
Appeal Decision

Site visit made on 29 October 2019

by Helen O'Connor LLB MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 December 2019

Appeal Ref: APP/W1850/W/19/3234852

Land to the West of Risbury Cross, Risbury HR6 0NG

- 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 and Mrs Andrew Smout against the decision of Herefordshire Council.
 - The application Ref 184541, dated 13 December 2018, was refused by notice dated 28 February 2019.
 - The development proposed is a bungalow with new access and incidental outbuilding.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. In my heading above I have used the site address given in the appeal form given that this was omitted from the original planning application form.
3. Notwithstanding the Council's reference to the application being made in outline with all matters reserved¹, it is reasonably clear from the application form and level of detail included in the submitted plans, that the application is made for full planning permission.
4. Since the Council made its determination, there has been relevant recent caselaw² regarding the potential effect on designated nature conservation sites from wastewater associated with development. The main parties have had the opportunity to comment on this in their appeal statement or final comments. I have determined the appeal on the submissions and evidence before me.

Main Issues

5. The main issues are:
 - Whether the site is suitably located for new housing development, having regard to local and national policies, and;
 - The effect of the proposal on the River Wye Special Area of Conservation.

Reasons

¹ Paragraph 2.2 Council's appeal statement

² Cooperatie Mobilisation for the Environment UA and College van gedeputeerde staten van Noord-Brabant (Cases C-293/17 and C-294/17, referred to as the 'Dutch case')

Location of development

6. As part of the overall housing strategy in the county, Policy RA2 of the Herefordshire Local Plan Core Strategy 2011-2031, October 2015 (CS) permits housing in identified settlements outside of Hereford and the main market towns in order to strengthen rural communities. Risbury is listed amongst those settlements that would be the main focus for proportionate rural housing development³. The policy further outlines how neighbourhood development plans will be the main mechanism for establishing minimum growth targets and allocating sufficient land to address development in such rural areas. Otherwise new residential development in rural locations is limited to the exceptions identified in policy RA3 of the CS. The proposal is not for affordable housing and the evidence presented does not show that the proposal would otherwise fall within any of the exceptions listed in policy RA3.
7. Policy HFSP3 of the Humber, Ford and Stoke Prior Neighbourhood Development Plan 2011-2031, May 2016 (NP) establishes the target of a minimum of 43 new homes by 2031 within the area covered by the NP and Policy HFSP5 specifically relates to Risbury. It stipulates that, subject to certain criteria being met, housing development in Risbury will be accommodated through permitting new homes to be built on suitable sites within the defined settlement boundary. The appeal site comprises part of a field that lies adjacent to, but outside of, the settlement boundary for Risbury as defined in the NP.
8. I therefore conclude that the proposal would be inconsistent with NP policy HFSP5 and it follows that it would also conflict with policy RA2 of the CS relating to the location of new housing development. These policies are broadly consistent with the provisions of the National Planning Policy Framework (the Framework) in relation to the provision of rural housing.
9. The Council have also referred to policies SS1 and SS6 of the CS in the refusal reason on the decision notice. Policy SS1 sets out the presumption in favour of sustainable development similar to that in paragraph 11 of the Framework, which I consider further below. Policy SS6 states that development should conserve and enhance environmental assets that contribute towards the county's distinctiveness. However, although the Council object to the location of the appeal site for housing in principle, it is not part of the Council's case that the development would fail to conserve or enhance environmental assets or diminish local distinctiveness⁴ and I have nothing before me to suggest otherwise. Consequently, I do not find conflict with these policies in relation to the location of the site.

Special Area of Conservation

10. The site lies within the catchment area for the River Lugg which comprises part of the River Wye Special Area of Conservation (SAC), a habitat recognised under the Conservation of Habitats and Species Regulations 2017 as being of international importance for the aquatic flora and fauna it supports. At present the levels of phosphates in the River Lugg sub-catchment of the River Wye SAC exceed the water quality objectives and is therefore, in an unfavourable condition.

³ Figure 4.14 Policy RA2 of Herefordshire Local Plan Core Strategy 2011-2031, October 2015

⁴ Page 7, paragraphs 4 and 6 Council's Delegated Decision Report

11. Caselaw⁵ requires the decision maker, when considering the effect that a proposal may have on such a European Site either individually or in combination with other development, to consider mitigation within an appropriate assessment rather than at screening stage. In the absence of mitigation measures and using a precautionary approach, run off from drainage associated with the development may affect the nutrient levels and therefore, the water quality of nearby watercourses. The balance of which could impact on the habitat supporting wildlife and further exacerbate the unfavourable water quality condition within the SAC. As such, there is a risk of a significant effect on the internationally important interest features of the SAC.
12. Whilst previously Natural England and the Council had considered that development that accorded with the Nutrient Management Plan (NMP) for the River Wye SAC, that aimed to reduce phosphate levels to below the target by 2027, might be acceptable, the position has changed in light of more recent caselaw⁶. This decision suggests that where a designated European conservation site is failing its water quality objectives there is no, or very limited scope for the approval of development that may have additional damaging effects.
13. Recent advice from Natural England⁷ to the Council confirms that reasonable scientific doubt remains as to whether the NMP would provide appropriate mitigation. However, specifically in relation to the use of private foul water treatment systems discharging to soakaway drainage fields at some distance from watercourses, criteria are set whereby there would be sufficient scientific certainty to ensure that all phosphate pathways to the River Lugg would be mitigated.
14. These criteria were reiterated following consultation under Regulation 63 (3) of the Habitats Regulations 2017 whereby Natural England have indicated that if the following thresholds are met, then there will be no likely significant effects. *'All parts of the site are more than 30m from a mains connection; The drainage field is more than 50m from the designated site boundary (or sensitive interest feature) and; The drainage field is more than 50m from any surface water feature e.g. ditch, drain, watercourse, and; The drainage field is in an area with a slope no greater than 15%, and; The drainage field is in an area where the high water table groundwater depth is at least 2m below the surface at all times and; There are no other hydrological pathways which would expedite the transport of phosphorus e.g. fissured geology, flooding, shallow soil.'* In light of their specialist expertise I have taken account of, and given considerable weight to, this advice.
15. The development proposes to deal with surface water via soakaway and in relation to foul drainage proposes a septic tank system to serve the dwelling with a soakaway across the adjacent paddock⁸. Policy SD4 of the CS indicates that where connection to wastewater infrastructure is not practical, connection to a package sewage treatment works should be utilised in

⁵ People over Wind and Peter Sweetman v Coillte Teoranta (Case C-323/17)

⁶ Cooperatie Mobilisation for the Environment UA and College van gedeputeerde staten van Noord-Brabant (Cases C-293/17 and C-294/17)

⁷ Letters dated 5 August 2019 & 30 August 2019, Appendices C & D, Council Statement of case

⁸ Drawing 274/03

preference to a septic tank. Furthermore, the limited evidence provided does not clearly establish that drainage arrangements for the proposal would be able to comply with the detailed criteria concerning the distance from watercourses, gradient of the field and hydrological pathways in order to provide mitigation.

16. As such, based on the evidence before me, I do not have certainty that there is a reasonable basis to suppose that a condition would secure compliance with the required criteria. Moreover, although the appellant suggests a condition to require an unspecified alternative foul water scheme that does not require a soakaway in the event that the criteria could not be met⁹, there would be even less certainty as to whether this would be sufficient to overcome the adverse effects. Given this uncertainty, it is not a matter that can be left to a condition as it goes to the principle of the development. Therefore, I am not assured that the proposal would not add to the unfavourable phosphate levels within the river.
17. In the light of a negative assessment, the Habitats Regulations require consideration as to whether there are any alternative solutions and if not, whether there are any imperative reasons of overriding public interest that would justify the development. I have nothing before me that would rule out alternative solutions being available but am aware that none have been put forward for my consideration. Nevertheless, the provision of one additional dwelling would not amount to an imperative reason of overriding public interest. In these circumstances the Habitats Regulations indicate that permission must not be granted.
18. Therefore, I find that the proposed development would harm a designated nature conservation site, with particular regard to the discharge of phosphates into the River Lugg. It would therefore, conflict with policy SD4 of the CS which primarily seeks to ensure that development should not undermine the achievement of water quality targets for rivers within the county, in particular through the treatment of waste water. Additionally, the proposal would be inconsistent with the provisions in the Framework in relation to conserving and enhancing the natural environment and would not accord with the Conservation of Habitats and Species Regulations 2017.

Planning Balance

19. The Council does not dispute that it cannot demonstrate a 5-year supply of deliverable housing sites¹⁰. Paragraph 11 of the Framework states that in these circumstances relevant policies for the supply of housing should not be considered up-to-date and the presumption in favour of sustainable development means that planning permission should be granted unless (i) the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development, or (ii) that any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole (the tilted balance).

⁹ Appellants final commented dated 17.10.19

¹⁰ Paragraph 5.3 Council's Statement of Case

20. For the reasons already outlined above, I have found, having undertaken an appropriate assessment, that the proposal would adversely affect the integrity of the SAC and therefore, it is clear from paragraph 177 of the Framework that the presumption in favour of sustainable development does not apply in these circumstances. Moreover, the policies in the Framework relating to the protection of such areas provide a clear reason for refusing the proposal. As such, the tilted balance in paragraph 11d)(ii) does not apply.
21. I have had regard to the two appeal decisions to which I am referred¹¹. However, these related to different districts with different development plan policies and neither case raised issues in relation to a European designated site. As such, the balance of issues in each case was considerably different to that before me, and so they are of limited weight.
22. Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise¹². There are benefits arising from the proposal including the provision of an additional dwelling to the housing supply where there is unmet demand. Furthermore, this would be close to other residential development and the appellants intend to commission the construction for themselves¹³, general support for which is given in paragraph 61 of the Framework. It would also bring economic benefit as a result of the construction, and the social and economic benefits associated with the occupants of an additional dwelling supporting local services. However, in light of the modest scale of the proposal, these benefits attract limited weight. Accordingly, the benefits arising from the proposal do not provide sufficient justification for development that conflicts with the development plan, the Framework policy and the Habitats Regulations.

Conclusion

23. For the reasons given above, I conclude that the appeal should be dismissed.

Helen O'Connor

Inspector

¹¹ Referenced APP/F1610/W/18/3217856 & APP/P1615/W/18/3213122

¹² Section 38(6) Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.

¹³ Paragraph 5.22 Appellant's Appeal Statement