

Our Ref: Fishery Lane/WIG/CW

Date: 6th August 2019

Head of Development Management
Planning Services
Havant Borough Council
Public Service Plaza
Civic Centre Road
Havant
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PO09 2AX

Dear Sir/Madam

Section 73 Application: Removal of Conditions from Retrospective Planning Permission APP/18/01165 Requiring Planting of 9m High Cypress Leylandii Tree Associated with Mast Redevelopment at Southern Water Compound, Fishery Lane, South Hayling, PO11 9NF

Further to numerous email correspondence with Daphney Haywood regarding the above please find enclosed an application under section 73 of the Act to remove the planning conditions as outlined below.

Planning permission in retrospect was granted subject to three conditions to The Wireless Infrastructure Group (WIG) for the redevelopment of an existing 10m high monopole style mast to a 15m high mast of similar design and ancillary development at the above location under planning application reference APP/18/01165 on 16th January 2019. **(Appendix 1)**

Condition 1 was imposed on this permission stating "1. *The development hereby permitted shall be carried out in accordance with the following approved plans: Site Location dwg 130542 -01 issue C, Site Location dwg 130542 -02 issue C Site Location dwg 130542-03 issue C; Reason: To ensure provision of a satisfactory development.*"

Condition 2 was imposed on this permission stating " *Within 3 months of the date of this permission the landscaping works comprising the planting of a leylandii tree minimum height when planted of 9m, as shown on the approved plans ref. 130541-02 and 130541-03, shall be carried out in accordance with the approved details. The proposed tree shall be planted and maintained in accordance with best practice recommendations set out in BS 8545:2014 Trees: from nursery to independence in the landscape, including the provision of bracing/supporting structures as required and provisions for watering. In the event that the tree is removed, uprooted, destroyed, dies or become severely damaged or becomes seriously diseased within 5 years*

of planting it shall be replaced within the next planting season by a tree of similar size and species to be planted and maintained in accordance with best practice recommendations set out in BS8545:Trees from Nursery to independence in the landscape, including the provision of bracing/supporting structures as required and provision for watering. Reason: To ensure the appearance of the development is satisfactory and in the interest of the amenities of the nearby properties and having due regard to policies CS11 and CS16 of the Havant Borough Local Plan 9Core Strategy) 2011 and the National Planning Policy Framework."

Condition 2 requires the planting of a 9m high Cypress Leylandii tree within a very small space between the existing boundary fence and the redeveloped mast. The condition requires this to be planted in accordance with BS 8545:2014 Trees: from Nursery to independence in the landscape. This British Standard gives recommendations for transplanting young trees, with a view to achieving their eventual independence in any landscape. It specifically covers planning, design, production, planting and management of young trees.

It outlines a process for planting young trees that will result in them achieving 'independence in the landscape', meaning they are healthy and have every chance of survival. This standard will assist practitioners in making balanced and informed tree planting decisions. Ideally, all newly planted trees need to be able to grow with vigour appropriate to the species and situation, in good health, and with minimal nuisance to achieve the desired planting objectives.

BS 8545 applies to trees where a distinct crown has been prepared in the nursery. It does not apply to whips, transplants and seedlings, or to other woody material.

As part of this British Standard an assessment of the planting site is required to evaluate constraints, and ground /soil type, a consideration of competing trees and existing physical constraints such as buildings and infrastructure, then a species should be selected. **(Appendix 2).**

The background to this matter is contained in the letter dated 1st May 2019 from Harlequin to Daphney Haywood (Principal Planner) **(Appendix 3).**

It is noted that the decision notice for APP/18/01165 contains an apparent error **(Appendix 1)**, in that correctly condition 1 refers to drawings numbers 130542 01-03 issue C as submitted with the application, however condition 2 incorrectly refers to drawing number 130541-02 and 130541-03. No such drawing numbers were submitted to the Council as part of the application and we therefore assume this is a drafting error and it should read drawings numbers 130542-02 and 130542-03?

Unfortunately previous discussions between the Council and WIG's previous agents were undertaken without any reference by either party to expert advice as to in the above guidance and as to identifying constraints in accordance with Appendix 3, then identifying a suitable species and size of tree that could possibly be planted in the space left by the ultimate removal of the damaged Cypress Leylandii tree. See photographs below:



Photograph of existing mast prior to height increase. Note proximity to existing Cypress Leylandii tree and that antennas are below the height of the upper tree canopy and therefore the signal would be greatly attenuated in this direction. As such the existing tress must be at a height of 10-11m.



Photograph of cut back to tree to allow for new replacement 15m mast to be installed, note limited space between tree and palisade boundary fence, also note size of base of tree in region of 10-11m high.

Upon receiving the decision notice with the condition and undertaking investigations to source a contractor (*Trinkle & Pearce Landscapes Ltd*) to plant a 9m high Cypress Leylandii tree it became apparent to WIG that such a tree could not be planted in the space available. This informal advice has now been formalised into a report (**Appendix 4**). It is clear from this report that the advice in BS8545:2014 Trees: from nursery to independence in the landscape cannot be complied with and that a tree of this species and height cannot be physically planted in this location and appropriately braced and likely to thrive in accordance with the BS standard, which is the purpose of this standard as highlighted above and the reason why it was introduced.

Advice on the use of planning conditions is contained in "Circular 11/1995: Use of conditions in planning permission" and outlines the Six tests required for planning conditions paragraph 14 states *"On a number of occasions the courts have laid down the general criteria for the validity of planning conditions. In addition to satisfying the court's criteria for validity, the Secretaries of State take the view that conditions should not be imposed unless they are both necessary and effective, and do not place unjustifiable burdens on applicants. As a matter of policy, conditions should*

only be imposed where they satisfy all of the tests described in paragraphs 14-42. In brief, these explain that conditions should be

- i. necessary;*
- ii. relevant to planning;*
- iii. relevant to the development to be permitted;*
- iv. enforceable;*
- v. precise; and*
- vi. reasonable in all other respects."*

It is therefore clear that condition 2 does not meet the above 6 tests, it is not reasonable as it is impossible to comply with, nor is it enforceable for the same reason. WIG would further question whether it is also necessary. In terms of reasonableness and enforceability it requires a tree to be planted in accordance with a specified standard that is not possible. As such the Council have imposed a condition that is not reasonable in its requirements as these are not possible to comply with. As such the condition is not enforceable as the Council could hardly enforce a provision of the condition that is not possible.

In terms of necessity it is unfortunate the original tree was damaged, but as demonstrated in the above photographs its height and proximity were such that it would likely require removal to allow the clear propagation of the network coverage to the surrounding area as the dense foliage of this type of evergreen would significantly attenuate the RF signal.

It would appear these boundary trees were planted to provide some screening to the Southern Water compound and the plant and buildings within it, from the wider area and this is the purpose of planting such a fast growing species of tree with such dense foliage. Other than screening the compound these trees contribute little to the overall character and appearance of the area and are not therefore subject to a TPO. As a result they have no statutory protection and could be removed at any point in time.

The reliance therefore on these trees for screening the mast cannot be assured and should not be used as a reason for the approval of its siting and appearance. The mast even at 10m high was an established development at this location and assimilated with existing other similar utilitarian structures such as the telegraph poles. Its increase by 5m whilst significant, is not such that it would only be acceptable if a 9m high Cypress Leylandii was planted to its immediate west, between the mast and boundary fence. The other existing 10-11m high Leylandii trees provide a natural vertical context and screening from a number of directional views from the north and a backdrop to those from the south, so the planting of a further 9m tree to replace the one that was damaged and removed would not appear to be necessary as this cannot be the only reasons the development's siting and appearance is acceptable. In this respect the condition should not have been imposed on the retrospective planning permission as it is unnecessary to make the development otherwise acceptable on these merits. Accordingly Condition 2 requires to be removed from the permission.

Condition 1 is a “belts and braces” condition, usually applied in England to allow for section 73 minor amendment applications. This is a retrospective application merely to regularise development that had already occurred, contrary to GPDO Part 16 Condition A.3 so again this condition is unnecessary as the development had been completed on site. Then only reason for it would be to ensure compliance with the amended site plan which indicated (*incorrectly*) that a 9m tree could be planted in the space identified on the plan as requested by the Council. However this requirement is already covered by Condition 2 which references the relevant plans (*albeit incorrectly with the wrong drawing numbers*). Therefore Condition 1 is wholly unnecessary and should be removed from the permission.

WIG are aware of the Council's apparent stance on this and that they wish to stand by their original permission and its unrealistic requirements to plant this tree, and that the Council's advice was to appeal against these conditions. However this application seeks to give the Council an opportunity to formally reconsider this matter and make a determination on it, prior to any last resort action by WIG to submit the relevant planning appeal to The Planning Inspectorate. I trust the Council will therefore give this application careful and due consideration, and on balance agree that both conditions 1 and 2 imposed on planning permission APP/18/01165 do not meet the required 6 tests and are therefore removed from the permission by the granting of this application under section 73 of the Act.

Please do not hesitate to contact me if you require any further information to either validate, or to progress this application.

Yours faithfully,



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