

## CONSULTATION RESPONSE: COUNTRYSIDE AND ENVIRONMENT (ECOLOGY)

To / I:	Operational Manager Development & Building Control	From / Oddi Wrth:	Ecology, Development Services  Countryside and Economic Projects.
FAO	Mr. S. D. Butler		Mrs Erica Dixon
Date / Dyddiad:	17 August 2017	Tel / Ffôn:	(01446) 704855
Your Ref / Eich Cyf:	2017/00746/RES	My Ref / Fy Cyf:	
Location	Land off Cardiff Road/Cross Common Road, Dinas Powys		
Proposal	Approval of all matters reserved including Appearance, Landscaping, Layout and Scale and the subsequent discharge of planning conditions 2 (Reserved Matters), 6 (Drainage), 10 (Tree Protection), 12 (Slab levels), 16 (Noise Assessment) attached to the Outline Permission (Ref: 2015/00392/OUT)		

ECOLOGY RESPONSE	
<input type="checkbox"/> No comment	<input type="checkbox"/> Notes for applicant
<input checked="" type="checkbox"/> Object (holding objection)	<input checked="" type="checkbox"/> Request for further information
<input type="checkbox"/> Object and recommend refusal	<input type="checkbox"/> Recommend planning conditions

### **Summary**

We object to this application at the current time, on the lack of appropriate ecological information regarding European Protected Species (dormouse). The LPA is not currently able to assess the impact on dormouse and is therefore unable to determine the planning application at the current time.

### **Detailed Comments**

The comments are made with respect to the following document submitted in support of the planning application.

- Land off Cardiff Road/Cross Common Road, Dinas Powys, Vale of Glamorgan. Bat Tree Assessment and Survey; July 2017 by Terraqua.

### Dormouse

The adjacent scheme (Cross Common Road road improvements 2015/00928/RG3) highlighted the presence of dormouse and as a result, a Development licence was

obtained from Natural Resources Wales to enable the works to go ahead. The licence included land within the red line boundary of this application. Therefore, we cannot assess the likely impact on dormouse in the absence of submitted ecological information.

### Bats

The bat report above is considered to be inadequate in allowing the LPA to assess the likely impact of the development on bats. We note that 4 trees were identified as bat roosts, but the consultant has not identified the likely type of roost at each.

It is unknown as to the likely safety of the Roost trees, in particular T9, TPO1 and TPO2 following development – can the applicant confirm whether these trees are inside or outwith the curtilage boundaries. (required to establish whether the trees are secured in the long term. And if these trees are outwith curtilage boundaries, a significant proportion of the canopy (which may include the limbs/branches used by roosting bats) overhangs the adjacent plot gardens – and therefore the new owners would be entitled to cut these branches / limbs back. What measures are proposed to prevent potential incidental destruction of bat roosts?

### ***Recommendations***

- 1) That the applicant submit dormouse survey information, relevant ecological reports and mitigation proposals. In addition, the dormouse Development licence obtained for the road alignment may also be relevant.
- 2) Applicant to provide clarification on the bat roost trees, detailed above.
- 3) Planning Officer to consult NRW on the assumed presence of dormouse on the site and on the bat roost trees, as they may qualify as high risk bat cases..

## **ANNEX 1 – SUPPORTING INFORMATION (LEGISLATION, PLANNING POLICY AND CASE LAW)**

### **CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010 (AS AMENDED):**

Known as the “Habitats Regulations”, this statutory instrument transposes the Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (the Habitats Directive) into UK law. The Directive is the means by which the European Union meets its obligations under the Bern Convention. The most vulnerable and rarest of species internationally (in the European context) are afforded protection under this legislation. The species listed on Schedule 2 are termed “European Protected Species” and are afforded the highest levels of protection and command strict licensing requirements for any works which may affect them. The species include all British bats, Otter, Dormouse and Great Crested Newt. They are fully protected against disturbance, killing, injury or taking. In addition any site regarded as their “breeding site or resting place” is also protected. It is generally regarded that the site is protected whether the animals are present or not.

The Habitats Regulations clearly outline the role of Planning Authorities in the implementation of the Habitats and Birds Directives; by stating [Section 9(3)] “**A competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive and Birds Directive so far as they may be affected by the exercise of those functions**”

New amendments to the Conservation of Habitats and Species Regulations 2010 included a duty on LPAs to “*take such steps in the exercise of their functions as they consider appropriate to contribute to... the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the UK including by means of the upkeep, management and creation of such habitat....*” (Reg 9A(2) & (3))

#### ***Habitats Regulations Licensing***

Where works will affect a EPS, then the developer must seek a derogation (licence) prior to undertaking the works. The licence can only be issue once the “3 tests” are satisfied, that is:

- Test 1 – the purposes of “preserving public health or safety, or for reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment”.
- Test 2 – there must be “no satisfactory alternative”; and
- Test 3 – the derogation is “not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range”.

Licences are issued by Natural Resources Wales (NRW), with NRW assessing Test 3, and the LPA assessing tests 1 & 2 (where proposals are not subject to planning, then NRW alone will assess all three tests). Where Planning regulations apply, the NRW will only issue a licence after determination of the planning application. Planners failing to do so will be in breach of the Habitats Regulations (see also Case Law, Morge Case and Woolley Ruling below).

## **WILDLIFE AND COUNTRYSIDE ACT 1981 (AS AMENDED)**

The WCA protects the UK's most vulnerable and rare species as outlined below.

Section 1 – breeding birds. The basic protection afforded to all birds is:

- Protection from killing, injury or taking of any wild bird
- Protection from taking, damaging or destroying the nest of any wild bird
- Protection from taking or destroying the egg of any wild bird

Further, some species, specifically those listed on Schedule 1 of the Act are afforded extra levels of protection to include:

- Protection from disturbance whilst it is nest building; or, is at or near a nest with eggs or young, or disturb the dependant young of such a bird.

There are exemptions from this basic protection for, for example: sale, control of pest species and sporting eg. game birds outside of the close season.

Section 9 (Schedule 5) - protected animals (other than birds) All animals listed on Schedule 5 are protected against killing, injury or taking. Any structure/place used for shelter or protection is protected against damage, destruction or obstructing access to. And it is an offence to disturb an animal whilst using such a structure / place. Some species are afforded "Part Protection" meaning that they enjoy only some of the protection outlined above – eg the animals may be protected, but not their structure used for shelter/protection (such as slow worm).

Section 13 (Schedule 8) – protected plants. Protected plants are afforded protection against: being picked, uprooted or destroyed. They are also protected against sale (or advertising for sale) – this is particularly relevant with respect to bluebells.

## **THE PROTECTION OF BADGERS ACT 1992**

This protects badgers from killing, injury and taking; or attempting to kill, injure or take. Badger setts are also afforded protection and it is an offence to:

- Damage a badger sett or any part of it
- Destroy a badger sett
- Obstruct access to any entrance of a badger sett
- Disturb a badger when it is occupying a badger sett

Development which will destroy or disturb a badger sett (within 30m) is subject to licensing. The licensing body is NRW. However, badgers are considered a species protected under UK legislation (see PPW) and are therefore a material consideration during the planning decision.

## **NATURAL ENVIRONMENT AND RURAL COMMUNITIES (NERC) ACT 2006**

Under the NERC Act, Local authorities have a Duty to have regard to the conservation of biodiversity in exercising their functions. The Duty affects all public authorities and aims to raise the profile and visibility of biodiversity, to clarify existing commitments with regard to biodiversity, and to make it a natural and integral part of policy and decision making. Note - Conserving biodiversity includes restoring and enhancing species populations and habitats, as well as protecting them.

### **PLANNING POLICY WALES SEPTEMBER 2009 (TECHNICAL ADVICE NOTE 5: NATURE CONSERVATION AND PLANNING)**

Section 6.2.1 – the presence of a protected species is a material consideration when a local planning authority is considering a development proposal, that, if carried out, would be likely to result in disturbance or harm to the species or its habitat.

Section 6.2.2 – It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted.

Section 6.3.5 – any step in the planning or implementation of a development likely to affect a European Protected Species could be subject to a licence to permit or the survey or implement the proposal are under a duty to have regard to the requirements of the Habitats Directive in exercising their functions.

### **PLANNING POLICY WALES (EDITION 5, NOVEMBER 2012)**

Planning Policy Wales, Section 5.5.11 states that *“The presence of a species protected under European or UK legislation is a material consideration when a local planning authority is considering a development proposal which, if carried out, would be likely to result in disturbance or harm to the species or its habitat”*.

Furthermore, Section 5.5.12 states that *“Developments are always subject to the legislation covering European Protected Species regardless of whether or not they are within a designated site. ”*And *“Local planning authorities are under a duty to have regard to the requirements of the Habitats Directive in exercising their functions. To avoid developments with planning permission subsequently not being granted derogations in relation to European protected species, planning authorities should take the above three requirements for derogation into account when considering development proposals where a European protected species is present”*.

## **VALE OF GLAMORGAN COUNCIL - SUPPLEMENTARY PLANNING GUIDANCE**

Supplementary Planning Guidance – Biodiversity and Development

### **WOOLLEY RULING**

This case confirmed that local planning authorities must apply the same three tests as Natural England (in Wales, CCW) when deciding whether to grant planning permission when one or more of the European protected species offences under the Habitats Regulations may be committed.

This judgment clarifies a legal duty which was already in existence although many planning authorities were not applying it correctly. His Honour Judge Waksman QC, in the High Court in June 2010, handed down this ruling in the case of R (on the application of Simon Woolley) v Cheshire East Borough Council concerning a development with a bat roost. **This judgment makes it clear that the local planning authority must apply the “3 tests” when determining a planning application.**

### **MORGE CASE (SUPREME COURT CASE 19 JANUARY 2011)**

The case gives clarification to deliberate disturbance and to the interpretation of “damage or destruction of a breeding site or resting place”. It also gives guidance on how LPA should discharge their duties with respect to the Habitats Directive.

### **CORNWALL RULING**

**Judgement that a planning authority had acted unlawfully by granting planning permission without sufficient information on flora and fauna.**

Sometimes planning authorities grant planning permission before some or all ecological surveys have been carried out, making ecological surveys a planning condition, or Section 106 Agreement, under the Town and Country Planning Act 1990.

For development that requires an Environmental Impact Assessment this practice was subject to judicial review proceedings in the High Court and it was determined that the planning authority had acted unlawfully by granting planning permission without sufficient information on flora and fauna (known as the Cornwall Ruling because the planning authority in this case was Cornwall County Council). Requiring surveys as a condition of the Section 106 Agreement was not sufficient, as this would exclude the consultation process that is required under the Town and Country Planning (EIA) Regulations (1999).