

Welwyn Hatfield District Council

Location: 35 Kentish Lane, Brookmans Park

Proposal: Conversion of loft space, external alterations

Reference: 6/2016/0398/HOUSE

Date: 24/03/2016

Objection: Bat survey required before application can be determined. Once a suitable survey has been submitted and approved, the objection can be withdrawn provided any required actions are conditioned in the planning approval.

The design of the building is extremely suitable for bats, it is situated in close proximity to high value feeding and roosting habitat and there are records of bats from the near vicinity. If present the development could result in breaches of the legislation protecting bats and their roosts. Therefore there is a reasonable likelihood that bats may be present.

ODPM circular 06/05 (para 99) is explicit in stating that where there is a reasonable likelihood of the presence of protected species it is essential that the extent that they are affected by the development is established before planning permission is granted, otherwise all material considerations cannot have been addressed in making the decision.

LPAs have a duty to consider the application of the Conservation of Habitats and Species Regulations 2010 in the application of all their functions. If the LPA has not asked for survey where there was a reasonable likelihood of EPS it has not acted lawfully. This may lead to prosecution or the overturning of the planning decision. Recent case law (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.

Where there is a reasonable likelihood that protected species are affected by development proposals, surveys must be conducted before a decision can be reached (as stated in ODPM circular 06/05). It is not acceptable to condition ecological survey in almost all circumstances.

In this instance a bat survey of the building will be required before a decision can be reached. The survey should be consistent with national survey standards and the information submitted in accordance with BS 42020.

If you wish to discuss any of these comments please do not hesitate to get in touch.

Best wishes

Matt Dodds



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# Appendix 1

## **Biodiversity in Planning - Relevant policy and legislation for Planners**



Herts & Middlesex

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### **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.

A list of habitats and species of principle importance to the purpose of conserving biodiversity was drawn up, largely based on the UK Biodiversity Action Plan priority habitats and species, as required by section 41. The list can be viewed [here](#).

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. 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.

### **National Planning Policy Framework**

The National Planning Policy Framework (NPPF) 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.

### ***Conservation as primary objective***

In conformity with paragraph 118, the LPA should permit development proposals where the primary objective is to conserve or enhance biodiversity.

### ***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.

### ***SSSI***

Development likely to have an adverse effect on a Site of Special Scientific Interest “should not normally be permitted” (paragraph 118).

### ***SPA/SAC***

Paragraph 119 establishes that the presumption in favour of sustainable development (paragraph 14) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives (ie. development affecting Special Protection Areas and Special Areas of Conservation) is being considered, planned or determined. Paragraph 118 confirms that potential SPAs and SACs, listed or proposed Ramsar Sites have the same protection as European sites.

### ***AONB, National Park***

The NPPF states that the conservation of wildlife and cultural heritage is an important consideration in National Park, the Broads and Areas of Outstanding Natural Beauty, and should be given great weight. Paragraph 116 goes on to say, “Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest.”

### ***Mineral development***

In respect of determining applications for mineral development, the NPPF directs that local planning authorities should ensure that there are no unacceptable adverse impacts on the natural and historic environment. The LPA should also “provide for restoration and aftercare at the earliest opportunity to be carried out to high environmental standards, through the application of appropriate conditions where necessary.”

### ***Bats and lighting***

According to the NPPF, “by encouraging good design, planning policies and decisions should limit the impact of light pollution from artificial light on local amenity, intrinsically dark landscapes and nature conservation.”

## **National Planning Practice Guidance**

The government’s National Planning Practice Guidance supports the NPPF. It is intended to further explain and give clarity to planning policy, helping local planning authorities and developers to interpret policy and understand government and legal requirements. The guidance relies on signposting to existing information and guidance, for instance on protected species, Local Sites and green infrastructure.

Planning Officers are advised to read this guidance and refer to the signposted information to ensure that the council’s planning decisions contribute positively to the maintenance and restoration of biodiversity and ecological networks. The government Planning Practice Guidance can be accessed alongside the National Planning Policy Framework at <http://planningguidance.planningportal.gov.uk/>

Section topics concerning the natural environment include:

- Natural environment

- Biodiversity, ecosystems and green infrastructure
- Landscape
- Brownfield land, soils and agricultural land
- Open space, sports and recreation facilities
- Health and wellbeing
- Tree Preservation Orders
- Light pollution
- Water supply, wastewater and water quality
- Climate change
- Air quality
- Flood risk and coastal change
- Renewable and low carbon energy

The NPPG reiterates the NPPF policy that planning should contribute to conserving and enhancing the natural environment and moving from a net loss of biodiversity to achieving net gains for nature as part of sustainable development. This reflects Government's natural environment policy commitments, as set out in the [Natural Environment White Paper](#) and the [Biodiversity 2020](#) strategy for England.

The guidance confirms that Planners should consider the following in making planning decisions:

- The policies and commitments of Biodiversity 2020;
- Existing biodiversity strategies for the area and local biodiversity action plans;
- The need for and findings of any ecological surveys of the application site;
- Effects on the structure, function and resilience of local ecological networks.

Please refer to the guidance for more detail.

The guidance indicates that Defra is in the course of preparing updated guidance on protected species, Sites of Special Scientific Interest and European protected sites, which will replace the guidance in Circular 06/05. Until this guidance has been published, the Trust recommends that Planning Officers continue to refer to the biodiversity and geo-diversity [circular 06/2005](#). The legislation to which it refers, including the Conservation of Habitats and Species Regulations 2010 (as amended) and the Wildlife and Countryside Act 1981 (as amended), remains in law.

## **Biodiversity 2020**

*Biodiversity 2020: A strategy for England's wildlife and ecosystem services* (Defra, 2011) followed Government's white paper *The Natural Choice: Securing the value of nature* in setting out a shift in policy to promote a joined-up, landscape-scale approach to nature conservation. Biodiversity 2020 and the natural environment White Paper advocate decision-making which properly values the natural environment and the benefits that a healthy, resilient natural environment brings to society.

*Biodiversity 2020 Vision: By 2050 our land and seas will be rich in wildlife, our biodiversity will be valued, conserved, restored, managed sustainably and be more resilient and able to adapt to change, providing essential services for delivering benefits for everyone.*

*Biodiversity 2020 Mission: to halt overall biodiversity loss, support healthy well-functioning ecosystems and establish coherent ecological networks, with more and better places for nature for the benefit of wildlife and people.*

The strategy reaffirms the importance of the NERC Act Section 41 list of priority species and habitats in informing and focusing actions.

Planning and development management in Hertfordshire should seek to respond to the following key priority actions from Biodiversity 2020:

- Establish more coherent and resilient ecological networks on land and safeguard ecosystem services for the benefit of wildlife and people.
- Take targeted action for the recovery of priority species, whose conservation is not delivered through wider habitat-based and ecosystem measures.
- Promote taking better account of the values of biodiversity in public and private sector decision-making.
- Take a strategic approach to planning for nature within and across local areas. This approach will guide development to the best locations, encourage greener design and enable development to enhance natural networks. Retain the protection and improvement of the natural environment as core objectives of the planning system.
- Align measures to protect the water environment with action for biodiversity, including through river basin planning approach under the Water Framework Directive.
- Continue to promote approaches to flood and erosion management which conserve the natural environment and improve biodiversity.
- Continue to implement the Invasive Non-Native Species Framework Strategy for Great Britain.

## Habitats and Species of Principle Importance

Habitats and species of principle importance, previously known also as Biodiversity Action Plan (BAP) habitats and species, require due consideration as outlined the CROW Act (2000) (section 74), the NERC Act (2006), paragraph 117 of the NPPF, and *Biodiversity 2020*.

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

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.

Hertfordshire's local habitat and species priorities are described in the Hertfordshire Biodiversity Action Plan – [A 50 Year Vision for the Wildlife and Natural Habitats of Hertfordshire](#).

### **Herts BAP habitat priorities**

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

## Protected Species 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. There 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.

### **Protected Species 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.