Department of the Environment

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Date APP/11910/A/94/235102

-8 AUG 1995

Received -9 AUG 1995

Comments

Dear Sirs

SECTIONS 174 AND 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPENSATION ACT 1991
LAND AT KINGSHILL WATER TOWER, TOWER CLOSE, SHOOTERSWAY, BERKHAMSTED
APPEALS BY HUTCHISON MICROTEL LTD AND THREE VALLEYS WATER PLC

1. I am directed by the Secretary of State for the Environment to refer to:-

a. appeals by Hutchison Microtel Ltd and Three Valleys Water PLC (formerly Rickmansworth Water Limited) against Dacorum Borough Council's enforcement notice, issued on 14 February 1994, relating to the installation of a safety rail walkway and two upright steel poles on the above-mentioned water tower, without the grant of planning permission; and

b. the appeal by Hutchison Microtel Ltd against the Council's refusal of planning permission for the erection of a walkway and safety rail in connection with PCN (Personal Communications Network) development implemented under Part 24 of Schedule 2 to the Town and Country Planning General Development Order 1988 (the GDO).

2. The appeals against the enforcement notice were made on grounds (a), (c) and (g) in section 174(2)(a) of the Town and Country Planning Act 1990, as amended.

3. The written representations made in support of the appeal, and those of the Council and other interested parties, have been considered. An officer of the Department has inspected the appeal site and submitted a report of his inspection, including an appraisal of the issues. A copy of the report is annexed to this letter and forms part of it. The whole of the report has been carefully considered.

4. In the Department's letter of 5 April 1995, the parties were invited to comment on matters which did not appear to have previously been fully argued between them, namely whether or not the walkway and safety rail fell within the definition of "telecommunications apparatus" in paragraph A.3 of Class A in Part 24 of the GDO, and, if

so, whether they were covered by the condition in sub-paragraph (a) of paragraph A.2 in Part 24. Further representations were made on behalf of Hutchison Microtel Ltd on 13 April, by Three Valleys Water PLC on 19 April, and by the Council on 2 June 1995.

SUMMARY OF THE DECISIONS

5. The formal decision is set out in paragraph 21 of this letter. The appeals against the enforcement notice on ground (c) succeed and the notice is being quashed. The planning appeal does not, therefore, fall to be considered.

REASONS FOR THE DECISION

The appeals on ground (c)

6. On behalf of Hutchison Microtel Ltd, it was submitted that planning permission was not required as the safety rail and walkway and two upright steel poles were permitted development under Part 24 of Schedule 2 to the GDO, as amended. It was explained that the works had been installed as part of a telecommunications facility operated by the Company, and although when the enforcement notice was issued, the facility was not operational and no antennas had been attached to the poles, these had since been installed. It was submitted that the safety rail and walkway had been erected for use in connection with the running of a telecommunications system, which works, as such, fell within the definition of telecommunications apparatus and therefore constituted permitted development. The Company contended that the safety rail and walkway had been erected in connection with the use of a telecommunications system, although they were also of benefit to the Water Company. Commenting on the Council's view, based on Counsel's opinion, that for the walkway and safety rail to fall within Class A of Part 24 of Schedule 2 to the GDO, they had to be reasonably necessary, and that condition A.2(1) had to be complied with, while the Company accepted that the equipment should be installed in accordance with condition A.2(1), and that an alternative means of siting the cable tray could be found, they submitted that the relevant test was not that the equipment was reasonably necessary, but that it should be reasonably linked to the running of the telecommunications system. However, while it was contended that the test of necessity was stricter than the legislation actually required, it was explained that one of the Company's operational requirements was that ready access should be available to their equipment at all times and in almost all weather conditions, for maintenance, servicing and emergencies, and that the Company had a target time of 1½ hours in which to restore service in the event of equipment failure, and it was essential that they had ready, easy and safe access to be able to implement any repairs. The walkway and the safety rail were said to be fundamental to this target. It was also submitted that neither of the alternative means of access referred to in the Council's submissions represented a desirable or practicable solution. External scaffolding was considered impractical because it would be extremely cumbersome and time consuming. A safety harness system would be burdensome and unsatisfactory, and could make it difficult to respond in a reasonable time in case of equipment failure, and would not meet the

Company's reasonable operating requirements. The Company also needed two engineers to carry out repairs, and for that reason the walkway needed to completely encircle the Water Tower. The safety rail and walkway were reasonably linked and necessary as part of the telecommunications facility, and were needed in order to meet both Health & Safety requirements, and the Company's reasonable operational requirements.

7. On behalf of Three Valleys Water PLC, it was submitted that although the main argument concerning the work carried out on the tower by Hutchison Microtel, to whom the Water Company had granted facilities to erect aerials for telecommunications purposes, related to the applicability of the work for their purposes, the Water Company also gained some benefit from the use of the walkway for their maintenance needs. They therefore supported the points made in Hutchison Microtel's written representations.

8. Commenting on the question whether the walkway and safety rail fell within the definition of "telecommunications apparatus" in paragraph A.3 of Class A in Part 24 of Schedule 2 to the GDO, it was submitted, on behalf of Hutchison Microtel Ltd, that these items fell within the definition of telecommunications apparatus in paragraph 1 of Schedule 2 to the Telecommunications Act 1984, because they had been designed for use "in connection with the running of a telecommunications system". Reference was made to the Company's agents' letter to the Council of 2 March 1994 which expressed the view that paragraph 1 of Schedule 2 to the 1984 Act had two limbs and, by inference, that the matters particularised in sub-paragraphs (a) and (b) of that paragraph did not confine the definition, a view the Council appeared to accept. It was submitted that the works fell within sub-paragraph (b) for two reasons. First, the cable tray was supported by the safety rail and walkway (although it could be supported by other means); thus the cable tray and optical fibre cables were telecommunications equipment, supported by the safety rail, which fell within sub-paragraph (b). Second, the safety rail and walkway had been erected in part to allow the safe installation of the antennas and other associated apparatus such as supporting poles and optical fibre cables. The safety rail and walkway continued to be required to allow for the safe repair, replacement of, or addition to, such telecommunications apparatus in the event of failure, damage or changes in operational requirements. As a result, it was concluded that the safety rail and walkway fell to be defined as a structure or other thing on, by or from which any telecommunication apparatus is or may be installed, and fell within sub-paragraph (b).

9. As to whether the walkway and safety rail are covered by the condition in sub-paragraph (1) of paragraph A.2 in Part 24, it was argued that the condition did not apply to the safety rail and walkway. It was submitted that the equipment cabins were located elsewhere and that the reference to radio equipment housing was irrelevant; the safety rail and walkway did not support any of the antennas, which were fixed, using supporting poles, to the walls of the tower itself. As the supporting apparatus referred to in the condition related to the antenna supports, the safety rail and walkway appeared to fall outside the scope of the condition. While

the safety rail and walkway provided a supporting function to the cable tray, it was not related to the supporting of the antennas, and was an incidental feature, its main purpose being to allow the safe installation and maintenance of telecommunications apparatus.

10. These additional representations on behalf of Hutchison Microtel Ltd were endorsed by Three Valleys Water PLC.

11. On behalf of the Council, it was contended that a breach of planning control had occurred, and that planning permission was required for the safety rail and walkway because, (i) it had not been demonstrated that they were reasonably necessary for the purposes of running a telecommunications system (particularly as the walkway completely encircled the tower), and accordingly the apparatus did not fall within Class A.(a) of Part 24 of Schedule 2 to the GDO; (ii) the walkway had not clearly been erected in connection with the running of a telecommunications system, but appeared to have been erected to meet the requirements of both the telecommunications operator and the water authority; (iii) alternative systems requiring the installation of less apparatus to afford access to the antennas in a less visually obtrusive manner would have been preferred and could have been provided under the provisions of the GDO and Hutchison Microtel's telecommunications operator's licence; and (iv) Condition A.2.(1) of Part 24 of Schedule 2 to the GDO had not been complied with. It was further submitted that the definition of "telecommunications apparatus" in paragraph 1 of Schedule 2 to the Telecommunications Act 1984 had two parts, namely section 4(3) apparatus: antennas etc, and other apparatus "designed ... for use in connection with the running of a telecommunications system", of which paragraphs (a) and (b) contained examples, and that the relevant question was whether or not the walkway and safety rail were apparatus designed for use in connection with the running of a telecommunications system. The Council disputed the contention in the Company's agents' letter of 2 March 1994, that the safety rail and walkway had "clearly" been erected in connection with the running of a telecommunications system, given that the safety rail and walkway now completely encircled the tower, whereas, initially, only two-thirds of the tower were to have been surrounded. If the "clear" reason for the installation was to gain access to the section 4(3) apparatus, ie the antennas, for maintenance purposes, then it was arguable whether they were "designed for use in connection with the running of a telecommunications system". However, this would relate only to the two-thirds of the walkway which linked the antennas and not the element added after the initial notification. The Council explained that the 1984 Act definition of "telecommunications apparatus" contains no express reference to maintenance, or maintenance equipment, and submitted that the statutory context demanded that ancillary apparatus (such as walkways and safety rails) should be reasonably necessary for the purposes of running a telecommunication system, and that a full appraisal of the likely frequency of maintenance operations and the extent to which antennas could be reached for maintenance purposes in other ways or by temporary means of access, was required before the installation could be justified.

12. The Council went on to contend that, even if the walkway and safety rail were taken to fall within the definition of "telecommunications apparatus", they still had to comply with the conditions in A.2. of Part 24, and that requirement A.2.(1) was reinforced by Condition 7.1 to Schedule 4 of Hutchison Microtel's operator's licence. It was contended that these conditions had not been complied with in that only two thirds of the walkway and safety rail could conceivably be required to allow access to the antennas, and the effect of the development on the external appearance of the building had not been minimised. While it was accepted that the walkway and rail provided one way of complying with the Health, Safety and Welfare Regulations 1992, it was submitted that these regulations did not prevail over planning requirements or those of the operator's licence, and that the Council had suggested alternative methods of complying with health and safety requirements, including the use of a safety harness system, which would minimise the effect on the external appearance of the tower at little additional cost to the Company. It was further submitted that there was no need for the rail and walkway to encircle the building, or to be of such an utilitarian design, which gave the impression that they had been installed purely from a functional perspective, with no regard to aesthetics or the character of the building. As to the role of the safety rail and walkway in supporting a cable tray, it was accepted that they did so "in connection with the running of a telecommunications system", but on the available evidence, it was not necessary to support the tray in such a prominent and visually obtrusive manner. The earlier submitted plans referred to a "feeder cable fixed to handrail" and not to a cable tray, and only the plans submitted on 2 March 1994 included details of a cable tray. It was clear that the cable tray had not been sited to minimise its effect on the external appearance of the building.

13. Commenting on Hutchison Microtel Ltd's written representations, the Council reiterated that it had not been demonstrated that the rail and walkway were reasonably necessary for the purposes of running a telecommunications system. It was assumed that maintenance, and servicing, were pre-planned activities, carried out on a regular but infrequent basis, and could be carried out by trained personnel, accustomed to working at high levels, using a safety harness system, without any operational inconvenience to the Company. It also appeared that equipment failure would be an infrequent, if unpredictable, event, and the likelihood of equipment failure and the frequency of demand for emergency access had to be balanced against the permanent defacement of the building by the safety rail and walkway. While the Company's 1½ hour target response time might be increased if a harness system were used instead of a safety rail, this was not unreasonable given the infrequency with which equipment failure was likely to occur. The Council did not accept that the Company's objection to the use of a harness system was sufficient to justify the provision of the safety rail and walkway.

14. Commenting on the question whether the walkway and safety rail fell within the definition of "apparatus" for the purposes of Part 24 of Schedule 2 to the GDO, the Council relied on their previous submissions, and contended that the use of the words "is or may be

installed.." were governed by the opening words of the definition in paragraph 1 of Schedule 2 to the Telecommunications 1984 Act, namely "designed or adapted for use in connection with the running of a telecommunications system". While they agreed that sub-paragraphs (a) and (b) merely identified particular aspects of the broader definition, they contended that the words "may be installed" should not be interpreted to mean "may possibly be installed.." but rather to mean "would be reasonably likely to be installed..". In their view, anything less would take sub-paragraph (b) outside the scope of the broader definition, and would conflict with the clear intention of Parliament to apply reasonable limits to the definition of "telecommunications apparatus" and to permitted development rights in respect of such apparatus. Otherwise, the scope of sub-paragraph (b) was potentially infinite, as there were few structures, poles or other things on, by or from which telecommunications apparatus could not, in theory, at some time be "installed, supported, carried or suspended".

15. On the question whether Condition A.2(1) applied to the safety rail and walkway, the Council contended that the words "any antenna or supporting apparatus" were simply intended to summarise the category of development permitted by Class A.(a) and were, in effect, shorthand for Class A.(a) development, and that any other construction would be illogical and inconsistent with the clear intention of Parliament to seek to minimise the visual impact of "telecommunications apparatus".

16. The parties' submissions, including those made after the site inspection, and the Department's officer's appraisal and recommendations, have all been carefully considered. The main issue to be determined is whether the walkway and safety rail may be regarded as permitted development under the provisions of Class A of Part 24 of Schedule 2 to the GDO 1988, as amended, which permits development by telecommunications code system operators subject to certain conditions and limitations. The version of Part 24 in force at the date of the alleged breach of planning control, and on which the decision on the ground (c) appeal is based, is contained in Amendment No 6 (SI 1992 No 2450) which came into force on 4 January 1993. Condition A.2.(1) of the substituted Part 24 provides that Class A.(a) development is permitted subject to the condition that any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building in accordance with that permission shall, so far as is practicable, be sited so as to minimise its effect on the external appearance of the building.

17. In the context of the provisions of Part 24 of Schedule 2 to the GDO, it was not disputed that Hutchison Microtel Ltd is a telecommunications system code operator permitted to carry out, in accordance with its licence, development consisting of the installation of telecommunication apparatus, which is defined by reference to paragraph 1 of Schedule 2 to the Telecommunications Act 1984, as apparatus constructed or adapted for use in transmitting or receiving signals of various types, and also includes apparatus not

falling within that primary definition but which is designed or adapted for use in connection with the running of a telecommunication system.

18. In the present context, it is considered that the first issue to be decided is whether the installation of the safety rail and walkway can be regarded as apparatus designed or adapted for use in connection with the running of a telecommunications system, rather than whether it is reasonably necessary for that purpose, as submitted by the Council. The Department's officer concludes, in paragraph 8 of his appraisal, that on the available evidence, while the walkway and railings have benefited the Water Company, they were erected solely to enable telecommunications equipment to be maintained. In their further representations on the question whether the safety rail and walkway could be regarded as "telecommunications apparatus" for the purpose of Part 24 of Schedule 2 to the GDO, Hutchison Microtel Ltd submitted that the items fall within the definition of "telecommunication apparatus" in paragraph (1) of Schedule 2 to the Telecommunications Act 1984, in that they have been designed for use in connection with the running of a telecommunications system, and fall within sub-paragraph (b) of that paragraph because they support not only the cable tray and optical cables, but also facilitate the installation of (and repair or replacement of, or addition to) the antennas themselves and other associated apparatus. The Council contended that the words "is or may be installed.." are governed by the opening words of the definition in paragraph 1, and maintained that the words "may be installed.." should be interpreted as meaning "would be reasonably likely to be installed..", and that any other interpretation would take paragraph (b) outside the scope of the broader definition and would conflict with what they saw as the intention of reasonably limiting the definition of "telecommunications apparatus" and the permitted development rights granted in respect of such apparatus.

19. These submissions have been carefully considered and the view is taken that the words "may be installed" have the meaning "capable of being installed", and that had Parliament intended to limit the scope of the definition of "telecommunications apparatus" more strictly, the legislation would have indicated so. The Council argued that since maintenance or maintenance equipment are not expressly referred to in the 1984 Act definition, ancillary apparatus such as walkways and safety rails should be "reasonably necessary" for the purposes of running a telecommunications system. While it is accepted that maintenance equipment is not specifically referred to either in the 1984 Act definition, or in the GDO, the issue for consideration is whether such equipment satisfies all the requirements of Part 24. The legislation does not provide for the import of the test proposed by the Council to justify its installation. With regard to the Council's argument that the walkway was not erected solely in connection with the running of a telecommunications system but that it was provided to meet the requirements of both the telecommunications operator and the Water Company, it is considered, in agreement with the Department's officer, that while they may incidentally benefit the latter, they were erected to afford access to, or facilitate the maintenance of, the operator's telecommunication equipment or apparatus. Accordingly, it is

concluded that the walkway and safety rail constitute "apparatus designed for use in connection with the running of a telecommunications system", in that they constitute structures or other things by or from which telecommunication apparatus is or may be installed, supported, carried or suspended, within sub-paragraph (b) of paragraph (1) of Schedule 2 to the Telecommunication Act 1984, and may therefore may be regarded as "telecommunications apparatus" for the purposes of Part 24 of Schedule 2 to the GDO.

20. In view of the above conclusion, it is necessary to consider whether the works are excluded from Part 24 of Schedule 2 to the GDO by virtue of the condition imposed by paragraph A.2.(1). The condition states that any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building in accordance with Class A(a) or (c) permission shall, so far as is practicable, be sited so as to minimise its effect on the external appearance of the building. The Department's officer concluded in paragraph 9 of his appraisal, that the appeal structures do not conform with condition A.2. In their further comments on the relevance of the condition Hutchison Microtel Ltd submitted that the safety rail and walkway do not support any of the antennas, and fall outside the scope of the condition, and, while they accept that they support the cable tray, this was an incidental feature. The primary purpose of the structure was to allow the safe installation and maintenance of telecommunications apparatus. It was the Council's view that the words "any antenna or supporting apparatus" merely summarise Class A.(a) development, to reflect Parliament's intention to minimise the visual impact of "telecommunications apparatus". Again these submissions have been carefully considered, and the view is taken that condition A.2.(1) is not intended to relate to Class A.(a) development as a whole, but only to the categories of development specified in it, on the basis that if it had been intended to relate to the whole of Class A.(a) it would have been worded accordingly. The appeal structures do not fall within the categories of antenna, radio equipment housing, or development ancillary to such housing. They do not support any antennas, and while they support the cable tray, their main purpose is to facilitate the installation and maintenance of telecommunications apparatus. The term "supporting apparatus" does not, by definition, include the telecommunications apparatus itself. For these reasons, it is concluded that they cannot be regarded as falling within the category of "supporting apparatus", and therefore that they fall outside the scope of condition A.2.(1). It is not contended that the appeal development fails to comply with any of the other requirements in paragraphs A.1 or A.2 of Part 24, and accordingly the installation of the safety rail and walkway is considered to constitute development permitted under Class A of Part 24 of Schedule 2 to the GDO. The two upright steel poles referred to in the enforcement notice, to which the Council maintain their opposition, are for the purpose of supporting antennas which have been installed by the operating company, since the issue of the enforcement notice. In the absence of representations to the contrary, it is agreed with the Department's officer that the erection of the poles also constitutes development permitted by Class A of Part 24 of Schedule 2 to the GDO. For all the above reasons, it is concluded that the appeal

development involved no breach of planning control, the appeals on ground (c) therefore succeed, and the enforcement notice will be quashed. In these circumstances the appeals on ground (a) and (g) against the notice, and that against refusal of planning permission do not fall to be considered.

FORMAL DECISION

21. For the reasons given in paragraphs 16 to 20 above, the appeals against the enforcement notice on ground (c) succeed and the Secretary of State, in exercise of his powers in section 176(1) of the 1990 Act, hereby quashes the Council's enforcement notice issued on 14 February 1994 in respect of land at Kingshill Water Tower, Tower Close, Shootersway, Berkhamsted.

RIGHT OF APPEAL AGAINST THE DECISION

22. This letter is issued as the Secretary of State's determination of the appeals. Leaflet C, enclosed for those concerned, sets out the rights of appeal to the High Court against the decision.

23. A separate decision letter is being sent to Three Valleys Water PLC.

Yours faithfully

A J WRIGHT
Authorised by the Secretary of State
to sign in that behalf

DAS AM CB

Department of the Environment

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b. the appeal by Hutchison Microtel Ltd against the Council's refusal of planning permission for the erection of a walkway and safety rail in connection with PCN (Personal Communications Network) development implemented under Part 24 of Schedule 2 to the Town and Country Planning General Development Order 1988 (the GDO).

2. The appeals against the enforcement notice were made on grounds (a), (c) and (g) in section 174(2)(a) of the Town and Country Planning Act 1990, as amended.

3. The written representations made in support of the appeal, and those of the Council and other interested parties, have been considered. An officer of the Department has inspected the appeal site and submitted a report of his inspection, including an appraisal of the issues. A copy of the report is annexed to this letter and forms part of it. The whole of the report has been carefully considered.

4. In the Department's letter of 5 April 1995, the parties were invited to comment on matters which did not appear to have previously been fully argued between them, namely whether or not the walkway and safety rail fell within the definition of "telecommunications apparatus" in paragraph A.3 of Class A in Part 24 of the GDO, and, if

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so, whether they were covered by the condition in sub-paragraph (a) of paragraph A.2 in Part 24. Further representations were made on behalf of Hutchison Microtel Ltd on 13 April, by Three Valleys Water PLC on 19 April, and by the Council on 2 June 1995.

SUMMARY OF THE DECISIONS

5. The formal decision is set out in paragraph 21 of this letter. The appeals against the enforcement notice on ground (c) succeed and the notice is being quashed. The planning appeal does not, therefore, fall to be considered.

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9. As to whether the walkway and safety rail are covered by the condition in sub-paragraph (1) of paragraph A.2 in Part 24, it was argued that the condition did not apply to the safety rail and walkway. It was submitted that the equipment cabins were located elsewhere and that the reference to radio equipment housing was irrelevant; the safety rail and walkway did not support any of the antennas, which were fixed, using supporting poles, to the walls of the tower itself. As the supporting apparatus referred to in the condition related to the antenna supports, the safety rail and walkway appeared to fall outside the scope of the condition. While

the safety rail and walkway provided a supporting function to the cable tray, it was not related to the supporting of the antennas, and was an incidental feature, its main purpose being to allow the safe installation and maintenance of telecommunications apparatus.

10. These additional representations on behalf of Hutchison Microtel Ltd were endorsed by Three Valleys Water PLC.

11. On behalf of the Council, it was contended that a breach of planning control had occurred, and that planning permission was required for the safety rail and walkway because, (i) it had not been demonstrated that they were reasonably necessary for the purposes of running a telecommunications system (particularly as the walkway completely encircled the tower), and accordingly the apparatus did not fall within Class A.(a) of Part 24 of Schedule 2 to the GDO; (ii) the walkway had not clearly been erected in connection with the running of a telecommunications system, but appeared to have been erected to meet the requirements of both the telecommunications operator and the water authority; (iii) alternative systems requiring the installation of less apparatus to afford access to the antennas in a less visually obtrusive manner would have been preferred and could have been provided under the provisions of the GDO and Hutchison Microtel's telecommunications operator's licence; and (iv) Condition A.2.(1) of Part 24 of Schedule 2 to the GDO had not been complied with. It was further submitted that the definition of "telecommunications apparatus" in paragraph 1 of Schedule 2 to the Telecommunications Act 1984 had two parts, namely section 4(3) apparatus: antennas etc, and other apparatus "designed ... for use in connection with the running of a telecommunications system", of which paragraphs (a) and (b) contained examples, and that the relevant question was whether or not the walkway and safety rail were apparatus designed for use in connection with the running of a telecommunications system. The Council disputed the contention in the Company's agents' letter of 2 March 1994, that the safety rail and walkway had "clearly" been erected in connection with the running of a telecommunications system, given that the safety rail and walkway now completely encircled the tower, whereas, initially, only two-thirds of the tower were to have been surrounded. If the "clear" reason for the installation was to gain access to the section 4(3) apparatus, ie the antennas, for maintenance purposes, then it was arguable whether they were "designed for use in connection with the running of a telecommunications system". However, this would relate only to the two-thirds of the walkway which linked the antennas and not the element added after the initial notification. The Council explained that the 1984 Act definition of "telecommunications apparatus" contains no express reference to maintenance, or maintenance equipment, and submitted that the statutory context demanded that ancillary apparatus (such as walkways and safety rails) should be reasonably necessary for the purposes of running a telecommunication system, and that a full appraisal of the likely frequency of maintenance operations and the extent to which antennas could be reached for maintenance purposes in other ways or by temporary means of access, was required before the installation could be justified.

12. The Council went on to contend that, even if the walkway and safety rail were taken to fall within the definition of "telecommunications apparatus", they still had to comply with the conditions in A.2. of Part 24, and that requirement A.2.(1) was reinforced by Condition 7.1 to Schedule 4 of Hutchison Microtel's operator's licence. It was contended that these conditions had not been complied with in that only two thirds of the walkway and safety rail could conceivably be required to allow access to the antennas, and the effect of the development on the external appearance of the building had not been minimised. While it was accepted that the walkway and rail provided one way of complying with the Health, Safety and Welfare Regulations 1992, it was submitted that these regulations did not prevail over planning requirements or those of the operator's licence, and that the Council had suggested alternative methods of complying with health and safety requirements, including the use of a safety harness system, which would minimise the effect on the external appearance of the tower at little additional cost to the Company. It was further submitted that there was no need for the rail and walkway to encircle the building, or to be of such an utilitarian design, which gave the impression that they had been installed purely from a functional perspective, with no regard to aesthetics or the character of the building. As to the role of the safety rail and walkway in supporting a cable tray, it was accepted that they did so "in connection with the running of a telecommunications system", but on the available evidence, it was not necessary to support the tray in such a prominent and visually obtrusive manner. The earlier submitted plans referred to a "feeder cable fixed to handrail" and not to a cable tray, and only the plans submitted on 2 March 1994 included details of a cable tray. It was clear that the cable tray had not been sited to minimise its effect on the external appearance of the building.

13. Commenting on Hutchison Microtel Ltd's written representations, the Council reiterated that it had not been demonstrated that the rail and walkway were reasonably necessary for the purposes of running a telecommunications system. It was assumed that maintenance, and servicing, were pre-planned activities, carried out on a regular but infrequent basis, and could be carried out by trained personnel, accustomed to working at high levels, using a safety harness system, without any operational inconvenience to the Company. It also appeared that equipment failure would be an infrequent, if unpredictable, event, and the likelihood of equipment failure and the frequency of demand for emergency access had to be balanced against the permanent defacement of the building by the safety rail and walkway. While the Company's 1½ hour target response time might be increased if a harness system were used instead of a safety rail, this was not unreasonable given the infrequency with which equipment failure was likely to occur. The Council did not accept that the Company's objection to the use of a harness system was sufficient to justify the provision of the safety rail and walkway.

14. Commenting on the question whether the walkway and safety rail fell within the definition of "apparatus" for the purposes of Part 24 of Schedule 2 to the GDO, the Council relied on their previous submissions, and contended that the use of the words "is or may be

installed.." were governed by the opening words of the definition in paragraph 1 of Schedule 2 to the Telecommunications 1984 Act, namely "designed or adapted for use in connection with the running of a telecommunications system". While they agreed that sub-paragraphs (a) and (b) merely identified particular aspects of the broader definition, they contended that the words "may be installed" should not be interpreted to mean "may possibly be installed.." but rather to mean "would be reasonably likely to be installed..". In their view, anything less would take sub-paragraph (b) outside the scope of the broader definition, and would conflict with the clear intention of Parliament to apply reasonable limits to the definition of "telecommunications apparatus" and to permitted development rights in respect of such apparatus. Otherwise, the scope of sub-paragraph (b) was potentially infinite, as there were few structures, poles or other things on, by or from which telecommunications apparatus could not, in theory, at some time be "installed, supported, carried or suspended".

15. On the question whether Condition A.2(1) applied to the safety rail and walkway, the Council contended that the words "any antenna or supporting apparatus" were simply intended to summarise the category of development permitted by Class A.(a) and were, in effect, shorthand for Class A.(a) development, and that any other construction would be illogical and inconsistent with the clear intention of Parliament to seek to minimise the visual impact of "telecommunications apparatus".

16. The parties' submissions, including those made after the site inspection, and the Department's officer's appraisal and recommendations, have all been carefully considered. The main issue to be determined is whether the walkway and safety rail may be regarded as permitted development under the provisions of Class A of Part 24 of Schedule 2 to the GDO 1988, as amended, which permits development by telecommunications code system operators subject to certain conditions and limitations. The version of Part 24 in force at the date of the alleged breach of planning control, and on which the decision on the ground (c) appeal is based, is contained in Amendment No 6 (SI 1992 No 2450) which came into force on 4 January 1993. Condition A.2.(1) of the substituted Part 24 provides that Class A.(a) development is permitted subject to the condition that any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building in accordance with that permission shall, so far as is practicable, be sited so as to minimise its effect on the external appearance of the building.

17. In the context of the provisions of Part 24 of Schedule 2 to the GDO, it was not disputed that Hutchison Microtel Ltd is a telecommunications system code operator permitted to carry out, in accordance with its licence, development consisting of the installation of telecommunication apparatus, which is defined by reference to paragraph 1 of Schedule 2 to the Telecommunications Act 1984, as apparatus constructed or adapted for use in transmitting or receiving signals of various types, and also includes apparatus not

falling within that primary definition but which is designed or adapted for use in connection with the running of a telecommunication system.

18. In the present context, it is considered that the first issue to be decided is whether the installation of the safety rail and walkway can be regarded as apparatus designed or adapted for use in connection with the running of a telecommunications system, rather than whether it is reasonably necessary for that purpose, as submitted by the Council. The Department's officer concludes, in paragraph 8 of his appraisal, that on the available evidence, while the walkway and railings have benefited the Water Company, they were erected solely to enable telecommunications equipment to be maintained. In their further representations on the question whether the safety rail and walkway could be regarded as "telecommunications apparatus" for the purpose of Part 24 of Schedule 2 to the GDO, Hutchison Microtel Ltd submitted that the items fall within the definition of "telecommunication apparatus" in paragraph (1) of Schedule 2 to the Telecommunications Act 1984, in that they have been designed for use in connection with the running of a telecommunications system, and fall within sub-paragraph (b) of that paragraph because they support not only the cable tray and optical cables, but also facilitate the installation of (and repair or replacement of, or addition to) the antennas themselves and other associated apparatus. The Council contended that the words "is or may be installed.." are governed by the opening words of the definition in paragraph 1, and maintained that the words "may be installed.." should be interpreted as meaning "would be reasonably likely to be installed..", and that any other interpretation would take paragraph (b) outside the scope of the broader definition and would conflict with what they saw as the intention of reasonably limiting the definition of "telecommunications apparatus" and the permitted development rights granted in respect of such apparatus.

19. These submissions have been carefully considered and the view is taken that the words "may be installed" have the meaning "capable of being installed", and that had Parliament intended to limit the scope of the definition of "telecommunications apparatus" more strictly, the legislation would have indicated so. The Council argued that since maintenance or maintenance equipment are not expressly referred to in the 1984 Act definition, ancillary apparatus such as walkways and safety rails should be "reasonably necessary" for the purposes of running a telecommunications system. While it is accepted that maintenance equipment is not specifically referred to either in the 1984 Act definition, or in the GDO, the issue for consideration is whether such equipment satisfies all the requirements of Part 24. The legislation does not provide for the import of the test proposed by the Council to justify its installation. With regard to the Council's argument that the walkway was not erected solely in connection with the running of a telecommunications system but that it was provided to meet the requirements of both the telecommunications operator and the Water Company, it is considered, in agreement with the Department's officer, that while they may incidentally benefit the latter, they were erected to afford access to, or facilitate the maintenance of, the operator's telecommunication equipment or apparatus. Accordingly, it is

concluded that the walkway and safety rail constitute "apparatus designed for use in connection with the running of a telecommunications system", in that they constitute structures or other things by or from which telecommunication apparatus is or may be installed, supported, carried or suspended, within sub-paragraph (b) of paragraph (1) of Schedule 2 to the Telecommunication Act 1984, and may therefore may be regarded as "telecommunications apparatus" for the purposes of Part 24 of Schedule 2 to the GDO.

20. In view of the above conclusion, it is necessary to consider whether the works are excluded from Part 24 of Schedule 2 to the GDO by virtue of the condition imposed by paragraph A.2.(1). The condition states that any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building in accordance with Class A(a) or (c) permission shall, so far as is practicable, be sited so as to minimise its effect on the external appearance of the building. The Department's officer concluded in paragraph 9 of his appraisal, that the appeal structures do not conform with condition A.2. In their further comments on the relevance of the condition Hutchison Microtel Ltd submitted that the safety rail and walkway do not support any of the antennas, and fall outside the scope of the condition, and, while they accept that they support the cable tray, this was an incidental feature. The primary purpose of the structure was to allow the safe installation and maintenance of telecommunications apparatus. It was the Council's view that the words "any antenna or supporting apparatus" merely summarise Class A.(a) development, to reflect Parliament's intention to minimise the visual impact of "telecommunications apparatus". Again these submissions have been carefully considered, and the view is taken that condition A.2.(1) is not intended to relate to Class A.(a) development as a whole, but only to the categories of development specified in it, on the basis that if it had been intended to relate to the whole of Class A.(a) it would have been worded accordingly. The appeal structures do not fall within the categories of antenna, radio equipment housing, or development ancillary to such housing. They do not support any antennas, and while they support the cable tray, their main purpose is to facilitate the installation and maintenance of telecommunications apparatus. The term "supporting apparatus" does not, by definition, include the telecommunications apparatus itself. For these reasons, it is concluded that they cannot be regarded as falling within the category of "supporting apparatus", and therefore that they fall outside the scope of condition A.2.(1). It is not contended that the appeal development fails to comply with any of the other requirements in paragraphs A.1 or A.2 of Part 24, and accordingly the installation of the safety rail and walkway is considered to constitute development permitted under Class A of Part 24 of Schedule 2 to the GDO. The two upright steel poles referred to in the enforcement notice, to which the Council maintain their opposition, are for the purpose of supporting antennas which have been installed by the operating company, since the issue of the enforcement notice. In the absence of representations to the contrary, it is agreed with the Department's officer that the erection of the poles also constitutes development permitted by Class A of Part 24 of Schedule 2 to the GDO. For all the above reasons, it is concluded that the appeal

development involved no breach of planning control, the appeals on ground (c) therefore succeed, and the enforcement notice will be quashed. In these circumstances the appeals on ground (a) and (g) against the notice, and that against refusal of planning permission do not fall to be considered.

FORMAL DECISION

21. For the reasons given in paragraphs 16 to 20 above, the appeals against the enforcement notice on ground (c) succeed and the Secretary of State, in exercise of his powers in section 176(1) of the 1990 Act, hereby quashes the Council's enforcement notice issued on 14 February 1994 in respect of land at Kingshill Water Tower, Tower Close, Shootersway, Berkhamsted.

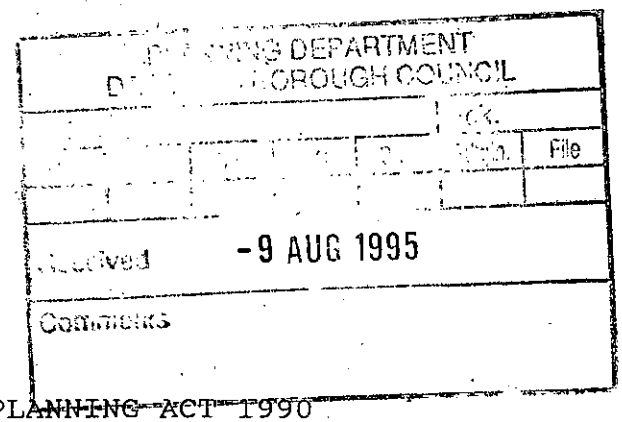
RIGHT OF APPEAL AGAINST THE DECISION

22. This letter is issued as the Secretary of State's determination of the appeals. Leaflet C, enclosed for those concerned, sets out the rights of appeal to the High Court against the decision.

23. A separate decision letter is being sent to Three Valleys Water PLC.

Yours faithfully

A J WRIGHT
Authorised by the Secretary of State
to sign in that behalf



TOWN AND COUNTRY PLANNING ACT 1990

PLANNING AND COMPENSATION ACT 1991

DACORUM BOROUGH COUNCIL

APPEALS

by

HUTCHISON MICROTEL LTD and THREE VALLEYS WATER SERVICES PLC

against an

ENFORCEMENT NOTICE

and a

REFUSAL OF PLANNING PERMISSION

concerning land and premises at

KINGSHILL WATER TOWER, TOWER CLOSE, SHOOTERSWAY, BERKHAMSTED

Inspector : W J Weeks FRICS

Date of Site Visit : 5 December 1994

File References : T/APP/C/94/A1910/633168
T/APP/C/94/A1910/633287
T/APP/A1910/A/94/235102

Tollgate House
Houlton Street
BRISTOL BS2 9DJ

29 December 1994

To the Right Honourable John Gummer MP
Secretary of State for the Environment

Sir

I have been asked to advise on the appeals made by Hutchison Microtel Ltd and Three Valleys Water Services PLC under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991, against an enforcement notice issued by the Dacorum Borough Council. I have also been asked to advise on the appeal by Hutchison Microtel Ltd against a refusal of planning permission by the Council. All three appeals concern land and premises at Kingshill Water Tower, Tower Close, Shootersway, Berkhamsted. I carried out an inspection of the site on your behalf on 5 December 1994. A list of those present at the site visit is appended below.

1. a. The notice was issued on 14 February 1994.

b. The breach of planning control alleged in the notice is, without planning permission, the installation of a safety rail walkway and two upright steel poles on the water tower shown in green on the plan attached to the notice.

c. The requirements of the notice are:

i. Remove the safety rail, walkway and two upright steel poles from the tower;

ii. make good any damage caused to the corbels, parapet, gutter or roof of the tower by the installation or removal of the safety rail, walkway and two upright steel poles.

d. The period for compliance with the notice is nine months.

e. The appeals against the notice were made on the grounds set out in Section 174(2) (a) (c) and (g) of the 1990 Act as amended by the 1991 Act.

2. The development for which planning permission was refused is the erection of a walkway and safety rail in connection with PCN development implemented under Part 24 of the GDO. The reason for refusal was that Berkhamsted Water Tower is a

building with a strong architectural character and is a prominent feature of the Berkhamsted skyline. The proposed development is inappropriate in terms of its design and materials and consequently causes harm to the appearance of the building and is visually intrusive. The development is unacceptable in the terms of policy 8 of the Dacorum Borough Local Plan (Deposit Draft and Proposed Modifications).

3. This report includes a description of the appeal site and its surroundings, my appraisal (on the basis of my observations and the written representations of the parties) on the various grounds of appeal and my recommendation as to the decision which might be made in this case.

THE APPEAL SITE AND THE SURROUNDINGS

4. The Water Tower is within a residential area, comprising mainly detached dwellings, on the southern edge of Berkhamsted. It is between 14m and 16m in diameter and a total of some 38m high. It is constructed of concrete and has a conical tiled roof. The top 9m of tower is wider and overhangs the lower part on corbels. The roof rises from a concrete upstand which rings the building and forms a concealed gutter. The upstand overhangs the main building and is also supported on corbels.

5. The safety rail and walkway are supported by vertical galvanised steel tubes. These are welded to plates bolted to alternate corbels. The tubes extend some 150mm outside the upstand and rise above it to support the walkway and two rails. A 300mm deep cable tray conceals the lower rail for about two thirds of its length. The walkway is 600mm wide and comprises short, straight sections of steel lattice. It is about 26.8m above the ground. There are three sets of antennae. One is at the point where a dormer window in the roof provides access to the walkway. The other two, which also have microwave dishes, are evenly spaced one third and two-thirds of the way round the roof.

6. I saw the Tower from the nearby streets of Shootersway, Tower Close, Oxfield Close, Cross Oak Road and Kingsdale Road. I could also see it in the middle distance from sections of Kingshill Way and the Berkhamsted bypass.

ARTICLE 4 DIRECTION

7. On 17 June 1994 you approved an Article 4 Direction which had the effect of withdrawing the permission to carry out development within Class A(a) of Part 24 of Schedule 2 to the General Development Order 1988 (as amended) on the appeal site. As the walkway was erected before this, the Direction did not apply to it. However, if the notice is upheld, any replacement structure which Hutchison Microtel might wish to erect would require planning permission.

APPRAISAL

The appeals under ground (c)

8. As Hutchison Microtel is a telecommunications system code operator it is permitted to carry out development which falls within Part 24. The installation of any telecommunications apparatus is among the developments in Class A(a) of this Part. Such apparatus includes any designed or adapted for use in connection with the running of a telecommunications system. Whilst they have incidentally benefitted the Water Company, I think the evidence shows that the walkway and railings were erected solely to enable telecommunications equipment to be maintained.

9. Condition A.2(1) requires that, for something to come within Class A(a), it shall, so far as is practicable, be sited so as to minimise its effect on the exterior of the building. I do not think that it would be reasonably practicable for engineering staff to reach the antennae, even with safety harnesses, except along a walkway. Nor do I believe that scaffolding would provide a realistic alternative. In the letter dated 2 December 1993, from Moult Benn, the Appellants indicate that it would be practicable for the cable tray to be shallower and in a less obtrusive position. They also indicate that the walkway need only encircle two-thirds of the tower. These changes would reduce the effect on the exterior of the building. I do not therefore believe that the structure conforms with condition A.2. It follows that I consider it to have been development which required planning permission.

10. The two poles referred to in the allegation are independent of the walkway. They support antennae which have been installed by a telecommunications system code operator. In my view their erection was permitted by part 24. I consider that the notice should be varied so as to omit them.

The appeals under ground (a), the deemed application and the section 78 appeal.

11. I consider that the main issue raised by these appeals is the effect of the structure on the appearance of the locality.

12. Structure Plan policies seek to maintain the quality of urban areas. The draft Dacorum Borough Local Plan is at an advanced stage of preparation. I consider that it should be accorded substantial weight. Policy 103 provides that telecommunications apparatus will be assessed primarily on its effect on the appearance of a locality.

13. In my opinion the Water Tower is an unusual and interesting building. It gives the impression of having been a fortification. Whilst constructed of concrete it is only possible to distinguish it from stone at fairly close quarters. Trees in the locality limit the areas from which it

can be seen. However this results in elements of surprise, which add to the interest the building creates. Seen from nearby streets, it looms high above the surrounding dwellings. It is also a very prominent feature in medium distance views. I think that it makes a major and positive contribution to the appearance of the locality.

14. The walkway follows the line of the concrete upstand fairly closely. As a result it did not appear to me to be an unduly obtrusive feature. However the railings, which run across the upstand, and rise above it, did. The cable tray was considerably more so. Although not evident during my site inspection, I consider that the galvanised surfaces of these components will often reflect sunlight. This will add to the obtrusive appearance of the rail and the tray. I also consider that it will draw attention to the walkway. In my opinion the structure harms the appearance of the tower and unacceptably diminishes the contribution it makes to the appearance of the locality, contrary to draft Local Plan policy 103.

15. In addition to supporting the representations made on behalf of Hutchison Microtel, Three Valleys Water Services draws attention to Guidelines, prepared in 1988, which require it to carry out external inspections of water towers at least every 3 years. It says that inspection of the guttering and roof was extremely difficult before the walkway and handrail were provided. If the appeal were unsuccessful, the Company would consider erecting a walkway for its own use. It could do so under Class E(g) of Part 17 of the GDO. There is no certainty that this would happen and I do not believe that the possibility justifies accepting the harm which the existing structure causes.

16. The equipment which has been installed is operational. It forms an integral part of the network which Hutchinson Microtel is required to provide under the terms of its licence. It provides good coverage, a direct line of sight to Hemel Hempstead, and meets operational requirements, including ready access to equipment in most weather conditions. It therefore facilitates the growth of the system which is being provided. These are significant advantages but I do not think that they outweigh the harm which the structure causes.

17. The Appellants suggest that planning permission could be granted subject to conditions requiring the walkway to be reduced in length, the cable tray resited, and the metalwork painted. These would reduce the impact of the structure. However, particularly having regard to the handrail's projection above the upstand, I do not consider that they would make it acceptable.

18. The Appellants also suggest a planning condition which required the replacement of the existing structure with one having a different design, colour and mode of installation. As the existing structure is the subject of the Section 78 and

deemed applications, such a condition would negate any permission granted. It would therefore be unreasonable.

The appeals under ground (g)

19. If the notice is upheld, Hutchison Microtel may decide that access to their equipment is too difficult and seek an alternative site. They request that the period for compliance be extended to 2 years to enable this to be done. Initial studies of an existing mast at Dickshill Wood indicate that it would be unable to meet the Company's requirements. No other studies have been carried out to identify possible alternatives. However, bearing in mind that the Company is anxious to avoid disruption to its services, it would have every incentive to carry out any studies as quickly as possible. Furthermore, it is uncertain whether the Company would decide to relocate. I consider that, in these circumstances, a period of one year would be reasonable.

RECOMMENDATIONS

20. I recommend as follows:

a. the enforcement notice be varied by:

i. the deletion from paragraphs 3 and 5 of the words "safety rail walkway and two upright steel poles" and the substitution therefore of the words "safety rail and walkway";

ii. the deletion from paragraph 5 of the words "nine months" and the substitution therefore of the words "one year";

b. the notice, as varied, be upheld;

c. the section 78 appeal be dismissed.

SIGNED

W J WEEKS
PINS 6

PERSONS PRESENT AT THE SITE VISIT.

For the Appellants Mr S Shamash of King Sturge & Co

Mr J Bridgeman, Three Valleys Water Services PLC

For the Council Mr M McFarland

DEPARTMENT OF THE ENVIRONMENT
TOLLGATE HOUSE
HOULTON STREET
BRISTOL
BS2 9DJ

LEAFLET C

RIGHTS OF APPEAL

a) On an enforcement appeal.

An appeal against the decision given in the accompanying letter on the enforcement notice appeal may be made to the High Court on a point of law under the provisions of section 289 of the Town and Country Planning Act 1990. **Such an appeal requires the leave of that Court.** Any application for leave to appeal must be made within 28 days of the date of this letter (unless the period is extended by the Court). However, any decision to grant planning permission on the deemed application in section 177(5) of the Act or to discharge a condition or limitation, under section 177(1)(a) or (b) **(but only these aspects of the enforcement appeal decision)** may alternatively be challenged under the following provisions, which do not require the leave of the Court.

b) On a decision on the enforcement appeal to grant planning permission or to discharge a condition or limitation, or where there is a related appeal under section 78 of the Act.

Section 288 of the Town and Country Planning Act 1990 provides that a person who is aggrieved by the decision, given in the accompanying letter, to grant permission on the deemed application or to discharge a condition or limitation, or by the decision on the appeal made under section 78 of the Act, may challenge its validity by an application to the High Court within six weeks from the date of this letter. The grounds upon which an application may be made to the Court under section 288 are that:-

1. the decision is not within the powers of the Act (that is, the Secretary of State has exceeded his powers); or

2. any of the relevant requirements have not been complied with, and the applicant's interests have been substantially prejudiced by the failure to comply.

"The relevant requirements" are defined in section 288 of the Act: they are the requirements of that Act, the Tribunals and Inquiries Act 1971 (or any other enactment replaced thereby), and the requirements of any order, regulations or rules made under those Acts. This includes the Town and Country Planning (Inquiries Procedure) Rules 1992 (SI 1992 No 2038), the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 1987 (SI 1987 No 701), the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1992 (SI 1992 No 1903), and the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991 No 2804 as amended by SI 1992 No 1904).

A person who thinks there may be grounds for challenging a decision should seriously consider taking legal advice before embarking on a legal challenge.

INSPECTION OF DOCUMENTS

(only for appeals decided following a local inquiry)

Under the provisions of rule 17(3) of the Town and Country Planning (Inquiries Procedure) Rules 1992, and rule 19(4) of the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1992, any person entitled to be notified of the decision given in the accompanying letter may apply to the Secretary of State in writing within six weeks of the notification of him of the decision, or the supply to him of the Inspector's report, whichever is the later, for an opportunity of inspecting any documents, photographs and plans appended to the report. Such documents etc are listed in an appendix to the report. Any application under this provision should be sent to the address on the decision letter, quoting the Department's reference number shown on the decision letter and stating the proposed date and time (in normal office hours) for the inspection. At least 3 days' notice should be given, if possible.

DEPARTMENT OF THE ENVIRONMENT (PD4)

March 1995

Department of the Environment

Room TX113
Tollgate House
Houlton Street
Bristol BS2 9DJ

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Divisional Enquiries 01179
Fax Number 01179 878639
GTN Code 1374 8630

Council's ref 4/0333/94EN
Your ref SS/JMP

Messrs King Sturge & Co
40 Berkeley Square
BRISTOL
BS8 1HU

Our ref APP/C/94/A1910/633287 &
633168
Date APP/1191[illegible]

Dear Sirs

SECTIONS 174 AND 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPENSATION ACT 1991
LAND AT KINGSHILL WATER TOWER, TOWER CLOSE, SHOOTERSWAY, BERKHAMSTED
APPEALS BY HUTCHISON MICROTEL LTD AND THREE VALLEYS WATER PLC

1. I am directed by the Secretary of State for the Environment to refer to:-

a. appeals by Hutchison Microtel Ltd and Three Valleys Water PLC (formerly Rickmansworth Water Limited) against Dacorum Borough Council's enforcement notice, issued on 14 February 1994, relating to the installation of a safety rail walkway and two upright steel poles on the above-mentioned water tower, without the grant of planning permission; and

b. the appeal by Hutchison Microtel Ltd against the Council's refusal of planning permission for the erection of a walkway and safety rail in connection with PCN (Personal Communications Network) development implemented under Part 24 of Schedule 2 to the Town and Country Planning General Development Order 1988 (the GDO).

2. The appeals against the enforcement notice were made on grounds (a), (c) and (g) in section 174(2)(a) of the Town and Country Planning Act 1990, as amended.

3. The written representations made in support of the appeal, and those of the Council and other interested parties, have been considered. An officer of the Department has inspected the appeal site and submitted a report of his inspection, including an appraisal of the issues. A copy of the report is annexed to this letter and forms part of it. The whole of the report has been carefully considered.

4. In the Department's letter of 5 April 1995, the parties were invited to comment on matters which did not appear to have previously been fully argued between them, namely whether or not the walkway and safety rail fell within the definition of "telecommunications apparatus" in paragraph A.3 of Class A in Part 24 of the GDO, and, if

so, whether they were covered by the condition in sub-paragraph (a) of paragraph A.2 in Part 24. Further representations were made on behalf of Hutchison Microtel Ltd on 13 April, by Three Valleys Water PLC on 19 April, and by the Council on 2 June 1995.

SUMMARY OF THE DECISIONS

5. The formal decision is set out in paragraph 21 of this letter. The appeals against the enforcement notice on ground (c) succeed and the notice is being quashed. The planning appeal does not, therefore, fall to be considered.

REASONS FOR THE DECISION

The appeals on ground (c)

6. On behalf of Hutchison Microtel Ltd, it was submitted that planning permission was not required as the safety rail and walkway and two upright steel poles were permitted development under Part 24 of Schedule 2 to the GDO, as amended. It was explained that the works had been installed as part of a telecommunications facility operated by the Company, and although when the enforcement notice was issued, the facility was not operational and no antennas had been attached to the poles, these had since been installed. It was submitted that the safety rail and walkway had been erected for use in connection with the running of a telecommunications system, which works, as such, fell within the definition of telecommunications apparatus and therefore constituted permitted development. The Company contended that the safety rail and walkway had been erected in connection with the use of a telecommunications system, although they were also of benefit to the Water Company. Commenting on the Council's view, based on Counsel's opinion, that for the walkway and safety rail to fall within Class A of Part 24 of Schedule 2 to the GDO, they had to be reasonably necessary, and that condition A.2(1) had to be complied with, while the Company accepted that the equipment should be installed in accordance with condition A.2(1), and that an alternative means of siting the cable tray could be found, they submitted that the relevant test was not that the equipment was reasonably necessary, but that it should be reasonably linked to the running of the telecommunications system. However, while it was contended that the test of necessity was stricter than the legislation actually required, it was explained that one of the Company's operational requirements was that ready access should be available to their equipment at all times and in almost all weather conditions, for maintenance, servicing and emergencies, and that the Company had a target time of 1½ hours in which to restore service in the event of equipment failure, and it was essential that they had ready, easy and safe access to be able to implement any repairs. The walkway and the safety rail were said to be fundamental to this target. It was also submitted that neither of the alternative means of access referred to in the Council's submissions represented a desirable or practicable solution. External scaffolding was considered impractical because it would be extremely cumbersome and time consuming. A safety harness system would be burdensome and unsatisfactory, and could make it difficult to respond in a reasonable time in case of equipment failure, and would not meet the

Company's reasonable operating requirements. The Company also needed two engineers to carry out repairs, and for that reason the walkway needed to completely encircle the Water Tower. The safety rail and walkway were reasonably linked and necessary as part of the telecommunications facility, and were needed in order to meet both Health & Safety requirements, and the Company's reasonable operational requirements.

7. On behalf of Three Valleys Water PLC, it was submitted that although the main argument concerning the work carried out on the tower by Hutchison Microtel, to whom the Water Company had granted facilities to erect aerials for telecommunications purposes, related to the applicability of the work for their purposes, the Water Company also gained some benefit from the use of the walkway for their maintenance needs. They therefore supported the points made in Hutchison Microtel's written representations.

8. Commenting on the question whether the walkway and safety rail fell within the definition of "telecommunications apparatus" in paragraph A.3 of Class A in Part 24 of Schedule 2 to the GDO, it was submitted, on behalf of Hutchison Microtel Ltd, that these items fell within the definition of telecommunications apparatus in paragraph 1 of Schedule 2 to the Telecommunications Act 1984, because they had been designed for use "in connection with the running of a telecommunications system". Reference was made to the Company's agents' letter to the Council of 2 March 1994 which expressed the view that paragraph 1 of Schedule 2 to the 1984 Act had two limbs and, by inference, that the matters particularised in sub-paragraphs (a) and (b) of that paragraph did not confine the definition, a view the Council appeared to accept. It was submitted that the works fell within sub-paragraph (b) for two reasons. First, the cable tray was supported by the safety rail and walkway (although it could be supported by other means); thus the cable tray and optical fibre cables were telecommunications equipment, supported by the safety rail, which fell within sub-paragraph (b). Second, the safety rail and walkway had been erected in part to allow the safe installation of the antennas and other associated apparatus such as supporting poles and optical fibre cables. The safety rail and walkway continued to be required to allow for the safe repair, replacement of, or addition to, such telecommunications apparatus in the event of failure, damage or changes in operational requirements. As a result, it was concluded that the safety rail and walkway fell to be defined as a structure or other thing on, by or from which any telecommunication apparatus is or may be installed, and fell within sub-paragraph (b).

9. As to whether the walkway and safety rail are covered by the condition in sub-paragraph (1) of paragraph A.2 in Part 24, it was argued that the condition did not apply to the safety rail and walkway. It was submitted that the equipment cabins were located elsewhere and that the reference to radio equipment housing was irrelevant; the safety rail and walkway did not support any of the antennas, which were fixed, using supporting poles, to the walls of the tower itself. As the supporting apparatus referred to in the condition related to the antenna supports, the safety rail and walkway appeared to fall outside the scope of the condition. While

the safety rail and walkway provided a supporting function to the cable tray, it was not related to the supporting of the antennas, and was an incidental feature, its main purpose being to allow the safe installation and maintenance of telecommunications apparatus.

10. These additional representations on behalf of Hutchison Microtel Ltd were endorsed by Three Valleys Water PLC.

11. On behalf of the Council, it was contended that a breach of planning control had occurred, and that planning permission was required for the safety rail and walkway because, (i) it had not been demonstrated that they were reasonably necessary for the purposes of running a telecommunications system (particularly as the walkway completely encircled the tower), and accordingly the apparatus did not fall within Class A.(a) of Part 24 of Schedule 2 to the GDO; (ii) the walkway had not clearly been erected in connection with the running of a telecommunications system, but appeared to have been erected to meet the requirements of both the telecommunications operator and the water authority; (iii) alternative systems requiring the installation of less apparatus to afford access to the antennas in a less visually obtrusive manner would have been preferred and could have been provided under the provisions of the GDO and Hutchison Microtel's telecommunications operator's licence; and (iv) Condition A.2.(1) of Part 24 of Schedule 2 to the GDO had not been complied with. It was further submitted that the definition of "telecommunications apparatus" in paragraph 1 of Schedule 2 to the Telecommunications Act 1984 had two parts, namely section 4(3) apparatus: antennas etc, and other apparatus "designed ... for use in connection with the running of a telecommunications system", of which paragraphs (a) and (b) contained examples, and that the relevant question was whether or not the walkway and safety rail were apparatus designed for use in connection with the running of a telecommunications system. The Council disputed the contention in the Company's agents' letter of 2 March 1994, that the safety rail and walkway had "clearly" been erected in connection with the running of a telecommunications system, given that the safety rail and walkway now completely encircled the tower, whereas, initially, only two-thirds of the tower were to have been surrounded. If the "clear" reason for the installation was to gain access to the section 4(3) apparatus, ie the antennas, for maintenance purposes, then it was arguable whether they were "designed for use in connection with the running of a telecommunications system". However, this would relate only to the two-thirds of the walkway which linked the antennas and not the element added after the initial notification. The Council explained that the 1984 Act definition of "telecommunications apparatus" contains no express reference to maintenance, or maintenance equipment, and submitted that the statutory context demanded that ancillary apparatus (such as walkways and safety rails) should be reasonably necessary for the purposes of running a telecommunication system, and that a full appraisal of the likely frequency of maintenance operations and the extent to which antennas could be reached for maintenance purposes in other ways or by temporary means of access, was required before the installation could be justified.

12. The Council went on to contend that, even if the walkway and safety rail were taken to fall within the definition of "telecommunications apparatus", they still had to comply with the conditions in A.2. of Part 24, and that requirement A.2.(1) was reinforced by Condition 7.1 to Schedule 4 of Hutchison Microtel's operator's licence. It was contended that these conditions had not been complied with in that only two thirds of the walkway and safety rail could conceivably be required to allow access to the antennas, and the effect of the development on the external appearance of the building had not been minimised. While it was accepted that the walkway and rail provided one way of complying with the Health, Safety and Welfare Regulations 1992, it was submitted that these regulations did not prevail over planning requirements or those of the operator's licence, and that the Council had suggested alternative methods of complying with health and safety requirements, including the use of a safety harness system, which would minimise the effect on the external appearance of the tower at little additional cost to the Company. It was further submitted that there was no need for the rail and walkway to encircle the building, or to be of such an utilitarian design, which gave the impression that they had been installed purely from a functional perspective, with no regard to aesthetics or the character of the building. As to the role of the safety rail and walkway in supporting a cable tray, it was accepted that they did so "in connection with the running of a telecommunications system", but on the available evidence, it was not necessary to support the tray in such a prominent and visually obtrusive manner. The earlier submitted plans referred to a "feeder cable fixed to handrail" and not to a cable tray, and only the plans submitted on 2 March 1994 included details of a cable tray. It was clear that the cable tray had not been sited to minimise its effect on the external appearance of the building.

13. Commenting on Hutchison Microtel Ltd's written representations, the Council reiterated that it had not been demonstrated that the rail and walkway were reasonably necessary for the purposes of running a telecommunications system. It was assumed that maintenance, and servicing, were pre-planned activities, carried out on a regular but infrequent basis, and could be carried out by trained personnel, accustomed to working at high levels, using a safety harness system, without any operational inconvenience to the Company. It also appeared that equipment failure would be an infrequent, if unpredictable, event, and the likelihood of equipment failure and the frequency of demand for emergency access had to be balanced against the permanent defacement of the building by the safety rail and walkway. While the Company's 1½ hour target response time might be increased if a harness system were used instead of a safety rail, this was not unreasonable given the infrequency with which equipment failure was likely to occur. The Council did not accept that the Company's objection to the use of a harness system was sufficient to justify the provision of the safety rail and walkway.

14. Commenting on the question whether the walkway and safety rail fell within the definition of "apparatus" for the purposes of Part 24 of Schedule 2 to the GDO, the Council relied on their previous submissions, and contended that the use of the words "is or may be

installed.." were governed by the opening words of the definition in paragraph 1 of Schedule 2 to the Telecommunications 1984 Act, namely "designed or adapted for use in connection with the running of a telecommunications system". While they agreed that sub-paragraphs (a) and (b) merely identified particular aspects of the broader definition, they contended that the words "may be installed" should not be interpreted to mean "may possibly be installed.." but rather to mean "would be reasonably likely to be installed..". In their view, anything less would take sub-paragraph (b) outside the scope of the broader definition, and would conflict with the clear intention of Parliament to apply reasonable limits to the definition of "telecommunications apparatus" and to permitted development rights in respect of such apparatus. Otherwise, the scope of sub-paragraph (b) was potentially infinite, as there were few structures, poles or other things on, by or from which telecommunications apparatus could not, in theory, at some time be "installed, supported, carried or suspended".

15. On the question whether Condition A.2(1) applied to the safety rail and walkway, the Council contended that the words "any antenna or supporting apparatus" were simply intended to summarise the category of development permitted by Class A.(a) and were, in effect, shorthand for Class A.(a) development, and that any other construction would be illogical and inconsistent with the clear intention of Parliament to seek to minimise the visual impact of "telecommunications apparatus".

16. The parties' submissions, including those made after the site inspection, and the Department's officer's appraisal and recommendations, have all been carefully considered. The main issue to be determined is whether the walkway and safety rail may be regarded as permitted development under the provisions of Class A of Part 24 of Schedule 2 to the GDO 1988, as amended, which permits development by telecommunications code system operators subject to certain conditions and limitations. The version of Part 24 in force at the date of the alleged breach of planning control, and on which the decision on the ground (c) appeal is based, is contained in Amendment No 6 (SI 1992 No 2450) which came into force on 4 January 1993. Condition A.2.(1) of the substituted Part 24 provides that Class A.(a) development is permitted subject to the condition that any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building in accordance with that permission shall, so far as is practicable, be sited so as to minimise its effect on the external appearance of the building.

17. In the context of the provisions of Part 24 of Schedule 2 to the GDO, it was not disputed that Hutchison Microtel Ltd is a telecommunications system code operator permitted to carry out, in accordance with its licence, development consisting of the installation of telecommunication apparatus, which is defined by reference to paragraph 1 of Schedule 2 to the Telecommunications Act 1984, as apparatus constructed or adapted for use in transmitting or receiving signals of various types, and also includes apparatus not

falling within that primary definition but which is designed or adapted for use in connection with the running of a telecommunication system.

18. In the present context, it is considered that the first issue to be decided is whether the installation of the safety rail and walkway can be regarded as apparatus designed or adapted for use in connection with the running of a telecommunications system, rather than whether it is reasonably necessary for that purpose, as submitted by the Council. The Department's officer concludes, in paragraph 8 of his appraisal, that on the available evidence, while the walkway and railings have benefited the Water Company, they were erected solely to enable telecommunications equipment to be maintained. In their further representations on the question whether the safety rail and walkway could be regarded as "telecommunications apparatus" for the purpose of Part 24 of Schedule 2 to the GDO, Hutchison Microtel Ltd submitted that the items fall within the definition of "telecommunication apparatus" in paragraph (1) of Schedule 2 to the Telecommunications Act 1984, in that they have been designed for use in connection with the running of a telecommunications system, and fall within sub-paragraph (b) of that paragraph because they support not only the cable tray and optical cables, but also facilitate the installation of (and repair or replacement of, or addition to) the antennas themselves and other associated apparatus. The Council contended that the words "is or may be installed.." are governed by the opening words of the definition in paragraph 1, and maintained that the words "may be installed.." should be interpreted as meaning "would be reasonably likely to be installed..", and that any other interpretation would take paragraph (b) outside the scope of the broader definition and would conflict with what they saw as the intention of reasonably limiting the definition of "telecommunications apparatus" and the permitted development rights granted in respect of such apparatus.

19. These submissions have been carefully considered and the view is taken that the words "may be installed" have the meaning "capable of being installed", and that had Parliament intended to limit the scope of the definition of "telecommunications apparatus" more strictly, the legislation would have indicated so. The Council argued that since maintenance or maintenance equipment are not expressly referred to in the 1984 Act definition, ancillary apparatus such as walkways and safety rails should be "reasonably necessary" for the purposes of running a telecommunications system. While it is accepted that maintenance equipment is not specifically referred to either in the 1984 Act definition, or in the GDO, the issue for consideration is whether such equipment satisfies all the requirements of Part 24. The legislation does not provide for the import of the test proposed by the Council to justify its installation. With regard to the Council's argument that the walkway was not erected solely in connection with the running of a telecommunications system but that it was provided to meet the requirements of both the telecommunications operator and the Water Company, it is considered, in agreement with the Department's officer, that while they may incidentally benefit the latter, they were erected to afford access to, or facilitate the maintenance of, the operator's telecommunication equipment or apparatus. Accordingly, it is

concluded that the walkway and safety rail constitute "apparatus designed for use in connection with the running of a telecommunications system", in that they constitute structures or other things by or from which telecommunication apparatus is or may be installed, supported, carried or suspended, within sub-paragraph (b) of paragraph (1) of Schedule 2 to the Telecommunication Act 1984, and may therefore may be regarded as "telecommunications apparatus" for the purposes of Part 24 of Schedule 2 to the GDO.

20. In view of the above conclusion, it is necessary to consider whether the works are excluded from Part 24 of Schedule 2 to the GDO by virtue of the condition imposed by paragraph A.2.(1). The condition states that any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building in accordance with Class A(a) or (c) permission shall, so far as is practicable, be sited so as to minimise its effect on the external appearance of the building. The Department's officer concluded in paragraph 9 of his appraisal, that the appeal structures do not conform with condition A.2. In their further comments on the relevance of the condition Hutchison Microtel Ltd submitted that the safety rail and walkway do not support any of the antennas, and fall outside the scope of the condition, and, while they accept that they support the cable tray, this was an incidental feature. The primary purpose of the structure was to allow the safe installation and maintenance of telecommunications apparatus. It was the Council's view that the words "any antenna or supporting apparatus" merely summarise Class A.(a) development, to reflect Parliament's intention to minimise the visual impact of "telecommunications apparatus". Again these submissions have been carefully considered, and the view is taken that condition A.2.(1) is not intended to relate to Class A.(a) development as a whole, but only to the categories of development specified in it, on the basis that if it had been intended to relate to the whole of Class A.(a) it would have been worded accordingly. The appeal structures do not fall within the categories of antenna, radio equipment housing, or development ancillary to such housing. They do not support any antennas, and while they support the cable tray, their main purpose is to facilitate the installation and maintenance of telecommunications apparatus. The term "supporting apparatus" does not, by definition, include the telecommunications apparatus itself. For these reasons, it is concluded that they cannot be regarded as falling within the category of "supporting apparatus", and therefore that they fall outside the scope of condition A.2.(1). It is not contended that the appeal development fails to comply with any of the other requirements in paragraphs A.1 or A.2 of Part 24, and accordingly the installation of the safety rail and walkway is considered to constitute development permitted under Class A of Part 24 of Schedule 2 to the GDO. The two upright steel poles referred to in the enforcement notice, to which the Council maintain their opposition, are for the purpose of supporting antennas which have been installed by the operating company, since the issue of the enforcement notice. In the absence of representations to the contrary, it is agreed with the Department's officer that the erection of the poles also constitutes development permitted by Class A of Part 24 of Schedule 2 to the GDO. For all the above reasons, it is concluded that the appeal

development involved no breach of planning control, the appeals on ground (c) therefore succeed, and the enforcement notice will be quashed. In these circumstances the appeals on ground (a) and (g) against the notice, and that against refusal of planning permission do not fall to be considered.

FORMAL DECISION

21. For the reasons given in paragraphs 16 to 20 above, the appeals against the enforcement notice on ground (c) succeed and the Secretary of State, in exercise of his powers in section 176(1) of the 1990 Act, hereby quashes the Council's enforcement notice issued on 14 February 1994 in respect of land at Kingshill Water Tower, Tower Close, Shootersway, Berkhamsted.

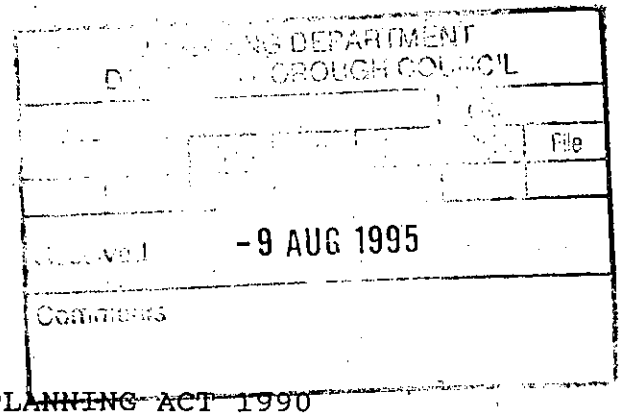
RIGHT OF APPEAL AGAINST THE DECISION

22. This letter is issued as the Secretary of State's determination of the appeals. Leaflet C, enclosed for those concerned, sets out the rights of appeal to the High Court against the decision.

23. A separate decision letter is being sent to Three Valleys Water PLC.

Yours faithfully

A J WRIGHT
Authorised by the Secretary of State
to sign in that behalf



TOWN AND COUNTRY PLANNING ACT 1990

PLANNING AND COMPENSATION ACT 1991

DACORUM BOROUGH COUNCIL

APPEALS

by

HUTCHISON MICROTEL LTD and THREE VALLEYS WATER SERVICES PLC

against an

ENFORCEMENT NOTICE

and a

REFUSAL OF PLANNING PERMISSION

concerning land and premises at

KINGSHILL WATER TOWER, TOWER CLOSE, SHOOTERSWAY, BERKHAMSTED

Inspector : W J Weeks FRICS

Date of Site Visit : 5 December 1994

File References : T/APP/C/94/A1910/633168
T/APP/C/94/A1910/633287
T/APP/A1910/A/94/235102

Tollgate House
Houlton Street
BRISTOL BS2 9DJ

29 December 1994

To the Right Honourable John Gummer MP
Secretary of State for the Environment

Sir

I have been asked to advise on the appeals made by Hutchison Microtel Ltd and Three Valleys Water Services PLC under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991, against an enforcement notice issued by the Dacorum Borough Council. I have also been asked to advise on the appeal by Hutchison Microtel Ltd against a refusal of planning permission by the Council. All three appeals concern land and premises at Kingshill Water Tower, Tower Close, Shootersway, Berkhamsted. I carried out an inspection of the site on your behalf on 5 December 1994. A list of those present at the site visit is appended below.

1. a. The notice was issued on 14 February 1994.

b. The breach of planning control alleged in the notice is, without planning permission, the installation of a safety rail walkway and two upright steel poles on the water tower shown in green on the plan attached to the notice.

c. The requirements of the notice are:

i. Remove the safety rail, walkway and two upright steel poles from the tower;

ii. make good any damage caused to the corbels, parapet, gutter or roof of the tower by the installation or removal of the safety rail, walkway and two upright steel poles.

d. The period for compliance with the notice is nine months.

e. The appeals against the notice were made on the grounds set out in Section 174(2) (a) (c) and (g) of the 1990 Act as amended by the 1991 Act.

2. The development for which planning permission was refused is the erection of a walkway and safety rail in connection with PCN development implemented under Part 24 of the GDO. The reason for refusal was that Berkhamsted Water Tower is a

building with a strong architectural character and is a prominent feature of the Berkhamsted skyline. The proposed development is inappropriate in terms of its design and materials and consequently causes harm to the appearance of the building and is visually intrusive. The development is unacceptable in the terms of policy 8 of the Dacorum Borough Local Plan (Deposit Draft and Proposed Modifications).

3. This report includes a description of the appeal site and its surroundings, my appraisal (on the basis of my observations and the written representations of the parties) on the various grounds of appeal and my recommendation as to the decision which might be made in this case.

THE APPEAL SITE AND THE SURROUNDINGS

4. The Water Tower is within a residential area, comprising mainly detached dwellings, on the southern edge of Berkhamsted. It is between 14m and 16m in diameter and a total of some 38m high. It is constructed of concrete and has a conical tiled roof. The top 9m of tower is wider and overhangs the lower part on corbels. The roof rises from a concrete upstand which rings the building and forms a concealed gutter. The upstand overhangs the main building and is also supported on corbels.

5. The safety rail and walkway are supported by vertical galvanised steel tubes. These are welded to plates bolted to alternate corbels. The tubes extend some 150mm outside the upstand and rise above it to support the walkway and two rails. A 300mm deep cable tray conceals the lower rail for about two thirds of its length. The walkway is 600mm wide and comprises short, straight sections of steel lattice. It is about 26.8m above the ground. There are three sets of antennae. One is at the point where a dormer window in the roof provides access to the walkway. The other two, which also have microwave dishes, are evenly spaced one third and two-thirds of the way round the roof.

6. I saw the Tower from the nearby streets of Shootersway, Tower Close, Oxfield Close, Cross Oak Road and Kingsdale Road. I could also see it in the middle distance from sections of Kingshill Way and the Berkhamsted bypass.

ARTICLE 4 DIRECTION

7. On 17 June 1994 you approved an Article 4 Direction which had the effect of withdrawing the permission to carry out development within Class A(a) of Part 24 of Schedule 2 to the General Development Order 1988 (as amended) on the appeal site. As the walkway was erected before this, the Direction did not apply to it. However, if the notice is upheld, any replacement structure which Hutchison Microtel might wish to erect would require planning permission.

APPRAISAL

The appeals under ground (c)

8. As Hutchison Microtel is a telecommunications system code operator it is permitted to carry out development which falls within Part 24. The installation of any telecommunications apparatus is among the developments in Class A(a) of this Part. Such apparatus includes any designed or adapted for use in connection with the running of a telecommunications system. Whilst they have incidentally benefitted the Water Company, I think the evidence shows that the walkway and railings were erected solely to enable telecommunications equipment to be maintained.

9. Condition A.2(1) requires that, for something to come within Class A(a), it shall, so far as is practicable, be sited so as to minimise its effect on the exterior of the building. I do not think that it would be reasonably practicable for engineering staff to reach the antennae, even with safety harnesses, except along a walkway. Nor do I believe that scaffolding would provide a realistic alternative. In the letter dated 2 December 1993, from Moult Benn, the Appellants indicate that it would be practicable for the cable tray to be shallower and in a less obtrusive position. They also indicate that the walkway need only encircle two-thirds of the tower. These changes would reduce the effect on the exterior of the building. I do not therefore believe that the structure conforms with condition A.2. It follows that I consider it to have been development which required planning permission.

10. The two poles referred to in the allegation are independent of the walkway. They support antennae which have been installed by a telecommunications system code operator. In my view their erection was permitted by part 24. I consider that the notice should be varied so as to omit them.

The appeals under ground (a), the deemed application and the section 78 appeal.

11. I consider that the main issue raised by these appeals is the effect of the structure on the appearance of the locality.

12. Structure Plan policies seek to maintain the quality of urban areas. The draft Dacorum Borough Local Plan is at an advanced stage of preparation. I consider that it should be accorded substantial weight. Policy 103 provides that telecommunications apparatus will be assessed primarily on its effect on the appearance of a locality.

13. In my opinion the Water Tower is an unusual and interesting building. It gives the impression of having been a fortification. Whilst constructed of concrete it is only possible to distinguish it from stone at fairly close quarters. Trees in the locality limit the areas from which it

can be seen. However this results in elements of surprise, which add to the interest the building creates. Seen from nearby streets, it looms high above the surrounding dwellings. It is also a very prominent feature in medium distance views. I think that it makes a major and positive contribution to the appearance of the locality.

14. The walkway follows the line of the concrete upstand fairly closely. As a result it did not appear to me to be an unduly obtrusive feature. However the railings, which run across the upstand, and rise above it, did. The cable tray was considerably more so. Although not evident during my site inspection, I consider that the galvanised surfaces of these components will often reflect sunlight. This will add to the obtrusive appearance of the rail and the tray. I also consider that it will draw attention to the walkway. In my opinion the structure harms the appearance of the tower and unacceptably diminishes the contribution it makes to the appearance of the locality, contrary to draft Local Plan policy 103.

15. In addition to supporting the representations made on behalf of Hutchison Microtel, Three Valleys Water Services draws attention to Guidelines, prepared in 1988, which require it to carry out external inspections of water towers at least every 3 years. It says that inspection of the guttering and roof was extremely difficult before the walkway and handrail were provided. If the appeal were unsuccessful, the Company would consider erecting a walkway for its own use. It could do so under Class E(g) of Part 17 of the GDO. There is no certainty that this would happen and I do not believe that the possibility justifies accepting the harm which the existing structure causes.

16. The equipment which has been installed is operational. It forms an integral part of the network which Hutchinson Microtel is required to provide under the terms of its licence. It provides good coverage, a direct line of sight to Hemel Hempstead, and meets operational requirements, including ready access to equipment in most weather conditions. It therefore facilitates the growth of the system which is being provided. These are significant advantages but I do not think that they outweigh the harm which the structure causes.

17. The Appellants suggest that planning permission could be granted subject to conditions requiring the walkway to be reduced in length, the cable tray resited, and the metalwork painted. These would reduce the impact of the structure. However, particularly having regard to the handrail's projection above the upstand, I do not consider that they would make it acceptable.

18. The Appellants also suggest a planning condition which required the replacement of the existing structure with one having a different design, colour and mode of installation. As the existing structure is the subject of the Section 78 and

deemed applications, such a condition would negate any permission granted. It would therefore be unreasonable.

The appeals under ground (g)

19. If the notice is upheld, Hutchison Microtel may decide that access to their equipment is too difficult and seek an alternative site. They request that the period for compliance be extended to 2 years to enable this to be done. Initial studies of an existing mast at Dickshill Wood indicate that it would be unable to meet the Company's requirements. No other studies have been carried out to identify possible alternatives. However, bearing in mind that the Company is anxious to avoid disruption to its services, it would have every incentive to carry out any studies as quickly as possible. Furthermore, it is uncertain whether the Company would decide to relocate. I consider that, in these circumstances, a period of one year would be reasonable.

RECOMMENDATIONS

20. I recommend as follows:

a. the enforcement notice be varied by:

i. the deletion from paragraphs 3 and 5 of the words "safety rail walkway and two upright steel poles" and the substitution therefore of the words "safety rail and walkway";

ii. the deletion from paragraph 5 of the words "nine months" and the substitution therefore of the words "one year";

b. the notice, as varied, be upheld;

c. the section 78 appeal be dismissed.

SIGNED

W J WEEKS
PINS 6

PERSONS PRESENT AT THE SITE VISIT.

For the Appellants Mr S Shamash of King Sturge & Co

Mr J Bridgeman, Three Valleys Water Services PLC

For the Council Mr M McFarland

DEPARTMENT OF THE ENVIRONMENT
TOLLGATE HOUSE
HOULTON STREET
BRISTOL
BS2 9DJ

LEAFLET C

RIGHTS OF APPEAL

a) On an enforcement appeal.

An appeal against the decision given in the accompanying letter on the enforcement notice appeal may be made to the High Court on a point of law under the provisions of section 289 of the Town and Country Planning Act 1990. Such an appeal requires the leave of that Court. Any application for leave to appeal must be made within 28 days of the date of this letter (unless the period is extended by the Court). However, any decision to grant planning permission on the deemed application in section 177(5) of the Act or to discharge a condition or limitation, under section 177(1)(a) or (b) (but only these aspects of the enforcement appeal decision) may alternatively be challenged under the following provisions, which do not require the leave of the Court.

b) On a decision on the enforcement appeal to grant planning permission or to discharge a condition or limitation, or where there is a related appeal under section 78 of the Act.

Section 288 of the Town and Country Planning Act 1990 provides that a person who is aggrieved by the decision, given in the accompanying letter, to grant permission on the deemed application or to discharge a condition or limitation, or by the decision on the appeal made under section 78 of the Act, may challenge its validity by an application to the High Court within six weeks from the date of this letter. The grounds upon which an application may be made to the Court under section 288 are that:-

1. the decision is not within the powers of the Act (that is, the Secretary of State has exceeded his powers); or

2. any of the relevant requirements have not been complied with, and the applicant's interests have been substantially prejudiced by the failure to comply.

"The relevant requirements" are defined in section 288 of the Act: they are the requirements of that Act, the Tribunals and Inquiries Act 1971 (or any other enactment replaced thereby), and the requirements of any order, regulations or rules made under those Acts. This includes the Town and Country Planning (Inquiries Procedure) Rules 1992 (SI 1992 No 2038), the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 1987 (SI 1987 No 701), the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1992 (SI 1992 No 1903), and the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 (SI 1991 No 2804 as amended by SI 1992 No 1904).

A person who thinks there may be grounds for challenging a decision should seriously consider taking legal advice before embarking on a legal challenge.

INSPECTION OF DOCUMENTS

(only for appeals decided following a local inquiry)

Under the provisions of rule 17(3) of the Town and Country Planning (Inquiries Procedure) Rules 1992, and rule 19(4) of the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1992, any person entitled to be notified of the decision given in the accompanying letter may apply to the Secretary of State in writing within six weeks of the notification of him of the decision, or the supply to him of the Inspector's report, whichever is the later, for an opportunity of inspecting any documents, photographs and plans appended to the report. Such documents etc are listed in an appendix to the report. Any application under this provision should be sent to the address on the decision letter, quoting the Department's reference number shown on the decision letter and stating the proposed date and time (in normal office hours) for the inspection. At least 3 days' notice should be given, if possible.

DEPARTMENT OF THE ENVIRONMENT (PD4)

March 1995