

## CONSULTATION RESPONSE: COUNTRYSIDE AND ENVIRONMENT (ECOLOGY)

To / I:	Operational Manager Development & Building Control	From / Oddi Wrth:	Ecology, Development Services  Countryside and Economic Projects.
FAO	Robert Lankshear		Mr Colin Cheesman
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Your Ref / Eich Cyf:	2020/01170/OUT	My Ref / Fy Cyf:	
Location	Land at Upper Cosmeston Farm, Lavernock Road, Penarth		
Proposal	Outline application for residential development, a primary school, community space and public open space with all matters reserved other than access.		

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
	<input type="checkbox"/> Approve

### Summary

Current status: Outline planning application submitted

Previous status:

### Comments

- a) The site has been subject to a number of surveys for habitats and species and is adjacent to Ty-y-Orsaf Site of Importance for Nature Conservation, which is noted for its lowland calcareous grassland. The site also bounds the green wedge 'South Penarth to Sully' identified in the Vale of Glamorgan UDP – policy MG 18 (6). The site itself was identified for mixed housing in the same document and for the provision of public open space – Policies MG 2 (24) and MG 28 (10).
- b) The application comes with a concept plan to show the likely development that will take place. It is on this document that many of the comments below are based.
- c) The application will have an impact on a number of species including bats, dormice, skylark and slow worms and also a negative impact on the network of

hedgerows that form important corridors and nest sites for these and other species. It is not clear from the documentation provided how mitigation for these impacts is to be compensated for within the development or beyond. With such extensive and multi-use applications it is easy to 'get lost' in the amount of paperwork involved and be unclear on the mitigations to be carried out. Therefore the applicant should prepare a simple table listing the species and habitats adversely affected and how they are to be mitigated for, either onsite or offsite. In doing so they should have in mind that mitigation needs to have a multiplier rather than be on a like for like basis. If a phased approach is to be taken with developer then relating mitigation to each phase will also help the process.

- d) Loss of habitats needs to reflect the nature of those habitats. It is not helpful to lump together woodland and hedgerows and treat them using an area scale. Hedgerows should be separated out and dealt with as linear habitats measured by length. Woodlands should continue to be measured by area. If this is carried through to the mitigation strategy then a comparison can be made against length lost and length to be created.
- e) Hedgerows are shown on the concept plan as blocks especially south of the infiltration basins. There seems to be some confusion with as some are clearly labelled as new planting of woodland. The same distinction between new woodland and new hedgerows needs to be used in the concept plan.
- f) The existing hedgerows are well established and serving a function in the landscape, for the farm and for wildlife. Every effort should be made to retain the network wherever possible within the new development. Even gappy hedges can be recovered through planting, protection and management. Although it is a concept plan it would help to overlay it onto an aerial photograph. I am concerned about the loss of network on the eastern side of the development and such an overlay might present opportunities for greater retention.
- g) Similarly the Coastal Path forms an important north south corridor which is truncated by previous development to the north. The concept plan shows development close to the Coastal Path at certain points which gives rise to concern because of cliff erosion, the ability to have the path as a green corridor for both people and wildlife and the ability to relocate the path further inland if needed in the future.
- h) In addition there is an opportunity to strengthen the corridor between the coastal path and the former railway line at the northern boundary with properties on Cosmeston Drive, Petrel Close and Whitcliffe Drive. This is currently quite 'thin' in places in the concept plan.
- i) Finally on the theme of corridors and landscape, because this development will become the boundary for Penarth to the south then the opportunity should be taken to make the boundary planting much stronger to provide visual amenity and also to link the woodland in the south eastern corner to the former railway line.
- j) There have been discussions with my predecessor concerning bat surveys, particularly emergence surveys from properties that are destined for demolition. Whilst all these have been completed and methodologies written on how to proceed with the demolitions I can find no evidence of what mitigations or enhancements are to be made in the new development. This could be dealt with in the table requested in c) above. In addition phasing will be important here –

the provision of alternative roosts ahead of the demolitions should be a requirement of the permission.

- k) Light will be an important impact of this development which in places feels quite intense and possibly out of character. Many species move through the landscape in dark corridors and much of the comments above have related to these corridors. In order to be useful then these need to be unlit. Identifying dark corridors, which can be hedgerows, grasslands and woodlands would be beneficial in making sure that the network is serving the interest of wildlife.
- l) Where trees have been identified as being of medium to high value for bats then these need to be retained.
- m) Slow worms are commonly found on railway lines, both active and redundant and like so many species depend on networks of hedges and grasslands to move through the landscape. It would be beneficial if the allotments and households with gardens were encouraged to construct compost heaps.
- n) The same is true for dormouse in terms of networks and habitats. It would be beneficial if in planting new 'woodlands' and hedgerows in including hazel, hawthorn and oak and ensure that the site is not over-managed to allow clumps of bramble to survive.
- o) The surveys conducted before this application indicated a breeding pair of Skylark. Skylark are currently a red-listed species in the UK due to a continued population decline since 1969 primarily as a result of the loss of breeding habitat and changes in farming practice. Because of the nature of the development it will not be possible to mitigate on site and the applicant should identify off site opportunities that enhance the number of species.
- p) The Vale of Glamorgan is poorly served with its urban trees. The applicant should be encouraged to be ambitious in the number of trees planted. The preference should be for native trees but there is a place for specimen non-natives in an urban setting. Consideration should be given to climate change in the choice of species as well as soil, aspect, etc.
- q) In the concept plan (Parameter Plan – green Infrastructure) there are a number of linear reedbeds. Other than as a physical and landscape barrier these will have relatively little value for wildlife. A large reedbed would be used by nesting birds and invertebrates especially if associated with open water and could be located at the infiltration basins?
- r) Quite a number of features are being created here including orchards, allotments, water features, species rich grasslands, woodlands and hedgerows. I am concerned that the continuing value of these to wildlife and the community requires management. What plans and finance is available for the medium to long term management of such assets once they are outside of the contractual maintenance?
- s) Finally in terms of connectivity for biodiversity, education and people would a green feature bridge to Cosmeston Lakes Country Park be of more value to the occupants, visitors, the Primary School and wildlife of this development than an onsite feature bridge?

## **Conclusion**

The applicant is asked to provide additional information as follows:

- i. A table of impact on species and habitats, the scale and extent of mitigations proposed on site and off site and how they relate to any phased development of the application site
- ii. That hedgerows and woodlands are separated in terms of both loss and mitigation and that the concept plan and the table in i) above reflect this
- iii. A plan that overlays the proposed development over an aerial photograph is prepared to show the extent of retention of existing features
- iv. That the connectivity described in g, h and i above is reflected in the concept plan
- v. That dark corridors are identified within the concept plan
- vi. Consideration be given to creating a larger reedbed and open water where the infiltration basins are currently indicated in the concept plan.
- vii. That the future maintenance of the features created in the medium to long term is discussed and the responsibility, finance and specification is agreed through discussion.
- viii. That the concept plan considers the connectivity east – west within the site and beyond in accessing the greenspace of Cosmeston Lakes Country Park.

Although only a concept plan the applicant is asked to note items m, n and p in detailing planting plans.

Finally the applicant needs to agree off site mitigation for Skylarks with a landowner(s) of suitable land and detail this.

## **RELEVANT POLICIES FOR INFORMATION**

### **1) MG21 - SITES OF IMPORTANCE FOR NATURE CONSERVATION, REGIONALLY IMPORTANT GEOLOGICAL AND GEOMORPHOLOGICAL SITES AND PRIORITY HABITATS AND SPECIES.**

Development proposals likely to have an adverse impact on sites of importance for nature conservation or priority habitats and species will only be permitted where it can be demonstrated that:

1. The need for the development clearly outweighs the nature conservation value of the site;
2. Adverse impacts on nature conservation and geological features can be avoided;
3. Appropriate and proportionate mitigation and compensation measures can be provided; and
4. The development conserves and where possible enhances biodiversity

### **MD9 – PROMOTING BIODIVERSITY**

New development proposals will be required to conserve and where appropriate enhance biodiversity interests unless it can be demonstrated that:

1. The need for the development clearly outweighs the biodiversity value of the site; and
2. The impacts of the development can be satisfactorily mitigated and acceptably managed through appropriate future management regimes.

## **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 10, DECEMBER 2018)**

Planning Policy Wales, Section 6.4 places a duty on local authorities to ensure that biodiversity and resilience are fully considered by Local authorities.

Particular reference is made to The Section 6 Duty (Environment Act) to ensure that planning authorities demonstrate that they have sought to fulfil the duties and requirements of Section 6 of the Environment Act by taking all reasonable steps to maintain and enhance biodiversity in the exercise our their functions.

Protected Species under European or UK legislation, or under section 7 of the Environment Act are a material consideration when a 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 and to ensure that the range and population of the species is sustained. (Section 6.4.22)

Paragraph 6.4.23 outlines the process whereby European Protected Species are considered in Planning.

## **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).