



Appeal Decision

Site visit made on 3 May 2021

by Helen Heward BSc (Hons) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 11 June 2021

Appeal Ref: APP/F0114/W/21/3267412

Lyncombe Court, Lyncombe Vale Road, Bath, BA2 4LR

- 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 & Mrs C & D Rogers against the decision of Bath & North East Somerset Council.
 - The application Ref 20/04312/FUL, dated 12 November 2020, was refused by notice dated 7 January 2021.
 - The development proposed is described as "*erection of 1no. 3 bed dwelling*".
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Decision

1. The appeal is dismissed.

Main Issue

2. The Council refused the application for a number of reasons. Of these, I consider that the main issue is the effect of the proposal upon the integrity of the Bath and Bradford-on-Avon Bats Special Area of Conservation.

Procedural Matters

3. The application was accompanied by a Preliminary Ecological Appraisal Report, by Peak Ecology, February 2020. The Appellant's Full Statement of Case appends a Preliminary Ecological Appraisal Hillside House at Lyncombe Court, Bath, dated 7 January 2021 (the Ecology Report).
4. In considering whether or not I should take account of this update I am mindful of the need to ensure that the interests of the various parties are not prejudiced. Although not considered by the Council at the application stage, the updated report was provided with the initial appeal documents and the Council had an opportunity to respond and to send a full statement of case. Interested parties also had an opportunity to respond to the evidence.
5. For these reasons, I have taken it into consideration and as I have concluded that the appeal should be dismissed, I am satisfied that no interested party would be prejudiced.

Reasons

6. The Conservation of Habitats and Species Regulations 2017 transpose the Habitats Directive and the Birds Directive into English law. The aim is to conserve key habitats and species by creating and maintaining a network of sites (European sites) known as the Natura 2000 network. Site designation and provision of advice is the responsibility of the appropriate statutory nature conservation body; Natural England (NE).

7. The citation for the Special Area of Conservation for Bath and Bradford-on-Avon Bats, designated 1 April 2005, SAC EU code: UK0012584 (the SAC) describes it as comprising extensive networks of caves, mines and man-made tunnels which are used by bats for hibernation, mating and as a staging post prior to dispersal. It also includes areas of calcareous grassland, scrub and woodland which are used as feeding and commuting habitat by the bats. The qualifying features include S1303 Lesser horseshoe bat *Rhinolophus hipposideros*, S1304 Greater horseshoe bat *Rhinolophus ferrumequinum* and S1323 Bechstein's bat *Myotis bechsteinii*. Supplementary advice produced by NE¹ on the qualifying features explains:-

"The lesser horseshoe bat is one of the smallest bats in the UK, found exclusively in Wales, the West Midlands and South West England. In winter they hibernate in caves, mines, and other cave-like places, ideally selecting places where the temperature remains stable during the prolonged hibernation period. During the summer they form maternity colonies in old buildings and emerge to hunt in nearby woodland. The species prefers to hunt in sheltered valleys with extensive deciduous woods or dense scrub, along woodland edges, and field margins, and over wetland, riparian habitats, and pasture. Where habitat is fragmented, linear features such as hedgerows, tree lines and stone walls are important corridors between roosts and foraging areas. Summer and winter roosts are usually less than 5-10 km apart. The bats are vulnerable to the loss or disturbance of both summer and winter roost sites and the removal of linear habitat corridors. This complex of sites, straddling the boundary between Bath and North East Somerset and Wiltshire, supports a significant number of hibernating lesser horseshoe bats, totalling up to approximately 2% of the UK population. The bats also hibernate in lower numbers in many other disused mines in the area and rely on the surrounding extensive woodland and grazed pastures with good quality hedgerows for their flight lines and feeding grounds.

The greater horseshoe bat is one of the largest bats in the UK, found in Wales and South West England. In winter they depend on caves, abandoned mines and other underground sites for undisturbed hibernation. A system or series of sites is required, offering a range of temperatures and air-flow patterns. During the summer, the bats form maternity colonies, generally in large old buildings, and forage in pasture, edges of mixed deciduous woodland and hedgerows. Such mixed land-use, especially on south-facing slopes, favours the beetles, moths, and other insects on which the bats feed. Summer and winter roosts are usually less than 20-30 km apart. The bats are vulnerable to the loss of insect food supplies due to insecticide use, changing farming practices and the loss of broad-leaved tree-cover, and to the loss or disturbance of underground roost sites. This complex of hibernation sites, juxtaposed between Bath and North East Somerset and Wiltshire in the central part of its range, supports up to 15% of the UK population. The SAC contains at least one maternity roost for these bats, but only the hibernating population is a qualifying feature of the SAC. A principal maternity roost is located at Fiord Manor SSSI, several kilometres to the south of the site. The bats also hibernate in many of the other disused mines in the area that lie outside of the SAC and rely on the surrounding extensive

¹European Site Conservation Objectives: Supplementary advice on conserving and restoring site features Bath and Bradford-on-Avon Bats Special Area of Conservation (SAC) Site Code: UK0012584, March 2019

woodland and grazed pastures with good quality hedgerows for their flight lines and feeding grounds.

Bechstein's bat is one of the UK's rarest bats, found in central southern England and the southern Welsh borders. Its ecology is relatively poorly known. Caves and abandoned mines may be used for hibernation, though it is possible that the bats also remain in woodland roosts during the winter. Maternity roosts are typically in woodpecker nest holes, generally in old growth, ancient semi-natural, deciduous woodlands of at least 25 ha and ideally above 50 ha in size. This might equally well be composed of a network of well-connected smaller woodlands. Woods tend to have a closed canopy and a dense, "cluttered" understorey, ideal for foraging. They are particularly sensitive to intensive woodland management and woodland removal, and artificial light, seeking out dark corridors along which to commute....."

8. NE's stated conservation objectives for this SAC are to ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the favourable conservation status of its qualifying features, by maintaining or restoring the extent and distribution of the habitats of qualifying species; the structure and function of the habitats of qualifying species, the supporting processes on which the habitats of qualifying species rely; the populations of qualifying species, and the distribution of qualifying species within the site.
9. NE's supplementary advice includes a table of targets. This includes, amongst other things to (1) maintain the abundance of the populations above their baseline population-size, whilst avoiding deterioration from current levels; (2) maintain the presence, structure and quality of any linear landscape features which function as flight lines. Flight lines should remain unlit, functioning as dark corridors. Flight lines will extend beyond the designated site boundary into the wider local landscape and are also important for the commute between summer and winter roost sites and (3) maintain any core areas of feeding habitat outside of the SAC boundary that are critical to the bat features during their hibernation period. Feeding areas used by SAC bats may be outside of the SAC boundary but be critical to successful hibernation. Bechstein's bats don't tend to range far from their roosts, generally up to a maximum distance of 1-2.5km, usually closer to 1km. Within the winter a mean foraging radius of 1.2 km around hibernation sites is reported. Lesser Horseshoes commute and forage along linear features over wet grassland and woodland.
10. Advice on Gov.uk² explains that there is a duty to protect, conserve and restore European sites and that competent authorities must take action to help protect, conserve, and restore the protected habitats and species of European sites. This includes a duty to consider how to help to prevent significant disturbance of the site's designated species from human activity or natural changes. The competent authority is usually the body which is responsible for granting consent to carry out an activity such as development or plan making. In this appeal I am the competent authority.
11. If a plan or project might impact on the qualifying features the competent authority must carry out a habitats regulations assessment (HRA). HRA can be required for a proposal with the potential to impact a feeding area used by one of the site's designated species some distance away from the SAC.

² <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>

12. The Appellant's Ecology Report does not specify the extent of the Zone of Influence for potential impacts on Bats but acknowledges that the site is within 2Km of the SAC and the Council advise that the closest component unit of the SAC is 1.18km to the south; a hibernation site designated due to use by Lesser Horseshoe, Greater Horseshoe, and small numbers of Bechstein's bats.
13. The Council report that the woodland corridor along Lyncombe Vale Road is known to be used by Horseshoe bats, the Ecology Report notes several records of European protected species mitigation licences within 1Km of the site including Lesser and Greater Horseshoe bats and 6 records relevant to the site or proposals of Lesser and Greater Horseshoe bats, within less than 1.8Km of the site between 2012 and 2018.
14. The opinion of the Council's Ecology Officer dated 11 December 2020, was that the appeal site is suitable foraging and commuting habitat for Horseshoe and Bechstein's bats. The Appellant's Ecology Report agrees that the woodland habitat on site provides opportunities for foraging bats and linear connectivity between the site and other suitable foraging habitats close to the site. It concludes that the habitats on site are considered to have high suitability for foraging and commuting bats, given the well-connected nature of the site with surrounding woodland, the presence of other suitable habitat in the vicinity, and the presence of known roosts close to site. The mature trees and scrub on site were considered to provide suitable foraging resources, likely supporting an abundance of invertebrate prey.
15. The Ecology Report informs that a Phase 1 Habitat Survey was undertaken on 14 January 2020, during which the broad habitat types were identified, mapped, and assessed for their ecological importance. The potential of the site to support roosting bats and other protected species was also assessed, with both a Ground Level Tree Assessment of all trees and an Aerial Roost Assessment of trees identified with potential roost features. Section 1.1 advises that the report is intended to provide details regarding the ecological value of the site, highlight any constraints to the proposals and recommend further surveys, if required. It states that is not designed to be suitable to support a planning application as a standalone document.
16. Paragraph 2.7.2 Survey methods further qualifies that *"The scoping assessment for protected species highlights habitats and features suitable for protected species and notes any incidental sightings or field signs discovered; however, it should not be interpreted as providing a comprehensive presence/likely absence survey for individual species. Whilst a surveyor may be able to confirm presence of a bat roost, where evidence such as droppings or feeding remains are found in accessible areas, it is not always possible to rule out presence of bats based on a PBRA alone. It should be noted that if there were no records or observations of certain protected or rare species, this does not preclude their presence on site. There is always a risk of species being overlooked, either owing to the timing of the survey or the scarcity of the species occupying the site."*
17. Save for an old shed, a compost area, and the remnants of a historic path the steep sided site is largely undeveloped. On my site visit I observed that it appeared largely undisturbed and saw little evidence of lighting.
18. The proposed dwelling would sit roughly in the middle of this hillside which forms part of a linear woodland and green space. There would be vehicular and pedestrian access from the south and the building form would follow the

alignment of a historic woodland path with the dwelling stretching out over the route from east to west. The design concept is also one of creating the living space within the canopy of the trees above. Constructed on raised platforms several metres above the sloping woodland floor, it would afford two raised floors of external and internal spaces. Amongst other things, there would be lighting to new external walkways along the alignment of the historic route. The dwelling would have large glazed openings to most elevations, and windows on the north elevation towards the top, and most secluded part of the site. Some of the large glazed openings would afford purpose designed framed views into the woodland area. There would be a retractable glazed roof to a sun terrace and a number of rooflights.

19. Section 7 of the Design Statement Revision A explains that the *"The lift doors open and the reveal of the tree canopy greets you. The southern daylight fills the courtyard and the views of the tree canopy above immediately contrasts with the heavy ground entry sequence. Looking left and right the plan of the home is instantly legible as the social spaces wrap the courtyard with views east and west into the woodland. The courtyard that is created by sliding the rooms around the circulation axis becomes the focus for the plan. In the summer months the east-west facades can open up to allow a cross flow of air to naturally ventilate the spaces and fully connect the home with nature and the landscape setting."*
20. The authors of the Ecology Report advise that careful consideration should be given to the design of any additional pre or post construction lighting that may be installed, as this may disrupt the foraging and commuting habits of bats. The Report advises that proposed lighting schemes should avoid direct lighting of any retained mature trees or vegetation and any proposed linear vegetation features; where possible install lamps of the shortest permissible column height and at the lowest permissible density; use low intensity bulbs (sodium lamps) to minimise light intensity and impacts to bats; lamps should be fitted with spill accessories avoiding upward spill and spill onto site boundaries; and use timers, dimmers and activity sensors to avoid lighting areas of the site at night.
21. The application proposes that a sensitive considered lighting scheme in accordance with guidance set out in Bats and Artificial Lighting in the UK (BCT, 2018) could be developed with the ecologist and lighting designer as a condition of a planning approval. The drawings also indicate some mitigation measures such as vertical screening fins and automated black out blinds on a building management system to close buried rooflights that penetrate the woodland floor to prevent electrical light spill to the woodland floor. But I find that there is a significant tension between the design of the dwelling and the need to avoid human disturbance to foraging and commuting habits of the qualifying features.
22. I am mindful that NE's supplementary advice includes that Bechstein's bats are particularly sensitive to artificial light. There is very little evidence to demonstrate the likely internal and external light spill of the proposed development and scant evidence that the detailed design of the proposals has been assessed to any extent by a suitably qualified Ecologist.
23. The authors of the Ecology Report state that it is their understanding that the proposed development will be designed to ensure minimal loss of vegetation and that the foraging value of the woodland and the potential for the woodland edge to act as a commuting route would be retained post-development.

Engineering concept drawings within 'Design Statement Revision A' indicate a contiguous piled wall installed with ground anchors to support ground excavation and for slope stability, reinforced concrete walls around the four-storey lift and some isolated piles for support to superstructure works. In this document some of these works appear to be just under either the canopy or within root protection areas of some retained trees.

24. The slope is steep, and the drawings are not entirely clear. It is proposed that a construction management plan would be completed at a later date which would set out the strategy for woodland preservation in coordination with the Structural Engineer, the Arboriculture Consultant and the chosen contractor with details to be resolved at a later date, after permission has been granted.
25. However, Section 2.2 of the Arboricultural Impact Assessment notes that the development would not be a standard construction and it is to be carried out on a steep slope. It cautions that it is likely that *"construction may be something of a one of a kind. This means that to some extent those involved will be learning as they go. It is also possible that when contractors become involved they may discover practical constraints that have not yet been foreseen at this theoretical stage and which will require further arboricultural input. Section 4 concludes that "the overall impact of works will be mixed. There will be the loss of a few trees that were of good quality, though not of great age or size or of significant importance to the visual amenity of the woodland."*
26. Whilst the Arboriculturist opines that the works would allow new planting at all layers, lighten up the lower stories of the wood and create a greater range of habitat in the woodland, there is little to say what the effects will be upon the SAC qualifying features. 20 trees would be felled, and work required to others. The mature trees and scrub on site considered to provide suitable foraging resources, likely supporting an abundance of invertebrate prey would be somewhat denuded. What would remain of the linear woodland on the site would be fragmented into pockets of trees on the hillside. NE's supplementary advice includes that Bechstein's bats are particularly sensitive to intensive woodland management and woodland removal and that Lesser Horseshoe bats are vulnerable to the removal of linear habitat corridors
27. Pedestrian access through the woodland floor and the introduction of living accommodation within the tree canopy and all the normal residential activity that occupation of a dwelling house entails would result in a new level and type of human activity and disturbance.
28. There is little evidence about the effects of placing cantilevered buildings above the woodland floor and habitable rooms within the tree canopy layer upon the use of this site and the woodland corridor by the qualifying features of the SAC. There is also insufficient detailed evidence about retained/replacement dark foraging habitat and flight lines, and the effects of the proposals upon the value of the site as part of a linear foraging and commuting corridor for the qualifying features.
29. For the reasons given above, I conclude that the proposal has the potential to impact a feeding and commuting area used by qualifying features of the SAC's. A pathway for effect on the designated features and conservation objectives of the SAC exists. Advice on gov.uk³ is that a significant effect should be considered likely if it cannot be excluded on the basis of objective information

³ <https://www.gov.uk/guidance/appropriate-assessment>

- and it might undermine a site's conservation objectives. A risk or a possibility of such an effect is enough to warrant an appropriate assessment (AA).
30. I am not satisfied that sufficient robust evidence has been submitted, including complete, precise, and definitive findings and conclusions to ensure that there is no reasonable scientific doubt as to the effects of the proposed project. It is the responsibility of the applicant to provide the information reasonably required to undertake AA. I have considered if I should require the information, however in view of the work which would be required, and in the interests of natural justice and fairness to all parties, it is not appropriate at this stage.
 31. The Appellant submitted that matters could be dealt with at a later stage. For the purposes of HRA, it would only be within my gift as the competent authority to approve a plan subject to such conditions if I was certain that the conditions would be strict enough to guarantee that those parameters would not adversely affect the integrity of the site. I am not satisfied that I have sufficient robust evidence to so conclude.
 32. I am unable to determine that the proposal will not significantly adversely affect the conservation objectives and integrity of the SAC, including mitigation and other characteristics of the proposed development intended to avoid or reduce effects. There is no evidence about an alternative solution that would have a lesser effect.
 33. The site forms part of the grounds of Lyncombe Court a grade II listed building constructed around 1825 after years as "the Cottage" set within King James Pleasure gardens. Cartographic and historic evidence reveal that there was a historic walkway route through the wooded hillside. The access, steps and route remain in varying states of repair. The Appellant advises that the proposal offers an opportunity for management of the woodland, path restoration and that the proposal would reinstate some of the joys of the historic pleasure garden. However, the woodland would be private garden and the path encompassed as a private access to and through/under the dwelling. In this way the proposals would amount to a private rather than a public benefit and do not mount to an imperative reason of overriding public interest to justify the grant of permission despite a potentially negative effect on the integrity of the SAC.
 34. Adopting the precautionary principle, I conclude that the risk of a significant effect on the conservation objectives and integrity of the SAC, either alone or in combination with other plans and projects, cannot be ruled out beyond reasonable doubt.
 35. The proposal is contrary to requirements of Bath and North East Somerset Placemaking Plan, District Wide Strategy and Policies, 2017, Policy NE3 that development that would adversely affect, directly or indirectly, Internationally Important Sites will not be permitted except in exceptional circumstances where: (a) there is no alternative solution; and, (b) there are imperative reasons of overriding public interest for the development; (c) mitigation measures can be secured to prevent any significant adverse effect on the site, and that any harm to the nature conservation value of the site would be minimised. The proposal fails to satisfy the requirement of Policy NE5 that development proposals demonstrate what contribution will be made to ecological networks as shown on the Policies Map through habitat creation, protection, enhancement, restoration and/or management. The proposal has also failed to satisfactorily demonstrate a requirement of Policy NE6 (a) that

development seeks to avoid any adverse impact on trees and woodlands of wildlife, landscape, historic, amenity, productive or cultural value.

Other Matters

36. The Appellant's reside at Lyncombe Court. They wish to downsize and build a home better suited to their retirement needs and enabling them to stay within the immediate area. They submit that the dwelling will be a high-quality sustainable design and the accessibility of the location is not disputed. At the application stage a number of letters were submitted in support of the proposal, others were submitted against.
37. The Council's decision notice included other reasons for refusal including potential adverse effects to badgers, dormice and amphibians, harm to the Bath Conservation Area, the Bath World heritage Site and the setting of the Lyncombe Court, a Grade II listed building; the effects of a proposed balcony on the proposed East elevation upon loss of privacy and over-looking for Grove House; whether or not the proposed dwelling would have sufficient outdoor amenity space, and concerns regarding surface water and flood risk. None of these other matters would be determinative.

Conclusion

38. Even if I were to agree with the Appellant's submissions on all of the other matters, this would not outweigh the very considerable weight I attach to my conclusion that the scheme has failed to demonstrate beyond reasonable doubt that the proposal will not significantly adversely affect the conservation objectives and integrity of the SAC.
39. Advice in the Framework at paragraph 174 a) is that when determining planning applications, if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused. Framework paragraph 11d)i) explains that the presumption in favour of development does not apply where the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed.
40. Therefore and having taken all other matters raised into consideration, including those raised by third parties, the appeal is dismissed for the reasons given.

Helen Heward

PLANNING INSPECTOR