

CONSULTATION RESPONSE: COUNTRYSIDE AND ENVIRONMENT (ECOLOGY)

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| To / I: | Operational Manager Development & Building Control | From / Oddi Wrth: | Ecology, Development Services Countryside and Economic Projects. |
| FAO | Mr. Morgan P. Howell | | Mrs Erica Dixon |
| Date / Dyddiad: | 13 November 2018 | Tel / Ffôn: | (01446) 704855 |
| Your Ref / Eich Cyf: | 2016/01160/OUT | My Ref / Fy Cyf: | |
| Location | Woodside Hamlet, Ham Manor, Llantwit Major | | |
| Proposal | Proposed tourist (Tree Tent) accommodation development on land adjacent to Woodside Hamlet, with associated parking, wash up and toilet facilities | | |

ECOLOGY RESPONSE

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

Summary

We remove our objection to this application, however, we recommend that the issues regarding 1) tree removal for Health and Safety reasons, 2) exact positioning of tree pods, 3) lighting and 4) Japanese Knotweed treatment be addressed at Reserved Matters. We recommend that this consent includes two Advisory notices for the applicant relating to Japanese Knotweed and a Bat licence, if required.

Comments

This consultation response updates and replaces previous responses.

We refer to the following documents in our comments below

- fdsa Ham Wood, Llantwit Major, Extended Phase I Habitat survey 2015 (amended) by East Ecology
- Ham Woods, Llantwit Major. Ecological Impact Assessment 2016, revision 1.3 by East Ecology
- Ecology planning consultation response of 3 November 2015

- *Letter from Andrew Hurst (NRW) to Morgan Howell (VoGC Planner) of 19 December 2016*
- *Email from Erica Dixon (VOGC Ecologist) to Morgan Howell (VoGC Planner) of 11 January 2017*
- *Email from Simon Morgan (Morgan Design Studio) to Morgan Howell (VoGC Planner) of 28 February 2017*
- *Letter received from Jack Taylor (Woodland Trust) to Morgan Howell (VoGC Planner) of 3 March 2017*
- *Email from NRW (Andrew Hurst) to Morgan Howell (VoGC Planner) of 6 April 2017*
- *Email from Simon Morgan (Morgan Design Studio) to Morgan Howell (VoGC Planner), 12 December 2017*
- *Letter from NRW to Morgan Howell (VoGC Planner) of 3 January 2018*
- *Email from Andrew Hurst (NRW) to Morgan Howell (VoGC planner) 5 January 2018*
- *Email from Erica Dixon (VoGC) to Morgan Howell (VoGC planner) 15 March 2018*
- *Woodland Trust 2nd response of 10 January 2018*

We note the trees have been assessed for the presence of bats. We note that the limited dormouse survey was inconclusive.

Conclusion

In summary, we remove our objection to this application and recommend that the aspects detailed above are more fully addressed at Reserved Matters. We recommend that there is a planning condition requiring a lighting plan (to be submitted at Reserved matters stage). For this consent, we recommend the following 2(no) advisory notices.

To be addressed at Reserved Matters:-

LIGHTING. A condition regarding the lighting plan for the site will need to be included on the consent, to ensure impacts on biodiversity arising from lighting can be adequately mitigated. This will protect bats, potentially dormouse and otter on site.

TREES TO BE REMOVED FOR H&S REASONS - We note that a plan showing the potential bat roosts with trees to be removed on Health and Safety grounds was not provided, however, we do not consider this a consideration to warrant further objection. We remind the applicant of his obligations regarding bats and Health & Safety tree works, regarding of the planning controls, as the legislation will still apply. We recommend an advisory (below)

EXACT POSITIONING OF TREE PODS - We welcome the plan showing the location of the tree pods with respect to the potential bat roost trees. At Reserved matters

stage, this should be resubmitted, in more detail, and at a larger scale for further consideration, however at this stage, it is not considered that the presence of tree pods poses a risk to the integrity of bat roosts in trees (if present).

JAPANESE KNOTWEED TREATMENT PLAN – A plan detailing management/treatment of Japanese Knotweed on site, (see comments under Advisories, below)

Suggested Advisory(s)

- 1) Though a Japanese Knotweed treatment plan will be requested at Reserved Matters, we recommend that the applicant begin treatment management prior to this, and ideally as soon as possible, this is particularly important given that the stand of Knotweed lies adjacent to/close to neighbouring residential properties.
- 2) Trees to be removed / pruned on Health and Safety grounds will need to be assessed for the possible presence of bat roosts and a licence from NRW sought if necessary.

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

CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2017

Known as the Conservation of Habitats and Species Regulations 2017 “Habitats Regulations” transpose the Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the Habitats Directive) instrument transposes the 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 of the Habitats Regulations 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 10]

10.—(1)a competent authority must take such steps in the exercise of their functions as they consider appropriate to secure the objective in paragraph (3), so far as lies within their powers.

(3) The objective is the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of Article 2 of the new Wild Birds Directive (measures to maintain the population of bird species).

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.

ENVIRONMENT (WALES) ACT 2016

The Environment (Wales) Act became law in March 2016 and replaces the earlier Natural Environment and Rural Communities Act 2006. It puts in place legislation to enable Wales' resources to be managed in a more proactive, sustainable and joined up manner and to form part of the legislative framework necessary to tackle climate change. The Act supports the Welsh Governments wider remit under the Well-Being of Future Generations (Wales) Act 2015 so that Wales may benefit from a prosperous economy, a healthy and resilient environment and vibrant, cohesive communities.

Section 6 of the Environment Act requires all that public authorities “***must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions***”. The intention of this duty is to ensure biodiversity becomes an integral part of decision making in public authorities.

Welsh Government, with consultation with NRW must prepare and publish a list of habitats and species which, in their opinion, are of principal importance for maintaining and enhancing biodiversity in Wales (“Section 7 list”). Public bodies must take all reasonable steps to maintain and enhance the living organisms and types of habitat on this list. At the current time, this list directly replaces the list created under the now defunct Section 42 of the Natural Environment of Rural Communities (NERC) Act 2006 (Habitats and Species of Principal Importance for Conservation in Wales).

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 9, NOVEMBER 2016)

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).