



Appeal Decision

Site visit made on 13 February 2024

by E Grierson BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 March 2024

Appeal Ref: APP/A2280/W/23/3325107

Land off Lodge Hill Lane, Chattenden

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Mr Andrew Wilford (Esquire Developments) against the decision of Medway Council.
 - The application Ref MC/20/2980, dated 18 November 2020, was refused by notice dated 4 January 2023.
 - The development proposed is the erection of 8 to 12 self-build dwellings with all matters reserved except for access. Provision of open spaces, landscape buffers, drainage features and earthworks. Enhancement and widening of existing access track from Lodge Hill Lane and formation of 2No. new cross-over accesses from Lodge Hill Lane to serve 2No. dwellings.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. A revised National Planning Policy Framework (the Framework) was published on 19 December 2023 and updated on 20 December 2023, which I have had regard to as a material consideration in my decision making. In this instance, the issues most relevant to the appeal remain unaffected by the revisions to the Framework. I am therefore satisfied that there is no requirement to seek further submissions on the revised Framework, and that no party would be disadvantaged by such a course of action.
3. There is also an appeal¹ against the refusal to grant planning permission for the demolition of the existing structures and the erection of 9 dwellings on the adjoining site, Storage Yard, Land to the North of 2 Farm Cottages, Lodge Hill Lane, Chattenden, Rochester. Whilst the main issues and much of the evidence submitted are similar, as they are separate developments on separate sites, I have dealt with both of these appeals individually and come to my conclusions based on the evidence submitted for each.

Main Issue

4. The main issue is the effect of the proposed development on Chattenden Woods and Lodge Hill Site of Special Scientific Interest (SSSI) with regard to increased recreational activity and the effect on nightingale birds from cat predation.

¹ Ref APP/A2280/W/23/3325108

Reasons

5. The appeal site is an undeveloped plot of land currently occupied by grassland and surrounded by trees, shrubs and hedging. It is surrounded by several dwellings and unused farm buildings and is directly adjacent to the Chattenden Woods and Lodge Hill SSSI. The SSSI is nationally important for its ancient and semi-natural woodland, unimproved neutral grassland and the nationally important population of nightingale birds that the site supports. Which, I am informed, is the single most important site in England for nightingales, a red-listed species due to substantial decline in their national population over the past 50 years.
6. Policy BNE35 of the Medway Local Plan 2003 (the LP) states that development that would materially harm, directly or indirectly, the scientific or wildlife interest of these sites will not be permitted. It also states that development for which there is an overriding need will exceptionally be permitted if no reasonable alternative site is (or is likely to be) available. Policy BNE37 of the LP also seeks to prevent development that would cause a loss of important wildlife habitats or features.
7. These are generally consistent with the approach of Paragraph 186(a) of the Framework which seeks to refuse planning permission for development where significant harm to biodiversity cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated or, as a last resort, compensated for, and Paragraph 186(b) that states that development on land within or outside of a SSSI which is likely to have an adverse effect on it (either individually or in combination with other developments) should not normally be permitted. With the only exception where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest. Paragraph 180 of the Framework also seeks to ensure that planning decisions protect and enhance sites of biodiversity in a manner commensurate with their statutory status.
8. The Chattenden Woods and Lodge Hill SSSI is partly designated in order to safeguard the nightingale population and the habitat upon which they are reliant. The presence of the appropriate habitat and a current lack of disturbance provide suitable conditions for nightingales. However, due to challenges in relation to access, the appellant has not carried out an up to date survey of nightingale numbers and habitats, instead relying on data from a national survey undertaken in 2012 by the British Trust for Ornithology (the 2012 data). Therefore, although no evidence has been provided to outline the current extent of the nightingale population in the SSSI, from the 2012 data and the suitable conditions identified, it can be reasonably assumed that the nightingale population in this location is significant and in close proximity to the appeal site.
9. Birds can be disturbed by the urbanising impacts of residential development including recreational pressures and predation from domestic pets. Whilst not a precise correlation, the potential for adverse effects increases with the number of dwellings nearby. Therefore, whilst the appellant has identified over 1,000 existing dwellings within 400 metres of the SSSI, additional dwellings would still have the potential to increase adverse effects upon it.

10. Whilst there is no direct access from the appeal site into the SSSI, there are two public rights of way in close proximity, which future occupiers of the proposed development could use to access parts of it for recreational activities. Although it is likely that they would stick to designated routes, the additional footfall and the associated noise and activity this would generate would still result in some disturbance to the habitats for which the site is designated for. Due to the scale of the proposed development, the numbers of additional people accessing the SSSI would not be substantial. Nevertheless, although limited, the proposal would still result in additional recreational pressures, resulting in disturbance that would have an adverse impact on the habitats within the SSSI and the species which inhabit it. I understand that this is particularly relevant for the nightingale population due to their sensitivities to disturbance and ground nesting tendencies.
11. From information submitted by the appellant based on figures relating to cat ownership, the development proposed on the appeal site and the neighbouring site in combination would result in the introduction of around 7 domestic cats. Although this number is not significant, due to the predatory nature of cats and their ability to roam, the proposed development and the likely increase in the number of domestic cats in the area would still have an adverse impact on the population of nightingales within the SSSI. To reduce the impact of the proposed development on the notifying features of the SSSI, the appellant has put forward a number of mitigation measures.
12. These mitigation measures include a no cat policy for the occupiers of the proposed dwellings via a restrictive covenant inserted into the title deeds of each property and enforced by an independent management company. The appellant has stated that they will enter into a legal agreement with the Council to secure this, however this has not been provided as part of the appeal. However, even if regular inspections are carried out by the management company, it would be difficult to identify the owners of any cats discovered and enforce any suspected breach of the covenant, thereby making it ineffective. The appellant has also proposed cat proof fencing between the appeal site and the boundary with the SSSI, with additional planting to provide a robust, thorny boundary. However, limited details have been provided regarding its design and maintenance, and it is likely that cats could traverse around such a boundary. As such, these mitigation measures would not fully prevent cat ownership on the appeal site or entirely mitigate the subsequent impact upon the nightingale population from an increased number of predatory cats.
13. The appellant has also put forward the addition of a green buffer to separate the proposed dwellings from the boundary with the SSSI and create a dark corridor. However, this has a limited width and the proposed development would still be in close proximity to this boundary. The provision of information packs to the occupiers of the proposed dwellings has also been suggested. This would help educate residents on the features of the SSSI, but would only provide advisory measures, which are not enforceable and would be unlikely to last the lifetime of the development. Therefore, these measures would not significantly reduce the urbanising impacts from the proposed development.
14. An independent assessment carried out by the Council indicates that the appellant has undertaken reasonable steps to mitigate the impact of the proposed development and that no additional measures are considered practicable or appropriate for residential developments of this scale and in this

location on the land within the appellant's control. However, whilst some of the proposed mitigation measures would help to somewhat reduce the urbanising impacts of the proposed development on the SSSI, such as disturbance from recreational activities, and minimise cat predation, it would not fully mitigate these issues.

15. The proposed development of up to 12 dwellings is not significant in scale with a limited number of additional residents to the area. However, the proximity of the appeal site to the boundary of the SSSI and, without more recent survey data to suggest otherwise, the proximity to a substantial and nationally important number of nightingale territories, would result in significant harm to the wildlife and habitats within the SSSI from the recreational pressures and cat predation as identified above. In accordance with Policy BNE35 of the LP and Paragraph 186(b) of the Framework, development that would materially harm and have an adverse effect on the SSSI should not normally be permitted. Furthermore, in accordance with Paragraph 186(a) of the Framework, as it has not been demonstrated that the significant harm to biodiversity identified cannot be avoided, adequately mitigated or compensated for, planning permission should be refused.

Planning Balance

16. The proposed development would contribute between 8 and 12 dwellings to the housing supply in the area at a time when the Council have a significant shortfall in housing land supply and are failing to meet their housing delivery requirements. Therefore, the test in paragraph 11(d) of the Framework should be applied. However, while the framework advocates granting planning permission where there are no relevant development plan policies, this is unless, in accordance with paragraph 11(d)(i), the application of policies in this Framework that protect areas or assets of particular importance provide a clear reason for refusing the development. The harm to the SSSI identified is such that the policies in the Framework relating to the SSSI provide that clear reason for refusing the development. As a result, the presumption in favour of sustainable development does not apply and does not weigh in favour of the proposal.
17. The appellant has outlined that the site is being delivered by a small to medium enterprise (SME), which they indicate is recognised and supported by the Government for housing delivery in terms of their ability to bring forward development quickly and offer a range of products to diversify the market. For this reason, the development will be delivered quickly and add a choice of housing to the market. They have also stated that they will employ other local businesses and local people as a result of the proposed development, the proposed development would have a high quality design, will have a beneficial impact to landscape features on the site and will improve the localised private track off Lodge Hill Lane. However, due to the scale of the proposed development, these benefits would be given limited weight.
18. The proposed development would provide plots for self-build and custom housebuilding. Paragraph 70(b) of the Framework supports small sites to come forward for self-build and custom-build housing. The Housing and Planning Act 2016 provides that authorities must give suitable development permission in respect of enough serviced plots of land to meet the demand for self-build and custom housebuilding in the authority's area arising in each base period. The

appellant has contended that there is a substantial level of unmet need in Medway and that the Council have failed to meet their statutory duty, with the Self-Build Register Returns (31 March 2023) showing a significant deficit of 105 plots between 2015 and 2022 and no adopted or emerging strategy to address this shortfall. Therefore, 8 to 12 plots for self-build and custom housebuilding is a material consideration in favour of granting permission and would make a significant contribution to addressing the current shortfall in provision.

19. Whilst the provision of self-build and custom housebuilding plots is given significant weight in this case, as I have found that the proposed development would significantly harm the SSSI, the benefits of the development in the location proposed would not clearly outweigh its likely impact on the features of the site that make it of special scientific interest. It would therefore not fall under the only exception within Paragraph 186(b) of the Framework. Furthermore, no other reasonable alternative sites have been considered and, whilst beneficial, for the reasons outlined above, the provision of self-built plots do not constitute an overriding need required by Policy BNE35 of the LP for which development will be exceptionally permitted.
20. Therefore, as the proposed development would result in significant harm to the Chattenden Woods and Lodge Hill SSSI, and the wildlife and habitats within it, which could not be avoided, adequately mitigated or compensated for and where the benefits would not clearly outweigh its likely impact on the features of the site, the proposed development would conflict with Policies BNE35 and BNE37 of the LP and Paragraphs 180 and 186 of the Framework.

Other Matters

21. It is noted that similar mitigation methods were supported for the development of 50 retirement homes that were granted planning permission at appeal² and 68 dwellings that were granted planning permission³ by the Council, both within the nearby village of Cliffe Woods. However, these developments would be situated a greater distance from suitable habitats for nightingales than the proposed development, with the 2012 data showing less nightingale territories in the Cliffe Wood area when compared to those surrounding the appeal site. Therefore, these developments are not directly comparable to the appeal proposal before me.
22. The Council has stated that the appeal site is located within 5km of the Medway Estuary and Marshes Special Protection Area (SPA) and Ramsar site and 2km of the Thames Estuary and Marshes SPA and Ramsar site. Therefore, the proposed development is likely to have an effect on the North Kent SPAs/Ramsar sites from recreational disturbance on the over-wintering bird interest. The Conservation of Habitats and Species Regulations 2017 (as amended) requires the decision maker to undertake an Appropriate Assessment (AA) where there are likely significant effects from the proposal, either alone or in combination with other plans or projects. However, regulation 63(1) indicates the requirement for an AA is only necessary where the competent authority is minded to give consent for the proposal. Therefore, in view of my overall conclusions resulting in my decision to dismiss the appeal, it has not been necessary to address this in any further detail.

² Ref APP/A2280/W/18/3202264

³ Ref MC/21/1694

Conclusion

23. Therefore, for the reasons given above and having had regard to all other matters raised, the proposal would conflict with the development plan taken as a whole and I conclude that the appeal should be dismissed.

E Grierson

INSPECTOR