



Appeal Decision

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 December 2022

Appeal Ref: APP/K1128/X/22/3296079

Land north of Seymour Drive, Dartmouth, TQ6 9GE

Easting 286140; Northing 51425

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Roark Investments LLC against South Hams District Council.
 - The application ref 0413/22/CLE is dated 2 February 2022.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The failure to comply with any condition or limitation for which a certificate of lawful use or development is sought is a continuous breach of condition 7 to planning permission reference 15/1790/98/F.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. As the determination of this appeal rests on legal matters and past events a site visit is not considered to be necessary.
3. For the avoidance of doubt, I should explain that the planning merits of any use or operations are not relevant, and they are not therefore an issue for me to consider, in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.
4. The onus of proof rests with the appellant and the level of proof is on the balance of probabilities.
5. The Council did not validate and determine the application for the LDC but they state that had they done so it would have been refused as the applicant has not discharged the burden of proof. I note that the Council now accepts that it should have validated the application.
6. The main issue in this appeal is whether at the date of the application (2 February 2022) the period during which the Council could have taken enforcement action against the breach of planning control has ended. The breach of planning control claimed by the appellants is a failure to comply with condition 7 of the 1999 permission for which the period during which the Council could have taken enforcement action is 10 years.

The appeal site and relevant planning history

7. The site is an area of private land remaining following the development of a housing scheme to its south at Seymour Drive. The site is fenced and there appears to be no public access at present. Between 2003 and 2006 a woodland planting scheme was carried out on the site but an area of about 2750 sq. m was unlawfully felled in December 2018 without a felling licence as required by the Forestry Act 1967.
8. Planning permission for the Seymour Drive development was granted in February 1999 (15/1790/98/F) for the development of 28 dwellings subject to conditions. Condition 7 stated:

"A landscaping scheme shall be carried out and an area of open grassland provided on the areas of land to the west of the residential estate hereby permitted (indicated as "B" on the approved drawing no. MH232/323A) and to the north of the residential estate in accordance with the details shown on the approved drawing no. MH232/323A. All planting, seeding or turfing comprised in the approved landscaping scheme and within the area of open grassland shall be carried out and completed by the end of the first planting and seeding seasons following the completion of the residential development, or as otherwise may be agreed in writing by the Local Planning Authority. Any trees or plants which within a period of five years from the completion of the residential development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of a similar size and species unless the Local Planning Authority gives written consent to any variation. The landscaping scheme shall be strictly adhered to during the course of development and thereafter."
9. The reason for the condition is "To ensure the provision of an appropriate landscaping scheme and area of open grassland accessible to the public in the interests of the visual and residential amenities of the locality and to assimilate the development into its surroundings."
10. In November 2021 an appeal was dismissed against the non-determination of a similar LDC for the non-compliance with Condition 7 of the 1999 permission. (APP/K1128/X/20/3252613). The inspector in that appeal concluded (paragraph 35) on the evidence before him that on the balance of probabilities the planting scheme was carried out within the timeframe required by Condition 7 of the 1999 permission. He also found that there was no material loss of trees or plants from death, removal, damage or disease during the five year period defined in the condition. In that respect there had been no failure to comply with Condition 7 on the assumption that the planting scheme was that shown on approved drawing MH232/323A. However the inspector only had a superseded drawing available to him and commented that the appellant was quite unable to show that there had been a failure to comply with the condition.
11. He went on to say at paragraph 37

"This is even more so since, in December 2018, a significant amount of the planting was removed by the appellant. It is clear to me that the Council regards the required landscaping scheme to be maintained in perpetuity and considers that the final sentence of the condition achieves that requirement. Even if it was the approved scheme that was implemented the removal took

place about two years prior to the LDC application date. The Council would therefore have had a further eight years to take enforcement action if it appeared to the Council that there had been a breach of planning control”.

12. In reaching his conclusions the inspector referred to the representations of the South Hams Society (SHS) and others which assisted in the determination of the appeal.
13. The only difference between that appeal and the subsequent application for an LDC the subject of the current appeal is that the appellant has produced the approved drawing MH232/323A which had hitherto not been available to the previous inspector.
14. Despite this appeal relating to an LDC, the parties have not relied on caselaw in support of their arguments. The key principles in the interpretation of conditions is provided in *Dunnett Investments Ltd v SSCLG & East Dorset DC* [2016] EWHC 534 (Admin) (upheld in [2017] EWCA Civ 192). Of particular note is that conditions must be construed in the context of the permission as a whole; be construed in a common sense way; and, be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood.

Reasons

15. The appellant’s case is that as the development was completed more than 10 years ago, the failure to comply with the requirements of Condition 7 to provide a landscaping scheme and an area of open grassland to the north of the residential development is therefore lawful and no enforcement action can now be taken against the breach.
16. The appellant’s submitted copy of approved drawing MH232/323A is of poor quality. The boundary of the appeal site coincides with the area to the north of the residential estate and includes an area described as ‘open grassland’ containing an area shown as ‘group of standard trees beech’, and an area of land marked ‘C’ on its east side and a small area of land forming part of a larger area of land marked ‘B’ on the approved drawing. Area ‘C’ extends behind the dwellings to their east side but does not form part of the appeal site. The labels attached to the peripheral planting areas to the east and north are illegible as are the general notes and the legend, albeit that the appellant has endeavoured to interpret and read the drawing. However, its overall illegibility limits the weight I can attach to it.
17. The appellant initially made no reference to the small area marked ‘B’ as being part of the appeal site but later acknowledged this to be the case. The appellant contends that from the submitted aerial photographs this area had had the same treatment as the wider area and, as such, Condition 7 has not been complied with on that area.
18. Condition 7 requires compliance with the whole of the area to the west and the north and does not create a distinction with area B to the south of or to the north of the southern boundary of the appeal site.
19. In support of the appellant’s case that the landscaping scheme and open grassland elements of Condition 7 have not been carried out are photos submitted as Appendix 4A, B and C. Photos 4A and 4B are images from Google Earth dated 2006 and 2010 which the appellant states shows that the site has

been fenced, and no attempt has been made to provide an area of open grassland or the whip planting and embankment within area C. It is further contended that any planting that may have taken place within or adjacent to area A does not appear to have been planted in accordance with the approved drawing MH232/323A. Photo 4C is a Google Earth street view from Seymour Drive looking towards the gated entrance of the site.

20. The Council argues that the appellant's evidence is not contemporaneous with the events that should be proven to support the application. The trigger for the initial compliance period with Condition 7 is tied to the planting season following the completion of the development, so that by the end of that season, the scheme shall have been carried out and the grassland planted. This requires the developer to demonstrate when the development was completed; the date of the end of the planting season after completion, whether any planting/seeding had taken place by then; and did it comply with the landscaping scheme shown on the approved drawing. The appellant's evidence does not answer these questions.
21. I note that the aerial photos both have two dates marked so they cannot be relied upon as being an indication of the site on a specific date. Whilst the photos show a fence and double gates at the northern end of Seymour Drive, they do not show that the site as a whole has been fenced. In any event it is not clear what point the appellant is making about the fence at the end of Seymour Drive. If it is to show that there was no public access to the site, then all it shows is a closed gate, not a locked gate. It appears from the representations received that access through the gates has been possible in the past but the dilapidated gates have since been replaced with more secure gates after the recent transfer of ownership of the site.
22. I note that the appellant's interpretation of the legend refers to 'CBF' being close boarded fencing but it is not possible to see where on the approved plan this refers.
23. It is impossible to conclude from the photos that 'no attempt' has been made to provide the open area or whip planting, or that any planting that 'may' have taken place in respect of areas A, is not in accordance with the approved drawing as that drawing is insufficiently clear to reach such conclusions. There is no specification for, or definition of grassland. The condition refers to 'seeding or turfing' and it cannot be concluded from the photos that this was not done before the end of the first planting season.
24. These points were covered by the previous inspector, who commented in paragraph 32:

"There is evidence that the woodland gradually encroached upon the grassland that may amount to failure of maintenance but that is not one of the elements that could trigger action under this part of condition 7. In any event it is for the appellant to establish when this failure occurred. The appellant does not do so since of course it is the appellant's position that it was never provided in the first place. There has therefore been no failure to comply with condition 7 in this regard."
25. Although the appellant did not comment on the evidence of the SHS and others at the time of the previous appeal, comments have been submitted as part of this appeal. In particular a comparison is made of extracts of the superseded

drawing and the approved landscaping scheme on drawing No. MH232/323A. The appellant states that area A in the superseded plan is much wider area (although it is not possible to identify area A on the approved drawing) and that the SHS refer to the land being planted as woodland.

26. The SHS state that "The conditioned landscape plan illustrates the site as largely woodland planting with planting to Forestry Commission specification as well as a further area of open grassland that also contains tree planting. The site was tree planted with an application for a grant under the Woodland Grant Scheme Mk3 which ran from 1996 to 2004."
27. The appellant considers that as the site was planted out under the Woodland Grant Scheme it was not in accordance with the approved landscape scheme of Condition 7. However, it does not necessarily follow that the planting of the site under the Woodland Planting Scheme automatically means that it was contrary to the requirements of Condition 7. Whilst the legend refers to area 'A' Woodland planting to Forestry Commission specification, Area A is not clearly identifiable on the appellant's submitted approved drawing.
28. The appellant refers to his correspondence with the Council in which the appellant infers the woodland mix for area B should be the same as for area A and that as the mix for area A was not in accordance with that mix, this constitutes a failure to strictly adhere to the landscaping scheme. However the planting for area A is for woodland planting to Forestry Commission specification and there is no express reference to any type of mix, in contrast to the legend for areas B and C. On this basis, the appellant's inference appears to be misconstrued. However in the rebuttal statement, the appellant states that area A is completely different between the superseded and approved plans, but if this is the case, it is unclear why reference has been made in the appellant's statement to an area of little relevance to the current appeal.
29. The previous inspector referred (at paragraphs 24 to 32 of his decision) to three possible ways in which the condition could be breached. Firstly, with the timing of the planting; secondly with the provision of open grassland; and thirdly, with the replacement of failed planting. None of this changes with the production of the approved plan.
30. The appellant was not the applicant for the 1999 permission, nor the developer of the site and has had to rely on historical sources. Whilst they have been able to submit a copy of the approved drawing that was not available to the inspector for the previous appeal, this drawing is of poor quality and indecipherable in places. The appellant has also interpreted aspects of the drawing and their photographic evidence in ways that are not necessarily the only interpretations possible.
31. Additionally, the Council suggests that the appellant has attempted to retro-fit evidence previously submitted by third parties into the revised plan, such as with the photograph reproduced at 5.8 (of the appellant's statement) which is not matched with the plan to indicate its location or scaled to show its bounds lie outside of that specific planting area. Furthermore, the reference to the Woodland Grant Scheme is not evidence of the extent of site coverage and the fact that the whole appeal site and beyond is not conclusive of the tree coverage at any time from 1996 (pre-application) to 2004(close to the compliance date for Condition 7).

32. Although the previous inspector was clearly hampered by the absence of the approved plan, the appellant appears to be of the view that its presentation in evidence in this appeal overcomes the reasons for the dismissal of the earlier appeal. Although this approved plan is now before me, I find it difficult to rely on the appellant's interpretation of events regarding the implementation or non-implementation of Condition 7 in the light of the evidence of the SHS and that of the Council. The appellant has not provided adequate responses to the critical questions that need to be satisfied to achieve success in this appeal. Accordingly, I conclude that the appellant has not shown on the balance of probabilities that has been a failure to comply with Condition 7 of the 1999 permission.
33. The appellant has invited me to make alterations to the wording of the LDC application but the suggestions would not overcome the burden of proof that rests with the appellant. In particular, the appellant invites me to indicate that Condition 7 is no longer enforceable in respect of the site. However, in the light of the previous inspector's comment at paragraph 37 of his decision regarding the removal of planting in December 2018, any LDC issued in the terms suggested by the appellant would fetter the Council's scope for enforcement, should they consider that there has been a breach of planning control.

Conclusion

34. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of a continuous breach of Condition 7 to planning permission reference 15/1790/98/F was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

P N Jarratt

INSPECTOR