



Appeal Decision

Site visit made on 7 March 2024

by M Aqbal BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 April 2024

Appeal Ref: APP/W1850/W/23/3323323

Land to the south of Rose Cottage, Munderfield, Bromyard HR7 4JL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant approval to details required by a condition of a planning permission.
 - The appeal is made by Mr Andrew Crompton, Munderfield (Bromyard) Limited against the decision of Herefordshire Council.
 - The application Ref P223197/RM sought approval of details pursuant to conditions 1, 3 and 4 of planning permission Ref 191886, granted on 11 November 2019.
 - The application was refused by notice dated 6 December 2022.
 - The development proposed is application for approval of reserved matters following outline approval 191886 (Removal of Condition 7 of P183456/O (Outline planning application for the erection of up to 3 no. dwellings and associated works with all matters reserved).).
 - The details for which approval is sought are: Access, appearance, landscaping, layout and scale.
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Decision

1. The appeal is dismissed.

Background and Main Issue

2. The appeal site lies within the hydrological catchment of 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 amended ('Habitats Regulations') as being of international importance for its aquatic flora and fauna. At present the levels of phosphates in the River Lugg exceed the water quality objectives and it is therefore in an unfavourable condition.
3. Where a site, in this case the River Wye SAC, is considered to be 'failing' its conservation objectives, the competent authority is required to consider all potential effects (either alone or in combination with other development) of the proposal upon the European site through the Habitat Regulations Assessment process ('HRA process').
4. In determining the application, the Local Planning Authority ('LPA') found the proposal to be acceptable with regard to the reserved matters. However, the LPA concluded that as a consequence of the proposal for three new dwellings, the generation of additional foul water and associated phosphates without any viable foul drainage solution would adversely impact the integrity of the River Wye SAC. As a result, and in the absence of sufficient details, confidence and the ability to demonstrate a viable foul drainage solution that provides 'nutrient

neutrality,' the LPA was unable to undertake a positive Appropriate Assessment ('AA'), as required by the Habitats Regulations.

5. The appellant is of the view that there is no power under the Habitat Regulations for an LPA to require an AA at the reserved matters stage.
6. Accordingly, the main issue is whether the reserved matters application should be subject to a HRA under the Habitats Regulations, and, if so, whether there would be any adverse effect on the integrity of the River Wye SAC.

Reasons

7. The appellant's principal reason for the appeal is predicated on advice provided in the form of a legal opinion to the Home Builder's Federation ('HBF'). This advice was provided in June 2022 and concludes that there is no power under the Habitat Regulations for an LPA to require an AA at the reserved matters application or discharge of conditions stage.
8. Subsequently, in July 2022, a Written Ministerial Statement ('WMS') was issued by the Secretary of State for Department for Environment, Food and Rural Affairs. Whilst acknowledging the ongoing difficulties in the ability of LPAs and developers to find mitigation quickly and effectively to allow development to take place, the WMS confirmed that the HRA provisions apply to any consent, permission, or other authorisation, this may include post-permission approvals; reserved matters or discharges of conditions. The WMS supersedes the HBFs legal opinion.
9. Furthermore, I have been referred to the *CG Fry & Sons Ltd v SSLuHC* judgement. In summary, the challenge arose following a planning inspector's decision that conditions on a reserved matters could not be discharged without an AA of the whole of the development phase in question. The claimant, with the support of the HBF, advanced three grounds of challenge to the inspector's decision: (1) whether a HRA must be undertaken at condition discharge stage if it has not been done before; (2) how that applies in the case of Ramsar Sites (which are not subject to the Habitats Regulations directly, but are treated in the same way by the Framework); and (3) whether the scope of any assessment is limited to matters which are affected by the particular conditions being discharged.
10. All three grounds of challenge were dismissed at High Court. Most notably, and irrespective of the circumstances appertaining to the various caselaw considered, the judgment is clear that the Habitats Directive and Habitats Regulations mandate that an AA be undertaken before a project is consented. That is irrespective of whatever stage the process has reached according to UK planning law, and that the application of the Habitats Directive and a purposive approach to the interpretation of the Habitats Regulations 2017 require the application of the assessment provisions to the discharge of conditions. The strict precautionary approach required would be undermined if they were limited to the initial - the permission - stage of a multi-stage process.
11. Although the above judgement could be the subject of a challenge, pending the outcome of any such challenge, I afford this significant weight to the determination of this appeal.
12. In determining previous planning applications relating to the appeal site, the LPA appear not to have applied the Habitats Regulations. The LPA has not

provided any clear reasons for this. Whilst I understand the appellant's frustrations in this regard, this is a matter for the main parties. Irrespective of this, and in light of the aforementioned WMS and judgement, the Habitats Regulations require the application of the HRA to the reserved matters application.

13. Finally, the appellant has suggested that it is open to the competent authority (in this case me) to consider whether mitigation can offset the impacts of the development when carrying out an AA. To this end, the appellant advises that there are a range of Council-led and private schemes being promoted which might deliver the requisite mitigation for the phosphate impacts of the proposed development.
14. Accordingly, and based on the approach taken in another area, the appellant has proposed a Grampian condition to delay occupation of the development until implementation of any necessary mitigation or offsetting has been secured.
15. Irrespective of the above, Paragraph: 025 Reference ID: 21a-025-20140306 says that: The only conditions which can be imposed when the reserved matters are approved are conditions which directly relate to those reserved matters. Conditions relating to anything other than the matters to be reserved can only be imposed when outline planning permission is granted. A condition relating to phosphate mitigation would not relate to any of the reserved matters before me. As such, I am unable to support the suggested Grampian condition.
16. Drawing on the above reasons, the proposal for the approval of reserved matters forms part of a multi-stage consent. This triggers the requirement under the Habitat Regulations for a HRA to be undertaken, including 'screening' and, as applicable an AA.
17. As the competent authority I am required to consider all potential effects (either alone or in combination with other development) of the proposal upon the designated site through the HRA process. The HRA process must be based on a demonstration of legal and scientific and be undertaken with a 'precautionary' approach.
18. The proposal in this case would allow for the construction of three new dwellings. These dwellings would generate additional foul water including phosphates. The proposal does not provide a viable drainage solution that demonstrates that there would not be no adverse impact on the integrity of the River Wye SAC. For the reason already stated, I cannot support the appellant's suggested Grampian condition.
19. As a result, and in the absence of sufficient details to demonstrate a viable foul drainage solution that provides 'nutrient neutrality,' I am unable to undertake a positive AA, under the Habitat Regulations. I am therefore unable to conclude that the development would not add to the unfavourable phosphate levels within the River Lugg sub-catchment. I, therefore, find that the development would result in harm to the River Wye SAC via the discharge of phosphates into the River Lugg.
20. As such, the proposal conflicts with Policies LD2 and SD4 of the Herefordshire Local Plan-Core Strategy. Together, these Policies do not permit development

that would harm environmental assets including sites of European importance or undermine water quality objectives.

Conclusion

21. For the above reasons, I conclude that this appeal should be dismissed.

M Aqbal

INSPECTOR