

Welwyn Hatfield Borough Council

Site: Ellenbrook Fields, Hatfield Business Park, Hatfield

Proposal: Outline application for large scale mixed use development including 1,100 new homes

Application number: 6/2018/2768/OUTLINE

Date: 10/12/2018

Dear Planning

Objection: Ecological impacts on areas consistent with Local Wildlife Site selection criteria have not been adequately compensated, impacts on whole site have not been informed by qualitative and quantitative assessment, and measurable net gain to biodiversity has not been demonstrated. Invertebrate survey has not been undertaken. Application should be withdrawn or refused until measurable net gain has been proven in accordance with NPPF, the emerging Welwyn Hatfield Local Plan, and BS 42020.

1. The ecological report has identified a large area of land that is consistent with the selection criteria for a local wildlife site in Hertfordshire – ‘grazed area in central south of application site’. Two thirds of this area is proposed to be destroyed by this development. No justification against emerging local plan policies, quantification of impact using the DEFRA biodiversity impact assessment calculator, or measurable compensation has been proposed to offset these impacts. The emerging local plan states:

SADM 16

Local Wildlife Sites, other habitats, species and ecological assets of local importance, including ecological networks, woodland, orchards, protected trees and hedgerows and allotments, will be refused unless:

- *The mitigation hierarchy has been fully implemented to avoid, reduce and remediate and compensate direct and indirect adverse impacts; and*
- *The need for, and benefits of, the development outweigh the loss or harm*

12.16 *Proposed compensatory measures should be informed by both qualitative and quantitative assessments of biodiversity and ecological impacts.*

The revised NPPF (July 2018) states:

170. Planning policies and decisions should contribute to and enhance the natural and local environment by:

- a) *protecting and enhancing valued landscapes, sites of biodiversity or geological value*
- d) *minimising impacts on and providing net gains for biodiversity*



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174. To protect and enhance biodiversity and geodiversity, plans should:
a) Identify, map and safeguard components of local wildlife-rich habitats and wider ecological networks, including the hierarchy of international, national and locally designated sites of importance for biodiversity

b) promote the conservation, restoration and enhancement of priority habitats, ecological networks and the protection and recovery of priority species; and identify and pursue opportunities for securing measurable net gains for biodiversity.

175. When determining planning applications, local planning authorities should apply the following principles:

a) if significant harm to biodiversity 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;

d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity.

BS 42020 states:

'8.1 Making decisions based on adequate information

The decision-maker should undertake a thorough analysis of the applicant's ecological report as part of its wider determination of the application. In reaching a decision, the decision-maker should take the following into account:

h) Whether there is a clear indication of likely significant losses and gains for biodiversity.'

The development and ecological information supplied must demonstrate consistency with these policies. At present it does not because it has not demonstrated how ecological impacts have been measurably assessed and compensated. The assessment that is provided is a subjective view, which concludes that there is a significant net loss of this habitat. In order for a transparent, objective, quantitative and qualitative assessment to be made the DEFRA biodiversity assessment metric should be used (Warwickshire County Council BIAC v 19). This will inform exactly how much compensatory habitat needs to be provided to demonstrate net gain and hence consistency with NPPF, BS 42020 and the emerging local plan.

2. The rest of the application site consists of habitats which are described as being of negligible importance for biodiversity. These habitats consist largely of scrub and species poor semi improved neutral grassland (NVC MG1 variants). These areas are large and no compensation is offered for their loss or their ecological value quantitatively or qualitatively assessed by reference to the DEFRA metric. The policy text above seeks to conserve and enhance 'biodiversity' leading to 'measurable net gains in biodiversity'. It does not seek only net gains in priority habitat or local wildlife sites as the text in this report suggests. The majority of our biodiversity occurs on habitats that are not priority habitat and it is these habitats that the DEFRA metric has been specifically designed to measure in order to achieve net gain.

It is ecologically illogical to suggest that the loss of five hectares of scrub with associated rough grassland – with all the ecological niches it provides particularly to invertebrates and birds – is ecologically neutral. This is not scientifically defensible and clearly contrary to policy. Similarly the uncompensated loss of the large tract of semi improved grassland at the north of the site (referred to as hay meadow to the north of site), cannot be considered to be ecologically neutral.

In order to justify statements claiming no net loss or net gain, impacts must be objectively measured by using the DEFRA metric. It should be noted that the northern hay meadow has seven of the eight species required to be consistent with selection as a local wildlife site. To suggest that it is therefore worthless is incorrect. It has substantial value due to its size, position in the ecological unit, structure and diversity, as evidenced by the species that occur there. Application of the metric will reveal this currently dismissed value.

The object of an ecological report submitted in support of a planning application should be to demonstrate how the proposals are capable of being consistent with NPPF and local planning policy. The ecological report should state, the objectively assessed value of what is there, how it will be affected by the proposal and how any negative impacts can be avoided, mitigated or compensated in order to achieve measurable net gain to biodiversity. Until this report utilises the DEFRA metric to assess net ecological impacts on habitats it cannot be considered to be consistent with national and emerging local policy and should be refused.

3. The huge and complex area of interface between scrub and semi-improved grassland of differing quality is likely to support a rich invertebrate community. This should be assessed through a suitable survey together with a qualitative and quantitative measurement of its value (e.g. Pantheon). This should then form the basis of what compensatory habitats will be required to be created when a measured assessment of habitat value has taken place.

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

Best wishes

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Appendix 1

Biodiversity in Planning - Relevant policy and legislation for Planners



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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.

170. Planning policies and decisions should contribute to and enhance the natural and local environment by:

- a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);

- b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland;
- c) maintaining the character of the undeveloped coast, while improving public access to it where appropriate;
- d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;
- e) preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution or land instability. Development should, wherever possible, help to improve local environmental conditions such as air and water quality, taking into account relevant information such as river basin management plans; and
- f) remediating and mitigating despoiled, degraded, derelict, contaminated and unstable land, where appropriate.

171. Plans should: distinguish between the hierarchy of international, national and locally designated sites; allocate land with the least environmental or amenity value, where consistent with other policies in this Framework; take a strategic approach to maintaining and enhancing networks of habitats and green infrastructure; and plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries.

172. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads.

The scale and extent of development within these designated areas should be limited.

Planning permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:

- a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
- b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
- c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.

173. Within areas defined as Heritage Coast (and that do not already fall within one of the designated areas mentioned in paragraph 172), planning policies and decisions should be consistent with the special character of the area and the importance of its conservation. Major development within a Heritage Coast is unlikely to be appropriate, unless it is compatible with its special character. Habitats and biodiversity

174. To protect and enhance biodiversity and geodiversity, plans should:

a) Identify, map and safeguard components of local wildlife-rich habitats and wider ecological networks, including the hierarchy of international, national and locally designated sites of importance for biodiversity; wildlife corridors and stepping stones that connect them; and areas identified by national and local partnerships for habitat management, enhancement, restoration or creation; and

b) promote the conservation, restoration and enhancement of priority habitats, ecological networks and the protection and recovery of priority species; and identify and pursue opportunities for securing measurable net gains for biodiversity.

175. When determining planning applications, local planning authorities should apply the following principles:

a) if significant harm to biodiversity 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;

b) development on land within or outside a Site of Special Scientific Interest, and which is likely to have an adverse effect on it (either individually or in combination with other developments), should not normally be permitted. The only exception is where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest;

c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons⁵⁸ and a suitable compensation strategy exists; and

d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity.

176. The following should be given the same protection as habitats sites:

a) potential Special Protection Areas and possible Special Areas of Conservation;

b) listed or proposed Ramsar sites; and

c) sites identified, or required, as compensatory measures for adverse effects on habitats sites, potential Special Protection Areas, possible Special Areas of Conservation, and listed or proposed Ramsar sites.

177. The presumption in favour of sustainable development does not apply where development requiring appropriate assessment

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	Lowland calcareous	Reedbeds
hedgerows	grassland	Cereal field margins
Oak-hornbeam woodland	Lowland hay meadow	

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*²).

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.