

FAREHAM

BOROUGH COUNCIL

Report to the Executive for Decision 03 July 2023

Portfolio:	Policy and Resources
Subject:	Lease of Open Space, Warsash Recreation Ground
Report of:	Director of Planning and Regeneration
Corporate Priorities:	A dynamic, prudent and progressive Council

Purpose:

This report seeks authority to publish a notice under Section 123 of the Local Government Act 1972 (as amended) in a local newspaper, which specifies that the Council is proposing to grant a lease for a period of 10 years on a small section of open space at Warsash Recreation Ground to allow a Telecommunications Mast and associated apparatus to be erected.

The report also seeks delegated authority to the Executive Member for Policy and Resources to consider any representations received in response to the published notice, to determine whether the public interest in granting the lease outweighs any negative impacts raised in representations received, and to therefore decide whether to grant the lease to install telecommunications apparatus on Warsash Recreation Ground.

Executive summary:

Mobile network coverage has been provided in Warsash for many years by a roof top base station at Warsash Maritime Academy in Newtown Road. The site owner is looking to dispose of part of the site for residential development. The redevelopment of part of the Warsash Maritime academy site will involve the demolition of the building where the roof top station is currently located.

The companies that deliver mobile telephone coverage/internet services have highlighted that to avoid the creation of a large 'coverage gap' in Warsash, a new mast must be provided prior to the removal of the existing apparatus.

Fareham Borough Council, in its capacity as the local planning authority, received an application to install a 20m high telecommunications mast and associated apparatus at the Warsash Recreation Ground on Osborne Road, in July 2021. For the reasons set out in the Executive Briefing Paper, the telecommunications operator is entitled to proceed to undertake the works from a planning perspective.

The Council has subsequently been approached in their capacity as landowner of the proposed site to grant a lease for the telecommunications mast and associated apparatus.

The Government has granted extensive powers to mobile service providers, to

enable them to install their apparatus on third party land. The relevant legislation is The Electronic Communications Code 2017 (known as 'The Code'). In short, requests from mobile services providers are difficult to resist and to achieve this the prejudice caused must outweigh the public benefit of having access to a choice of a high-quality telecoms network and not be capable of monetary compensation.

The Council has commissioned specialist legal advice who have advised that the likelihood of resisting this request is very low. Given the above, the terms of the lease have been provisionally agreed in principle but prior to granting this the Operator has accepted the Council will need to comply with the provisions of Section 123 of the Local Government Act 1972 (as amended). This requires the Council to advertise the intention to grant a lease of Open Space for two consecutive weeks in a local newspaper and to consider comments received in response to assess any positive or negative impacts of the proposals.

Recommendation:

It is recommended that the Executive:

- (a) authorises the publication of a notice under Section 123 of the Local Government Act 1972 (as amended) in a local newspaper for two consecutive weeks; and
- (b) agrees to delegate authority to the Executive Member for Policy and Resources to consider any representations received in response to the notice referred to in recommendation (a) above, to determine whether the public interest in granting the lease outweighs any negative impacts raised in representations received, and therefore to decide whether to grant the lease to install telecommunications apparatus on Warsash Recreation Ground.

Reason:

There are limited grounds for objection to the proposed mast under The Electronics Communications Code 2017, but the Council must observe the provisions of S.123 of the Local Government Act 1972.

Cost of proposals:

Having taken specialist legal and property advice the Council has provisionally agreed in principle subject to public notice and consideration of representations, terms for a 10 year Lease to Waldon Telecoms Limited at a rent of £1,200 per annum and a one-off payment of £4,000 as a "build disturbance payment". Professional fees will also be covered, as well as the cost of advertising the S.123 notice.

Appendices: **Appendix A** Photos and Plans of Proposals

Background papers: None

Reference papers: None

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Executive Briefing Paper

Date:	03 July 2023
Subject:	Lease of Open Space, Warsash Recreation Ground
Briefing by:	Director of Planning and Regeneration
Portfolio:	Policy and Resources

INTRODUCTION

1. Fareham Borough Council (in its capacity as the Local Planning Authority) were approached by Waldon Telecom Limited (on behalf of EE Limited and Hutchison 3G UK) in July 2021 to install a Telecommunications Mast at the Warsash Recreation Ground.
2. The proposed works comprise the installation of telecommunications apparatus on the southern edge of Osborne Road. The apparatus includes a number of cabinets at ground level and a 20-metre-high monopole mast with transmission dishes. Plans and photo illustrations of the proposed scheme are attached at Appendix A. This document formed part of the operator's application to the Council in 2021 (under planning reference P/21/1227/PA).
3. Coverage for the area is currently provided by a rooftop installation on the nearby Warsash Maritime Academy in Newtown Road. The installation will need to be removed shortly when the site is redeveloped.
4. The operators have highlighted that to avoid the creation of a large 'coverage gap' in Warsash, a new mast must be provided prior to the removal of the existing apparatus. No existing installations would provide coverage to this area. A new site within the area is required to replicate and enhance mobile coverage/services across Warsash.
5. As well as providing continued network coverage in Warsash, the new mast at Osborne Road would accommodate 5G high-speed broadband. The mast will also provide coverage for the Emergency Services Network, giving first responders priority access to life saving data, images and information on the frontline.
6. An application seeking approval for the siting and appearance of the telecommunications apparatus at the Recreation Ground was submitted to the Council in July 2021. On 9 September 2021, the Council issued a notice refusing to give approval for the siting and appearance of the apparatus. The Council considered that the harm to the visual appearance of the area, the residential amenity of neighbouring properties and the enjoyment of a valued community facility, outweighed the benefits of positioning the telecommunications apparatus here.

7. Following receipt of the Council's decision notice, Waldon Telecom Limited challenged whether the Council were entitled to refuse the application. The basis of their challenge was that the relevant planning legislation requires that decisions on applications such as these must be made within 56 days of receipt. They believed the Council had made its decision on day 57 and were therefore out of time.
8. On reviewing the process, the Council established that the computer system it used to produce the timescales for deciding applications such as this, had 'counted' the 56 days starting the day after the application was received; the relevant planning legislation requires that counting should begin on the date of receipt.
9. Having thoroughly reviewed the matter, the Council accepts it has made an error in how it dealt with the application under planning, in that it did issue its formal decision notice after the 56-day period. As the decision on the application was made outside of the 56-day period, the Council's planning decision to refuse the application does not stand. In planning terms, the telecommunications operators are entitled to proceed with the monopole and associated cabinets shown on the application submitted in July 2021 (under planning reference P/21/1227/PA).

THE COUNCIL IN ITS CAPACITY AS LANDOWNER

10. The Council has now received a request from the Operator to grant a lease on the small section of the Warsash Recreation Ground that the mast and associated apparatus would be sited upon as it is the landowner. Set out below are the relevant matters which must be considered when telecommunication operators seek to site telecommunications apparatus on the Council's land. The Executive Briefing Paper further sets out the publicity the Council is required to undertake if it is to grant a lease for a period in excess of 7 years.

The Electronic Communications Code 2017

11. To ensure that a mobile network can be developed and delivered across the UK as quickly and effectively as possible, the Government has granted extensive powers to mobile service providers to enable them to install their apparatus on third party land. The relevant legislation is The Electronic Communications Code 2017 (known as 'The Code').
12. The Government expects mobile service providers to reach agreement with landowners to erect telecommunications apparatus but, if this is not the case, the Courts can compel landowners to accept the apparatus on their land. There are very limited cases where landowners have been able to prevent apparatus being erected. The cases that have gone to Court have predominantly been decided in favour of the operators as the threshold to successfully oppose is so high. Successfully defended cases have been on the grounds that firm development proposals would not proceed if a lease were granted and financial compensation could not be provided.
13. The grounds for objecting to the proposed mast under The Code are two-fold and both need to be satisfied. Paragraph 21 of The Code covers this:

Part 1: Does the prejudice caused outweigh the public benefit of having access to a choice of a high-quality telecoms network? And;

Part 2: Can the prejudice caused be compensated by money?

14. Any objection to the proposals of the operator would therefore have to override the

benefit to the public of having a mobile network and not be capable of monetary compensation.

15. When contacted by Waldon Telecom Limited, the Council appointed a specialist legal advisor and surveyor with expertise in Code matters to act on their behalf. As part of this process various concerns were raised with the Operator but none of these were considered sufficient to overcome Paragraph 21 of The Code. Accordingly, the terms of a new lease were provisionally negotiated with completion of a lease being subject to the Council complying with its obligations under S.123 of the Local Government Act and determining any representations in accordance with the legislation.

Proposed Lease Terms

16. Following negotiations between the Telecoms Operator and the Council's appointed consultants, Heads of Terms have been drawn up 'in principle' for a proposed lease. A term of 10 years has been agreed at an annual rent of £1,200 per annum and a one-off payment of £4,000 for disturbance. It has been confirmed that these lease terms are best value from a financial viewpoint. However, it is clear there is no significant financial advantage to the Council in proceeding with the lease as the sums involved are low.
17. There is a Restrictive Covenant on the Warsash Recreation Ground which states: "*Not to erect or permit to be erected any building other than a pavilion or otherwise as required for use of the property as a recreation ground*". This has been raised with the Operator and legal advice sought by the Council which has shown that the Courts are unlikely to see this as a qualifying reason for objection to the mast. The Telecommunications Operator has agreed to provide an indemnity policy in respect of the Restrictive Covenant. This would not preclude a claim being made against the Council but would provide protection.

S.123 of The Local Government Act

18. This is the stage the Council has reached. A Council cannot dispose of any land forming part of an open space without complying with Section 123 of The Local Government Act 1972. This requires a notice of the intention to dispose to be advertised for two consecutive weeks in a local newspaper. A 'disposal' of land is defined as a 'Lease over 7 years' so is slightly misleading. The Council is not selling the Land, but the operator will have rights to renew the lease at the end of the 10 years.
19. Following advertisement, the Council will:
 - i) consider the comment/objection in its own right but only in relation to the impact on the use of the open space. For the avoidance of doubt the landowner cannot consider objections on the proposed mast raised on the following basis:
 - a. visual appearance/design of mast
 - b. altering the character of the local area
 - c. loss of property value
 - d. outlook from nearby properties
 - e. the potential for relocation
 - ii) weigh it up in the context of the Code rights, and

(iii) make a decision on the proposed disposal of land in accordance with the legal tests as set out in s.123 and the Code.

RECOMMENDATIONS

20. Given the above it is recommended that the Council proceeds to advertise in accordance with S123 of The Local Government Act 1972 and authority is given for this with a delegated authority to the Executive Member for Policy and Resources to consider the representations and to decide whether to grant the lease.

Enquiries:

21. For further information on this report please contact Steven Farndell, Head of Asset Management (07585 204206)