

Date: 3 July 2024

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By Email

Cambridge City Council
Greater Cambridge Shared Planning Service
The Guildhall
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For the Attention of Dean Scrivener

Dear Sir

Mayflower House, Manhattan Drive, Cambridge, Cambridgeshire CB4 1JT
Erection of (i) 8 no. flats (4 no. studios, 2 no. one bed & 2 no. two bed flats) on the eighth floor on Mayflower House with removal of Electronic Communications Apparatus on the roof (ii) bin-store for proposed flats occupying one existing car parking bay (iii) bespoke structure to cover 20 no. existing cycle bays (iv) structures to cover 32 no. additional cycle bays

Planning Application Ref: 23/02127/FUL

1. I am instructed by Mayflower Manhattan Ltd (Mayflower), the applicant on the above planning application, to respond to one of the requests set out in your email dated 12 June 2024 that was sent to their architect John Muir of 4D-Studio.
2. In particular, I have been instructed to respond in relation to the third issue set out, i.e. the Loss of Telecoms Provision.



3. I am instructed because I have specialised in town planning and electronic communications since 1986. In supplying this report, I should clarify that I have not been previously involved in the scheme, the subject of the application that is before the Council.
4. In previous roles, I have been a member of the Government Planning and Electronic Communications Working Group and so contributed to the drafting of Codes of Practice as well as the evolution of the permitted development rights and national planning policy. In addition, I was greatly involved in the 2017 reform of the Electronic Communications Code in making representations and holding discussions directly with the Law Commission and what was the Department of Culture Media and Sport.
5. With this background, I have an expert understanding of the interrelationship between the town planning system and the separate matters controlled by the Electronic Communications Code.
6. I have seen the proceedings of the Planning Committee that was held on 11 June and note the resolution was simply to defer consideration of the application. I can see that your request seeks information that is hoped to allay the concerns held by Members in relation to the loss of telecoms provision.
7. As you recognise in your email, there are confidentiality issues. This is twofold – the Mobile Network Operators (MNOs) themselves are in competition with each other and there are ongoing commercial discussions with Mayflower.
8. There are other substantive issues. I regret the request is unrealistic, as it is a complex exercise to relocate an installation. At high level, this requires the identification and assessment of potential alternative sites, discussions with alternative site providers and the City Council as planning authority, the preparation and approval of drawings for planning, prior consultation, the planning process itself and agreeing lease terms with the new site provider, which might possibly require seeking the imposition of an agreement via the Electronic Communications Code.
9. There are also a number of other factors that might affect the position. At present the MNOs only provide 4G services from Mayflower House and so the relocation presents them with an opportunity to consider how best to provide 5G services. This could entail splitting the cell, by using two smaller installations in different locations, possibly involving the deployment of street works monopoles, or using small cell antennas installed on existing lampposts, or perhaps a combination along with other network optimisation of existing installations to best balance out their operational requirements with minimising potential visual impact. The proposed merger between Three and Vodafone, which is currently before the Competition and Markets Authority, also has the potential to greatly affect matters.
10. At this stage, it is therefore technically unrealistic to effectively seek a definitive relocation programme for the MNOs, even setting aside the commercial sensitivities. Nonetheless, as explained in more detail below, constructive discussions are underway

with CTIL and MBNL, acting on behalf of all the MNOs, to agree potential timescales for vacating the roof of Mayflower House and should provide the necessary reassurance, even if not in the detail requested.

11. Whilst Mayflower is keen to be constructive, open and co-operative with the Council, this does not affect the fundamental point that the loss of telecoms provision in this case is not, in any event, a material planning consideration as it is a matter that is controlled by other legislation. This is consistent with the online guidance provided by the City Council on Material Considerations and in particular what is not a material consideration. This could not be clearer:

“The following are not material planning considerations as defined by national regulations and case law, so we can’t take them into account when deciding on planning applications. Please do not comment on:

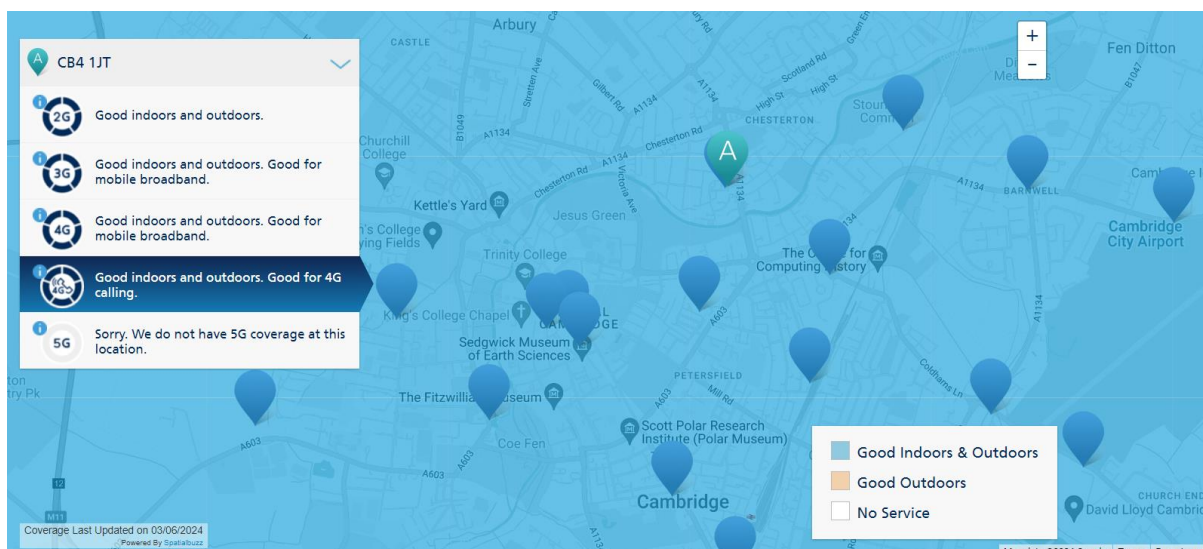
.....

Matters controlled by other legislation....”

12. I will explain this further below along with the reasons why it would not be appropriate for the City Council to seek to use the planning system to duplicate the existing controls.
13. Insofar as your Council might remain of the view that the matter can be a material consideration, for the same and other reasons, the issue is not one to which any weight should be attached.
14. I set out the following under sub-headings to help clarify the position and at the same time provide sufficient reassurance for the City Council that it can grant the planning permission sought without losing the provision of mobile services across the local area, a key concern expressed by Members.

The Extent of Any Potential Loss

15. I should point out that in an urban area, mobile installations that can send and receive signals over many kilometres tend to be much more closely sited. This is to minimise the effects of potential signal obstruction or attenuation that can be caused by high buildings, to provide additional network capacity and to provide resilience in the event that a site fails or needs to be turned off or reduced in power during any maintenance or repairs.
16. This is well illustrated by the O2 coverage checker below – icon A is Mayflower House and the other blue balloon icons are the locations of other nearby installations. As indicated in the bottom left hand corner, this was last updated on 3 June 2024.



O2 Coverage Checker

17. O2 and Vodafone share many of their sites, which are managed by Cornerstone Telecommunications Infrastructure LTD (CTIL), a company originally established by them as a joint venture. In view of this, one can reasonably assume that Vodafone will have access to these sites as well as possibly others.
18. A similar position exists with the other two MNOs, Three and EE, who established Mobile Broadband Networks Ltd (MBNL) to manage their network requirements. As the City Council will know, they submitted an application on the nearby building Bridgacre (Ref: 23/03981/FUL). In passing, I should point out that the refusal of this application on 14 December 2023 means MBNL is having to reconsider the options. These include resubmitting an application with the further information sought by your Council, possibly with some revisions, or looking again at the alternative sites identified from page 20 of the Site Specific Supplementary Information submitted with the application, along with other potential sites and technical solutions, such as small cells. This serves to bear out why it is unrealistic to be seeking a definitive relocation programme to be supplied now
19. Anyway, the coverage plots submitted with application 23/03981/FUL in relation to EE and Three, show similarly dense networks, with only some diminution in indoor coverage through the potential loss of Mayflower House, particularly for Three.
20. It is notable, that any diminution in indoor coverage is unlikely to result in any real loss of service for mobile devices. This is because most mobile users within buildings, whether commercial or domestic, will connect via Wi-Fi supplied by fixed broadband. Apart from generally better connections, this is normally less costly and does not use up limited mobile data plans. In addition, Wi-Fi is now widely available in coffee shops, restaurants and pubs, so can be readily accessed by anyone on the move and who might wish to use a device for a high data purpose.

21. The OFCOM broadband checker confirms that ultra-fast broadband is available in the wider area with download speeds up to 1,000 Mbps and upload speeds of 100 Mbps, which is significantly faster than current mobile speeds.
22. I hope this information provides reassurance to the Council that even if the development at Mayflower House resulted in the temporary loss of the mobile services currently provided from the roof, this would not equate to a significant loss of telecoms provision. As revealed by information that originates from the MNOs themselves, there would just be a degree of service diminution to indoor coverage that in all probability could be addressed through the use of existing and excellent fixed broadband services.
23. To the extent that you consider this to be a material consideration, this information should help you appreciate it is not one to which any significant weight should be attached, much less overriding weight.
24. **In any event, it is not for the planning system to address this issue, but the Electronic Communications Code.**
25. As recognised in paragraph 8.5 of the Committee Report, the National Planning Policy Framework (NPPF) does not provide any protection against the loss of individual sites and this has always been the case with previous expressions of national policy. As a consequence, Policy 84 of the Cambridge Local Plan (2018), which must be in accordance with national policy, does not offer any protection either.
26. The lack of protection against the loss of individual sites in the NPPF is not therefore an oversight, but deliberate as that protection is provided through the separate control of the Electronic Communications Code. I explain this in more detail below.

The Separate Control of the Electronic Communications Code

27. The Electronic Communications Code is now found at Schedule 3A to the Communications Act 2003, following the amendments made within the Digital Economy Act 2017. These amendments were introduced pursuant to extensive consultation with stakeholders that informed the Law Commission's Report (Law Com No 336) presented to Parliament in 2013. Since then further amendments have been made by the Product Security and Telecommunications Infrastructure Act 2022 to iron out certain issues, but the purpose and main objective of the statutory scheme were deliberate and clear.
28. The purpose of the Electronic Communications Code is to regulate the relationships between Electronic Communications Code Operators (which includes all four UK MNOs) and site providers.
29. The main objective of the Electronic Communications Code is to help facilitate the deployment of digital services, including those provided by the MNOs and the continuation of such services in the public interest. The Electronic Communications

Code therefore specifically controls the potential loss of services that is of concern to the City Council in this case.

30. At the heart of the Electronic Communications Code and the associated guidance is that agreements between operators and site providers should be consensual and fair to both parties. This involves a balanced approach in terms of the statutory powers that the MNOs seek to employ and also the payment of compensation where a site provider might suffer any loss.
31. It is especially relevant that one of the few grounds under which a potential or existing site provider may successfully resist the imposition of an agreement or the renewal of an agreement to remain on a site is for redevelopment. It is not therefore the intention of the Electronic Communications Code to place network requirements over the ability of a site provider to redevelop the whole or part of a site or building – the Government effectively acknowledges this could stifle much needed development required, for example, for economic purposes or housing development.
32. In addition, to limit the rights of a site provider to undertake redevelopment would be an unduly onerous burden and one that would be in conflict with human rights. It would clearly be inappropriate and wrong for the planning system to attempt to do this instead in these circumstances.
33. The Electronic Communications Code does, however, include mechanisms under which an MNO can remain on a building for a temporary period up to 18 months in the absence of any consensual agreement and these can come into play if necessary and considered justified by the Court to ensure the continuation of services. This is explained in more detail below with specific reference to Mayflower House.

Consensual Agreements

34. The MNOs all occupy space on the roof of Mayflower House under separate leases that have all expired. Consistent with the objectives and spirit of the Electronic Communications Code, Mayflower has been in positive and constructive dialogue with CTIL and MBNL that should lead to consensual agreements to allow the orderly relocation for services.

The Backstop of the Electronic Communications Code

35. If it is not possible to reach consensual agreement on such matters, then the MNOs have the backstop of being able to seek an agreement under the Electronic Communications Code to retain the apparatus already installed for a temporary period.
36. Even where such an agreement is granted by the Court, if at the end of that period the apparatus has not been removed, Mayflower would, in the absence of any further agreement, have to apply to have the apparatus removed under paragraph 37 of the Electronic Communications Code.

37. If the MNOs had to rely on these backstop powers and prevented or delayed Mayflower from being able to undertake its development, then compensation would have to be paid by them for this loss and any other losses. This might include, for example, professional fees associated with any planning application to renew the planning permission.
38. As you will know, the MNOs themselves have not objected to the planning application. This reflects the genuine attempts by all parties to reach agreement to dovetail the development proposed with their ability to successfully relocate, against the background of their considerable powers under the Electronic Communications Code.
39. The planning system should not therefore be used to duplicate these controls, which are more than adequate. Importantly also, they make provision for compensation to be paid to Mayflower in the event that it suffers any loss. By contrast, the refusal of planning permission on the basis of any loss of telecoms provision would effectively deny Mayflower the compensation otherwise due. This would be entirely contrary to the statutory scheme that has been devised by Government to be fair to all parties and recognising the need to respect human rights, only allowing interference of property rights where due compensation is paid.

Emergency Permitted Development Rights

40. One matter that is not raised in your email, but which clearly concerned Members, was the prospect of the MNOs seeking to install temporary installations, with reference being made to previous proposals on Jesus Green. I am not familiar with the full circumstances of that case, but understand that the MNOs were looking to install a temporary mast for a period of 18 months under the emergency Permitted Development Rights (PDRs). As you will know, these rights can be used without requiring any form of application – only a simple notification to the City Council.
41. Whilst such rights do exist, they can only be used in specific circumstances and I think it helpful to clarify that on the face of it, they do not apply in this case. The relevant PDRs are set out under Part 16 of Schedule 2 to the Town and Country (General Permitted Development) (England) (Order) 2015, as amended (the GPDO).
42. The emergency PDRs are set out under Class A (b) and allow for:

“the use in an emergency for a period not exceeding 18 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 that purpose.”
43. From this, one can discern three distinct criteria, all of which must be met.
44. First, the situation must be an emergency. "Emergency" is not defined in the GPDO or the Town and Country Planning Act 1990, as amended, but it is commonly understood in law to mean an urgent, sudden or unanticipated event. A lease expiry and with it

the possibility of having to surrender up a site are entirely normal and predictable estate events that can be successfully managed.

45. This is evident from the definition of "Emergency" that is set out in Section 1 of the Civil Contingencies Act 2004, as amended. This makes it clear that it is the event or situation that must be an emergency, which might lead to the disruption of the communication service, i.e. the disruption is not in itself an emergency:

"1. Meaning of "emergency"

(1) In this Part "emergency" means—

(a) an event or situation which threatens serious damage to human welfare in a place in the United Kingdom,

(b) an event or situation which threatens serious damage to the environment of a place in the United Kingdom, or

(c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.

(2) For the purposes of subsection (1)(a) an event or situation threatens damage to human welfare only if it involves, causes or may cause—

(a)....,

(f) disruption of a system of communication,..."

46. This is also made clear in the Electronic Communications Code. Although the Electronic Communications Code does not define "Emergency", a definition for "Emergency Works" is set out under paragraph 51 (9) and this confirms the above, i.e. "Emergency Works" are works to effectively end or prevent a situation arising that has caused or may cause disruption to service.
47. The Emergency PDRs also envisage a scenario under which the Code Operator has to react so quickly that the normal notification requirements are, under Condition A.2 (5B), deferred until "as soon as practicable after the emergency begins".
48. The MNOs occupy tens of thousands of sites and every year have to relocate a few hundred because of planned site redevelopments, which they refer to as 'churn'. The MNOs accordingly have established estate management procedures for dealing with these situations, which are not emergencies, even if they might result in some disruption in service. This criteria would not therefore be met.

49. Second, the emergency PDRs only allow the replacement of "unserviceable apparatus" and so clearly envisage some cataclysmic event in which an installation is damaged beyond repair. Again, the removal of the apparatus from the Mayflower House would not be undertaken because it had been rendered unserviceable by some sudden and cataclysmic event, but simply through lease expiry. This second criteria would not be met either.
50. Third, the apparatus installed must be moveable, which is the only criteria that might be met.
51. I hope this clarifies and allays the concern of the City Council that the emergency PDRs do not apply in this case. In the event that any temporary installations are required by the MNOs, they will therefore have to be subject to the normal town planning requirements for either full planning permission or prior approval under the GPDO, depending on the site specific circumstances.

Summary

52. In summary, whilst it is not realistic to be able to provide a detailed relocation programme for the four MNOs on Mayflower House, reassurance can be given about the constructive discussions to dovetail the planned development with their relocation. Any replacement installation or installations would be subject to the normal planning processes and so any significant proposals would require an application for either planning permission or under the GPDO prior approval process. The prospect of such applications is not relevant to this application and they would have to be considered by the City Council on their own merits.
53. If it transpires that the MNOs require any temporary installations, the emergency PDRs are unlikely to apply and so these would also have to be subject to the same processes. With the advance notice already given to the MNOs and likely timings under discussion, such installations should not prove necessary.
54. In any event, even if the installations on Mayflower House were removed before replacement, there would not be a total loss of mobile services. On the information available from the MNOs this would be largely confined to some diminution of indoor coverage. Furthermore, as mobile devices could still connect indoors via Wi-Fi through the ultra-fast broadband that is available across the wider area, this would be unlikely to result in any discernible service issues to the average mobile user.
55. Thus, even if considered to be a material planning consideration, little weight should be attached to this matter. It would clearly be inappropriate to afford overriding weight to protect existing installations when there is no policy basis for doing so in the specific guidance in the NPPF and Local Plan Policy 84. On the clear guidance of the City Council this matter is not a material planning consideration.
56. The continuation of service is a matter that is deliberately protected by separate legislation under the Electronic Communications Code and not through planning policy.

57. In the event, that the parties cannot reach a consensual agreement to dovetail the development proposed with the relocation efforts of the MNOs, then they can apply under the Electronic Communications Code to remain on site for a temporary period. Even after that period expires, Mayflower might have to follow further procedures under the Electronic Communications Code to require the removal of the apparatus if left in place. In these circumstances, Mayflower would be entitled to make a claim for compensation for any losses incurred.

Conclusion

58. In conclusion, the protection of the existing mobile installations on the roof of Mayflower House is not a material planning consideration and is clearly not a matter on which the Council could refuse planning permission on the basis of the NPPF, the Local Plan, or any other reasonable ground.
59. To withhold or refuse planning permission on this basis would be contrary to the statutory scheme devised by Government. This provides a clear divide between the respective roles of the planning system and the Electronic Communications Code. This scheme was enacted following extensive consultation by the Law Commission with stakeholders. The scheme expressly protects the right of redevelopment by a site provider, whilst at the same time making provision if necessary to allow for the continuation of services for a period of time that could be 18 months or more dependent on the processes that may have to be followed. At the same time, the scheme provides for the payment of any losses to the site provider.
60. Denial of planning permission on this ground would therefore represent a duplication of controls, contrary to the online guidance set out by the City Council. In addition, it would also unfairly deny Mayflower compensation in circumstances where that could be very high and where the Government has determined compensation should be payable to uphold human rights.
61. A refusal on this basis would also, in my opinion, expose the City Council to an award of costs in the event of any planning appeal.
62. I hope with this information and clarification you can maintain in your report to Committee a recommendation for approval (assuming the other issues are also addressed satisfactorily).

I trust this assists, but if you have any queries about this matter, or require any further amplification, please do not hesitate to contact me.

Yours faithfully

Saleem Shamash

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