirements.

In considering the planning appeal, the Reporter was of the opinion that adequate screening was critical to the acceptability of this development and has therefore imposed what is known as a 'suspensive' condition. He accepted the applicant's offer to plant landscaping although the applicant is now unable to gain sufficient control of land to facilitate any such scheme. The Reporter felt that the location of the mast was acceptable and would not impact upon the amenity of the nearby hospital. The Reporter however considered that the existing screening should be augmented by new planting as stated above.

Government Guidance on Conditions

6.3 Circular 4/1998 "The Use of Conditions in Planning Permissions" sets out the six tests for a conditions. A condition must be necessary, relevant to

planning, relevant to the proposed development, precise, reasonable and enforceable.

6.4 The main query in the consideration of this application is whether the condition is enforceable and reasonable as it is considered that all other tests are met. The Circular states that a condition should not be imposed if it cannot be enforced and if it is unreasonable. For example, if the applicant does not have sufficient control over the land to enable the works to be carried out conditions should not be imposed.

6.5 The Guidance continues to state however that although it would be ultravires to require works by a developer which he has no powers to carry out, it may be possible to achieve a similar result by a condition worded in a negative form, prohibiting development until a specified action has taken place, known as a 'suspensive condition'. In this case the applicant is required to submit the details of tree planting which must then be carried out prior to the erection of the mast. The Circular refers to case law which supports the use of such conditions where there is a perceived need for their imposition. It is understood that the Reporter attached this condition to his earlier decision intending that it be suspensive in nature.

PAN 62

6.6 PAN 62 offers advice on good practice when dealing with radio telecommunication development. It advises that development must be undertaken in a manner which keeps environmental impact to a minimum. It states that siting and design can reduce visual intrusion. The Reporter's decision offered a scheme which complied with this advice, the proposal now before the Committee will not.

Consultations and Representations

6.7 No negative issues have been raised by the statutory consultation process. The letter of objection is detailed in Section 4 of this report.

7. FINANCIAL AND LEGAL IMPLICATIONS

7.1 There are no financial or legal implications for the Council in the determination of this application.

8. CONCLUSIONS

8.1 As indicated in Section 5 of this report, the application should be determined in accordance with the Development Plan unless material

considerations indicate otherwise. The Approved Ayrshire Joint Structure Plan contains no relevant policies, whilst the Adopted East Ayrshire Local Plan has relevant policy considerations. It is considered that for those reasons stated in Section 5 of this report, the proposal does not comply with the provisions of the EALP. The material considerations indicated in Section 6 are also supportive of such a position and do not warrant approval of the application. At the previous planning appeal the appellant's agent offered to provide planting as a visual screen. Whilst this Division would have been content with a smaller planted area than the Reporter, which could be concentrated around the ground based compound, it does not consider that the scheme can be supported without any additional landscaping provision.

9. RECOMMENDATION

9.1 The application should be refused for the reasons indicated on the enclosed sheet.

CONTRARY DECISION NOTE

Should the Committee agree that the application be approved contrary to the recommendation of the Head of Planning, Development and Building Standards, the application will not require to be referred to the Development Services Committee as it would not be a significant breach of policy.

Alan Neish
Head of Planning, Development and Building Standards

29 July 2004
(FMF/MMM)

FV/DVM

LIST OF BACKGROUND PAPERS

1. Application Form and Plans.
2. Statutory Notices/Certificates.
3. Consultation Responses.
4. Representations.
5. Approved Ayrshire Joint Structure Plan (1999).
6. Adopted East Ayrshire Local Plan.
7. National Planning policy Guideline 19: Radio Telecommunications.
8. Planning Advice Note 62: Radio Telecommunications.
9. Planning Application and Appeal 02/0415/FL
10. Circular 4/98.

Anyone wishing to inspect the above papers please contact Fiona Finlay on 01563 576768.

Implementation Officer: Dave Morris

EAST AYRSHIRE COUNCIL

TOWN & COUNTRY PLANNING (SCOTLAND) ACT 1997

03/0556/FL

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| Site of Proposal: | West Mosside Farm Kirklandside KILMARNOCK |
| Nature of Proposal: | Proposed Deletion of Condition 2b with regard to Appeal Decision P/PPA/190/83 with respect to Reference 02/0415/FL |
| Name & Address of Applicant: | Hutchison 3G UK Ltd C/o Agent |
| Name & Address of Agent: | Stappard Howes The Fountain Business Centre Ellis Street COATBRIDGE ML5 3AA |

DPOs Reference: FMF/MMM

The above FULL application should be refused subject to the following reasons:-

1. The proposed development would be contrary to Policy CS2 part (i) of the Adopted East Ayrshire Local Plan and paragraph 60 of Planning Advice Note 12 in that as a result of the lack of screen landscaping the telecommunications apparatus will have a detrimental visual impact on the surrounding environment.

**DUE TO ORDNANCE SURVEY REGULATIONS AND COPYRIGHT
THE MAP IS AVAILABLE FOR VIEWING AT THE COUNCIL'S
PLANNING OFFICE IN KILMARNOCK. FOR INFORMATION ON
VIEWING PLEASE CONTACT (01563) 576790.**