

**CONSULTATION RESPONSE:
COUNTRYSIDE AND ENVIRONMENT (ECOLOGY)**



To / I:	Operational Manager Development & Building Control	From / Oddi Wrth:	Ecology, Development Services Countryside and Economic Projects.
FAO	Ceiri Rowlands		Mr Colin Cheesman
Date / Dyddiad:	11 th January 2021	Tel / Ffôn:	(01446) 704855 0780 3713587
Your Ref / Eich Cyf:	2019/00871/OUT	My Ref / Fy Cyf:	
Location	Land at Model Farm, Port Road, Rhoose		
Proposal	Outline application comprising demolition of existing buildings and erection of 44.79ha Class B1/B2/B8 Business Park, car parking, landscaping, drainage infrastructure, biodiversity provision and ancillary works. All matters reserved aside from 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 Permission sought

Previous status:

Comments

These observations update and supersede those of my predecessor, Erica Dixon, dated 7th January 2020.

They also refer to: *Proposed Additional Mitigation and Wildlife Enhancement Drawing Number - ECO01271-002 revision A - dated November 2020*

This follows further discussions with the applicant and their agents.

In January 2020 there were concerns over the impacts on priority and protected species and a holding objection was asked for.

There remain concerns over some protected species but through the introduction of planning conditions they can be dealt with in the detailed planning stages.

Bats

In particular, and despite the approach of NRW in terms of limiting their interaction to licensing activity, the loss of the farm buildings through demolition, the routing of the 'Spine Corridor Road' close to boundaries with high bat counts from the transect survey (Bat Activity Transects Results October 2019, drawing 5A, dated October 2019), the limitation of the bat surveys to the development site rather than the whole land holding to the detriment of Lesser Horseshoe bats, *Rhinolopus hipposideros* as pointed out by Hawkeswood Ecology (correspondence dated 29/04/2020 & 24/10/2019) and the lack of a lighting plan, albeit that this is an outline application, are a cause of concern.

The mitigation suggested relies on a range of Schwegler boxes affixed to trees and the incorporation of roosting cavities and tubes into new buildings without the identification of those buildings or their locations. Experience of such sites elsewhere indicates that development will be phased as demand for plots arises. Therefore the applicant is asked to determine which building locations will be required to incorporate the features and that it be a condition in determining reserved matters when planning permission for those buildings is sought. How effective will the mitigation be if these plots remain unoccupied for several years?

In addition an overall lighting plan should be submitted to the LPA so that the effects on bats and other nocturnal animals can be determined. This will also be a requirement within the phases of development of the site for each unit proposed where there will be a need to reduce light pollution and maintain dark corridors.

In determining the route of the Spine Corridor Road ensure the absolute minimal loss of hedgerows, which could then be allowed to mature, and siting low impact timed lighting on the opposite side of the highway away from designated dark corridors.

Depending on timescales, consider undertaking a bat survey of the entire area of land in the ownership of L & G to properly assess the impacts of the development for foraging and to assist in the transfer of management for the allocated extension. This would focus on the unsurveyed area and not repeat the previous surveys.

Farmland Birds

There is concern over the impact of this development on farmland bird's especially ground-nesting birds.

The additional mitigation and enhancement submitted by the applicant after discussions on the ground is helpful in addressing these concerns. It addresses the location of where the mitigations and enhancements will take place and their nature in addition to those already suggested previously.

It is noted that they are entirely within that area that is suggested to come into the curtilage of Porthkerry Country Park. In order to be effective then management must be relevant to those farmland species for whom the mitigation is intended over a significant period of time. The management of the 'allocated extension' area will need to be agreed in detail and its funding resolved as it is not the role of publicly funded and managed land to compensate for the ecological impacts of development.

Hedgerow loss

The last response raised the concern that there would be losses of hedgerows which it was proposed to compensate through additional planting especially to increase woodlands and existing boundaries. This was not thought appropriate.

Although an extensive survey for Hazel Dormouse, *Mucadinus avellanarius*, was undertaken, no records were found though the general impression of the site was that it could hold dormice.

The opportunity to create more suitable habitat through planting predominantly hazel in adding to existing woodlands and hedgerows will be beneficial.

In addition the additional mitigation and enhancement submitted by the applicant includes a number of new hedgerows. If the applicant can quantify the additional area of planting, the length of new hedgerows and the length of hedgerows to be lost in the development then a final judgement can be made.

Waterbody

The application results in the loss of an agricultural waterbody that does not hold Great-crested Newts. The proposal to have three SUDS attenuation areas/swales will create a number of wet, marshy areas as part of the water management of the development. This presents the opportunity to deliver habitat of a more diverse nature than the existing water body which will have a greater impact for biodiversity.

The previous recommendations were:

Recommendation	Current Situation
1) Address the issue of farmland / ground nesting birds on site, including confirming breeding status or alternatively providing secured breeding habitat for a minimum of 10 years post development.	A proposal for management of the transfer land to mitigate for farmland birds has been agreed. However a 10 year costed plan has not been formulated and will be required ahead of any transfer.
2) Provide details of replacement waterbodies	Completed. Details of any planting to be resolved at the detailed application stage.
3) Provide details (including location, species composition) of replacement hedgerow.	New hedgerow and scrub/coppice planting in revised plan. Quantities need to be confirmed before resolution.
4) Do not erect bird boxes on ash trees	The advice still stands
5) Replacement habitat for ground nesting birds – need to address issue of land ownership, responsibility for the management, and the means to secure compensation measures	Duplicates Recommendation 1. Need for costed plan.
6) Liaise with Clive Moon regarding drainage / SUDS features.	Unknown

Conclusion

Further Information required

1. Consider undertaking a bat survey of the rest of the land in L & G ownership to capture the Lesser Horseshoe bat interest and to assist in the future management of land.
2. Quantify the area of scrub/coppice to be planted, the length of hedgerows to be lost and the length of hedgerows to be planted to allow a final assessment.
3. Outline planting and management of the three SUDS swales/attenuation ponds.
4. Contingencies for bat mitigation if units that would have contained mitigation features are not bought forward early in the site development.

To be conditioned

1. A Bat mitigation strategy detailing the locations of all the mitigation measures and identifying the building location sites for roost cavities and tubes so that they can be dealt with under reserved matters when proposals come forward. It should also identify a network of dark corridors and be linked to 2. below.
2. An overall lighting strategy for the development for the 'common' areas including the Spine Corridor Road to be able to assess impacts on bats and other nocturnal mammals.

To be agreed

1. A 10 year management plan with costings for the land proposed to be transferred to Porthkerry Country Park to be agreed between the applicant and the Countryside Section of the Council.

RELEVANT POLICIES FOR INFORMATION

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.

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).