

READING ORACLE RIVERSIDE ADVICE PERTAINING TO THE ENVIRONMENT AGENCY'S OBJECTION

1. Introduction

- 1.1 Ecological Planning & Research Ltd (EPR) has been asked by Leadmanage, on behalf of Hammerson, to provide advice in relation to an extant objection by the Environment Agency (EA), received in response to planning application number 151537 (Erection of a single storey restaurant unit (class A3), kiosk (class A1) and public realm improvements).
- 1.2 The EA's original objection is set out within a letter dated 2 November 2015, and was later maintained in a letter dated 7 December 2015 submitted in response to a technical note produced on behalf of the applicant by Peter Brett Associates, dated 3 November 2015. This technical response addresses each of these letters insofar as the objection relates to issues of nature conservation.
- 1.3 The EA's objection on nature conservation grounds can be summarised by the statement on page 3 of their letter of 2 November, in which they state that they are seeking "...a *greater enhancement...*" [for biodiversity], than that which was offered, at that point, by the proposals (which at that stage included both a new sedum Green Roof on the proposed restaurant unit, and floating planters with riparian/marginal native planting).

2. Planning Policy Analysis

- 2.1 In seeking to justify their objection, the EA refer to both National and Local Planning Policy as follows:
 - Paragraphs 109 and 118 in Section 11 of the National Planning Policy Framework (NPPF); and
 - Policy CS36: 'Biodiversity and Geology' of Reading Borough Council's Core Strategy (adopted January 2009 with alteration adopted 27th January 2015).
- 2.2 The implications of each of the above policies is considered below.

Section 11 of the NPPF

- 2.3 Firstly, paragraph 109 of the NPPF, states broadly that "*the planning system*" should "*contribute to and enhance the natural and local environment*". The first point to note therefore, is that this paragraph is referring to the aspirations of the planning system as a whole for nature conservation, in the broadest possible sense and as a 'general principle'.

The paragraph is not worded, as appears to have been interpreted by the EA, as to indicate that it should apply to any specific planning application on an individual basis.

- 2.4 Further to this however, there then follows from the abovementioned opening sentence of paragraph 109, a series of bullet points, which expand upon the initial statement to explain exactly how it is that the planning system should go about enhancing the ‘natural and local environment’. Bullet point 3 explains that the planning system should do this by:

*“....minimising the impacts on biodiversity and providing net gains in biodiversity **where possible**...” [Our emphasis].*

- 2.5 As has already been established, the proposal does not have any significant negative impact upon biodiversity. Beyond this however, and notwithstanding the fact that the original EA letter of 2 November concedes that the proposals **do** in fact provide a biodiversity enhancement (i.e. a “net gain”), it is clear from the above text that ‘net gains’ in biodiversity are not mandatory in all cases – only where they are ‘possible’ (i.e. where they are technically achievable and where cost does not become prohibitive).
- 2.6 Turning now to paragraph 118 of the NPPF, this again states that planning authorities should ‘aim’ to conserve and enhance biodiversity (which the proposals achieve in both instances, regardless of whether the use of the term ‘aim’ can be said to make the latter mandatory).
- 2.7 Again, the bullet points that expand upon paragraph 118 offer further clarity, as bullet point 3 here states:

*“development proposals where the primary objective is to conserve or enhance biodiversity **should be permitted**...” [Our emphasis]*

- 2.8 As can be seen from the above therefore, the text of paragraph 118 again acts **positively** to **encourage** development that offers to deliver biodiversity enhancement and to see them permitted (as indeed the proposals do). It **does not**, however (anywhere) indicate that development proposals which *cannot* provide net gains in biodiversity should be refused. Refusal is only espoused where a project has negative implications for the natural environment, which is not the case here and has not been suggested by the EA.

Reading Borough Core Strategy Policy CS36

- 2.9 The relevant part of Policy CS36 cited by the EA in their objection states:

“....Where applicable, developments should be designed to protect, consolidate, extend and enhance the network of wildlife links and corridors in and adjoining the Borough..... ”

2.10 Firstly, as the application does not propose any negative change to the River Kennet, there is no suggestion that the proposals have not been designed so that they achieve the protection of the River.

2.11 Again, leaving aside the fact that the application is already acknowledged by the EA as having proposed a biodiversity enhancement, the following questions are pertinent to understanding the requirements of Policy CS36:

1. Does Policy CS36 make biodiversity enhancement a requirement for this application (i.e. does it go beyond the requirements of the NPPF as outlined above)?; and
2. If so, does Policy CS36 require biodiversity enhancement to be delivered in any specific form or to any specific quantum? (i.e. that sought in this instance by the EA)?

2.12 In the first instance, in response to question 1 above, it should first be borne in mind that Local Plan Policies are required to be in accordance with National Planning Policy as set out in the NPPF. Paragraph 150 of the NPPF in this respect states:

*“Local Plans must be prepared with the objective of contributing to the achievement of sustainable development. To this end, they should be **consistent with** the principles and policies set out in this Framework...”* [Our emphasis]

2.13 Furthermore, paragraph 152 entreats LPAs to “seek opportunities” to achieve net gains in the economic, social and environmental dimensions of sustainable development. It thus places the onus on LPAs to achieve a **balance** in the three ‘pillars’ of sustainable development; seeking opportunities in all three but not placing any one in precedence over the other two.

2.14 The text included within Reading’s Core Strategy alongside Policy CS36, which seeks to explain the scope and application of that policy, recognises this balance, and states:

*“11.33 There is a recognised need to attain a balance between accommodating development activity, and preserving significant elements of the natural environment. Therefore, whilst inappropriate forms of development will be resisted in accordance with PPS9 [NB: now superseded by the NPPF] there may be some cases where alternative sites (which would result in less environmental harm) cannot be identified for development and hence, it may be necessary to allow sensitive development to proceed. However in these circumstances, it must be demonstrated that features are being retained, incorporated and (**where possible**) enhanced, and that appropriate compensatory and mitigation measures are being implemented....*

....11.36 Opportunities will also be sought in conjunction with development proposals, to enhance the quality and integrity of LNRs and WHSs. Proposals should seek ways to enhance and restore biodiversity and geology, and enhance the quality and integrity of LNRs and WHSs (where appropriate) by maximising the inclusion of significant biodiversity and nature conservation features, as part of good design.....”

[Our emphasis. Note also LNR = Local Nature Reserve. WHS = Wildlife Heritage Site, now known as Local Wildlife Sites - LWSs]

- 2.15 From the explanatory text copied above, it can be seen that, far from requiring every project to provide biodiversity enhancements (i.e. net gains in all cases) the Council actually accept that there may be exceptional cases whereby projects with unavoidable negative impacts on features of ecological value may need to be consented (NB this does not however apply to the current application, as no negative impacts are contemplated).
- 2.16 Where enhancements are contemplated, the text of the Core Strategy echoes the language that is used in the NPPF – i.e. that enhancements are to be sought “where possible”. It is clear that the delivery of ecological enhancements is framed through Policy CS36 as being a desirable planning objective to be pursued where it can be – there is no requirement to deliver enhancements in all cases (even though, as mentioned, the proposals do offer enhancement).
- 2.17 Much of the application of the policy is also linked to locally designated sites for nature conservation (LNRs and WHSs/LWSs) – designations which do not apply to the stretch of the Kennet that runs through the application site (the nearest such site is a Local Wildlife Site that covers part of the River Kennet/Kennet and Avon Canal approximately half a kilometre to the South of the proposals).

3. Conclusions and Advice

- 3.1 The review, outlined above, of planning policy cited by the EA in their objection (paragraphs 109 and 118 of the NPPF and Policy CS36 of the Reading Core Strategy) has shown that there is no absolute policy requirement for the delivery of biodiversity enhancement with a development proposal.
- 3.2 Instead, both the NPPF and Policy CS36 of the Core Strategy are consistent with each other in that they encourage biodiversity enhancement to be delivered ‘where possible’ and as a desirable aspiration of the planning system that does not stand apart from or above the delivery of other economic and social objectives of Sustainable Development.
- 3.3 Furthermore, there is nothing whatsoever set out in either National or Local Planning Policy which requires a biodiversity enhancement to be delivered to any particular quantum, in any

particular form, or to any specific extent that may be 'preferred' either by the EA or indeed by RBC.

- 3.4 The Planning and Compulsory Purchase Act 2004 requires that applications for development consent be determined in accordance with the statutory development plan for the area, unless material considerations indicate otherwise. In our view, and taking the above into account, if RBC were therefore to insist upon the re-engineering of this section of the River Kennet corridor as a biodiversity enhancement, and refuse the application if this demand were not met, then a demand for such unrequired provision, and refusal on this basis, would be likely to be *ultra vires*.
- 3.5 Furthermore, in our view, the use of planning policy which is aimed at encouraging biodiversity enhancement to be delivered, to refuse a project which does in fact offer a biodiversity enhancement, would be a perverse application of this policy.
- 3.6 We understand that the additional enhancement measures requested by the EA in their original letter of 2 November have been subject to cost forecasts by structural engineers instructed by the applicant, and due to a number of complications including the need to remove and replace existing ground anchors and carry out excavation of the promenade to facilitate this, the anticipated costs would be in the region of around:
- £151,010 to lower the existing planting shelf in front of Jamie's Italian; and
 - £801,704 to lower the existing river frontage wall on the North bank to provide a new planting shelf.
- 3.7 The above anticipated costs are clearly grossly disproportionate to a project of this small size, which is ultimately only for the provision of 1 additional restaurant unit and 1 kiosk (with significant budget also spent on a range of improvements to the public realm, which have other sustainability benefits).
- 3.8 Notwithstanding the above, the EA have also failed to recognise that the application already proposes the delivery of biodiversity enhancements, and therefore fully meets the aspirations of all of the abovementioned planning policy.
- 3.9 Originally, the enhancements proposed were in the form of a new sedum green roof with included wildflowers on the new restaurant, and floating planters containing native marginal aquatic plants (beneficial for a range of wildlife including aquatic invertebrates and bird in particular).
- 3.10 The floating planters have since been withdrawn following concerns in the EA letter of 7 December that they may collide with boats or floating debris, but they have been replaced with a new proposal for a green wall containing native woodland planting, improvements to the pre-existing green roof proposal to create a wildflower-rich meadow on the roof surface, and the provision of new Swift nest boxes and House Sparrow terraces (both of these are Red listed birds of conservation concern). Invertebrate boxes are also proposed within the public realm planters and in associated with the green wall and roof.

- 3.10 During a meeting with the EA and RBC held on 28 January 2016 aimed at trying to overcome the EA objection, the above engineering and cost difficulties were re-communicated.
- 3.11 The EA suggested that a potential alternative option for delivering riparian biodiversity enhancements (to that which they originally suggested) might be the creation of a new in-channel planting area, and the installation of Sand Martin nest tubes in the river wall masonry. The EA appeared however to accept that, if these options can be fully explored and are also found to be unfeasible, then the EA would then drop their objection to the most current package of biodiversity enhancement (accepting that this would then be the most favourable enhancement package that is actually deliverable).
- 3.12 Whilst, ostensibly, the measures newly suggested by the EA appear to have many of the same difficulties as those previously considered (e.g. boat or debris strike for the in-channel planting area as well as reduction of storage volume for river water, and also the weakening of river wall structure either through attaching planting supports or hole-boring to insert Sand Martin tubes), the applicant has undertaken to instruct engineers to examine in detail whether any of these proposals can be delivered, including what they would cost, and to report this back to RBC.
- 3.13 In the event that these newly suggested measures are achievable (in whole or in part), and are reasonable in terms of affordability, then they will be substituted for some of the other measures currently proposed. If not, then the current (most recently offered) package of biodiversity enhancements (to include the Green Roof and Green Wall) will still be offered.
- 3.14 A more detailed comparison of the proposed biodiversity enhancement measures, versus the existing baseline situation, is provided at **Appendix 1** to this technical note, which serves to highlight the biodiversity enhancements that would be offered by this project.
- 3.15 Additionally, at the meeting, the EA explained that the driver behind their position is the need to work towards the objectives of the EU Water Framework Directive in relation to improving the biological condition of rivers. Whilst this is understood (and supported), the commitments of the Directive apply to EU member states as a whole, and nothing within the Directive requires individual developers of small projects to fund disproportionate and onerous proportion of the measures needed to achieve improvement.
- 3.16 It should be noted in this instance that RBC is the decision maker that must determine the application. Whilst they must of course consider consultation responses from statutory agencies like the EA, they are not obliged to adhere to their recommendations, particularly where those recommendations are demonstrably erroneous.
- 3.17 Potentially relevant case law pertaining to the weight that should be afforded by a decision maker to advice received from statutory agencies and consultees such as the EA can be found in *Cornwall Waste Forum v Secretary of State and Sita* (2012). This case concerns potential impacts on a nearby Special Area of Conservation (SAC) rather than the provision

or otherwise of biodiversity enhancements, but the particular question of whether a decision maker should be bound by the views of agencies including the Environment Agency was examined. The judgement states:

“... he [the Secretary of State as decision maker] was entitled.... To be guided by the expertise of the relevant specialist agencies, the EA and NE. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason.”

- 3.18 In view of the above, our view is that, unless the present EA objection is dropped in recognition of the biodiversity enhancements proposed, the position maintained by the EA is demonstrably contrary to the requirements of policy, and this must be recognised by RBC as the decision maker in determining this application.

EPR, 9 February 2016

APPENDIX 1

Schedule of Proposed Biodiversity Enhancements

Scheme Iteration	Biodiversity Enhancements Offered	Notes
1. Baseline Position (Existing)	None	Most planting already present is non-native/ornamental and very limited, some Willow in existing waterside planter, some Harts Tongue Fern growing from walls etc. The majority of the riparian habitat is engineered and inappropriate for wildlife.
2. As Originally Offered (Nov 2015)	Sedum Green Roof with some incorporated native wildflowers. Floating planters with native marginal planting	Species list for floating planters was reviewed following EA comments to remove both non-native ornamental species, and domestically produced cultivars of native species. Additional native species added.
3. Amended Proposals (Current Offering Following EA Consultation Responses)	Green roof is now proposed for a wildflower species mix to be sown onto a low nutrient substrate. Both the substrate and the species mix specification is taken from a 3 year PhD study by Kadas (2010) which aimed to identify the best possible specification for a green roof to deliver biodiversity benefits (particularly for invertebrates) within London (i.e .appropriate to the Thames Catchment). New green wall proposed on east-facing aspect of building. Planting will comprise native woodland ground flora, climbers and understorey species, with species selected specifically to provide foliage and nectar sources for as much of the year as possible. Swift boxes proposed for north-facing aspects of overlooking buildings (urban red-listed bird)	Species lists have been reviewed, but can be made the subject of pre-commencement condition if further iteration is desired.

	House Sparrow terraces proposed for buildings (urban red-listed bird) Invertebrate boxes included on green wall, green roof and planters	
4. Alternative Measures Proposed by EA at Meeting of 28 January 2016	In-channel planting shelf Sand Martin Tubes installed in bankside masonry	Measures will be substituted for those listed under scheme iteration 3 above, if engineering team advises that they are both feasible and not prohibitively expensive.