
Appeal Decision

Hearing held on 4 October 2016

Site visit made on 4 October 2016

by Patrick Whelan BA(Hons) Dip Arch MA MSc ARB RIBA RTPI

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

Decision date: 21st November 2016

Appeal Ref: APP/U2235/W/16/3143679

Land to the south-east of Runham Lane, Sandway Road, Lenham, Kent ME17 1HT

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Park Valley Leisure Ltd against Maidstone Borough Council.
 - The application Ref 15/503937/FULL, is dated 5 May 2015.
 - The development proposed is the use of land for the riding of motorcycles for 28 days per year.
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Decision

1. The appeal is dismissed and planning permission for the use of land for the riding of motorcycles for 28 days per year is refused.

Preliminary Matter

2. Mr Richard Knox-Johnston, on behalf of the Campaign to Protect Rural England (CPRE) challenged me at the opening of the Hearing, as to whether the Hearing should take place at all, because a decision to allow the appeal would be to condone or to support an illegal act, and would therefore be likely to lead to a judicial review.
3. He referred to a 2013 appeal decision¹ into an enforcement notice relating to this site which included a requirement for the restoration of the land to its previous levels which would, as a consequence, disturb a colony of great crested newts (GCN). In that case, my colleague declared the notice a nullity, concluding that it required the appellant to do something unlawful. The Inspector identified that compliance with the notice would require the GCN to be disturbed, for which without first obtaining a consent or licence, a criminal offence would be committed. Furthermore, he identified ambiguity in the notice where even if the appellant were to apply for a licence for the works, there was no certainty that the licence would be granted.
4. That case was determined under section 174 of the Town and Country Planning Act 1990 as amended, under specific grounds given in the section, whereas this case is to be determined under section 78. The legal context of these two cases is quite different.

¹ Appeal Ref: APP/U2235/C/12/2180487

5. I am bound, under section 38(6) of the Planning and Compulsory Purchase Act 2004, to determine this appeal in accordance with the development plan unless material considerations indicate otherwise. As I explained during the Hearing, my decision will give full consideration to any European Protected Species on the site and I will fulfil my duties under the Habitat Regulations 2010, as appropriate. Granting planning permission in this appeal, or hearing the evidence leading to its determination, would not be condoning an illegal act.
6. There is no conflict with the proceedings or outcome of this appeal with the statutory protection of the GCN. Indeed, Natural England's standing advice² is that before it will issue a licence for a development proposal it expects the planning position to be fully resolved and requires all necessary consents to be obtained and all the relevant conditions discharged. This includes planning permission. There is therefore no reason for the Hearing not to proceed, for the evidence to be heard, and for a decision to be reached.

Main Issues

7. Though the Council did not determine the application, its putative reasons for refusal are that the exposed earth demarcating the track would harm the character of the countryside, and; because of a lack of information it is not possible to assess fully the impact of the proposal on ecology/ biodiversity. Numerous surrounding occupiers have objected to the proposal on the grounds of noise and disturbance from the use of the track. The main issues in this appeal are therefore:
 - the effect of the proposal on protected species;
 - the effect of the proposal on the living conditions of surrounding occupiers, with particular regard to noise and disturbance, and;
 - the effect of the proposal on the character and appearance of the countryside.

Reasons

Background

8. The appeal site is located between Harrietsham and Sandway beyond any settlement boundaries, on undesignated land. It occupies what was once a sand quarry and a landfill site, which was cleared for the construction of the High Speed 1 railway line (HS1). Following its construction, the site was landscaped and two ponds provided as part of the mitigation works connected with the HS1 project.
9. The application the subject of this appeal was submitted in May 2015 after the Council made an Article 4 Direction. The Direction removed permitted development rights on the site under Class B of Part 4 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (as amended). These rights were to use the land for any purpose for not more than 28 days in a year, of which 14 days in total may be for purposes including motorcycle racing including trials of speed, and practising for these activities.
10. At the Hearing the appellant clarified that the soft, sandy soil of this site makes it particularly suitable for novice riders; the site would be used by adults and

² Natural England Guidance Note: European Protected Species and the Planning Process 2010 (NE292)

children under a controlled, membership scheme, and it would address to some degree the shortage of licensed, managed sites in the south-east of England.

Protected species

11. The Council is concerned that the appellant's ecological survey is out of date and that there is a risk of significant harm to biodiversity from the proposal.
12. The appellant has submitted a letter from BSG Ecology dated April 2015 which considers the ecological impacts of the proposal. This is based largely on the proof of evidence of Dr Ian James Fairclough which was submitted in the appeal against an enforcement notice issued in 2012, which was itself a review and update of an appraisal of ecological features by KB Ecology undertaken in 2011. The BSG letter says that surveys in 2013 revealed the presence of a medium-size class population of great crested newts (GCN) in association with a single pond within the site. Details of the surveys, including their methodologies, have not been submitted with the appeal.
13. GCN are protected under the Wildlife and Countryside Act 1981 (as amended) and Schedule 2 of The Conservation of Habitats and Species Regulations 2010 (as amended). GCN are a European Protected Species, and it is an offence to deliberately capture, kill, injure, or even to disturb them.
14. As regards the currency of the survey, I turn to paragraph 99 of Circular 06/2005³. This states that *'it is essential that the presence or otherwise of protected species, 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'*.
15. There is no evidence that in the years since the survey, that the population of GCN on the site has increased or begun to inhabit other areas of the site. Equally, there is no evidence that their population has declined. Indeed, whilst the appellant says that there have been some instances of unauthorised use of the site by motorcyclists, it seems to me that in the period since the survey there has been no significant activity on the site that may materially threaten the population of GCN. Without a more up-to-date survey, the evidence indicates that there is a reasonable likelihood of this protected species being present on the site today.
16. Without more current data it is not possible to ascertain precisely the likely impact of the proposal on the species. However, the data reported from 2013 can inform a reasonable approximation, as impacts and proposals for mitigation and compensation remain germane, and the population of GCN is unlikely to have altered so significantly in the intervening period that the data is irrelevant. In any event, it is the only GCN data in this appeal.
17. The appellant says that there would be no direct impact on GCN on the basis that the track has been maintained in a condition that makes it unsuitable to them. However, there is no guarantee that when the circuit is in use that the GCN would keep off the track or refrain from crossing to the second pond or to

³ Circular 06/2005: Biodiversity and Geological Conservation – Statutory Obligations And Their Impact Within The Planning System

- surrounding habitat. There would therefore be a risk of GCN being crushed on the track when it is in use. A similar risk to GCN would arise from motorcyclists who may accidentally veer off the track into their habitat.
18. The appellant points out that there is a risk of indirect impact from sand spray from the tyres of motorcycles which may result in hibernating newts being unable to dig their way out of covered ground. CPRE Kent also points out that there would be a similar risk of harm from spray to GCN eggs laid on leaves around the pond edges, and from the impact of sand sedimentation within the pond. These indirect impacts are significant.
 19. There was much debate at the Hearing about the engineering and maintenance of modern motorcycles and how fuel spillage and oil drips are almost 'designed-out' of modern machines. While planning conditions and an effective management regime could reduce the risk of any spillage, I am not convinced that every motorcycle using the track might achieve such high standards as those modern machines. Therefore, the possibility of a cumulative polluting effect on the water in the pond and on the surrounding vegetation could not be reduced to an acceptable degree. These factors indicate that the proposed use would adversely affect the protected species and its habitat.
 20. The appellant has proposed several mitigation measures including harrowing the track, placing straw bales next to rabbit holes, providing a controlled refuelling area and securing a 5m wide, fenced-off buffer zone around the ponds. A properly controlled refuelling area would be essential to prevent pollution and could be secured by condition. However, harrowing and straw bales would not prevent the harm identified above. I am not sure that the erection of fences around a buffer zone would not present a risk of injury to riders. Moreover, the circuit as indicated, would run closer than 5m to the ponds in many places, which suggests that the implementation of a 5m buffer may reduce the length of the circuit substantially, which may threaten its popularity, and in turn its viability. I have taken into account the limited duration of the proposal. I have also considered if a condition restricting use to certain days or weeks or months might mitigate the impacts identified. I appreciate the flexibility the appellant showed on this matter during the Hearing, however, the harmful impacts to GCN would occur throughout the seasons.
 21. I acknowledge the compensation proposals including log piles which would enhance the terrestrial habitat for newts, but would not outweigh the harm to the pond habitat. The provision of a new pond in the south-east corner of the site may increase general biodiversity but there is no evidence that the site could accommodate a pond which could support an equivalent population of GCN as the size of this population is unknown. Furthermore, any GCN colonising that pond would be likely to suffer the same impacts as identified above for the existing pond, and there is no evidence that the area proposed would provide a suitable terrestrial habitat.
 22. Taking all of these factors into account, despite the age of the survey data, I conclude that the proposed use would adversely affect the protected species and its habitat, and that the proposed mitigation and compensation measures would not overcome that harm. This would breach the protection afforded to GCN by the EU Habitats Directive, the requirements of which are implemented in the UK by the Habitat Regulations 2010. As a consequence, the proposed

- development would require a licence under Regulation 53, which permits activities that would otherwise constitute an offence, provided three specific tests are met.
23. While the licensing authority for this purpose is Natural England, Regulation 9(5) places a statutory duty on a Planning Inspector to have regard to the requirements of the Habitats Directive in the exercise of his function. This means that I am obliged to consider the three derogation tests set out in Regulation 53.
 24. The first of these specifies that the proposed development must meet a purpose of "*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*". The second test is that there is no satisfactory alternative to the proposal under consideration, and the third "*that 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*".
 25. I acknowledge that the proposal would provide significant social benefit of sport and recreation in the open-air, and some economic benefit to local shops and services. However, there is no overriding public interest in or benefit to the environment from the leisure use proposed. There is no evidence that similar benefits could not be obtained from an alternative site which would not affect GCN. There is, however, evidence that the proposed use would be detrimental to the population of GCN and their habitat. The proposed development does not meet any of the three derogation tests for a licence.
 26. I conclude on this issue that the proposal would be contrary to Policy ENV41 of the Borough-wide Local Plan 2000 (LP) which protects ponds and their wildlife function from harm, and paragraph 118 of the National Planning Policy Framework 2012 (the Framework), which sets out principles for local planning authorities to follow in aiming to conserve and enhance biodiversity. It says that if significant harm resulting from a development cannot be avoided, adequately mitigated, or as a last resort, compensated for, then planning permission should be refused. The proposal would cause significant harm to the protected species on the site and its habitat, which is not outweighed by the need for the development or the benefits from it which would arise.

Noise and disturbance

27. The nearest dwellings to the appeal site are located around 350m to the south in Runham Lane, 350m to the north-east, and 300m to the west towards Harrietsham.
28. LP Policy ENV28 says that permission for development in the countryside which harms the amenities of surrounding occupiers will not be given. It is consistent with paragraph 123 of the Framework which states that decisions should avoid noise giving rise to significant adverse impacts on health and quality of life as a result of new development. This is reflected in the Planning Practice Guidance (the PPG), which stresses the need for decision-taking to take account of the existing acoustic environment and assess whether a significant adverse effect is likely to occur, and whether a good standard of amenity can be achieved.

29. The Council does not object to the proposal in terms of noise. It considers that a permission of limited duration with constraints on the times and days of use together with noise monitoring would not cause significant adverse impacts on health and quality of life but would allow any noise impacts to be reviewed.
30. The appellant undertook a noise survey on a Sunday morning, being the most sensitive time when the circuit would be in use, to measure the existing ambient noise levels at houses close to the site, and to establish noise emission levels from the site.
31. The assessment calculates the difference between the background noise levels and the predicted site noise in three receiver positions around the site. At the north-west receiver, the site noise level $L_{Aeq,T}$ would be around 5dB below the background $L_{A90,T}$ noise level. This suggests that there would be no adverse effect on neighbours to the north-west. However, at the north-east receptor, the site noise levels $L_{Aeq,T}$ would be around 3dB above the background $L_{A90,T}$ noise level, and to the south-west, the site noise levels $L_{Aeq,T}$ would be between 3dB and 8dB above the background $L_{A90,T}$ noise level. The appellant suggests that these results are marginal or moderate noise levels on the basis that while the noise may be a potential source of disturbance, the levels would not be significantly elevated in comparison to the existing noise sources.
32. I disagree. A difference of 8dB would be more than moderate when taking into account the nature of the existing noise and the spectral content and character of the site noise. During my site visit close to dwellings to the north-east and south-west of the site, while the wind was blowing to the south-west, I noticed that the noise from the traffic on the motorway had a continuous but intense character. I appreciate that residents can become used to environmental noise like that from motorways and trains, but I found the noise from traffic on the motorway to have a significant impact on the otherwise tranquil nature of the area. Noise from trains was noticeable but brief, and less disturbing than the traffic noise.
33. My site visit demonstrated to me that the existing noise environment for neighbours to the north-east and south-west is already strained by the existing sources of noise. In this context, the noise levels predicted from 30 motorcycles which would be of varying pitches and fluctuating intensities would be unacceptably intrusive and disturbing to the surrounding occupiers to the north-east and south-west. The PPG states that where existing noise sensitive locations already experience high noise levels, a development that is expected to cause even a small increase in the overall noise level may well result in a significant adverse effect. The noise assessment does not lead me to conclude other than that a significant adverse effect would be likely to occur.
34. Interested parties raised many concerns about the veracity and relevance of the assessment. For instance, while the predicted noise levels took account of the limited amount of motorcycles in the test, 10, compared to the 30 to be run in the calculations, there is no mention in the report of the noise output of the motorcycles used. How typical were they of the outputs of the motorcycles likely to be used on the site? Neighbours have submitted declarations that there were no more than 6 motorcycles used in the test rather than the 10 stated. Furthermore, there seems to be no account taken of wind direction in the survey, which is exacerbated by the relatively short length of the survey being on a single day rather than over a spread of days and times. As regards

the data collected, the appellant was unable to explain why the sound levels measured at one position were recorded as being lower when the motorcycles were running than when they were not being run.

35. More concerning, its selection of receptor points appears to be limited to the closest dwellings, which might ordinarily not be unreasonable. However, there were a substantial number of representations from residents in Platts Heath, many of whom came to the Hearing, referring to noise impacts during the test day. The noise assessment appears to have dismissed on distance terms the potential for significant noise impacts in Platts Heath, whereas the evidence from residents at the Hearing was that the topography of the land between the appeal site and Platts Heath makes it a significant receptor of noise.
36. I have taken into account that the proposal relates to 28 days of use and that conditions could control the operating hours and the number of motorcycles using the circuit, as well as noise outputs at the site boundaries. These could alleviate the potential impact of the proposal, but would not overcome the harm identified. I have also considered the effect of a time-limited permission in order to monitor the noise effects of the proposal, however, given my finding of harm to the living conditions of surrounding occupiers, I do not consider this appropriate. I acknowledge the reference to providing mitigating screening, but without any details of the likely effectiveness, I cannot conclude that it would sufficiently reduce the effects identified. I have given little weight to the risk of noise from the use of the site without the consent of the owner, as public controls and civil processes exist outside the planning system to remedy damage or trespass.
37. I conclude on this issue, that on the basis of the noise assessment and its shortcomings which I have already identified, the proposed development would have a significant adverse impact on the health and quality of life of surrounding occupiers, with particular regard to noise and disturbance, contrary to LP Policy ENV28 and paragraph 123 of the Framework.

The character and appearance of the countryside

38. The Council considers that the use of the site would expose the soil beneath the surface of the circuit which would degrade the natural landscape and visually harm the countryside.
39. In terms of character, the land to the south contains the M20 and HS1, which the appellant described as a 'transport corridor' which has a significant bearing on the character of the site. While the track's circuitous shape and artificially constant width would appear man-made before a backdrop which is more suggestive of a naturalistic landscape, given the proximity of HS1 and the audible accompaniment of the traffic on the M20, I do not find that the track would appear out of character in this setting. The use of the land for motorcycles to ride within sight of the track of HS1 would not be incongruous with that background. The character of the land to the north of HS1 gradually transforms from a railway line to the bucolic and agricultural setting of the countryside beyond, but given the form of the cutting through the land on both sides of HS1, the character of the proposed use would not be out of place.
40. I appreciate that the site owes its form and appearance to the land restoration following the installation of HS1, and in that sense it is more an artificial landscape than the surrounding open countryside. Nonetheless, time has lent

a softness to its edges and a harmony with the forms and textures of its rural setting. It features as the foreground of the countryside in views from HS1, and as a middle ground element in views from land to the south of HS1. Its shape, surface and colour are central elements of the rural landscape and crucial to the setting of the countryside to the north.

41. Being on an escarpment rising from the railway line to Sandway Road, the track is not visible in views from beyond the site to the north, and because of intervening woodland and enclosures, views of the site from the east and west are limited. The site's significant aspect, in terms of views, is from the south.
42. The M20 motorway runs around 150m to the south of the site, and is well screened by trees on its northern flank. I was unable to see more than the most minimal and fleeting glimpse of the site when travelling in both directions along it. It is though visible on the limited strip of land between the M20 motorway and HS1, and from the trains travelling on the railway. Whilst these views towards the site are significant, they are restricted by the limited number of public viewpoints on the land south of HS1, and by the transient nature of the views of the passengers in the trains travelling along the line.
43. Whilst I saw that the circuit is long, it occupies relatively little of the overall surface area of the site, and is screened by tall vegetation between many of its twists and turns. It is relatively narrow and follows for the most part the contours of the hillside. These factors would reduce the visual impact of the exposed earth. In any event, the soil exposed by the use of the track would be sandy and would reflect to some degree the background tone and texture of the land surrounding it. Whilst I consider the landscape value of the site high in relation to its setting, I do not find that the track, its use, and the consequential exposure of the soil would harm the appearance of that landscape to the degree which warrants the refusal of the application.
44. I conclude on this issue that the use would not harm the character or appearance of the countryside. There would be no conflict with saved Policies ENV21 and ENV28 of the Maidstone Borough-wide Local Plan 2000, which protect the character and appearance of strategic routes, and which accept development for open-air recreation in the countryside so long as it does not, amongst other things, harm its character and appearance.

Other Matters

45. I note the objections to the impact on local roads from additional traffic, and the concern for surrounding trees and the potential for harm from the proposed use. There is no substantial evidence that the local roads could not cope with the additional traffic generated by the proposal, and planning conditions could effectively secure traffic management and control measures. Similarly, were I minded to allow the appeal, a condition relating to the protection of trees would make the development acceptable in this respect.

Conclusion

46. For the reasons set out above, while the proposed development would not harm the character or appearance of the countryside, it would harm the protected species on the site and its habitat, and it would have a significant adverse impact on the health and quality of life of surrounding occupiers. It would thus conflict with the policies of the development plan, and with the

advice in the Framework. I have not found any other material considerations of sufficient weight to overcome these conflicts. I therefore determine that the appeal should be dismissed, and that planning permission be refused.

Patrick Whelan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr James Bennett	Park Valley Leisure Ltd
Mr Nicholas Willock MRTPI MRICS	Robert Halstead Chartered Surveyors

FOR THE LOCAL PLANNING AUTHORITY:

Mr Andrew Jolly	Maidstone Borough Council
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INTERESTED PERSONS:

Mr Adam Pyrke	Cushman & Wakefield for Residents Against Sandway Motocross
Mr Ed Clarke	Clarke Saunders Associates
Mr James Proudlock	Local resident
Councillor Glenda Dean	Harrietsham Parish Council
Councillor Shellina Prendergast	Maidstone Borough Council
Councillor Janetta Sams	Maidstone Borough Council
Councillor Peter Titchener	Maidstone Borough Council
Vicky Ellis	Campaign to Protect Rural England, Kent
Mr Richard Knox-Johnston	Campaign to Protect Rural England

DOCUMENTS SUBMITTED AT THE HEARING

1. Letter from Ms Sue Peschek submitted by Ms Sue Peschek
2. Letter submitted by Dr Felicity Simpson PhD on behalf of the Maidstone Committee of the Campaign to Protect Rural England