

LATE OBSERVATIONS
06/09/17

7a) 16/03721/REM & 16/04544/REM – Land North of Bath Road, Corsham

Subsequent to the agenda publication, Officers have received the following legal briefing note prepared by the Applicant's Solicitors:

“16/03721/REM AND 16/04544/REM: DEVELOPMENT ON LAND NORTH OF BATH ROAD, CORSHAM, WILTSHIRE, SN13 0QL

1. We are instructed by Redrow Homes Ltd, the applicant of the above reserved matters applications, which are to be considered by the Northern Area Planning Committee tomorrow (Wednesday 6 September 2017).
2. We have reviewed the Northern Area Planning Committee Report Outline for Agenda items 7a (16/03721/REM) and 7b (16/04544/REM).
3. We note the comments provided in the Report Outline on the potential impacts of the development proposals on protected bat species in the context of Natural England's licensing requirements (in particular on pages 23, 24, 26 and 37).
4. We are writing now because we consider that it will assist the Committee members, in their determination of the above applications, to understand:
 - 4.1. the very specific circumstances in which the presence of bats requires refusal of a planning application, as set out by the Supreme Court in *Morge v Hampshire County Council* [2011] UKSC 2;
 - 4.2. that *only* if those specific circumstances apply must planning permission be refused due to bats. As long as those circumstances do not apply then the presence of bats does not present a legal obstacle to the grant of planning permission;
 - 4.3. that those specific circumstances do not apply to the above reserved matters applications; and
 - 4.4. that bats therefore do not present a legal obstacle to approval of the above reserved matters applications.
5. For the avoidance of doubt, this letter is not directed at the Council's Habitats Regulations Assessment of potential impacts of the above development on the designated bat features of the Bath and Bradford Avon Bats Special Area of Conservation, which is governed by a separate legal framework.

Wiltshire Council's legal duty in relation to bats when determining planning applications

6. Under regulation 9(3) of the Conservation of Habitats and Species Regulations 2010 (as amended), Wiltshire Council has a duty, as a competent authority in exercising its functions, to have regard to the requirements of the Habitats Directive and Wild Birds Directive so far as they may be affected by the exercise of those functions.

7. All species of bat are European Protected Species (“**EPS**”) listed in Annex IV of the Habitats Directive and as such are protected by the prohibitions in Article 12(1) of the Habitats Directive. Article 12(1) prohibits “deliberate capture or killing” of a bat; “deliberate disturbance of bat species”; and “deterioration or destruction of breeding sites or resting places of bats”. These prohibitions have been implemented as criminal offences under regulation 41 of the Conservation of Habitats and Species Regulations 2010.
8. Article 16(1) of the Habitats Directive, however, permits derogations (ie exceptions) from the Article 12(1) prohibitions where three “derogation tests” are met. Natural England is responsible for implementing this derogation system through the EPS licensing system under regulation 53 of the Conservation of Habitats and Species Regulations 2010.
9. In *Morge v Hampshire County Council* [2011] UKSC 2 the Supreme Court considered how planning authorities should discharge this regulation 9(3) duty.
10. In his leading judgment, Lord Brown, at paragraph 29, stated that **planning permission should be granted unless the planning committee concludes that the proposed development would both (a) be likely to offend Article 12(1) of the Habitats Directive; and (b) be unlikely to be licensed by Natural England pursuant to the derogation powers.**
11. The rationale behind this approach is that Natural England (the EPS licensing authority), and not planning authorities, has primary responsibility for ensuring compliance with the Habitats Directive. Therefore it would be wrong to place a substantial burden on the planning authority in effect to police Natural England’s own duty. As such, *unless* the planning committee concludes that both (a) and (b) in the paragraph above apply to a planning application, planning permission should be granted and the matter should be then be left to Natural England’s regulation.

Applying *Morge* to 16/03721/REM and 16/04544/REM

12. When determining the above reserved matters applications the Northern Area Planning Committee should have in mind Lord Brown’s judgment (10. above).
13. The following explains that neither (a) nor (b) of Lord Brown’s judgment (10. above) applies to these reserved matters applications. Bats therefore do not present a legal obstacle to approval of these reserved matters applications.

“Would the proposed development be likely to offend Article 12(1)”?

14. There is a mineshaft used by bats in the south west of the development site. As such the potential impact of this development on bats has been debated at length both at the planning appeal which led to grant of outline planning permission (13/05188/OUT) on 27 May 2015 and again since the lodging of the reserved matters applications.
15. The Inspector in his appeal report dated 27 May 2015 concluded that, taking into account the bat mitigation measures to be secured through the outline planning permission conditions, “*there can be a high degree of confidence that the ecological functionality of the airshaft breeding site would be adequately protected by the proposed mitigation*” (paragraph 73); the development “*would be unlikely to result in the deterioration of a [bat] breeding site*” (paragraph 80) and “*would not result in the deterioration of the breeding site for bats*” (paragraph 151) and as such “*On this basis a licence [from Natural England] may not be required*” (paragraph 80). The Inspector

made no specific mention of the other prohibitions of Article 12(1) (see 7. above) but it can be presumed, from his otherwise detailed analysis, that if the Inspector had had concerns about them he would have voiced them. It should also be noted that the other prohibitions (7.) require the prohibited act to be carried out “deliberately”. Lord Brown in *Morge* stated that “deliberate” means “*an intentional act knowing that it will or may have a particular consequence*” [ie disturbance of the species or killing]” (paragraph 15), and this is very unlikely to apply where the development is delivered in compliance with the outline planning permission’s mitigation measures designed to safeguard the bats.

16. Redrow Homes Ltd’s ecological consultants, EAD Ecology, emailed the Council’s ecologist, Jon Taylor, on 26 April 2016 explaining that, given the bat mitigation measures required under the outline planning permission, they also do not consider that the prohibitions in Article 12(1) will be triggered by delivery of the development under 16/03721/REM and therefore no licence from Natural England is required. Fiona Elphick (Council’s ecologist) has confirmed (24 July 2017) that the reserved matters applications are compliant with the required outline permission bat mitigation measures.
17. However the Council’s ecologist, Jon Taylor, has continued to express concerns he raised at the planning inquiry, that the proposals would result in deterioration of a bat breeding site, significant disturbance and increased mortality (22 February 2017). Jon Taylor has now left the Council but his replacement Fiona Elphick has stated (24 July 2017) “*Jon Taylor’s original comments in relation to the swarming function for bats within the site still stand and it should be noted that I agree with him on this point*”. Nevertheless they both accept that these arguments were well rehearsed during the course of the inquiry and that the Inspector took a different view. Jon Taylor concedes (22 February 2017) “*my professional opinion must now be weighed in the balance alongside the Inspector’s report and the decision made in the narrower context of the reserved matters application.*”
18. Taking all of this into account, it cannot reasonably be concluded that the proposed development “would be likely to offend Article 12(1)”. If the fully considered views of the Inspector (and the views of EAD Ecology) are followed then the conclusion is that Article 12(1) is unlikely to be offended. If Jon Taylor / Fiona Elphick’s views are given any weight, even though the Inspector considered them and did not agree with them, then it might potentially be concluded that the position is uncertain. But, either way, based on all the information, it cannot be concluded that Article 12(1) *would be likely* to be offended. To do so would amount to a wholesale departure from the Inspector’s conclusions.
19. Since, under *Morge*, refusal of planning permission is required only where the proposed development would both (a) be likely to offend article 12(1); and (b) be unlikely to be licensed pursuant to the derogation powers, it can already be seen that, since (a) does not apply in this case, refusal to approve the reserved matters approvals due to bats is not appropriate.
20. For completeness, however, we also now consider part (b) of Lord Brown’s judgment ie whether, *if* a licence were sought, the development would be unlikely to be licensed pursuant to the derogation powers.

“Would the proposed development be unlikely to be licensed”?

21. Even though the Inspector in 2015 considered that “*On this basis a licence [from Natural England] may not be required*” (paragraph 80), he still went on to consider the

likelihood of a licence being granted if an application were made to NE. He did this because in the Statement of Common Ground between the parties in the Inquiry it had been stated: *“It is accepted solely for the purposes of these proceedings that in order to undertake the works for which consent is being sought that an application for a licence under the Conservation of Habitats and Species Regulation 2010 (as amended) is required from NE”* (paragraph 80).

22. The Inspector considered that the first two licensing derogation tests (that there are “imperative reasons of overriding public interest” for the development; and that there is “no satisfactory alternative”) were met (paragraphs 81 and 82). There is no reason for any different conclusion on these tests to be reached by the Northern Area Planning Committee now.
23. The Inspector also concluded that the third licensing derogation test was met. He said *“For the reasons given above, I do not consider that the proposal would be detrimental to the maintenance of the population of the species in question at a favourable conservation status”* (paragraph 83).
24. He then drew his overall conclusion *“Consequently the evidence before me does not indicate that this is a case where NE would be unlikely to grant a licence”* (paragraph 83).
25. Following on from his position at the planning inquiry, Jon Taylor has nevertheless continued to express a concern that the proposal would be detrimental to the favourable conservation status of the bat populations / species concerned (22 February 2017). As already noted above (17.), he however recognises that his professional opinion must be weighed alongside the Inspector’s report and the narrower context of reserved matters applications.
26. Once again, given the Inspector’s conclusions, it cannot reasonably be concluded that the proposed development *“would be unlikely to be licensed”*. If the fully considered views of the Inspector are followed then this is not a development which *“would be unlikely to be licensed”*. If Jon Taylor’s views are given any weight, even though the Inspector considered them and did not agree with them, then it might potentially be concluded that the matter is *uncertain*. Lord Brown’s judgment in *Morge* (paragraphs 28 and 29), where he rejects the earlier decision of the Court of Appeal, makes clear that uncertainty in this context is not an acceptable basis for refusal of planning permission.

Conclusion

27. Lord Brown’s judgement in *Morge* is clear: planning permission may only be refused on bat grounds where the planning committee concludes that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers.
28. There is no reasonable basis for the planning committee to draw either of these conclusions in this case. As such, bats do not create any legal obstacle to approval of the above reserved matters applications.”

Responding to the letter’s content, the Pickwick Association has commented as follows:

“Freeth’s comments conveniently avoid mentioning certain issues and misinterpret others – for example:-

- the assurances given at the Public Inquiry (paras 70 and 80 of the Inspector’s decision) that a derogation licence would be applied for;
- that – also at para 80 – the Inspector noted ‘it is not for me to determine whether or not a licence would be required as that is the duty of NE.’ We now know that is not the case since NE will only react once a licence application has been made;
- whilst noting Inspector’s over-riding conclusion in para 83 (Freeth’s point 24) it has to be said that it does not carry the weight attributed to it as it is predicated on the faulty assumption (based on undertakings that have since proved worthless) that NE would be asked to grant a licence.

And

- the fact that Redrow have advised Natural England that they will not apply for such a licence.”

Having sought advice from the Council’s Solicitor, Officers would not dispute the factual content and legal basis and would advise Members that this is duly noted in respect of both applications as above.

Members are also requested to note a further point of clarification/correction in the penultimate sentence of the final paragraph of the report to application 16/03721/REM, which for consistency with the preceding point on ‘prejudice’ should be amended and read as follows:

“*Whether or not* ultimately subject to the granting of a Licence by Natural England, in the view of Officers the scheme will make adequate provision for the various elements of ecological mitigation sufficient to satisfy the relevant conditions and original terms of the outline application as judged by the Inspector.”

7 b) 17/03035/REM – Land at Former Blounts Court Nursery, Studley

Letter received from Mr Richard Fitter, stating:

“There is an inaccuracy in the committee report in respect of the proposed Toucan crossing.

You say in your report that “the outline planning permission was conditioned such that there will be a 3m cycleway on the south side of the A4 connecting the new Toucan crossing with the link to Chapel Street”. This is not correct.

Condition 14 only refers to a pedestrian link to CALW65. It makes no reference to the width of that link and as you are aware a pedestrian link does not have to be 3m wide.

The S106 only refers to a pedestrian crossing and associated works unless agreed otherwise. It references SK01-A but that plan only shows a 3m link half way to CALW65, stopping short at the bus stop which it describes as a 'pinch-point'.

There is nothing in the S106 or planning conditions requiring a 3m link from the Toucan to CALW65, and no plans have been submitted to suggest how it could be delivered. It is difficult to see how it could be delivered with the Toucan in the proposed location without felling a number of mature trees.

I appreciate that you consider the crossing to be outside the remit of this reserved matters application but there is a very real prospect that it cannot be delivered as shown on SK01, or that a complete 3m route can be provided to CALW65, in which case the Toucan may have to move, and that would have a material implication for the layout of the housing scheme, which is precisely the subject of this application."

Officer Comments:

Condition 14 states the following:

"No development shall commence on site until details of a pedestrian link from the development hereby approved to Footpath CALW65 to the west of the site, and pedestrian/cycle links from the development site to the local centre, via a new Toucan crossing on the A4 and CALW65, generally as shown on submitted drawing SK01 (Transport Statement Addendum Report, April 2016) have been submitted to and approved in writing by the local planning authority. Prior to the occupation of the first dwelling on the site the approved details shall have been implemented in accordance with the approved plans."

The condition clearly requires the submission of details relating to the pedestrian & cycle link to be submitted and approved in writing. Plan SK01 does show a pinch point in close proximity to the bus stop but this is not the approved plan. The final details will be approved and these details implemented prior to the occupation of the first unit. The condition states that the details shall be generally in accordance with the plan and thus allow the provision of a 3m link in this location.

Condition 2 should be changed to read as follows:

The development hereby permitted shall be carried out in accordance with the following approved plans:

**2550-5-2-DR-0001 P7 Received 19/07/2017
2550-5-2-DR-0002 P7 Received 10/08/2017
2550-5-2-DR-0003 P7 Received 10/08/2017
2550-5-2-DR-0004 P7 Received 19/07/2017
2550-5-2-DR-0005 P6 Received 19/06/2017
2550-5-2-DR-0006 P2 Received 22/03/2017
2550-5-2-DR-0007 P1 Received 01/02/2017
2550-5-2-DR-0008 P1 Received 01/02/2017
2550-5-2-DR-0009 P1 Received 01/02/2017
2550-5-2-DR-0010 P2 Received 13/07/2017
2550-5-4-LM-T4-S3 P1 Received 01/02/2017**

1030 Received 01/02/2017
3600 Received 01/03/2017
3601 Received 01/03/2017
5000 REV E Received 10/08/2017
5001 REV E Received 10/08/2017
6001 Rev.A Received 06/09/2017
6002 REV A Received 01/03/2017
6003 REV A Received 01/03/2017
6004.1 REV A Received 01/03/2017
6004.2 Received 01/02/2017
6005.1 Received 01/02/2017
6005.2 Received 01/02/2017
6006.1 REV B Received 16/03/2017
6006.2 REV B Received 16/03/2017
6006.3 Received 01/02/2017
6007.1 Received 01/02/2017
6007.2 Received 01/02/2017
6007.3 Received 01/02/2017
6010 Received 01/02/2017
6011 Received 01/02/2017
6012 Received 01/02/2017
6013 Received 01/02/2017
6020.1 REV A Received 21/06/2017
6020.2 REV A Received 21/06/2017
6020.3 REV A Received 21/06/2017
6020.4 REV A Received 21/06/2017

REASON: For the avoidance of doubt and in the interests of proper planning.