

Regeneration and Economic Development Department

APPLICATION NO: 21/00752/CLD

APPLICANT: IX Wireless Ltd

WARD AFFECTED: St Michael's

DEVELOPMENT: CERTIFICATE OF LAWFULNESS FOR THE ERECTION OF A 15M HIGH POLE SUPPORTING FIBRE INTERNET CABLES TOGETHER WITH INSTALLATION OF ASSOCIATED STREET CABINET HOUSING ELECTRONIC COMMUNICATIONS APPARATUS

LOCATION OF SITE: Pavement at The Junction of Reeds Road and Bakers Green Road, Huyton, Knowsley.

KNOWSLEY LOCAL PLAN ALLOCATION –

Primary Residential Development - Primary Residential Development

RELEVANT POLICIES

N/A

TECHNICAL CONSULTATIONS:

None required.

NEIGHBOUR NOTIFICATION:

There is no statutory requirement to consult third parties including Parish Councils or neighbours.

ISSUES AND ASSESSMENT:

SITE AND SURROUNDINGS

The application relates to an adopted footway that is located at the junction of Reeds Road and Bakers Green Road, Huyton. The site is adjacent to an existing grassed area surrounded by knee rail fencing. The area is predominantly residential with residential dwellings surrounding the site.

The site is not on Article 2(3) land or within an SSSI.

PROPOSAL

The application seeks to determine whether the installation of a 15 m high pole to which would support fibre internet cables, together with a street cabinet for housing electronic communications apparatus is permitted development as set out at Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

The application is accompanied by a planning statement, location plan, drawings and the applicant's Counsel Advice. The 15 m high pole would consist of either a metal or timber vertical pole to carry fibre cable above the ground, it would support fibre cables that would lead from the pole to properties at heights of between 8 – 15 m. Atop of the pole there would be a switch gear and cable device cover together with splice boxes lower down the pole. Adjacent to the pole would be a street cabinet. The proposal would facilitate connection from the network to the user's premises by overhead physical cables.

The applicant is a Code Operator within the meaning of the Electronic Communications Code (the Code).

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LEGAL CONTEXT

The key statutory framework for lawful development certificates and their determination is set out in sections 191-193 of the Town and Country Planning Act 1990 (as amended). The application is made under s192 of the Town and Country Planning Act 1990 (as amended). An application under s192 seeks to establish whether

- a) Any proposed use of buildings or land; or
- b) Any operations to be carried out in, on, over or under land,

would be lawful.

S192 (2) sets out that if on application under this section, the Local Planning Authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect.

It is therefore not an application for planning permission. Instead, it is a legal determination based upon evidence and facts presented by the applicant as to whether the stated activity would be lawful. In such cases, the Local Planning Authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Issues such as the planning policies do not fall to be taken into consideration as the decision is based on fact and not on policy grounds and therefore, planning merits are not relevant at any stage in this particular application process.

OFFICER APPRAISAL

Schedule 2, Part 16 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) relates to permitted development rights for communications development.

Class A (A (a)) states that development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on or under land controlled by that operator or in accordance with the electronic communications code consisting of the installation, alteration or replacement of any electronic communications apparatus is permitted development.

The Applicant has confirmed that it is a registered company with powers under the Electronic Communications Code as stated within the Ofcom register and therefore Class A applies.

Consideration must be had as to the definition of a “mast” for the purposes of deciding whether this element of the proposal is permitted development. In that regard, a “mast” is defined within the Interpretation of Class A (A.4) which states ‘a “*mast*” means a radio mast or radio tower.’ The application is supported by Counsel Advice which considers the meaning of “mast” having regard to case law R (on the application of Nigel Mawby and Lewisham Council [2013] EWHC 263. In summary, this contends that as the pole is not defined as a “mast”.

The GDPO states in the ‘*Interpretation of Class A*’ that for the purposes of “electronic communications apparatus” and “electronic communications code” have the same meaning as in the Communications Act 2003. The Electronic Communications Code (the new Code) came into force on 28 December 2017 and is set out in *Electronic communications code* at sections 106–119 of the Communications Act 2003 and the revised Schedule 3A, Part 1 which replaces the previous Electronic Communications Code, set out in Schedule 2 to the Telecommunications Act 1984 (TA 1984) as amended by Communications Act 2003.

Schedule 3A states at 5 (1) that:

“electronic communications apparatus” means—

- (a) *apparatus designed or adapted for use in connection with the provision of an electronic communications network,*

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- (b) *apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,*
- (c) *lines, and*
- (d) *other structures or things designed or adapted for use in connection with the provision of an electronic communications network.*

(2) *References to the installation of electronic communications apparatus are to be construed accordingly...*

In the code -

“line” means any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service;

“structure” includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus.

The proposal is considered to consist of three elements comprising a 15 m high pole, internet cables / switch gear / splice boxes and a street cabinet.

15 m high Pole

Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (“the GPDO”) is relevant and states that:

A. Development by or on behalf of an electronic communications code operator for the purpose of the *operator’s electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—*

(a) the installation, alteration or replacement of any electronic communications apparatus,...

Class A of the GDPO states that:

Development not permitted: ground-based apparatus

A.1— (1) *Development consisting of the installation, alteration or replacement of electronic communications apparatus (other than on a building) is not permitted by Class A(a) if—*

(a) in the case of the installation of electronic communications apparatus (other than a mast), the apparatus, excluding any antenna, would exceed a height of 15 metres above ground level;

Officer Appraisal – The proposed apparatus would not exceed a height of 15 m above ground level and is considered to be permitted under Schedule 2, Part 16, Class A (a) of the GDPO and prior approval is not required for this element of the proposal.

(b) in the case of the alteration or replacement of electronic communications apparatus (other than a mast) that is already installed, the apparatus, excluding any antenna, would when altered or replaced exceed the height of the existing apparatus or a height of 15 metres above ground level, whichever is the greater;

Officer Appraisal– Not applicable, the proposal does not involve replacement of apparatus.

(c) in the case of the installation of a mast, the mast, excluding any antenna, would exceed a height of—

(i) 30 metres above ground level on unprotected land; or

(ii) 25 metres above ground level on article 2(3) land or land which is on a

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highway;

Officer Appraisal – Not applicable as the proposal does not involve the installation of a “mast”.

- (d) *in the case of the alteration or replacement of a mast, the height of the mast, excluding any antenna, would when altered or replaced exceed the greater of the height of the existing mast or a height of—*
 - (i) 30 metres above ground level on unprotected land; or
 - (ii) 25 metres above ground level on article 2(3) land or land which is on a highway;or
- (e) *in the case of the alteration or replacement of a mast—*
 - (i) *the mast is on any land which is, or is within, a site of special scientific interest;*
and
 - (ii) *the mast would, when altered or replaced, exceed the original width of the mast by more than one third.*

Officer Appraisal – Not applicable as the proposal does not involve the alteration of a “mast”.

Internet cables / switch gear / splice boxes

The proposed pole would carry fibre cables together with a covered switch gear and cable devices, as well as splice boxes. None of which would exceed 15 m in height.

Officer Appraisal - The apparatus is electronic communications apparatus to be provided in the provision of an electronic communications network or electronic communications service which does not exceed 15 m in height and is considered to be permitted and prior approval is not required for this element of the proposal.

Street Cabinet for Housing Electronic Communications Apparatus

The housing would have dimensions of 900 mm by 900 mm (0.81 sq m).

The GDPO states:

Development not permitted: ground or base area

A1. (7) Development consisting of the installation, alteration or replacement of any electronic communications apparatus other than—

- (a) *a mast;*
- (b) *an antenna;*
- ~~(c) *a public call box;*~~ *(paragraph (c) deleted by SI No, 907 2019)*
- (d) *any apparatus which does not project above the level of the surface of the ground; or*
- (e) *radio equipment housing,*

is not permitted by Class A(a) if the ground or base area of the structure would exceed 1.5 square metres.

Officer Appraisal - Returning to the point that “mast” means a radio mast or radio tower’, then it must therefore follow that if the proposed pole is not considered to be a ‘radio’ mast, then the street cabinet for the housing of electronic communications apparatus cannot fall to be considered under criterion (e) ‘radio equipment housing’.

The base area of the proposed housing for electronic communications apparatus does not exceed 1.5 square metres and is therefore considered to be permitted development not requiring prior approval.

CONCLUSION

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Having regard to the applicant's Counsel advice (D E Manley QC, Kings Chambers dated 16 May 2019) and relevant case law cited, the proposed operations are considered to be permitted development under Class A (a), Schedule 2, Part 16 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). Consequently, planning permission is not required for the development and a Certificate of Lawfulness can be issued.

RECOMMENDATION:

A Certificate of Lawfulness be granted as the proposed development is permitted under the provisions of Schedule 2, Part 16, Class A (a) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

Maxine Wishart
6 April 2022

Alan Kilroe
12 April 2022

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