

North Tyneside Council Report to Cabinet 8 December 2014

ITEM 6(f)

Grass Verge at Addington Drive – Article 4 Direction to Remove Permitted Development Rights for Telecommunications Development

Portfolio(s): Housing & Environment

Cabinet Member(s): Councillor John Harrison

Report from Service
Area:

Environment & Leisure

Responsible Officer:

Phil Scott – Head of Environment & Leisure

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Wards affected:

Battle Hill

PART 1

1.1 Purpose:

1.1.1 Cabinet made a decision on the 14th July 2014 to propose an Article 4(1) direction to remove certain permitted development rights for electronic communications code operators (ECCO) within a section of grass verge on Addington Drive, Wallsend. The Direction was published and was subject to a 21 day statutory consultation process, which ended in September 2014. A further decision from Cabinet is required as to whether or not to confirm the Direction, having regard to the representations received and Government guidance.

1.2 Recommendation(s):

1.2.1 It is recommended that Cabinet:

- a) review the representations received as a result of the consultation undertaken following the making of the Article 4(1) Direction in July 2014; and
- b) do not confirm the Article 4(1) Direction for the reasons set out in section 1.5.7 of this report.

1.3 Forward Plan

Twenty eight days notice of this report has been given and it first appeared on the Forward Plan that was published on 2 September 2014.

1.4 Council Plan and Policy Framework

This report links to 'Our North Tyneside' Council Plan, Priority 1 – Our People - Will be listened to by services that respond better and faster to their needs and Priority 2 – Our Places – Be places that people like living in and will attract others to either visit or live.

1.5 Information

1.5.1 Background to the proposed Addington Drive Article 4 Direction

1.5.1.1 Detailed information was set out in the report considered by Cabinet at its meeting in July 2014 and this is attached as Appendix A to this report.

1.5.1.2 Since the previous report to Cabinet some upgrading works have been carried out at the mast site to replace the existing antenna behind the shroud and upgrade the existing cabinet. No additional cabinets were erected. The operators have advised that they still require a further cabinet and works to the existing mast to facilitate 4G services from the site.

1.5.2 Legislative Provisions

1.5.2.1 Under the provisions of the General Permitted Development Order (GPDO), some small works (such as erecting a cabinet less than 2.5 cubic metre) can be carried out with the benefit of permitted development without involvement of the Local Planning Authority (LPA). Other works e.g. erection of free standing masts up to 15m, require the prior approval of the LPA but consideration for approval, is more limited than when considering a full planning application, as the LPA may only consider the siting and appearance of the equipment proposed.

1.5.2.2 LPAs have the power to make an Article 4 Direction to withdraw certain permitted development rights. The legal requirement for making a Direction is that the LPA must be satisfied that it is expedient that development that would normally benefit from permitted development rights should not be carried out unless permission is granted for it on an application.

1.5.2.3 The purpose of an Article 4 Direction would be to require an operator to submit a full planning application for equipment within the identified part of the grass verge in order to protect the local amenity of the area. Once confirmed, any Direction must be notified to the Secretary of State for Communities and Local Government. He has the power to modify or cancel it at any time.

1.5.3 Considerations

Government Guidance

1.5.3.1 Advice in the National Planning Policy Framework (NPPF) sets out in paragraph 42 that: “advanced high quality communications infrastructure is essential for sustainable economic growth”. It goes on to state in paragraph 44 that: “local planning authorities should not impose a ban on new telecommunications development in certain areas, impose blanket Article 4 directions over a wide area or a wide range of telecommunications development..”.

1.5.3.2 The NPPF also specifically advises in paragraph 102 that the use of Article 4 directions: “to remove national permitted development rights should be limited to situations where it is necessary to protect local amenity or the wellbeing of the area”.

1.5.3.3 Further guidance is provided in the National Planning Practice Guidance (NPPG). Paragraph 038 Reference ID: 13-038-20140306, which states that: “The use of Article 4 directions to remove national permitted development rights should be limited to situations where this is necessary to protect local amenity or the wellbeing of the area. The potential harm that the direction is intended to address should be clearly identified”.

1.5.4 Consultation

1.5.4.1 Consultation on the proposed Article 4 Direction was carried out in accordance with the GPDO. The Direction was available on the Authority’s website which allowed representations to be posted. A public notice appeared in the local press and notices were posted at either end of the proposed site on Addington Drive. Letters were sent to 118 properties in the immediate vicinity and operators occupying the site (including the mast operators) were invited to comment.

1.5.4.2 The results of the consultation are summarised in the tables below. Further details of the results of the consultation process are contained in Appendix B:

Representations received:

- 120 signed copies of a letter (from 107 addresses) with 86 of those sending a letter also signing a petition containing a total of 160 signatures (representing 114 addresses);
- 1 letter from resident of Carnforth Close; and
- 3 letters from and on behalf of the Hadrian Park Residents Action Group.

Key concerns	Officer comment
Appeal decision on original application was fundamentally flawed. There is doubt about the validity of the application, the consultation process and concern over the appeal process and whether or not the Planning Inspector attended the correct site	Comments on the lawfulness of the existing mast are noted but this is not a matter for Cabinet. The Article 4 Direction relates to future proposals and has no bearing on the existing mast and cabinet.
Impact on visual amenity	For impact on visual amenity to form a compelling reason to confirm the Direction, the harm caused has to be clearly identified.
Highway safety Reference to concerns expressed by a local police officer	Cabinet agreed previously that highway safety was not a reason for making the Direction. A highway safety audit completed in September 2013 looked at the current situation and with the inclusion of additional equipment concluded there was no basis to justify a Direction on grounds of highway safety. No objection has been made by the Police.
Unacceptable location	The Direction would have no bearing on the existing mast and equipment.
Impact on Health	Advice in NPPF paragraph 46 is clear that LPA’s “ <i>should not... determine health safeguards if the proposal meets International Commission guidelines for public exposure</i> ”. The operator has demonstrated that the existing equipment complies with international guidance on emissions and would also have to demonstrate this for any additional equipment. As agreed in making the Direction, there is no justification on health related grounds on which to confirm the Direction.

Devaluation of property	Financial loss or devaluation of property is not a material planning consideration and cannot be used as justification for the Article 4 direction.
Engineers working at the site wouldn't want a mast outside their home	Comments made by engineers on site are noted but this is not a matter for Cabinet as it does not provide a basis on which to confirm the Direction.
Depressing impact of the mast	Wellbeing can be a consideration but Counsel advice is that is not a compelling reason to justify confirming the Article 4 direction.
Coverage maps showing that there is already good 4G coverage here. It has been questioned how a claim for loss of business could be substantiated if there is already coverage	The operator was asked to comment on this and has advised that coverage maps do not indicate the site capacity, network demand or the need to future proof the site. As higher numbers of users join services, it is clear that there will be a need for further equipment. In the context of NPPF this would not form appropriate justification to confirm the Direction.
Compensation: Council should put the needs of residents before the telecommunications operators	This is a matter related to the fiduciary duty of Cabinet.
There is strong justification for the use of an Article 4 direction which would not be flawed or in conflict with NPPF	NPPF paragraph 102 states that Article 4 directions " <i>should be limited to situations where it is necessary to protect local amenity</i> ". It advises against any blanket Direction over a wide range of telecommunication equipment. Counsel advice is that the Direction does conflict with NPPF.
Potential council compensation liability will not arise as the operator does not need additional equipment to provide 4G services	The potential risk of compensation must be considered by Cabinet as part of its fiduciary responsibility i.e. financial responsibility in terms of considering the consequences of decisions and striking a fair balance between the interests of tax payers and the wider community interest.

Representations opposing the confirmation of the Direction:

- Letter from Cornerstone Telecommunications Infrastructure Ltd (for telecommunications operators on site);
- Three representations from a resident of Agricola Gardens; and
- One anonymous objector and 16 on line representations (including one from a resident in Ashburn Road) opposing the Direction but giving no comment.

Rationale is questionable, and conflicts with national policy and guidance	NPPF provides positive support for telecommunications development. Counsel advice is that the Direction does conflict with NPPF.
No justification on health or highway safety grounds	In making the Direction Cabinet did not use highway safety or health impact as justification and there are no grounds to do so now.
Non-specific visual impact is not sufficient	Counsel shares this opinion.
Disproportionate to use Direction to restrict small additional cabinet which will also restrict development by fixed broadband operators	The Direction would restrict all future telecommunications development.
Location no different from any other part of the estate as noted by Planning Inspector	Planning Inspector described location as <i>“a grass verge on a busy roadside in a predominantly residential area....Nearby are a post box, street lights, traffic signage and a bus stop.... (the mast) would blend readily into the street scene and would not be detrimental to the visual amenity of pedestrians and other road users”</i> . Counsel agrees that a general reference to visual amenity is not sufficient and that the Inspector gave little weight to visual amenity concerns.
No strong justification for Direction or evidence that exercising permitted development rights would harm local amenity or the wellbeing of the area	Noted and agreed.
Dangerous precedent Can't have different rules in different areas	Other requests would have to be considered on their own merits.
Need to balance real potential compensation liability against the perceived wider public interest	This should form part of the decision making process.
4G coverage needs to meet customer expectations of speeds and capacity and the network resilience is required. Area should have better phone coverage	NPPF provides positive support for high quality communications infrastructure.
NIMBYism is cause of the support for the Article 4 and confirming it would be a backward step	Noted.
Verge isn't a Greenbelt and this isn't fracking and the Direction is disproportionate	Noted.
The verge has been damaged incurring more costs to tax payers & banners displayed are illegal	This is not relevant.

1.5.4.3 In accordance with the legislative requirements the Secretary of State was notified that the Direction had been made and provided with an opportunity to comment at that stage. He advised that he had no comments at this stage.

1.5.4.4 Undertaking consultation on the Article 4 Direction as made has provided the Authority with the opportunity to review representations from the operator as well as local residents.

1.5.4.5 In considering whether to confirm the Direction, Cabinet would have to be satisfied that it was expedient that development which would normally benefit from permitted development rights should not be carried out unless permission is granted for it on an application. In reaching a decision Cabinet will need to consider whether there is a compelling need for the confirmation of the Direction, taking into account representations received from the consultation, advice in the NPPF and NPPG and considering how, in the absence of an Article 4 Direction, works carried out with the benefit of permitted development might cause harm to local amenities. It will also need to take into account the potential financial impacts of any decision and balance this against the wider public interest.

1.5.5 Compensation

1.5.5.1 Cabinet was advised in the report of 14 July 2014 that in making a Direction there are circumstances where the Authority would be liable to compensate developers or landowners whose developments are affected by an Article 4 (1) Direction. The circumstances where a compensation liability can arise are where an LPA subsequently:

- Refused planning permission for development which would have been permitted development if it were not for an Article 4 Direction; or
- Granted planning permission subject to more limiting conditions than the GPDO would normally allow, as a result of an Article 4 Direction being in place.

1.5.5.2 Compensation may be claimed for abortive expenditure or other loss or damage directly attributable to the withdrawal of permitted development rights (S.108 of the Town and Country Planning Act 1990 (as amended)). For an ECCO this can include loss of profit as set out in the representation made on behalf of the operator.

1.5.5.3 Whilst the operators have given no indication as to the exact extent of any claim (for reasons of commercial sensitivity), they have indicated that this is likely to be a six figure sum. The level of compensation which might arise in a circumstance where the Article 4 Direction was confirmed and permission subsequently refused for works which would previously have benefitted from permitted development cannot be further assessed at this time.

1.5.6 Legal Advice

1.5.6.1 Counsel's advice has been sought regarding the appropriateness of confirming the Article 4 Direction in the context of relevant policies, legislation and relevant case law. In the light of that advice the confirmation of the Article 4 Direction is not recommended. Further details of the advice are contained in a confidential report elsewhere on the agenda for this meeting.

1.5.7 Conclusion

- 1.5.7.1 In the planning policy context, whilst the concerns of residents who support confirmation of the Direction are noted, it is considered there are not sufficient grounds on which to pursue the Article 4 Direction to confirmation stage. The Direction would be in conflict with national planning policy and, whilst it is recognised that additional equipment at this location would have some visual impact, it is not considered possible to make a compelling case that this visual impact would be of such harm as to justify confirmation of the Direction. A general reference to visual amenity is not sufficient to satisfy the requirement to identify the potential harm which confirming the Direction would address. Undertaking consultation has not assisted in identifying any clear harm which would offer sufficient justification to confirm the Article 4 Direction.
- 1.5.7.2 The absence of a compelling justification on visual impact grounds also needs to be balanced against the potential compensation liability which could arise as a result of actions following the confirmation of the Direction. Grounds of impact on health and highway and pedestrian safety have also been considered and do not offer any justification on which to confirm the Direction.
- 1.5.7.3 The Authority would retain control, via the prior approval process, over additional equipment of such a scale as warrant consideration of its siting and appearance through existing planning regulations. It is considered that it would be difficult to make a strong case to resist other equipment of a smaller scale in light of the appeal decision such that to confirm the Direction would place the Authority at risk of future, potentially substantial, compensation claims.

1.5 **Decision options:**

Cabinet are requested to consider whether to confirm an Article 4(1) Direction, and have two options:

Option 1

Confirm a non-immediate Article 4(1) direction to restrict Permitted Development rights pertaining to ECCOs within the area of land identified on the map attached as Appendix A. This option would bring the Article 4(1) direction into effect immediately.

Option 2

Decline to confirm the Article 4 (1) Direction on the grounds that it would not be expedient to confirm it in the absence of being able to satisfactorily demonstrate the potential harm which would be addressed by confirming the Direction and imposing a restriction on small scale telecommunications equipment.

Option 2 is the recommended option.

1.6 **Reasons for recommended option:**

Option 2 is recommended for the following reasons:

Upon review of the representations that have been received, consideration of national policy and guidance provided in NPPF and NPPG, the 2011 Inspector's decision, and the advice of Counsel Option 2 is recommended. To confirm the Direction would result in a decision which would be contrary to national planning policy and guidance where no clear planning justification to outweigh this conflict has been identified. It would also place the Authority in a position of financial risk which is not considered to be outweighed by the localised benefits of reducing the visual impact of additional, small scale equipment.

1.7 Appendices:

Appendix A: Report to Cabinet dated July 14 2014
Appendix B: Summary of results of consultation

1.8 Contact officers::

Jackie Palmer, Planning Manager, tel. (0191) 643 3663
Philip Craig, Lawyer, tel. (0191) 643 5355
Andrew Holmes, Planning Officer, Planning, tel. (0191) 643 4822
Catherine Lyons, Regulatory Services Manager, tel. (0191) 643 7780
Alison Campbell, Finance Business Manager, tel. (0191) 643 7038

1.9 Background information:

The following background papers/information have been used in the compilation of this report and are available at the office of the author:

1. [Town & Country Planning Act 1990 \(as amended\)](#)
2. [Town & Country Planning \(General Permitted Development\) Order 1995 \(as amended\)](#)
3. Replacement Appendix D to Department of the Environment Circular 9/95: General Development Consolidation Order 1995
4. [National Planning Policy Framework](#)
5. [National Planning Practice Guidance](#)
6. Draft Letter from Hadrian Park Residents Action Group to Patrick Melia (undated)

PART 2 – COMPLIANCE WITH PRINCIPLES OF DECISION MAKING

2.1 Finance and other resources

If the Authority were to confirm the Article 4(1) direction and then refuse planning permission for works that would otherwise have been permitted development or were to approve them subject to more onerous conditions, ECCOs would have a period of 12 months following that decision to make a claim to the Authority for compensation for abortive expenditure or other loss or directly attributable damage including loss of profit. The level of compensation claimed could be substantial and there is no budget provision for this.

In addition, if an Article 4(1) direction is confirmed requiring planning applications to be submitted for works at this location, no planning application fee would be required to be paid to the LPA to cover any of the costs of processing such applications.

All preparatory work and background work to prepare this report and to draft an Article 4(1) Direction has been undertaken by existing staff and the costs of consultation, including the press notice, will be contained within existing budgets.

2.2 Legal

The legal implications are set out in the body of this report and the separate confidential report elsewhere on the agenda for this meeting.

2.3 Consultation/community engagement

There has been a statutory consultation of 21 days, the results of which are detailed in this report, in line with the guidelines as set in our Replacement Appendix D to Department of the Environment Circular 9/95: General Development Consolidation Order 1995.

If confirmed the Local Planning Authority would have to notify the land owner and any occupier of the land as well as local residents, who will be made aware of the Direction by way of a local press advertisement and notices posted around the site.

2.4 Human rights

There are no human rights implications directly arising from this report.

2.5 Equalities and diversity

There are no equalities and diversity implications directly arising from this report.

2.6 Risk management

At this stage in the process, no risk assessment has taken place. If the Direction were to be confirmed the potential financial risk to the Authority would need to be added to the corporate and operational risk registers.

2.7 Crime and disorder

There are no crime and disorder implications directly arising from this report.

2.8 Environment and sustainability

There are no environment and sustainability implications directly arising from this report.

PART 3 - SIGN OFF

- Deputy Chief Executive
- Head of Service
- Mayor/Cabinet Member(s)
- Chief Finance Officer
- Monitoring Officer
- Head of Corporate Strategy