



Appeal Decision

Site visit made on 6 November 2019

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd April 2020

Appeal Ref: APP/W1850/W/18/3207671

Land East of Newcastle Farm, Orcop Hill, Herefordshire HR2 8SF

- 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 H Beavan and G West (Trustees) against the decision of Herefordshire Council.
 - The application Ref 173385, dated 7 September 2017, was refused by notice dated 30 May 2018.
 - The development proposed is residential development of 3 dwellings.
 - This decision supersedes that issued on 7 March 2019. That decision on the appeal was quashed by order of the High Court.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. I have taken the description of development from the Council's decision notice, which generally reflects the description on the appeal form, as one was not included on the original planning application form.
3. The Appellants, in their appeal submissions, included a revised outline drainage strategy (Drawing No. D01 Rev.D) which was not considered by the Council when it made its decision. The strategy concerned only sought to alter the note regarding the approximate frequency of emptying the proposed cesspools. As this was submitted with the initial appeal documents, interested parties would have had an opportunity to comment on it, as would the Council, and so would be unlikely to be prejudiced. I have therefore taken account of that revised strategy in making my decision.
4. The Council and Appellants refer in their submissions to the Council's document entitled Current Development in the River Lugg Catchment Area Position Statement 15 October 2019 (the RLCAPS). I have afforded some weight to that document and taken it into account due to the degree of support it provides to the relevant development plan policies.

Main Issues

5. The main issues are, having particular regard to the proposed use of cesspools as the means of dealing with foul waste, the effect of the proposed development on:

- i) the wider environment, including in respect of the River Wye Special Area of Conservation (SAC);
- ii) the living conditions and amenities of local residents, in particular relating to noise and disturbance from vehicular movements and general activity associated with the process of collecting the foul waste from the proposed cesspools, and odours associated with emptying, servicing and maintaining those cesspools;
- iii) the highway network, in particular relating to the vehicular movements associated with the process of collecting the foul waste from the proposed cesspools.

Reasons

Effect on the wider environment, incorporating Appropriate Assessment (AA) under the Birds or Habitats Directives and Habitats Regulations

6. The site is located within the catchment of the SAC. There is a need to protect the integrity of the SAC, in particular relating to water quality and nutrient levels relating to supporting river habitats. The SAC currently suffers from the effects of point source or diffuse water pollution, and from elevated phosphate levels in particular. Provision of new housing within the catchment would therefore have the potential to cause additional pollution from foul waste that would add to those. The proposed development would therefore give rise to the possibility of likely significant effect on the SAC through pollution from foul waste. Without adequate provision for disposal of such waste the proposed development would have the potential to significantly impact upon the SAC's features and to threaten its integrity.
7. In considering provision for foul waste disposal, I have had regard to policy SD4 of the Herefordshire Local Plan Core Strategy (the Core Strategy) which relates to wastewater treatment and river water quality. The preferred option is for connection to the wastewater infrastructure network. Where there is evidence that this would be impractical, the policy sets out a hierarchy of other options.
8. In this case, there is insufficient substantive evidence to demonstrate that there is a means by which connection could be made from the site to a mains sewer system. Furthermore, the submitted evidence indicates that there is not a suitable watercourse within the near vicinity of the site into which direct discharge would be possible from a package sewage treatment works. Local ground conditions at the site could also not achieve appropriate percolation soakaway results for soakaway discharge from either a package treatment works or septic tank.
9. I have had regard to neighbour representations putting forward an alternative solution comprising package treatment plants and a reed bed with drainage to a watercourse, via an existing drain in the curtilage of the adjacent property known as Holmelea Cottage. However, there remains doubt over the status of the existing drain concerned, serving the highway; whether that drain would be appropriate in terms of the extent to which it has water flow throughout the year; and the condition of the drain. Furthermore, any connection with that drain would be via third party land, thereby requiring the permission of that

- third party. The granting of such permission could not be guaranteed. I have therefore afforded little weight to this alternative proposed option.
10. The only remaining option would be for the proposed use of cesspools, which policy SD4 states will only be considered in exceptional circumstances and where it can be demonstrated that sufficient precautionary measures will ensure no adverse effect upon natural drainage water quality objectives.
 11. The proposed cesspools would comprise watertight tanks, suitable for siting in well drained or wet ground conditions, designed and installed to prevent leakages and damage to their structure. They would also have to comply with separate Building Regulations. There would be an element of human reliance on the cesspools being emptied promptly and in the correct manner so as to prevent spillage, and being maintained and managed appropriately. However, measures to ensure this could be secured through a condition requiring compliance with an approved drainage construction and management plan. Such a plan could also include the requirement for the implementation and maintenance of an alarm system to alert the residents of the property concerned when the cesspools are reaching capacity. This would also be notwithstanding any separate legal obligations, outside of planning controls, to which prospective house owners would need to adhere.
 12. The Council has conducted its own AA since the quashed appeal decision referred to in the above header, in which it concluded that the proposed development would not result in adverse effects on the integrity of the SAC. However, I have also had regard to Natural England's (NE) comments on that AA in which it is highlighted that the Council was unable to confirm where the foul waste would be treated. More specifically, NE notes that the Council was not able to confirm that foul drainage from the proposal would not be transferred to treatment works discharging to the River Wye catchment to enable the potential impact to be assessed.
 13. As highlighted by NE, targets have been set to maintain or restore the designated species and habitats within the SAC to Favourable Conservation Status. The River Wye Nutrient Management Plan (NMP) is a project developed to enable the desired economic growth in Herefordshire, whilst achieving reduced phosphate levels in the River Wye catchment, including the River Lugg, to below the target level by 2027. The NMP has therefore been a means of mitigation for new development within the River Wye catchment even when that development may add to the existing phosphate levels in the river.
 14. However, the NE goes on to highlight that below Hope under Dinmore, the River Lugg is part of the SAC and that at the present time that section of the SAC is failing its conservation objectives for phosphate. The NE goes on to comment that where a site, in this case the River Lugg, is failing its water quality objectives or its ecological objectives, due to water quality, and is therefore classed as in unfavourable condition, following clarification in the judgement on the Dutch Nitrogen cases¹, the possibility of approving additional damaging effects is necessarily limited. Therefore, careful consideration still needs to be given to the circumstances where new development can be consented where a site, in this case the River Lugg, is in an unfavourable condition. In this respect the RLCAPS highlights that the NMP approach regarding development with potential phosphate impacts in the River Lugg

¹ The Cooperatie Mobilisation case (Joined Cases C-293/17 and C-294/17) (the Dutch Nitrogen cases)

catchment is currently under review and I have not received any evidence to the contrary.

15. Without adequate control as to where the tankers used for collecting the foul waste from the proposed cesspools are emptied, this could lead to unacceptable additions of phosphate pollution to the SAC, particularly in respect of the River Lugg. Whilst it may be the case that any particular waste treatment works is fully licensed and operating within its permit, reliance on the NMP in respect of the River Lugg, due to the degree of uncertainty as to whether it can provide appropriate mitigation, is not necessarily appropriate in light of the judgement referred to above.
16. Therefore, in order to be certain that the integrity of the SAC would not be harmed, it would be necessary to ensure that foul waste from the proposed development is collected by an appropriately licensed tanker company and taken to a treatment works where discharge would not be into the River Lugg. In this respect the Appellants have submitted a section 106 planning obligation within a Unilateral Undertaking (UU).
17. The UU's Covenants to the Council from the Owner include provision for any changes to the waste carrier, treatment plant or details relating to the waste disposal outfall be submitted to the Council's Planning Obligations Manager prior to any such changes taking effect. However, there is no provision for the Council's approval of those changes. There is also a covenant in the UU concerning a system that would be agreed whereby the waste carrier would provide prospective property owners with a waste transfer receipt each time a cesspool is emptied. Those receipts would be passed on to the Council. However, there is insufficient evidence before me to indicate that the Council would have the certainty of having received receipts for all such events. These factors therefore provide some uncertainty as to the robustness of the UU in terms of ensuring that foul waste is not disposed of inappropriately in respect of protecting the integrity of the SAC.
18. Furthermore, the Council has raised concerns with the UU in terms of uncertainty over the ownership of the land concerned. The Appellants state that there is sole ownership by H. Beavan, the person named in the UU, who is one of the two original applicants as referred to in the second bullet point of the above header. However, the second applicant, G. West, also named in the above header, is also referred to as a trustee on both the application and appeal forms. That introduces an element of uncertainty over sole ownership in itself, albeit that the Appellants have stated that G. West is not a trustee and does not have a legal interest in the land concerned.
19. There is also reference in the submissions to a tenancy on the land at the time the original planning application was made and that there was a tenancy between April and October 2019 that has come to an end leaving the land vacant. However, particularly in light of the notice served on the tenant at the time of the original application, no formal documentary evidence has been provided in respect of the expiry of any tenancy on the land. Additionally, the Appellants refer to the executors of N. Beavan, the former second owner alongside H. Beavan, having become legal owners following N. Beavan's passing, albeit stated as now having passed away themselves. Whilst the Appellants have provided evidence of N. Beavan having passed away, no

similar evidence has been submitted for N. Beavan's executors. Neither have the Appellants provided a certificate of title for the land.

20. In light of the complexities and uncertainty referred to above surrounding the ownership of the land and the lack of clear documentary evidence of sole ownership by H.Beavan, some doubt is cast over the enforceability of the UU. Such circumstances provide further uncertainty as to the robustness of the UU for the purposes of protecting the integrity of the SAC.
21. Clause 2.3 of the completed UU also includes an error with reference to non-existent clauses 8 and 9; and in 2.3(b) introduces some uncertainty as to the enforceability of those planning obligations which would need to be fulfilled prior to the commencement of development, as it refers to all provisions, other than the non-existent clauses 8 and 9, taking effect when the development has commenced. A second UU, seeking to address those factors, has not been dated and so remains incomplete and in any case, in clause 2.3, erroneously refers to a non-existent schedule 2 and so lacks robustness.
22. The Appellants state that the obligations set out in the UU could alternatively be secured by planning conditions instead of through the UU. However, as I have found above, were the wording of those obligations to be re-produced as conditions, there would be some doubt cast over their robustness in respect of protecting the SAC. Furthermore, the use of conditions alongside a completed UU would cause inappropriate duplication. Any re-wording within any such conditions, to address the above concerns about robustness of the wording of the obligations, would cause inconsistency with the completed UU. For these reasons, I have not taken account of the suggested use of conditions as an alternative to the UU.
23. For the above reasons, without adequate control in place for the disposal of foul waste through the UU, I am unable to be certain that the proposed development would not have a significant effect on the SAC. Therefore, I conclude on this issue and AA that the proposed development would adversely affect the integrity of the SAC. As such, it would be contrary to policies SS6 and SD4 of the Core Strategy which together, amongst other things, require that development proposals should conserve and enhance those environmental assets that contribute towards the county's distinctiveness, especially those with specific environmental designations; should not undermine the achievement of water quality targets for rivers within the county, in particular through the treatment of wastewater; and that where there would be a likely significant effect upon a SAC river, it should be ascertained that the proposed development would have no adverse effect on the integrity of the SAC. It would also be contrary to the Habitats Regulations.
24. Because of my conclusion on this issue, under paragraph 177 of the National Planning Policy Framework (the Framework) the presumption in favour of sustainable development does not apply. I will consider this issue further in the planning balance.

Living conditions and amenities

25. The movement of tanker vehicles used for collecting the foul waste from the proposed cesspools would add to the number of large vehicles travelling along the local roads. It has been submitted, since the Council's decision, that the number of such movements would be greater than indicated at the original

- planning application stage. This would be likely to cause some increase in noise and disturbance due to engine noise on the roads. However, it is unlikely that such movements would be so frequent or be of such a duration as to cause a significant increase in noise and disturbance over and above that which is likely to be caused by existing traffic, including farm vehicles.
26. Tanker engine and pumping noise and general activity relating to the emptying of the cesspools would also be likely to cause some noise and disturbance to neighbouring residents or as experienced in the lane running past the site. There would also be likely to be some degree of odour release during such a process. As highlighted by the Council, there would be a maximum total of approximately 68 tanker visits each year for the combined development. This in itself would therefore leave many days without any foul waste collection activity. Due to the varying degrees of separation between the proposed cesspools and the neighbouring properties, the extent of noise and disturbance and odour experienced at any one of those properties would also be variable, depending upon which cesspool is being emptied. Each event would also be for a relatively short period of time.
27. Whilst the proposed cesspools would be vented and therefore likely to emit odours to some degree, they would be set well away from neighbouring dwellings. Furthermore, the construction and maintenance of the cesspools in accordance with a drainage and management plan could be secured by condition in order to protect the living conditions of those neighbouring residents in this respect.
28. I have also received no substantive technical evidence to indicate that the additional vehicle movements and cesspool emptying process would cause a harmful level of noise and disturbance or odours. Furthermore, no objections have been received on these grounds from the Council's Environmental Health section.
29. For the above reasons, I conclude on this issue that the proposed development would not cause unacceptable harm to the living conditions and amenities of local residents, in particular relating to noise and disturbance from vehicular movements and general activity associated with the process of collecting the foul waste from the proposed cesspools, and odours associated with emptying, servicing and maintaining those cesspools. As such, in respect of this issue, it would accord with policies SS6 and SD1 of the Core Strategy which together, amongst other things, require development proposals to take account of local amenity, air quality and tranquillity; and to safeguard residential amenity and not contribute to adverse impacts arising from noise or air contamination.

Highway network

30. As referred to above, the proposed use of cesspools for storing foul waste would result in a maximum of approximately 68 tanker visits to the site each year to collect the waste. This would equate to an average of less than two visits each week. I have received no substantive evidence to indicate that such an increase in vehicle movements, both in the vicinity of the site and on the wider road network, would be to an extent as to be likely to cause a significant increase in traffic movements in the context of current levels, including in relation to existing dwellings and farms locally.

31. The proposed development would also provide space within the site for the tankers to park and manoeuvre without having to block the highway. Furthermore, the proposed site access would also act as a passing bay to aid the free flow of traffic along the adjacent lane. The size of the tanker vehicles, so as to minimise manoeuvring problems and the likelihood of blocking surrounding roads, could also be controlled as part of a condition relating to the implementation of a drainage management plan.
32. For the above reasons, the additional vehicle movements associated with the proposed development, particularly relating to the foul waste tankers, would also be unlikely to significantly increase journey times on local roads, to detrimentally impact upon the efficient and safe operation of the highway network, or cause significant additional damage to local roads.
33. The highway authority (the HA) has also raised no objections to the proposed development and does not consider that the highway impact would be severe. That would be subject to ensuring the implementation of necessary site layout and access requirements to facilitate safe provision for tanker and prospective residents' vehicles and to ensure appropriate measures to maintain highway safety during the construction process, which could be secured by appropriate conditions. Although the HA's comments were made on the basis of a lower number of anticipated tanker visits at the time the original planning application was determined, I have not received any further comments from the HA to indicate that the increased number would alter its position.
34. For the above reasons, I conclude on this issue that the proposed development would not unacceptably impact upon the highway network, in particular relating to the vehicular movements associated with the process of collecting the foul waste from the proposed cesspools. As such, in respect of this issue, it would accord with policy SS4 of the Core Strategy which, amongst other things, states that new developments should be designed and located to minimise the impacts on the transport network; ensuring that journey times and the efficient and safe operation of the network are not detrimentally impacted.

Planning balance

35. Under the Habitats Regulations, subject to considerations of overriding public interest, the competent authority may agree to the proposed development only after having ascertained that it will not adversely affect the integrity of the European site (the SAC in this case). I have not been able to ascertain that to be the case as I cannot be certain that the proposed development would not adversely affect the integrity of the SAC. Given the high bar set under the Habitats Regulations for the protection of SACs, I have therefore afforded very substantial weight to my conclusions on this matter. My conclusions in respect of the second and third main issues concerning living conditions and amenities and the highway network do not deflect from or influence my findings on that first main issue.
36. The proposed development would have the benefit of adding to the local housing supply, particularly as the Council has confirmed that it cannot demonstrate a five year supply of deliverable housing sites (5 year HLS), stating this to stand at 4.55 years albeit that the Appellants highlight a drop to 4.05 years in the latest 2019 figures. In light of my conclusions on the first main issue, and with regard to paragraph 11(d)(i) of the Framework, the tilted balance as set out in paragraph 11(d)(ii) of the Framework is not triggered.

Nevertheless, I have had regard to the Framework where it highlights in paragraph 59 that to support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay. I also note the submissions relating to Orcop Hill being a settlement identified in the Core Strategy for proportionate housing development. The proposed development would also have likely economic benefits in terms of providing construction jobs.

37. However, the above benefits, even with a HLS of 4.05 years, would be small, relating to only three additional dwellings, and insufficient to outweigh my conclusions above relating to the effect of the proposed development on the integrity of the SAC, to which I have afforded very substantial weight, and I am aware of no other benefits that would do so.

Conclusion

38. For the above reasons, and having taken account of all other matters raised, I conclude that the appeal should be dismissed.

Andrew Dawe

INSPECTOR