

**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:	14 <sup>th</sup> June 2021	Tel / Ffôn:	(01446) 704855 07514 623147
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 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 type="checkbox"/> Recommend planning conditions   |
|   | <input type="checkbox"/> Approve                         |

**Summary**

Current status: Outline Planning Application submitted

Previous status:

**Comments**

Supplementary comments

**Preliminary Ecological Appraisal**

The applicant employed RPS Group to undertake a Preliminary Ecological Assessment (PEA) dated the 18<sup>th</sup> June 2018.

A Proposed Additional Mitigation and Wildlife Enhancement Plan was submitted in November 2020.

An addendum containing a Proposed Wildlife and Mitigation Strategy on the 15<sup>th</sup> December 2010

A Hedgerow, Scrub and Woodland Management Plan was submitted in June 2021.

The original PEA conformed to the standard set out by the Chartered Institute for Ecology and Environmental Management, 'Guidelines for Preliminary Ecological Appraisal' Second edition, December 2017.

Both the previous County Ecologist and myself do/did not regard the PEA as deficient though both of us have raised issues that have resulted in both further surveys and amendments to the plans.

This will continue to be an iterative process as this is an outline application and further details will be worked through as the development moves forward and the concomitant biodiversity mitigations and enhancements.

### **Rare species**

A number of rare species have been recorded on site but none of these has any protection in law through either the Wildlife and Countryside Act 1981 (as amended) nor in the Section 6 species list of the Environment (Wales) Act 2016. In reviewing the application, it has been our view that such species are unlikely to be adversely affected by the development.

#### *Platycis minutus*

A beetle found in and around rotting wood, mainly beech, birch and oak, in woodland and parkland settings. 46 records in Wales with 30 since 2000 in 20 hectads. (Aderyn)

#### *Platyrhinus resinosus* – Resin Weevil

Nationally scarce but increasing in range and abundance recently. Associated with the fungus *Daldinia concentrica* found growing on Ash and some other broadleaved trees. 21 records in Wales with 18 since 2000 in 18 hectads (Aderyn)

#### *Pluteus aurantiorugosus* – Flame Shield mushroom

A wood rotting fungus that occurs on stumps and buried logs of broadleaved trees principally elm and ash. 13 records in Wales in 9 hectads, all since 2000. (Aderyn)

#### *Perenniporia ochroleuca*

A small polypore (bract) fungus that is normally found on blackthorn, hawthorn and oak. 7 records in Wales in three tetrads all since 2006 (Aderyn). The Kew Lost and Found Project (2014 – 2020) added 96 records in the UK including 6 in Wales at 5 separate locations.

All of these species are principally woodland species and the existing woodlands are not affected by the development close to Port Road but within the area to be managed for nature conservation by Porthkerry County Park.

### **Hedgerows**

The applicants have now provided a table listing the losses of hedgerow at 2.04 km. and a length of 3.01 km of new hedgerows and 0.3km of hedgerows to be restored through additional planting. Therefore, the target set out in the Biodiversity and Development SPG has been met. The applicants also propose to plant 1.5 hectare of hazel dominated scrub, 1 hectare of scrub and 2.5 hectares of new broadleaved woodland planting.

### *Conclusion*

THE PEA and supporting documents are to the standards set out by CIEEM.

Rare Species – none have statutory protection, and most are confined to the woodlands which are unaffected by the development.

The applicant has met the requirements in the Biodiversity and Development SPG for the compensation by length of lost hedgerows.

## **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.

## **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).