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**Sukaina Devraj**

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**From:** Odette Carter [Odette.Carter@hmwt.org]  
**Sent:** 29 January 2013 11:41  
**To:** Planning  
**Subject:** Comments for application S6/2012/2656/S73B (land at Hornbeam Lane, Brookmans Park)

**FAO Mr A Mangham**

Dear Mr Mangham,

**Planning ref:** S6/2012/2656/S73B  
**Location:** land at Hornbeam Lane, Brookmans Park  
**Description:** Time extension of planning permission S6/2009/2575/FP (Erection of new dwelling, three bay garage block, garden store together with retention and alte

Thank you for consulting Herts & Middlesex Wildlife Trust. We commented on the previous application (S6/2009/27/FP), recommending a number of conditions to secure further bat surveys and bat mitigation, precautions in respect of nesting birds, and landscaping to benefit biodiversity.

We have no objection against extension of the time limit. However, it must be ensured that update ecology surveys are undertaken, including protected species surveys if shown to be necessary. Surveys are needed to establish any changes in site conditions and potential impacts on protected and priority species, and what actions may be required to minimise adverse impacts and ensure compliance with legislation. Generally speaking, ecological survey results remain valid for a maximum of 2 years.

If ecology surveys reveal that protected species may be affected, then no development should commence until suitable mitigation for the species concerned has been proposed by an ecologist, and implemented as directed. Conditions should be used to secure mitigation where needed.

The development site is adjacent to a Local Wildlife Site – 70/1001 Hornbeam Lane green lane. The wider site is rural, with mature trees, hedgerows, ponds, woodland patches and grassland. These habitats are of wildlife value, and it should be ensured that development does not result in any harm to its ecological value.

Existing trees and hedgerows and Hornbeam Lane Local Wildlife Site should be retained and protected from damage during the course of development, in accordance with BS 5837:2012. Suitable protective measures should be implemented to ensure against damage, including to root systems.

The applicant should seek to achieve gains for biodiversity, through appropriate management of habitats and habitat enhancement and creation where appropriate. It is noted that the previous application included a landscape management plan and specification. At a glance, the management prescriptions should help improve biodiversity and ecological connectivity. It is recommended that the management plan is updated to reflect any changes in habitat composition and quality since 2009, informed by ecological survey observations, to ensure that the prescriptions remain appropriate.

*Details of relevant wildlife legislation and planning policy and guidance are given at the end of this email.*

Please don't hesitate to contact me should you wish to discuss this matter further.

Yours sincerely,

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## NPPF

The National Planning Policy Framework sets out that planning should function to achieve sustainable development, which includes contributing to "Moving from a net loss of biodiversity to achieving net gains for nature", in line with the objectives of the Natural Environment White Paper 2011.

Paragraph 152 states:

"Local planning authorities should **seek opportunities** to achieve each of the economic, social and environmental dimensions of sustainable development, and **net gains** across all three. **Significant adverse impacts** on any of these dimensions should be **avoided** and, wherever possible, **alternative** options which reduce or eliminate such impacts should be pursued. Where adverse impacts are unavoidable, measures to **mitigate** the impacts should be considered. Where adequate mitigation measures are not possible, **compensatory measures** may be appropriate."

The NPPF paragraph 109 sets out that the planning system should "**contribute to and enhance** the natural and local environment by... **minimising impacts on biodiversity** and providing **net gains** in biodiversity where possible... including by establishing coherent ecological networks that are more resilient to current and future pressures."

Paragraph 118 of the NPPF instructs that "if significant harm resulting from a development cannot be **avoided** (through locating on an alternative site with less harmful impacts), **adequately mitigated, or, as a last resort, compensated for**, then planning permission should be **refused**."

Paragraph 176 states, "Where safeguards are necessary to make a particular development acceptable in planning terms (such as environmental mitigation or compensation), the **development should not be approved if the measures required cannot be secured through appropriate conditions or agreements**."

Paragraph 118 also instructs that **opportunities** to incorporate biodiversity in and around developments should be encouraged.

The NPPF advocates a proactive and positive approach to planning, looking for "solutions rather than problems" and seeking to "approve application for *sustainable* development where possible". Paragraph 114 instructs that local planning authorities should plan positively for the **creation, protection, enhancement and management** of networks of biodiversity and green infrastructure. Paragraph 187 goes on to say the local planning authorities should work **proactively** with applicants to secure developments that improve the economic, social and environmental conditions of the area. The LPA should therefore work with applicants to **pursue opportunities to benefit wildlife and improve habitats and the local ecological network**. This is in accordance with paragraph 118 and 152 of the Framework.

### Local Wildlife Sites, BAP habitats and ecological networks

As established by paragraph 113 of the NPPF, the LPA should have 'criteria based' policies in the local plan against which proposals for any development on or affecting protected wildlife sites will be judged. The NPPF states that, where the development plan is absent, silent or relevant policies are out-of-date, the LPA should grant permission unless:

1. Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
2. Specific policies in the Framework indicate development should be restricted.

As described in paragraph 117, planning policies should also promote the preservation, restoration and re-creation of **priority habitats, ecological networks** and the protection and recovery of **priority species** populations, linked to national and local targets. As stated in paragraph 117, the 'local ecological network' may include international, national and **locally designated sites** of importance for biodiversity, **wildlife corridors and stepping stones** that connect them and **areas identified by local partnerships for habitat restoration and creation**

Paragraph 114 establishes that the LPA should 'plan positively' for the "**creation, protection, enhancement and management** of networks of biodiversity and green infrastructure".

### **Ancient Woodland and Veteran trees**

Paragraph 118 establishes that planning permission should be refused for development resulting in the loss or deterioration of **irreplaceable habitats**, including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss.

### **ODPM circular 06/2005 to PPS9**

The National Planning Policy Framework, published in March 2012, replaced the preceding suite of Planning Policy Statements and guidance notes, including PPS9 – *Biodiversity and Geological Conservation*. The **government circular 06/2005 Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System, has been retained and **remains as valid guidance** for local planning authorities on decisions affecting protected species and designated nature conservation sites, among others. The circular can be accessed [here](#).**

*The External Review of Government Planning Practice Guidance* ('Taylor Review', report published December 2012), concluded that the advice within circular 06/2005 is necessary, but needs updating and could be streamlined. The circular has been recommended by the committee for retention until it is replaced by revised guidance. The report considers it a priority for the government to update the biodiversity guidance to reflect legal requirements and NPPF policy.

### **BAP priority habitats and species**

**Paragraph 84** of ODPM Circular 06/2005 to PPS9 states, "The potential effects of a development, on habitats or species listed as priorities in the UK Biodiversity Action Plan (BAP) and by Local Biodiversity Partnerships, together with policies in the England Biodiversity Strategy are capable of being a material consideration in the preparation of regional spatial strategies and local development documents and the making of planning decisions."

**Paragraph 85** highlights the duties to conserve biodiversity conferred by Section 74 of the Countryside and Rights of Way Act 2000 and PPS9 (now the NPPF), for local authorities "to promote the taking of steps by others to further the conservation of the habitat types and species of principle importance for biodiversity" (ie. BAP habitats and species), including through their planning function.

### **Protected species**

**Paragraph 98** states, "The presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat."

**Paragraph 99** continues, "It is essential that the presence or otherwise of protected species [where there is a reasonable likelihood of them being present and affected], and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances."

**Paragraph 116** confirms that, when dealing with cases where a European protected species may be affected, the planning authority has a statutory duty under regulation 9(5) of the *Conservation of Habitat and Species Regulations 2010* to have regard to the requirements of the Habitats Directive in the exercise of its functions. The paragraph continues, "Planning authorities should give due weight to the presence of a European protected species on a development site ... and this may potentially justify a refusal of planning permission."

## The NERC Act (2006) Biodiversity Duty

Section 40(1) of the Natural Environment and Rural Communities Act (*NERC Act*) places a direct statutory duty to conserve biodiversity on all public authorities:

***Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.***

Section 40(3): conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat. **Local Authorities have a duty therefore to work to increase populations of BAP priority species and create and enhance BAP habitats.**

Section 41(3): the Secretary of State must take such steps as appear to him to be reasonably practicable to further the conservation of the living organisms and types of habitats included in the list of species of principal importance (the UK BAP list). He is further required to promote the taking by others (such as public bodies) of such steps to further the conservation of the statutory priority species.

## Biodiversity Action Plan priority habitats and species

Local and national Biodiversity Action Plan (BAP) habitats species require due consideration as outlined in Paragraphs 84 and 85 of ODPM Circular 06/2005 to PPS9, the CROW Act (2000) (section 74), paragraph 117 of the NPPF and the NERC Biodiversity Duty.

Local and/or national BAP species include great crested newts, various bat species, song thrush, bull finch, hedgehogs, water vole, grizzled skipper and stag beetles. Rivers, hedgerows, lowland meadows, wet woodland and lowland mixed deciduous woodland are BAP priority habitats.

A list of UK BAP habitats and species (i.e. NERC Act 2006 section 41 habitats and species of principle importance) can be accessed [here](#).

### **Herts BAP habitat priorities**

Chalk rivers	Lowland acidic grassland and lowland heathland	Floodplain grazing marsh
Lowland beech woods Ancient	Lowland calcareous grassland	Fens
Species-rich hedgerows	Lowland hay meadow	Reedbeds
Oak-hornbeam woodland		Cereal field margins

### **Herts BAP species priorities**

Water vole	Tree sparrow	Stag beetle
Common dormouse	Bittern	Great pignut
Otter	Stone curlew	Cornflower
Natterer's bat	Song thrush	River water dropwort
Great crested newt	Chalkhill blue	Pasqueflower
White-clawed crayfish	Grizzled skipper	

## Wildlife Legislation

The following summarises the key legislation.

**Birds.** Under Section 1 of the *Wildlife and Countryside Act 1981 (as amended)*, it is illegal to kill, injure or capture any wild bird, and illegal to damage, destroy or take their nests and eggs. Bird species listed in Schedule 1 are also protected against disturbance whilst nesting and while they have dependent young.

**Great crested newts, bats, otters, dormice** are fully protected under Schedule 5 of the *Wildlife & Countryside Act 1981 (as amended)* and Schedule 2 of the *Conservation of Habitats and Species Regulations 2010 (as amended)*, making them European protected species. Great crested newts, otters and some bat species are also national or local Biodiversity Action Plan priority species.

Where development activities affect a **European protected species** (great crested newts, bats, dormice, otters), or their places used for shelter or protection, work may need to be conducted under a European Protected Species

licence issued by Natural England under Regulation 53(2)(e) of the *Conservation of Habitats and Species Regulations 2010*. In order for a licence to be issued the following three tests must be met:

1. The consented operation must be for "preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment";
2. The must be "no satisfactory alternative"; and
3. The action authorised "will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range".

**Water voles** are protected under Schedule 5 of the *Wildlife & Countryside Act 1981 (as amended)*. Water voles are also a UK and Hertfordshire local Biodiversity Action Plan priority species.

**Reptiles.** The adder, common lizard, grass snake and slow worm are protected against intentional killing or injuring under Schedule 5 of the *Wildlife and Countryside Act 1981 (as amended)*. The sand lizard and smooth snake are fully protected under Schedule 5 of the *Wildlife and Countryside Act 1981 (as amended)* and Schedule 2 of the *Conservation of Habitats and Species Regulations 2010* making them European Protected Species.

**Badgers** are protected under the Wildlife and Countryside Act 1981 (as amended) and the Protection of Badgers Act 1992, which makes it an offence to:

- Wilfully kill, injure or take a badger, or to attempt to do so;
- Cruelly ill-treat a badger; or
- Intentionally or recklessly interfere with a badger sett by:
  - a) damaging a sett or any part of one;
  - b) destroying a sett;
  - c) obstructing access to or any entrance of a sett;
  - d) causing a dog to enter a sett; or
  - e) disturbing a badger when it is occupying a sett.

### **Conservation of Habitats and Species Regulations 2010 (as amended)**

It is an offence under Regulation 41 to:

- Deliberately capture, injure or kill any wild animal of a EPS
- Deliberately disturb any wild animal of a EPS, in particular disturbance which is likely to:
  - Impair their ability to survive, breed or reproduce, or to rear or nurture their young
  - Impair their ability to hibernate or migrate
  - Significantly affect the local distribution or abundance of the species
- Deliberately take or destroy the eggs of any wild animal of a EPS
- Damage or destroy a breeding site or resting place of any wild animal of a EPS (*NOTE: strict liability applies to this offence<sup>2</sup>*).

Regulation 42 provides certain defences that can be used for offences in section 41. Under paragraphs 42(9) and 42(10), defences listed in paragraphs 42(1) to 42(4) only apply where it is shown by a defendant that:

- There was no satisfactory alternative; and
- The action was not detrimental to the maintenance of the population of the species concerned at favourable conservation status in their natural range.

Regulation 53 establishes the system of licensing for certain activities (including regulation 53(2)e) for preserving public health and safety or other overriding reasons of public interest) relating to European Protected species of animals or plants, covering derogation from regulations 41, 43 and 45. The wildlife licensing system in England is operated by Natural England.

In order for Natural England to grant a **European protected species licence** for an operation that would breach the regulations, the following conditions must be met:

1. The consented operation must be for "preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment";
2. The must be "no satisfactory alternative"; and
3. The action authorised "will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range".

A EPS licence application relies on a reasoned statement and a method statement to demonstrate that the above points have been addressed.

Under regulation 9(3), a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats and new Wild Birds Directives so far as they may be affected by the exercise of those functions.

### **Wildlife and Countryside Act 1981 (as amended)**

In respect of wild animals listed in Schedule 5 of the WCA, it is an offence to:

- Intentionally or recklessly kill, injure or take any wild animal included in Schedule 5
- Have in your possession or control any live or dead wild animal included in Schedule 5, or part or derivate of such an animal.
- Intentionally or recklessly damage or destroy a structure or place used for shelter or protection by a wild animal specified in Schedule 5
- Intentionally or recklessly disturb any such animal while occupying a structure or place used for shelter or protection
- Intentionally or recklessly obstruct access to any structure or place used for shelter or protection by a wild animal specified in Schedule 5

It is also an offence under the WCA to knowingly cause or permit to be done an act which is made unlawful by any of the provisions of Section 9 (other than 9(5)(b)).

There is no system of licensing that will cover offences under the WCA. Some 'defences' are available in the Act, but a defendant must show that all reasonable measures have been taken to avoid an offence, which requires efforts to find out what offences may be committed and measures to avoid this occurring.

### **Wildlife Case law**

The Woolley case (*R (on the application of Simon Woolley) v Cheshire East Borough Council*) clarified that planning authorities are legally obligated to have regard to the requirements of the EC Habitats Directive and apply the three tests applied by Natural England in the context of licensing (as per *the Conservation of Habitat and Species Regulations 2010*, listed above) when deciding whether to grant planning permission where species protected by European Law may be harmed. The final test (favourable conservation status) cannot be assessed without an initial assessment and, depending on its outcome, possibly a follow-up emergence or activity survey.

The Morge case (*Supreme Court judgement Morge (FC) (Appellant) v Hampshire County Council (Respondent) On appeal from the Court of Appeal (Civil Division) [2010] EWCA Civ 608*) highlights that impacts on bat *habitat* important enough that its loss or damage could impair breeding, rearing, hibernation or migration, are grounds for refusal. Should planning authorities take decisions without the necessary assessments, planning permission is liable to be revoked.

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