
Appeal Decision

Site visit made on 9 September 2019

by Graham Chamberlain BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14th October 2019

Appeal Ref: APP/C1435/W/19/3227221

South View Cottage, Southview Road, Crowborough, TN6 1HL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr McKay against the decision of Wealden District Council.
 - The application Ref WD/2018/2758/F, dated 21 December 2018, was refused by notice dated 22 March 2019.
 - The development proposed is described as 'erection of single dwelling, access, parking, landscaping and other associated infrastructure'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Paragraph 3.3 of the appellant's rebuttal statement refers to an application for an award of costs, but no further substantive details have been submitted. Accordingly, I share the Council's view that a formal application for an award of costs has not been made. The site visit procedure was altered to an unaccompanied visit because the appellant was not present at the prearranged time and I could see all I needed to from public land.

Reasons

3. The main issue in this appeal is the effect of the proposal on the Ashdown Forest Special Protection Area (SPA) and Special Area of Conservation (SAC).
4. The Conservation of Habitats and Species Regulations 2017 requires that where a plan or project is likely to result in a significant effect on a European site, and where the plan or project is not directly connected with or necessary to the management of the European site, as is the case here, a competent authority is required to make an Appropriate Assessment of the implications of that plan or project on the integrity of the European site in view of its conservation objectives. In so doing, an assessment is required as to whether the development proposed is likely to have a significant effect upon a European site, either individually or in combination with other plans and projects.

Assessment of likely significant effects on the SPA

5. The Ashdown Forest contains a large area of lowland heath. The qualifying feature underpinning the SPA designation is the concentration of Dartford warbler and European nightjar. The conservation objectives for the SPA can be summarised as ensuring that the integrity of the site is maintained or restored

as appropriate so that it continues to support the population and distribution of its qualifying features

6. Natural England's (NE) supplementary advice on conserving and restoring site features for the Ashdown Forest SPA (2019)¹ identifies recreational disturbance as one of the principle threats to ground nesting birds. Evidence provided by the Council in its Habitat Regulation Assessment for the Emerging Local Plan (eLP), undisputed by the appellant, supports this by demonstrating that increased recreation can result in damage to the bird's habitat through trampling and erosion. Moreover, the presence of people can disturb ground nesting birds during their breeding season, which is from February to August. Dog walking can be particularly problematic in this regard, especially if dogs are let off their lead.
7. If constructed, the appeal scheme would facilitate a permanent increase in the number of people living within a short drive of the SPA. The Ashdown Forest is an attractive semi-natural area which is close to the appeal site and easily accessible from it, due to the presence of car parks and footpaths. It is somewhere future residents of the proposed dwelling would likely wish to visit for recreation. Evidence in the form of visitor surveys, summarised in the Council's Ashdown Forest SPA Mitigation Zone Background Paper, demonstrates that residents living close to the Ashdown Forest are likely to visit it and thus provide a pathway of effect for recreational disturbance. Those living at sites within 7km of the Ashdown Forest are highly likely to visit, perhaps daily. The appeal site is about 1.3km from the Forest.
8. The level of recreational disturbance arising from the appeal scheme could be minimal, but a significant effect on the SPA would occur when it is considered cumulatively in combination with other plans and projects, particularly other residential development in the surrounding area.

Assessment of likely significant effects on the SAC

9. The qualifying features underpinning the SAC designation are the presence of European dry heath, North Atlantic wet heath and great crested newts. The conservation objectives for the SAC can be summarised as ensuring the favourable conservation status of its qualifying features by, amongst other things, maintaining or restoring qualifying habitats.
10. The supplementary advice on conserving and restoring the SAC² explains that the heathland habitat of the Ashdown Forest is sensitive to changes in air quality. Exceedance of 'critical values' for air pollutants may modify its chemical substrate, accelerating or damaging plant growth, altering its vegetation structure and composition and causing the loss of typical heathland species. Accordingly, the appeal scheme could result in an impact pathway to the SAC if it contributes to an exceedance in critical values.
11. The heathland habitat in the Ashdown Forest SAC is vulnerable to atmospheric pollution from several sources including vehicle emissions from motor vehicles. There is a potential impact pathway from increased traffic flows associated with new development on the roads which go through or run adjacent to the SAC. Many of the characteristic plants, mosses and lichens of heathland habitats are adapted to nutrient poor conditions and extra input of nitrogen can

¹ See Planning Practice Guide Paragraph: 002 Reference ID: 65-002-20190722

² Ibid

disadvantage these characteristic species in favour of others with a greater tolerance of higher nitrogen levels.

12. Section 5 of the eLP, which is supported by up to date evidence, suggests that the heathland habitat of the Ashdown Forest SAC is at risk from nitrogen deposition exceeding the 'critical load', in part due to vehicle emissions from traffic crossing or close to the SAC, which is already in a degraded condition. Annual monitoring studies from 2014 - 2016 have shown that rates of nitrogen deposition in the SAC exceed the critical load and are comparatively high at points close to the roads. This indicates that the SAC habitats closest to roads are already being impacted by nitrogen deposition from vehicles. The Council's propositions are supported by up to date technical evidence in the form of bespoke studies, traffic modelling and air quality readings brought together in the Council's Habitat Regulations Assessment for its eLP.
13. The appeal site is located in an established residential area of Crowborough and thus within the development boundary of the town. The occupants of the proposed dwelling would be located a short drive from the Ashdown Forest. The proposed development would result in a net increase in traffic movements, the appellant's Highways Report suggest an average of approximately 4-5 vehicular movements a day. Modelling provided by the Council indicates it would be likely that some of these movements would take place on roads that cross the SAC or are close to it, thus providing a pathway of effect.
14. NE has provided comments in its capacity as the Statutory Nature Conservation Body. It questions whether the Council's traffic and air quality modelling is sensitive enough to consider the impacts of minor development. However, NE are not in a position of being able to provide technical advice on traffic modelling. Moreover, questioning the evidence is not the same as demonstrating it is inaccurate. NE has also referred to its consultation response to the eLP, but this relates to the development proposed in the eLP whereas the appeal scheme would be in addition to this.
15. Improvements in vehicle technology would reduce nitrogen deposits and this needs to be viewed in the context that nitrogen emissions in the UK are generally falling, as confirmed in a report by the Institute of Air Quality Management. However, there is no determinative evidence before me that the emissions from the development that is likely to occur in the future would be offset by reductions achieved by new technology.
16. The evidence before me on atmospheric pollution is complex and contradictory and has been subject to lengthy debate as part of the eLP examination. It is unclear when the examining Inspector will report, so it is incumbent on me to draw conclusions based on the evidence before me. Although contradicted by technical evidence, such as that prepared by AECOM, the Council's evidence provides a cogent scientific explanation as to why the proposal would result in an identifiable adverse effect on the SAC. It is more than hypothetical. The submissions from NE and the appellant do not exclude the risk that a deterioration of the heathland can be linked, in part, to atmospheric pollution caused by traffic and that this would be made worse by the proposal.
17. The implication of the foregoing is that the impacts from atmospheric pollution caused by the appeal scheme, in combination with other plans and projects cannot, when following a precautionary approach, be excluded as a likely significant effect on the SAC.

Findings in relation to adverse effects on integrity

18. Given the foregoing, an appropriate assessment, in accordance with Regulation 63 of the Habitats and Species Regulations 2017, is required to consider the implications of the proposal for the integrity of the SPA and SAC in view of the conservation objectives. In so doing the Habitats Regulations require that I may only give permission for the proposal after having ascertained that it will not adversely affect the integrity of the European site. I may consider any conditions or other restrictions which could secure mitigation and so provide certainty that the proposal would not adversely affect the integrity of the site.
19. Due to the small scale of the proposed development there is no scope to provide on-site mitigation for the impacts on the SPA. Thus, some other form of mitigation would be necessary to ensure that the proposal would not adversely affect the integrity of the SPA in the ways identified above, such as a financial contribution towards Suitable Alternative Natural Greenspace (SANG) and Strategic Access Management and Monitoring (SAMM) in line with the tariffs in the Council's Ashdown Forest Mitigation Zone Background Paper. The appellant has not advanced a planning obligation as a means of securing this.
20. Instead, the appellant suggests this could be secured through a planning condition, but the condition suggested would require the appellant to submit a 'scheme' to be approved. This is a vague term. In all likelihood, the scheme would involve the payment of money towards SAMM and SANG via a legal obligation. The Planning Practice Guidance advises that in exceptional circumstances a negatively worded planning condition requiring a planning obligation or other agreement to be entered into before development can commence may be appropriate in the case of more complex and strategically important development. The appeal scheme is neither complex nor strategic and therefore such a planning condition cannot be imposed.
21. In respect of atmospheric pollution, the appellant states that in the event mitigation is required, reliance can be placed on that imbedded within the eLP, which allows for some windfall development within the development boundaries subject to a package of measures set out in draft Policy AF2 of the eLP. The eLP is still in draft and has not been adopted by the Council. Accordingly, there is doubt at this stage as to whether the mitigation could be collected in advance of adoption and, failing this, whether the measures set out in the second condition suggested by the Council would be effective when decoupled from the strategic mitigation measures set out in Policy AF2 to be secured through financial contributions.
22. Notwithstanding this, the development planned for the Middle Super Output Area 004, and assessed in the eLP's Habitats Regulations Assessment, is for 121 homes in Crowborough Town Centre over the plan period. The appeal site is outside Crowborough Town Centre and therefore it would be development in addition to that planned within the eLP and mitigated by draft Policy AF2. In any event, no means of securing a financial contribution in accordance with draft Policy AF2 is before me.
23. In the absence of mitigation, the proposal would have significant effects on the SPA through recreational disturbance and the SAC through atmospheric pollution. The appeal scheme makes no provision to mitigate these impacts and thus maintain in a favourable condition the integrity of the SPA and SAC. For this reason, the appeal scheme would fail to adhere to the conservation

objectives. The appellant has not suggested that there are no alternative solutions to providing unmitigated housing at the appeal site. A scheme for a single dwelling, with the limited support it would provide to housing land supply and the local economy, would not provide imperative reasons of overriding public interest for allowing the appeal.

24. Consequently, as directed by the Habitat Regulations, permission must not be granted. Accordingly, the proposal would be at odds with Policy WCS12 of the Wealden District Council's Core Strategy and saved Policies EN1, EN7 and EN15 of the Wealden Local Plan (1998). There is nothing of substance before me to suggest these policies are inconsistent with Paragraphs 174 and 175 of the National Planning Policy Framework.

Other Matters

25. The Council are currently unable to demonstrate a five year housing land supply (the supply is 2.62 years). However, Paragraph 177 of the National Planning Policy Framework states that the presumption in favour of sustainable development in Paragraph 11 of the Framework does not apply where a plan or project is likely to have a significant effect on an SPA/SAC site, and an appropriate assessment has concluded that the plan or project will adversely affect the integrity of the SPA/SAC. As the appropriate assessment has not been concluded positively then Paragraph 11 of the Framework is not engaged.
26. The appellant has referred to an appeal decision³ where an Inspector concluded that developments can proceed without SAC mitigation being required. However, following a legal challenge by the Council the appeal decision was quashed and has been remitted for redetermination. Thus, it is not a determinative point in favour of the proposal. I have carefully considered the Secretary of State's decision⁴ in relation to a scheme in Mid Sussex District Council. However, this is a decision relating to development in a different local authority area where a different body of evidence was presented. It is unlike the appeal scheme before me given the technical evidence provided by the Council.

Conclusion

27. The proposed development would be contrary to the development plan and there are no other considerations which outweigh this finding. Accordingly, for the reasons given, the appeal should not succeed.

Graham Chamberlain
INSPECTOR

³ APP/C1435/W/18/3197286

⁴ APP/D3830/W/16/3152641