

## 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. Morgan P. Howell		Mrs Erica Dixon
Date / Dyddiad:	9 March 2017	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, including access from Mill Lane, with associated parking, wash up and toilet facilities		

### ECOLOGY RESPONSE

<input type="checkbox"/> No comment	<input type="checkbox"/> Notes for applicant
<input 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

Further information is required from the applicant and clarification is required from NRW before we can conclude our comments

### Comments

We refer to the following documents in our response:-

- *Ham Woods, Llantwit Major. Ecological Impact Assessment 2016, revision 1.1 by East Ecology*
- *Ham Wood, Llantwit Major, Extended Phase I Habitat survey 2015 (amended) by East Ecology*
- *Email from Simon Morgan (Morgan Design Studio) to Morgan Howell (VoGC Planner) of 28 February 2017*
- *Email from Erica Dixon (VOGC Ecologist) to Morgan Howell (VoGC Planner) of 11 January 2017*
- *Ecology planning consultation response of 3 November 2015*

- *Letter received from Jack Taylor (Woodland Trust) to Morgan Howell (VoGC Planner) of 3 March 2017*
- *Letter from Andrew Hurst (NRW) to Morgan Howell (VoGC Planner) of 19 December 2016*

*This consultation response updates and replaces previous responses.*

We note that The Woodland Trust has objected to the application.

We note that Natural Resources Wales have not objected, subject to 2(no) planning conditions being included upon the consent for

- pre-construction checks and surveys for European Protected Species, and
- to submit and agree a lighting plan

It is not clear whether these suggested conditions for “European Protected Species” relate to dormouse or bats, or both.

*Recommendation 1: MPH to email NRW for clarification.*

## HABITAT

It has been established that the site is an area of Restored (or Replanted) Ancient Woodland Site [RAWS]. This makes the site a SINC, as it qualifies under the criteria for identification of SINC. As the site is replanted, this is not a pristine / original ancient woodland habitat and this slightly lower quality should be taken into account when assessing the likely impact of the development on the site. *This does not directly transpose to likely impact on protected species, which may live in even degraded habitats.* It is our understanding that the site is currently used by local residents for walking/recreation

It is likely that long term retention of all trees will be threatened, however, this could also be considered to be beneficial to the woodland by ensuring management which will open up the canopy to create a better underlayer, better diversity and a better ground flora.

Changes to hydrology are not considered to be a factor, as NRW have not commented on this aspect, however, they have indicated that a Flood Risk Activity Permit will be required for the two river crossings.

## BATS

The Ecological Impact Assessment has identified 26 trees with a very high or high potential for supporting a bat roost. It is recommended that any of the high/very high category trees require alteration then surveys are required to determine if a roost is present. Trees confirmed as roosts will require a NRW licence for their removal.

It has been confirmed by the applicant that no trees are to be removed for the development. However, trees which require pruning, or the placing of the tents may affect bat roosts if present. Therefore, it will be necessary to assess the impact of the development in light of the potential bat roost trees affected.

*Recommendation 2: A Tree Impact Assessment is required with the following information overlaid:- trees to be affected by the pods, trees that will be removed or lopped/pruned etc, trees/hedgerow removed or altered for access and potential bat roost trees.*

#### NRW Letter regarding European Protected Species

The Ecology report states that some survey was done for dormouse, but not enough to rule out presence. However, given that the woodland is largely unsuitable for dormouse, it is unlikely they are present, and even if they are, the type and nature of development is such that there is unlikely to be a significant impact on dormouse. [I agree with this statement]

Last paragraph, page 1 – states that a development likely to contravene the protection afforded to dormouse may only proceed under a NRW licence and that the “3 tests” must be undertaken. However, dormouse are not likely to be present. It is unclear as to why the LPA should be required to undertake the 3 tests on a species that probably isn’t present.

The ecology report identifies 26 trees of high or very high likelihood to support a bat roost, and the report recommends a survey of those trees which will be affected by the positioning of the tree tents (felling, pruning, or any tree surgery). The report goes on to conclude that if the tree(s) affected support a bat roost, then a European Protected Species licence would be required. [agreed]. We do not currently have the information as to which of the potential bat roost trees may be directly impacted by the development.

Paragraphs at the top of page 2 discuss Planning policy and the likely impacts on European Protected Species and advice the inclusion of planning conditions. However, it is not clear as to whether European Protected Species in this sense refers to dormouse, bats, or both.

This is an important distinction, because as NRW have recommended conditions be included on the consent/S106 agreement, it would be reasonable to infer that the third test of not detrimental to the maintenance of the population of the species concerned at Favourable Conservation Status in their natural range has been met (subject to adhering to conditions).

Given the outstanding survey work for bats and/or lack of information in the current application as to which trees may be affected by the tree tents, it is not clear how the conclusion of “no impact on FCS” for bats has been met.

If this comment relates solely to dormouse, then the conditions appear inappropriate as dormouse are unlikely to be present.

If the comments do relate to bats then we should be extremely wary of the LPA including conditions on a consent, with survey work outstanding. This would be against current caselaw and best practice and potentially opens up the authority to prosecution or Judicial Review.

When NRW have clarified these points then I shall be able to provide my comments.

### ***Recommendations***

- NRW to clarify as to whether their comments regarding “European Protected Species” and the 2 suggested planning conditions relate to bats, dormouse or both.
- Applicant to submit a Tree Impact Assessment

### ***Conclusion***

As woodland is a highly resilient habitat, temporary effects are likely to be inconsequential. Notwithstanding protected species issues, the development is unlikely to have a significant impact on the woodland habitat.

There may be protected species issues, but we require further clarification from NRW and from the applicant before we can form a conclusion.

## **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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## **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).