
Appeal Decision

by Helen O'Connor LLB MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 May 2020

Appeal Ref: APP/C1760/W/19/3243263

Dandys Ford Fishery, Dandys Ford Lane, Sherfield English SO51 6DT

- 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 Metcalfe against the decision of Test Valley Borough Council.
 - The application Ref 18/02363/FULLS, dated 3 September 2018, was refused by notice dated 5 July 2019.
 - The development proposed is the change of use of part of a tearoom and storage building to a rural worker's dwelling.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr and Mrs Metcalfe against Test Valley Borough Council. This application is the subject of a separate Decision.

Procedural Matters

3. In response to travel restrictions currently in place due to the COVID-19 pandemic I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the information already available. Both the appellants and the Council have agreed to the appeal proceeding on this basis.

Main Issues

4. The main issues are:
 - Whether the site is suitably located for new housing development, having particular regard to local and national planning policies for rural workers, and;
 - The effect of the proposal on the Solent and Southampton Water Special Protection Area and the New Forest Special Protection Area.

Reasons

5. Policy COM2 of the Test Valley Borough Revised Local Plan Development Plan Document 2011-2029, January 2016 (LP) sets out a settlement hierarchy for the borough. It seeks to direct development to within the boundaries of settlements identified in the hierarchy. Outside of those settlements

- development is restricted to specified exceptions, including where it is essential for the development to be located in the countryside.
6. Policy COM10 of the LP applies specifically to occupational accommodation for rural workers. It permits residential development at or near where they work subject to stated criteria. In relation to businesses that have been established for over three years the criteria include, amongst other matters, that there is an essential functional need for the dwelling based on evidence of that business (criterion bi). In addition, there must be financial evidence to demonstrate that the business is viable and established (criterion bii).
 7. These development plan policies broadly align with paragraph 79 of the National Planning Policy Framework (the Framework) which stipulates that planning decisions should avoid the development of isolated homes in the countryside. However, one of the express exceptions is sub-paragraph 79a, where there is an essential need for a rural worker to live permanently at or near their place of work.
 8. Dandys Ford Fishery covers an area of approximately 6.27 hectares near to the village of Sherfield English and is outside of any of the settlement boundaries identified in the LP and is therefore, in the countryside. It has been registered as a fishery since 2003¹ and has been operational in excess of three years. It comprises of three manmade lakes that provide coarse fishing for individuals, events for angling clubs and corporate groups including matches and night fishing. A service building on the site presently accommodates a tearoom and WC facilities for anglers. The appeal proposal relates to part of this building where it is proposed to use approximately half of it as a 3 bedroom dwelling with the remainder retained as a tearoom, storage and customer toilets. It is proposed that the appellants, who own and manage the fishery day to day, would reside in the dwelling.
 9. A dwelling at this location would be an isolated home in the countryside, and neither party suggests otherwise. Essentially, the parties disagree as to whether the proposal would fall within the permitted exception for rural workers in the development plan. Namely it is disputed whether there is evidence to show (1) an essential functional need for the dwelling arising from the business and to some extent, (2) whether the business is viable.
 10. Planning Practice Guidance² indicates that in considering paragraph 79a of the Framework it may be relevant to consider the necessity for a rural worker to live at, or in close proximity to, their place of work to ensure the effective operation of an agricultural, forestry or similar land-based rural enterprise. It refers to examples where farm animals or agricultural processes require on-site attention 24-hours a day and where otherwise there would be a risk to human or animal health or from crime, or to deal quickly with emergencies that could cause serious loss of crops or products.
 11. It is the appellants' view that there is an essential need for a dwelling arising from fish welfare and breeding, security and the safety of anglers. In relation to the first of these matters, the evidence³ indicates that a key issue for the fishery is that it has suffered from five incidents of significant fish losses

¹ Paragraph 2.1 Appellants' Statement of Case

² Paragraph 010 Reference ID 67-010-20190722

³ Appendices 1-3 to Supporting Additional Information & paragraph 21 Reading Agricultural Consultants Report dated 5 April 2019

between 2009-2018 and these appear to occur periodically often around February or March. The resultant loss of fish is clearly detrimental to the welfare of those animals. Furthermore, it has an adverse impact on the financial health of the business as the lake affected must be closed to fishing for several weeks and restocked and there are long term impacts if breeding stock are affected. Such incidents may also cause some reputational damage.

12. Nevertheless, notwithstanding the investigation of each significant mortality incident, there remains uncertainty as to the cause of the fish loss, or even if the underlying cause is consistent as different lakes and species have been affected to differing degrees over time. In that context, some of the advice by the experts involved recommend the regular monitoring of environmental conditions and water quality⁴. This is reinforced by the letter dated 23 April 2019 from Mr S Leonard who advises that poor water quality can be difficult to spot and can change rapidly. Accordingly, constant monitoring and vigilance is required to enable a quick response to stabilise water chemistry.
13. However, both national and local policies refer to an essential need being demonstrated in order for the exception for rural workers dwellings to apply, which is a purposefully high threshold. Based on the information before me, I have concerns that the evidence does not sufficiently make a remedial link between the undeniable problems encountered with fish losses and the appellants living permanently at the site. Given the number of losses sustained over several years and the nature of the expert advice given, it seems likely that the appellants have been diligently monitoring the water quality at the site. In fact, it is suggested that this in part, results in the appellants working long hours⁵. Nevertheless, it appears losses have still occurred⁶ and incidents have increased.
14. It is not fully explained how living permanently at the site, although more convenient, would result in greater vigilance on the part of the appellants. Although reference is made to the appellants' developing a management protocol⁷ it is unclear why this would necessitate permanently living at the site, especially given that it would be based on an approach used in other years that appears to have been successful in combatting mortalities. Therefore, it is not shown how the management practices at the fishery would change as a result of living on site nor why the presence of a dwelling at this location would be instrumental in achieving this.
15. My concerns are reinforced by the conclusions of Reading Agricultural Consultants⁸ who point to a lack of evidence that an on-site presence for the business is now required when this had not previously been the case. Furthermore, in light of the uncertain causation, it follows that it cannot be shown that living on site would have prevented the losses that have occurred.
16. The appellants further refer to the poaching of valuable specimen fish, and crime is one of the factors that the PPG suggests may be relevant. However, whilst I accept that this is a risk for the business, there is limited evidence provided in terms of the number of incidents of poaching and the resultant

⁴ Including Environment Agency, Initial Mortality Reports dated 5.4.16 & 7.3.18, Appendices 2 & 3 to Supporting Additional Information

⁵ Paragraph 4.18 Appellant' Statement of Case

⁶ Paragraph 3.6 Supporting Additional Information, dated 8.12.19

⁷ Letters from S Leonard dated 23.4.19

⁸ Paragraph 45, Reading Agricultural Consultants Letter dated 5.4.19 and subsequent email dated 15.5.19

- financial cost to the appellants. Notwithstanding that there has been an incident involving the CCTV system, the evidence does not show that it is generally unequal to providing an appropriate level of security, nor the only method available. As such, the increased security arising from the presence of a dwelling at the site is of limited weight.
17. It is highlighted that the business increasingly facilitates events that include night fishing and that appropriate measures to address health and safety concerns are required. However, it is stated that the appellants have health and safety measures in place⁹ and therefore, the absence of a dwelling on site has not prevented the fishery from holding such events to date. I accept the presence of a worker living at the site may be desirable in these circumstances. Nevertheless, this falls short of being essential in order to respond appropriately to human emergencies or health risks.
 18. The Council also raises some doubts that the fishery business is financially viable. However, the accounting information presented shows that the business has maintained a profit since at least 2014. Furthermore, a comprehensive explanation covering the impact from the fish mortalities, changes in the operation of the tearooms and investment in angler accommodation for the seeming fall in profits is given¹⁰. Overall, I am satisfied that the evidence indicates that the business is viable and established as required by policy COM10 of the LP.
 19. The appellants highlight that versions of the advice provided by the Council's consultant Reading Agricultural Consultants was changed a number of times during the consideration of the planning application. Nevertheless, I have given most weight to the final version of the advice provided dated 5 April 2019 and the follow up email 15 May 2019 as they, in combination, were given in response to the entirety of the information provided by the appellants.
 20. My attention is drawn to the planning permission granted by the Council for a managers' dwellings at Whinwhistle Coarse Fishery, Whinwhistle Road, East Wellow¹¹. The appellants indicate that the business is comparable in nature to Dandys Ford Fishery and in finding an essential need in that case, the Council gave weight to the issues of fish welfare and security. On that basis, there is some common ground between the developments. However, I have only been provided with a decision notice¹² and have not seen all the supporting detailed information for the Whinwhistle Coarse Fishery application. Moreover, I accept that fish welfare and security are relevant to the consideration of essential need, but the respective weight that each factor attracts depends upon the specific circumstances of the case and evidence provided. Therefore, the limited amount of information inhibits a comparison between the cases and hence, this matter attracts only limited weight. In any event, I have considered the proposal on its own merits.
 21. Drawing these factors together, although I accept that the business is viable and established, I am not assured that there is an essential functional need for the dwelling that would justify a worker living permanently at the site. In reaching this view I have considered paragraph 83 of the Framework which

⁹ Paragraph 6.6, Business Appraisal in support of rural workers' dwelling prepared by Assetsphere

¹⁰ Letter dated 11.12.19 from Tax and Strategy Limited

¹¹ Reference 16/01559/FULLS dated 30.11.16

¹² Appendix 3, Appellants' Statement of Case

broadly looks to support the sustainable growth and expansion of all types of businesses in rural areas. Nevertheless, I have given greater weight to paragraph 79a of the Framework as it applies more precisely to the circumstances of the proposal.

22. The appellants have provided evidence regarding the availability of houses in the locality either for sale or rent. However, as I have found that an essential need has not been demonstrated I have not considered the availability of alternatives further. Accordingly, I find that as the proposal fails to show an essential need for a rural workers' dwelling, it would result in an unjustified isolated dwelling in the countryside contrary to policies COM2 and COM10 of the LP and paragraph 79 of the Framework.

Habitat Sites

23. The site is within the Solent Region which is one of the most important for wildlife in the United Kingdom. This includes the Solent and Southampton Water Special Protection Area (Solent SPA) which is internationally important for its wildlife and is also a habitat recognised under the Conservation of Habitats and Species Regulations 2017 (the Regulations). There are high levels of nitrogen and phosphorus input into this water environment with evidence that these nutrients are causing eutrophication resulting in dense mats of green algae that can impact on the Solent SPA's protected habitat and bird species.
24. Recent caselaw¹³ requires the decision maker, when considering the effect that a proposal may have on such a European Site, to consider mitigation within an appropriate assessment rather than at screening stage.
25. In the absence of mitigation measures and using a precautionary approach, additional domestic waste water generated by the development is likely to exacerbate harm from eutrophication to the water quality of the Solent SPA. I am required to consider the effect of the proposal both individually and in combination with other projects. As such, notwithstanding the modest scale of the proposal, there is a risk of a significant effect on the internationally important interest features of the protected habitat referred to and I have not seen evidence to demonstrate otherwise.
26. Recent advice from Natural England¹⁴ suggests that given the uncertainty as to the impact of new growth, a precautionary approach would be for development to achieve nutrient neutrality to ensure that it does not add to existing nutrient burdens. It sets out a methodology as to how this might be calculated, which in light of their expertise attracts considerable weight. Broadly speaking, if the calculation shows a nitrogen surplus (a positive figure), then mitigation is required to achieve nitrogen neutrality. If the calculation identifies a deficit (a negative figure), no mitigation is required¹⁵. The document further suggests mitigation options.
27. Notwithstanding that the appellant considers that their calculation¹⁶ demonstrates that the proposal does not present a harm to nitrate pollution, it has a positive final figure, and no mitigation measures have been proposed. It

¹³ People over Wind and Sweetman v Coillte Teoranta ECLI:EU:C:2018:244

¹⁴ Advice on achieving nutrient neutrality for new development in the Solent region, Version 4, March 2020

¹⁵ Paragraph 5.1

¹⁶ Appendix 2, Appellants' Statement of Case

is not fully explained how, in light of this, it meets with the Natural England advice. As such, I am not adequately assured that this would prevent the likely harm to the water quality of the Solent SPA.

28. In addition, the appeal site is located within 13.6km of the New Forest Special Protection Area (NF SPA), a habitat recognised under the Regulations as being of international importance for rare and vulnerable species of birds.
29. In the absence of mitigation measures and using a precautionary approach, given the proximity to the NF SPA it is reasonable to suppose that future residents of the development would potentially visit the site for recreational purposes and dog-walking. Intensification of such activities would be likely to cause disturbance to the birds and their habitat.
30. The Council have an interim mitigation strategy in relation to the NF SPA which sets out the strategic approach to mitigating the adverse effects of new housing development through avoidance measures including the provision of alternative recreational space. The mitigation measures are funded by contributions from new development, with the proportionate rates set out in the strategy. The Council indicate that in this case this equates to £1,300, and that this has been provided by the appellants together with a completed Habitats Mitigation Contribution Agreement¹⁷. Nevertheless, I do not have a copy of the agreement before me and have limited information to demonstrate that the mitigation to prevent such harm from occurring is appropriate and secured. Therefore, based on the information provided, it is not shown that there would be adequate mitigation for the likely harm to the NF SPA.
31. However, I have not returned to the main parties in order to request further information and assurance regarding the mitigation measures, nor sought the views of the statutory nature conservation body as part of an appropriate assessment, as given that I have other substantive concerns regarding the appeal proposal, this would not change the outcome of my decision overall.
32. 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 little before me that would rule out alternative solutions being available. In any event, the provision of an 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.
33. Therefore, I find that the proposed development would result in harm to designated European sites and fails to secure appropriate mitigation. It would therefore, conflict with policy E5 of the LP, which amongst other matters, seeks to prevent development that is likely to result in a significant effect, either alone or in combination, on an international or European nature conservation designation. 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.

¹⁷ Paragraph 8.37 Council's Officer Report

34. Had I been minded to allow this appeal, it may have been necessary to seek a screening direction from the Secretary of State in accordance with Regulation 14(2) of The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 in order to determine whether the appeal related to an "EIA application" as defined in those regulations.

Planning Balance and Conclusion

35. I accept that the ability to live on site would be beneficial to the appellants and may provide economic benefits by the more effective operation of the business. I also note that there was no objection from Sherfield English Parish Council to the proposal. However, given the relatively modest scale of the proposal, the extent of such benefits would be limited in nature.
36. Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise¹⁸. The benefits that the proposal would bring do not outweigh the significant weight given to the conflict with the development plan policies outlined. Accordingly, they do not justify my determining the development other than in accordance with the adopted development plan and Framework.
37. Therefore, for the reasons given above, I conclude that the appeal should be dismissed.

Helen O'Connor

Inspector

¹⁸ Section 38(6) Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.