

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



To / I:	Operational Manager Development & Building Control	From / Oddi Wrth:	Ecology, Countryside Services  Planning Section
FAO	Ceiri Rowlands		Mr Colin Cheesman
Date / Dyddiad:	4th January 2023	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	Hybrid application comprising an outline application for the demolition of existing buildings and erection of 44.75ha Class B1/B2/B8 Business Park, car parking, landscaping, drainage infrastructure, ecological mitigation and ancillary works (all matters reserved aside from access) within Area A and a full application for change of use from agricultural land to country park (Use Class D2) within Area B.		

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 checked="" type="checkbox"/> Recommend planning conditions
	<input type="checkbox"/> Approve

**Summary**

Current status: Hybrid Application submitted

Previous status:

**Comments**

These comments respond to recent submissions in respect of this application and its treatment of protected species and also makes reference to the following documents submitted by the applicant:

Preliminary Ecological Assessment (PEA), May 2019, RPS

Ecology Surveys Report, October 2019, RPS

Parameter Plan: Green Infrastructure, May 2019, RPS

Hedgerow, Scrub and Woodland Plan, June 2021, RPS

Proposed Additional Mitigation and Wildlife Enhancement, November 2020, RPS  
Biodiversity Management Strategy, October 2019, RPS  
Tree Survey and Impact Assessment Report Parts 1.2 & 3, June 2019, RPS

## **Badgers**

The original PEA, dated 24 May 2019 by RPS, mentions badgers in paragraphs 4.24 and 4.25 and recommends surveys to be undertaken.

The Ecology Survey Report undertaken by RPS and dated 11 October 2019 mentions badgers in the summary and more extensively at 2.8 Methods, 3.6 Limitations, 4.6 Results, 5.6 Discussion and Evaluation of Impact and at 6.4 Recommendations and Mitigations.

In my view badgers have been dealt with thoroughly.

In the summary section the Ecology Survey Report mentions the potential for the creation of an additional sett but this is not carried forward in the recommendations. This needs rectifying. A Feasibility Study should be added as a planning condition. The feasibility study should include site visits, mapping and costings to see if there is potential for an additional badger sett as per the summary recommendations in the Ecology Survey Report.

Similarly in Table 2 of the Biodiversity Management Strategy, Badgers are not mentioned and this too needs updating to reflect the results of the surveys and the ambition in the enhancements.

## **Bats**

Bats have been dealt with in both the PEA and the Ecology Survey Report. The Ecology Survey Report mentions bats in the summary and at 2.1 to 2.4 Methodology, 3.2 Limitations, 4.1 and 4.2 Results, 5.1 Discussion and Evaluation of Impact and at 6.1 Recommendations. The results section runs to some seven pages and details investigations of suitable trees, buildings through emergence surveys, and general bat activity through the placement of static detectors. Nine species of bats were recorded.

Bats are part of Table 2 in the Biodiversity Management Strategy and there are mitigations for lost roosts at 6.1.6 and habitat management recommendations at 6.1.14 to 6.1.16.

The applicant will have to secure a Protected Species Licence from Natural Resources Wales before works commence especially the removal of building or trees that have been surveyed and contain bat roosts.

## **Brown Hare**

The search of records undertaken by RPS through SEWBRc revealed only 2 records at 379 metres from the proposed development dating from 2015. Recent representations indicate two records of Brown Hare on site in April and November 2022 at two distinct locations. Brown hare habitat preference is for mixed farmland that is comparatively undisturbed with plenty of opportunities to secret leverets in longer vegetation. The aim of the transfer of land and the future management is for biodiversity as illustrated by the Green Infrastructure Plan (drawing JCD0064-006) and the Hedgerow, Scrub and Woodland Plan (drawing JCD0064-007). This allows for the creation of more habitat suitable to Brown Hare as well as many other species.

## Protected Species

Through a series of reports and surveys the applicant has dealt with those protected species which have been made aware to them from the searches of the SEWBRcC database and through the surveys commissioned by RPS. Table 4 in the PEA lists all the protected species, their numbers and distance from the proposed development. The applicant, through RPS, has commissioned surveys detailed in the Ecology Survey Report and listed mitigations and enhancements.

The procedure followed standard practice as set out in the CIEEM Guidelines for Preliminary Ecological Appraisal.

Species of principal importance identified in recent representations and their treatment as part of this planning application are listed below.

Brown Hare	at the time of the PEA no records on or near the site were in the SEWBRcC database. The proposed management of the transfer land will be to suit species such as Brown Hare.
Bats	see heading above
Skylark	in paragraph 3.35 of the PEA and in Table 4. Also dealt with in 2.7 Breeding Bird Survey of the Ecology Survey Report which recorded 1 possible breeding pair and 4 probable breeding pairs plus Figure 6 – Breeding Bird Survey Results. The Green Infrastructure Plan (drawing JCD0064-006) identifies areas of grassland to be managed for skylark as mitigation.
Common Linnet	in paragraph 3.35 of the PEA and in Table 4. Also recorded at 4.5.2 of the Breeding Bird Survey of the Ecology Survey Report which confirmed 1 possible breeding pair. The mitigation is outlined in 7.1.8 to 7.1.12 especially 7.1.10 of the Ecological Enhancements of the same report. The hedgerow in Figure 6 is not adversely affected by the proposed development and is indicated for enhancement.
Yellowhammer	in paragraph 3.35 of the PEA and in Table 4. Also recorded at 4.5.2 of the Breeding Bird Survey of the Ecology Survey Report which confirmed 1 probable breeding pair and in Figure 6 of the same report. The mitigation is outlined in 7.1.8 to 7.1.12 especially 7.1.10 of the Ecological Enhancements of the same report. The hedgerow where the yellowhammer was located is being retained as part of the proposed development.
Kestrel	in paragraph 3.35 of the PEA and in Table 4. Record located some 348 metres from the site in 2019. Land transferred to Porthkerry and managed for wildlife should have an increased number of passerines.
Black Headed Gull	Section 7 species. Most records are for overwintering birds some of which are European migrants.
House Sparrow	in paragraph 3.35 of the PEA and in Table 4. Also, in 4.5 with 2 confirmed breeding records both located within the farmhouse/farm buildings. In 7.1.9, a Schwegler 1SP sparrow terrace is to be erected on the first new build. It will be important that demolitions do not proceed until alternative nesting arrangements are provided.
Dunnoek	in paragraph 3.35 of the PEA and in Table 4. Also, in 4.5 with 3

	possible breeding, 3 probable breeding and 1 confirmed breeding. Hedges where breeding activity was suspected/confirmed are all due for retention and some for enhancement.
Common Starling	in paragraph 3.35 of the PEA and in Table 4. Also recorded at 4.5.2 of the Breeding Bird Survey of the Ecology Survey Report which confirmed 1 possible breeding and 1 confirmed breeding and in Figure 6 of the same report. The mitigation is outlined in 7.1.8 to 7.1.12 especially 7.1.10 of the Ecological Enhancements of the same report.

### Validity of species records

The bulk of the biodiversity surveys were undertaken in 2019 with more recent activity including a walkover survey in November 2022.

The British Standard for ‘Biodiversity – code of practice for planning and development’ (BS 42020) advises under 6.2 (7) ecological information should be up to date (e.g., not normally more than two/three years old) or as stipulated in good practice guidance. The Advice Note issued by the Chartered Institute for Ecology and Environmental Management ([Advice-Note.pdf \(cieem.net\)](https://www.cieem.net/Advice-Note.pdf)) gives a timescale and actions required from the date of the original survey. For 18 months to three years the advice is for a professional ecologist to undertake both a site visit and a desk study involving a revisit of the species records. This should then lead to a revision of the PEA and the mitigations and enhancements required. This is especially true for mobile species like Brown Hare which have now been recorded on site.

Whilst a walkover survey has been conducted an updated search of records since 2019 should also be conducted and incorporated into the plans.

The Advice Note also says that after more than 3 years a professional ecologist should make an assessment but that any data will be increasingly invalid.

It is noted that for the detailed development of plots within the overall application that new assessments will be required.

### Conclusion

There is no evidence that protected species have been overlooked or deliberately ignored in the ongoing process of database searches and surveys that have formed this planning application.

A planning condition should require a Feasibility Study on the likely success of a new badger sett being located on the land as part of the scheme.

The applicant is advised that a Protected Species Licence will be required from Natural Resources Wales for both bats and hazel dormouse.

The applicant should refresh the data search with the Local Environmental Records Centre and update the PEA and any mitigation and enhancement proposals to reflect the results of that data search.

## **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 an 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 e.g., 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 – e.g., 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 of 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).