



Appeal Decision

Site visit made on 18 September 2024

by C Billings BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 December 2024

Appeal Ref: APP/W1850/W/24/3342292

Homelands, C1059 from Bradleys Corner to C1061, Hampton Charles, Herefordshire WR15 8PZ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for planning permission
 - The appeal is made by Mr Stuart Yarnold against Herefordshire Council.
 - The application ref is 223512.
 - The development proposed is demolition of barn and erection of a new 3 bed dwelling.
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Decision

1. The appeal is dismissed and planning permission for the demolition of barn and erection of a new 3 bed dwelling is refused.

Applications for Costs

2. An application for costs has been made by Mr Stuart Yarnold against the Council. This is subject to a separate decision.

Preliminary Matters

3. Prior approval was granted in March 2022, under the provisions of Article 3(1) and Schedule 2, Part 3, Class Q, paragraph Q.2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO)(as amended) for the proposed change of use of an agricultural building to form one smaller dwellinghouse (Class C3) and for building operations reasonably necessary for the conversion of the building at The Homelands, appeal ref. APP/W1850/W/21/3280896. This includes the barn which the current appeal dwelling is proposed to replace. I have considered this extant Class Q permission in reaching my decision.

Background and Main Issue

4. While the Council had not determined the planning application prior to the submission of the appeal, it has subsequently set out in its statement of case that had it had opportunity to determine the application, it would have approved it, subject to no objection being raised by Natural England in respect of the Habitats Regulations Assessment (HRA). The HRA was required in regard to the likely effect of the proposed development on the River Wye Special Area of Conservation (SAC).
5. The Council completed an Appropriate Assessment as the Competent Authority under the Conservation of Species and Habitats Regulation 2017 (as amended) (the Habitats Regulations), concluding that in its opinion there would be no

adverse effects on the integrity of the SAC, subject to appropriate mitigation being secured. Subsequent to this, Natural England has confirmed¹ that they have no objection to the appeal proposal, and that, provided the appropriate nutrient neutrality mitigation measures are secured as part of the planning permission there would be no adverse effects on the integrity of the SAC.

6. In view of the above, the main issue in this appeal is whether or not appropriate mechanisms would be in place to protect the integrity of the River Wye SAC.

Reasons

7. The appeal site is within the hydrological catchment area for the River Lugg SAC which is part of the River Wye SAC. The SAC is identified under the Habitats Regulations as being of international importance for its aquatic flora and fauna. The present levels of phosphates in the River Lugg exceed the water quality objectives and so, is in an unfavourable condition. In such circumstances, due to the failing conservation objectives of the European designated site, there is limited scope to approve development which may have additional damaging effects on it.
8. On the basis of the likely effects on the integrity of the SAC, it is necessary to undertake an Appropriate Assessment (AA) under Regulation 63 of the Habitats Regulations. Based on the evidence before me, including the Surface and Foul Water Drainage Strategy prepared by Corner Water Consulting (November 2023), and the subsequent advice provided by Natural England, I am satisfied that the AA undertaken by the Council is suitably robust. The AA demonstrates that the proposed dwelling would likely cause significant effects on the integrity of the SAC, due to the additional foul and surface water discharge leading to increased phosphate entering into the River Lugg catchment area.
9. As there are no public or private sewers in the vicinity of the site, a detailed drainage strategy is proposed. This includes a dedicated septic tank to the south of the barn and a soakaway for surface water. Also, it includes a drainage field with orchard beyond on the land adjacent to the appeal site, that would comprise planting of Braeburn apple and Walnut trees downslope, to absorb the nutrients entering the drainage field.
10. Having regard to the proposed drainage strategy and the mitigation contained therein, Natural England have confirmed they are happy with the AA undertaken and raise no objection to the proposal, subject to the proposed nutrient neutrality measures being secured. Therefore, based on the evidence before me, including Natural England's advice, I am satisfied that the adverse effects of the development on the European Site can be adequately mitigated.
11. To ensure the required mitigation measures are carried out they need to be appropriately secured as part of the permission. The Council and appellant have suggested that a negatively worded condition, which requires the completion of a S106 planning obligation prior to the commencement of development to secure the required mitigation measures would be appropriate in such regard.
12. While the proposed mitigation measures, including the drainage field and orchard would be on land outside the application site, this land is shown to be

¹ Natural England correspondence dated 31 July 2024

within the control of the appellant (land outlined in blue) on the application plans at the time the planning application was submitted to the Council. Also, a draft Unilateral Undertaking (UU) under section 106 of the Town and Country Planning Act has been provided by the appellant.

13. However, I have not been provided with evidence of the title deed of the blue land, to show this land can be used for the necessary long term drainage mitigation measures proposed therein. Also, the draft UU does not set out details in its heads of terms or schedules the proposed mitigation measures that would be carried out to protect the integrity of the European Site, or for how long this would be maintained. Rather, the draft UU only includes that the development shall commence within 12 months of the grant of planning permission and the landowner notifies the Council of such commencement within 7 days.
14. On this basis, I do not have assurance that a suitable UU can be completed, so the required and appropriate mitigation measures will be implemented and maintained thereafter for the lifetime of the development, or any other such timescale that may be appropriate, in order to protect the integrity of the European Site.
15. The Planning Practice Guidance (PPG) advises that a negatively worded condition limiting development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Ensuring that any planning obligation is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed.
16. Comments were sought from the main parties in regard to exceptional circumstances. The appellant sets out that there is no clear evidence that the delivery of the development would otherwise be at serious risk in relation to the appeal proposal without such negatively worded condition. Also, that the appeal has been submitted because the Council failed to determine the planning application would not amount to exceptional circumstances. Having regard to such, and the merits of the case, including the importance of protecting the integrity of the European Site and lack of evidence of title deed in respect of the land where the required mitigation works is to take place, there are no exceptional circumstances to support a negatively worded condition requiring a planning obligation in this instance.
17. Due to the lack of clear evidence in respect of enforceability of the proposed negatively worded condition, there is no assurance that the delivery of the development would otherwise be at serious risk without a planning obligation in place. Therefore, the proposed condition would not meet the relevant tests for conditions, as set out in the PPG and the National Planning Policy Framework (the Framework).
18. While I acknowledge that the Council did not provide comments on the draft planning obligation, a UU only needs to be entered into unilaterally by the appellant/landowner, without the local planning authority. Therefore, this could have been completed by the appellant/landowner in any case.
19. In view of the above, due to the lack of certainty to secure appropriate and necessary mitigation measures, appropriate mechanisms would not be in place to protect the integrity of the River Wye SAC. Therefore, the requirements of

Regulation 63 of the Habitat Regulations would not be met and the proposal would conflict with paragraphs 185-188 of the Framework.

20. For such reasons, the proposal would also conflict with Policy SD4 of the Herefordshire Local Plan Core Strategy (October 2015) (HLP), which amongst other matters, sets out that where development might lead to nutrient levels exceeding limits for the target conservation objectives within a SAC river, planning permission will only be granted where it can be demonstrated that there will be no adverse effects on the integrity of the SAC in view of the site's conservation objectives.
21. Additionally, the proposal would conflict with Policies SS6 and LD2 of the HLP, which respectively require development proposals to conserve and enhance environmental assets, including biodiversity and geodiversity assets of Herefordshire, with Policy LD2 setting out, amongst other matters, that development which would likely harm sites and species of European importance will not be permitted. For the same reasons, the proposal would conflict with Policy SD3 of the HLP, which requires development to help conserve and enhance watercourse and riverside habitats, where necessary through managed and mitigation measures.

Other Matters

22. The appellant asserts that there is a fallback position in respect of the Class Q prior approval granted for the conversion of the existing barn to 1 dwelling. While the drainage and phosphate discharge may not be that different between the appeal proposal and the Class Q approved dwelling, there is a different part of the Habitat Regulations applicable in respect of when the integrity of a European protected site is to be considered. However, it is still necessary to ensure that there has been compliance with the Habitats Regulations before such 'permitted development' permitted under a prior approval may proceed. The grant of prior approval in itself is not confirmation that the requirements of the Habitat Regulations have been met, rather, both are required to be satisfied irrelevant of the order in which they are sought and subsequently granted.
23. Under Article 3(1) of the GPDO, there is a condition that prohibits commencement of any 'permitted development' that would affect a European Site until such time that the local planning authority provides written notification of approval of a Regulation 77 application. Therefore, while prior approval can and has been granted for the conversion of the barn to a dwelling on appeal in March 2022, there is also a requirement to comply with the applicable condition of the GPDO in respect of a European Site before the development can be implemented.
24. I acknowledge the appellant's assertion that the Council has not engaged nor provided approval and/or confirmation that Regulations 75 or 77 to the Habitat Regulations. However, I have not been provided with any substantive evidence to demonstrate that the appellant has sought such Regulation 77 approval for the Class Q permission, nor that it has been granted. Therefore, without such approval, there is no realistic fallback position in place in respect of the implementation of the barn conversion scheme and so, I give limited weight to this. Such limited weight, would not outweigh the conflict I have found above.

Conclusion

25. For the reasons given above, the proposal conflicts with the development plan and the material considerations do not indicate that the appeal should be decided other than in accordance with it.
26. Accordingly, the appeal should be dismissed and planning permission is refused.

C Billings

INSPECTOR