

From: Wager, Alastair
Sent: Wednesday, 29 January 2020 03:39 PM
To: 'John SMITH' <jesmith12@tiscali.co.uk>
Subject: 184086 & 184250 - Newcourt Lugwardine

Dear Mr Smith,

My apologies for the delay in writing to you regarding the above applications, as I appreciate you have been in contact with my colleague Heather Carlisle, however I remain the sole case officer for the applications. The reason for the delay with the application is because the River Lugg, as a sub catchment of the River Wye Special Area of Conservation is currently failing its conservation objectives in regard to phosphates and so the Council is unable to grant consent to any project that would have an adverse likely significant effect on this European site. The proposal as part of these applications is for the conversion of the outbuilding into a residential dwelling, this would include additional overnight accommodation which has a risk of an adverse likely significant effect on the SAC from the additional phosphates being discharged.

An explanation of the situation is included below for clarity:

Habitats Regulations:

The application site lies within the catchment for the River Lugg, which comprises part of the River Wye Special Area of Conservation (SAC), a European site covered under the Habitats Directive & the Conservation of Habitats and Species Regulations 2017 ('Habitats Regs.' henceforth). The River Wye SAC is an internationally important conservation site which has been designated for its special features of ecological and biodiversity value. The Core Strategy requires under policy SD4 that development should not undermine the achievement of water quality targets for rivers within the county, in particular with the treatment of wastewater. Further the Core Strategy at policy LD2 sets out that development proposals should conserve, restore and enhance biodiversity; explicitly development that is likely to harm sites and species of European importance will not be permitted. This is reflected in the framework at paragraph 177, in that the presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a SAC, unless an appropriate assessment has concluded the proposal will not adversely affect the integrity of the habitats site. Further paragraph 11 d) i. (when read with footnote 6) of the framework includes adverse effects to habitat sites as clear reason for refusing development proposals, with there being no need to undertake the pre-weighted test of d) ii (i.e. any harm significantly and demonstrably outweighing the benefits of the proposal).

HRA Process

Under the Habitats Directive (which is transposed into UK legislation in the Habitat Regs.), Herefordshire Council (as the 'competent authority') has a statutory duty to assess if a proposal is likely to have "a significant effect" whether in combination or alone, this must take place before granting planning permission (or any consent, permission, other authorisation, including any variation or modification to the consent or permission (i.e. section 73 applications, discharge of conditions & non-material amendments), Regulation 61, Habitat Regs.). This initial assessment is known as the 'screening stage' which considers if there is a possibility of a 'likely significant effect' on the integrity of the SAC, this considers both the effect of the proposal and

the in-combination effect; this is considered to be a notably low threshold which acts as a trigger, (thus ruling out only cases where there is no doubt or no real risk of significant effects). At the screening stage the proposal must be considered without regard to any mitigation, any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether the plan or project is likely to have an adverse effect on a European Site, these may only be considered as part of an appropriate assessment. Any proposal that has the mere possibility of a 'likely significant effect' (LSE) on the integrity of the SAC triggers an 'Appropriate Assessment' of the proposal.

Once an 'Appropriate Assessment' (AA) has been triggered by the screening stage, the competent authority may only grant consent if it can be demonstrated 'beyond reasonable scientific doubt' using the 'best scientific knowledge in the field' that the proposal will not adversely affect the integrity of the SAC, this assessment should utilise 'best scientific knowledge in the field' as well as considering mitigation and in-combination effects.

The AA must consider the implications on the European site in view of the site's conservation objectives; in cases where there is considered to be an effect on a site but it will not undermine the conservation objectives, the proposal cannot be considered to have a LSE on the European site; as the procedures are designed to maintain designated habitats and species 'at a favourable conservation status'. However if the European site's conservation status is not considered to be favourable, then the proposal must 'maintain' / 'restore' the condition and not worsen it, (as clarified by Ouseley J at para 26 in *Royal Society for the Protection of Birds and Lydd Airport Action Group v Secretary of State* [2014] Env. L.R. 30) thus after mitigation any effect is considered to impact the integrity of the site and the assessment can not demonstrate there are no LSE on the SAC.

The AA is considered to be a pre-weighted test, with the onus being on the proposal to demonstrate no LSE; thus if doubt remains when using the 'best scientific knowledge in the field' as to the absence of adverse effects, the proposal fails to satisfy the AA and consent must be refused / withheld. For the purposes of an appropriate assessment the competent authority must be Natural England (the 'appropriate nature conservation body') and have regard to any representations they make, as per Sec 63 (3) of the Habitat Regs.

For proposals that are considered to result in an adverse LSE on the SAC at the AA stage and where there are no alternative solutions, the only provision for consenting to the proposal is where there is shown to be a 'Imperative Reason of Overriding Public Interest' (IROPI henceforth). The IROPI must relate to human health, public safety or beneficial consequences of primary importance to the environment, these may be of social or economic nature; however IROPI is not considered to be applicable in this instance due to the diminutive scale and thus benefits of the proposal; with IROPI generally being reserved for projects such as nuclear power stations or wind turbines. Thus if a proposal fails to satisfy an appropriate assessment, the proposal is not considered to be permissible.

Screening

The proposal in this case would be an intensification of the Lugg catchment, thus generating additional phosphates through the foul water drainage from the development, which may have a pathway into the River Lugg, which is already in an unfavourable ecological condition. Therefore without mitigation there is at least the possibility of a likely significant

effect on the River Wye SAC; therefore as the proposal can not be screened out, it is necessary to undertake an Appropriate Assessment. At this stage there is not sufficient information to clearly demonstrate that the project would not have an adverse effect on the SAC once mitigation is taken into account, therefore the LPA is unable to consent to the development.

The Council's Lugg HRA position statement may be found at the link below (and also attached):

https://www.herefordshire.gov.uk/info/200142/planning_services/66/about_planning_services/12

Regarding the exceptions criteria for development to be considered permissible in the river Lugg catchment, these criteria have now been adopted as part of the Council's position statement on the HRA issue. If an application can clearly demonstrate that all the criteria below are satisfied then the LPA should be in a position to confirm the mitigation is satisfactory and there would not be a LSE. For clarity these are set out below:

"The way forward

Herefordshire Council have sought their own legal advice on how to proceed and are in talks with Natural England and other partners to liaise closely to find an effective solution as soon as possible. This includes discussions with the NMB.

There remains potential for a positive Appropriate Assessment to enable development to proceed, on Natural England's advice, where it can be demonstrated that any impacts would be neutral (where avoidance / mitigation measures included in the plan or project, counterbalance any nutrient (phosphate) increase from the plan or project), or would lead to 'betterment'.

In relation to discharges to drainage fields in the red zone, Natural England have indicated that if the following criteria are in place then phosphorous would be unlikely to reach the river and there is therefore no pathway for impacts, the development could therefore be acceptable:

- *The drainage field is more than 50m from the designated site boundary or sensitive interest feature (includes Habitats of Principal Importance and other designated ecological important features identified through Core Strategy SD4/LD2/SS6 **and**;*
- *The drainage field is more than 50m from any surface water feature e.g. ditch, drain, watercourse, **and**;*
- *The drainage field in an area with a slope no greater than 15%, **and**;*
- *The drainage field is in an area where the high water table groundwater depth is at least 2m below the surface at all times **and**;*

There are no other hydrological pathways which would expedite the transport of phosphorous e.g. fissured geology, flooding, shallow soil."

Therefore, unfortunately until the HRA impasse in the River Lugg catchment is addressed or the criteria above are clearly demonstrated (a matter that I would consider to be challenging given the context of this proposal), then the Council will not be able to grant consent to the applications, as the Council must fulfil its legal obligations under the Habitat Regulations. If and when the River Lugg returns to a

favourable conservation status, the Council should be in a better position to progress this application. I understand that a meeting of the River Wye Nutrient Management Board is meeting today to discuss the issues and challenges, with a view to resolving the impasse, however the timescale for this resolution are not clear at the present time.

Kind Regards,

Alastair

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