



## Appeal Decision

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by N Jones BA (Hons) MSc MRTPI

an Inspector appointed by the Welsh Ministers

Decision date: 01/08/2023

Appeal reference: CAS-02376-P1W3W4

Site address: Land at Foxfield, Fagl Lane, Hope, Flintshire LL12 9RB

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- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Michael Forgrave for Gower Homes Ltd against the decision of Flintshire County Council.
  - The application Ref 063335, dated 14 April 2022, was refused by notice dated 26 October 2022.
  - The development proposed is part demolition of existing dwelling and residential development comprising of 7 detached dwellings and associated roads and drainage works.
  - A site visit was made on 27 June 2023.
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### Decision

1. The appeal is dismissed.

### Background and Procedural Matters

2. The appellant states that the Council's decision notice was not issued until 25 November 2022, yet was back-dated as 26 October 2022, which he contends makes it legally defective. I am satisfied however that the Council's decision notice meets the requirements set out in article 24 of The Town and Country Planning (Development Management Procedure) (Wales) Order 2012.
3. The application was amended during its determination by the Council to reduce the number of new dwellings proposed from 8 to 7 and I have considered the appeal on this basis.
4. The Flintshire Local Development Plan 2015-2030 (LDP) was adopted on 24 January 2023 as the development plan and supersedes the Flintshire Unitary Development Plan on which the Council's decision was based. The appeal must be determined in accordance with the current development plan unless material considerations indicate otherwise. I am satisfied that both parties have been provided with an opportunity to make representations on the up-to-date LDP policies relevant to the proposed development.
5. The Council's sole reason for refusal was that it considered it had not been demonstrated that the proposed development would not lead to an increase in phosphate levels in the

River Dee and Bala Lake Special Area of Conservation ('the SAC'), a European protected site. There was no other matter at dispute between the main parties.

6. Natural Resources Wales (NRW) published an update to its phosphorus targets for water bodies in Special Areas of Conservation (SAC) rivers in Wales in July 2023 during consideration of the appeal. Having regard to the facts of the case, I am satisfied that the updated advice does not raise any new matters of significance, and I have taken it into account in my decision.
7. During the appeal process, the appellant provided a signed Statement of Common Ground (SoCG) in which the appellant and Council confirm their agreement that a proposed mitigation scheme set out within it would address the Council's reason for refusal and confirming that there are consequently no matters in dispute.
8. The appellant has also provided a unilateral undertaking (UU) under Section 106 of the Town and Country Planning Act (TCPA) 1990 in relation to delivery of the mitigation scheme and a financial contribution towards education.

### **Main Issue**

9. The main issue is the effect of the proposal on the integrity of the SAC.

### **Reasons**

10. The appeal site lies within the Local Service Centre of Hope which is a Tier 2 settlement identified under LDP Policy STR2 as a location for modest levels of new housing development. Occupied by a dwelling, it is a large enclosure on the rural edge of the village adjoining a cemetery.
11. The appeal site is within the catchment of the SAC. NRW sets conservation objectives for the SAC, including phosphorus targets. In 2021, it published the results of its Compliance Assessment of Welsh River Special Areas of Conservation against Phosphorus Targets. Although the SAC is meeting those targets, NRW confirms that very limited capacity remains for additional flows without leading to detrimental effects. The proposal would connect foul drainage to the public sewerage system which would discharge into the Hope Wastewater Treatment Works (WwTW). The WwTW includes phosphorus removal capability and operates under a permit to discharge treated wastewater into the SAC catchment. The permit is subject to review against revised phosphorus targets for the SAC. The appeal proposal has the potential to be a source of additional phosphorus and there is a pathway for impact on the SAC from the scheme. Consequently, it cannot be screened out of the requirement for a Habitats Regulations Assessment (HRA) under the Conservation of Habitats and Species Regulations 2017 (as amended) ('the Regulations'). The HRA is attached as an Annex.
12. For the reasons set out in the HRA, I am unable to conclude beyond reasonable scientific doubt that the development would not have a significant adverse effect on the integrity of the SAC. The proposal would therefore conflict with advice on the protection of European sites in Planning Policy Wales (Edition 11) and LDP Policy EN15.

### **Other Matters**

13. I have had regard to concerns regarding the effects of the proposal on highway safety, the tranquillity of the adjoining cemetery; the character and appearance of the area, flooding and biodiversity, and the strain it would place on local services and facilities. I saw however that the design and layout of the proposed dwellings would reflect other developments locally. The site's relationship with the cemetery would be similar to that

seen in other residential settings and there is no evidence that future residents would be likely to create unacceptable noise or disturbance to cemetery visitors. Consultees have raised no concerns in relation to flooding or capacity issues in relation to drainage, or in relation to biodiversity. The proposal would make appropriate contributions to support local services and facilities. The Highway Authority has not objected to the scheme, and I saw no reason during my site visit to reach a different conclusion.

## **Conclusion**

14. Notwithstanding my findings under Other Matters, the harm likely to arise to the SAC provides compelling grounds to dismiss the appeal. For the above reasons and having regard to all matters raised, the appeal is dismissed.
15. In reaching my decision I have taken into account the requirements of sections 3 and 5 of the Well-being of Future Generations (Wales) Act 2015. I consider this decision is in accordance with the Act's sustainable principle through contribution towards one or more of the Welsh Minister's wellbeing objectives as required by section 8 of the Act.

*N Jones*

Inspector

Annex: Habitats Regulations Assessment

**Preliminary Matters**

1. In accordance with Regulation 63 of the Conservation of Habitats and Species Regulations 2017 (as amended) ('the Regulations'), the purpose of this Appropriate Assessment (AA) is to report on the impacts of the scheme on a site that forms part of the National Sites Network (the River Dee and Bala Lake Special Area of Conservation - the SAC). As required by Regulation 63(3) of the Regulations I have had regard to the comments of Natural Resources Wales (NRW) provided to the Council and to Planning and Environment Decisions Wales.
2. The appellant initially asserted that the proposal should be screened out of the requirement for a Habitats Regulations Assessment (HRA) under the Conservation of Habitats and Species Regulations 2017 (as amended) ('the Regulations') due to the small volume of phosphorus that would be generated; the likely occupiers of the proposal; because discharges would be directed to Hope Waste Water Treatment Works (WwTW) which provides phosphates treatment, and because other uses of land contribute to phosphate discharges but are not required to provide mitigation or curtail their activities. However, such matters do not negate the need for an HRA to be undertaken.
3. The appellant has proposed mitigation which has also been the subject of a Statement of Common Ground (SoCG) with the Council and which it is contended means the proposal can be screened out of needing an HRA. However, as set out in the Welsh Government HRA guidelines provided by the appellant, and in advice on NRW's website as a result of the 'People over Wind' ruling (case C-323/17), competent authorities cannot take into account any mitigation measures when making screening decisions for the purposes of deciding whether an AA is required. I have therefore considered the mitigation in my AA.

**Background**

4. The entry in the register of European sites for Wales identifies the habitat and species that are the primary reason for the SAC's designation as water courses of plain to montane levels within the Ranunculion fluitantis and Callitriche-Batrachion vegetation, Atlantic salmon, and floating water-plantain. Present as qualifying features of the SAC are Sea lamprey, Brook lamprey, River lamprey, Bullhead and otter. The SAC Core Management Plan (CMP) sets out the vision and conservation objectives for the SAC. The effect of a project is considered significant if it would undermine the conservation objectives of the SAC and is assessed against the prevailing environmental conditions of the SAC.
5. The SAC CMP sets out the vision for the site that it is maintained at, or where necessary restored to, high ecological status with all its features at favourable conservation status (FCS). The CMP also sets out the conservation objectives for the SAC to ensure the vision is achieved. For the watercourse to achieve FCS, ten listed objectives must be met, including no deterioration in water quality and levels of nutrients, including phosphates, will be kept below agreed levels. Conservation objectives for many of the qualifying features to achieve FCS in their own right require that the parameters defined in the vision for the watercourse are met.

**Likely Significant Effect**

6. Irrespective of the anticipated volume, the proposal has the potential to be a source of additional phosphorus and there is a pathway for impact on the SAC from the scheme.

NRW advice is that the SAC is currently passing phosphorus targets. Nevertheless, the proposal would connect foul drainage to the public sewerage system which would discharge into the Hope WwTW. The Hope WwTW permit is subject to a review against increased phosphate targets. Although Dŵr Cymru-Welsh Water's (DCWW) water quality modelling indicates that alteration to its existing phosphorus limit is unlikely, NRW confirms that final data and further quality assurance is required. There is no confirmed timetable for finalisation of the review and therefore no confirmation that the WwTW can accommodate additional flows without harming the integrity of the SAC. Notwithstanding any other sources of phosphates, the appeal proposal would involve the construction of new dwellings, discharges from which would be released into the River Alyn, a tributary of the SAC. NRW advise that there is very limited capacity downstream of the confluence of the Alyn with the Dee SAC to receive additional phosphorus inputs without leading to an exceedance of the current water quality targets.

7. Likely significant effects from the project on the River Dee and Bala Lake SAC cannot therefore be ruled out as the proposal is a source of additional wastewater and phosphorus with a pathway for impacts on the SAC. Accordingly, an AA is necessary.

### **Appropriate Assessment**

8. The appeal site is occupied by a single dwelling, Foxfield, which is served by a septic tank. A neighbouring dwelling at Bryn y Grog is also served by a septic tank on the appeal site. The proposal is to retain and remodel Foxfield and to erect 7 new dwellings. All 9 dwellings would be connected to the public sewerage network, discharging to the Hope WwTW, resulting in increased phosphate discharge into the River Alyn.
9. Albeit that DCWW has indicated that headroom exists at Hope WwTW to accommodate flows from the proposal within existing permit limits and that no change to the permit limit is likely to be necessary as a result of the permit review against revised phosphorus targets, NRW indicates that this review has not been completed. Furthermore, given that that there is limited headroom downstream of the confluence of the Alyn with the Dee SAC to receive additional phosphorus inputs without leading to an exceedance of the current water quality targets, there is no certainty that the WwTW can accommodate the discharges from the proposed development within its permit limit, taking into account revised phosphate targets for the SAC. NRW advises that an analysis should be undertaken which quantifies how phosphorus loading from the proposal entering the WwTW would affect the phosphorus concentration in the WwTW outflow, and how that in turn would affect the phosphorus concentration in the River Alyn. The results of such an analysis have not been provided.
10. I am unable to conclude therefore that the phosphorus discharges from the proposal would not lead to significant adverse effects on the integrity of the SAC. I therefore turn to consider whether those effects can be suitably mitigated as part of the proposal.

### **Mitigation**

11. As set out in his 'Septic Tank Replacement Phosphorus Mitigation Scheme – Technical Note' (TN) dated 6 April 2023 and signed SoCG dated 25 April 2023, the appellant proposes mitigation in the form of an off-site package treatment plant with phosphate stripping capability which would be installed to serve two properties, one of which is owned by the appellant. The SoCG confirms the parties' agreement that such a scheme would improve existing water quality discharges into the SAC by reducing the phosphorus concentration of wastewater discharging from the septic tank into the River Dee.

12. NRW has advised that the principle of replacing existing poorly performing private drainage systems with alternatives that have a higher standard of environmental performance is supported, and that any nutrient credit can be used against other planned developments. The TN scheme is based on the replacement of an existing septic tank, located about 40m from the River Dee, with a package treatment plant which would contain phosphorus stripping capabilities. The SoCG scheme would also provide a similar package treatment plant, but in addition to the existing septic tank, which would be retained. Calculations under both mitigation schemes conclude that nutrient neutrality would be achieved, cancelling out the effects of the appeal proposal, as well as resulting in a betterment which could be used as a credit, albeit at different rates, against other future development.
13. Neither the TN nor SoCG provides detailed scaled drawings of the existing or proposed systems, or a copy of the existing waste discharge exemption certificate, and no cogent evidence that the existing septic tank system is failing is provided. The TN applies a default discharge concentration to the existing system in the absence of water quality testing, but assumes the discharge is entirely into the SAC without accounting for discharges to ground. The SoCG's calculations are based on a higher total output figure, and it also provides a lesser figure for the output accounting for discharge to ground, but it provides no monitoring data, or any other evidence, to show how those figures were obtained. Calculations in the SoCG are based on precautionary average occupancy rates. However, whilst occupancy levels applied in the TN to the two existing dwellings are described as precautionary as they are less than would be derived from NRW's methodology in relation to permit regulations, I have seen no evidence that dwellings served by septic tanks would be likely to have a higher occupancy rate than the precautionary average rate the TN applies to the proposed new dwellings.
14. It has also been suggested that restrictions could be placed on the occupants of the future dwellings. However, restricting first purchasers of the proposed dwellings to local residents would not guarantee that those dwellings, or existing dwellings released as a consequence, would not be occupied by others from outside the catchment.
15. Given the uncertainties over the condition of the existing septic tank system and how calculations of outputs from it have been derived and applied, as well as the variations in applying precautionary principles to calculating outputs, I am not satisfied that the mitigation schemes are supported by sufficiently robust best available scientific evidence to demonstrate that nutrient neutrality could be achieved.

#### *Delivery*

16. Significant adverse effects on the integrity of the SAC would occur unless mitigation measures are in place when the proposed development starts to discharge phosphorus into the SAC and those measures continue to operate effectively for the lifetime of the development. In terms of the delivery of mitigation measures, a unilateral undertaking (UU) has been submitted.
17. I note that it is not dated and therefore has no legal effect. Nevertheless, even if it was properly executed, the UU does not prevent prior connection of the two existing properties at Foxfield and Bryn y Grog to the public sewerage system at any stage in advance of implementation of the mitigation scheme, which could result in additional phosphorus discharges to the SAC. Moreover, it provides no methodology for approval by the Council of any phosphate-stripping sewage treatment plant (STP) or any certainty that the standard of phosphate-stripping capability would match that set out in the mitigation schemes. It provides no mechanism for reporting on the efficacy of the mitigation scheme, nor a methodology for addressing and rectifying any reduced performance. Although the UU states that a mitigation scheme would not be required

should sufficient phosphates headroom exist, it is vague in terms of what form DCWW's 'announcement' would take and provides no definition of related terminology. Whilst I am mindful of NRW's updated advice and the appellant's reference to the use of Grampian conditions in other cases brought to my attention, there is no certainty in this case when the permit review of the Hope WwTW will be completed or of its results. I am not satisfied that these matters should be left to conditions or a legal agreement, particularly in view of the requirement to adopt a precautionary approach to my assessment.

18. Given the above, I am unable to conclude that there would be no adverse effects on the site's integrity as a consequence of the project alone. Consequently, it is not necessary for me to consider in-combination effects.

### **Derogation**

19. I have taken into account the benefits of the scheme including the financial contributions that would be made to education and open space provision, economic benefits including construction jobs and spending, householder expenditure in the local economy and tax revenue, its social benefits including sustaining the local community and services and facilities, as well as the environmental credentials of the scheme. Nevertheless, those benefits would be common to many similar proposals and given the relatively small scale of the scheme, they fall far short of constituting imperative reasons of overriding public interest. Whilst I have also had regard to other developments, including appeal decisions, brought to my attention by the appellant, I have insufficient details of the specific effects of those proposals on the relevant protected sites to enable direct comparisons to be drawn with the appeal proposal which I have considered on its own merits.

### **Conclusion**

20. For the reasons given, I conclude that I am unable to rule out all reasonable scientific doubt of an adverse effect on the integrity of the SAC.

*N Jones*

Inspector