



Appeal Decision

Hearing Held on 27 November 2018

Site visit made on 28 November 2018

by John Woolcock BNatRes(Hons) MURP DipLaw MRTPI

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

Decision date: 28 December 2018

Appeal Ref: APP/W1850/W/17/3191991

Off Madley Road, Clehonger, Herefordshire HR2 9TE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application to discharge a planning condition for consent, agreement or approval to details required by a condition of a planning permission.
 - The appeal is made by Gladman Developments Ltd against Herefordshire Council.
 - The application Ref 171662, dated 5 May 2017, sought to discharge Condition No.18 of an outline planning permission Ref P141964/O, which was granted on 17 November 2016 (Appeal Ref:APP/W1850/W/15/3140016).
 - The development proposed is a residential development of up to 90 dwellings with access, parking, public open space with play facilities and landscaping.
 - Condition 18 states that: "No development shall take place until: i) a survey to establish the current flow and load received at Clehonger waste water treatment works has been undertaken ; and ii) an assessment of the impact of the development hereby approved on the waste water treatment works having regard to the results of the flow and load survey has been undertaken and agreed with the local planning authority; and iii) if necessary, a scheme of upgrading for the Clehonger waste water treatment works has been agreed with the local planning authority in order to allow it to accommodate the foul discharges from the development hereby approved without increasing the risk of breaches to the discharge consent for the Clehonger waste water treatment works. No dwellings shall be occupied until the agreed scheme has been completed."
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Decision

1. The appeal is dismissed and the application Ref 171662, dated 5 May 2017, to discharge Condition No.18 attached to outline planning permission Ref P141964/O granted by appeal Ref:APP/W1850/W/15/3140016 on 17 November 2016 is refused.

Application for costs

2. At the Hearing an application for costs was made by Gladman Developments Ltd against Herefordshire Council. This application is the subject of a separate Decision.

Preliminary matters

3. Herefordshire Council (HC) did not determine the application. But HC's Statement of Case says that in order to achieve compliance with the development plan in respect of water quality, works of improvement as specified by Dŵr Cymru Welsh Water (DCWW) are necessary. In answer to my

questions at the Hearing HC indicated that the application was considered to be in conflict with Policies SD3, SD4 and LD2 of the Herefordshire Local Plan Core Strategy (HLP), which was adopted in 2015.

4. Foul drainage from residential development on the Madley Road site would be treated at the Clehonger Waste Water Treatment Works (WWTW), which is operated by DCWW. Environment Agency Wales (EA) granted a consent to discharge from the WWTW to Cage Brook. This specifies that the discharge shall not contain more than;
 - (i) 25 mg/l of biological oxygen demand (BOD),
 - (ii) 37 mg/l of suspended solids (TSS), and
 - (iii) 18 mg/l of ammoniacal nitrogen (N).The consent does not impose any limit on phosphorous/phosphates.
5. Cage Brook runs through the Cage Brook Valley Site of Special Scientific Interest (SSSI), and is a tributary of the River Wye, joining it upstream of Hereford. The River Wye is a European designated site of Special Area of Conservation (SAC), and it is also an SSSI.
6. Residential development is currently underway on another site in Clehonger. This is known as the Seven Stars site, which has permission for 80 dwellings. This development will utilise the WWTW. In granting outline permission for the Madley Road site the Inspector was aware of a section 106 obligation for the Seven Stars site to upgrade the WWTW, but she took into account submissions by DCWW that its timescale for funding any works for the Madley Road scheme would be beyond 2020, the end of the current AMP period (DL42-44). The Inspector also noted that there were unexplained inconsistencies in the works then required by DCWW for the Madley Road site and some other developments in Clehonger (DL19).
7. The current position is that Persimmon Homes Ltd, the developer of the Seven Stars site, is funding the works that DCWW had previously required of the Madley Road scheme. A scheme has been secured by a legal agreement with Persimmon Homes Ltd for;
 - (i) 1 no recirculation pumping station and rising main,
 - (ii) inlet screen,
 - (iii) actuation of primary settlement tank (PST) de-sludge valves,
 - (iv) a motor control centre (MCC),
 - (v) along with various chamber and pipework modifications.These improvements would provide for 90 dwellings on the Seven Stars site, but as only 80 are to be built, the requirement sought by DCWW from the Madley Road site is to accommodate 80 dwellings.
8. The Inspector in granting outline planning permission for the Madley Road site stated that "...it is not possible for me to conclude that the proposal would not adversely affect the integrity of the SSSIs/SAC" (DL46). But granting permission subject to Condition 18 gave effect to the statutory requirement in R68(3) of the 2010 Habitats Regs, which then applied.¹

¹ This provision is now R70(3) of The Conservation of Habitats and Species Regulations 2017 (Habitats Regs) and provides that where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

9. Prior to the Hearing I asked Natural England (NE) for its view on how the Habitats Regs applied to the application to discharge Condition 18. I also raised this question at the Hearing, and the parties were given time to submit written submissions.² I closed the Hearing in writing on 12 December 2018.
10. In commenting on the application NE advised that damp alder woodland is a notified feature of Cage Brook Valley SSSI. The soil wetness and nutrient status determine the occurrence of species, and so a change in nutrient levels could detrimentally affect the vegetation community. In relation to the SAC, NE advised that without the mitigation of increases in phosphate from development, or other sources, the River Wye is at risk of failing its Conservation Objectives for phosphate (0.05 mg/l) between two sewage treatment plants at Hereford. If phosphate levels were raised above the conservation objective this would lead to a deterioration of water quality, which would affect plants and other species, including the interest/notified species, which rely on the river. NE also advised that there was a clear pathway between the WWTW and the River Wye SAC, that there are likely significant effects on the SAC, and that an Appropriate Assessment (AA) is required. NE added that with the current uncertainty around the capacity of the WWTW it is not possible to conclude that there are no adverse effects on the integrity of the SAC, and that alternatives would need to be considered.
11. In response to my questions it was later stated by NE that if a development caused a discharge consent to be exceeded then the *River Wye SAC Nutrient Management Plan Evidence base and options appraisal* by EA and NE, dated May 2014 (NMP), would not have taken this into account and an AA would be required.³

Planning policy and guidance

12. The development plan for the area includes the HLP. Policy SD3 requires measures for sustainable water management, to be achieved by ensuring that, amongst other things, the proposal would not lead to deterioration of EU Water Framework Directive water body status, should not cause an unacceptable risk to the quality of water resources, and in particular, should not adversely affect water quality through overloading of Wastewater Treatment Works.
13. Policy SD4 provides that where connection to the existing mains wastewater infrastructure network would result in nutrient levels exceeding conservation objectives targets, in particular additional phosphate loading within a SAC designated river, then proposals will need to fully mitigate the adverse effects of wastewater discharges into rivers caused by the development. This may involve delaying development until further capacity is available, the use of developer contributions to improve waste water treatment works, and where development might lead to nutrient levels exceeding the limits for the target conservation objectives within a SAC river, planning permission would only be granted where it can be demonstrated that there will be no adverse effect on the integrity of the SAC in view of the site's conservation objectives.
14. Development proposals should, to accord with Policy LD2, conserve, restore and enhance biodiversity assets, through the protection of nature conservation sites and habitats in accordance with their status. Development likely to harm sites of European importance will not be permitted, and harm to SSSIs will only

² HD6 and HD7.

³ HD5.

be permitted if the conservation status of their habitat can be protected by conditions, or other material considerations are sufficient to outweigh nature conservation considerations.

15. The *National Planning Policy Framework* provides that decisions should contribute to and enhance the natural and local environment by, amongst other things, preventing new development from contributing to unacceptable levels water pollution, and should, wherever possible, help to improve water quality.
16. The *Framework* also refers to *Government Circular: Biodiversity and geological conservation – statutory obligations and their impact within the planning system*, ODPM Circular 06/2005. This notes that in considering the combined effects with other proposals it will normally be appropriate to take account of outstanding consents that are not fully implemented, ongoing activities or operations that are subject to continuing regulation (such as discharge consents or abstraction licences) and other proposals that are subject to a current application for any kind of authorisation, permission, licence or other consent. Thus, the assessment is not confined to proposals that require planning permission, but includes all relevant plans and projects.
17. The *Planning Practice Guidance* states that water quality is only likely to be a significant planning concern when a proposal would, amongst other things, indirectly affect water bodies, for example, through a lack of adequate infrastructure to deal with wastewater.

Main issue

18. The main issue in this appeal is the effect of discharging Condition 18 on water quality, and on Cage Brook Valley SSSI and the River Wye SAC/SSSI.

Reasons

19. In granting outline planning permission there was some doubt about the relationship between the Seven Stars development and the Madley Road scheme concerning the achievement of necessary improvements to the WWTW. However, it would now not be unreasonable to assume that the works required by DCWW from the Seven Stars site amount to no more and no less than that necessary to accommodate the Seven Stars development, which at that time was 90 dwellings. But with an existing plant, improvements required to provide for the Seven Stars development could also be of more general benefit. The appellant does not consider that any further mitigation works would be necessary to accommodate up to 90 additional dwellings from the Madley Road site, and makes no provision for any such works. The question then becomes whether the WWTW, with the improvements funded by Persimmon Homes Ltd, would be sufficient to provide for the Madley Road scheme without an adverse impact on water quality that would increase the risk of breaching the EA's discharge consent.
20. The underlying reason for the imposition of Condition 18 is concern about water quality, having regard to local and national policy, including likely effects on the designated SSSIs and the SAC. That is also the basis on which a decision about discharging Condition 18, with respect to parts ii) and iii), should properly be made.
21. EA sampling for the period from January 2016 to July 2018 indicates that the WWTW has been operating in compliance with its discharge consent. The overall 95%tile for BOD recorded for this period was 12.5 mg/l, but the

- equivalent figure so far for 2018 is 21.8 mg/l. There has been a single sample failure in March 2018, with a recorded BOD of 26 mg/l. Samples for N and TSS have consistently averaged around half of the consent levels. The EA takes monthly samples (12 per year). Three failures would result in non-compliance with the consent. However, in addition, Ofwat imposes a financial penalty on the operator if the total number of single sample failures exceeds a certain number per year.
22. Part i) of Condition 18 has been complied with by a Flow and Load (F&L) survey, which was undertaken for 7 days in accordance with an agreed procedure. However, it does not provide absolute clarity about all relevant matters, and the Hearing was advised that 14 days of data would be required for design purposes. Nevertheless, the 7 day survey confirms that for the survey period the existing WWTW performs relatively well, and currently operates within its discharge consent. There is some evidence from the mass flow analysis that parts of the plant underperform, such as the PST.
 23. It was evident at my site visit that one of the biofilters was leaking from its base, but there is no evidence that this is adversely affecting treatment. DCWW advised that the crack has been surveyed, and any risks compared to the costs of repairs. It has been determined that any risks from the seepage did not score high enough to warrant funding the repair.
 24. The F&L survey and analysis does not resolve disagreements between the experts about flows because of assumptions made about the addition of hose pipe water to the PST to break up surface scum formation. The 7 day survey must of necessity be a snapshot for a specific period and the circumstances that applied to the catchment and plant during that time. There must inevitably be some doubt about how relevant the data obtained would be when other circumstances apply, such as during heavy rain, severe cold spells or when other weather related events occur, especially with the greater variability predicted to result from climate change. This is especially so as the WWTW does not have a storm flow split and so must treat all flows arriving at the works. There is disagreement between the experts about consumption rates, and infiltration, but clearly the addition of 80 dwellings would increase flow to the WWTW and increase nutrient load, and so would be likely to increase the discharge of nutrients into Cage Brook.
 25. The WWTW treats all flows so the peak flow has to be resolved. This is not a matter that should be left for resolution by the discharge of Condition 20 requiring a pumping station with storage on the Madley Road site. Such a facility might be able to better regulate flows to the WWTW, but it would pose a number of other practical difficulties. The Hearing was advised that the EA would not consent to any emergency overflow from such storage, and this might result in design constraints regarding its volume. A wet well storage facility within the residential development might also give rise to concerns about management, access, and possibly odour control. In addition, even though the pumping station would only manage sewage and not surface water, no storage capacity could guarantee that it would never be exceeded in some circumstances, and so the WWTW would still need to be designed to cope with peak flows, if and when they arrived at the plant, especially as this is a small catchment with limited retentive capacity.
 26. Nonetheless, the F&L survey should be a key factor in deciding compliance with part ii) of Condition 18, but it is not the only factor. The wider context within which the WWTW operates is also relevant to the likely effects on water quality

- of the additional demands that would result from discharging Condition 18. Such factors might include how the whole system operates in different conditions, including the relationship between the sewer network and the plant, having regard to industry good practice and relevant standards, along with Ofwat requirements.
27. The EA's discharge consent for the WWTW includes specific limits. But there is some force in DCWW's submissions about the realities of having to design and operate to tighter standards in order to be able to ensure compliance with EA limits in a wide range of conditions. DCWW advised that in spring, with warm weather, more solids come off the biofilters, increasing the risk to BOD. In winter the N limit is at greater risk because bacteria in the filters get too cold. Even allowing for the possibility of 'weather waivers' by the EA for failed samples during unusual weather conditions, the risk of breaching the discharge consent is a factor that warrants a cautious approach to the design and operation of the WWTW, so as to build into the system sufficient leeway.
28. The advice from NE highlights an identified and acknowledged nutrient issue for the SSSIs/SAC. Phosphate levels are of particular concern and there is reliance on the NMP to safeguard the SAC. But breaches of discharge consents, even where no limit is set for phosphates, would add to the level of phosphate in the nutrient load for the River Wye, and could cumulatively compromise the effectiveness of the NMP. It seems to me that in discharging Condition 18 there would need to be a high degree of confidence in the outcome, given that it is the means by which the planning system, in the interests of national objectives for SSSIs/SAC, can properly regulate development in relation to the provision of necessary infrastructure.⁴
29. I consider that the addition of waste water from the Madley Road development would be a significant increase for the flow and load demand on the WWTW, and that the evidence adduced is insufficient to confirm that it would have no material effect on the risk of breaches of the discharge consent. In the circumstances that apply here, I find that discharging Condition 18 would pose an unacceptable risk of harm to water quality, and to the nature conservation interests of the SSSIs/SAC. I am unable to find that discharging Condition 18 without any further mitigation would accord with HLP Policies SD3, SD4 and LD2. The evidence does not indicate that allowing the appeal would comply with national policy and guidance.
30. This appeal is about whether there is evidence to discharge Condition 18. Given the respective cases put to the Hearing the determination of this appeal is not the place to speculate about what further mitigation might be necessary. DCWW set out in evidence to the Hearing what works it considers would be required to accommodate development from the Madley Road site.⁵ However, the appellant's case at the Hearing was that no works at all would be necessary. So there is nothing from the appellant about what it considers would be required if it was determined that some measures were necessary

⁴ In relation to sewerage the Supreme Court found that "the planning authority has the power...of preventing a developer from overloading a sewerage system before the undertaker has taken steps to upgrade the system to cope with the additional load". *Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (Welsh Water)* [2008] EWCA Civ 1552 and [2009] UKSC 13, cited in APP/W1850/W/15/3140016. I concur with the previous Inspector that this principle should equally apply to provision for waste water treatment.

⁵ The works requested were as follows; flowsplit to sidestream process with flowmeter and actuated valve; 1 no fully integrated Rotating Biological Contact (RBC); associated pipework, tanker access and footpaths; MCC for the RBC and associated items.

before Condition 18 could be discharged. Therefore, I am not in a position to decide what works would be required to reduce the risk to an acceptable level – or to determine who should fund such works. In the absence of any section 106 obligation, these remain matters for the parties.

31. Turning to the Habitats Regs, I cannot exclude, on the basis of the objective information available, that discharging Condition 18 would, in combination with other plans or projects, have a significant effect on the SAC. I find, therefore, that before deciding to authorise the discharge of Condition 18 an AA would be required. But as the appeal is to be dismissed and the application to discharge the condition refused, it is not necessary for me to undertake an AA.

Other matters

32. I have taken into account all other matters raised in evidence, but have found nothing to outweigh the main considerations that lead to my conclusion.

Conclusion

33. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be dismissed and the application to discharge Condition 18 refused.

John Woolcock
Inspector

Richborough Estates

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Anjoli Foster	Counsel
Dr Andrea Burgoyne	Process Engineering Manager Dŵr Cymru Welsh Water
Sonny Robinson	Land Development Control Officer Dŵr Cymru Welsh Water
Edward Thomas	Herefordshire Council

FOR THE APPELLANT:

Freddie Humphreys	Counsel
Bill Lilly BSc(Hons)	BBLB Consulting Ltd

DOCUMENTS SUBMITTED AT THE HEARING

- Document 1 Statement of Common Ground dated October 2018.
- Document 2 Opening statement by Herefordshire Council.
- Document 3 Costs application on behalf of the appellant.
- Document 4 Response to costs application by Herefordshire Council.
- Document 5 Email dated 10 December 2018 from Natural England re Nutrient Management Plan.
- Document 6 Response to Inspector's questions re HRA - joint position statement by DCWW and Herefordshire Council dated 11 December 2018.
- Document 7 Response to Inspector's questions re HRA - by appellant.